SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DANIEL NUNEZ and WILLIAM TUPUA SATELE Defendants and Appellants.	California Supreme Court No. S091915 Los Angeles County Superior Court No. NA039358

APPELLANT WILLIAM TUPUA SATELE'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE TOMSON T. ONG, PRESIDING

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INTRODUCTION

On October 29, 1998, Edward Robinson, and his girlfriend, Renesha Fuller were killed in a "drive-by" shooting outside Robinson's residence in Harbor City. Both victims were African-Americans. Ernie Vasquez, a former member of the Harbor City Gang, a local Hispanic gang, had been smoking drugs and cruising the area with his girlfriend and heard, but did not see, the shooting. Vasquez stopped to render aid but fled the scene just before the police arrived.

About two months later, while Vasquez was in custody for car theft and outstanding warrants, the police told Vasquez there was a $50,000 reward for information about the Fuller-Robinson killings. Vasquez told police that about a month earlier he had been in Los Angeles County's main jail and had met appellant, who was a member of the West Side Wilmas, a Hispanic gang from a turf adjacent to Harbor City. Vasquez told the police that appellant admitted to him that he had been involved in the killings of Robinson and Fuller.

Shortly thereafter, Vasquez was transferred to the Lynwood jail where he happened to meet Daniel Nunez, another member of the West Side Wilmas. Vasquez told police that Nunez had also admitted killing Robinson and Fuller.

Vasquez then testified at trial that both men had confessed to him.

The prosecution was not able to prove who the actual shooter was, although the evidence suggested a single shooter. Nonetheless, the jury returned verdicts indicating that both defendants had personally used the one weapon employed in the murder.

This inconsistent verdict was the product of a combination of errors in instructions, verdict forms, and arguments of the prosecutor that led the jury to conclude it was unnecessary to determine the intent of the non-shooting aider and abettor, in spite of the fact that intent was crucial in assessing the aider and abettor's culpability. This error, in combination with the extraordinary improbability of Vasquez's jailhouse "snitch" testimony, the paucity of other evidence, numerous improper rulings by the trial court, and other errors, led to an irrational result and the unconstitutional imposition of death verdict appellant. The judgment must be reversed.

STATEMENT OF THE CASE

An information filed on July 7, 1999, charged appellant and his co-defendant and co-appellant, Daniel Nunez, with two counts of willful, deliberate, and premeditated murder (Counts 1 and 2) in violation of Penal Code section 187(a) [1]. The information further alleged that both appellants personally used a firearm causing great bodily injury and death to both victims, within the meaning of Penal Code section 12022.53, subdivisions (c) and (d). The information also alleged that in the commission of the crime a principal was armed with firearm, within the meaning of Penal Code section 12022(a)(1). The information further alleged, as an enhancement, that the offenses were committed for the benefit of a street gang with the intent to promote criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b).

[1] Unless otherwise indicated all statutory references are to the California Penal Code.

The information further alleged three special circumstances. It was alleged that the murders were racially motivated within meaning of Penal Code section 190.2(a) (16). Multiple murder special circumstances, within the meaning of Penal Code section 190.2(a)(3), were also alleged with respect to both Counts 1 and 2. (2CT 385-388.)

The jury trial commenced on April 19, 2000, with the selection of jurors. The presentation of evidence began on May 1, 2000, and concluded on May 22, 2000, whereupon the jury retired to commence deliberations. After 4 days of deliberation, the jury returned verdicts on June 2, 2000. (2RT 325, 4RT 867; 38CT 10913, 10918, 10920, 10924.)

The jury convicted appellant and co-appellant Nunez of both counts of murder, finding that the murders were willful, deliberate, and premeditated. The jury also found to be true both multiple murder special circumstance allegations, but found the special circumstance allegation that the crimes were racially motivated to be not true. The jury also found to be true the street gang enhancement allegation and the enhancement allegation that appellant and Nunez both personally and intentionally discharged a firearm, a Norinco MAK-90, which proximately caused the death of Fuller and Robinson. (38CT 10925-10940, 15RT 3457-3463.)

The penalty phase commenced on June 14, 2000. The jury retired to commence deliberations on June 26, 2000. (38CT 10996, 11121.) On June 30, 2000, after 4 days of deliberations, the court replaced Juror 10. (38CT 11121, 11125, 11127, 11131, 11136.) Subsequently, on July 5, 2000, the court replaced Juror 9. Less than one hour later, the jury returned death verdicts as to both appellant and Nunez. (38CT 10941-10944, 18RT 4497-4403.)

On September 15, 2000, the court denied the defense motion for Modification of Judgment and court sentenced both appellant and Nunez to death for both counts. The court also imposed a sentence of 25 years to life for the special allegation of section 12022.53, subdivision (d) and (e). The court ordered

restitution in the amount of $10,000. (18RT 4606-4608, 4610-46111; 39CT 11309-11323, 11324-11335, 11346, 11348, 11372-11374.)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Cal. Const., art. VI, § 11; Pen. Code, § 1239.

STATEMENT OF THE FACTS

A. The Guilt/Innocence Phase

1. The Prosecution Case.

a. The Homicides.

On the evening of October 29, 1998, Bertha Jacque and her husband, Frank Jacque, were at home in their apartment at 254th Street and Frampton in Harbor City with Bertha's brother, Edward Robinson, and Robinson's girlfriend, Renesha Fuller. (5RT 977-978, 1050-1051.) Robinson was 21 years old and had been dating Fuller for about five or six months. (5RT 977-978.) The Jacques' apartment was situated in a gang turf claimed by both the Harbor City Gang, a Hispanic gang, and the Harbor City Crips, an African-American gang. (9RT 2101-2102.) The Jacques, Robinson, and Fuller were all African-Americans. (5 RT 1089-1090.)

In a parking lot down the block, a 35-year-old Hispanic man named Ernie Vasquez was drinking beer in a light blue compact car with his girlfriend, Kathy Romero. Vasquez had been a member of the Harbor City Gang but had not been involved in gang activities for several years. Vasquez and Romero had been using crack cocaine that evening, and had been driving around the neighborhood trying to sell a stolen VCR that someone had given to Vasquez. (5RT 1121-1123, 1128.)

At around 10:30 p.m., Bertha Jacque went upstairs to take a shower. She looked out the window and saw that Fuller's Ford Escort was still parked outside

the apartment. Shortly before 11, Robinson and Fuller went outside to Fuller's car, and Frank Jacque came upstairs to the bedroom. (5RT 1052-1054.)

As the Jacques were about to go to bed, they heard several gunshots and the sound of a car accelerating. Bertha ran to the window and saw Robinson lying in the street. (5RT 980-984.) She also saw the rear tail lights of a car driving down Frampton towards Pacific Coast Highway. (5RT 989-990.) The car appeared to be a large, older car. (5RT 991.) After calling 911, Bertha and Frank ran outside. (5RT 988, 1054.)

Robinson was lying next to the place Bertha had seen Fuller's car parked before the shots were fired. (5RT 988.)

Fuller's car had been moved, but was stopped a few yards away with the engine still running. Robinson's eyes were half-open and he appeared to be alive, but Bertha could see blood on his side. (5RT 992.) Robinson was trying to get up, but Frank told him not to move. (5RT 1056.)

Bertha then went to Fuller's car, where she saw Fuller in the driver's seat, slumped over to the side. (5RT 993.) Although Bertha told Fuller to hang on, Fuller did not respond. (5RT 994.) Frank tried to take Fuller's pulse, but could not find it. (5RT 1054.)

From their car in the parking lot, Vasquez and Romero had also heard gunshots and immediately ducked down out of sight. (5RT 1123-1124.) Vasquez thought that he heard between five and seven shots. (6RT 1280.) They decided to leave. As Vasquez pulled out of the parking lot onto Frampton he saw a man lying in the middle of the street and stopped the car. He got out, put his beer can down on the street, and approached Robinson. (5RT 1124-1125.) [2]

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[2] Vasquez's version of the incident differed substantially from the story told by the Jacques. Vasquez testified that he arrived on the scene first and was helping Robinson when the Jacques emerged from their house. However, Brenda Jacque testified that she and Frank had come out first and checked on both victims before Vasquez's car pulled up at the scene. It is not clear from the record how much alcohol and cocaine Vasquez had

Bertha told Vasquez what had happened, and Vasquez told someone to get a blanket. When a neighbor handed Vasquez a blanket, Vasquez placed it over Robinson. (5RT 1000-1101.) Bertha and Vasquez then went over to Fuller's car. Vasquez saw that Fuller was "stooped over" in the car, with "smoke" or "steam" coming out of her arm. (5RT 1131-1132.) Bertha reached inside to turn off the engine, causing the car to start rolling. Vasquez helped her and together they managed to stop the car. [3]

Romero called to Vasquez to leave. Vasquez was on probation for possession of cocaine and domestic violence and had warrants out for probation violations. (5RT 1133-1135.) Vasquez told Frank that he had to leave before the police arrived because there were warrants out for him. Vasquez then got back in the car with Romero and drove off. (5RT 1002-1003, 1061.)

Sergeant Jeffrey Pailet, of the Los Angeles Police Department (LAPD), was the first officer to respond to the scene, arriving at 11:30 p.m. (5RT 1083-1085, 1088.) Pailet saw Robinson lying on the ground and another African-American male, who Pailet testified could have been Frank Jacque, trying to render aid. (5RT 1089-1090.) Robinson's eyes were open, but he appeared to be unconscious. Pailet also saw Fuller slumped over in the driver's side of a Ford Escort. Both Robinson's and Fuller's clothes were bloody, and they appeared to have been shot. (5RT 1091.)

Robinson was taken by ambulance to Harbor General Hospital where he died that night. Fuller died before the ambulance arrived. (5RT 1003-1004.)

An autopsy revealed that Robinson had been shot either two or three times. (9RT 2014.) One bullet entered the upper arm left arm, passed through the left side of the chest through the lung, heart, and liver, and stopped in the abdominal

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consumed that night. Vasquez testified that he was not "real high," but also said when he heard the shots, it "woke me up." (5RT 1128.)

[3] Ernie Vasquez's fingerprint was later found on Fuller's car. (5RT 1112, 1114-1117.)

wall. (9RT 2016.) This wound would have been fatal. (9RT 2017.) Robinson also had a "through-and through" wound in his left forearm and another wound caused by a bullet which entered the left hip and stopped at the spine. (9RT 2018-2020.) These two wounds could have been caused by the same bullet. (9RT 2021, 2024.) There was no indication of gunpowder stippling or other signs that the shots were fired at close range. (9RT 226-2027.)

An autopsy of Fuller's body revealed that she had been shot twice. (9RT 2041-2043, 2048, 2051.) The first bullet entered her upper left arm. The bullet passed through her left shoulder, between the second and third ribs, through the left lung and aorta, through the right lung, and came to rest near the right shoulder blade. (9RT 2041-2043.) This would have been a fatal wound. (RT 2047.) The entrance wound was a "gaping wound," which suggested that the bullet had previously struck another object that altered the trajectory of the bullet and caused it to tumble, thus creating an unusually large entrance wound. (9RT 2044-2045.) Fuller also had a second gunshot wound which entered the right posterior and side area of her back. That bullet exited through the left lower back and upper left buttocks. Portions of that bullet fragmented and remained in Fuller's body. (9RT 2048, 2051.)

Several casings and bullets were found at the scene or recovered from the bodies of Robinson and Fuller. (9RT 1974-1977,1978-1982-1986.) The bullets appeared to be armor-piercing bullets designed to penetrate steel and other hard materials. (9RT 1973.)

b. The Investigation

At around 3:40 a.m., on October 31, 1998, Alan Greenburg, an officer with LAPD, was on patrol with his partner, Officer Vinh Nguyen, in the area of Ronan and Denni Street when they stopped a maroon Buick Regal for driving without its lights on. (8RT 1793-1795; Exhibit 47.) Co-defendant Daniel Nunez was the driver of the car. Appellant, who was wearing a white cap with the word "Bone"

written on the back, was seated in the right front passenger seat, and a third man was seated in the back. (8RT 1798, 1800-1820, 1822-1823.)

All three occupants got out of the car and started walking away. When Greenburg tried to stop Nunez the three began running, even though Greenburg identified himself and told them to stop. (8RT 1801, 1812-1813) Greenburg managed to detain appellant. (8RT 1801-1820.) Nunez and the third man managed to get away. (8RT 1802.)

After appellant had been detained, Greenburg discovered a Norinco Mak-90 assault rifle, similar to an AK-47, on the front seat of the car. (8RT 1802-1803, 1805-1806, Exhibit 48.) Inside the rifle was a clip with 26 bullets in it. (8RT 1802-1803, 1805-1806; Exhibit 49.) The car was then impounded, and both the car and the gun were tested for fingerprints. (8RT 1808.) No usable fingerprints were found on either the Buick Regal or the weapon. (9RT 1942, 1945-1946.) However, casings and bullets found at the murder scene were compared to casings and bullets test fired from the Norinco Mak-90, and a police expert concluded that all the casings and bullets had been fired from that gun. (9RT 1974-1977, 1978-1982-1986.)

Police subsequently learned that the maroon Buick Regal belonged to a woman named Ruby Feliciano. (8RT 1772-1774; 1793-1795.) When contacted, Feliciano told the police that two weeks earlier she had mechanical trouble with the car and had taken it to Daniel Nunez and asked him to fix it. (8RT 1774-1776.) Nunez was supposed to return the car the same day but instead kept it, telling Feliciano that he needed a part for the car in order to repair it. (8RT 1776-1778.) A week after that, Feliciano saw an unknown woman driving her car. (8RT 1779.) She contacted Nunez and demanded her car back, but Nunez threatened her life. (8RT 1780.) Feliciano reported the car stolen. (8RT 1779.)

On October 31, two days after the Robinson/Fuller homicides, she learned that the car had been impounded and the car was returned to her by the police. (8RT 1781.)

In late November or early December, 1998, Ernie Vasquez was stopped for driving a car which had its windows improperly tinted and was arrested for his outstanding warrants. (6RT 1167.) Because he wanted to avoid arrest on additional warrants, Vasquez gave the police the false name "John Vasquez," and was booked into the main Los Angeles County Jail under that name. (6RT 1169.)

On December 3, 1998, while still in the county jail, Vasquez was in the "court line" waiting to be sent to Department J for a hearing. While he was in the holding cell waiting to go to court he saw appellant, whom Vasquez later identified as "Wil-Bone." (6RT 1202-1204.) Vasquez noticed that appellant had tattoos on his forearm that read either "west" or "wilmas." (6RT 1204.) As a Harbor City Gang member, Vasquez knew that these tattoos meant appellant was a member of the "West Side Wilmas," a rival of the Harbor City Gang. "Wilma" was short for "Wilmington," a neighborhood of the Los Angeles South Bay area adjacent to the Harbor City neighborhood. (6 RT 1205.)

According to Vasquez's later testimony, Vasquez introduced himself to appellant and mentioned that he was from Harbor City. Appellant asked whether Vasquez had heard anything about the shooting and killing that happened in the neighborhood. (6RT 1208-1209.) According to Vasquez, appellant said either, "I did that," or "We did that," and also said either, "We AK'd them," or "I AK'd them." (6RT 1210.)

On January 6, 1999, Vasquez was ordered out of County Jail to meet with Los Angeles Police Detectives Robert Dinlocker and Charles Knolls. The Detectives told Vasquez one of his fingerprints had been found at the Robinson/Fuller murder scene. (6RT 1313-1314.) Vasquez thought that he was going to be arrested for the murder, so he told the Detectives how he arrived at the murder scene and saw the body in the street. (6RT 1314.) Dinlocker told Vasquez that he could help him with his case, and that there was a $50,000 reward if he were to help them in this matter. (6RT 1299, 1316.) Vasquez told Dinlocker about the alleged conversation he had with appellant the previous month. Vasquez

identified a photograph of appellant. (8 RT 1876-1877; Exhibit 23, photograph 6.)

After talking to the detectives and identifying appellant as the person he spoke to in jail, Vasquez was transferred to Lynwood Jail. (6RT 1214.) Vasquez later claimed he had asked to be transferred to Lynwood Jail in order to be closer to his family and to get away from Los Angeles County Jail. (6RT 121-1214.) He denied that he had been transferred by Detectives Knolls or Dinlocker so that he could "work" for them. (6RT 1214.)

At the Lynwood jail, Vasquez met Nunez, who had been arrested in the interim. Nunez was a "trustee" giving him more privileges than other inmates and greater access between different pods in the jail. (6RT 1217-1219.) Nunez thus had access to the jail pod where Vasquez was housed. One day, Vasquez met Nunez, when Nunez was in Vasquez's pod. Nunez introduced himself as "Speedy." Nunez asked Vasquez if Vasquez was from Harbor City. When Vasquez replied that he was, Nunez asked Vasquez if he heard about the "niggers" that got killed in the neighborhood. (6RT 1220-1221, 1224-1225.) According to Vasquez, Nunez raised his hands like he was holding a gun and said, "I did that shit." (6RT 1225-1226.) Nunez told Vasquez that he was driving down the street and the guy looked at him "wrong," so he turned back and "blasted him." (6RT 1226.)

On February 2, 2000, district attorney investigator John Neff arranged for a meeting with a 15-year-old West Side Wilmas member named Joshua Contreras. Contreras had been recently convicted of attempted murder and robbery and was facing a sentence of 25-years-to-life. (8RT 1666.) The meeting took place at the California Youth Authority (CYA) Southern Youth Reception Center and was attended by Detective Dinlocker, the prosecuting Deputy District Attorney, Scott Millington, two CYA staff members, Karen Rainey and Vivian Martinez, and a jail guard. (8RT 1826, 1828.) Contreras's mother also attended part of the meeting, but arrived late. (8RT 1829-1830.) Most of the interrogation of Contreras was taped, as were three subsequent interrogations. (8RT 1879-1882.)

Although he did not tell Contreras that he would get him out of jail, Millington did discuss relocating Contreras to a federal prison and also relocating Contreras's family out of the Wilmington neighborhood. (8RT 1833-1834.) After speaking privately to his mother, Contreras told the officers that at about 7 p.m. on October 29, 1998, he and two fellow members of the West Side Wilmas had been stopped by the police near a liquor store at F Street and Wilmington Boulevard. (7RT 1508.) The two gang members with him were Juan Carlos Caballeros, who was also known as "G-Boy," and Daniel Nunez, who Contreras knew as "Speedy." (7RT 1505-1506.) The police took information on witness interview cards. (9RT 2077-2078.) Then they took Caballeros to his home, but released Contreras and Nunez, who went to get something to eat at Taco Sinaloa. They took the food to Contreras's apartment at the Dana Strand Projects and ate it on the porch, where they remained until about 9:00 p.m. (7RT 1493, 1510, 1513-1514.) At that time, Nunez's girlfriend, Yolanda Guaca came by to get Nunez to take him home because he had to take care of their baby. (7RT 1516.) Contreras then went into his home and went to bed. (7RT 1516.)

A few hours later, in the early morning of October 30, Contreras was at the playground at the Dana Strand Projects when Caballeros, Nunez, and appellant arrived with food from Taco Bell. (9RT 1959.) Contreras and Caballeros talked while sitting on the swings of the park. (9RT 1959.) Appellant said they had gone out "looking for niggers," and either Nunez or appellant said they thought they hit one of them. (9RT 1961-1962.)

Later that day, Contreras and Caballeros were visiting Contreras's girlfriend, April, when appellant and Nunez arrived. Nunez stayed outside, but appellant entered the apartment and spoke to Contreras. (7RT 1608-1611.) Appellant said that a murder in Harbor City had been on the news. Appellant told Contreras he shot a African-American guy and girl in Harbor City. (8RT 1627-1628.) Appellant was nervous when he was talking about the news story, and said that those were the people he had shot. (7RT 1616-1624.)

Contreras said that the "R" as used by the West Side Wilma gang stands for "Rider," which is a person who "puts people down," i.e., kills them, and that both Nunez and appellant were "riders." (9RT 1959-1960.)

Contreras was shown a photograph of Ruby Feliciano's maroon Buick Regal and said it looked like a car Nunez had been driving in October of 1998. (RT 1732.) He was also shown a photograph of the Norinco Mak-90 and recognized it as a gun owned by appellant and Nunez. Contreras said they referred to the gun as "Monster." (8RT 1631-1633.)

On February 11, 2000, Detective Dinlocker arranged to have appellant and Nunez transported from jail to and from court in Long Beach in a van that had been bugged to surreptitiously record what they said. (8RT 1888.) Previously, Dinlocker had interviewed both Satele and Nunez, showing them pictures of the car depicted in Exhibit 47, asking if that was the car used in the homicide. (8RT 1889.)

The tapes from the van were enhanced, transferred to a disc, and played for the jury, which followed along on a transcript prepared by the district attorney's office. On the tape, appellant stated that the prosecution could not prove which car they used, but that if they had shown him the car they "actually did that shit in," he would be "stressing." (8RT 1892-1893; Exhibits 52, 53, and 54.)

c. The trial.

At trial, Ernie Vasquez testified that prior to the killings, while he was driving around the Harbor City area trying to sell the stolen VCR, he had seen a ten or 15-year-old red or burgundy car, similar to a Buick Regal, two or three times. (5RT 1137-1138.) Vasquez saw three or four people in the car. (5RT 1139.) He remembered seeing the car once at 253rd Street and Belle Porte. At that time he was able to see the faces of the people in the car, although he did not get a clear view of them. (5RT 1139, 1141.) Vasquez also saw the Buick Regal again, at which time he was able to get a better look at the occupants. (6RT 1150.)

At that time, Vasquez was making a turn from 253rd street on to Belle Porte, and the Buick was driving on 253rd. Vasquez "shrugged his head" to the driver of the Buick. (6RT 1151-1152.)

Vasquez testified that the person he saw the best was the driver of the car. At a photographic line-up and at the preliminary hearing Vasquez selected a photograph of the person he thought was the driver of the Buick Regal. It was stipulated that the person in that photograph was Juan Carlos Caballero. (6RT 1157-1160, 7RT 1366-1367, 1368, 1370-1371.)

Although he had testified at the preliminary hearing that he had not seen either appellant or Nunez in the car, at trial Vasquez testified was "not sure" whether he saw appellant in the car, but that appellant looked like one of the people he had seen. (7RT 1391-1392.) He also testified that he was not sure if he saw Nunez in the car. (7RT 1392.)

Vasquez explained that when he spoke to the detectives in February of 1999 he told them that the more he thought about it, the more he thought that it might have been appellant in the front seat and Nunez in the back seat of the car he had seen, although he had only clearly seen the driver. (7RT 1394-1395, 1407.)

Vasquez testified that he was aware of the $50,000 reward being offered in this case. (6RT 1160.) He also testified that Detectives Knolls and Dinlocker had provided him with substantial help with his legal problems. For example, Vasquez said that after he had cooperated with them, Detectives Knolls and Dinlocker spoke on Vasquez's behalf in the cases relating to his outstanding warrants. (6RT 1160-1161.) Subsequently, Vasquez's sentence was reduced from 365 days in jail to 54 days, which was the time he had served at the time the sentence was reduced. (6RT 1164-1166.) When Vasquez failed to complete the domestic violence program the court had ordered him to attend, Detective Dinlocker helped get him reinstated to the program and scheduled classes for him, and on various occasions

Dinlocker gave money to Vasquez. (6RT 1166.)[4] Dinlocker also helped Vasquez get his mother's car released from the impound lot. (6RT 1168-1170; 8RT 1872.)

Contreras took the stand and denied that he had made any of the statements on the tape of his interrogation by Neff and Millington on February 2, even denying that his voice was on the tape. (8RT 1667, 1670.) Contreras denied telling the Millington that he was afraid of retaliation by the West Side Wilmas Gang. (8RT 1742.) He denied telling Neff or Millington that he was aware that Caballeros had been murdered or that he thought the murder may have been in retaliation for Caballeros talking to the police about this case. (7RT 1561.) Contreras also denied that he was intimidated or frightened because of what had happened to Caballeros. (7RT 1563.) All these statements contradicted statements on the tapes of the interviews with Contreras. (9RT 1957.)

Contreras also testified that when the interview with Detectives Knolls and Dinlocker on February 5, 1999 took place, the police were "harassing him" for three or four hours. He said that at one point, Detective Knolls squeezed his head and banged his head on the table between two and four times. (8RT 1749-1754, 1880-1881, 9RT 2164.) Contreras testified that he had been interviewed by Detectives Knolls and Dinlocker on a couple of occasions, but said he told them he did not want to talk to them. (7RT 1520.)

Vivian Martinez testified that she was present at the February 2nd interview of Joshua Contreras. She said that part of her job as a case work specialist for the CYA is to make sure there is no duress or pressure on the wards of CYA, and the ward is always told that any time the ward wants to stop the interview, they will do so immediately. (8RT 1834.) Martinez said Contreras never indicated that he

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[4] Detective Dinlocker admitted that he had given Vasquez $320 from the District Attorney's Witness Protection Fund to pay for meals, hotels, and other incidentals. (8RT 1873.) He also admitted he had notified the city that Vasquez was a potential claimant for the $50,000 reward. (8RT 1874-1875.) Dinlocker also admitted helping Vasquez get reinstated to the domestic violence program and waiving the impound hold on Vasquez's mother's car. (8RT 1872.)

wanted the interview to be terminated. (8RT 1834-1835.) She described the district attorney's demeanor with Contreras as "cordial" and said the district attorney did not promise Contreras money or threaten or intimidate him in any way. (8RT 1836.)

CYA staff member Karen Rainey also testified that she was present at the February 2nd interview of Contreras. She said she did not hear the Deputy District Attorney Millington threaten Contreras or promise him money in exchange for his testimony. (8RT 1861.)

Investigator John Neff also testified that he was present at the interview of Joshua Contreras on February 2nd. (9RT 1957.) Neff did not hear Mr. Millington threaten Contreras or tell him how he should testify. (9RT 1958.)

Detective Dinlocker denied threatening Contreras during any interviews or grabbing his face. (8RT 1880, 1882.) He also testified that the answers on the tape and in the transcripts of the tape were the responses that Contreras gave in the interview. (8RT 1881-1882.)

Deputy Sheriff Scott Chapman testified that he was assigned to the Operation Safety Jail Office (OSJO), the jail gang unit whose job it is to identify gang members and gather intelligence on gangs. In that capacity, he had come into contact with numerous gang members. (9RT 1933-1934.)

Chapman testified that Hispanic gangs who are rivals on the street put their rivalries aside when in custody and bond together within the racial group. (9RT 1935-1936.) He said that Hispanic gangs include Samoans. (9RT 1936.) Chapman said that members of the Harbor City and West Wilmas Gangs would interact with each other in jail since both groups are "South Siders," i.e., members of the Hispanic gangs from Southern California, as opposed to "Northerners." (9RT 19366-1937.) Chapman also said that gang members will often brag about their crimes to other gang members in jail as a means of gaining status. (9RT 1938.)

Los Angeles Police Officer Julie Rodriquez testified that she knew Daniel

Nunez from prior contacts, and knew him by his gang moniker, "Speedy." (9RT 2076.) She knew Caballero as "Curly" and Contreras as "Tweedy" or "Little Tweedy." (9RT 2077.) She knew appellant as "Wil-bone." Rodriguez testified that she had stopped Nunez, Caballeros, and Contreras on the evening of October 29, and all three were briefly questioned for "field interview cards" and released. (9RT 2077-2078.) Appellant was observed on a bicycle inside the Dana Strand Projects and also was detained briefly. (9RT 2078-2079.)

Rodriguez said members of the West Side Wilmas often have "WWS" or "WHP" tattoos, the later standing for "Wilhall Park," an area park that they frequent. Some members have "WS" tattoos for "West Side." (9RT 2084, 2086.) Sometimes they will have "West" on one arm and "Side" on the other arm. (9RT 2087.) Rodriguez said Nunez has the tattoo "Wilmas, West For Life" on his stomach. (9RT 2087.) Appellant also has a gang tattoo on his left arm. (9RT 2088.)

Rodriguez believed that both appellant and Nunez were "hard core," or mid-level gang members, the members that "put in the work" for the gang by selling drugs, committing robberies, and doing drive-by shootings, the primary activities of the West Side Wilmas Gang. (9RT 2090-2091, 2093.)

Rodriguez testified that gang members who cooperate with the police are considered rats or snitches and may be killed by the gang. Gang members who tell something to the police will often "back-pedal" later, changing their stories, so as not to be perceived as a snitches. (9RT 2092.)

Rodriguez said the West Side Wilmas Gang controls the turf from Harry Bridge Street to Lomita on the north and south, and from the 110 Harbor Freeway to Avalon, on the east and west, respectively. (9RT 2094-2095.) She had never had seen any West Side Wilmas Gang members in the area of 254th and Frampton, because that area belonged to the Harbor City Boys and Harbor City Crips. West Side Wilmas members would only go to that area to commit a crime. (9RT 2101-2102.) In her opinion, if three members of the West Side Wilmas

Gang went to that area with a loaded Norinco Mak-90, they would be going there to try and kill someone. (9RT 2102-2103.) Rodriguez was also of the opinion that a crime like the one in this case would increase the gang status of anyone committing the crime. (9RT 2106.)

2. The Defense Case

Co-defendant Daniel Nunez testified and gave an alibi defense. (12RT 2782, 2791.) Nunez denied being with appellant and driving around Harbor City in a Buick Regal the night of October 29th. (12RT 2900.) Instead, Nunez testified that at the time of the offense, he was living with his girlfriend, Yolanda Guaca, in the apartment of Guaca's mother, Sandra Lopez. On the afternoon of October 29, 1998, Lopez asked him to take one of his two children, Daniel Jr., to the doctor to have a rash treated. Nunez did not want to go because the doctor's office was located in the turf of the rival East Side Wilmas Gang, so he gave Guaca the keys to the car. (12RT 2836-2837.)

Nunez said that at around 7:00 p.m., he, Contreras, and Caballeros had gone to the Taco Sinaloa Restaurant, bought food, and took it to the Dana Strand housing project where Contreras lived. (12RT 2886-2887.) At around 9:00 p.m., after they finished eating, Guaca came and picked him up. (12RT 2836-2837, 2887-2888.) Nunez took Guaca and their son to get something to eat, and then they went back to Lopez's house, where he spent the night. (12RT 2838-2839.)

Nunez testified that he was not a trustee when he was in jail on January 17, 1999. (12RT 2914.) He said he did not remember ever seeing Vasquez, and he denied ever telling anyone in jail he committed the crime. (13RT 2972.) He also said he had never had a problem with African-American people because of their race or with African-Americans living in his neighborhood, and testified that he had several African-American friends. (12RT 2820-2821.)

Nunez admitted that he was a member of the West Side Wilmas Gang, and that he had seen "Monster," which he testified was a "neighborhood gun," he

denying that he and appellant bought it. (12RT 2791, 2900-2902.) He also admitted that it was his voice on the tape from the van. (12RT 2857-2858, 2864.)

Yolanda Guaca, Nunez's girlfriend, testified and confirmed that Nunez was with her on the evening of October 29th. She said she specifically remembered that evening because their baby was sick, and she had to contact Nunez and get the keys to the car from him so she could take the baby to the doctor. (11RT 2598, 2602, 2608-2611.)

After taking the baby to the clinic, she picked up Nunez in the Dana Strand project about six blocks from where she lived, and he drove her home, where they ate dinner and went to bed. Nunez did not leave the house after that. (11RT 2613-2621.) In a taped interview with the police, Exhibit 65, she said that Nunez may have gone out the night of October 29th, but she could not remember for sure if he left the house that night. (12RT 2709-2710.)

Guaca admitted being on the three-way call with Nunez and Ruby Feliciano and admitted telling Feliciano to "correct" the story she had told the police. (12RT 2676-2678.)

Sandra Lopez testified that she was with Nunez and Guaca on the night of October 29. She remembered that evening because Nunez's baby, Daniel, was sick and Yolanda borrowed Nunez's car to take the baby to the doctor. (11RT 2544-2552.) After she returned from the doctor's, Yolanda went to pick up Nunez, who had left the apartment, returning with Nunez between 8:45 and 10:00 p.m. that evening, remaining in the apartment the rest of the night. (11RT 2544-2552.)

Lawrence Kelly, a member of the West Side Wilmas also known as "Puppet," testified that he knew "Tweety" Contreras and that Contreras was frequently under the influence of crystal methamphetamine. Kelly said that when Contreras was using the drug, he often became paranoid and thought other people were talking about him. (10RT 2402-2409.) Kelly said that he met appellant, Nunez, Tweety, and Curly at the Dana Strand Park playground on October 30th.

(10RT 2409.) Kelly did not remember appellant or Nunez say anything about going out "looking for niggers" or saying that they thought they "got" one. (10RT 2410.)

Kelly said there were about 30 to 40 members of the West Side Wilmas, and that the gang was racially mixed. Kelly said the gang had no leaders and that its members associated informally. (10RT 2394-2396.) Kelly denied that the Wilmas Gang had a racial prejudice against African-Americans and noted that the gang shared the same turf as the Waterfront Pirus, a local African-American gang, without animosity. (10RT 2396, 2432.) Kelly also said he had never heard appellant use the "N-word," and had never seen him act in a disrespectful manner towards Afro-Americans. (10RT 2396-2398.)

Kelly also denied that the Wilmas Gang engaged in drive-by shootings. (10RT 2434.) He admitted one of the Wilmas' gang activities was selling drugs, and that members were armed at times. (10RT 2438-2439.) Kelly said he recognized the Norinco Mak-90 rifle. He said that for some time the weapon had been kept at the home of a gang member named Lashawn. However, Kelly said all the gang members had access to the gun, and any of them could use it when needed. (10RT 2402-2404.)

Kelly testified that he knew a man named Glenn Phillips, whose wife was African-American. Kelly denied offering Phillips's wife or another African-American $100 to testify that the Wilmas Gang gets along well with African-Americans. (10RT 2412-2413.)

Vondrea Williams, an inmate at Los Angeles County Jail inmate at the time of trial, testified that he had met co-defendant Nunez when both were being held in what he referred to as the jail's "high power unit." (10RT 2247-2248.) Williams said that Nunez had been housed two cells away from him. (10RT 2248-2249.)

Williams, an African-American, testified that he had been a trustee in the unit and confirmed that Nunez had also been a trustee. (10RT 2250, 2253-2253.)

As trustees, Williams and Nunez were allowed to "circulate" more than other prisoners, who were usually confined to their cells for all but 30 minutes per day. (10RT 2250.) Part of the trustee's job was to calm down tensions in the unit, including racial tensions, and Williams testified that Nunez had helped him with such situations in the unit. (10RT 2258-2260.) Williams said he had never experienced racial prejudice coming from Nunez. (10RT 2261-2265.)

Williams testified that he had served ten years in prison, beginning in 1987. (10RT 2251.) Williams said that in the years he had served in prison, no one had ever come up to him "right away" and confessed to committing a murder. Williams said that prisoners would be hesitant in talking to another prisoner about such matters for fear that the other prisoner could be a snitch. (10RT 2255-2256.)

An African-American woman named Jacqueline Oree testified that her sons, Jason and Jonathan Brooks, were in the West Side Wilmas Gang. (10RT 2285, 2287, 2298.) Oree said she had known appellant for about six years, and during that time she had never known appellant to use racial slurs or otherwise act inappropriately against African-Americans. (10RT 2296-2298.) Oree sometimes asked appellant to watch her house for her when she was out of town. (10RT 2296.)

Jason Brooks, Oree's sixteen-year old son, testified that he had known appellant and Nunez for several years, and that he was "involved" with the West Side Wilmas Gang. (10RT 2310-2311.) Jason testified that there is a difference between "nigger" and "nigga." "Nigga" is a "hip-hop" word that is "like, cool, you're my friend and things." (10RT 2323.) Brooks testified that he never heard Nunez use the "N-word," though at times he had heard Nunez say, "What's up, my nigga," which is a friendly term, as distinguished from "nigger." (10RT 2323-2324.) Brooks also heard appellant use the term "nigga," but never heard him use "nigger." (10RT 2337.) Brooks testified that appellant was like a brother to him. (10RT 2337.) Brooks had never heard appellant say anything about wanting to kill African-Americans. (10RT 2337.) Brooks also testified that the West Side

Wilmas Gang was not hostile towards the Water Front Pirus, an African-American gang in the same area. (10RT 2328-2329.)

A man named Darnell Demery testified that he was married to appellant's cousin, and that appellant baby-sat for her son. (10RT 2449-2450.) He said he had never heard appellant use "the N-word" and never knew him to be aggressive. (10RT 2451.)

Richard Satele, appellant's father, testified that he had never known his son to exhibit any racial bias. (11RT 2467-2468.)

A teacher named Willy Guillory testified that he had been appellant's teacher in high school and also knew appellant's family. Guillory said he had never known appellant to do or say anything displaying animosity towards African-American people or any other racial group. (11RT 2526.) Guillory said he would find it "unusual" if he heard that appellant punched a African-American inmate in the face in jail while the inmate was handcuffed. (11RT 2528.)

David Butler, a firearm's examiner, testified that he had reviewed the police reports and examined the rifle, shell casings, projectiles, and fragments that had been retained by the Los Angeles Police Department. (10RT 2201-2202.) Based on the materials he reviewed, Butler concluded that the gun was fired from an area "generally" in the street or across the street from the area where the bodies were found. It did not appear that the gun had been moved a significant distance between the shots. (10RT 2212-2214.) Butler saw no evidence indicating whether the shooter was in a car when the gun was fired. (10RT 2227-2228.)

Butler also stated that in his opinion the Norinco Mac-90 qualified as an "assault weapon" within the meaning of Penal Code section 12276, but stated that he did not believe the rifle qualified as an "assault weapon" under the definition used by the Department of Defense and the military. (10RT 2226-2227.)

A sociologist and criminologist named Lewis Yablonski testified as an expert on gangs. (11RT 2473.) Yablonski testified that gangs are "near groups" and are not as organized as the police perceive them to be. He said there is a

"disorganized quality" to gangs in terms of their structure. (11RT 2477.) Yablonski said the level of participation in gang activities varies, and although some members may commit violent crimes, others associated with the gang may not. (11RT 2478-2479.) Yablonski testified that he had interviewed several members of the West Side Wilmas Gang and concluded that the gang's structure was similar to that of other gangs that he described. (11RT 2480-2482.) He believed there were about 15 to 20 "core" members. (11RT 2482.)

Yablonski testified that the West Side Wilmas Gang's territory overlapped with that of the Water Front Piru Gang. Although the Wilmas Gang is mostly Hispanic, and the Piru's are mostly African-American, he did not detect any hostility between the two gangs. (11RT 2483-2484.) Yablonski said that while gangs may occasionally fight with each other, it is not typical of gang members to attack non-gang members. (11RT 2480.) Yablonski interviewed two Afro-American members of the West Side Wilmas and did not detect any signs of racial animus. He also interviewed appellant, who he said had African-American relatives and African-American co-gang members, and found no "special animosity" towards African-Americans. (11RT 2484.)

Yablonski testified that gang members tend to brag and exaggerate their behavior and may do so to others in jail to show how "bad" they are. However, Yablonski testified that it would be "very unlikely" for two gang members to confess to a murder to the same stranger they met in jail, days apart. (11RT 2494-2495.) Yablonski said that reference to "we" in such bragging about gang actions may refer to the gang doing something and not necessarily the individual personally. If an individual was referring to his own actions, he would be more likely to use "I" than "we." (11RT 2484-2487.)

Yablonski testified that racial acrimony increases in jail. (11RT 2485.)

Yablonski said that gangs often have "communal weapons" that are shared among the gang members. Yablonski believed that the Norinco Mak-90 was such a communal weapon. (11RT 2481, 2487.)

The parties stipulated that if called to testify, Los Angels Police Officer Simmons would testify that she had interviewed Bertha Jacque on the night of the incident and that Jacque told her that after her brother walked Renesha to her car, she had heard seven shots and saw a small, gray-colored car driving southbound down the street. (10RT 2361.) Jacque told Officer Simmons that she went outside and saw her brother and Renesha lying in the street. She told Simmons that a car pulled up and a white man and woman got out of the car. Jacque told Simmons that she asked them to call the police. She said the woman yelled to the man that the police were coming, and they both got in their car and left. (10RT 2361-2362.)

3. Rebuttal

Glenn Phillips, a real estate investor, testified that he knew Lawrence Kelly in 1999. (13RT 3000.) Contrary to Kelly's testimony that Kelly never offered an African-American money to testify that testify that "they" get along with African-Americans, Phillips testified that he overheard Kelly offer Warren Battle, an African-American employee of Phillips, $100 to testify that "we" get along with African-Americans. (13RT 3001.)

John Kepley, a Los Angeles County deputy sheriff, testified that on December 22, 1999, he had been assigned to the sheriff's prison gang intelligence unit and was working at the Mens' Central Jail in Los Angeles. (13RT 3106.) At around 2:30 that afternoon, the unit conducted a random search of the jail cells for weapons due to racial fighting that had occurred the day before. Kepley said that while he was conducting the search, he saw the inmate in Cell 16 attempt to throw the shaft of a spear into the "freeway," the walk-way area in front of the cells. He identified appellant as the inmate in Cell 16. (13RT 3106-3108.)

However, according to the inmate housing record, Exhibit 26, Nunez was the person assigned to cell 16. (13RT 3110-3111.)

When presented with the jail records, Kepley acknowledged that it was possible that he incorrectly identified the person he had seen in Cell 16. (11RT

3116.)

Larry Arias, a Los Angeles County Sheriff, November 9, 1999, was assigned to the unit escorting inmates at the Los Angeles Jail. While he was escorting inmate Keys, a African-American member of the Blood gang, who had his hands chained to his waist, appellant approached Keys and hit Keys in the face with his fist. Arias had not seen Keys do anything to provoke appellant. (13RT 3119-3124.)

B. The Penalty Phase

1. Prosecution Case

Renesha Fuller's mother, Roberta Hollis, testified that Renesha excelled in school and had been placed in the magnet program for advanced classes. (RT 3660, 3662-3663.) Renesha's death had a major impact on her and her family. (16RT 3665.) Hollis used to have a lot of family pictures in the house, but she has taken them all down because she was no longer able to "keep the tradition" she had of displaying the pictures. (16RT 3677-3678.)

Hollis said that she and Renesha also used to dress up every year for Halloween and pass out candy. Renesha had started preparing the candy bags shortly before she was killed. (16RT 3881-3882.) Since the murders, Hollis had not been able to celebrate Halloween, and Renesha's grandmother could no longer bear visiting Hollis's house. (16RT 3882, 3884.) Renesha's siblings still miss her "a lot." (16RT 3884.)

Simon Hollis, Renesha's stepfather, described how Renesha would come to him with her problems and how they would talk about his work as a police officer. He gets "a hurting feeling" when he sees a car similar to the type of car Renesha had or when he drives past the auto shop where she had a part time-job. (16RT 3894-3897.) He testified that Renesha had worked with high-risk kids to help keep them in school. (16RT 3900.)

Lea Robinson, Edward Robinson's step-mother, testified that she had raised

him and his sister, Rosa, after his mother died. (16RT 3942-3943.) She said that Robinson had excelled at his school, a trilingual school which taught English, Japanese, and Spanish. (16RT 3965.)

Lea had looked forward to being a mother-in-law and grandmother and now knows that will not happen. (16RT 3960.)

Since the death of Robinson, Albert, Edwards's father has trouble eating and sleeping. (16RT 3960.)

Lea's daughter had been a recovering addict who had been doing well until Edward was killed. Since then she is no longer sober and is out in the streets. (16RT 3962.)

Lea's granddaughter, Renesha, who was very close to Edward, is having a difficult time getting along with other family members and does not seem to understand that life must go on. (16RT 3963-3964.)

Rosa Morris, Edward's sister, described how she was close to Edward, how she helped raise him when he was younger, and how he used to frequently go to her house (16RT 3974-3977.) She is angry and hurt and feels guilty that she was not there to protect Edward. (16RT 3983-3984.) She has a hard time sleeping at night, and if she has to get into her car at night she is afraid. She feels "tired in her heart." (16RT 3985.)

Renesha, Edward's niece, had a "very special" relationship with Edward, considering him more of a best friend than an uncle, because they were only two years apart in age. (16RT 3987-3988.) She has been impacted by his death great deal, not having the security that Edward provided for her and regretting the fact that her son will not have the opportunity to know Edward. (16RT 3993.)

Albert, Edward's father, frequently thinks of Edward. Holidays are particularly difficult when his family comes over and Edward is missing. It is also difficult going to the church where he used to go with Edward because Edward is no longer there. (16RT 4003-4006.)

2. Defense Case[5]

Richard Satele, appellant's father, testified that appellant was an only child. (17RT 4066.) Appellant's parents were married after appellant was born. (17RT 4067.) At the time, Richard was working two jobs and was seldom home. (17RT 4068.) He also began drinking too much, and when he was home he fought verbally and physically with appellant's mother. (17 RT 4070-4071.) Appellant's mother left when appellant was two or three years old. (17RT 4071.) After that Richard Satele and appellant moved in with Richard's parents, who helped him raise appellant. (17RT 4071.)

Appellant's mother began to resume regular contact with appellant when he was five years old, which Richard encouraged. (17RT 4072-4073.) Richard began taking time off from work to spend time with appellant, and they began taking yearly trips, including a trip to Samoa where Richard has other relatives. (17RT 4074.)

Appellant had to use orthopedic braces as an infant to straighten out his legs. This was a "sore point" causing arguments in Richard's relationship with appellant's mother because when appellant was wearing the braces he was crying all the time. Richard's mother was a nurse and thought that appellant should have worn the braces 24 hours a day, which caused friction between Richard's mother and his wife, who would want to remove the braces when appellant was crying. (17RT 4069-4070.)

By the time appellant was 12, Richard had managed to save some money and bought a house in Redondo Beach. (17RT 4072.) Appellant had to change schools. Around this time appellant started to get into trouble, including being suspended from school for "tagging," or spray-painting graffiti. Although Richard usually disciplined appellant verbally, at times he thought "more attention" was needed and he either slapped him or used a belt. (17RT 4073.) Richard used a

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[5] The defense penalty phase evidence pertaining to co-defendant Nunez has been omitted.

belt on appellant the first time he was caught tagging. (17RT 4075-4076.)

The second time appellant was caught tagging, he told the school that he was afraid to go home because his father would hit him with the belt. As a result, appellant was sent to Child Protective Services, which informed Richard that it was illegal to physically "lay a hand on" a child. (17RT 4076-4077.) After that, Richard did not physically discipline appellant because he was told that he would be arrested if he did. From then on he tried to discipline appellant by withholding things like money or television. (17RT 4077.) After that, appellant began to stay away from home for periods ranging from a weekend to a full week. (17RT 4078.) After a while, Richard became aware of the fact that appellant was cutting school. (17RT 4079.)

Later, appellant got into trouble again for tagging and destruction of public property, for which he was incarcerated in a juvenile camp for three months. (17RT 408.)

After he was released from camp, it seemed like appellant's attitude had changed and he wanted to go back to school, which he did for a while. (17RT 4083.)

However, when he was sixteen years old, appellant was arrested for possession of a .38 caliber handgun. As a result, he was sent to a "military boot camp." (17RT 4084-4085.) After he was released from boot camp, appellant again indicated a desire to continue with school, but soon dropped out. (17RT 4085-4086.) At the age of seventeen, appellant "took off" from home and did not come back. (17RT 4086-4087.)

Esther Tufele, appellant's mother, testified that she "stayed away" from appellant when from when he was two until he was about 5 or 8 years old because she did not think she was ready to be a mother. (17RT 4091-4092.) After Tufele resumed contact with appellant, he often stayed with her on the weekends. Often, when she returned him to his father's house, appellant tearfully told her he wanted to stay with her. (17RT 4093.)

Dr. Samuel Miles, a psychiatrist, testified that he examined appellant on three occasions and also met with appellant's parents. He later prepared a report as a result of those meetings and examination. (17RT 4106-4107, 4111.)

Dr. Miles said that he studied appellant's history, emotional background, the history of his functioning through life in school, work, and social situations, his mental status, and thought process. (17RT 4111.) Dr. Miles said he had also administered the Minnesota Multiphasic Personality Inventory (MMPI) and found appellant's results "highly pathological" and consistent with someone who is in turmoil and has identity problems. If intoxicated, appellant would have a tendency to lose contact with reality and become impulsive and/or aggressive. (17RT 4112-4114.)

Dr. Miles was of the opinion that after appellant's father "gave up" on corporal punishment, appellant was left without adequate discipline. (17RT 4115.)

Appellant had a history of alcohol and drug abuse, which would affect his ability to sleep and reduce his ability to gauge reality and control his impulses. (17RT 4115-4116.)

He administered other tests and found appellant to be in "borderline" range of intelligence, although not low enough to be retarded. (17RT 4117.)

Dr. Miles also administered the Millon Clinical Multiaxial Inventory and found the responses indicated appellant was in turmoil and had a history of problems with the law. (17RT 4118-4110.) Dr. Miles concluded that appellant might be psychotic, meaning he had trouble distinguishing what is real and what is fantasy. (17RT 4114.) Appellant has a tendency when under "a loss of structure" or intoxication to lose contact with reality and become impulsive and aggressive. (17RT 4114.) Appellant also displayed signs of very low self-esteem and possible paranoia. (17RT 4114.) Although appellant was 20 years old when interviewed, Dr. Miles found appellant had the emotional make up of a twelve-year old. (17RT 4120.)

Dr. Miles diagnosed appellant in the multi-axial format of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders and concluded that appellant suffered from probable psychosis, borderline personality disorder, amphetamine abuse, and alcohol abuse. (17RT 4119.) Dr. Miles said this symptomatology tended tend to make appellant attracted to a gang environment, as he would be looking for a consistent environment where he would be accepted. (17RT 4120.)

ARGUMENTS

GUILT PHASE ISSUES

I

THE FINDING THAT BOTH APPELLANTS SHOT THE VICTIMS WAS A FACTUAL INCONSISTENCY THAT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND THE EIGHTH AMENDMENT RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE, THEREBY REQUIRING A REVERSAL OF THE JUDGMENT AND DEATH PENALTY VERDICT

The jury erred in finding that both appellants personally used the firearm, thereby depriving appellant of a fair trial and a reliable jury determination on the essential elements of the crimes for which he had been charged, in violation of his right to due process of law and his right to a reliable determination of the facts in a capital case, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States. This error was further compounded when the trial court, in denying the motions for a new trial and modification of the sentence, relied in part on the fact that the jury determined that both defendants were the shooters. Reversal is required.

A. Introduction

In this case, the jury found to be true, as to both defendants, the allegation of "personal use" of a firearm, although only one defendant was the shooter. The prosecutor never contended that both defendants fired the weapon and further recognized in closing argument at the guilt/innocence phase that he had failed to prove who the shooter was. These inherently inconsistent findings were the product of the misleading argument made to the jury by the prosecutor and incorrect language in the verdict forms given to the jury.

When gang enhancement allegations under section 186.22, subdivision (b)

are found to be true and the jury finds that "a" defendant used a firearm, the other defendant is *vicariously* liable and is subject to the enhancement. However, the verdict forms in this case did not ask the jury to determine whether "a" defendant used the weapon, but whether *each* of the defendants had "personally" used the weapon. The finding of "personal use" although only one of the defendants fired the rifle, represents a factual inconsistency in the verdicts.

This finding had profoundly harmful consequences, independent of the enhancement, because it prevented the jury from addressing critical issues regarding the mental state of the two defendants. First, the error prevented the jury from making a critical determination as to the mental states of the defendants. While either defendant could have been convicted on an aiding and abetting theory, and either defendant could have been convicted as the actual shooter, the mental state of the aider and abettor is different from that of the actual shooter. In order to convict the non-shooter of the murders, the jury was required to determine whether he had the mental state required for an aider and abettor. This analysis was never conducted.

Secondly, the error prevented the jury from performing the analysis necessary to determine whether the non-shooter had the mental state required to qualify for the death penalty. A defendant who is not the actual killer is not liable for the death penalty unless that person, with the intent to kill, aided the actual killer, findings that must be found by the jury to be true beyond a reasonable doubt. (*Tison v. Arizona* (1987) 481 U.S. 137, 152, 158 [95 L.Ed.2d 127, 140-145, 107 S.Ct. 1676.)

Finally, in determining whether to impose the death penalty, the jury and the trial court may consider a wide variety of facts pertaining to the individual defendant's particular culpability. In most cases, the actual killer is clearly the more culpable of the parties and a jury is more likely to convict and sentence to death a person who held the gun and fired the shots. Thus, an improper finding that one defendant is the actual shooter improperly increases the culpability of that

defendant.

Indeed, the fact that each defendant was the actual shooter was expressly given by the court as one of the reasons for imposing the death penalty and refusing to modify the penalty and/or grant a new trial for either defendant.

As a result, the finding that both defendants were the actual shooter was an error that had an impact on both the finding of guilt and the imposition of the death penalty. The error requires reversal of the entire judgment.

B. The Evidence at Trial

At trial, the evidence showed that only one person was the actual shooter of the only firearm used. The only percipient witness was Bertha Jacque, who testified that she looked downstairs, saw Renesha's car parked at the curb, and thought that Robinson and Fuller were out there talking. Bertha turned away from her window and walked toward her bed, but stopped at the sound of "all these gunshots" and "immediately" ran back to the window. (5RT 983-984, 988.) Right after the gunshots, Bertha heard the sound of a car accelerating. However, by the time she got to her window she could only see the tail lights of the car down the street. (5RT 989-990.) All of these events appear to have taken place within mere seconds. There was no evidence to suggest the shots were fired in two groups, as would have been the case had the gun been passed from one shooter to another.

The Deputy Medical Examiners' testimony concerning the placement of wounds on Robinson and Fuller also confirms that only one person fired the shots. Robinson had four gunshot wounds. (9RT 2014.) Wound No. 1 entered his upper left arm and passed through his lung and heart. (9RT 2016.) Wound No. 2 entered his left forearm. (9RT 2018-2019.) Wound No. 3, which may have been caused by the same bullet as Wound No. 2, entered his left hip. (9RT 2021, 2024.) Wound No. 4, shown in exhibit 59-E, appears to be a wound to the left thigh. (9RT 2022.) At least one of the two wounds sustained by Fuller appears to have been caused by a bullet that passed through Robinson's body. (9RT 2044-2045.)

Nothing in the coroner's observations caused him to conclude that the firearm that caused the wounds had been moved between shots. (9RT 2027.) A reasonable inference is that the shots occurred in such rapid succession that Robinson did not even have time to fall to the ground or even turn between shots.

The firearms analysis evidence further confirms the conclusion that there was but a single shooter. The Norinco Mak-90 rifle was described as a "high capacity rapid fire semiautomatic" weapon that could fire up to four rounds per second. (10RT 2208.) The expended casings were found in a cluster, leading reasonably to the inference that the weapon was not moved any distance between shots. (10RT 2212-2214.) Since this was a drive-by shooting, the expended casings would have been spaced some distance apart if two persons in different positions within the car used the firearm to shoot and kill Robinson and Fuller. The only reasonable conclusion is that the firearm was not moved between the car's occupants and that the shots were fired in rapid sequence.

In his argument to the jury at the guilt/innocence phase, after discussing principles relating to aiding and abetting, the prosecutor argued that both defendants were guilty, and that it did not matter who the actual shooter was. The prosecutor acknowledged, "I will be the first to tell you that I did not prove to you who the actual shooter was." (14RT 3210-3211.) Later, he reiterated this statement, saying "

> . . . again, I'm the first to tell you I didn't prove who the actual shooter was, if you don't know who the actual shooter was – that jury instruction says the person that aided and abetted, you must also find they intended to kill .
>
> So, although I didn't show who the actual shooter was, all three intended to kill while they were in that car. . . ."

(14RT 3214.)

Later, addressing the weapon enhancement under section 12022.53, the prosecutor explained:

> That gun allegation requires that I prove that a defendant

> personally and intentionally discharged a firearm that proximately caused someone's death. . . .
>
> Then we have the words "personal use." I told you, I don't know how long ago it was now I've been going on, that I did not prove to you which of the two defendants personally used a gun. So you're going to say, "I'm going to find that allegation not true, because Mr. Millington did not prove who personally shot the gun." But if you look in that instruction, I think it's 17.19, there's a paragraph that is important. . . . What it says is that gang members are vicariously liable. They are all liable for that personal use if that gun has been intentionally discharged and proximately caused death and there is a gang allegation that has been pled and proven. . . .
>
> Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word "personal" to throw you off. When you go back there and it says, "We, the jury find the allegation that the defendants personally, intentionally used a firearm..."dah, dah, dah, to be true, please circle the true.

(14RT 3222-3223; underline added.)

However the jury forms given to the jury did not read, "We, the jury find the allegation that *a defendant* [or one of the defendants] personally, intentionally used a firearm, . . . " Because the jury had to find that one of the defendants used the firearm, but did not have to determine which one, this would have been the correct wording. Instead, four different verdict forms were given to the jury.

One form given to the jury read "We, the jury find the allegation that the defendant William Satele personally and intentionally discharged firearm. . . . . which proximately cause the death of Edward Robinson . . . to be _____ (true or not true)." A second form substituted the name "Renesha Ann Fuller" in place of "Robinson," but was otherwise identical to the first form. (38CT 10934.)

Likewise, corresponding forms for co-defendant Nunez were also given to the jury, the first reading, "We, the jury find the allegation that the defendant Daniel Nunez personally and intentionally discharged firearm. . . . . which proximately cause the death of Edward Robinson . . . to be _____ (true or not true)." A second form substituted the name "Renesha Ann Fuller" in place of "Robinson," but was otherwise identical to the first form. (38CT 10929.)

The jury filled in "true" in the blank spaces of all four forms, although the prosecutor had not attempted to prove who fired the gun, and had acknowledged that he had not proved who fired the weapon. (38CT 10929, 10934.)

Subsequently, during penalty phase argument to the jury, the prosecutor attempted to make an election as to who the shooter was, arguing that appellant Satele was the actual shooter while appellant Nunez was in the back seat as a lookout. (17RT 4193-4295.) The prosecutor gave no explanation for this new conclusion.[6]

In a written Supplemental Motion for a New Trial, the defense explained there was insufficient evidence for the jury to determine who the actual shooter was. (39CT 11152.) It was argued that "to find two defendants guilty of murder, the shooter must be established and alternatively an aider and abettor status be found as to the other defendant." (38CT 10934.) This argument was based on the premise that the actual killer has to have express malice under *People v. Woods* (1992) 8 Cal.App.4th 1570 and *People v. Solis* (1993) 20 Cal.App.4th 264, 270-271, and that the aider and abettor has to act with knowledge of the killer's express malice and must also intend to aid in the killing. (*People v. Patterson* (1989) 209 Cal.App.3d 610, 616-617.)

Later, at the hearing on the Motion for a New Trial filed by appellant Nunez, and joined by appellant Satele, appellant Nunez's counsel argued that there was a question of who the shooter was, explaining that the evidence showed there was only one possible shooter, and that it appeared from the verdicts that the jury was not able to determine who that shooter was. (18RT 4551-4552.) The defense further argued that the jury wanted to convict because of the nature of the case, but was unable to determine who the shooter was and who aided and abetted. Thus,

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[6] Indeed, the length of the rifle, the awkwardness of maneuvering a weapon of this size in the confined space of a car occupied by three adult males, and the likelihood (based on the southbound direction of the car following the shooting) that the shots were fired from the left side of the car, makes it less probable that the front seat passenger would have fired the weapon and more likely that the back seat passenger did so.

the only way to convict was to have both defendants convicted as being the shooter. (18RT 4552.) The defense further explained that the shooter normally has a greater degree of culpability, and that juries are more likely to impose death on that person. (18RT 4552.)

Later, in denying the motion, the court stated:

> On the first part defendant Nunez seems to suggest that he did not shoot the victims in this case. With respect to the identity of the shooter, defendant Nunez' motion is denied. The record is unambiguous that the jury has sufficient information to conclude beyond a reasonable doubt that the defendant Nunez is a shooter in this case. His admission against penal interest, to wit Ernie Vasquez at the county jail stating in quote, "I did that, I AK'd them, couple with the simulation of the holding of the AK 47 is sufficient for the jury to conclude he is one of the shooters."

(18RT 4578.)

Next, the court addressed the issue of Satele as the shooter, stating:

> Moreover, the record is also unambiguous that the jury has sufficient information to conclude beyond a reasonable doubt that defendant Satele is a shooter in this case. The appellate court is invited to the testimony of Joshua Contreras introduced by way prior inconsistent statement or quote, unquote "Greened" statements pursuant to People versus Green, through the playing of the tapes or the tape recordings read into the record and the testimony of Detective Knolls and Dinlocker. Defendant Satele also told Ernie Vasquez, I, or we, did that, I or we, AK'd them" close quote when referring to the two victims shot in this case."

(18RT 4578.)

In addition, the trial court relied upon the same information in denying appellants' motions for modification of the degree of the crime or the sentence. In connection with Factor "J" evidence, the court said, "Defendant Nunez admits to Ernie Vasquez: 'I did that, I AK'd them,' close quote when referring to his killing of Robinson and Fuller. The statement was made proudly while simulating the holding a rifle in his arms". (18RT 4596.)

The court next made the analogous finding as to appellant, saying, "Defendant Satele admits to Ernie Vasquez, 'I or we with did that , I or we AK'd them,' close quote." (18RT 4596-4597.)

Thus, the trial court relied upon the determination that both appellant and Nunez were the actual shooter in denying the motions to reduce the degree of the offense and to reduce the sentence from the death penalty to life in prison without possibility of parole.

C. Substantial Evidence Showed That Only One Defendant Was The Actual Shooter

The right to due process of law includes the right a verdict based on sufficient evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) This requires that there be "substantial evidence from which a jury might reasonably find that an accused is guilty beyond a reasonable doubt." (*Id.* at p. 319, n. 12.)

The requirement of the jury reasonably finding guilt mirrors other due process prohibitions against irrational State action. "As a substantive limitation on governmental action, the due process clause precludes arbitrary and irrational decisionmaking." (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1183.) Likewise, illogical presumptions violate due process of law. (*County Court of Ulster County* (1979) 442 U.S. 140, 166; *Leary v. United States*. (1969) 395 U.S. 6, 36.)

While it is true that there was some evidence that could support a finding that both defendants shot the victims, since there was evidence (however improbable) that both defendants made admissions to that effect, substantial evidence requires more than merely "some" evidence. In *Estate of Teed* (1952) 112 Cal.App.2d 638 the court explained the concept of "substantial evidence" as follows:

> "The sum total of the above definitions is that, if the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the

> word cannot be deemed synonymous with 'any' evidence. It must be 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."

(Id. at p.644, quoted in *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667.)

In this case, the only evidence that *both* defendants shot the rifle consisted of the testimony of the jailhouse snitch, Ernie Vasquez, who testified that each defendant had separately made admissions to him. However, this evidence must be balanced against the testimony of the only percipient witness, the coroner, and the firearms expert showing there can only have been one shooter. Moreover, Vasquez's testimony must be evaluated in light of the hearsay nature of the statements, the vagueness and uncertainty he expressed regarding the statement he attributed to appellant, his manifest self-interest, and the sheer improbability of his version of events.

As noted, the evidence overwhelmingly points to the conclusion that there was only one shooter, a fact which the prosecution did not dispute. The combined testimony of Bertha Jacque, the Deputy Medical Examiners, and the firearms expert David Butler establishes that the shots were fired from one position and in rapid succession-- so rapidly in fact that the position of Robinson's body was not significantly altered between the first and last shots that hit him, so rapidly that the bullet casings fell in a single cluster, and so rapidly that the shooter's car was down the street by the time Bertha got back to her window to see where the shots were coming from.

In view of this evidence, the notion that a shooter seated in the front seat fired the Norinco Mak-90 and passed the weapon to a second shooter in the back seat, who then aimed and fired the weapon at the same targets is contrary to any reasonable interpretation of the facts. Apart from the sheer awkwardness of passing a large assault rifle in the confined space of a car interior in which there were three adult male occupants, the act of passing the rifle would serve no

purpose and would tend to defeat the shooter's goal by giving the intended victims time to seek cover. The absurdity of this notion serves to illustrate why this experienced trial prosecutor never sought to argue that the evidence in his case proved Robinson and Fuller were shot and killed by two separate shooters but instead argued there had been one—albeit unknown-- shooter.

Seen against the foregoing uncontradicted evidence of three unbiased witnesses, two of whom were forensic experts, and the prosecutor's own theory that there had only been one shooter, Ernie Vasquez's extraordinary claim that both appellant and Nunez separately admitted their individual role as shooters to him is wholly unworthy of belief. First of all, with respect to the statement allegedly made by appellant, Vasquez by his own admission was not even sure whether appellant had said "I" did the shooting or "we" did the shooting. According to Vasquez, appellant said either, "I did that," or "We did that," and also said either, "We AK'd them," or "I AK'd them." (6RT 1210.) In contrast to this vague, uncertain testimony, Vasquez expressed in unmistakable terms the way Nunez had claimed sole responsibility for the killing, including describing how the male victim had looked at him "wrong" and then mimicking aiming the rifle and pulling the trigger. Thus, Vasquez's testimony, while it may implicate Nunez, on its own terms is not substantial evidence that appellant was the actual shooter.

Furthermore, even if Vasquez had actually testified that appellant and Nunez both admitted personally shooting the victims, his testimony would remain incredible not merely because it contradicted the physical and eyewitness evidence, but also because well-known rules of evidence and common sense rendered it inherently suspect. First, the statements related by Vasquez are obviously hearsay. While appellant recognizes that they were admissible into evidence under the hearsay exception for admissions, the fact that they were hearsay affects their reliability and should not be ignored, particularly in light of the factors discussed below. For example, Vasquez's reliability was negatively impacted by the fact that he was a member of a rival gang and was incarcerated for

a theft offense. In addition, the dual jailhouse "admissions" Vasquez claimed were made to him while he, appellant, and Nunez were in custody were suspect by their very nature. (See *In re* Wilson (1992) 3 Cal.4th 945, 957 [testimony from jailhouse informants is inherently suspect].)[7]

Moreover, evidence at trial established that investigating detectives provided extraordinary benefits to Vasquez. Indeed, Vasquez's testimony was that he did not begin providing information implicating appellant or Nunez until he had been advised of the $50,000 reward. Evidence that Vasquez received substantial benefits for his contributions to the prosecution directly undercuts the reliability and credibility of the facts to which he testified because it establishes the existence of "bias, interest, or other motive," for his testimony. (See CALJIC No. 2.20, with which appellant's jury was instructed (37CT 10729).)

The reliability of Vasquez's testimony was also undermined by its inherent improbability. Vasquez was not only a total stranger to appellant and Nunez but was himself a member of a rival Hispanic gang that claimed a turf adjacent to that of the West Side Wilmas. One would not normally expect a member of one gang to admit to a member of a rival gang a crime that could subject him to the death penalty. Vasquez's involvement with the case was also implausible and suspicious. He testified that he had been present at the scene of the crime purely by the happenstance that he and his girlfriend were parked nearby using drugs when the gunfire began and had actually seen appellant and two other men driving in the area where the crime occurred shortly before the killings. Later he was arrested on outstanding warrants and suspicion of car theft and just happened to be placed in the same pod as appellant, who he claimed spontaneously admitted participating in a dual murder. After he told the police about this alleged conversation, he was immediately transferred to the Lynwood jail where he was

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[6]. The jury was instructed with CALJIC No. 3.20 advising the jury that the testimony of an in-custody informant should be viewed with caution and considered in light of the extent to which it may have been influenced by the expectation benefits to be received

given access to Nunez. According to Vasquez, Nunez too spontaneously admitted the killings.

Thus, Vasquez conveniently testified to being wherever he needed to be, and seeing or hearing whatever he needed to see or hear, to plug any possible holes in the prosecution's case. The sheer implausibility of Vasquez's story, coupled with his awareness that he was in line for a $50,000 reward, stretches credulity to the breaking point.

Furthermore, Vasquez first began to implicate others after he had been informed that his fingerprints were found at the scene of the murder. (6RT 1313-1314.) This raises additional concerns related to the testimony of accomplices who are distrusted because they have an overwhelming motive to shift blame to their co-perpetrators to save their own skin when they have been implicated in a crime. (*People v. Guiuan* (1998) 18 Cal.4th 558, 574-575 (conc. opn. of Kennard, J.) See also Williamson v. United States (1994) 512 U.S. 594, 601 (1994) [noting that an accomplice's strong motivation "to implicate the defendant and to exonerate himself," makes his "statements about what the defendant said or did . . . less credible . . ."]..)

Finally, even if Vasquez's hearsay testimony were to be accepted at face value, the reliability of the declarants' claimed "admissions" is further undercut by the fact that, in the expert opinion of prosecution jailhouse gang expert Deputy Scott Chapman, in-custody gang members typically brag about their crimes to other gang members as a means of gaining status because status is important in the jailhouse setting. (9RT 1938.) Thus, even if we were to accept the implausible hypothesis that appellant and Nunez both spontaneously made admissions to this total stranger and member of a rival gang with a $50,000 motive to implicate them in the crimes, the truth of the matters asserted in the admission must be viewed in light of Deputy Chapman's testimony that jailed gang members are motivated to brag about crimes. Thus, even assuming arguendo that the statements were made, they were too inherently unreliable to be believed.

Apart from Vasquez's vague and incredible testimony, the only other evidence that appellant was the shooter was the testimony of Joshua Contreras to the effect that appellant had told him he had shot a African-American guy and girl in Harbor City. (8RT 1627-1628.) However, like Vasquez's statements, Contreras's statements were taken while he was in custody and were made in exchange for substantial benefits to Contreras and his family, and were therefore inherently suspect.

Finally, the prosecutor thought so little of Contreras's supposedly corroborating testimony that even he admitted he had not proved which defendant committed the killings.

Although a reviewing court generally will not disturb factual findings made at the trial level, such a court may hold that the prosecution's evidence was demonstrably false, inherently improbable, or of insufficient substantiality to support the judgment. (9 Witkin, Cal. Proc. 4th (1997), Appeal, § 367, p. 416.)

In this case, the evidence compels the conclusion there was a solitary shooter. The evidence supporting a theory there were two shooters is insubstantial and unworthy of belief for the reasons set forth above. Accordingly, although the jury could conceivably have found that *one* of the two defendants fired the shots, the verdicts finding that *both* appellant and Nunez shot and killed Robinson and Fuller are factually and irreconcilably inconsistent. Balancing the evidence as to the number of shooters, the only reasonable interpretation is that there was one shooter.

D. The Firearm Use Finding Cannot be Imposed on Appellant Under a "Vicarious Liability" Theory Because the Jury was Improperly Instructed on the Elements of the "Vicarious Liability" Firearm Enhancement.

As shown in the previous section, the findings that appellant and Nunez *both* personally discharged the weapon were invalid for inconsistency and lack of substantial evidentiary support. Since it was never proved which defendant

actually fired the weapon, and since both defendants could not have fired the weapon, the jury findings that both defendants personally and intentionally discharged the weapon, within the meaning of Penal Code section 12022.53, subdivision (d), are invalid.

Moreover, vicarious liability for the personal firearm use enhancement, within the meaning of section 12022.53, subdivision (e)(1), cannot be imposed upon appellant or Nunez because a critical element was omitted from the jury instruction regarding the vicarious liability theory. Thus, the enhancement finding is invalid for this separate reason.[8]

Appellant and codefendant Nunez were charged by information with, *inter alia*, the firearm use enhancement set forth in Penal Code section 12022.53, subdivision (d). This enhancement imposes a sentence of 25 years to life on "any person who, in the commission of a [specified] felony . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, . . . or death, to any person other than an accomplice, . . ." Subdivision (e), paragraph (1), of this section then provides this enhancements applies to any person who is a principal in the commission of an offense if the person violated subdivision (b) of Section 186.22 and any principal in the offense committed any act specified in subdivision (b), (c), or (d).

Section 186.22 criminalizes street gang activity and defines both a substantive offense and a series of sentence enhancements. Subdivision (a) of the section makes it a felony to actively participate in a criminal street gang with knowledge that its members have engaged in a pattern of criminal activity, and to willfully promote, further, or assist in the criminal conduct of the gang. (Pen. Code, §186.22, subd. (a).) Subdivision (b) then imposes sentence enhancements on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, . . ."

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[8] This issue is discussed in more detail in Argument V, *infra*.

(Pen. Code §186.22, subd. (b).)

With respect to the firearm enhancement of section 12022.53, subdivision (d), the jury was instructed with the 1996 ### CHECK DATE version of CALJIC No. 17.19. The instruction stated that it was alleged that "the defendants Daniel Nunez and William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, during the commission of the crimes charged, in violation of Penal Code section 12022.53(d)." (CT 10788.) After defining various terms, the instruction further advised that "[t]his allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d), and 186.22(b) are plead [sic] and proved." (*Ibid.*)

However, as set forth in more detail in Argument III, *infra,* the instruction which explained section 186.22 to the jury described not the elements of the enhancement of subdivision (b), but rather the elements *of the substantive offense* of subdivision (a), with the trial court giving a modified version of CALJIC No. 6.50.

Under that instruction, the jury was free to return a "true" finding to the charged enhancement without finding the essential elements of the enhancement of subdivision (b), viz., (1) that the crime charged was committed for the benefit of, at the direction of, or in association with a criminal street gang, and (2) that the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. Instead, the jury was able to find the enhancement allegation to be true merely if the defendant participated in a street gang and aided and abetted the commission of a murder.

As appellant has explained in detail in Argument III, because essential elements of the enhancement allegation were never charged in the information or found by the jury, the verdict with respect to section 186.22 is invalid. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, [any fact that increases the maximum

penalty for a crime, must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt], quoting *Jones v. United States* (1999) 536 U.S. 227, 243, n. 6; *People v. Coleman* (1904) 145 Cal 609, 612 [enhancement must be proven as any other material fact in the trial of the cause] (superseded by statute as stated in *People v. Saunders* (1993) 5 Cal.4th 580, 588.)

Furthermore, because a violation of subdivision (b) of section 186.22 was itself an essential element of the vicarious liability firearm use enhancement of section 120922.53, subdivision (e)(1), upon which the jury was instructed, the error in instructing on section 186.22, subdivision (a), instead of section 186.22, subdivision (b), resulted in the omission of essential elements from the firearm use enhancement as well. Thus, even if the "personal use" finding were not invalid for factual inconsistency and lack of substantial evidentiary support, the jury finding regarding the firearm use enhancement of section 12022.53, subdivision (d), could not be supported on a vicarious liability theory.

E. Different Mental State Elements Apply to the Actual Shooter and the Aider And Abettor

Because the jury improperly found that both defendants personally used the firearm, the jury failed to address crucial mental state issues that were necessary for a guilty verdict. For this reason, the improper finding on personal use requires reversal of the judgment.

As this court has repeatedly held, the acts and mental states required for liability for murder are different depending on whether the defendant is the actual killer or an aider and abettor. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122 [mental state required of an aider and abettor is "different from the mental state necessary for conviction as the actual perpetrator"], quoted in *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

Murder liability for an actual killer requires the mental state of malice aforethought and a "willful, deliberate, and premeditated" act. (Pen. Code, §§ 187

and 189.) No further facts are necessary for a finding of guilt of first degree murder for the actual killer.

By contrast, general accomplice liability requires a showing that the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1994) 35 Cal.3d 547, 560.) Additionally, if the offense is a specific intent crime, the accomplice must "share the specific intent of the perpetrator," which occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Ibid.*)

As this court has stated:

> To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citation.] When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.] Thus, we held, an aider and abettor is a person who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime. [Citation.]"

People v. Prettyman (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman, supra*, 35 Cal.3d 547, 560-561.)

As *Beeman* and *Prettyman* both state, prior knowledge of the perpetrator's purpose to commit either the charged crime or a target crime is an element of any murder by an aider and abettor. Conversely, lack of knowledge of the perpetrator's purpose is a defense. (*People v. Mendoza, supra*, 18 Cal. 4th at p.

1132.) Similarly, it is a well-established principle that "[M]ere presence at the scene of a crime is insufficient to establish aider and abettor liability." (*People v. Salgado* (2001) 88 Cal.App.4th 5, 15.)

Thus, a defendant who is not the actual shooter cannot be found guilty of first degree murder on an accomplice theory without a jury finding that he acted with knowledge of the purpose of the perpetrator and with an intent to encourage or facilitate that purpose. The jury must be so instructed and must so find.

In this case, the jury's invalid finding that both appellant and Nunez personally fired the weapon permitted it to sidestep the mental state analysis required to find the non-shooting defendant guilty of murder. Here, appellant's culpability could be based on the fact that he shot and killed, or it could be based on the fact that he aided someone who shot and killed. In either case, the jury would have to agree on the requisite intent for that act. However, the jury must have believed that one of those two events occurred and, in view of the substantial evidence there was but a single shooter, the jury could not lawfully base its verdict on the conclusion that both people were the shooters and neither aided and abetted.

The right to a unanimous jury in criminal cases and the right to have the jury agree as to which act the defendant committed, is guaranteed by the California Constitution and is inherent in the requirement of a fundamentally fair trial, guaranteed by the United States Constitution. (Cal. Const., art. I, § 16; *People v. Jones* (1990) 51 Cal.3d 294, 321). Appellant recognizes that unanimity is not required when there is one criminal act and two separate legal theories support the conviction. (*People v. Santamaria* (1994) 8 Cal.4th. 73, 77.) However, in this case, there were two different acts and/or mental states that could support the conviction, and the jury cannot attribute the same act and/or mental state to different people where substantial evidence establishes that only one person shot and killed the victims. Courts have recognized that "[I]t is appropriate the jurors all agree the defendant is responsible for the same discrete criminal event." (*People v. Davis* (1992) 8 Cal.App.4th 28, 45; People v. Hernandez

(1995) 34 Cal.App.4th 73, 77.) Here, by finding that both appellants personally used the firearm, the jury improperly avoided making other crucial findings as to the mental state of the non-shooter, and reversal is required.

F. Improper Utilization Of The Finding Of Personal Use To Impose The Death Penalty

In addition to excusing the jury from making crucial findings as to the mental state of the aider and abettor, the inconsistent finding that both appellants fired the fatal shots improperly inflated appellant's culpability when it came to the decision as to whether to impose the death penalty. This is contrary to the established principle that the right to a fair trial includes the right to be judged on one's "personal guilt" and "individual culpability." (*United States v. Haupt* (1943, 7th Cir.) 136 F.2d 661, cited in *People v. Massie* (1967) 66 Cal.2d 899, supra, 66 Cal.2d 899, 917, fn. 20.) It also violates the Eighth and Fourteenth Amendment requirements of an individualized capital sentencing determination. (See *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

As noted above, an aider and abettor cannot be found guilty of murder without a jury finding that he possessed the mental state required for aiding and abetting. In addition, a non-perpetrating defendant cannot be subjected to the death penalty for murder without a jury finding that he possessed the requisite mental state.

In *Enmund v. Florida* (1982) 458 U.S. 782, the Supreme Court reversed the death sentence of a defendant convicted under Florida's felony-murder rule. The Court explained that only a small handful of states allowed for the imposition of the death penalty in felony murder cases for a defendant who is not the actual killer, absent substantial aggravating factors. (*Id.* at pp. 789-793.) The court further noted that "[s]ociety's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries

have made" in that the vast majority of the people executed since 1954, the person executed personally committed the fatal assault. (*Id.* at p. 794.) The Court noted that the focus in the decision to impose the death penalty must be on the culpability of the specific defendant and not on the culpability of the actual shooter. The Court explained why this was so: "for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" (*Id.* at p. 798, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

The Court held that the Eighth Amendment does not permit "the imposition of the death penalty on [one] who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (Id. at p. 797.) *Enmund* recognized that in determining the validity of capital punishment for an accomplice's conduct, the focus must be on the accomplice's culpability, not on that of the individual who shot and killed the victim. (*Id.* at p. 798.) The court held that an aider and abettor in a felony murder context cannot be subjected to the death penalty unless he intends to kill. (*Id.* at p. 801.)[9]

Enmund shows how critical it is for the jury in a death penalty case to determine which of two defendants was the actual killer, as only the actual killer will normally be subjected to the death penalty. The recent case of *In re Hardy* (2007) 41 Cal.4th 977 is illustrative of how this court views the importance of the status of an actual killer in the minds of jurors weighing death.

In *Hardy*, the defendant was convicted of murder and conspiracy to commit murder to collect life insurance proceeds. Proceedings following the order to show cause on the habeas petition did not support a showing of innocence,

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[9] Subsequently, in *Tison v. Arizona, supra,* 481 U.S. 137, 152, the court appeared to lower the bar somewhat and held that eligibility for the death penalty for the aider and abettor in a *felony murder* requires that the defendant be at least a major participant in the crime and acts with reckless indifference to human life. However, as explained in Argument IV, reckless indifference only applies to felony murder cases. Therefore, appellant still had to have intent to kill to be liable as an aider and abettor in this case.

because as a conspirator Hardy was properly convicted of first degree murder. However, this court nevertheless reversed the death penalty judgment because, on a claim of ineffective assistance of counsel, the defense showed that a person named Calvin Boyd may have been the actual killer, a role attributed to the defendant at trial. This court explained that it reversed the penalty phase judgment because, "had the jury entertained a reasonable doubt that petitioner was the actual killer and concluded he was merely a coconspirator, there is a reasonable probability it would have returned a sentence of life instead of death." (*Id.* at 853.)

This court further explained that at trial, while the prosecution argued Hardy was the actual killer, the evidence that petitioner was the actual killer was weak and circumstantial. In contrast, there was substantial evidence as to his guilt as an aider and abettor and coconspirator. (*Id.* at 855.) This court noted that the aggravating evidence against Hardy was primarily the circumstances of the offense itself. The only other aggravating evidence appeared to be a "domestic disturbance" resulting in misdemeanor possession of nunchakus and disturbing the peace. Likewise, this court characterized the mitigation as "meager." (*Id.* at 857.) Thus, this courted concluded "had the jury been aware that petitioner was likely not the actual killer, but merely participated in the conspiracy to kill for insurance proceeds, there is a reasonable probability the jury would have viewed the balance of aggravating and mitigating circumstances differently and concluded petitioner did not deserve the death penalty. (*Id.* at 894-895, citing *In re Gay*, *supra*, 19 Cal.4th at p. 790.)"

This court went on to explain:

> But the jury operated under the understanding, fostered by the prosecutor's closing argument, that petitioner personally stabbed the victims. If that were true, petitioner's moral responsibility for the crimes would be at the zenith, with no coconspirator having greater culpability. That he killed more than one victim, that he killed a child, that he did so in such a brutal and horrific manner, that he did so simply for money and according to a preconceived plan, all these factors substantially aggravated the case and amply justified the

> jury's verdict that he should suffer the death penalty for his crimes. But if he did not kill anyone, if he merely conspired with [the others]... the nature of his moral culpability is quite different. More to the point, the jury's weighing of the relative aggravating and mitigating factors would have been entirely different.

(*Id.* at p. 894-895.)

As in *Hardy*, in this case the evidence does not show who the actual killer was, and even the prosecutor admitted he had not proved who the shooter was. (*Ante*, at p. 36, 14RT 3210-3211.) Also as in *Hardy*, the aggravating factors against appellant are primarily the facts of the crime itself and the impact of the crimes on Fuller and Robinson's families. While victim impact testimony can be very moving, the fact that the victim's family has been impacted by their loss is not an unusually aggravating factor, since there is some victim impact virtually every case. On the other hand, the mitigation includes appellant's age at the time of the crime, his troubled family background, including his mother abandoning him when he was young, his lack of intellectual development and borderline" range of intelligence, and his possible psychotic mental state. These facts make the mitigating evidence in appellant's case far more persuasive than the "meager" evidence available to Hardy, and thus the case for penalty reversal is stronger here than it was in that case. Furthermore, like the defendant in *Hardy*, appellant's criminal history is relatively minor, consisting of tagging type offenses and one case of possession of a firearm.

It is very likely that a jury would be influenced by a party's role as the actual killer in a murder case. The danger of guilt by association in gang cases has long been noted by the courts in a variety of contexts. (*In re Wing Y* (1977) 67 Cal.App.3d 69, 79; *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342.) In gang cases a defendant is subject to conviction because of the actions of his co-defendants.

However, the actual killer is clearly the more culpable of the parties to a crime, and any jury will be inclined to hold that person more responsible. Indeed,

as noted above (ante, at p. 36-37), in denying the motions for a new trial and modification of the penalty, the court relied on the jury determination that appellant was the actual shooter, apparently believing that this increased level of culpability justified the imposition of the death penalty, and did exactly the same with defendant Nunez. The corollary is equally true; i.e., any jury will be more inclined to impose a sentence of life without the possibility of parole, rather than death, upon the defendant who aids and abets but does not actually kill.

Consequently, a finding that both defendants are the actual killers, when such a conclusion is not possible, is contrary to the requirement of an individualized determination of culpability and requires a reversal of the judgment entered below. This improper "personal use" finding impermissibly weighted the scale in favor of death and improperly tilted the delicate balance in a capital case that must be reached in returning a death verdict.

The special findings that both defendants actually shot and killed Robinson and Fuller are irreconcilably in conflict with the factual evidence, denied appellant a fair trial and due process of law, and require a reversal of the judgment of death.

G. Other Relevant Principles Of Law

Numerous other principles of law are also violated by the inconsistent finding that both defendants personally used the firearm.

1. The Prohibition Against Inconsistent Factual Findings

Appellants' right to due process of law was violated by the inconsistent finding that both Nunez and Satele personally used the weapon. While it is not necessary for a jury to agree on a theory of liability, it is imperative that they agree on the facts upon which liability is based.

In this respect, this case is analogous to *In re Sakarias* (2000) 35 Cal.4th 140. In that case, two habeas petitioners, Sakarias and Waidla, who were separately convicted of first degree murder and sentenced to death for the same

murder, each filed a petition for writ of habeas corpus claiming the prosecutor presented factually inconsistent theories in separate trials.

The evidence at both trials showed they both participated in the fatal attack on the victim, perpetrated with a hatchet and a knife. In separate trials, the same prosecutor attributed to each defendant the series of three hatchet blows to the victim's head. While there was evidence that they both hit the victim with the hatchet, the prosecutor at each defendant's trial maintained the defendant on trial had inflicted all the fatal chopping wounds. He described the hatchet as "the more devastating of the instruments," and the knife as "the lesser implement."

The prosecutor's penalty phase arguments relating to domination were also inconsistent. (See Pen. Code, § 190.3, factor (g) ["substantial domination" by another may be considered in mitigation].) At Waidla's trial, he argued Waidla "was the dominate person between himself and Mr. Sakarias. . . ." However, at Sakarias's trial, he argued Sakarias was "in no way" dominated by Waidla.

In *Sakarias*, this court concluded that principles of fundamental fairness do not permit the prosecutor to attribute to two defendants, in separate trials, a criminal act only one of them could have committed because, by necessity, such an argument rests on "a false factual basis" which is "inconsistent with the goal of the criminal trial as a search for truth" and undermines the reliability of the convictions or sentences thereby obtained. (*Id.* at p. 156.) This court in *Sakarias* only reversed the conviction of one defendant, stating that where "the available evidence points clearly to the truth of one theory and the falsity of the other, only the defendant against whom the false theory was used can show constitutionally significant prejudice." (Id. at p. 150.)

As previously noted (*ante*, at p. 37), because of the difficulty of maneuvering a rifle in a car and the fact that the car appellants were in was driving a southbound direction, it is likely that the person in the back seat fired the weapon. In addition to the mutually conflicting admissions as to having been the shooter, Vasquez testified that Nunez was in the back seat. (7RT 1394-1395,

1407.) Thus, it is likely that Nunez was the shooter, and therefore the evidence points to the falsity of the theory that appellant fired the weapon.

Judicial disapproval of the prosecution's use of inconsistent and irreconcilable theories in separate trials for the same crimes has also been voiced in opinions of the United States Supreme Court and decisions of the federal circuit courts. (See *Jacobs v. Scott* (1995) 513 U.S. 1067 (dis. opn. of Stevens, J., from denial of stay); *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045 (en banc) (reversed on other grounds sub nom. *Calderon v. Thompson* (1998) 523 U.S. 538) [inconsistent prosecutorial theories may present a due process violation]; *Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1051 ["[t]he State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth."].) A similar conclusion was also reached by the Sixth Circuit in *Stumpf v. Mitchell* (6th Cir. 2004) 367 F.3d 594, cert. granted sub nom. *Mitchell v. Stumpf* (2005) 534 U.S. 1043.) The vice in this situation stems from the fact that, as to the two inconsistent and irreconcilable theories, one must be false. "Because inconsistent theories render convictions unreliable, they constitute a violation of the due process rights of any defendant in whose trial they are used." (*Id.* at p. 613.)

Convictions based on two inconsistent theories are themselves inconsistent with the principles of public prosecution and the integrity of the criminal trial system. The function of the prosecution, as an agent of the state, is "to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial." (*United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127.)

Just as it would not be permissible for the state to punish a person who is factually innocent, it also violates due process to base the punishment of two different persons on the same criminal act when only one could have committed them.

In *Sakarias*, it was not legally necessary for the prosecution to attempt to

attribute any particular act to either defendant. Had the prosecution in the two trials in *Sakarias* only proved that *someone* used a hatchet and someone used a knife, and both acted in concert to kill the victim, both defendants would have been liable for the death penalty, regardless of who had which weapon. However, it was impermissible for the prosecution to argue both factually inconsistent theories, and verdicts based on both of those theories were not permissible.

In this case, the prosecution did not have to prove who the shooter was, and at the guilt/innocence phase the prosecutor admitted he had not done so. (*Ante*, at 34.) If the prosecutor had remained true to his argument that it did not know who fired the weapon, but both defendants were liable for their joint action if "a" defendant used the firearm, a murder conviction could have been returned without the jury specifying who acted in the role of the shooter. This would be permissible under the rule that the jury need not agree on the theory of liability. However, while the jury need not agree on the theory of liability, it may not base its finding on irreconcilable and inconsistent factual theories.

Because of the factual inconsistency, this error also impacts the reliability of the truth seeking process in violation of the heightened reliability requirements of the Eighth and Fourteenth. (*Woodson v. North Carolina, supra*, (1976) 428 U.S. 280, 305; Gilmore v. Taylor (1993) 508 U.S. 333, 334; *Johnson v. Mississippi, supra*, 486 U.S. 578, 584-85; *Zant v. Stephens, supra*, 462 U.S. 862, 879.)

In this case, it is not possible to determine which defendant fired the rifle. As explained above, the trial court listed the evidence supporting each theory, apparently accepting both theories as true. While it is true that there was evidence which could have supported a finding that either defendant was the shooter, that is substantially different from finding that both defendants were the shooter. The former is possible. The latter is not.

Because this court is not in a position to resolve this factual dispute, both convictions must be reversed.

2. Due Process Requires Jury Unanimity

The finding that both Nunez and Satele personally discharged the weapon deprived appellant of the due process right to have the jury unanimously determine the essential facts upon which guilt was founded.

The right to a unanimous jury in criminal cases, and the right that the jury agree as to which act the defendant committed, is guaranteed by the California Constitution and is inherent in the requirement of a fundamentally fair trial, guaranteed by the United States Constitution. (Cal. Const., art. I, § 16; *People v. Jones* (1990) 51 Cal.3d 294, 321). The principle of juror unanimity requires that "the jurors all agree the defendant is responsible for the same discrete criminal event." (*People v. Davis* (1992) 8 Cal.App.4th 28, 45; *People v. Hernandez* (1995) 34 Cal.App.4th 73, 77.)

Appellant recognizes that under Penal Code section 12022.53, subdivision (e)(1), the jury would not have been required to find which defendant actually fired the weapon. Had they jury been instructed on that section and given an appropriate jury form, they might have properly found both defendants vicariously liable for the firearm use even if they had not been able to decide which defendant actually fired the weapon. However, they jury was not given a verdict form which gave them the option of choosing a vicarious liability theory. Instead, they were asked to decide which of the two defendants actually fired the weapon. Their failure to do so, and their decision to instead find both defendants actually used the weapon was not merely a logical impossibility, but a violation of both defendants' rights to a unanimous jury verdict. Reversal is required.

H. Prejudice

For the reasons set forth in the foregoing sections, the jury's finding that both defendants fired the weapon deprived appellant of his right to due process of law, a reliable determination of guilt and penalty, and a unanimous jury, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments. When an error at trial deprives a criminal defendant of federal constitutional rights, the error is presumed to be prejudicial, and a reversal is required, unless the beneficiary of the error can show the error to be harmless. (*Chapman v. California* (1967) 386 U.S. 82, 87.) Respondent cannot make this showing here.

The error clearly prejudiced appellant in the guilt phase. The jury's finding that both defendants actually fired the rifle meant that the jury failed to conduct the legally required analysis of his mental state to find an aider and abettor liable for the acts of the actual shooter. Appellant was entitled to a jury verdict which found all the critical elements of the crime to be true. However, as the prosecutor admitted, he failed to prove which defendant actually fired the weapon. Thus, the non-shooting defendant was entitled to a jury verdict based upon an analysis of whether he acted in furtherance of the shooter's purpose and had the requisite mental state.

Moreover, the evidence strongly suggested that Nunez, and not appellant, actually fired the weapon, and that appellant was therefore the defendant deprived of the benefit of the requisite mental state analysis. The testimony of Ernie Vasquez showed that Nunez not merely admitted shooting the rifle in unequivocal language, but also mimicked how he had done so and explained that he did so because the male victim looked at him "wrong." By contrast, Vasquez's testimony regarding appellant's supposed admission was equivocal; he could not recall whether appellant had said "I" or "we" were responsible for the shooting. Furthermore, the testimony of the percipient witness, Bertha Jacque, that she had seen the car driving south immediately after the shootings suggests that the shots were fired from the left side of the car, and appellant was seated in the right front passenger seat. It also would have been far easier and less awkward for a person seated alone in the backseat to maneuver the rifle than for one of two persons in the front seat to have done so. As this court held in *Sakarias,* where "the available evidence points clearly to the truth of one theory and the falsity of the other, only

the defendant against whom the false theory was used can show constitutionally significant prejudice." (*Id.* at p. 150.) As the more likely aider and abettor, appellant has shown such "constitutionally significant" prejudice and is entitled to reversal.

In addition, respondent plainly cannot show the error to have been harmless with respect to the penalty phase. As the United States Supreme Court and this court have both held, the jury is far more likely to impose death upon the actual shooter than upon the aider and abettor. (*Enmund v. Florida, supra,* 458 U.S. 782, 789-793; of *In re Hardy* (2007) 41 Cal.4th 977.) Indeed, as noted, the fact that both defendants were found to be the actual shooter was a fact expressly relied on by the trial court if refusing to modify the verdict. (*Ante*, at p. 36.) Therefore, the jury's illogical finding that both defendants actually fired the rifle thus plainly exposed appellant, the more likely aider and abettor, to the death penalty in a way that a contrary finding would not. The jury's illogical determination that both defendants actually fired the weapon deprived appellant.

Accordingly, reversal is required.

I. Conclusion

The jury erred in finding that both appellant and Nunez were the shooters in this case, thereby depriving appellant of the right to a jury determination on essential elements of the crimes for which they had been charged, in violation of the right to a jury trial as guaranteed by the Due Process Clause of the Constitution of the United States, and further deprived appellant of the right to a fair trial under the Fifth and Fourteenth Amendments of the Constitution of the United States. The judgment must be reversed.

II.

BY FAILING TO INSTRUCT SUA SPONTE ON THE LESSER-INCLUDED OFFENSE OF IMPLIED MALICE MURDER OF THE SECOND DEGREE THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, A JURY TRIAL, AND A RELIABLE DETERMINATION OF THE PENALTY IN A CAPITAL CASE

A. Introduction

Appellant was charged with murder in counts 1 and 2. Because the prosecution's conflicting evidence supported several alternative murder theories, the court instructed the jury on first degree deliberate and premeditated murder (37CT 10766-10767; 14RT 3186-3187); first degree murder by use of armor-piercing ammunition (37CT 10768; 14RT 3188); and first degree drive-by murder (37CT 10769; 14RT 3188). The court also instructed the jury on the lesser-included offense of unpremeditated murder of the second degree (i.e., express malice murder of the second degree) and on the related special finding pertaining to the intentional discharge of a firearm from a vehicle with the specific intention to inflict great bodily injury. (Pen. Code, § 190, subd. (d); 37CT 10770, 10771; 14RT 3188-3189.)

However, the court failed to instruct the jury on the lesser-included offense of second degree murder resulting from the commission of an unlawful act dangerous to life; i.e., implied malice murder of the second degree. (See CALJIC No. 8.31.[10]) Because substantial evidence supported such an instruction, and

[10].CALJIC No. 8.31 states: "Murder of the second degree is the unlawful killing of a human being when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act, it is not necessary

because the court's error prevented the jury from considering a theory that would have resulted in a lesser degree of homicide, the court's error violated appellant's Fourteenth Amendment right to due process of law, his Sixth Amendment right to trial by jury, and his Eighth Amendment right to a reliable determination of guilt and penalty. Accordingly, the judgment must be reversed. A more detailed discussion follows.

B. The Factual Background

Viewed in the light most favorable to the judgment, the evidence showed that appellant, co-defendant Daniel Nunez, and Juan Carlos Caballeros had been in the car from which the shots were fired at the time of the killings of Renesha Fuller and Edward Robinson. However, the evidence was in conflict with respect to which of these three individuals actually fired the shots.

According to witness Ernie Vasquez, co-defendant Nunez told him he had fired the shots. Vasquez said that Nunez claimed Robinson "looked at him wrong" so Nunez shot him. (6RT 1226.) Vasquez said Nunez mimicked holding a rifle while making this claim. Vasquez also told police that when he saw the Buick Regal earlier in the evening he believed Caballeros had been driving, appellant had been in the front passenger seat, and Nunez was sitting by himself in the back seat. If so, this would support the theory that Nunez fired the shots, since it is more probable that the rifleman would have been seated alone in the back of the car.

However, Vasquez also said that appellant had told him that either "I" or "we" had shot Fuller and Robinson, and witness Joshua Contreras also testified that appellant admitted to him that he had been the one who shot the victims. Apart from these hearsay statements, there was no other evidence regarding what took place in the car at the time of the killings.

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to prove that the defendant intended that the act would result in the death of a human being."

The prosecutor contended that Caballeros had been the driver of the car, but, as explained above, he acknowledged that he had not proved the identity of the actual shooter. (*ante*, at pp. 33-34 14RT 3211) Instead, the prosecutor contended that all three men were "aiders and abettors and principals in the commission of this offense." (14RT 3211, 3232-3233.)

C. **Argument.**

Although there was substantial evidence of second degree implied malice murder, the court failed to instruct the jury on this lesser included offense. In failing to give this instruction, the court clearly erred.

1. The Duty To Instruct On Lesser Included Offenses

In capital cases, the Fourteenth Amendment Due Process Clause requires that a lesser included offense instruction be given when the evidence warrants such an instruction. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) In addition, the Eighth Amendment prohibition on cruel and unusual punishments requires instruction on lesser included offenses in order to ensure that sentencing discretion in capital cases is channeled so that arbitrary and capricious results are avoided. (*Hopper v. Evans* (1982) 456 U.S. 605, 611.)

This court has also held that "a defendant has a constitutional right to have the jury determine every material issue presented by the evidence and that, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present, the failure to instruct on a lesser included offense, even in the absence of a request, constitutes a denial of that right. (*People v. Benevides* (2004) 35 Cal.4th 69, 101.)

> California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was

> committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.

(*People v. Birks* (1998) 19 Cal.4th 108, 112.)

The sua sponte duty to instruct is designed to protect not only a defendant's "'constitutional right to have the jury determine every material issue presented by the evidence'" but also "'the broader interest of safeguarding the jury's function of ascertaining the truth.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) The duty extends to every lesser included offense supported by substantial evidence; it is not satisfied "when the court instructs [solely] on the theory of that offense most consistent with the evidence and the line of defense pursued at trial." (*People v. Breverman* (1998) 19 Cal.4th 142, 153.)

A particular offense is considered a "lesser included offense" if it satisfies one of two tests. The "elements" test is satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that the greater cannot be committed without committing the lesser. The "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser offense. (*People v. Cook* (2001) 91 Cal.App.4th 910, 918.) The scope of the sua sponte duty to instruct is determined from the charges and facts alleged in the accusatory pleading:

> "[T]he rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are presented in the accusatory pleading itself and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither 'harsher [n]or more lenient than the evidence merits.' [Citations.]

(*People v. Birks, supra*, 19 Cal.4th at p. 119.))

2. Second Degree Murder

It is well established that the crime of second degree murder is a lesser included offense of first degree murder. (*People v. Seaton* (2001) 26 Cal.4th 598, 672.) First degree murder is an intentional, premeditated, deliberate killing with malice aforethought, or a murder perpetrated during the commission of a felony enumerated in Penal Code section 189. All other forms of murder are second degree murder. (Penal Code section 189.)

Second degree murder has also been described as "an unpremeditated killing with malice aforethought." (*People v. Seaton, supra*, 26 Cal.4th at p. 672.) Malice may be express or implied. Malice is express when there is manifested an intention to unlawfully kill a human being. Malice is implied when: (1) a killing results from an intentional act; (2) the natural consequences of the act are dangerous to human life; and (3) the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. (*People v. Combs* (2004) 34 Cal.4th 821, 856, n. 8.)

Accordingly, when there is substantial evidence to support a finding that a killing was unpremeditated and without express malice, the trial court must instruct on the lesser included offense of second degree murder. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) "'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.'" (*People v. Benavides, supra*, at p. 102.)

In this case, there was ample evidence from which the jury could have concluded the killings were second degree murder. Although the record reveals some confusion among the parties concerning the nature of express and implied malice murder of the second degree, it also shows the court and the parties were aware that the evidence supported an instruction on second degree implied malice murder. As a result of the confusion, the court summarily concluded the need for

an instruction on second degree murder would be satisfied with the giving of an instruction for express malice second degree murder.

For example, after discussing instructions relating to armor piercing bullets, the following colloquy occurred among court and counsel:

> The Court: Alright
> 8.31 is murder in the second degree, which is a lesser included.
> The Court: Killing resulting from an unlawful act dangerous to life.
> Mr. Millington: I think that is more of a wreckless [sic.] driving-type thing or something. I think the instructions we have incorporate second degree murder.
> The Court: Do you agree counsel.
> Mr. Osborne: Well, I have some of my own in my package.
> The Court: I'll get to yours in a second.
> Mr. McCabe: I thought we had second degree included:
> The Court: Yes.
> Mr. Millington: Yes.
> The Court: All right.
> The second degree has issue has been addressed in the other instruction.

(13RT 3071, ll. 11-28.)

Later, after the discussion manslaughter and heat of passion, the following exchange took place:

> The Court: Here is the deal.
> Let's say, for instance, that the jury does not believe [the prosecution's] theory that the reason for the murder is, or for the killing I should say, is because of their passion. The culprit alleged passion against African Americans. They don't believe that portion.
> Then they're unlawful killing with a drive-by shooting, okay, then arguably could be just a random act, kind of like driving by with reckless disregard and even something lesser in order to kill two human beings. Assuming that is the case.
> And if there sufficient information – if we don't believe the hate crime theory, okay, then there is a possibility that does not mean – if the jury does not believe the hate crime theory, and does not believe that there was commission of malice aforethought, and they were driving by spraying at random, with a less than depraved heart, kind of like wreckless disregard for safety of humans, then I would say that perhaps that would be without malice aforethought.

(13CT 3073.)

Later in the discussion on jury instructions, however, when the parties discussed whether the jury should be instructed on the crime of voluntary manslaughter, the trial court described the very scenario that should have led the court to instruct on second degree implied malice murder, stating, "We don't know if it's a drive-by in the first place. It could be that the person jumped out of the car and plugged the rounds." (13RT 3073-3074.)

The court observed that if the jury rejected the prosecution's theory that the murder was motivated by racial hatred,[11] the resulting offense would arguably be a random shooting akin to a "driving by with reckless disregard and even something lesser," which the court described as an act committed "without malice aforethought." (13RT 3073-3074.) The crime described by the court was, of course, second degree murder committed with implied malice, *viz.*, the doing of an intentional act the natural consequences of which are dangerous to human life performed with knowledge of the danger to, and with conscious disregard for, human life.

Subsequently, the prosecutor revisited the question of whether voluntary manslaughter instructions were warranted in this case and again affirmed the existence of implied malice in the evidence in his case. The prosecutor said:

> "If the court was saying these guys got out of the car or if they shot a Norinco Mac-90 within 15 feet of these two individuals with armor piercing bullets, with four rounds that , i[t] was obviously an intentional act dangerous to human life, with conscious disregard for human life."

(13RT 3094.)

As noted above, the evidence strongly supported a finding that there was one shooter. This evidence included the testimony of Bertha Jacque as to the fact that the shots were fired in a very short time, the cluster of the wounds showing

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[11] As to both appellants, the jury found the hate crime special circumstance and the related hate crime enhancement to be *not* true. (38CT 10927-10928, 10931-10932.)

Robinson had not moved between shots, all of which were fired from one gun, and the speed at which multiple shots could be fired from the weapon used. However, the evidence fails to show who actually fired the fatal shots, and there was no evidence as to the shooter's mental state or of the mental state of the non-driving, non-shooting occupant of the car.[12] The prosecutor prosecuted both appellant and co-defendant Nunez as the actual shooter and the aider and abettor. Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. (*People v. McCoy, supra*, 25 Cal.4th at p. 1120.) Where, as here, the prosecution did not rely upon and the jury was not instructed on the natural and probable consequences doctrine, the aider and abettor may have acted with reckless disregard and with the intent to inflict great bodily injury, i.e., with the mens rea of implied malice, while the shooter shot with the intent to kill. Or the converse may have been the case.

Because it was not proven at the guilt phase who the actual shooter was, instructions on implied malice were needed so that the jury had that option as to either defendant. Therefore, for purposes of this analysis, in it does not matter who was the actual shooter.

It is true that the prosecution's gang expert testified that if three members of the Wilmas Gang entered the area where the crime occurred with a firearm, it would be for the purpose of trying to kill someone (9RT 2102-2103), and this would support a finding of premeditation. However, the jury is not bound to accept the testimony of any particular witness. More importantly, a second degree murder instruction must be given if there is evidence to support that theory, without regard to whether there is also evidence to support a finding of first degree murder of another form of homicide.

Furthermore, the very nature of this type of crime is such that while it may be premeditated, it is equally possible that it was a spur of the moment incident.

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[12] The prosecution's theory was that Juan Carlos Caballero was the driver of the vehicle from which shots were fired. (14 RT 3235-3238.)

In fact, common experience shows that young men frequently cruise various areas without a premeditated intent to kill. Even gang members may cruise rival territory with an intent to commit crimes other than murder. It is equally likely that the shooter, seeing a target of opportunity, rashly opened fire without giving the matter any consideration.

Had this been the case, the non-shooter could have been guilty of murder on an implied malice theory.

In *Mitchell* v. *Prunty* (9th Cir. 1997) 107 F.3d 1337 the Ninth Circuit explained

> Except in West Side Story, gang members do not move in lock-step formation. Gang movements are, in fact, often more chaotic than concerted. See Jeffrey J. Mayer, "Individual Moral Responsibility and the Criminalization of Youth Gangs", 29 Wake Forest L. Rev. 943, 949-50 (1993) (describing most gangs as 'disorganized' and decrying 'efforts to prosecute...gang members on the basis of social ties,' as opposed to 'traditional legal principles,' as a 'panic response').

(*Id.* at p. 1342.)

Likewise, the defense expert explained that gangs are not as organized as the police perceive them to be. (11RT 2477.) This would support a jury having doubts as to the "West Side Story" nature of gang activity. Because the prosecution must prove first degree murder, if the jury had a doubt as to the nature of gang activity itself proving premeditation, it would be important for them to have the option of second degree murder on an implied malice theory.

It is important to remember that the trial court itself recognized that implied malice, second degree murder would be a possible verdict if the jury rejected the hate crimes allegation. (13CT 3073.) In fact, this is precisely what happened, but the jury was deprived of the option which the court perceived as a possible situation if that result was reached. Accordingly, it was error to fail to give an instruction on section degree implied malice murder.

D. Prejudice

In *People v. Breverman, supra,* 19 Cal.4th at p. 176, this court concluded that failure to instruct on second degree implied malice murder when the evidence supports such an instruction is subject to the test of *People v. Watson* (1956) 46 Cal.2d 818, 836, and is reversible if it is reasonably probable that the defendant would have obtained a better result in absence of the error.

However, as Justice Kennard recognized, "[i]nstructions omitting or misdescribing an element of an offense are subject to harmless error analysis under the test of *Chapman v. California, supra,* 386 U.S. 18." (*People v. Breverman, supra,* 19 Cal.4th 142, 194., dis. opn. Kennard, J.)

In *Beck v. Alabama, supra,* 447 U.S. at p. 637-638, the United States Supreme Court held that a sentence of death may not be constitutionally imposed after a jury verdict of guilt of a capital offense where the jury was not permitted to consider a verdict of guilt of a lesser-included noncapital offense and the evidence would have supported such a verdict. Therefore, it is clear that *Chapman,* rather than *Watson,* is the correct standard by which this error should be judged.

In *People v. Barton* (1995) 12 Cal.4th 186, 196, this court noted:

> 'Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence."

(*Ibid.*)

The state of the evidence makes it impossible to conclude that beyond a reasonable doubt that a different result would not have been reached had the jury been instructed on second degree murder committed with implied malice. As a result of the trial court's failure to instruct on implied malice murder, appellant's jury was presented with an unjustified all-or-nothing choice between express malice murder and acquittal.

First, the prosecution presented no direct evidence of events within the car from which shots were fired immediately before the shooting took place. In order to place appellant in the car with Juan Carlos Caballero, the prosecution relied on the much-impeached and profitably rewarded Ernie Vasquez and his suspect and self-contradictory testimony that both defendants admitted being the shooter. The prosecution presented no evidence as to the identity of the actual shooter. The prosecution presented no evidence as to the actions or the mental state of any of the car's occupants prior to and at the time of the shooting. The prosecution's evidence concerning events prior to the shooting consisted primarily of circumstantial evidence which shed very little light on the intent of the participants at the time of the offense.

Nor was the question of the participants' intent resolved by other jury findings. Moreover, while a true finding on a gang enhancement allegation might provide some marginal support for a conclusion of express malice had the victims been members of a hostile gang, there was no evidence in this case to suggest that Edward Robinson or Renesha Fuller were or appeared to be gang members. Thus, under the circumstances of this case, the true finding on the gang enhancement allegation provides no evidence relevant to the issues of premeditation or express or implied malice. Furthermore, as will be discussed below in Argument III, the true finding of the gang enhancement was itself invalid because it was based on

flawed instructions, with the trial court giving the instruction for another subdivision of the relevant Penal Code section. Therefore, the finding of that enhancement does not establish the missing element that would make an instruction on implied malice unnecessary.

Moreover, although it may first appear that the verdicts finding willful, deliberate, and premeditated murder necessarily mean the jury found appellant acted with express malice, i.e., with an intent to kill, closer review shows the verdicts were necessarily produced by limitations in the verdict forms provided to the jury. Appellant earlier noted that in addition to willful, deliberate, and premeditated murder of the first degree, the trial court instructed the jury on first degree murder perpetrated by use of armor-piercing ammunition and on first degree murder committed by discharging a firearm from a motor vehicle with the specific intent to inflict death. And yet the verdict forms in the record show the jury was not provided with any options if it found implied malice. (38CT 10927, 10939, 10945-10957.) Limited to this choice of verdict forms, the jury was forced to choose between acquitting or convicting of crimes requiring express malice. Under such circumstances, it may not be reasonably said that the verdict of premeditated murder renders the omission of instructions on the implied malice form of second degree murder harmless error. (*Cf. People v. Coddington* (2000) 23 Cal.4th 529, 591-594; overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

Nor does the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) found true in this case dispose of appellant's claim. The jury was instructed that in order to find the multiple murder special circumstance to be true, it had only to find: "[¶] A defendant has in this case been convicted of at least one crime of murder of the first degree and one or more crimes of murder of the first or second degree." (37CT 10780; 14RT 3195.) The finding thus does not require the jury find an intent to kill.

The trial court also instructed the jury on the special circumstance intent requirement for the actual shooter and for the accomplice. In so doing, the court included instructional language pertaining to the intent requirement for an accomplice to a felony murder. Thus, the court instructed the jury that if it found "the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true." The jury was further instructed that if it found "the defendant was not the actual killer, or if it was unable to decide whether the defendant was the actual killer or aider and abettor or co-conspirator," it could not "find the special circumstance to be true unless it was satisfied beyond a reasonable doubt the defendant with the intent to kill" aided, abetted, etc., any actor in the commission of the murder, "or with reckless indifference to human life and as a major participant" aided, abetted, etc., in the commission of the crime of "Penal Code 190.2 (a)(3)[,] Penal Code 190.2 (a)(16),"[13] i.e., the multiple murder or hate crime special circumstance.[14] (CALJIC No. 8.80.1; 37CT 10778; 14RT 3193-3195.)

This instruction thus told the jury it could find the special circumstance to be true if it found appellant acted with the mental state of "reckless indifference to human life." The instruction also told the jury if it found appellant actually killed a human being they did not need to find he intended to kill in order to find the special circumstance to be true. Here, as repeatedly noted, the prosecutor readily acknowledged he had failed to prove the identity of the actual shooter. Under these instructions, and assuming the jury actually reached a conclusion as to the identity of the shooter and the identity of the aider and abettor where the

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[13] Where the CALJIC instruction provided for the insertion of the statutorily defined underlying felony, the court here inserted the Penal Code citations for the multiple murder and hate crime special circumstance allegations.

[14] As will be discussed below in Argument IV, the inclusion of the wording "reckless indifference to human life and as a major participant" was itself an error as that language is only applicable to felony murder, which was not charged in this case. Because the language of CALJIC No. 8.80.1 is more pertinent to that issue, the instruction is reproduced in that section at pp. 90-91.

prosecutor could not, the jury could have found defendant A to be the actual shooter and returned a true finding as to him without finding he intended to kill. The jury could also have found defendant B to have aided and abetted with reckless indifference and as a major participant and returned a true finding as to him without finding he intended to kill. In short, the multiple murder special circumstance instruction did not require that the jury find express malice or an intent to kill in order to return a true finding.

As noted previously, the court's error violated appellant's Fourteenth Amendment right to due process of law and his Eighth Amendment right to a reliable determination of guilt and penalty. (*Beck v. Alabama, supra,* 447 U.S. at p. 637; *Hopper v. Evans, supra,* 456 U.S. at p. 611.)

Furthermore, correct jury instructions serve to ensure accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gilmore v. Taylor, supra,* 508 U.S. 333, 334; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

The physical and testimonial evidence regarding appellant's intent is neither overwhelming nor are they substantial. Under such circumstances, because the right to instructions on lesser included offenses is a constitutionally protected right, the conviction must be reversed unless the reviewing court is able to declare a belief that it was harmless beyond a reasonable doubt. (*Beck v. Alabama, supra,* 447 U.S. at p. 637-638; *Chapman v. California, supra,* 386 U.S. 18, 24.)

Accordingly, reversal of the convictions set forth in counts 1 and 2 is required.

III

THE COURT VIOLATED CONSTITUTIONAL RIGHTS WHEN IT OMITTED ESSENTIAL ELEMENTS FROM THE GANG ENHANCEMENT INSTRUCTION, AND THE ENHANCEMENT MUST THEREFORE BE REVERSED

A. Introduction

The amended information alleged a sentence enhancement that appellant committed the murders charged in Counts 1 and 2 for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b), paragraph (1). (37CT 10675.) The jury returned "true" findings on this enhancement allegation. (38CT 10928, 10933.)

However, the "true" findings were obtained under erroneous instructions. Subdivision (a) of Penal Code section 186.22 defines the substantive offense of participation in a criminal street gang, while subdivision (b) imposes a sentence enhancement when a felony is committed for the benefit of a street gang. These two subdivisions describe different elements and require different mental states. The trial court erroneously instructed the jury on the elements of the substantive offense rather than the elements of the sentence enhancement. Because this error violated appellant's federal constitutional rights, the street gang sentence enhancement must be struck.

B. Analysis

The enhancement alleged in this case is defined in Penal Code section 186.22, subdivision (b), and requires the imposition of various enhancements on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, . . ."

(Pen. Code section 186.22, subdivision (b)(1).) The elements of this enhancement are: (1) the crime charged was committed for the benefit of, at the direction of, or in association with a criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (Pen. Code, § 186.22, subd. (a); see also CALJIC (7th ed. 2003) CALJIC No. 17.24.2; CALCRIM (Fall 2006) CALCRIM No. 3250.)

However, instead of instructing the jury on the foregoing elements, the trial court gave a modified version of CALJIC No. 6.50, which read as follows[15]:

> [Defendant is accused in Counts 1 and 2 of having violated section 186.22, subdivision (b) of the Penal Code, a crime.]
>
> Every person who actively participates in any criminal street gang with knowledge that the members are engaging in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, is guilty of a violation of Penal Code section 186.22, subdivision (b), a crime.
>
> "Pattern of criminal gang activity" means the [commission of,] [or] [attempted commission of,] [or] [solicitation of] [sustained juvenile petition for,] [or] [conviction of] two or more of the following crimes, namely, murder and assault with a deadly weapon, provided at least one of those crimes occurred after September 26, 1988 and the last of those crimes occurred within three years after a prior offense, and the crimes are committed on separate occasions, or by two or more persons.

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[15] Counsel for Nunez objected to the giving of the instruction, albeit on the ground the prosecution had failed to present evidence of a pattern of criminal gang activity. (See 13RT 3041-3043.) It does not appear that counsel for appellant Satele objected.

Appellant Satele should not be precluded from raising this issue on grounds of waiver for several reasons.

First challenges to jury instructions affecting substantial rights are not waived even if no objection is made at trial. (Penal Code § 1259) While generally, the failure to state the correct grounds for an objection fails to preserve the issue, trial courts have a sua sponte duty to give correct instructions of the elements of the offense, negating the need to objected. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

Furthermore. a failure to object is not a waiver of the objection if it would have been futile to make the objection (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Because counsel for Nunez had just unsuccessfully objected, it would have been futile for appellant to also object, because there is no reason to suspect that the trial court would have ruled in a different manner.

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, murder and assault with a deadly weapon, (2) having a common name or common identifying sign or symbol, and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Active participation means that the person must have a relationship with the criminal street gang that is more than in name only, passive, inactive or purely technical.

Felonious criminal conduct includes murder and assault with a deadly weapon.

In order to prove this crime, each of the following elements must be proved:

1 A person actively participated in a criminal street gang;

2 The members of that gang engaged in or have engaged in a pattern of criminal gang activity;

3 That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and

4 That person either directly and actively committed or aided and abetted [another] [other] member[s] of that gang in committing the crime[s] of murder and assault with a deadly weapon."

CALJIC No. 6.50; 37CT 10761-10762; 14RT 3181-3183[16].)

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[16] Counsel for Nunez objected to the giving of the instruction, albeit on the ground the prosecution had failed to present evidence of a pattern of criminal gang activity. (See 13RT 3041-3043.) It does not appear that counsel for appellant Satele objected.

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Under this instruction, the jury was free to return a "true" finding to the charged enhancement without finding the essential elements of the enhancement, viz., (1) that the crime charged was committed for the benefit of, at the direction of, or in association with a criminal street gang, and (2) that the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. Instead, the jury was able to find the enhancement allegation to be true if it found appellant merely participated in a street gang and aided and abetted the commission of a murder. Furthermore, the instruction as given allowed for a "true" finding of the enhancement if the defendant was aware that the gang had engaged in criminal conduct in the past, whereas a correct instruction would have required the specific intent to assist in criminal conduct by gang members in the present. Thus, the incorrect instruction eliminated the specific intent element the enhancement requires.

The court's error was exacerbated by the fact that the trial court failed to include a reference to the sentence enhancement in its instruction that in order to return a "true" finding the jury had to find the concurrence of act and specific intent. The court instructed with CALJIC No. 3.31, as follows: "In the crimes charged in counts one and two, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the crime to which it relates is not committed. [¶] The specific intent required is included in the definitions of the crimes set forth elsewhere in these instructions." (37CT 10758; 14RT 3179.) Under the plain language of this instruction, the requirement of a union of act and intent was limited solely to the two murders and not to the enhancement allegations. Thus, not only was the jury not properly instructed on the elements of the enhancement, it was also not properly instructed on the need to find the concurrence of the actus reus and mens rea necessary for the enhancement.

The Fifth and Fourteenth Amendment Due Process Clauses and the Sixth Amendment notice and jury trial guarantees require that any fact, other than a

prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey, supra*, 530 U.S. 466, 476; *In re Winship* (1970) 397 U.S. 358, 364.) Because a sentence enhancement requires findings of facts that increase the maximum penalty for a crime, the United States Supreme Court has held that this rule applies specifically to sentence enhancement allegations. (*Blakely v. Washington, supra*, 542 U.S. at pp. 301-302; *Apprendi v. New Jersey, supra*, 530 U.S. at pp. 476, 490.)

The Due Process Clause requires that the prosecution prove every element of the offense charged against a defendant. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510.) Due process also requires that the court must instruct the jury that the state bears the burden of proving each element of the crime beyond a reasonable doubt, and the court must state each of those elements to the jury. (*In re Winship* (1970) 397 U.S. 358, 363; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *Carella v. California* (1989) 491 U.S. 263, 265) Omission of an element of a crime from an instruction is federal due process error (*Evenchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933-939) and compels reversal unless the beneficiary of the error can show the error to have been harmless beyond a reasonable doubt. (*Chapman, supra,* at p. 265.)

Similarly, to find the facts necessary for a sentence enhancement to be true beyond a reasonable doubt, the jury must be properly instructed on the elements of the enhancement. Thus, this court has held that the trial court must instruct on general principles of law relevant to and governing the case, even without a request from the parties. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) This rule applies not only to the elements of a substantive offense, but also to the elements of an enhancement. (*People v. Winslow* (1995) 40 Cal.App.4th 680, 688.)

Correct jury instructions serve to ensure accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person

may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which require greater reliability in capital cases. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305; *Gilmore v. Taylor, supra*, 508 U.S. 333, 334; *Johnson v. Mississippi, supra*, 486 U.S. 578, 584-585; *Zant v. Stephens, supra*, 462 U.S. 862, 879.) As applied to the facts of this case, the foregoing cases required that the jury be instructed on all of the elements of the criminal street gang enhancement charged in the information.

The omission of an essential element of an instruction compels reversal unless respondent can show the error to have been harmless beyond a reasonable doubt. (*Mitchell v. Esparza* (2003) 540 U.S. 12, 16, and cases there cited; *Chapman v. California, supra*, 386 U.S. 18, 24.) To determine whether an error contributed to a verdict, *Chapman* "instructs the reviewing court to consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279, explaining *Chapman, supra* 386, at 24.)

In this case, appellant did not concede or admit the omitted elements of the sentence enhancement, so the instructional error may not be found harmless on that basis. (*Carella v. California, supra*, 491 U.S. at p. 271 (conc. opn. of Scalia, J.).) Nor was the jury called upon to find the omitted elements as predicate facts in the resolution of appellant's guilt of the substantive offenses. (*Ibid.*) To the contrary, the prosecution's theory was that appellants were West Side Wilma gang members motivated by the culture of their particular gang to shoot and kill Robinson and Fuller because they were African-Americans. The jury soundly rejected this theory when it refused to find the hate crime special circumstance allegations to be true.

In rejecting the prosecution's theory that Robinson and Fuller were killed because the West Side Wilmas hated African-Americans, the jury also implicitly rejected the theory that the motive for the killings was gang-related. That suggests

in turn that a properly instructed jury would not have found the sentence enhancement to be true. However, the instruction as given permitted a "true" finding without any gang-related motive for the killings. Under the plain terms of the instruction, the jury was free to impose the enhancement if both defendants were gang members and one aided the other in the commission of a crime, without regard to whether the crime was a product of gang membership or culture. Finally, no other properly given instruction required that the jury resolve the factual questions in issue in the omitted instruction. Thus, it may not be said that the jury's verdict on other points resolved the factual issues necessary to a finding of the sentence enhancement. (*California v. Roy* (1997) 519 U.S. 2.

For these reasons, respondent cannot show the instructional error to have been harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 84.) Accordingly, the portion of the judgment imposing the enhancements of Penal Code section 186.22, subdivision (b)(1) must be reversed.

Moreover, the instructions on the street gang enhancement directly contributed to the improper, inconsistent finding that both defendants personally used the firearm. As explained in detail in Argument V, *post*, the instruction on the firearm use enhancement (CALJIC No. 17.19) informed the jury that the firearm enhancement applied "to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d), and 186.22(b) are plead [sic] and proved." (CT 10788.) Since the jury was never instructed on 186.22, subdivision (b), but was instead given an instruction on subdivision (a), the instructional error on the street gang enhancement also invalidates the firearm "personal use" finding. These two errors in turn improperly inflated appellant's individual culpability and allowed the jury to avoid resolving crucial questions as to the mental state of the aider and abettor. It was also likely to be a factor that would heavily influence a jury to impose the death penalty, and it was a factor relied on by the trial court in denying the request to modify the verdict and/or grant a new trial.

Clearly, the error in instructions on the gang enhancement had an impact beyond the imposition of the enhancement itself, thereby requiring a reversal of the judgment of conviction and the death sentence.

C. Instructing The Jury With The Substantive Offense Under Section 186.22, Rather Than Enhancement Provided For By That Section Had The Effect Of Denying Appellant The Right To Due Process Of Law By Denying Him The Right To Notice Of The Charges Alleged Against Him.

The trial court's error in instructing the jury with the substantive offense of participation in a criminal street gang in violation of section 186.22, subdivision (a), instead of the enhancement charged under subdivision (b), as described in the preceding portion of this argument, deprived appellant of the right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, because it deprived appellant of the right to notice of the charges being alleged against him.

The Sixth Amendment guarantees a defendant the right to be informed of the nature of the charges against him so as to permit adequate preparation of a defense. As our Supreme Court has stated, "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." (*Cole v. Arkansas* (1948) 333 U.S. 196, 201; see also *In re Oliver* (1948) 333 U.S. 257, 273 ["A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence...."]; Jackson v. Virginia, *supra*, 443 U.S. 307, 314, [A person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend."].)

In determining whether a defendant has received fair notice of the charges against him, one must first look to the information. (*James v. Borg* (9th Cir. 1994) F.3d 20, 24, citing *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805. 813 – "A court

cannot permit a defendant to be tried on charges that are not made in the indictment against him").

"When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime." (*People v. West* (1970) 3 Cal.3d 595, 612 quoted in *People v. Thomas* (1987) 43 Cal.3d 818, 826.)

Recently, *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993, held automatic reversal was appropriate when a discrepancy existed between the enhancement alleged and the enhancement for which jury instructions were given, and the jury found the enhancement allegation to be true. In *Gautt*, the enhancement under section 12022.53, subdivision (b) was alleged by number and verbatim in the information, but the instruction included the language of section 12022.53, subdivision (d). The Ninth Circuit explained that the two subdivisions of section 12022.53 differ in several critical respects. Italicizing the relevant differences, the court explained that subdivision (b) provides for an enhanced sentence when a defendant "*personally used a firearm*," while subdivision (d) provides for the increased sentence when a "*intentionally and personally discharged a firearm and proximately caused great bodily injury*" to another. (*Id.* at p. 1013.) The court explained the confusion began when the verdict form cited to section 12022.53(b), but listed the personal discharge and proximate causation elements of section 12022.53(d). Additionally, the verdict form did not include subdivision (d)'s element of intentional discharge. (*Id.* at p. 1013.)

In finding reversible error, *Gautt* stated that the situation presented was not one where merely the numerical citation was incorrect but rather one where the verbal description did not correspond to the information. Nor was it a situation where the reference to one statute necessarily encompassed the other one as a lesser-included offense. Therefore, the court found that the defendant Gautt's constitutional right to be informed of the charges against him was violated by the

stark discrepancy between the enhancement charged and the enhancement imposed. (*Id.* at p. 1007.)

Gautt next evaluated whether the failure to give the defendant notice of the charges should be evaluated under the harmless error standard of *Chapman v. California, supra*, 386, U.S. 18 or the per se reversal standard of structural error of *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.

Gautt explained that the Supreme Court has characterized the defendant's right to be informed of charges against him as both "basic in our system of jurisprudence," , and as a "principle of procedural due process" that is unsurpassed in its "clearly established" nature (quoting from *In re Oliver* (1948) 333 U.S. 257, 273 and *Cole v. Arkansas* (1948) 333 U.S. 196, 201. The Ninth Circuit concluded that this the failure to be notified of the charges must be regarded as structural error because it

> " 'affect[s] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself," [citations] describing structural defects as those that "infect the entire trial process" and "which defy analysis by 'harmless-error' standards".)

(*Gautt*, at p. 1015-1017.)

This case is identical to *Gautt*. Like *Gautt*, this is not a case where the error was a mere mistake in reciting the number of the code section, while correctly listing the elements. In this case the jury was presented with an instruction which asked them to find "true" elements of which appellant had never received notice. In particular, the elements of active participation and knowledge of the pattern of criminal behavior by the members of the gang had never been alleged in the information, and appellant had no notice that these elements would be part of the case against him. Nonetheless, these elements were submitted to the jury, and appellant was sentenced for an enhancement based of this finding. Therefore, appellant submits that the findings pursuant to Penal Code section 186.22, subdivision (b) must be reversed.

Furthermore, as discussed above, the personal use of the firearm was found to be true as a result of the enhancement under sections 186.22. This finding was used by the trial court in its decision to impose the death penalty returned by the jury. Because the finding of personal use of the firearm was constitutionally infirm, ~~appellant submits that the firearm use finding must also be invalidated.~~ Moreover, it was error for the jury and the court to rely upon these two findings to impose the death penalty.

IV

IN FAILING TO REDACT PORTIONS OF CALJIC NO. 8.80.1, THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY ON THE MENTAL STATE REQUIRED FOR ACCOMPLICE LIABILITY WHEN A SPECIAL CIRCUMSTANCE IS CHARGED. THE ERROR PERMITTED THE JURY TO FIND THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE TO BE TRUE UNDER A THEORY THAT WAS NOT LEGALLY APPLICABLE TO THIS CASE, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HIS SIX AMENDMENT RIGHT TO A JURY TRIAL.

A. Introduction

The jury found the multiple murder special circumstance allegation to be true in findings made in conjunction with Counts 1 and 2. (38CT 10927.) However, the jury reached these special findings under a version of CALJIC No. 8.80.1 that incorrectly stated the law regarding accomplice intent by allowing the jury to find the enhancement to be true for aiders and abettors without first finding the required intent to kill. The instruction incorrectly informed the jury that the special circumstance could be found to be true if the jury believed appellant was a major participant in the crime and acted with reckless indifference, an element that is only applicable to felony murder cases and not to the special circumstance alleged in this case.

This error violated appellant's Fifth and Fourteenth amendment rights to due process of law and his Sixth Amendment right to a jury trial. The error was not harmless beyond a reasonable doubt in this case because the jury could have reasonably concluded, as in fact the prosecutor argued, that it was not proven who acted as the actual shooter and who acted as the aider and abettor.[17] Thus, under

[17] Indeed, as appellant has elsewhere noted (see Argument I, section C, pp. 38-39), the facts strongly suggest that appellant was not the actual shooter.

properly given instructions, the jury would have had to determine whether appellant aided and abetted with the intent to kill before finding the enhancement true as to him. The instructional error concerned an element of the special circumstance and was not harmless beyond a reasonable doubt. Reversal of the special circumstance findings is required.

B. The Jury Was Incorrectly Instructed as to the Law Regarding Accomplice Intent

A defendant is subject to a sentence of death or life imprisonment without the possibility of parole if he is convicted of first degree murder and the jury finds to be true a special circumstance allegation that the defendant has been convicted of more than one offense of murder in the first or second degree. (Pen. Code, §§ 190.2, subd. (a)(3), 190.3, 190.4.)

If the defendant is the actual killer, as opposed to an aider and abettor, the jury need not find the defendant acted with intent to kill in order to return a true finding to the multiple murder special circumstance. (Pen. Code, § 190.2, subd. (b); *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 992 [amendments to Pen. Code, § 190.2, by Propositions 114, 115, effective June 6, 1990]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301-302 [Prop. 115 amendment to Pen. Code, § 190.2(b), codified holding in *People v. Anderson* (1987) 43 Cal.3d 1104, 1144-1145].)

However, except as set forth below, a finding of intent to kill is required before the special circumstance can be imposed upon aiders and abettors. Penal Code section 190.2, subdivision (c), provides: "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true. . . ." Thus, while intent to kill is not an

element of the multiple murder special circumstance where the actual killer is concerned, when a defendant is an aider and abettor, rather than the actual killer, intent to kill must be proved. (*People v. Anderson, supra*, 43 Cal.3d 1104, 1149-1150; overruling *People v. Turner* (1984) 37 Cal.3d 302, to the extent it holds to the contrary.)

An exception to this rule, however, has been created for cases that arose on or after June 6, 1990, and involve a felony-murder special circumstance. In felony murder cases, a defendant who is not the actual killer and who does not act with intent to kill is nevertheless subject to the death penalty if he acts with reckless indifference to human life and as a major participant aided in the commission of a felony enumerated in subdivision (a)(17) of Penal Code section 190, and the enumerated felony resulted in the death of some person or persons, for which the defendant is convicted of first degree felony murder. (Pen. Code, § 190.2, subd. (d).) In short, subdivision (d) of Penal Code section 190.2 permits imposition of the death penalty on a defendant who is determined to be a major participant acting with reckless indifference to life in a felony-based special circumstance. (*People v. Smith* (2005) 135 Cal.App.4th 914.)

In appellant's case, the pleading did not allege the felony murder special circumstance. Accordingly, the jury in this case could not impose the special circumstance on a defendant who was an aider and abettor unless it first found that the defendant acted with the intent to kill.

However, the trial court erroneously instructed appellant's jury with a modified version of CALJIC No. 8.80.1, the "introductory" special circumstances pattern instruction, which was intended to apply only to aiders and abetters in *felony-murder* cases. The resulting instruction permitted the jury to find appellant eligible for the death penalty even if they believed he did not intend to kill but merely possessed the mental state of reckless indifference to human life. The court then compounded the error by inserting into blanks in the pattern instruction the numbers of the Penal Code sections of the charged *special circumstances*

rather than the section numbers of the underlying felony-murder felonies, as the CALJIC authors had intended, thus exposing appellant to the death penalty if the jury found he merely aided and abetted another in the commission of a special circumstance rather than a substantive crime. The improper instruction given to the jury read as follows:

> "If you find a defendant in this case guilty of murder of the first degree, you must determine if one or more of the following special circumstances are true or not true: Penal Code 190.2 (a)(3), Penal Code 190.2 (a)(16).
>
> "The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> "Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, *or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of Penal Code 190.2 (a)(3)[,] Penal Code 190.2 (a)(16)* [18] *which resulted in the death of a human being*, namely Edward Robinson and Renesha Ann Fuller.
>
> "A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being.

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[18] Although the authors of the pattern instruction intended for the court to insert the Penal Code section or sections of the relevant underlying felony required for felony murder, the instruction as given incorrectly cited the Penal Code sections for the charged multiple murder and hate crime special circumstances. (37CT 10778.)

"You must decide separately as to each of the defendants the existence or nonexistence of each special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one or more of them, you make your finding as to the one or more upon which you do not agree.

"You must decide separately each special circumstance alleged in this case as to each of the defendants. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

"In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

"You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied."

(37CT 10778-10779; 14RT 3193-3195; emphasis added.)

The foregoing pattern instruction includes the major participant/reckless indifference language under which an aider and abettor who is charged with the felony murder special circumstance may be subject to the death penalty. In modifying the version of CALJIC No. 8.80.1 given to appellant's jury, the trial court failed to redact this language from the pattern instruction. The prosecutor exacerbated the error when he explained in closing arguments to the jury that both of the defendants were major participants in the offense. Later, the prosecutor again described appellant's role in the crime as "major." (17RT 4294, 4295.)

As a result of this error, the jury was allowed to find the multiple murder special circumstance to be true as to appellant if it merely found him to be a major participant who acted with reckless indifference to life and who aided and abetted another person to whom one of these two special circumstances applied. Thus, the instructional error allowed the jury to find the special circumstances true without a proper legal theory to support the finding. Allowing the jury to convict under an improper theory violates the principles set forth in *People v. Guiton* (1993) 4 Cal.4th 1116.

The court's error in failing to redact the reckless indifference language from CALJIC 8.80.1 resulted in part from the somewhat confusing structure of the pattern instruction, a flaw which the authors of the new CALCRIM instructions appear to have recognized and corrected. The new CALCRIM instructions correctly explain the difference between the aider and abettor's mental state for felony murder special circumstances, on the one hand, and the aider and abettor's mental state in non-felony murder special circumstances, on the other.

In CALJIC No. 8.80.1, one paragraph contains the two mental states for aider and abettor in felony murder and non-felony murder cases, leaving it to the court to choose which one is applicable to the case at hand and redact the other. By contrast, CALCRIM separates felony-murder and non-felony-murder special circumstances into two different instructions, CALCRIM 702 and CALCRIM 703. In its heading, CALCRIM 702 is described as "Special Circumstances: Intent Requirement for Accomplice After June 5, 1990 – Other Than Felony Murder." This instruction, which would have been appropriate in this case, informs the jury that if the defendant is found guilty of first degree murder but was not the actual killer, then, in considering the special circumstances in section 190.2, subdivision (a)(2) through (a)(6) the jury must also decide whether the defendant acted with the intent to kill, a fact which the People must prove for the aider and abettor. (The applicable special circumstance in this case is multiple murders listed in section 190.2, subdivision(a)(3).)

The use note to CALCRIM 702 explain that under *People v. Jones* (2003) 30 Cal.4th 1084, 1117, a trial court has a sua sponte duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. The use note further explains that CALCRIM 702 is to be used in cases where the jury could conclude that the defendant was an accomplice to the homicide, and is charged with a special circumstance, other than

felony murder, that does not require intent to kill by the actual killer, the situation presented here.

The subsequent instruction, CALCRIM No. 703, then explains the intent requirement for the aider and abettor for the special circumstances in felony murder cases. CALCRIM 703 states that if the defendant is guilty of first degree murder but was not the actual killer, then, when considering the felony murder special circumstance, the jury has to find either that the defendant acted with intent to kill *or* that the defendant was a major participant in the crime and acted with reckless indifference to human life.

As the foregoing shows, while CALJIC combines the two distinct theories of aider and abettor liability into the same instruction and relies on the trial court to delete the phrases that are not applicable, CALCRIM tracks the structure of section 190.2, subdivisions (c) and (d) and crafts separate alternative instructions for felony murder and non-felony murder cases. This improvement makes it much less likely that the trial court will improperly edit the CALJIC instruction, as the court did here.

The erroneous instruction permitted the jury to find the special circumstance true as to appellant under three possible theories: (1) that he was the actual killer; (2) that he aided and abetted with intent to kill; or (3) that he acted with reckless indifference while aiding and abetting another in the commission of a special circumstance. As explained above, the third of these theories was legally incorrect. Because this court cannot now determine which of these theories the jury relied upon, reversal is required.

The question here is governed by the *Green/Guiton* analysis developed by this court more than a decade ago. In *Guiton, supra*, this court held that whether a conviction based upon an incorrect or inadequate theory requires reversal depends on whether the theory was factually inadequate or legally inadequate. This court held that in situations where a *factually* inadequate theory was presented, the error will not necessarily require reversal if another factually adequate theory was

presented, whereas presenting a jury with a criminal case premised on an inadequate *legal* theory normally *will* require reversal.

> "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."

(*People v. Guiton*, *supra*, 4 Cal.4th at p. 1125, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59.)

In *People v. Green* (1980) 27 Cal.3d 1, this court examined a kidnapping case in which the defendant moved the victim three separate times, and the jury could have based its verdict on any of the three asportations. As to the first asportation, this court found that the jury had been misinstructed. As to the third asportation, this court found that the movement was so slight as to have been insufficient as a matter of law to support the kidnapping verdict. Having found error as to two of the three possible segments of asportation, this court could not determine from the record "whether the jury based its verdict on either of the 'legally insufficient segments of [the victim's] asportation....'" (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1121, quoting *Green*, at p. 67.)

In *Green*, respondent contended that a continuous kidnapping had occurred beginning with the initial movement and ending with the murder. (*Ibid.*) This court was not persuaded: "The fatal flaw in this 'continuous kidnapping' theory, however, is that it was simply not the theory on which the case was tried." (*Ibid.*) Not only did the prosecutor emphasize the 90-foot movement as sufficient to satisfy the element of asportation, "[n]othing in the instructions, moreover, disabused the jury of this notion. The instructions ... told the jury only that the crime is committed when the defendant moves a person ... 'for a substantial distance ....' No further guidance was provided ...." (*Id.* at pp. 68-69.)

Thus, in *Green* the error amounted to the presentation of a legally deficient case. For such cases, this court stated this general rule: "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'" (*Id.* at p. 89, quoted in *People v. Guiton, supra,* 4 Cal.4th at p. 1122; *People v. Green, supra,* 27 Cal.3d at p. 69; see, *Griffin v. United States, supra,* 502 U.S. at pp. 52-55, 58-59; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1034; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1551.)

This court recognized that the record "contain[ed] evidence that could have led the jury to predicate its kidnapping verdict on the legally sufficient portion of [the] asportation. But it also contain[ed] evidence that could have led the jury to rely ... on ... the legally insufficient portion[] of that movement. The instructions permitted the jury to take the latter course; and the district attorney expressly urged such a verdict in his argument. . . . We simply cannot tell from this record which theory the jury in fact adopted." (*People v. Green, supra,* 27 Cal.3d at p. 71; cf. *People v. Aguilar, supra,* 16 Cal.4th at p. 1036 ["That the jury here was not, in the end, invited to reach a guilty verdict by a faulty analytical path is clear from a consideration of the context of the prosecutor's summation"].)

In *People v. Guiton, supra,* 4 Cal.4th 1116, this court expressly reaffirmed the principles in *Green.* A reviewing court will "negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law . . . ." [Citation.]" (*Id.* at pp. 1125-1126.) Accordingly, reversal is generally required in those instances "in which 'a particular theory of conviction ... is contrary to law,' or, phrased slightly differently, cases involving a 'legally inadequate theory' ... [including] a case where the inadequate theory 'fails to come within the statutory definition of the crime.' [Citation.]" (*Id.* at p. 1128.) However, this court in *Guiton* distinguished the situation in which multiple *factual* theories are presented, but at least one such theory is unsupported by sufficient evidence. In this situation, the

conviction with be presumed to be based upon the factually supported theory and the judgment will be permitted to stand because it is naturally more likely that the jury relied on the theory for which there was supporting evidence. This is because the jury is more suited to making factual determinations.

By contrast, in the *Green* situation, two or more theories of liability are presented, both of which have substantial evidence supporting them, but one of the theories is not a viable legal theory of liability. Reversal is compelled in such a case because the jury is not presumed to have *legal* knowledge, and therefore is not in a position to evaluate the sufficiency of the legal theories. (*People v. Guiton, supra*, 4 Cal.4th 1124-1126.)

The error in this case was one of legal, not factual, insufficiency, and reversal is therefore required. As applied to this case, jurors would not know that intent to kill is required for a multiple-murder special circumstance, nor would they know that "reckless indifference" is only applicable to felony murder. As a result, the jury may have regarded the aider and abettor's acts as reflecting a reckless indifference to human life, and could have found the special circumstance true on that basis. Moreover, by its terms, the instruction also permitted the jury to impose a special circumstance if it found that the defendant aided and abetted *the special circumstance* rather than the murder itself. As explained in *Richardson v. Marsh* (1987) 481 U.S. 200, 206, "the almost invariable assumption of the law [is] that jurors follow their instructions." In this case, if the jurors followed the instructions for the special circumstance allegations they could find those to be true on an improper theory, without having to address essential elements of the special circumstance. For these reasons, the legal theory was inadequate, and under *Green,* the error requires reversal of the special circumstance and penalty.

Correct jury instructions not only inform the jury of the legal elements of the crimes and special circumstances with which a defendant is charged, but also serve to ensure accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and

sentenced to death in violation of the Eighth and Fourteenth Amendments, which require greater reliability in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gilmore v. Taylor, supra,* 508 U.S. 333, 334; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

Appellant has described in Subsection B of Argument I the evidence establishing the fact that there was only one shooter. Although this error deals with the liability of the aider and abettor, and not the actual shooter, appellant is entitled to the benefit of a correct instruction on this issue because although the District Attorney later argued that appellant was the shooter, at the time that this instruction was given to the jury, and at the time that the jury resolved this issue, the prosecution's position was that it had not proven who the shooter was. (14RT 3211.) Therefore, at that time the jury was deciding appellant's liability as a potential aider and abettor.

The instructional error allowed the jury to return a true finding for the multiple murder special circumstance against appellant based on a theory that is not a proper basis for conviction. This requires a reversal of the conviction because it constitutes structural error. Structural errors are those which are so fundamental to a fair trial that they are reversible per se. (*Arizona v. Fulminante, supra,* 499 U.S. 2; 6 Witkin, Cal. Crim. Law 3d (2000) Chapter XVII. Reversible Error.)

The reason for this is that this instruction lowered the prosecution's burden of proof similar to the manner in which reasonable doubt instruction in issue in *Sullivan v. Louisiana,* supra, 508 U.S. 275 lowered the burden of proof. As explained in *Sullivan,* when a finding of "beyond a reasonable doubt" is undermined "when the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. A reviewing court can only engage in pure speculation-its view of what a reasonable jury would have done.

And when it does that, "the wrong entity judge[s] the defendant guilty." (*Id.* at p. 281.)

In *Pulido v. Chrones* (9th Cir. 2007) 487 F.3d 669 the Ninth Circuit held that a felony-murder conviction solely on the basis of post-murder involvement in the robbery, which was an invalid legal theory, was reversible error. In doing so the court stated that such an error "was structural and that 'where a reviewing court cannot determine with absolute certainty whether a defendant was convicted under an erroneous theory' reversal is required." (*Id.* at p. 676, quoting *Lara v. Ryan* (9th Cir. 2006) 455 F.3d 1080, 1086.)

This court has held instructional error harmless when it has been able to conclude that in determining the truth of the special circumstance allegation the jury had necessarily found an intent to kill under other properly given jury instructions or when evidence of the defendant's intent to kill the victims was "overwhelming." (*People v. Hardy* (1992) 2 Cal.4th 86, 192 [instructions considered in combination required jury to find defendant was either actual killer or that he intentionally aided actual killer in an intentional killing]); *People v. Johnson* (1993) 6 Cal.4th 1, 45 [overwhelming evidence of actual killer's intent to kill in *Carlos v. Superior Court* (1983) 35 Cal.3d 131 crime in that he strangled one victim and set her on fire and beat second victim to death by inflicting 10 to 12 kicks to head and face].)

However, even if this were not a structural error, the error would nevertheless require reversal because it violated appellant's rights to due process of law and respondent cannot show the error to have been harmless beyond a reasonable doubt, as required by *Chapman v. California, supra,* 386 U.S. 18.

Under the circumstances of appellant's case, it cannot be concluded beyond a reasonable doubt that the inclusion in the instruction of the major participant/reckless indifference language did not contribute to the verdict by allowing for an improper theory that the jury could use for conviction

The evidence showed that appellant and his fellow gang members got in a car with a weapon capable of rapid firing and drove around in the area inhabited by a rival gang. The jury was told how gangs act from the evidence of prosecution gang expert Julie Rodriguez. The jury might conclude that having gone into rival territory with his gang cohorts exhibited a reckless indifference to human life.

The evidence that appellant possessed the intent to kill Robinson and Fuller was not overwhelming. The jury rejected the allegation that Robinson and Fuller were *intentionally* killed because of their race (38CT 10927-10928). The prosecution presented evidence from which appellant's presence in the car from which shots were fired might be inferred, but no evidence of any action taken by him within the car and no evidence of his mental state while in the car that would constitute "overwhelming" evidence that he acted in the role of aider and abettor with the required intent to kill.

By contrast, if the jury had a question about appellant's intent, the jury could easily conclude that appellant's conduct of cruising with his fellow gang was indicative of a reckless indifference to human life. Indeed, it may be said that much of gang behavior shows a lack of concern for others that is closer to indifference that it is to an actual intent to kill. Therefore, it is very likely that the jury relied on the improper theory only applicable to felony murder.

Nor was the question of appellant's intent to kill necessarily resolved under other properly given instructions. The jury returned verdicts in Counts 1 and 2 convicting appellant of the crime of "willful, deliberate, premeditated murder." However, these verdicts do not reliably establish that the jury necessarily found that appellant had an intent to kill if it believed he was the aider and abettor. Rather, the jury could reach that conclusion under a theory of vicarious liability, on the belief that the shooter had that mental state.

Furthermore, as noted above, the prosecutor described appellant as being a major participant in this offense, thereby arguing to the jury that appellant could be convicted on that basis. (17RT 4294, 4295.)

A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. (*People v. Talle* (1952) 111 Cal.App.2d 650111 Cal.App.2d at p. 677.) Thus, when a prosecutor exploits errors from trial during closing argument, the error is far more likely to be prejudicial to the defendant. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Brady* (1987) 190 Cal.App.3d 124, 138; *Garceau v. Woodford* (9th Cir. 2001) 275 F3d 769, 777.)

Here, the instruction impermissibly allowed the jury to find the special circumstance to be true as to appellant if it determined he was a major participant who acted with reckless disregard for human life.

There was evidence from which the jury might have considered that appellant was a major participant who acted with reckless disregard for life. Therefore, the instruction allowing the jury to return a true finding to the multiple murder special circumstance based on a determination appellant was a major participant who acted with reckless disregard in lieu of necessarily finding he acted with the intent to kill was prejudicial error.

Consequently, reversal of the multiple murder special circumstance finding and the judgment of death are required.

V

THE PERSONAL FIREARM USE ENHANCEMENT MUST BE REVERSED. THE COURT'S ERRONEOUS INSTRUCTION AS TO THIS ENHANCEMENT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS BECAUSE IT AND OTHER ERRORS RELIEVED THE STATE OF THE BURDEN OF PROOF ON THE CRITICAL QUESTION OF MENTAL STATE AND FAILED TO DEFINE ESSENTIAL ELEMENTS OF THE ENHANCEMENT. THE ERRORS DESCRIBED HEREIN DENIED APPELLANT A FAIR TRIAL AT BOTH GUILT AND PENALTY PHASES AND REVERSAL OF THE JUDGMENT IS WARRANTED.

A. Introduction

In conjunction with the substantive offenses alleged in Counts 1 and 2, the jury found to be true the enhancements alleged under section 12022.53, subdivision (d), stating in separate verdict forms that both appellant and Nunez "personally and intentionally discharged a firearm," thereby causing the death of Robinson and Fuller. (2CT 385-388.) That enhancement operates aiders and abettors vicariously liable for the "personal use" weapon enhancement when the street gang violations of 186.22, subdivision (b), are pled and proved. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176.)

The instruction given for the section 12022.53 enhancement in this case was in error because it failed to distinguish between the proof requirements for the actual shooter and the aider and abettor, and also because it failed to define the term "intentionally and personally discharged a firearm," a critical element of the enhancement. (37CT 10788; 14RT 3200-3201.) The instruction was also in error because, in language proposed by the prosecution, it created a presumption that relieved the prosecution from proving that appellant was in fact a principal in the commission of the crime, either as the shooter who intentionally and personally discharged the firearm proximately causing death, or as the accomplice who possessed the required mental state to be held liable for the enhancement. Instead,

the jury was instructed that it was required to find appellant was in fact a principal in the commission of the offense and subject to the enhancement if it found appellant had been *charged* as a principal in the commission of the offense and the gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) had been pled and proved.[19] (37CT 10788; 14RT 3200-3201.)

The failure to properly instruct the jury regarding the firearm enhancement implicated appellant's Fifth, Sixth, and Fourteenth Amendment rights to fair jury trial where the State has the obligation of proving each element of the offense and the enhancements beyond a reasonable doubt. (*Ante*, at p. 77.)

Finally, the instruction was subject to the interpretation that the personal weapon use enhancement could be found true as to appellant based on alternate legal theories, one of which was legally incorrect. Because it is not possible to determine that the jury did not rely on that incorrect legal theory in finding the enhancement to be true as to appellant, reversal is required.

The prosecutor incorrectly argued to the jury that it could find the enhancement true as to both appellant and Nunez despite the "personal use" requirement because they were both liable as the result of the gang enhancement. (14RT 3223.) As a result, the jury found that appellant and Nunez both intentionally and personally discharged the Norinco MAK-90 proximately causing the deaths of Robinson and Fuller. The constitutionally infirm jury instruction and the circumstances described herein require that the section 12022.53 enhancement be stricken.

In addition, the section 12022.53 enhancement must also be stricken because, under the instruction given, the jury's finding regarding the weapon use enhancement was dependent upon the jury's first finding the gang benefit

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[19] As also noted in Argument I, the impact of the errors in the firearm enhancement instruction was further exacerbated by the fact that the jury was never actually instructed on the gang enhancement of section 186.22(b), but was instead instructed on the substantive offense of section 186.22, subdivision (a)—an offense with which neither defendant had actually been charged.

enhancement (Pen. Code, § 186.22, subd. (b)(1)) to be true. Appellant has explained in a separate Argument III in this brief that the trial court created error with regard to the gang benefit enhancement because it instructed the jury as to the substantive offense of participation in a street gang (Pen. Code, § 186.22, subd. (a)) rather than as to the sentence enhancement pertaining to the commission of the crime for the benefit of a gang. (Pen. Code, § 186.22, subd. (b)(1)).

Furthermore, the section 12022.53 enhancement must be stricken because the defective weapon use instruction, the prosecutor's associated misstatement of the law, and the flawed language of the verdict forms undermined the reliability of the special findings. Did the jury obey the instruction, adopt the reasoning the prosecutor, and conclude that while the evidence did not prove the identity of the actual shooter, it could nonetheless find the enhancement to be true as to appellant Satele on a finding he was *charged* as a principal in the commission of the murders? Or, did the jury find the evidence showed beyond a reasonable doubt that appellant personally and intentionally discharged the firearm as stated on the face of the verdict? The combination of errors makes it impossible to state which occurred. If the former, the jury reached such a conclusion in the absence of an instruction requiring it to first determine that the actual shooter had the requisite mental state and then determine whether appellant had the requisite mental state to be held liable as an accomplice in the commission of the murders. If the latter, the jury reached its conclusion in the absence of instructional language defining the term "intentionally and personally discharged a firearm" as used in the instruction. In either circumstance, we know that the jury, under compulsion of the instructional presumption, was relieved of determining whether appellant was in fact a principal in the commission of the crime because the instruction informed them that it was required to make that finding if appellant had been *charged* as a principal in the crime. In addition, in view of the substantial evidence there was but one shooter, the findings both appellant and Nunez were both the actual shooters are inherently suspect.

The consequences of the errors described above reached into the jury's determinations at both guilt and penalty phases to affect their outcome.

B. The Prosecutor Misapprehended The Applicable Law And Its Burden Of Proof Regarding The Firearm Use Enhancement And Obtained An Instruction And Successfully Argued That Appellant Was Liable For The Enhancement On The Basis Of That Mistake About The Law

During the colloquy among court and counsel over jury instructions, the prosecutor said he was requesting only one weapons use enhancement via a modified version of CALJIC No. 17.19. The prosecutor said, "I will be the first to admit that I have not proven which of the two defendants was the actual shooter. Therefore, I included the language, 'This allegation, pursuant to Penal Code section 12022.53(d) applies to *any person charged as a principal in the commission of an offense when a violation of Penal Code sections 12022.53(d) and 186.22(b) are [sic] pled and proved.*'" (13RT 3048-3049.)

The phrase which the prosecutor proposed including, "any person charged as a principal in the commission of an offense," was taken from Penal Code section 12022.53, subdivision (e)(1), as it existed in 2000, when appellant's case was tried. In 2002, the relevant language in subdivision (e)(1) was amended by the Legislature to read, as it does today, "any person who *is* a principal in the commission of an offense." (Italics added.) Although the Legislative Counsel's Digest does not offer a specific reason for the change in language to this statute, the digest stated, *inter alia*, that "[t]his bill would make various clarifying changes and would make additional technical changes." (See the website of the Legislative Counsel of the State of California.[20]) The prosecutor attributed his proposed modification to Penal Code section 12022.53, subdivision (e). (13RT 3048-3049.)

Three things are noteworthy about the prosecutor's assertions reported above. First, the prosecutor's admission to the court make clear that he believed

[20] http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_21512200/ab_2173_bill_20020709_chaptered.html

the evidence established there was but a single shooter. Second, the prosecutor failed to prove which of the two defendants was the actual shooter. Third, he believed that the enhancement was applicable solely on a vicarious liability theory: i.e., he sought to impose liability for the firearm enhancement without proving that the actual shooter intentionally and personally discharged the firearm and without proving the non-shooter was an accomplice with the requisite mental state.

This court has recognized that in proving a subdivision (d) enhancement against either the actual shooter or the aider and abettor, the prosecution must necessarily prove that the actual shooter intentionally and personally discharged the firearm proximately causing death or great bodily injury. In *People v. Garcia*, *supra*, 28 Cal.4th 1166, this court considered whether the actual shooter's conviction was a prerequisite to the imposition of the section 12022.53 enhancement upon the aider and abettor. (*Id.* at p. 1170-1171.) In its analysis in *Garcia,* this court identified the separate proofs needed in order to impose liability upon a shooter and an aider and abettor under subdivisions (d) and (e)(1).

Garcia explained that, as to the shooter, the enhancement is unambiguous, requiring a conviction of a specified felony and a finding that the shooter intentionally and personally discharged a firearm causing great bodily injury or death when committing the felony. (*Id.* at p. 1173.) This court then held that in order to find an aider and abettor liable under subdivision (d):

> the prosecution must plead and prove that (1) a principal committed an offense enumerated in section 12022.53, subdivision (a), section 246, or section 12034, subdivision (c) or (d); (2) a principal intentionally and personally discharged a firearm and proximately caused great bodily injury or death to any person other than an accomplice during the commission of the offense; (3) the aider and abettor was a principal in the offense; and (4) the offense was committed 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.

(*Id.* at p. 1174.)

Garcia thus makes clear that in proving the liability of both the shooter and the aider and abettor under subdivisions (d) and (e)(1), the prosecution has the burden of proving beyond a reasonable doubt that each was a principal and that a particular principal, i.e., the shooter as opposed to the aider and abettor, "intentionally and personally discharged a firearm proximately causing great bodily injury or death.

Garcia also makes clear that the liability of the aider and abettor requires proof that he was a principal in the offense, i.e., that he knew of the criminal purpose of the person who committed the crime and he intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of this crime. (Pen. Code, § 1111; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.)

> "The fact that a witness has been charged or held to answer for the same crimes as the defendant and then has been granted immunity does not necessarily establish that he or she is an accomplice. [citations] Nor is an individual's presence at the scene of a crime or failure to prevent its commission sufficient to establish aiding and abetting. [citations] Indeed, as we explained in *People v. Beeman* (1984) 35 Cal.3d 547, 560: "[T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense."

(*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91; accord *People v. Croy* (1985) 41 Cal.3d 1, 11-12.)

It appears that the prosecutor sought the stated modification to the instruction because he recognized that he could not prove which defendant was the actual shooter and which was the aider and abettor. Thus, the proposed modification was intended to compensate for this failure of proof regarding the mental state and identity of the principal who shot (i.e., that a particular "principal intentionally and personally discharged a firearm") and whether the other defendant was in fact an accomplice. This is borne out in the prosecutor's

argument to the jury. The prosecutor told the jury it could hold both appellant and Nunez liable for the subdivision (d) personal use enhancement because his proof of the gang enhancement made it unnecessary for him to prove that a particular principal had intentionally and personally discharged a firearm. "The reason being is because the law says that they are both liable if it's a gang allegation proven." (14RT 3223:11-12.)

The prosecutor told the jury:

> "Now, this [proof of the gang enhancement allegation] is also important for another reason. The last allegation. Penal Code section 12022.53 (d). This is the gun allegation.
>
> "That gun allegation requires that I prove that a defendant personally and intentionally discharged a firearm that proximately caused someone's death. Obviously, it proximately caused someone's death. Renesha and Edward.
>
> "You know this was intentional. This wasn't an accident.
>
> "Then we have the words "personal use." I told you, I don't know how long ago it was now I've been going on, that I did not prove to you which of the two defendants personally used a gun. So you're going to say, "I'm going to find that allegation not true, because Mr. Millington [the prosecutor] did not prove who personally shot the gun." But if you look in that instruction, I think it's 17.19, there's a paragraph that is important. It's towards the bottom. What it says is that gang members are vicariously liable. They are all liable for that personal use if that gun has been intentionally discharged and proximately caused death and there is a gang allegation that has been pled and proven.
>
> "I've told you I pled and proved that, because I proved that Dominic Martinez, Ruben Figueroa – we had Julie Rodriguez. So that gang allegation is proven.[21]
>
> "Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word "personal" to throw you off. When you go back there and it says, "We, the jury, find the allegation that the defendants personally, intentionally used a firearm . . ." dah, dah, dah, "to be true or not true," please circle the

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[21]. Prosecution gang expert Julie Rodriguez testified to the convictions and gang membership of WSW members Martinez and Figueroa to prove WSW is a criminal street gang within the meaning of Penal Code section 186.22. (9RT 2100.)

true. The reason being is because the law says that they are both liable if it's a gang allegation proven."

(14RT 3222-3223.)

In so arguing, the prosecutor incorrectly stated the law, misdirected the jury, and substantially reduced his burden of proving appellant's liability for the enhancement as either the actual shooter or the aider and abettor accomplice. The prosecutor misapprehended the statutory extension of liability contained within subdivision (e)(1) of Penal Code section 12022.53 and explained it to the jury as a reduction in his burden of proving the enhancement allegation to be true. This court has made clear in *Garcia* that such is not the case and that in proving the truth of the subdivision (d) enhancement against either the actual shooter or the aider and abettor the prosecution is required to prove that a particular principal intentionally and personally discharged a firearm and proximately caused death. In addition, the prosecution is required to prove the aider and abettor was an accomplice with the requisite mental state. (*People v. Garcia*, *supra*, 28 Cal.4th at pp. 1173-1174.)

C. The Instruction Omitted Critical Elements Of The Enhancement, Created A Mandatory Presumption, And Was Subject To The Interpretation That the Jury Could Choose From Alternate Legal Theories, One Of Which Was Legally Incorrect. These Errors Were Reinforced By A Separate Defect In The Instruction, The Prosecutor's Argument, And The Language Of The Special Findings.

CALJIC No. 17.19, as presented by the prosecution, was problematic on three levels. First, it was the wrong pattern instruction and therefore omitted critical elements of the enhancement. Second, the prosecutor's modification to the instruction impermissibly created a presumption that reduced the prosecution's burden of proving, as required by this court in *Garcia*, that both defendants were principals, that the shooter intentionally and personally discharged a firearm proximately causing death, and that the aider and abettor possessed the requisite

mental state to be held vicariously liable for the enhancement.[22] Third, the instruction could be interpreted as offering alternate legal theories, one of which was a legally incorrect theory.

1. The Instruction Omitted Critical Elements

The following version of CALJIC No. 17.19, as modified on request of the prosecutor, was given to appellant's jury, reading in pertinent part:

> "[1.] It is alleged in Counts One and Two that the defendants Daniel Nunez and William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, during the commission of the crimes charged, in violation of Penal Code section 12022.53(d).
>
> "[2.] If you find the defendants Daniel Nunez or William Satele guilty of one or more of the crimes charged, you must determine whether the defendants Daniel Nunez or William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, in the commission of those felonies.
>
> ...
>
> "[5.] This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead and proved."

(14RT 3200-3201, 17CT 10788.)

However, in requesting the foregoing instruction, the prosecutor selected the instruction intended for an inapplicable subdivision of section 12022.53. CALJIC No 17.19.5, not 17.19, is the instruction designated for section 12022.53, subdivision (d). CALJIC No. 17.19 is the instruction intended for subdivision (a) of that section. (CALJIC Nos. 17.19, 17.19.5 (CALJIC (6th ed.) January 2000 Pocket Part, the edition current at the time of appellant's trial, and annotations

[22] The court denied a defense request for an instruction that would have informed the jury that being in the company of someone who had committed the crime was an insufficient basis for proving guilt as an aider and abettor. Appellant contends in Argument VIII that the failure to give that instruction was error.

regarding usage thereto; *cf.* CALCRIM No. 3149 (CALCRIM Fall 2006 ed.).) The head-notes to section 17.19 state that the instruction is to be used when "personal use of firearm" pursuant to "Penal Code §§ 667.5(c)(8), 1203.06(a)(1) and 12022.5(a)" is alleged. (See 37CT 10788.)

Both CALJIC No. 17.19 and CALJIC No. 17.19.5 advise the jury that if it finds the defendant guilty of one or more of the charged crimes, it must then determine whether the defendant intentionally and personally discharged a firearm, and proximately caused death to a person who was not an accomplice to the crimes. [23] However, the instruction as given was flawed because it failed to instruct the jury that it was first required to find that a *particular* principal must have intentionally discharged the firearm. In the language of CALJIC No. 17.19.5, "The term 'intentionally and personally discharged a firearm,' as used in this instruction, means that the defendant himself must have intentionally discharged it."[24] Thus, the instruction as given omitted this critical element: i.e., that a particular principal personally and intentionally shot and killed Robinson and Fuller.

Instead, the modified instruction requested by the prosecutor that it could find the subdivision (d) enhancement to be true if it found appellant was "*charged*

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[23]. CALJIC No. 17.19.5 (CALJIC 6th ed., January 2000 Pocket Part) states in pertinent part:: "[¶] It is alleged in [Count[s] ___ that the defendant[s] ___ intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] [or] [death] to a person] [other than an accomplice] during the commission of the crime[s] charged. [¶] If you find the defendant[s] ___ guilty of [one or more] of the crime[s] thus charged, you must determine whether the defendant[s] ___ intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] [or] [death] to a person] [other than an accomplice] in the commission of [that] [those] [felony] [felonies] ... [¶] The term "intentionally and personally discharged a firearm," as used in this instruction, means that the defendant [himself] [herself] must have intentionally discharged it."

[24]. CALCRIM No. 3149 (CALCRIM Fall 2006 ed.) states in relevant part: "To prove this allegation, the People must prove that: [¶] 1. The defendant personally discharged a firearm during the commission [or attempted commission] of that crime; [¶] 2. The defendant intended to discharge the firearm; [¶] and [¶] 3. The defendant's act caused (great bodily injury to/[or] the death of) a person [who was not an accomplice to the crime]."

as a principal in the commission of" the offense "when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead and proved." (37CT 10788.)

Under this instruction, in lieu of deciding whether appellant was in fact a principal in the commission of the murders under the separate proofs for the shooter and aider and abettor described by this court in *Garcia*, the jury had only to look to the pleading to determine whether appellant had been *charged as a principal*. (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.) And, as discussed above, the prosecutor's argument exacerbated the error by informing the jury that it was not necessary to determine which defendant fired the shots, and effectively told them it was unnecessary to determine whether both defendants were principals. (*Ante*, at pp. 33-34.)

2. The Instruction Created an Impermissible Mandatory Presumption

The defective instruction created a mandatory presumption in violation of the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. (*Sandstrom v. Montana* (1979) 442 U.S. 510; *In re Winship* (1970) 397 U.S. 358.) The instruction told the jury it had to find the enhancements to be true as to any person *charged* as a principal when allegations under sections 12022.53 and 186.22, subdivision (b)(1) were pled and proved. The instruction thus required that the jury find that appellant *was in fact* a principal in the commission of the crime merely because appellant had been *charged* as a principal in the crime.

The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." (*Sandstrom v. Montana*, *supra*, 442 U.S. at 514.) The court must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference. A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts.

"A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600.) *Sandstrom* recognized that a mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. (*Sandstrom v. Montana, supra*, 442 U.S. at pp. 517-518.)

Mandatory presumptions must be measured against the standards of *Winship* as elucidated in *Sandstrom*. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. (*Patterson v. New York* (1977) 432 U.S. 197, 215 "[A] State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. Such inferences do not necessarily implicate the concerns of *Sandstrom*.

In *Sandstrom*, the defendant was charged with murder. Intent was thus an element of the crime. The prosecutor requested and the trial judge agreed to instruct the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." (*Sandstrom v. Montana, supra*, 442 U.S. at p. 513.) The United States Supreme Court concluded that a reasonable jury could have interpreted the presumption as "conclusive" or "as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption." (*Id.* at p. 517.) *Sandstrom* found, alternatively,

> "the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence – thus effectively shifting the burden of persuasion on the element of intent."

(*Id.* at p. 517.)

The Court observed that the fact that "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect" meant that the Court could not discount the possibility that the jurors actually did proceed under one or the other interpretation. (*Id.* at pp. 518-519.) *Sandstrom* concluded that because the offending instruction had the effect of relieving the state of the burden of proof on the critical question of the defendant's state of mind, the instruction represented constitutional error under *Winship*.

In appellant's case, at the prosecutor's urging, the court instructed the jury: "This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead and proved." (37CT 10788; 14RT 3200-3201.) Keeping in mind the statutory definition that a "presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action" (Evid. Code, § 600) and that "a mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts" (*Francis v. Franklin*, *supra*, 471 U.S. at p. 314), it is clear that the instructional language challenged here constituted a mandatory presumption. The instruction expressly told the jury the law required it to find the personal firearm use enhancements to be true as to any person *charged* as a principal in the commission of the crime when Penal Code sections 12022.53 and 186.22, subdivision (b)(1) are pled and proved. The instruction then required the jury to find that appellant was in fact a principal in the commission of the crime from the fact appellant had been *charged* as a principal in the crime. As

was true of the instruction in *Sandstrom*, a reasonable jury could have interpreted the presumption as a direction to find appellant *was* a principal if it was convinced appellant had been *charged* as a principal. Alternatively, a reasonable jury could have interpreted the instruction as a direction to find appellant was a principal if he was charged as a principal, unless appellant proved the contrary. (See *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 517.)

As appellant has discussed above, in order to return a true finding to the subdivision (d) enhancement, the jury was required to find that appellant was a principal, i.e., either that he as the shooter personally and intentionally discharged a firearm proximately causing death, or that he was an aider and abettor with the requisite mental state in an offense in which a principal personally and intentionally discharged a firearm proximately causing death. (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.) Under compulsion of the incorrect instruction, however, the jury was required to find appellant subject to the firearm use enhancement because he had been *charged* as a principal in the commission of the crime. In so mandating, the instruction relieved the prosecution of its burden of proving beyond a reasonable doubt that appellant was in fact a principal in the crime, that a particular principal personally and intentionally discharged the firearm, and, if appellant was found to be the aider and abettor, whether he aided and abetted with the requisite mental state to be held liable as an accomplice.

3. The Instruction Presented Alternate Legal Theories, One Of Which Was Legally Incorrect

Appellant has set forth the instruction given to his jury above, but reproduces the relevant paragraph here to facilitate this discussion. Paragraph [2] of that instruction states:

> ..."[2.] If you find the defendants Daniel Nunez or William Satele guilty of one or more of the crimes charged, you must determine whether the defendants Daniel Nunez or William Satele intentionally and personally discharged a firearm, and proximately

caused death to a person not an accomplice to the crimes, in the commission of those felonies."

Paragraph [5] of the instruction contains the modification sought and secured by the prosecution. That language, as appellant has explained above, incorrectly states the law by allowing the jury to hold appellant liable for the enhancement if it determines he has been *charged* as a principal in the commission of an offense and the gang benefit enhancement is pled and proved.

Because this aspect of the instruction relieves the prosecution of proving that the actual killer personally and intentionally discharged the firearm and proximately caused death and of proving that the aider and abettor possessed the requisite mental state, it incorrectly stated the elements of this enhancement as this court defined them in *People v. Garcia, supra,* 28 Cal.4th at p. 1174.

The instruction was subject to interpretation on the basis of these two paragraphs as presenting alternate legal theories, one of which was legally incorrect. One theory, under the paragraph 2, was that appellant could be liable if he or Nunez intentionally and personally fired a firearm. The other theory, allows the jury to hold find liability it is determined he was been *charged* as a principal in the commission of an offense and the gang benefit enhancement is pled and proved.

For this reason, the instruction violates the principles articulated by this court in *People v. Green, supra,* 27 Cal.3d 1 and *People v. Guiton, supra,* 4 Cal.4th 1116. Reversal is required when the prosecution presents its case on alternate theories, one or more of which are legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested. Appellant has discussed *Green* and *Guiton* in his separate Argument (*ante,* Argument IV), and in lieu of duplicating that discussion here incorporates it by reference.

As was the circumstance in *People v. Green, supra,* 27 Cal.3d at pp. 67-69, in this case there was evidence that could have led the jury to specially find that

appellant personally and intentionally shot Robinson and Fuller. But there was also evidence from which the jury could have found that appellant was a "person charged as a principal in commission of the offense" and that a gang benefit enhancement had been pled and proved. The instructions allowed the jury to make the latter finding and the prosecutor, as appellant has described, expressly argued that the jury find the enhancement to be true by following that faulty analytical path.

As explained above (*ante*, at pp. 90-91.) if the inconsistent theory is a factual one reversal is not required, whereas reversal is required when an improper legal theory is presented. (*People v. Guiton*, *supra*, 4 Cal.4th 1116, 1129 fn. omitted.) Because this is an inconsistency relating to alternate legal theories it falls within the ambit of the *Guiton* rule, requiring a reversal.

Reversal of the personal weapon use enhancements is required because the error complained of here constituted structural error. Structural errors are those so fundamental to a fair trial that they are reversible per se. (*Arizona v. Fulminante*, *supra*, 499 U.S. 2; 6 Witkin, Cal. Crim. Law 3d (2000) Chapter XVII, Reversible Error; see also *Pulido v. Chrones*, *supra*, 487 F.3d at p. 676 [invalid legal theory is subject to reversal "where a reviewing court cannot determine with absolute certainty whether a defendant was convicted under an erroneous theory.)

However, even if the error were not to be deemed structural in nature, reversal would still be required because the error was of federal constitutional dimensions and was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) The record here shows that the prosecutor expressly urged the jury to ignore that aspect of the instruction directing it to consider whether appellant personally and intentionally discharged the firearm and proximately caused death. The prosecutor's mistaken statement of the law removed an essential element of the enhancement from the jury's consideration and, as discussed below, the error was not corrected by the court or by other

properly given instructions. Under such circumstances, the error was not harmless beyond a reasonable doubt and requires reversal under *Chapman*.

Finally, incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which require greater reliability in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gilmore v. Taylor, supra,* 508 U.S. 333, 334; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585; *Zant v. Stephens, supra,* 462 U.S. 862, 879.) Thus, reversal is required on this separate constitutional basis.

4. The Instructional Defects Were Not Corrected By Other Properly Given Instructions

The instructional error discussed here, particularly with regard to the mental state element required to prove appellant's liability as an aider and abettor, was not corrected by other instructions defining "principals" in a crime[25] and "aiding and abetting."[26] (37CT 10754, 38CT 11081.)

A reasonable jury would *not* have applied CALJIC Nos. 3.00 and 3.01 in its deliberations concerning the truth of the personal and intentional firearm use enhancement to appellant because the instruction challenged here required it to

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[25]. The trial court defined "principals" with CALJIC No. 3.00 at both guilt and penalty phases: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime." (37CT 10754, 38CT 11081.)

[26]. The trial court defined "aiding and abetting" with CALJIC No. 3.01 at both guilt and penalty phases: "A person aids and abets the commission of a crime when he or she, [¶] (1) with knowledge of the unlawful purpose of the perpetrator and [¶] (2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (37CT 10755, 38CT 11082.)

find appellant was a principal by virtue of being charged and therefore vicariously liable for the enhancement. Under the instruction given, the jury never had to reach the question of whether appellant had the requisite mental state to be held liable as an accomplice and to look to other instructions in an attempt to resolve that question in order to return a finding on the weapon use enhancement.

In addition, the fact that the jury found the special circumstance to be true does not support a conclusion that the jury gave proper consideration to appellant's mental state before convicting him. As discussed above in Argument IV, the instruction given for the special circumstance, CALJIC No. 8.80.1, incorrectly allowed the jury to find the special circumstance to be true on a finding of reckless indifference, rather than intent, which was also an improper legal theory negating the need to make the requisite finding of intent. As a result, the special circumstance finding fails to support a conclusion that the jury gave proper consideration to the question of the aider and abettor's mental state.

Significantly, the instructional language giving rise to the mandatory presumption, the fatal instructional defect arising from the trial court's failure to correctly instruct the jury on the elements of the enhancement, and the misdirection of the prosecutor's argument combined to relieve the prosecution of its burden of proving that a particular principal in the commission of the offense personally and intentionally discharged a firearm proximately causing death and that the non-shooting defendant was in fact an accomplice. Other instructions given at either the guilt or penalty phases of the trial did not compensate for the misdirection contained in the instruction in issue here. The State was thus relieved from proving beyond a reasonable doubt every fact necessary to impose the personal firearms use enhancement. As a result, appellant was deprived of his constitutional right to due process of law as explained in *Winship* and the authorities set forth above.

D. The Prejudice Flowing from the Instructional Error Adversely Affected the Guilt and Penalty Phases of Appellant's Trial and Rendered It Fundamentally Unfair

The prejudice resulting from the error was not confined to the enhancement allegation but also affected the guilt and penalty phases in other ways, thereby rendering the trial fundamentally unfair and depriving appellant of due process of law. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." (*Lisenba v. California* (1941) 314 U.S. 219, 236-237.)

As previously explained, this court has made clear that subdivisions (d) and (e)(1) of Penal Code section 12022.53 do not relieve the prosecution of the burden of proving the aider and abettor possessed the requisite mental state. (*People v. Garcia, supra,* 28 Cal.4th at p. 1174.) And yet, in appellant's trial, under compulsion of instructions, argument, and verdict forms that incorrectly stated the law, the jury was misled into finding that both appellant and Nunez shot and killed Robinson and Fuller.

The findings that both defendants shot and killed the victims, findings influenced by the incorrect instructional error described above, adversely affected appellant's right to a fair trial at guilt and penalty phases because as they relieved the jury of its obligation to make other findings that were necessary for a guilty verdict and/or for death sentence eligibility.

In particular, the jury was relieved of having to find whether appellant acted as the actual shooter or the aider and abettor, and therefore never had to make the essential findings as to the requisite mental for an aider and abettor. Furthermore, because the jury was instructed it only had to determine whether appellant had been "charged" as a principal, it did not have to determine if he actually was a principal. As a result, the jury was able to convict appellant of the offenses

without finding the necessary mental state required for the offenses for the aider and abettor.

Because the jury did not have to determine these facts that were essential for the verdict, a reversal of the judgment is required.

VI

THE JURY FAILED TO FIND THE DEGREE OF THE CRIMES CHARGED IN COURTS ONE AND TWO, AND BY OPERATION OF PENAL CODE SECTION 1157, BOTH OF THE MURDERS OF WHICH APPELLANTS WERE CONVICTED ARE THEREFORE OF THE SECOND DEGREE, FOR WHICH NEITHER THE DEATH PENALTY NOR LIFE WITHOUT PAROLE MAY BE IMPOSED

When a crime is divided into degrees, the failure of a jury to "find the degree of the crime" in its verdict mandates that the crime is deemed to be of the lesser degree. (Pen. Code §1157.) Because the jury did not make that finding, the crimes of which appellants were convicted are by operation of law murders of the second degree. Once the verdicts had been returned with no degree specified, the trial court was compelled to sentence appellants for second-degree murder on these two counts and had no jurisdiction to proceed with the penalty phase of the trial, which was a nullity. (*People v. Hughes* (1959) 171 Cal.App.2d 362, 370.)

Appellant recognizes that recent decisions of this court – notably *People v. San Nicolas* (2004) 34 Cal.4th 614 – have rejected similar contentions, but respectfully requests that the court revisit this issue and disapprove those decisions for the reasons set forth herein.

A. Factual Background

Appellants were charged with two counts of murder. However, while the information did include special circumstance allegations, the information did not specify the degree of murder or allege that the murders were willful, deliberate, and premeditated. (2CT 397-400.)

At trial, the prosecution presented conflicting evidence supporting several alternative murder theories. As a result of this evidence, the court instructed on first degree deliberate and premeditated murder (37CT 10766-10767; 14RT 3186-3187); first degree murder by use of armor-piercing ammunition (37CT 10768;

14RT 3188); and first degree drive-by murder (37CT 10769; 14RT 3188). The court also instructed on the lesser-included offense of unpremeditated murder of the second degree (i.e., express malice murder of the second degree). (Pen. Code, § 190, subd. (d); 37CT 10770, 10771; 14RT 3188-3189.) Thus, evidence of more than one degree of murder and evidence of more than one theory of first degree murder, along with correlating instructions except as noted, were presented to appellant's jury.

In arguing appellant's guilt, the prosecutor told the jury appellant was guilty of first degree murder in "three different ways;" (1) willful, deliberate, premeditated murder (14RT 3207); (2) drive-by murder (14RT 3212); and (3) murder committed with the knowing use of armor-piercing ammunition (14RT 3212). The prosecutor reiterated that all three theories of first degree murder applied, but also acknowledged the jury might find he had only proven appellant's guilt of second degree murder. (14RT 3212, 3214:18.)

On May 31, 2000, at the conclusion of the guilt phase of the trial, the jury returned verdicts finding appellants guilty of murder, with the verdict reciting the fact that the murders were "willful, deliberate, premeditated" murder. (38CT 10925, 10930.) The jury also found the special circumstance allegation of multiple murder to be true. The jury also found true the allegation that the crimes were committed for the benefit of a street gang. (38CT 10927-10928, 10931-10932.) However, neither verdict form contained a blank where the degree of the offense was required to be specified, and the jury thus did not expressly designate the degree of murder.

On July 3, 2000, at the conclusion of the penalty phase, the jury returned separate verdicts for both appellants stating, "We, the Jury in the above-entitled action, having found the defendant . . . guilty of first degree murder, . . . and having found the special circumstance to be true, fix the penalty at death." (38CT 10941-10944.)

Although it may first appear that the guilt verdicts finding willful, deliberate, and premeditated murder arguably mean the jury found appellant guilty of first degree premeditated murder, closer review shows these verdicts were necessarily produced by limitations in the verdict forms provided to the jury. Although the trial court instructed the jury on all three theories of first degree murder and premeditated second degree murder argued by the prosecutor, the murder verdict forms in the record show the jury was only provided with guilty/not guilty verdict forms for a particular theory of first degree murder, viz., willful, deliberate, and premeditated murder, and for second degree murder. (38CT 10925-10927, 10939, 10945-10957.) Limited to this choice of verdict forms, the language pertaining to premeditated murder contained within the executed verdict form does not reasonably and conclusively demonstrate that the jury actually found appellant guilty of express malice premeditated murder, since a juror convinced of guilt under another theory may well have cast a vote in support of the verdict in the absence of other verdict choices and in the understandable belief that the trial court had provided it with appropriate verdict choices.

B. The Law Prior To *People v. Mendoza* (2000) 23 Cal.4th 896 And *People v. San Nicolas* (2004) 34 Cal.4th 614

In all cases tried before a jury, the question of the degree of the crime is a question that is *exclusively* for the jury to resolve. (*People v. McNeer* (1936) 14 Cal.App.2d 22, 25.) This is in accord with the long-established principle that the jury has the power to find the defendant guilty of a lesser degree of crime than is manifested by the evidence and the instructions given by the court. (*People v. Gottman* (1976) 64 Cal.App.3d 775.)

This rule is a result of section 1157 which provides, in pertinent part:

> 'Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if jury trial is waived, must find the degree of the crime or attempted crime of

> which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree.'

The requirement that the jury find the degree of the offense for which a defendant has been convicted dates back to the language in the statute as adopted in 1872. Early cases held that if a verdict for a crime distinguished into degrees did not make a finding of degree, the entire verdict was set aside and the defendant remanded for a new trial. (See, e.g., *People v. Travers* (1887) 73 Cal. 580; *People v. Lee Yune Chong* (1892) 94 Cal. 379.)

In 1949, the Legislature amended section 1157 to eliminate the need for a new trial in these situations, creating the rule that if the jury did not find the degree of the crime, it was automatically deemed to be the lesser degree. (Stats.1949, ch. 800, § 1, p. 1537.)

In *People v. Gottman, supra,* 64 Cal.App.3d 775, the defendant was convicted of rape and oral copulation. The jury found the rape to be forcible, but the oral copulation, also performed at knife point, was found to be consensual. At that time, consensual oral copulation between adults was a criminal offense and a lesser included offense to forcible oral copulation. In refusing to somehow regard the conviction as forcible, and avoid dismissal, the court explained that the jury has the power to acquit *or find a lesser degree of the offense* than that shown by the uncontradicted evidence. (*Id.* at p. 780.)

The court traced this power to *People v. Lem You* (1893) 97 Cal. 224, which explained that while the jury has the "power" to decide all the questions arising on the general issue of guilt, it only has the "right" to find the facts, and apply to them the law as given by the court. Thus, the power to decide on a lesser offense than that shown by the evidence may be described as a "naked power," without a "right." (*Ibid.*)

This naked power has been recognized by the United States Supreme Court which has long held that "[t]he judge cannot [in a criminal case] direct a verdict, it is

true, and the jury has the power to bring in a verdict in the teeth of both law and facts. . . . [T]he jury were allowed the technical right, if it can be called so, to decide against the law and the facts. . . ." (*Horning v. District of Columbia* (1920) 254 U.S. 135, 138-139.)

This power has long been recognized by the federal courts. As stated by the *Gottman* court at pages 780-781:

> "There has evolved in the Anglo-American system an undoubted jury prerogative-in-fact, derived from its power to bring in a general verdict of not guilty in a criminal case, that is not reversible by the court. . . . The existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law. (*United States v. Dougherty*, 473 F.2d 1113, 1130, 1132 [154 App.D.C. 76].) We recognize . . . the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence." (*United States v. Moylan*, 417 F.2d 1002, 1006 [cert. den., 397 U.S. 910].) "If they will, jurors may set at defiance law and reason and refuse to find the accused guilty; when they do, he escapes, however plain his guilt. But, though that is within their power, it is not within their right; they are as much bound by the law as a court." (*Seiden v. United States*, 16 F.2d 197, 198.) "We interpret the acquittal as no more than [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity." (*Steckler v. United States*, 7 F.2d 59, 60.)

In *People v. Beamon* (1973) 8 Cal.3d 625, the defendant was convicted of robbery and the jury found an "armed" allegation to be true. When the offense in *Beamon* was committed, under former Penal Code Section 211a, armed robbery was robbery of the first degree. The *Beamon* jury failed to fix the degree of the crime. Despite the jury finding on the armed allegation, the Court held that in the absence of a specific finding of the degree of the crime, the conviction must be deemed to be of the second degree. In so holding this court stated:

> "We cannot assume, contrary to the clear legislative direction, that because a factual finding was made which would have warranted a

> determination of first degree robbery, the jury unmistakably intended to make that determination when it refrained from expressly fixing the degree."

(*Id.* at p. 629, fn 2.)

Moreover, section 1157 has been applied by the courts automatically, in what has been described as a "formalistic" fashion, without regard to whether the verdict may be inconsistent with either the evidence or other findings made by the jury. (*People v. Bonillas* (1989) 48 Cal.3d 757, 802, 804, (conc. Opn. Of Arguelles, J.).)

As a result, this court has held that "[t]he operation of this proviso is categorical and conclusive, 'even in situations in which the jury's intent to convict of the greater degree is demonstrated by its other actions. . . . [Citation.]'" (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 73.)

Thus, the strict application of the language of section 1157 "protects defendants from the risk the degree of the crime will be increased after judgment." (*People v. Anaya* (1986) 179 Cal.App.3d 828, 832; People *v. Lamb* (1986) 176 Cal.App.3d. 932, 935.)

Section 1157 also reflects the fundamental constitutional policy prohibiting placing a defendant twice in jeopardy for the same offense. (U.S. Const., Amend. V; Cal. Const., art. I, section 15; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71.) This court has suggested that section 1157 may operate as a "former acquittal" within the context of double jeopardy doctrine, and has held that controlling United States Supreme court precedents compel the conclusion that federal double jeopardy principles bar re-prosecution of a defendant for a first-degree offense when section 1157 has rendered the conviction a second-degree offense as a matter of law. (*People v. Superior Court (Marks)*, *supra*, 1 Cal.4th, at pp. 74-76; *Green v. United States* (1957) 355 U.S. 184, 191.)

California courts have applied section 1157 in a long line of murder cases and have consistently held that the failure of the jury to specify the degree of

murder on the verdict form automatically renders the offense second degree murder by operation of law. (See, e.g., *People v. Hughes* (1959) 171 Cal.App.2d 362; *In re Harris* (1967) 67 Cal.2d 876; *People v. Williams* (1984) 157 Cal.App.3d 145; *People v. McDonald* (1984) 37 Cal.3d 351.)

In *People v. Hughes, supra*, 171 Cal.App.2d 362, the defendant was charged with first degree murder. The jury was instructed that it could return one of five possible verdicts, namely first-degree murder, second-degree murder, voluntary manslaughter, involuntary manslaughter, or not guilty. The trial judge showed the jury the five verdict forms and said, "the first one here is a verdict of guilty as charged in the information, which is a charge of first degree murder. If after considering the evidence and the law that should be your verdict you would use that form." (*Id.* at p. 366.) The jury returned a verdict finding the defendant "guilty as charged in the information." (*Id.* at p. 367.) The jury was then released and told to return the next morning to begin hearing evidence in the penalty phase.

Before the start of the penalty phase, the court addressed the jury foreman and said: "Mr. Neal [the foreman], in the forms of verdict that were handed you yesterday it was explained that there were five verdicts being handed to you and the verdict of 'Guilty as charged in the information' was a charge of murder in the first degree; and that was your understanding?" Neal responded in the affirmative, and the court asked, "Did any juror have a different understanding? There is no question as to the degree of guilt insofar as it is reflected in your verdict? Very well. We are ready to proceed with the second stage of the proceedings." (*Ibid.*)

After some evidence had been received at the penalty phase, the court informed the jurors that because of technical legal requirements the verdict fixing the degree had to be in writing. It therefore submitted a supplemental verdict form as to the degree of the crime, and the jury fixed the degree at first degree murder. The penalty phase proceedings continued, and the jury fixed the penalty at life imprisonment. (*Id.* at p. 368.)

The Court of Appeal held that the second verdict was invalid and that the defendant had been convicted of second-degree murder as a matter of law. Rejecting the People's contention that the failure to specify the degree of the verdict was "a mere formality," the Court concluded that in permitting the jury to submit a supplemental verdict, "what was done was, in point of fact, a resubmission to the jury of the issue of degree. In a very essential way this was a retrial of the issue of guilt." (*Id.* at p. 369.) Furthermore, the Court held that after that verdict had been received and the jury had been released, under section 1157, the verdict was of second degree murder. Because this was the end of the guilt phase, all proceedings thereafter were nullities, and the Court of Appeal therefore reversed the judgment and ordered the trial court to enter a judgment of conviction of second-degree murder. (*Ibid.*.)

In *People v. McDonald, supra*, 37 Cal.3d 351, the jury was instructed that before it could return a guilty verdict, it had to agree unanimously as to whether the murder was first degree murder. (*Id.* at p. 379.) The jury was also instructed that if it found the defendant guilty of murder in the first degree, it had to then determine if the murder was committed under the special circumstance of "while engaged in the commission or the attempted commission of a robbery." (*Id.* at p. 379.)

The jury returned a verdict only stating that it found the defendant guilty of murder "as charged in Count I of the information." (Id. at p. 379.)

Three-and-a-half weeks later, the jury was reconvened for the penalty phase. At that time, the court submitted a new guilty verdict form to the jury and explained that because of inadvertence or mistake there had been an omission in the original verdict form. The new form added the phrase, "and we further find it to be murder of the first degree, to be true/not true." (*Id.* at p. 379.) The jury deliberated briefly and returned a finding of first degree murder on this form. (*Ibid.*) After the penalty phase, the jury imposed the death penalty. (*Id.* at p. 355.)

Noting that *People v. Hughes*, *supra*, "present[ed] a factual situation almost identical to that before us," (*Ibid.*) the opinion cited with approval the Court of Appeal's conclusions that once the verdict had been returned without a specified degree, "all proceedings thereafter were nullities. . . ." and "the court had no jurisdiction to recall the jury for further proceedings." (*Id.* at pp. 381-382.)

This court rejected the People's argument in the following language:

> "These decisions illustrate the rule that the statute applies to reduce the degree even in situations in which the jury's intent to convict of the greater degree is demonstrated by its other actions, i.e., by signing a subsequent verdict form (*Hughes*) or making a finding on an enhancement (*Beamon*)."

(*Id.* at p. 382.)

To reinforce this court's proper role in the interpretation and enforcement of lawfully enacted statutes, this court went on to quote *People v. Campbell* (1870) 40 Cal. 129, 138, at length.

> "We have no right to disregard a positive requirement of the statute, as it is not our province to make laws, but to expound them." (40 Cal., at p. 138.) In interpreting the statutory provision which then required that the jury "designate" (rather than the equivalent current term "find") the degree of the crime, the court stated: "The word 'designate,' as here employed, does not imply that it will be sufficient for the jury to intimate or give some vague hint as to the degree of murder of which the defendant is found guilty; but it is equivalent to the words 'express' or 'declare,' and it was evidently intended that the jury should expressly state the degree of murder in the verdict so that nothing should be left to implication on that point. . . . [T]he very letter of the statute . . . requires the jury to 'designate,' or in other words, to express or declare by their verdict the degree of the crime. However absurd it may, at the first blush, appear to be to require the jury to designate the degree of the crime, when it appears on the face of the indictment that the offense charged has but one degree, there are plausible and, perhaps, very sound reasons for this requirement. . . . But whatever may have been the reasons for this enactment, it is sufficient for the Courts to know that the law is so written and it is their duty to enforce it."

(*Id.* 37 Cal.3d, at p. 383; citing *Campbell, supra*, at pp. 139-140.)

Strict compliance with section 1157 remained the rule until *People v. Mendoza* (2000) 23 Cal.4th 896.

C. People v. Mendoza

People v. McDonald, supra, 37 Cal.3d 351 was partly overruled by *People v. Mendoza*, which held where the trial court correctly instructs the jury only on first degree felony murder and to find the defendant either not guilty or guilty of first degree murder, then as a matter of law the only crime of which the defendant may be convicted is first degree murder, and the question of degree is not before the jury.

In *Mendoza*, the defendant was charged with murder arising out of a robbery/burglary, qualifying the offense as a first degree murder under section 189. The only theory ever argued to the jury by the prosecution or the defense was first degree murder.

Mendoza denied that he participated in the charged offense. He did not contend the jury could convict him of a degree of homicide other than first degree felony murder. He did not ask for instructions on any other offense. His attorney expressed his understanding that the prosecution's only murder theory was first degree felony murder. (*Id.* at p. 901.)

Similarly, the trial court instructed the jury only on first degree felony murder, telling the jury that felony murder was the only theory before the jury and that anyone who aided and abetted the robbery or burglary was guilty of murder in the first degree, mentioning five times the fact that the offense alleged was only first degree murder. (*Id.* at p. 902.) No form of homicide other than first degree felony murder was ever mentioned. (*Id.* at p. 902.)

In closing argument, the prosecution again stressed only first degree felony murder, repeatedly telling the jury that if it believed the defendant was involved in the robbery/burglary the defendant was guilty of first degree murder. (*Id.* at p. 902.)

The defense closing argument also told the jury its job was to "decide whether Alberto Mendoza is guilty of first degree murder . . ." and "the main decision you will have to make is whether he is guilty of the first degree murder. . . ." The defense further argued the jury should not convict of first degree murder because the defendant was not involved in the burglary/robbery. (*Id.* at p. 903.)

Finally, when the jury was polled they were asked whether the verdict reflected their vote on first degree murder. (*Id.* at p. 903.)

In *Mendoza,* this court took the position that the defendant was not "convicted of a crime . . . which is distinguished into degrees" within the meaning of section 1157 due to the nature of felony murder, because when a defendant kills while committing one of the qualifying felonies in section 189 "by operation of the statute the killing is deemed to be first degree murder as a matter of law." (*People v. Dillon* (1983) 34 Cal.3d 441, 465.) Consequently, "[t]here are no degrees of such murders; as a matter of law, a conviction for a killing committed during a robbery or burglary can *only* be a conviction for first degree murder." (*Mendoza, supra,* at p. 908.)

Mendoza noted there are other consequences of the fact that felony murder can only be first degree murder. For example, when the elements of felony murder are established, the *only* guilty verdict a jury may return is first degree murder. (*Mendoza, supra,* at p. 908, citing *People v. Jeter* (1964) 60 Cal.2d 671, 675), and therefore a trial court "is justified in withdrawing the question of degree from the jury" and instructing it that the defendant is either not guilty or is guilty of first degree murder. (*Mendoza, supra,* at pp. 908-909, citing *People v. Riser* (1956) 47 Cal.2d 566, 581.) Likewise, if the only theory is felony murder, the court need not instruct with CALJIC No. 8.70, which provides: "Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree." (*Mendoza, supra,* at p. 909, citing *People v. Morris*

(1991) 53 Cal.3d 152, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Likewise, in a felony murder case, if a jury returns a verdict for a crime other than first degree murder, the trial court must refuse to accept the verdict because it is contrary to law, and must direct the jury to reconsider. (*Mendoza*, *supra*, at p. 909, citing *People v. Scott* (1960) 53 Cal.2d 558, 561-562.)

In another area that has substantial implications for this case, as will be discussed, this court in *Mendoza* also noted the fact that the Legislature recognized that felony murder could only be first degree murder when it enacted section 1157 in 1872. Thus, the court explained that when the 1872 Penal Code was proposed to the Legislature, the California Code Commission explained in its note to section 189 that the degree of murder for felony murder

> "is answered by the statute itself, and the jury have [*sic*] no option but to find the prisoner guilty in the first degree. Hence, . . . all difficulty as to the question of degree is removed by the statute." (Code commrs. Note foll., Ann. Pen. Code § 189 (1st ed. 1872, Haymond & Burch, commrs.-annotators) p. 83.)"

(*Mendoza* at 909.)

This court explained that a contrary construction of section 1157 would "ignore the obvious purpose of the statute, which is to ensure that where a verdict other than first degree is permissible, the jury's determination of degree is clear." (*Id.* at p. 910.) The Court observed that when the crime is of the first degree as a matter of law and the trial court properly instructs the jury to acquit or convict of first degree murder there is no degree determination for the jury to make. Under those circumstances, a contrary construction of section 1157 would "do violence to the principle that the law does not require idle acts. [Citations.] As we have explained, such murders are of the first degree as a matter of law, and where the trial court properly instructs the jury to find a defendant either not guilty or guilty of first degree murder, there is simply no degree determination for the jury to make." (*Id.* at p. 911.)

Finally, *Mendoza* noted that a contrary construction would produce absurd and unjust results. This court commented that the result of applying section 1157 "where, under correct instructions, a jury may convict a defendant only of first degree felony murder would be both absurd and unreasonable, for it would require courts to deem a conviction to be of a degree that was never at issue and that the jury was neither asked nor permitted to consider. (*People v. Mendoza, supra,* 23 Cal.4th at p. 911.)

As a result, *Mendoza* concluded that:

> "where the trial court correctly instructs the jury only on first degree felony murder and to find the defendant either not guilty or guilty of first degree murder, section 1157 does not apply. Under these circumstances, as a matter of law, the *only* crime of which a defendant may be convicted is first degree murder, and the question of degree is not before the jury. As to the degree of the crime, there is simply no determination for the jury to make. Thus, a defendant convicted under these circumstances has not, under the plain and commonsense meaning of section 1157, been "convicted of a crime . . . which is distinguished into degrees."

(*Mendoza, supra,* at p. 910.)

Mendoza was followed by *People v. Gray* (2005) 37 Cal.4th 168, which reiterated the rule that in felony murder cases where the only theory of guilt argued to the jury is felony murder, the jury need not specify the degree because felony murder can only be first degree murder. (*Id.* at p. 199-200.)

D. The Reasons Mendoza Does Not Apply To The Instant Case

An examination of the reasoning underlying *Mendoza* demonstrates that *Mendoza* is not applicable to the instant case for numerous reasons.

First, as *Mendoza* explained, from the day that the Penal Code was proposed to the legislature, it was understood that felony murder was first degree murder and the jury had no other options but first degree murder when it found felony murder. As shown, the uniqueness of felony murder, in this regard, was a factor that was

prominently mentioned throughout *Mendoza*. In such a situation, to further designate felony murder by degrees would be redundant and futile. The only possible effect of such a requirement would be to create a loophole for no purpose. Obviously, the same is not true for other forms of murder, including the one for which appellant was convicted.

Second, as applied to this case, in *Mendoza* the only theory relied on by the prosecution, the defense, and the court was that the crime was first degree murder or nothing. *Mendoza* clearly stressed the fact that the rule it was establishing applied to situations where the jury is only instructed on first degree murder and the sole option before the jury is first degree murder or acquittal. Indeed, the word "only" appears fifty-one times in the opinion. In this case, the jury was instructed on second degree murder as well as first degree murder. (37RT 10770-1071.) Therefore, the "all-or-nothing" reasoning of *Mendoza* is not applicable.

Indeed, *Mendoza* was clear that its results only applied in the situation where the only option was first degree murder or acquittal. As the opinion clarified in response to objections from the dissenting Justices:

> "We are not establishing a rule that depends only on "the theory or theories argued by the prosecution" . . . "the evidence presented by the prosecution." . . . Rather, we hold that section does not apply where the *jury instructions* actually and correctly given do not permit the jury to consider or return a murder conviction other than of the first degree."

(*Mendoza*, *supra*, at p. 910.)

Clearly, this is not the situation here. Therefore, the rule of *Mendoza* should not apply. Likewise, as noted above, in *Mendoza*, although a verdict form was not provided specifying the degree, when the jury was polled they were asked if they had voted to convict the defendant of first degree murder, to which they all responded in the affirmative. In this case, when the jury was polled, the court simply read from the verdict forms, so the term "first degree" never arose during that process. (15RT 3463-3482.)

E. *People v. San Nicolas* (2004) 34 Cal.4th 614

Radically extending *Mendoza*, in *People v. San Nicolas* this court held that it was not necessary for the jury to designate the degree of the offense where the verdict form recited facts that would render the crime first degree murder. In *San Nicolas* the verdict form returned by the jury found the defendant guilty "of the offense of murder . . . as charged in Count I." The verdict stated that the jury further found "that in committing the offense of murder, the defendant (did/did not) act willfully, deliberately, and with premeditation." The jury handwrote the word "did" in the space.

Noting that under *Mendoza* section 1157 does not apply when the question of degree is not before the jury, this court in *San Nicolas* held that when the jury made the specific finding that defendant "did act willfully, deliberately, and with premeditation" it "is tantamount to a finding of first degree murder in the verdict form itself and section 1157 is therefore not implicated." *(Id.* at p. 629.)

In reaching this conclusion, this court also looked to *People v. Goodwin* (1988) 202 Cal.App.3d 940, 944, where the verdict forms found the defendant "guilty of residential burglary, in violation of Penal Code section 459, a Felony, as charged in Count I of the information." *Goodwin* held that "section 1157 does not apply . . . because the verdict forms did not find Appellant guilty simply of burglary without any indication of the degree." Rather, the form specifically found the defendant guilty of "residential burglary . . . as charged" in the information which alleged the burglary of an "inhabited" dwelling. Under section 460, burglaries of inhabited dwelling houses of the first degree, and therefore the rendition of this fact in the verdict form satisfied the requirement the jury specify the degree, with there being no logical reason to compel the jury to designate a numerical degree. (*Goodwin, supra,* 202 Cal.App.3d at p. 947, quoted in *San Nicolas* at pp. 629-630.)

In *San Nicolas*, this court concluded in language adopting and modifying that in *Goodwin*, "'There is no logical reason to compel the fact finder to articulate a numerical degree when, by definition, "first degree [murder]" and "[willful, deliberate, and premeditated killing]" are one and the same thing.' (*Goodwin, supra*, 202 Cal.App.3d at p. 947.) The statutory mandate of section 1157 was met even without the express use of the phrase 'first degree murder' in the verdict forms." (*People v. San Nicolas, supra*, 34 Cal.4th at p. 636.)

In *San Nicolas*, this court's analysis noted that the finding that the murder was a willful, deliberate, and premeditated killing was made on the verdict form itself. (*Id.* 34 Cal.4th at p. 635.) This aspect of the analysis is in keeping with the identified rationale for section 1157, which *Goodwin* and other cases have stated as: "The Legislature has required an express finding on the degree of the crime to protect the defendant from the risk that the degree of the crime could be increased after the judgment." (*People v. Goodwin, supra*, 202 Cal.App.3d at p. 947; *People v. Anaya* (1986) 179 Cal.App.3d 828, 832; *People v. Lamb* (1986) 176 Cal.App.3d 932, 935.) In short, matters reflecting the degree of the crime of which the defendant stands convicted must be expressly reflected on the verdict form itself to safeguard the defendant against post-verdict increases in the degree of the crime.[27]

Thus, *San Nicolas* and *Goodwin* establish that Penal Code section 1157 does not apply to reduce the degree of an offense when the verdict form specifies the degree through a "descriptive and definitive label" that "constitutes an acceptable alternative to specifying degree by number." (*People v. Goodwin, supra*, 202 Cal.App.3d at p. 947; *People v. San Nicolas, supra*, 34 Cal.4th at p. 636.)

In so holding, *Goodwin* observed of the case before it, "'[t]here is nothing uncertain or ambiguous in the jury's findings." The Court noted that the finding

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[27]. Appellant has observed above that within the general design of verdicts section 1157 functions as a safeguard of the jury's role as the community's conscience in limiting post-verdict claims that would increase the degree of the crime by providing that the degree of the crime be of the lesser degree by operation of law.

within the verdict was made in connection with the verdict finding the crime, as opposed to jury findings made in connection with either an enhancement or other special finding. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947; quoting *People v. Anaya*, *supra*, 179 Cal.App.3d at p. 832.) In addition, no uncertainty or ambiguity attended the conclusion the conviction was for first degree burglary because that conclusion was consistent with the parties' stipulation, which the trial court had expressed to the jury, that under the facts of the case the burglary, if found, could only be burglary of the first degree. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at pp. 946-948.)

Goodwin and *San Nicolas*, then, as with *Mendoza*, considered the question of the verdict before it in the context of the instructions and other circumstances of the trial for the purpose of ensuring that there could be no question the degree of the crime it was imputing to the verdict was the only possible finding of degree to be made.

F. Reasons San Nicolas Should Not Be Applied To This Case

1. The Rule Against General Verdicts

The first flaw in *San Nicholas* is that it failed to consider the rule that juries in criminal cases render general verdicts, and that the rule of *Goodwin*, as relied on by *San Nicolas*, has the effect of rendering the jury's verdict an improper special verdict.

Penal Code section 1150 provides:

> "*The jury must render a general verdict*, except that in a felony case, when they are in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict." (Italics added.)

Penal Code section 1152 provides

> "A special verdict is that by which the jury find the facts only, leaving the judgment to the Court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove

them, and these conclusions of fact must be so presented as that nothing remains to the Court but to draw conclusions of law upon them."

Clearly, the elements of willfulness, premeditation and deliberation are facts which need to be proven to the jury and which the jury must find in order to convict. (1 Witkin, Cal. Crim. Law 3d (2000) Crimes–Person, § 114.) In this case, these were facts which the prosecution argued to the jury that it had to determine. (14RT 3207-3209.) From the establishment of those facts, a legal conclusion is made. Phrased another way, once one determines that the killing was done in a willful, premeditated, and deliberate manner, it may be concluded that the killing is first degree murder. In criminal law, consistent with the purposes of section 1157, a jury is entrusted with both conclusions – finding the existence of the requisite facts and reaching the legal conclusion. Neither of these are the province of the trial or appellate court.

The problem with *Goodwin* is that it creates a rule that the jury need only find the fact of inhabited dwelling and the court will find that it is first degree. By extension, the problem with *San Nicholas* is that it allows the jury to find the facts of willfulness, premeditation and deliberation, and allows the trial and appellate court draw the legal conclusion that the murder was first degree.

The "danger of interference with the jury's deliberative process, is the very evil sought to be avoided by the rule against special criminal verdicts." (*People v. Farmer* (1989) 47 cal.3d 888, 920.) It is true that jurors are required to determine the facts and render a verdict in accordance with the trial court's instructions on the law, and that a trial court has the discretion to remove a juror when it appears that he is not following his or her oath to so. (*People v. Williams* (2001) 25 Cal.4th 441.) However, while a defendant does not have a right to jury instructions on jury nullification, it has long been established that the jury does have the ability to disregard or nullify the law and to acquit a defendant against the clear weight of the evidence. (*Id.* at 459.) Similarly, a jury has the ability to

acquit a criminal defendant against the weight of the evidence. This is an inherent aspect of the right to a jury trial. Thus, in *Horning v. District of Columbia*, *supra*, 254 U.S. 135, the Supreme Court stated that "the jury has the power to bring in a verdict in the teeth of both law and facts" (*Id.* at 138.)

Similarly, general verdicts are required specifically to permit the jury wide latitude in reaching its verdict. (*United States v. Spock* (1st Cir. 1969) 416 F.2d 165, 182.)

> The rule against special verdicts based on
>
> "the recognition of the principle that 'the jury, as conscience of the community, must be permitted to look at more than logic.' [Citation.] In the words of one thoughtful commentator, the prohibition of special verdicts affirms the notation that '[i]n criminal cases ... it has always been the function of the jury to apply the law, as given by the court in its charge, to the facts,' while preserving 'the power of the jury to return a verdict in the teeth of the law and the facts.' [Citation.]"

(*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 419, quoted in *Williams* at p. 450.)

This prohibition against special verdicts is important to the instant issue for several reasons. First, it corresponds to the naked power of the jury not to convict the defendant even if the facts are not in dispute. (*Ante*, at pp. 121-122.) The result in *San Nicolas* deprives the jury of this power, just as it deprives the jury of "the power to bring in a verdict in the teeth of both law and facts." Thus, once a jury finds the facts of willfulness, premeditation and deliberation, the jury has the power to refuse to convict and/or refuse to reach the legal conclusion which should be prompted by this finding of facts.

The recognition that the jury can acquit regardless of the facts finds support in other sections of the code governing jury verdicts. For example, section 1161 provides that after a verdict of conviction, if the court believes the jury may have been mistaken as to the law, the Court may explain the reason for that believe to the jury and direct the jury to reconsider their verdict. However, under that

section, if the jury had previously returned a verdict of acquittal, the judge cannot require the jury to reconsider it, even if he believes it was based on a mistake as to the law.

The impact of section 1161 is that even if the jury acquits because of a mistake of law, even when the jury did not intend to do so the judge cannot substitute his own judgment or ask the jury to reconsider.

Similarly, section 1162 provides

> "If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the Court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict."

Again, this is an indication that the Legislature intended to give the jury the final power not to reach a verdict, even in the face of all reasonable interpretations of the evidence. If the jury does not reach the verdict, the court cannot do so.

This court's reading of section 1157 in *San Nicolas* ignores the fact that even if the evidence is overwhelming and even if it is accepted by the jury that certain facts occurred, the legal conclusion to be drawn from those facts is a conclusion that the jury must reach, the jury cannot be compelled to reach, and the court cannot reach in place of the jury.

It is informative to note that all of the sections of the Code discussed in this subsection were enacted in year that the Code was enacted, 1872, and are all part of the same chapter. This is important because it is a firmly established rule of statutory construction that "it must be presumed that the Legislature, in enacting a statute, is aware of existing related laws and intends to maintain a consistent body of rules." (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7.) As applied to this case, the Legislature was aware of the several different sections which, as explained, serve similar functions. Therefore, section 1157 should be

read in conjunction with these other sections. Merely finding the facts is not sufficient. These sections require the jury must also specify the degree of the offense. It must draw the legal conclusion from the facts of the case that it has found, – i.e., render a general verdict. A court cannot tell the jury which has found these facts what verdict to return. It cannot reach that conclusion for the jury. Even if the jury reached its conclusion through a misapprehension of law, the verdict reached by the jury remains.

2. Other Flaws in *San Nicolas* and *Mendoza*

Another flaw in *San Nicolas* was it followed *Mendoza*, applying it to a non-felony murder conviction, without considering that *Mendoza* was specifically and expressly dealing with the legal consequences of felony murder, which are distinguishable from other forms of murder, to which the reasoning of *Mendoza* is not applicable.

This unique nature of felony murder, as well as the other consequences discussed above, such as the fact that the jury need not be instructed on second degree murder, and that the trial court can refuse to accept a verdict of second degree murder, go to support the conclusion that the jury need not expressly designate the degree of murder *in felony murder.*

However, in applying the result of *Mendoza* to non-felony murder, *San Nicolas* failed to realize that the rationale supporting the rule in *Mendoza* did not apply to other cases. The result is that the rationale of *Mendoza*, unique to felony murder, was just grafted onto a non-felony murder situation by *San Nicolas* without any consideration of whether that rationale applied.

Here, unlike felony murder situations, the trial court would have had to instruct on the lesser offense of second degree murder, and did give those instructions. Likewise the court could not have refused to accept a second degree verdict, order the jury back for further deliberations. Therefore, because first

degree murder was not the only alternative to acquittal, unlike *Mendoza*, the jury should have been required to specify the degree.

Another critical flaw in *San Nicolas* is that it does great violence to numerous established principle of statutory construction. The bedrock rule of statutory construction is where, as here, the statue's language is clear, "the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." (*Kizer* v. *Hanna* (1989) 48 Cal.3d 1, 8.) "It is a cardinal rule that a court is not justified in ignoring the plain words of a statute unless it clearly appears that the language used is contrary to what, beyond question, was the intent of the Legislature." (*Cisneros* v. *Vueve* (1995) 37 Cal.App.4th 906, 910.)

The language of section 1157 is clear. If the crime is divided into degrees, the jury must find the degree of the crime. This is an express mandate from which equally clear consequences flow when it is not met. Only by ignoring this express language, that it can be held that the jury may find the facts supporting the crime (willful, deliberate, and premeditated), and need not specify the degree in its place.

The decision in *San Nicolas* failed to recognize that all crimes that are divided into degrees are so divided because of the presence of additional facts making the crime more egregious than it would have been without those facts. For example, under Section 460 burglaries of inhabited dwelling houses, vessels or trailer coaches are first degree burglaries. Likewise, under Section 212.5 a robbery is of the first degree when it is committed within an inhabited dwelling house, as defined by section 460. Similarly, Section 12035 provides that criminal storage of a firearm is of the first degree when the defendant keeps a loaded firearm within any premises where it reasonably should be known that a child is likely to gain access to the firearm and the child obtains access to the firearm and thereby causes death or great bodily injury to himself, herself, or any other person.

Similarly, as noted above (*ante*, at p. 122), section 211a previously provided that robbery was of the first degree when the perpetrator was armed. In all such cases, the defendant will have been found to have committed a crime on a verdict

form that will often list the factual elements of the offense. However, in enacting section 1157 the Legislature did not require that the jury find certain facts *or* specify the degree. Rather, the Legislature required that the jury find the degree. In short, the plain language of section 1157 is in conflict with the result of *San Nicolas*.

Two other related core principles of statutory construction are implicated by *San Nicolas*. First, *San Nicolas* compromises the rule that courts are "loathe" to construe a statute so as to add language to the statute. (*People v. Buena Vista Mines, Inc.* (1996) 48 Cal. 4th 1030, 1034.) Second, *San Nicolas* ignores another basic rule of statutory construction, i.e., that "[a] construction making some words surplusage is to be avoided. . . ." (*People v. Smith* (2000) 81 Cal. App.4th, 630, 641, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; see also *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 ["Whenever possible, we must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless"]; *People v. Cicero* (1984) 157 Cal.App.3d 465, 477; *People v. Pitmon* (1985) 170 Cal.App.3d 38, at 49-50.)

In this case, allowing the verdict to stand because the jury found the underlying facts substitutes the word "fact" for "degree" and makes the word "degree" surplusage.

The fact that other statutes *do* require the jury to find the underlying facts *rather* than specifying the legal result also indicates that the mere finding of the facts by the jury is insufficient for the purposes of section 1157. For example, section 667.61 provides for an enhanced term for sex offenders when certain facts are present. In order to impose the enhancement, the Legislature mandated that the jury find true those facts which trigger the enhancement. (Pen. Code, § 667.61, subd. (j).) Likewise, firearms enhancements under section 12022.53 must be "pled and proven." In enacting section 1157, requiring that the jury determine the *degree* of the offense, the Legislature used language that was different from

the language used to describe the type of finding that must be made when additional factual elements are required to be found. Thus, when enhancements are pled, the Legislature requires that the jury find the facts. However, when it comes to finding the degree of the offense, the Legislature did not require that the jury find certain facts to be true. Rather, it was required that the jury designate the degree.

Under traditional rules of statutory construction, when there is a difference in statutory language it traditionally indicates that the Legislature intended the provisions to have different effects. (*McCarthy v. Board of Fire Comrs.* (1918) 37 Cal.App. 495, 497 – "When different language is used in the same connection in different parts of a statute it is presumed the legislature intended a different meaning and effect.") As a result, the difference in the use of different words means that the Legislature intended something different to satisfy section 1157 – namely, that the jury find the degree, not the facts.

Another rule of statutory construction that is applicable is the rule that, if there is any doubt as to the meaning of this statute, which appellant does not believe there is, the defendant is entitled to the one more favorable to him, and any doubts as to the meaning of a statute must be resolved in the defendant's favor. (*In re Christian S.* (1994) 7 Cal.4th 768, 780; *In re Carr* (1998) 65 Cal.App.4th 1525, 1530 -1531; *In re Tarter* (1959) 52 Cal.2d 250, 257.) Thus, appellant is entitled to the construction of section 1157 that is most favorable to his position.

Furthermore, it must be emphasized that the interpretation of the statute for which appellant is asking is not an irrational one. Rather, appellant is asking this court to apply that interpretation to the statute that has been applied by the overwhelming majority of courts of this state dealing with the issue prior to *San Nicolas*.

The failure of the Legislature to have taken action during the years preceding *Mendoza* and *San Nicolas* is also evidence of the legislative intent adopting the earlier *McDonald* rationale. "It is a generally accepted principle that

in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*Id.* at p. 839; *People v. Hall* (1994) 8 Cal.4th 950, 962. Stated another way, "[w]hen a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute. [Citation.]" (*People v. Bouzas* (1991) 53 Cal.3d 467, 475; *People v. Ledesma* (1997) 16 Cal.4th 90, 101.) Although section 1157 was amended in 1949, 1951, and 1978, the Legislature has never acted to overrule the strict construction of the statute that had been applied in many cases. This is evidence that this court's strict interpretation of the statute is consistent with the Legislature's intent.

Even stronger evidence of this legislative intent is the fact that in 1990, in the wake of *Bonillas*, the Legislature considered and specifically rejected a proposed amendment of section 1157 aimed at avoiding the sometimes anomalous results caused by its strict application. In *Bonillas, supra,* 48 Cal.3d 757, a concurring opinion directly addressed the sometimes "anomalous consequences" caused by section 1157, and specifically suggested "that the Legislature may wish to take a fresh look at the provisions of section 1157, particularly in view of the manner in which the section has been interpreted for several decades." (*Id.* at p. 802 [conc. Opn. Of Arguelles, J.].) Justice Arguelles noted that "[f]rom virtually the outset of the provision's enactment, many cases have construed section 1157 as prescribing an inflexible rule, which often requires a court to reduce the degree of a crime in the face of clear and reliable evidence that the jury must have actually found the defendant guilty of the higher degree offense." (*Id.* at pp. 802-803.)

Justice Arguelles went on to state:

> In light of *Sedeno, supra*, 10 Cal.3d 703, and its progeny, I think it is clear that this court would not interpret section 1157 in such a formalistic manner if we were approaching the issue today as a matter of first impression. We are not writing on a clean slate, however, because the judicial interpretation of section 1157 noted above has been in place for many years, *and the Legislature has effectively acquiesced in that interpretation by its inaction.* If the rigidity of section 1157 is to be modified, I believe at this point the initiative must appropriately come from the Legislature. . . . I think it would be advisable for the Legislature to reexamine the current language and prevailing interpretation of section 1157 and to make any modification in the provision which it deems appropriate.

(*Id.* at p. 804 [emphasis added].)

In *Mendoza*, this court rejected the argument that the failure of the legislature to amend section 1157 was an indication of the legislative intent that the legislature had acquiesced in the prior interpretation given to section 1157. This court took judicial notice of the proposed amendments to section 1157 introduced in March 1990, in the form of Senate Bill No. 2572 (1989-1990 Reg. Sess.), which would have allowed the trial court or an appellate court to fix the degree of an offense when the jury had neglected to do so. This proposal was later dropped in favor of other amendments to section 1164 (*Mendoza*, at pp. 919-920.) Likewise, this court noted other proposed amendments to section 1157 introduced in 1998 would have allowed a determination of the degree of the offense from facts such as the admitted evidence, the charging instrument, jury instructions given, or other jury findings that were made. (*Id.* at p. 920.) However, this court did not believe that the failed attempts to amend the statute required continued adherence to *McDonald's* discussion of section 1157, explaining that unpassed bills have little value in determining legislative intent, and the failure to amend section 1157 in 1990 and 1998 "demonstrates nothing about what the Legislature intended" when section 1157 was enacted. (*Id.* at pp. 920-921.)

Appellant respectfully submits that this reasoning is flawed and that Justice Mosk's dissent in *Mendoza* provides better reasoning.

In that dissent, Justice Mosk explained that the Legislature's inaction indicates acquiescence in this court's prior interpretation. (*Mendoza* at 927, dis. opn. of Mosk, J., citing *People* v. *Bonillas*, *supra*, 48 Cal.3d at 804.) Similarly, Justice Mosk noted the principle that the Legislature's retention of a provision, "despite various amendments and proposed amendments to the statute, implies its continued endorsement of that provision." (*Ibid.* citing *People* v. *Ledesma* (1997) 16 Cal.4th 90, 100-101, *People v. Bouzas* (1991) 53 Cal.3d 467-475, and *Devita v. County of Napa* (1995) 9 Cal.4th 763-795.)

Justice Mosk explained that the majority's reasoning was flawed when it held that the failure to amend 1157 was just an "unpassed bill" with little value in determining legislative intent. As Justice Mosk explained, it rather indicated that the Legislature considered this issue and rejected any change, in spite of the fact that this court had expressly stated that it was reaching the result it was reaching in *Bonillas* because this court believed that the Legislature was acquiescing in that interpretation. (*Id.* at p. 927.) Furthermore, it did so despite the fact that a justice of this court went to the trouble of writing a concurring opinion solely for the purpose of asking the Legislature to "to take a fresh look at the provisions of section." (*Bonillas*, *supra*, at 802, dis. opn. Of Arguelles, J.)

As a result, the history of section 1157 shows that the Legislature has elected not to alter the statute despite its strict interpretation by this court, and despite the direct invitation of Justice Arguelles and others to do so, an action that was part of the deliberative process during which the Legislature was actually considering and debating a contrary result, which was rejected.

Appellant submits this is more than mere inaction by the Legislature, but is evidence of an intent not to alter the established construction previously given to section 1157.

Finally, strict compliance with section 1157, in the manner in which that section had been interpreted up until *Mendoza*, does not lead to futile acts by the jury. Rather, that section serves an important prophylactic purpose. As *Mendoza* itself explained the purpose of section 1157 is to ensure that where a verdict *other than first degree is permissible*, the jury's determination of degree is clear. Indeed, as Justice Mosk's dissent in *Mendoza* explained, this is comparable to section 1164, which calls for polling the jury before its discharge. (*Mendoza*, *supra*, at 926.) As Justice Mosk explained, neither of these tasks are burdensome nor "Herculean." (*Ibid.*) Nonetheless, they serve the important function of making sure that the jury is clear as to its intents. No where is this more important than in cases involving the degree of murder.

The Eighth and Fourteenth Amendments to the United States Constitution require a greater degree of reliability in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Gilmore v. Taylor*, *supra*, 508 U.S. 333, 334; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.) Section 1157 serves to enhance the reliability of verdicts. The prophylactic function of section 1157 plays an important role in the criminal justice system, and this court should adhere to a strict interpretation of that section.

G. As A Matter Of Law, Appellant's Convictions In Counts One And Two Are For Second-Degree Murder

In view of the legislative history and the cases cited above strictly applying section 1157, it is clear that that section 1157 operates to reduce the degree of the offenses in Counts One and Two of this case to second degree murder. In fact, the legislatively mandated remedy for the failure to specify any degree in the verdict form is more clearly required here than in any of the cases discussed above.

Unlike *Hughes* or *McDonald* where the jury actually determined the degree of the offense (albeit too late in the trial process), appellant here was never given a jury verdict on the degree of the crime at the guilt phase. Although the verdict

form at the penalty phase did state in passing, as a recitation of purported fact, that the jury had previously found appellant guilty of murder in the first degree, this form was actually written by the prosecutor and was at any rate inaccurate. Clearly, the jury's penalty phase verdict did not represent a "finding" by the jury as to the degree of the crime. Furthermore, as noted previously, both *McDonald* and *Hughes* held that once a jury returns a verdict which fails to specify the degree of murder, Penal Code section 1157 deprives the court of jurisdiction over any further proceedings and renders the conviction one for second-degree murder. Accordingly, the trial court's action in subjecting appellant to a penalty phase trial in this case constituted an act in excess of its jurisdiction and was, in the words of the *Hughes* court, a "nullity."

The Due Process Clause of the Fifth Amendment to the United States Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." (U.S. Const., Amend. V.) The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ." (U.S. Const., Amend. XIV.) The California Constitution similarly states that "[p]ersons may not . . . be deprived of life, liberty, or property without due process of law." (Cal. Const., art. I, §15.)

In *Marks*, this court held a court's action in violation of statutory authority is an act in excess of its jurisdiction. (*Id.* 1 Cal.4th, at p. 70.) Fundamental jurisdictional error of this kind is a violation of due process. (*Ibid.*; see also *In re Hess* (1955) 45 Cal.2d 171, 175; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291.) Moreover, the failure of a state court to follow that state's statutory procedures constitutes a violation of federal due process guarantees of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

As shown above, appellant's convictions were, by operation of law, convictions for murder in the second degree for which the penalty is 15 years to

life. (Pen. Code, §190.) The death penalty is only permissible for first-degree murder. (Pen. Code, §§190.1, 190.2.) Therefore, the trial court in this case failed to follow this state's statutory procedures and violated appellant's right to due process of law under the federal and California constitutions. Furthermore, the convening of a penalty phase trial in this case placed appellant in double jeopardy in violation of the Fifth Amendment to the United States Constitution. In *People v. Superior Court (Marks)*, *supra*, this court held that "a defendant whose conviction has been deemed of a lesser degree crime by operation of section 1157 may invoke the protections of double jeopardy to the same extent as one whose similar conviction has followed an express finding of the lesser degree by the trier of fact." (*Id.*; at p. 71.) In *Marks*, the defendant was tried for murder and the jury failed to determine the degree of the offense. Accordingly, this court reversed and held that the offense was second-degree murder by operation of Penal Code section 1157. (*Id.*; 1344.) The court also reversed because the trial court had failed to hold competency hearings pursuant to Penal Code section 1368, and the case was therefore remanded for a new trial on the murder charges. (*Ibid.*)

On remand, the People attempted to retry the defendant for first-degree murder, and the defendant entered pleas of former acquittal and once in jeopardy. (*People v. Superior Court (Marks)*, *supra*, 1 Cal.4th, at p. 63.) He contended that by operation of section 1157 the prosecution could not retry him on any offense greater than second degree murder. This court concurred, stating:

> "We agree that the legal effect of the statute coincides in significant respects with an implied acquittal: It is a final verdict of the lesser degree crime after a determination on the merits. (See *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 571; *cf. Stone v. Superior Court* (1982) 31 Cal.3d 503, 516 ['discharge of the jury without a verdict is tantamount to an acquittal' once jeopardy attaches].)"

(*Id.* at p. 74.)

However, the court concluded that

> "we need not decide the former acquittal issue. The overriding fact remains that in fixing a defendant's conviction at the lesser degree, section 1157 conclusively resolves the question of his guilt for the greater degree crime in his favor after trial for that offense. In this circumstance, controlling United States Supreme Court precedents compel we accommodate a plea of 'once in jeopardy.'"

(*Id.* at p. 74)

Similarly, the jury verdict in this case also operated as an acquittal of the charge of first-degree murder. In *Green v. United States* (1957) 355 U.S. 184, the defendant was charged with both first and second degree murder; the jury found him guilty of second degree murder but failed to return a verdict on first degree murder. After the conviction was reversed, he was re-tried and convicted of first degree murder.

The United States Supreme Court reversed, relying on both a finding of an implied acquittal and the broader principle of once in jeopardy. The court stated as follows:

> "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense."

(*Id.* at pp. 189-190.)

Accordingly, appellant submits that when the jury submitted a verdict without specifying the degree of murder, that verdict constituted not only a conviction of second degree murder, but also an implied acquittal of first degree murder. The trial court therefore subjected him to double jeopardy when it convened penalty phase proceedings only permissible in cases of first degree murder. In addition, for the reasons given above, federal double jeopardy principles applicable to the states through the Fourteenth Amendment also prohibit his retrial on first-degree murder charges. (*People v. Superior Court (Marks)*, *supra*, 1 Cal.4th, at pp. 70-72; *Green v. United States*, *supra*, 355 U.S., at pp. 189-190; *Price v. Georgia*, *supra*, 398 U.S., at p. 329.)

Finally, Appellant submits that the jury's failure to determine the degree of the offense deprived him of his federal constitutional right to jury trial and to due process of law. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." (U.S. Const., Amend. VI.) This right is applicable to the states through the operation of the Due Process Clause of the Fourteenth Amendment. (*Turner v. Murray* (1986) 476 U.S. 28, 36.) The California Constitution similarly provides that "[t]rial by jury is an inviolate right and shall be secured to all. . . ." (Cal. Const., art. I, §16.) In addition, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358. 364.)

In this case, the jury failed to reach a verdict on the degree of the offense. Unlike the situations in *Hughes* and *McDonald*, the jury was never reconvened for the purpose of making this determination. Additionally, as noted above, the "naked power" of the jury to refuse to convict in spite of uncontradicted evidence is an inherent aspect of a jury trial. A holding that finding the factual predicate for first degree murder is the same as finding first degree murder itself, the ultimate result of *San Nicolas*, would deprive appellant of the right to a jury endowed with

options that have long been recognized as being valid aspects of the jury's discretion.

Accordingly, appellant was deprived of his right to a jury determination of the degree of the crime, and that deprivation also deprived him of due process of law.

H. The Recitation Of First Degree Murder In The Penalty Phase Verdict Form Does Not Cure The Error

The fact that the death penalty verdicts recited the fact that appellants had been convicted of first degree murder does not satisfy the requirement of section 1157 for two reasons. First, this was not a finding, but a recitation of a finding which, in reality, had not been made. Second, this designation occurred too late;

1. The Language Of "First Degree Murder" In The Penalty Phase Verdict Are Not A "Finding," But A Recitation Of A Fact The Jury Never Found.

The language in the verdict form of "having found the defendant . . . guilty of first degree murder" is not a finding. Rather, it is a recitation of a fact which was never found at the appropriate time. Secondly, the inclusion of the degree in the penalty verdict was an officious act of the Deputy District Attorney, who was interpreting the guilt verdict as meaning something the jury never in fact found.

Moreover, since the purpose of the verdict form was to permit the jury to state its decision on penalty, the language about first degree was irrelevant surplusage and thus does not even represent an adoptive finding.

At the stage that the penalty verdict was returned, the jury wanted to hand down the death penalty. The only verdict forms that could be used to achieve that end had this language which was not essential to the verdict of death. Thus, had the jury originally found the murders to have been in the first degree at the end of the guilt phase, but the penalty phase verdicts never contained a reference to

degree, the defendants would have been convicted of first degree murder and the jury could then determine degree without another reference to that fact.

Additionally, the prosecutor's language in drafting the verdict form was *false* in that the jury had *not* previously found appellant guilty of first degree murder. This false recitation of the finding of a fact inserted in the penalty verdict cannot act as conclusive proof of a finding never made.

Thus, adding a "finding" that was never made into the only form available to achieve their goal is simply false in that such a finding was never made.

2. The Recitation of Degree Was Too Late

The language in the verdict form of "having found the defendant . . . guilty of first degree murder" was too late to impose a conviction of first degree murder.

As explained previously (*ante*, at pp. 124-125), *People v. Hughes*, *supra*, 171 Cal.App.2d 362 and *People v. McDonald*, *supra*, 37 Cal.3d 351 rejected the contention that the requisite finding of degree could be made at a later stage in the proceedings, after the verdicts had been received and recorded. As discussed above, after the verdicts are recorded, the crime is second degree murder, and the court did not jurisdiction to proceed with the penalty phase of the trial, rendering that phase a nullity.

Therefore, the "finding" of first degree murder was not sufficient at that stage to revitalize the first degree murder charges.

I. No Reinterpretation Of Section 1157 Should Be Applied To Appellant.

The crimes for which appellant has been convicted happened in 1998. *People v. Mendoza* was decided in 2000. Although appellant contends that *Mendoza* and *San Nicolas* were decided incorrectly and/or are not applicable to the facts of this case for reasons set forth above, should this court reject that contention, appellant respectfully submits that the application of any such rule to

him would violate appellant's federal constitutional rights to due process of law, equal protection of the laws, and to be free of ex post facto application of the laws. (*Bouie v. Columbia* (1964) 378 U.S. 347.)

In *Bouie*, civil rights protesters who had conducted a "sit-in" at segregated lunch counter were convicted for trespassing under a statute which prohibited entry on land of another where notice had been posted prohibiting entry. Although all parties conceded that the defendants had not been given such notice prior to their sit-in, the South Carolina Supreme Court upheld the conviction by interpreting the statute as also prohibiting *remaining* on another's property after being given notice to leave. This new construction of the statute was announced for the first time following the conviction but was applied to the defendants. (*Id.* at pp. 349-350.)

The United States Supreme Court held that the application of this new construction of the statute to the defendants violated the ex post facto component of the Fourteenth Amendment's Due Process Clause. Analogizing to cases in which statutes had been struck down for vagueness, the court held that violations of due process "can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." (*Id.* 278 U.S. at p. 352.) Although the court stated that a vague statute could be saved for *prospective* application by a "clarifying gloss," it could not do so retroactively "where the construction unexpectedly broadens a statute which on its face had been definite and precise." (*Id,* at p. 353.) "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." (*Id.* at p. 54, citing Hall, *General Principles of Criminal Law* (2d ed. 1960) at pp. 58-59.)

At the time the crimes in this case were committed the law of the state of California clearly required that the degree of the crime be "explicitly specified" in the verdict form. (*People v. McDonald, supra,* 37 Cal.3d at p. 381.)

Appellant submits that to permit a finding of first degree murder based on the verdict forms used in this case, with the jury failing to expressly designate the degree of the offense, would violate the principles set forth in *McDonald*, which reflected the status of the law at the time that the offense was committed. Therefore, this new construction of the statute should not be retroactively applied to appellant.

J. Conclusion

At the time the verdicts were returned, under the interpretation that had been subscribed to section 1157 since the enactment of the Penal Code, appellant was convicted of second degree murder. It is only by applying the change in law that occurred five years after the crime, that the conviction for first degree murder is salvaged. Depriving appellant of the protection afforded under the principles discussed above is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Because appellant has a constitutionally protected liberty interest in the pre-*Mendoza* interpretation of section 1157, to utilize a new interpretation of that section further violated appellant's right to due process of law. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478). To uphold their convictions, in violation of these established legal principles, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma, supra*, 447 U.S. 343.)

Furthermore, as appellant has shown, *San Nicolas* is incorrect interpretation of section 1157, which clearly requires that the jury find the degree of the crime, not the underlying facts.

In summary, section 1157 mandates that when a crime is divided into degrees, the jury must specify the degree of the crime for which it is convicting the defendant. The failure to specify the degree results, by operation of law, in the conviction being for the lesser degree.

For the foregoing reasons, appellant submits that the failure of the jury to specify the degree of the crime resulted in the crime being second degree murder, for which the death penalty cannot be imposed.

VII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PRESENT TESTIMONY THAT LAWRENCE KELLY OFFERED A WITNESS $100.00 TO TESTIFY THE WEST SIDE WILMAS "GET ALONG" WITH AFRICAN-AMERICANS. THIS ERROR DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A RELIABLE DETERMINATION OF THE FACTS REQUIRED BY THE EIGHTH AMENDMENT IN A CAPITAL CASE

The trial court erred in overruling the defense objection to the testimony of prosecution witness Glenn Phillips to the effect that Lawrence Kelly offered Warren Battle $100.00 to testify that members of the West Side Wilmas Gang "get along" with African-Americans. This error deprived appellant of due process of law and a reliable determination of the facts required by the Eight Amendment in a capital case.

A. The Hearings Below

As explained in the Statement of the Facts (*ante*, at p. 18), the defense called Lawrence Kelly (a.k.a. "Puppet"), a member of West Side Wilmas, who testified to the following facts: that neither the gang nor appellants were racists (10RT 2394-2398); that all the gang members had access to the rifle used in the murders (10RT 2402-2404); that gang member and prosecution witness Joshua Contreras was frequently under the influence of methamphetamine, at which times he became paranoid and thought that people were saying things (10RT 2402-2409); and that when he saw appellants on October 28th at the Strand Park playground, neither appellant said anything about going out "looking for niggers." (10RT 2409-2410).

On cross-examination, the prosecution asked Kelly if he had offered someone money to testify that the West Side Wilmas get along with African-Americans. Kelly denied that he had done so. (10RT 2413.)

After the defense rested, at the start of the rebuttal portion of the guilt phase, the prosecution announced that it was calling Glen Phillips, a local businessman who invests in real estate, as a witness. (13RT 2978.) Counsel for appellant made a motion pursuant to Evidence Code section 402, explaining that the defense anticipated the prosecution would seek to have Phillips testify that he heard Kelly offer Warren Battle, a African-American employee of Phillips's, $100 to testify that "we" get along with African-Americans. (13RT 2978-2979.) The defense objected to this evidence, explaining that this incident occurred in 1999 and he (Kelly) did not say that this offer related to the instant case, and therefore it was "way out of contact." (13RT 2979.) Counsel for Nunez also objected under Evidence Code section 352. (13RT 2979.)

The prosecutor confirmed that it was offering this testimony. The prosecutor argued that during his examination of Kelly he had asked Kelly whether Kelly had made this offer, and Kelly had denied it. (13RT 2980.)

At a hearing pursuant to Evidence Code section 402, Phillips testified Kelly had been at a party at Phillips's house in August of 1999 and offered Battle $100.00 to say, "We get along with black people." (13RT 2983-2985.) Phillips said he had heard from someone else that Kelly knew that "a couple of guys" were having "problems." (13RT 2986.) Phillips thought this related to some people who "had gotten killed." (13RT 2987.)

In response to a question from the trial court, the prosecutor explained that it was offering this testimony for the limited purpose of impeaching Kelly, who had denied making the statement. (13RT 2991.)

The defense argued that "the impeaching testimony" of Kelly was remote and opened the door to different opinions as to what the evidence meant. Furthermore, there was no evidence that Phillips knew the defendants or that the statement related to this case. Therefore, the defense believed that the probative value of the evidence was outweighed by its prejudicial effect. (13RT 2994.)

The trial court ruled that this evidence was a direct contradiction of Kelly's testimony, and was therefore admissible. (13RT 2996.) The trial court further ruled that the probative value of the statement outweighed its prejudicial effect. (13RT 2995.)

Thereafter, before the jury in open court, Phillips testified that he knew Kelly in 1999, and Phillips had heard Kelly offer Warren Battle $100 to testify that "we" get along with African-Americans. (13RT 3000-3001.)

B. The Relevant Law

It is well established that evidence of efforts by a defendant to persuade a witness to testify falsely are admissible against a defendant to show a consciousness of guilt. However, it is equally well established that efforts by a third person to fabricate evidence are admissible against the defendant *only* if done in the defendant's presence and/or the defendant authorized the conduct of such a third person. (*In re Pratt* (1980) 112 Cal.App.3d 795; *People v. Terry* (1962) 57 Cal.2d 538, 556; *People v. Burton* (1961) 55 Cal.2d 328, 347.) The mere existence of a relationship between the defendant and the person making the attempt to fabricate evidence is not a sufficient basis for that inference. (*People v. Terry, supra*, 57 Cal.2d 538, 565-566; *People v. Hannon* (1977) 19 Cal.3d 588, 599; *People v. Perez* (1959) 169 Cal.App.3d 473, 477; *People v. Weiss* (1958) 50 Cal.2d 535, 553.)

Because there was no showing or contention that either defendant authorized or encouraged Kelly to try to influence a witness, the use of this evidence to show consciousness of guilt on the part of either appellant was prohibited. Thus, the prosecution argued that the evidence was admissible as impeachment evidence under Evidence Code section 780, subdivision (i), which permits impeachment of a witness to show "[t]he existence or nonexistence of any fact testified to by him." However, the problem with this theory is that the evidence would only be relevant to impeach Kelly about his response to a question

that was not designed to lead to admissible evidence, namely, the question of whether Kelly tried to bribe a witness. This was impermissible.

As this court stated in *People* v. *Lavergne* (1971) 4 Cal.3d 735, 744, "[a] party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions."

In *People v. Luparello* (1986) 187 Cal.App.3d 410, a witness had testified that someone had written graffiti associated with the "F-Troop Gang" on the witness's van. This was determined to be "marginally relevant" to credibility. (*Id.* at p. 422.) A subsequent witness then identified one of the parties, and described him as wearing clothing associated with the F-Troop. (*Id.* at p. 423.) The prosecutor then used this to "open the door" to get in a body of evidence about the F-Troop gang that otherwise would have been inadmissible. (*Id.* at pp. 424-246.)

This tactic was disapproved of by the Court, which stated:

> "In this manner, the prosecutor used a relatively innocuous description of a type of head gear . . . and began a foray based consistently on leading questions in which he attempted to inform the jury by innuendo not only that F-Troop was a street gang whose members were suspected of committing homicides and other violent attacks on persons, but also that the gang was likely connected to the case in such a way that its members had threatened a material witness."

(*Id.* at p. 426.)

In *Luparello*, had it not been for the earlier innocuous references to the gang and the clothing, this evidence would not have been admitted. Consequently, it was error to bootstrap this information into evidence by the use of the prior testimony. (*Id.* at pp. 426-247.)

From the foregoing, it is clear that a party is not allowed to cross-examine a witness/party on a marginally relevant subject, solely for the purpose of bringing in otherwise inadmissible evidence to rebut the information elicited. The admission of

such prejudicial and irrelevant evidence violates the right to due process of law raises due process concerns. In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the court explained that while one of the items of evidence complained of was "faintly relevant" to a material issue (*id.* at p. 1384, fn. 7), several of the items of evidence introduced were not relevant to any fact other than the defendant's character and the inference that he acted in conformity with that character. (*Id.* at pp. 1381-1884.) Because the other acts evidence gave rise to no permissible inferences, and because the exclusion of such evidence is "an historically grounded rule of Anglo-American jurisprudence," the admission of such evidence may result in a violation of due process. (*Id.* at p. 1381, citing *Jammal v. Van de Kamp* (1991, 9th Cir.) 926 F.2d 918, 920 and *Dowling* v. *United States* (1990) 493 U.S. 342, 352.)

C. Application of the Law

As established by *Lavergne* and the other authorities cited above, the court clearly erred in overruling the defense relevance objection and permitting the prosecutor to ask this highly prejudicial question. Although there was no showing that either defendant authorized this attempted bribe, the defense would surely be tainted by this misconduct.

The primary purpose of this evidence was to impeach Kelly. Kelly was a defense witness who testified that all the gang members had access to the rifle used in this crime. (10RT 2402-2404.) He testified that Contreras was frequently under the influence of methamphetamine and would get paranoid and think that people were saying things. (10RT 2402-2409.) He also testified that he did not hear Satele or Nunez say anything about going out "looking for niggers" or saying that they think they got one, a fact to which Contreras testified. (7RT 1597, 10RT 2410.)

Evidence suggesting that Kelly lied about one matter to which he testified cast doubts on the rest of his testimony, and the jury was instructed with CALJIC

No. 2.21.2 to the effect that if it found a witness was "willfully false" in one part of his testimony, that witness was to be "distrusted" in other parts of his testimony, and the jury could reject all of that testimony. (37RT 10733, 14RT 3167.)

Kelly's testimony was important to the defense partly because it potentially placed the fatal weapon in the hands of other gang members and partly because it could be used to undermine the credibility of Contreras. This was important because Contreras was a crucial witness to the prosecution. A substantial portion of the prosecution's case was built on the testimony of Vasquez. However, Vasquez's credibility was highly questionable. The odds against Vasquez running into the two defendants in this case in the manner he described are astronomical. Vasquez was a member of a rival gang who claimed to have inadvertently met one defendant, a total stranger, in jail and heard that defendant freely confess to a crime, and then shortly after that, when transferred to another jail, heard the other defendant—also a total stranger—freely confess to the same crime. Any reasonable jury would have viewed this testimony with considerable skepticism.

If Kelly were believed, his testimony would have bolstered the defense claim that other members of the Wilmas had access to, and could have used, the gun involved in this crime. His testimony would also have raised doubts about the alleged racial animosity of the gang and the accuracy of Contreras's testimony. By contrast, if Kelly were improperly impeached, the error would have bolstered the prosecution's case.

As explained above, the error deprived appellant of due process because of its inherently prejudicial nature in contrast to its lack of relevancy. Because this constituted as federal constitutional error, the error is subject to analysis under the standard of *Chapman v. California, supra*, 386 U.S. 18, which mandates that the conviction must be reversed unless the reviewing court is able to declare a belief that it was harmless beyond a reasonable doubt, and the burden shifts to the prosecution to show that the error was harmless.

Respondent cannot meet the burden of showing the error to be harmless beyond a reasonable doubt. Indeed, the error cannot be held harmless under any standard because the error was extremely prejudicial to the defense. It permitted the jury to infer that Kelly had attempted to bribe a witness into lying for the defense and that he himself was lying when he testified there the Wilmas bore no animus toward African-Americans

Clearly, the defense objection was well founded. As shown, this evidence has minimal probative value. On the other hand, there is a high likelihood that the jury will misuse the evidence to also infer a consciousness of guilt on the part of appellant, even though the foundational fact for that use, namely, the authorization of the attempted witness-tampering by the defendant, is lacking.

An example of confusion actually caused by this evidence is apparent in the closing arguments of the prosecution to the jury. As noted above, this evidence was *only* offered to impeach Kelly by showing a direct contradiction.

In fact, in closing argument, in questioning Kelly's veracity, the prosecution argued

> "Glen Phillips was called to show you that Mr. Puppet, that Puppet offered an African-American a hundred dollars to say we get along. Is this a witness, that being Puppet, somebody that you are going to believe in this courtroom. Somebody that go would go to the extent of going up to an African-American and say if you go into court and say something for us. Mr. Phillip's has no axe to grind in here. I know he has some misdemeanor convictions and felony convictions, but you don't find a swan in the sewer. These aren't witnesses that I chose. This is a witness, Puppet, Puppet is the person who hangs around Glenn Phillips, not Glen Phillips hangs around with these guys, offered a hundred dollars to a witness to lie in this case. What does that tell you about Puppet, and his testimony here."

(14RT 3399.)

Later, the prosecutor argued, "Lawrence Kelly, Puppet, I've already spoken about he fact that he said he bribed an individual with hundred bucks to come in here and lie." (14RT 3402.)

There are two important facts that can be gleaned from this argument. First, although the prosecution informed the court that the only purpose of the evidence was to show a direct contradiction between the testimony of the witness and another fact to which the witness testified, this was not what the prosecutor argued to the jury. Instead, the prosecutor argued that Kelly/Puppet had tried to bribe a witness, and that the jury could infer dishonesty from that fact. In fact, this proves the defense argument against the admission of the evidence under Evidence Code section 352, which provides that relevant evidence may be inadmissible when balanced against the potential confusion that the admission of the evidence may cause.

As explained above, the relevance on this evidence was minimal, showing that Puppet lied. However, the likelihood of confusion that may be caused by the misuse of the evidence is high. The prosecutor plainly attempted to mislead the jury into attributing Kelly's supposed attempt to bribe a witness to appellants. The prosecutor effectively invited the jury to engage in the following improper reasoning: (1) Kelly tried to bribe a witness into lying for the defense; (2) Kelly is a member of the West Side Wilmas; (3) the defendants are members of the West Side Wilmas; (4) it is likely that defendants authorized their fellow gang member's effort to bribe witnesses; therefore (5) the defendants have something to hide and are probably guilty. The law clearly prohibits such efforts to improperly influence the jury. This was not merely error, but bad faith misconduct by the prosecutor. However, leaving aside the prosecutor's motives, the error was profoundly prejudicial and compels reversal of the entire judgment.

Appellant anticipates that respondent may argue the issue is moot or the error is harmless because the hate crime special circumstance was found not true. However, the prejudicial impact of this testimony was profound and extended far beyond the narrow issue of the hate crime special circumstance. Phillips's testimony suggested that Kelly was trying to improperly influence the case on behalf of the West Side Wilmas, that he could not be trusted in the rest of his

testimony, and worst of all that the defense had something to hide. The prosecutor's improper line of questioning sought to persuade the jury that the defense could not be trusted and was trying to falsify the evidence to obtain an acquittal. The questioning thus undermined the credibility of the entire defense case. Indeed, it is difficult to imagine a more prejudicial combination of evidence.

Furthermore, the "not true" finding on the hate-crime allegation does not mean that the jury completely discredited the racial motive of the crime. In order to find the special circumstance to be true, the jury must believe that fact beyond a reasonable doubt. However, the jury may have had a reasonable doubt as to some fact, yet believe that fact to be true by a preponderance of the evidence, and therefore use it for other purposes that also benefit the prosecution.

In this case, even if the jury rejected the hate crime allegation because it had a reasonable doubt as to that fact, because of other evidence introduced relating to racial animosity, the jury could believe by a preponderance of the evidence that such an animosity existed. This would benefit the prosecution, and be detrimental to the defense, in several ways. First, it would create a motive for an otherwise senseless crime. Second, because racial animosity creates such a negative image, it paints the defendants in a particularly unattractive light. Consequently, it is clear that the introduction of this evidence was likely to, and in fact did, cause confusion regarding the proper use of this evidence.

Additionally, because the Deputy District Attorney's argument ensured that the jury would be confused as to the purpose of the evidence, the evidence was likely to have an adverse impact on the reliability of the verdict in violation of Eighth and Fourteenth Amendments, which impose greater reliability requirements in capital cases. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305; *Gilmore v. Taylor, supra*, 508 U.S. 333, 334; *Johnson v. Mississippi, supra*, 486 U.S. 578, 584-585; *Zant v. Stephens, supra*, 462 U.S. 862, 879.)

D. Conclusion

In summary, the trial court erred in overruling the defense objection to the prosecution's testimony of Glenn Phillips to the effect that Lawrence Kelly offered Warren Battle, a guest at Phillips's house, $100 to testify that members of the West Side Wilmas Gang "get along" with African-Americans. Because this evidence improperly undermined the credibility of a defense witness, and because of the likelihood of confusion of the issues, appellant was prejudiced by the introduction of this evidence, requiring a reversal of the judgment of conviction entered below.

VIII

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUEST FOR AN INSTRUCTION INFORMING THE JURY THAT BEING IN THE COMPANY OF SOMEONE WHO HAD COMMITTED THE CRIME WAS AN INSUFFICIENT BASIS FOR PROVING APPELLANT'S GUILT, AND REVERSAL IS REQUIRED

The trial court erred in refusing appellant's request for an instruction informing the jury that being in the company of someone who had committed the crime was an insufficient basis for proving guilt as an aider and abettor. This error had the effect of depriving appellant of the right to due process of law and the Eighth Amendment right to a reliable determination of the facts in a capital case, thereby requiring a reversal of the judgment and death penalty verdict.

A. The Requested Instruction

At the time that the jury instructions were discussed counsel for appellant[28] submitted a special instruction which read, "Merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict." (38CT 10868)

The prosecutor objected to this instruction, stating that it was almost the exact language of CALJIC No. 3.01, the instruction on aiding and abetting which was being given, and that in conjunction with CALJIC 2.90 it would be sufficient. (13RT 3058.)

The court refused the instruction stating that it was "leery about burden of proof to modify 2.90 and the collateral one. It's not a wise idea. We should stick with 2.90." (13CT 3058.)

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[28] Previously, the court and counsel had agreed that unless otherwise stated defense instructional requests were to be considered joint requests. (13RT 3058.)

B. The Relevant Law

A criminal defendant is entitled upon request to an instruction pinpointing the theory of the defense. (*People v. Wharton* (1991) 53 Cal.3d 552, 570.) Such an instruction may direct attention to evidence or amplify legal principles from which the jury may conclude that guilt has not been established beyond a reasonable doubt. (*People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1137.)

In a situation identical to that presented by this issue, in *People v. Woodward* (1873) 45 Cal. 293, 294 this court held it was error to refuse an instruction informing the jury that if the defendant merely stood by at the time of the offense then the defendant is not guilty of aiding and abetting the commission of the crime.

This court has explained the importance of pinpoint instructions, stating:

> "Ordinarily, the relevance and materiality of circumstantial evidence is apparent to the trier of fact, but this is not always true, and the courts of this state have often approved instructions pointing out the relevance of certain kinds of evidence to a specific issue."

(*People v. Sears*, *supra*, 2 Cal.3d 190.)

People v. Wright, *supra*, clarified this rule, holding that the defendant has no right to direct the jury's attention to specific evidence or testimony. Nevertheless, *Wright* specifically held that CALJIC 2.91 (regarding eyewitness testimony) and CALJIC No. 4.50 (regarding alibi) are proper pinpoint instructions. Each of those instructions calls attention, in a generic form, to the evidence upon which the defense theory is based and admonishes the jurors that if they have a reasonable doubt after considering such evidence, they must acquit. (See Evid. Code, § 502; *People* v. *Simon* (1996) 9 Cal.4th 493, 500-501 [as to defense theories, the trial court is required to instruct on who has the burden and the nature of that burden].)

People v. Saille (1991) 54 Cal.3d 1103 explained that a defendant is entitled to a pinpoint instruction upon request. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken

identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*Id.* at p. 1119; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1019, Brown, J. concurring.)

Here, the instruction requested by appellant – "Merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict" – was important to appellant's defense in several ways. First, the jury heard evidence that appellant, Nunez, Caballero, and Contreras were together in the early evening hours on the night of the shooting and that they were together in the park in the late night hours after the shooting. The prosecution's theory of the case was that Caballero was involved in the drive-by as the driver. Although the prosecution did not contend Contreras was involved in the crime, Contreras was a member of the West Side Wilmas, and it was alleged that the crime was for the benefit of the gang. If believed, evidence that appellant was with Nunez and Caballero shortly before and after the crime would give rise to an inference that appellant was also with them during the crime. If the jury believed that appellant was with other gang members immediately before and after the crime, this would bolster the prosecution's case that it was a gang crime.

As explained above, in the guilt phase, the prosecution admitted it did not prove who fired the shots. If the jury was convinced appellant was present but not sure who the shooter was, the jury then had to decide the issue of the intent of the non-shooter. While Nunez presented an alibi defense, appellant's defense merely questioned the prosecution's case and sought to create reasonable doubt. The requested instruction was important to appellant's theory of defense because it correctly pointed out that merely being in the presence of the others when the shooting occurred was not sufficient to prove his guilt beyond a reasonable doubt.

In a crime of this nature, where the shooting occurs in a brief time and the crime is equally consistent with a sudden impulse when the opportunity arose, it is crucial that the jury is made aware of all proper inferences that can be drawn from

presence at the scene of the crime. The requested instruction properly informed the juror that evidence appellant was seen with Nunez and Caballero was not enough to establish guilt and that proof of his guilt required more than his presence in the car with them. Thus, the requested instruction went to the core of appellant's defense.

California courts have long recognized the importance of focusing the jury's attention on their task through such pinpoint instructions, as the discussion of the following cases illustrates. In *People* v. *Roberts* (1967) 256 Cal.App.2d 488, the defendant was convicted of oral copulation. The evidence in that case showed that the police, who had received complaints of a public bathroom being used for sexual purposes, had used a peep-hole in that bathroom to observe several incidents of various individuals engaging in oral sex over a period of several days. The lighting conditions at the time of the observations were less than ideal, and the initial identification of the defendant was "tentative." There was no corroboration of the identification, but the court had held it to be sufficient. (*Id.* at p. 491.)

The defendant in *Roberts* had requested an instruction to the effect that if the jury had a reasonable doubt, based on the ability of the officers to identify the defendant from their place of concealment, the jury should acquit him. (*Id.* at p. 492.) The trial court refused the instruction and the defendant was convicted. The court reversed the conviction, holding that it was prejudicial error to refuse an instruction directing the jury's attention to the potential weaknesses of the identification, which was the core of the defense. (*Id.* at p. 494; see also *People v. Guzman* (1975) Cal.App.3d 380, 388 [it is error to refuse a defendant's request for an instruction relating identification to reasonable doubt].)

For the purposes of determining whether additional instructions on identification are needed, the court should consider whether the case may be considered to be a "close case." Part of this inquiry focuses on whether the identification has "any substantial corroboration." If there is no substantial corroboration, the refusal to give this type of pinpoint instruction is more likely to be regarded as prejudicial. (*People v. Gomez* (1972) 24 Cal.App.3d 486, 490.)

In *People* v. *Hall*, *supra*, 28 Cal.3d 143, 159, the court held that the trial court erred in not giving a tailored version of a proposed instruction on identification that was found to be too long and argumentative. However, the error was not prejudicial since the trial court did read to the jury CALJIC No. 2.91 that related the concept of reasonable doubt to identification testimony. (*Id.* at pp. 159-160.) However, the failure to give the proposed instruction herein was not cured in a similar manner because no instruction similar to CALJIC No. 2.91 was given to appellant's jury.

C. Application of the Law to the Instant Case

As noted above, the prosecutor objected to the requested instruction on the grounds that it was similar to CALJIC No. 3.01, which the court had already agreed to give. The court refused the instruction because it did not believe it a wise idea to tinker with the instructions. (13CT 3058.) Neither of these purported rationales justified the refusal to give the pinpoint instruction.

First, the prosecutor's contention that the pinpoint instruction was nearly identical to CALJIC No. 3.01 was simply incorrect. While there may be vague similarities between the requested instruction and CALJIC NO. 3.01, the two instructions have obvious and significant differences. CALJIC NO. 3.01, as given in this case, informed the jury, "mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting." (37CT 10755.) By contrast, the requested instruction never mentioned aiding and abetting but instead informed the jury that merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict.

It is thus glaringly obvious that the two instructions in question have completely different purposes. CALJIC No. 3.01 focuses primarily upon defining the scope of the *aiding and abetting* doctrine, which in turn is of significance in defining the nature of a principal's participation in a crime. By contrast, the proposed pinpoint instruction focused upon the quantum of evidence required to

establish *guilt*, a completely different question. Furthermore, CALJIC No. 3.01 focuses on a defendant's presence at the *scene* of a crime, while the requested instruction focuses the jurors' attention on being in the company of the *person* who committed a felony. The standard instruction thus bars an inference of guilt from mere proximity to the crime, whereas the requested pinpoint instruction prohibits and inference of guilt by association with another person—again, a completely different question, and a question of crucial importance in this case.

These distinctions are critical because the prosecution's case continually flirted with outright invitations to the jury to convict appellant on the basis of guilt by association due to his gang membership. For example, the prosecution's gang expert, Officer Rodriguez, testified that in her opinion if three members of the gang went to that area with a loaded weapon, their intent was to try and kill someone. (9RT 2102-2103.) The prosecutor attempted to persuade the jury that the gang itself, and therefore by implication appellants themselves, were racists motivated by their supposed hatred of African-Americans. For example, the prosecutor argued that the gang believed in segregation and the murder was committed because of that fact, and driving around Harbor City together looking for "N-people" was evidence of intent to kill. (14RT 3211, 3214.) This theme was repeated later when the prosecution argued that the fact that Fuller's purse was not stolen was evidence of the fact that they were not killed in a robbery, but because of the gang animus towards African-Americans. (14RT 3239.) The gang motive was again argued in the prosecution's rebuttal argument. (14RT 3397.)

The prosecutor also argued that the crime was committed to boost appellants' gang status (14RT 3219), thereby making their gang membership and presence during the drive-by shooting evidence of guilt. Likewise, the prosecutor argued to the jury that all people in the car were necessarily guilty because the way gangs operate in drive-by shooting is to have a driver, a shooter, and a lookout, so all people in the car were playing a role in the crime by being there. (14RT 3211.) The prosecutor's closing argument implied that the defendants were guilty of attempting

to bribe a witness because of the alleged conduct of another gang member, Lawrence Kelly, in spite of the fact that no connection between the defendants and Kelly, other than mere gang membership, was ever made. (14RG 3399.)

Guilt by association is a particularly discredited concept and deprives a defendant of the due process right to a fair trial. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072; *People v. Young* (1978) 85 Cal.App.3d 594, 603 fn. 3. Yet the prosecutor's case depended in large part on convincing the jury that appellant's were guilty because of their association with the gang and with each other. As a result, it was critically important that the jury be instructed that merely being in the presence of another who committed a felony is not sufficient to sustain the verdict.

As for the court's rationale for refusing to give the requested instruction—i.e., that it was not a standard CALJIC instruction, this was clear error. It is improper to refuse to give such an instruction simply because the instruction is nonstandard if the requested instruction is supported by the evidence. In an en banc decision, the Ninth Circuit has explained that trial judges who rely solely on CALJIC and decline to give proper, though nonstandard, instructions face reversal for the denial of a defendant's constitutional rights. In *McDowell v. Calderon* (9th Cir., 1990) 130 F.3d 833, the court stated:

> "A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions."

(*Id.* at p. 836)

The Ninth Circuit made clear that standard instructions are not always sufficient to assure that the jury will fulfill its purpose:

> "Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of 'standard' jury instructions are not debated and hammered out by legislators, but by

> ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong."

(*Id.* at p. 841.)

As the Ninth Circuit indicated in *McDowell*, CALJIC instructions are not immutable words of wisdom that should never be modified. Rather, the weight of the law clearly holds that modification is often advisable when such changes would clarify the law for the jury. Indeed, the recent wholesale revamping of the entire set of jury instructions from CALJIC to CALCRIM shows that the state judiciary officially recognized that CALJIC had substantial room for improvement and required a complete review and revision. As explained in the Preface to CALCRIM, the task of the CALCRIM committee "was to write instructions that are both legally accurate and understandable to the average juror." The necessity for this undertaking was the widely held opinion, reflected by the Blue Ribbon Commission on Jury System Improvement, which had stated that, "jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror." (Preface to CALCRIM, 2007 2d. ed., p. 1)

However, regardless of the flaws or benefits of the standard instructions in CALJIC, the requested pinpoint instruction was clearly a correct statement of the law, as it is well established that mere being in the company of the person who commits a crime is not a sufficient basis of proving guilt. Rather, the non-shooter must have the requisite intent to aid and abet the commission of the crime. (*People v. Prettyman, supra,* 14 Cal.4th at 259, quoting *People v. Beeman, supra,* 35 Cal.3d 547 at 560-561.) Moreover, because there was considerable evidence of association, the instruction was amply supported by the evidence. Hence, because the instruction was correct and supported by the evidence, it was clear error for the court to decline to give the instruction solely on the grounds that it was not a standard CALJIC instruction.

Thus, the reasons advanced by the prosecution and the trial court for refusing the requested instruction were meritless. By contrast, there were additional reasons why the instruction should have been given. For example, the court should have given the instruction in order to preserve appellant's right to reciprocity under the Due Process Clause. The court gave numerous pinpoint instructions directing the jury's attention to specific items of evidence supporting the prosecution's theory of the case from which the jury could infer guilt. These instructions highlighting the prosecutions theory included CALJIC Nos. 2.04 (Efforts by Defendant to fabricate evidence), 2.05 (Efforts other than by Defendant to fabricate evidence), 2.06 (Efforts to suppress evidence), 2.21.2 (Witness willfully false), and 2.51 (Motive), 07, and 2.09 (37CT 10719-10721, 10733, 10743.)

Fairness dictates that the court must also give instructions directing the jury's attention to those items of evidence that support the defense's case. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [37 L.Ed.2d 82; 93 S.Ct. 2208] the Supreme Court noted that state trial rules that provide for non-reciprocal benefits violate the due process clause. (See also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377.) Although *Wardius* was concerned with reciprocal discovery rights, the same principle should apply to jury instructions. (*People v. Moore* (1954) 43 Cal.2d 517, 526-527.)

As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. (*Mathews v. United States* (1988) 485 U.S. 58, 63.) The failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him, a right "so basic to a fair trial" that failure to do so where there is evidence to support the instruction can never be considered harmless error. (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.) As explained above, the purpose of pinpoint instructions is to direct the jury's attention to the defendant's

theory of the case. Because of the nature of gang and conspiracy cases, where it is easy for the jury to blame one person for the actions of his gang cohorts, it is imperative that the jury understand that even if appellant was in the company of the shooter, this would not be sufficient, by itself, to establish guilt.

Finally, unless the jury is properly instructed that being in the company of the shooter is not sufficient to prove guilt, the jury is likely to reach its verdict based on an incorrect understanding of the law, thereby undermining the requirement of heightened reliability in capital cases, in violation of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Gilmore v. Taylor*, *supra*, 508 U.S. 333, 334; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

The court's unjustified refusal to give the instruction was prejudicial in part because none of the other prosecution evidence in this case was particularly compelling.

For example, Eddie Vasquez testified as to admissions made by both defendants. However, Vasquez's credibility was highly suspect, to say the least. Vasquez was a jailhouse informant receiving a benefit for his testimony. Just as accomplices are rarely persons whose veracity is above suspicion because their participation in the charged offense is itself evidence of bad moral character (*People v. Guiuan* (1998) 18 Cal.4th 558, 574), so too is Vasquez's veracity questionable as a member of the criminal class. The danger of obtaining crucial testimony from criminals was similarly noted in *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1083, where the court noted that:

> . . . because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. (*Id.* at p. 1124.)

Testimony from accomplices and "snitches" who receive a deal for their testimony has been a frequent cause of wrongful convictions, as the Innocence Project has illustrated in its study of cases in which the defendant was later exonerated by DNA tests. (*Id.* at 1124, fn. 6.) Indeed, in-custody informants are one of the few classes of witnesses whose testimony the jury must be instruct to view with caution and close scrutiny. (Pen. Code, § 1127a, subd. (b).)

Furthermore, the admissions of both appellants, as recounted by Vasquez, were out-of-court, oral admissions, which required that the jury be instructed to view them with caution, even if they had come from a source more reliable than Vasquez. (CALJIC No. 2.70 [oral admission of the defendant not made in court should be viewed with caution to be given sua sponte]; *People v. Beagle* (1972) 6 Cal.3d 441, 455-456; *People v. Henry* (1972) 22 Cal.App.3d 951, 956-960.)

Vasquez's story was inherently implausible. Vasquez, a member of a rival gang, testified that he by chance encountered in jail one defendant, who was a total stranger to him, who admitted taking part in a murder, and that he was then transferred to another jail where, again by chance, he encountered the other defendant, also a stranger, who also confessed to the same murder. These coincidences, coupled with Vasquez's obvious self-interest in obtaining convictions, strains credulity.

In addition, the evidence showed that only one person fired the weapon during the crime, and the crucial evidence against the other defendant was his mere presence. There was therefore a danger that an uninstructed jury might believe that because appellant was present with a fellow gang member, he was probably involved in the murder. Therefore the jury needs to know that this association and mere presence with the shooter is not sufficient evidence for a guilty verdict.

It is particularly important that the jury be told of this principle at the time of deliberations. A reviewing court is unable to determine what evidence the jury accepted or rejected. It only knows the result reached. Therefore, post-verdict

review of the evidence will be necessarily speculative. Accordingly, it is of the utmost importance that the jury be correctly instructed on how to use any one item of evidence.

D. Prejudice

Appellant was profoundly prejudiced by the refusal of the trial court to give this instruction. Because this error adversely impacted appellant's right to due process of law, it must be evaluated under the standard of *Chapman v. California*, *supra*, 386 U.S. 18, which mandates that the conviction must be reversed unless the beneficiary of the error can show that the error was harmless beyond a reasonable doubt.

The prosecution cannot carry this burden here. First, the evidence did not establish who did what in terms of the actual execution of the offense. While evidence was presented that Caballero was driving, there was no evidence as to whether Satele or Nunez was the shooter. In fact, as discussed above (*ante*, at pp. 33-34), the prosecutor openly admitted that he had not proven who the shooter was, and the evidence was overwhelming that only one person acted in that capacity.

Likewise, the prosecution relied on Officer Rodriguez's characterization of the division of labor in gang drive-by shootings, testifying that they have a driver, a lookout, and a shooter, and presented evidence that Caballero was driver. (9RT 2104.) However, there was no evidence regarding the specific conduct of Satele or Nunez while in the car that in anyway proved accomplice liability. Therefore, the omitted instruction would have directed the jury's attention to the absence of evidence regarding the specific conduct of the non-shooter.

The nature of drive-by shootings is that the crime occurs very quickly and there is very little "conclusive" proof as to the intent of the people in the car other than the shooter. However, gang expert opinion evidence can give rise to a *possible* inference that the specific gang members were all planning the crime and

served the roles ascribed to them by the generic gang evidence present in every case – driver, shooter, look-out. Conversely, it is also logically possible that the parties were cruising the streets with no criminal intent in mind when the shooter spotted a target of convenience and opened fire without the advance knowledge or participation of others.

Testimony of supposed gang experts inferring intent from supposed typical conduct of gang members is in effect "profile" evidence; i.e., it is evidence that because other gangs act in a particular way, therefore it is more likely that these defendants did so as well.

People v. Robbie (2001) 92 Cal.App.4th 1075 explains that profile evidence is a collection of conduct and characteristics commonly displayed by those who commit a crime. In *People v. Erving* (1997) 63 Cal.App.4th 652, 663 the court explained, "Profile evidence is inadmissible because 'every defendant has the right to be tried based on evidence tying him to the specific crime charged, and *not on general facts accumulated by law enforcement* regarding a particular criminal profile.' Moreover, such evidence encourages the jury to engage in circular reasoning." (Citations omitted, italics added.)

Even if gang expert evidence does not rise to the level of profile evidence, the inherent danger of that type of evidence is still present and must be guarded against. Here, the jury was told by Detective Rodriguez that gangs conduct drive by shootings with a driver, a lookout, and a shooter. If this evidence was believed, then being in the company of the driver and shooter would be powerful evidence of the non-shooter's guilt. However, if the jury is informed that mere presence or association with another is not sufficient evidence for a conviction, the jury might very well have entertained a reasonable doubt as to whether *this* defendant in *this* crime was aiding and abetting or merely hanging out with his friends.

In light of the questionable nature of much of the state's case, informing the jury of this principle takes on special importance as a means of drawing the jury's attention to facts regarding gang evidence from which the jury could have a

reasonable doubt of appellant's guilt. Furthermore, this instruction would have focused the jury's attention on facts which may have had an impact in reaching their decision beyond a reasonable doubt. "An error in instruction which significantly misstates the requirement that proof of guilt be beyond a reasonable doubt 'compels reversal unless the reviewing court is able to declare a belief that it was harmless beyond a reasonable doubt.'" (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472, quoting *Chapman v. California, supra*, 386 U.S. 18, 24.)

Because of the confusion caused by other errors, it was imperative that the jury be accurately informed as to the principle ingrained in the requested instruction. It was highly likely that the jury was already operating under some degree of confusion regarding the issue of intent because of the errors in the instructions for the gang allegation and firearm allegation of sections 186.22 and 12022.53 Likewise, the jury may have been tempted to find that appellant was acting with reckless indifference to life by cruising with fellow gang members in enemy territory. (See Arguments III, IV, and V.)

The confusion in this area was aggravated by not informing the jury that merely being in the company of his crime mates was not sufficient to prove guilt. Accordingly, the court's refusal to give the requested instruction was prejudicial.

E. Conclusion

From the foregoing it is clear that this error had the effect of depriving appellant's of the right to due process of law, the Eighth Amendment right to a reliable determination of the facts in a capital case, thereby requiring a reversal of the judgment and death penalty verdict.

IX

THE TRIAL COURT ERRED IN REFUSING APPELLANT SATELE'S REQUEST TO GIVE THE JURY LIMITING INSTRUCTIONS REGARDING EVIDENCE THAT ONLY APPLIED TO CO-APPELLANT NUNEZ

The trial court erred in refusing appellant Satele's request to give the jury limiting instructions regarding evidence that only applied to co-appellant Nunez. In particular, the facts giving rise to the instructions contained in CALJIC Nos. 2.04and 2.05 only applied to co-appellant Nunez.

A. The Evidence Relating Only To Nunez And The Instructions Given Regarding That Evidence

1. CALJIC Nos. 2.04

At the close of trial, the prosecution requested that the jury be instructed pursuant to CALJIC No. 2.04, which provides:

> "If you find that a defendant attempted to or did persuade a witness to testify falsely or attempted to or did fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any are for you to decide."

(14RT 3161, 37CT 10719.)

Counsel for appellant objected to this instruction, stating that "there has been zero evidence as applied to William Satele as to anything whatsoever." (13 RT 3016.) The Deputy District Attorney explained that the proposed instruction

related to the testimony of Ruby Feliciano and Esther Collins[29]. The prosecution suggested that the instruction should be modified to specify that it related to those two witnesses. (13RT 3016.)

The trial court ruled that the jury would be instructed that if evidence does not apply, the jury should not consider that evidence. The judge explained that he would not "finger point" at the alleged attempt of co-appellant Nunez's girlfriend to persuade a witness to testify falsely, a reference to the Feliciano incident, explaining that such an instruction "simply would create problems for [Nunez's counsel], and I think that the neutral context of the instruction, if you find that a defendant, seems to be the most innocuous way without pointing." (13 RT 3017.)

The court told appellant Satele's counsel that he could argue to the jury that this instruction did not apply to Satele. (13 RT 3017.) CALJIC No. 2.04 was later read to the jury. (37 CT 10719, 14 RT 3161-3162.)

The jury was also instructed with a modified version of CALJIC No. 2.07, reading:

> Evidence has been admitted against one of the defendant, and not admitted against the other.
> *At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendant.*
> Do not consider this evidence against the other defendant.

(37 RT 10722, 14 RT 3162-3163, italics added.)

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[29] Feliciano was the owner of the Buick in which appellant and Nunez were riding when they were stopped by the police. The Norinco Mak-90 rifle was found in that car. (8RT 1772-1774, 1793-1795, 1802-1806.) Yolanda Guaca admitted being on the three-way call with Nunez and Ruby Feliciano and admitted telling Feliciano to "correct" the story she had told the police. (12RT 2676-2678.)

Esther Collins testified regarding an incident where Nunez approached her, asked her for money, and hit her in the mouth, calling her "nigger." (4RT 924-926, 928.) She also testified that she knew the West Side Wilmas Gang and was friendly with all of the members of the gang, including Appellant Nunez. (4RT 929.) This evidence was limited to Nunez. (4RT 920.) An investigator with the District Attorney's Office was present when Collins she expressed a fear about testifying in this case because of the comments that had been made on the bus to court. (5RT 970-971.)

The jury was also instructed with a modified version of CALJIC No. 2.09, reading:

> Certain evidence was admitted for a limited purpose.
> *At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.*
> Do not consider this evidence for any purpose except the limited purpose for which it was admitted. (37 CT 10725, 14 RT 3163 italics added.)

2. CALJIC 2.05

Similarly, appellant Satele objected to the jury being instructed with CALJIC 2.05, which instructed the jury on the possible inferences from the effort by someone other than a defendant to fabricate evidence and/or suppress evidence. (13RT 3018-3019.)

As to CALJIC No. 2.05, the Deputy District Attorney explained this also related to efforts of Nunez's girlfriend to get Feliciano to alter her testimony. (13RT 3018-3020.)

This instruction was given to the jury without limiting the evidence to which it referred to Nunez. (37 CT 10720-10721, 14 RT 3162.

B. The Relevant Law

It is inherent in the jury system that the jury will often need to be instructed on the limited use of evidence. The rules of evidence in a jury system are "based on the purpose of saving the jury from being misled." (James Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2ed. 1923, p. 125.) It is only because the jury is not trained in law and logic that the rules of evidence are necessary. "A trained judge would not need all these rules; and indeed, *the law of evidence in systems that lack a jury is short, sweet, and clear.*" (Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), pp. 266-267, italics added.)

As noted above (*ante*, at p. 171), a jury cannot fulfill its constitutional function unless it follows the law, which requires that it be properly instructed as to the relevant law. When the jury is instructed on particular evidence which by law is of limited use, the jury needs to know the evidence to which the instruction applies and the manner in which the evidence is limited. Without proper instructions, the jury would be precisely the kind of unguided missile warned about in *McDowell v. Calderon*, *supra*, 130 F.3d 836.

Clearly, a court has a duty to properly limit a jury's consideration of evidence to its proper purpose. If not sua sponte, when the defendant requests proper instructions the court is under a duty to give those instructions. For example, the courts have held that there is no sua sponte duty to instruct with CALJIC No. 2.50, clearly implying that such an instruction would be required upon request in a proper case. "Defendant did not request that this instruction be given and the trial court had no duty to give it sua sponte." (*People v. Morris*, *supra*, 53 Cal.3d 152, 214; see also *People v. Lang* (1989) 49 Cal.3d 991, 1020; *People v. Bunyard* (1988) 45 Cal.3d 1189 ; *People v. Collie* (1981) 30 Cal.3d 43, 63-64.) Conversely, when evidence is properly subjected to a limited use, and the defendant requests that the jury be limited in its consideration of that evidence, the court should so instruct the jury.

In this case, the trial judge felt that it was not able to limit these instructions not because the instructions were in any way improper, but solely because he did not want to prejudice co-appellant Nunez. While the court's concern with Nunez's right to a fair trial was admirable, appellant was entitled to equal consideration. Indeed, the presence of a co-defendant in his case cannot act to limit a defendant's trial rights. For example, it has long been recognized that joinder laws must never be used to deny a criminal defendant's right a fair trial. (*Williams v. Superior Court* (198') 36 Cal.3d 441, 451-452.)

Furthermore, correct limiting instructions are necessary to allow the jury to properly evaluate the evidence. As noted above, the theory of the law of evidence

in a jury system is that the jury needs guidance in its evaluation of the evidence. Thus, the failure to properly instruct the jury as to the correct use of evidence undermines the reliability of the verdict in violation of the Eighth and Fourteenth Amendments, which impose greater reliability requirements in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gilmore v. Taylor, supra,* 508 U.S. 333, 334; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

Finally, it should be noted that the trial court was in error when it believed that any problems caused by not limiting the evidence could be cured by defense counsel's argument to the jury. The court's conclusion was contrary to the well-recognized principle that arguments of counsel cannot substitute for correct instructions from the court. (*Carter v. Kentucky* (1981) 450 U.S. 288; *People v. Fudge* (1994) 7 Cal.4th 1075, 1111.)

C. Application Of The Law To This Case

The problem presented by these instructions is that while there was no evidence relating to attempts of appellant Satele to suppress evidence, the judge declined to limit the jury's consideration of this evidence to Nunez alone, because the judge did not want to "finger point." The judge anticipated that any confusion would be cleared up by a general instruction that when evidence was introduced for a limited purpose or against one defendant, the jury should not consider it for another purpose or against the other defendant.

However, the two instructions that would have limited the jury's consideration were CALJIC Nos. 2.07 and 2.11. Both of these instructions referred back to instructions given *at the time* that the particular evidence was introduced. The first problem with these instructions is that at the time that the evidence relating to CALJIC Nos. 2.04 and 2.05 was introduced, *no such limiting instructions were given.*

As detailed in the Statement of the Facts, Ruby Feliciano testified that she owned the car shown in Exhibit 47. She had given the car to Nunez to fix, but the car was later impounded. (8RT 1772-1776.) Later, Feliciano received a three-way call from Nunez's girlfriend and Nunez, who was in jail. (8RT 1783-1783.) Nunez said since she had gotten her car back she should "change what she said" to the detectives. (8RT 1783.) No limiting instruction was given at the time this evidence was admitted.

Thus, although the trial judge recognized that CALJIC Nos. 2.04 and 2.05 were not applicable to appellant, the judge's plainly erred in concluding that any prejudice would be eliminated because the jury would be told in CALJIC 2.07 and 2.09 that limitations on the consideration of evidence that had been given previously still applied. Because no limiting instructions had been given at the time the evidence was introduced, the perceived prophylactic effect of CALJIC Nos. 2.07 and 2.09 was nullified.

Indeed, far from being ameliorated by CALJIC Nos. 2.07 and 2.09, the likelihood that the jury would consider the evidence against appellant was actually heightened by CALJIC No. 1.11, which provides: "The word 'defendant' applies to each defendant unless you are instructed otherwise." (37 CT 10715, 14 RT 3157.) Because the jury had also been told that the use of the word "defendant" applies to both Satele and Nunez, unless otherwise instructed, the jury was effectively instructed to apply the word "defendant" in CALJIC No. 2.04 to both defendants, even though appellant was not involved in this attempt to suppress evidence. Thus, as given, the instructions told the jury to consider Nunez's alleged attempt to suppress evidence against appellant.

In fact, if the instructions in CALJIC Nos. 207 and 2.09 were followed, the jury would *only* limit its consideration of evidence to that evidence for which limiting instructions had been given originally, and it would not do so when no such instructions were given. Therefore, it must be presumed that they did not do so in regard to this evidence. Jurors are presumed to follow a court's admonitions

and instructions. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 13 *People v. Houston* (2005) 130 Cal.App.4th 279, 312)

Appellant anticipates that respondent may attempt to argue that the jury would not consider this evidence against appellant since it logically pertained to Nunez. However, as noted above, a jury is presumed to follow the court's instructions. Moreover, it is only because a jury is not trained in law and logic that instructions of any sort are needed. If a jury is mis-instructed, and that instruction is contrary to strict logic, it must be presumed that the jury followed the incorrect instruction.

Furthermore, although appellant's trial counsel did not specifically request that the instruction in CALJIC No. 2.05 be limited to appellant Nunez, this issue is not waived as to that instruction. Appellant's counsel had just made an identical request as to CALJIC No. 2.04 only to have that request denied. There is no reason why he should have expected the court to change its mind, and therefore an objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Arias* (1996) 13 Cal. 4th 92, 159.)

D. Prejudice.

Appellant was prejudiced by the failure of the trial court to limit this evidence. As previously noted, without proper instructions, and under the instructions given, the jury was likely to misuse this evidence against appellant.

Unless properly instructed as to the use of the testimony of Ruby Feliciano and Esther Collins, that evidence would have been used as evidence reflecting a consciousness of guilt on the part of appellant, even though it was only relevant to demonstrate a consciousness of guilt on the part of Nunez. If the jury had drawn the conclusion that appellant had something to hide and thus needed to fabricate or suppress evidence, it was likely to resolve any doubts it may have had of appellant's guilt against him.

Furthermore, because this evidence involved prior bad acts, the situation is comparable to the improper introduction of "other-crime" evidence against a defendant. The prejudicial effect of other crimes evidence is the motivating purpose behind Evidence Code section 1101. Evidence of other bad acts creates an "overstrong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts....[it creates] a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses." (1 Wigmore, Evidence §194.) "There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People* v. *Harris* (1994) 22 Cal.App.4th 1575, 1581.)

The court's errors improperly branded appellant with the acts of Nunez. As explained in *United States v. Hitt* (9th Cir. 1992) 981 F.2d 422, at p. 424, "It is bad enough for the jury to be unduly swayed by something that the defendant did; it's totally unacceptable for it to be prejudiced by something he seems to have done but in fact did not do."

The prejudicial effect of the errors was magnified here because the evidence against appellant was far from overwhelming. As previously explained, the prosecution's two main witnesses, Contreras and Vasquez, both had credibility problems which may have given the jury pause in reaching its decision. In such a situation, evidence which allows the jury to believe appellant has something to hide is powerful evidence that the defendant is guilty.

Furthermore, the prosecution's case relied upon guilt-by-association based upon the defendants' gang affiliation. In that respect, the case is similar to a conspiracy case, in which the parties' affiliation increases the danger that the jury will hold one defendant liable for the acts of another. As the Supreme Court has indicated, there is an increased danger of confusion causing prejudice in conspiracy cases.

> "As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself."

(*Krulewitch v. United States* (1949) 336. U.S. 440, 453.)

It has long been recognized that conspiracy cases present an unusually heightened danger of guilt by association. Although this case did not involve a charged conspiracy, the prosecution's theory of the case was that one defendant was aiding and abetting the other. It was therefore highly likely that the jury would have attributed the actions of one defendant to the other.

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.

(*Krulewitch v. United States*, *supra*, 336 U.S. 440, 454, con. Opn.)

Because this error impacted appellant's due process rights, prejudice must be evaluated under the standard of error applicable to deprivations of federal constitutional rights. Under this standard, the error 'compels reversal unless the reviewing court is 'able to declare a belief that it was harmless beyond a reasonable doubt.' " (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

In light of the weaknesses in the prosecution's case, the danger of confusion inherent in conspiracy cases, and the likelihood that the jury would misuse this evidence, it is clear that appellant was prejudiced by the failure of the trial court to correctly instruct the jury as to the proper use of this evidence.

Therefore, the judgment and verdict entered below must be reversed.

X

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO PRESENT REBUTTAL EVIDENCE THAT APPELLANT ALLEGEDLY STRUCK ANOTHER INMATE WHILE IN COUNTY JAIL.

The trial court abused its discretion is allowing the prosecutor to present rebuttal evidence that appellant struck another inmate in county jail. This evidence was admitted in violation of Evidence Code section 352 and also constituted improper rebuttal evidence. Because of its highly prejudicial nature, the error compels reversal of the judgment.

A. The Offer Of Proof And The Ruling Of The Court.

During the prosecution's case in chief, the Deputy District Attorney informed the court that he wished to present evidence that in the preceding two weeks appellant had "coldcocked" an Asian inmate in jail. The prosecutor explained that an Asian inmate was walking past appellant at a time when appellant's handcuffs had been removed, and that appellant had then punched the Asian inmate in the face with no apparent provocation. (7RT 1321.) The court did not rule on the prosecutor's request at that time.

During the defense case, witness Darnell Demery testified that he had never heard appellant use "the N-word" and had never known appellant to be aggressive. The prosecutor characterized Demery's testimony as evidence that appellant was easy-going and was not the type to get into fights. (10RT 2452.) The prosecutor contended that he should be permitted to rebut this testimony, stating, "I have information I have related to this court, two instances, I believe, if I recall correctly, that defendant Satele, attacking other inmates in the jail, when those people were restrained. ." (10RT 2452.)

In fact, the prosecutor's memory was not correct. The only prior reference the prosecutor had made to appellant's jail altercations was the proffer of evidence

regarding the assault on the Asian inmate described above (7RT 1321), and the prosecutor had not previously mentioned the alleged assault on the Afro-American inmate.

The defense objected, arguing that a jail environment is a more hostile and violent environment than the outside world, and therefore appellant's conduct in jail and his conduct in the outside were not related to each other. (10RT 2453.) The defense further argued that one would expect different behavior in the violent world of jail, so the evidence should not be admitted under Evidence Code section 352 because "it was not the same." (10RT 2453.) The defense explained that it did not "want to get into collateral stuff," and this evidence would be "opening the door, broad the question is here. " (10RT 2453.) The defense also noted that of the two incidents which the prosecution was then raising one involved an Afro-American inmate[30] and one involved an Asian inmate. (10RT 2454.) The court ruled that the probative value of this evidence was outweighed by its prejudicial nature and therefore prohibited the prosecution from presenting that evidence.

Later, during the testimony of Willie Guillory, a character witness for the defense who testified that he had never known appellant to go anything reflecting an animosity towards Afro-Americans, the prosecutor renewed his request to present evidence of appellant's alleged altercations in jail. The prosecution first referred to the testimony of Lewis Yablonski, the defense gang expert, which the prosecution characterized as saying there were "no fights inter-racial. " (11RT 2527.) Acknowledging the fact that the court had previously refused to allow this evidence, the prosecution stated, "[t]hey keep bringing it up and bringing it up. Now based upon this witness [Guillory], based upon Dr. Yoblonski , the court should allow me to get into it." (11RT 2527.)

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[30] This is the first reference to an altercation with an Afro-American inmate and refers the testimony of Deputy Larry Arias, who testified that in 1999 he was escorting inmate Keys, an Afro-American inmate, appellant approached Keys and hit Keys in the face (13RT 3119-3124.)

The prosecutor argued that the fact that appellant was "initially the aggressor to someone who was handcuffed, that shows racial animus and the defendant has opened the door numerous times." (11RT 2527-2528.) The defense argued that the mere fact that there was an altercation between two people of a different race did not show that the fight was motivated by race. (11RT 2528.) The court then held that it would allow the prosecution to present evidence of the incident involving the African-American inmate, stating that the testimony of Guillory was the second witness to testify as to "character and both were on the same issue." (11RT 2528-2529.)

On cross-examination, the prosecutor then asked Guillory if it would change Guillory's opinion of appellant to hear that appellant had struck a handcuffed African-American inmate when in jail. Guillory replied that he would find it "highly unusual," and that it would not describe the young man Guillory knew from high school. (11RT 2529-2560.)

Later, the prosecution presented the testimony of Deputy Larry Arias, who testified that in 1999 he was escorting inmates at the Los Angeles Jail, and while he was escorting inmate Keys, an Afro-American inmate, appellant approached Keys and hit Keys in the face with no apparent provocation. (13RT 3119-3124.)

B. The Relevant Law

Appellant respectfully submits that the court erred in permitting the prosecutor to present this testimony of Deputy Arias in rebuttal, thereby depriving appellant of a fair trial and due process of law. In addition, the late presentation of this witness also violated California statutory procedures and therefore also impaired appellant's 14th Amendment liberty interest. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346.)

1. The Evidence Was Inadmissible Under Evidence Code Section 352

Evidence Code section 352 states:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Under section 352, evidence is inadmissible if it poses "an intolerable risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1114, quoting *People v. Waidla* (2000) 22 Cal.4th 690, 724.)

In applying section 352 to exclude otherwise admissible proffered evidence, the trial court is required to weigh the countervailing factors. Analysis of the probative value of a piece of evidence requires a determination of the degree to which the evidence persuades the trier of fact that a particular fact exists and the relevance of the particular fact to the ultimate issues of the case. Evidence has probative value if it enhances the accuracy of jury's fact finding. That probative value is then weighed against the prejudice of confusing or misleading the jury by introducing evidence that improperly steers the jury to an emotional or irrational conclusion on the ultimate issues. Evidence is unfairly prejudicial when it detracts from the accuracy of fact finding by inducing the jury to commit an inferential error, i.e. the jury perceives the evidence to be logically probative of a fact when it is not, perceives the evidence to be more probative of fact than it logically is, or bases its decision on the ultimate issue on improper bias promoted by introduction of the evidence.

In *People v. Green* (1980) 27 Cal.3d 1, this court held that on a motion specifically invoking the discretion vested by section 352, a trial court must affirmatively show, on the record, that the judge did in fact weigh prejudice against probative value. This court explained that the reason for the rule was to furnish the appellate courts with the record necessary for meaningful review of any subsequent claim of abuse of discretion. Additionally, such an affirmative showing would ensure that the ruling on the motion was "the product of a mature and careful

reflection on the part of the judge." (*Id.* at p. 25; *People v. Frank* (1985) 38 Cal.3d 711, 731-732; *People v. Holt* (1984) 37 Cal.3d 436, 451-453.)

The failure of a trial court to properly examine the connection between evidence and the logical inference sought to be derive from it, and the failure to determine whether the evidence is truly relevant for that purpose, leads to what has been called was "an invitation to specious reasoning". (*People* v. *Valantine* (1988) 207 Cal.App.3d 697, 704.)

Because evidence of other misconduct gives rise to improper and excessive prejudice, this court has reiterated the principle that admission of this type of evidence "requires extremely careful analysis." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 and *People* v. *Balcolm* (1994) 7 Cal.4th 414, 422.)

It has long been observed that evidence of other prior offenses carries a strong danger of prejudice. (*People v. Smallwood* (1986) 42 Cal.3d 415 and *People v. Thompson* (1988) 45 Cal.3d 86, 109.) Evidence of prior violent acts is especially prejudicial. Moreover, evidence from which a jury could find a defendant poses a future danger if he receives a sentence of life in prison is an influential factor militating in favor of the death penalty. (*People v. Boyette* (2002) 29 Cal.4th 381, 446; *People v. Michaels* (2002) 28 Cal.4th 486, 540-541.)

The recognition of the prejudicial impact of this type of evidence is at the heart of the rules governing the admission of evidence of other wrongful acts on the part of a party to an action. When the probative value is nil, and the danger of prejudice is high, as is the case here, the wrongful admission of this evidence becomes a violation of the right to due process of law.

For example, *McKinney v. Rees*, *supra*, 993 F.2d 1378, the defendant's mother died of knife wounds that could have been made from any knife found in the house, including the kitchen knives and a knife the defendant's father was wearing on his belt around the time of the murder. None of the knives had any sign of blood on them. (*Id.* at p. 1382.) The trial court admitted evidence relating to various knives the defendant owned, including testimony that the defendant was

proud of his knife collection, and that he used a knife to scratch the words "Death is His" on the door in his dormitory room. In closing argument, the prosecutor described his case as concentrating on three things, one of which was the knives the defendant may have owned, arguing the connection the defendant had to any knives that could have been used in the crime was important. (*Ibid.*)

After reviewing the evidence in question, the court in *McKinney* concluded that some of the evidence, including the prior ownership of a particular knife that the defendant no longer owned at the time of the murder, was not relevant to any fact other than the defendant's character and the inference that he acted in conformity with that character[31]. (*Id.* at pp. 1381-1884.)

The *McKinney* court contrasted the lack of relevance of the evidence with the prejudicial effect created by presenting the image of the defendant as a person fascinated with knives. (*Ibid.*) The court held that because the other-acts evidence gave rise to no permissible inferences, because of the prejudicial nature of the evidence, and because the exclusion of such evidence is "an historically grounded rule of Anglo-American jurisprudence," the admission of such evidence may result in a violation of due process. (*Id.* at p. 1381, citing *Jammal* v. *Van de Kamp* (1991, 9th Cir.) 926 F.2d 918, 920 and *Dowling* v. *United States* (1990) 493 U.S. 342, 352 [110 S.Ct. 668, 107 L.Ed.2d 708].)

Applied to the instant case, it is clear that the evidence of appellant assaulting another inmate should have been excluded because its probative value was outweighed by the potential of its prejudicial impact. The mere fact that the prosecutor was able to articulate a rationale for introducing evidence did not transform prejudicial irrelevant evidence into admissible evidence.

First, it is essential to determine exactly what this evidence is actually

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[31] The court did acknowledge that one of the items of evidence complained of, that the defendant owned another particular knife, was "faintly relevant" to a material issue since the ownership of that knife and his presence in the house could give rise to an inference of opportunity. (*Id.* at p. 1384, fn 7.)

relevant to prove. Clearly, the relevance of this evidence for its proffered purpose-- i.e., showing appellant's racial bias-- it very low, at best.

Assuming *arguendo* that the altercation actually took place, the mere fact that appellant had an altercation with another inmate, with no other evidence, does not show or suggest what the motive for the altercation might have been. Had appellant used a racial slur prior to or after the assault, it might be possible to infer such a motive. However, in the situation described by the prosecutor, there was no evidence from which appellant's motive could be inferred, and the prosecutor was simply speculating that because the other inmate was Afro-American, appellant must have been motivated by racial animus in striking him. Without something more than the prosecutor's sheer speculation as to motive, the evidence was not relevant.

Secondly, it must be remembered that the prosecutor initially offered evidence of appellant's altercation with an Asian inmate. Later, the prosecutor sought to introduce evidence of altercations with two different inmates, an Asian inmate and a African-American inmate. If appellant actually engaged in altercations with inmates of two different ethnicities, as the prosecutor claimed, the basis of the prosecutor's speculation that the altercation was because of a hatred of African-Americans is severely undermined.

Furthermore, as discussed in greater detail below (*post*, at pp. 199, 201-202), the relevance of this evidence for rebuttal purposes is also nil because the fact that appellant struck a African-American inmate does not tend to disprove any of the facts shown by the defense evidence, namely that appellant's gang had not been involved in fights with a local African-American gang and that appellant did not have a history of racial animosity.

Thus, when the full context of appellant's behavior is examined, it is clear that the probative value of this evidence, for the purpose for which it was offered, is minimal at best.

Clearly, a court faced with evidence of unprovoked violence by appellant would recognize the tendency such evidence would have to impact both the jury's

decision to both convict and to later select the death penalty. The prejudicial impact would only be increased by the alleged fact that this attack was on a handcuffed, and therefore relatively defenseless victim.

Furthermore, while there was no evidence of a racial motive for the alleged attack, there was a grave danger that the jurors, not being experts in logic, would be likely to accept the speculative argument of the prosecutor, a person the jury is likely to hold in high regard. Racially motivated crimes are particularly odious, and under the circumstances of this case, the presence of racial hatred, if found, would tend to expose appellant to a special circumstance (Pen. Code § 190.2, subd. (a)(16)). The jury was therefore likely to give even greater weight to this evidence in determining whether to impose the death penalty. Indeed, it is hard to imagine many acts that would be more likely to persuade the jury to select death than racially motivated, otherwise unprovoked acts of violence in prison against a helpless victim.

Consequently, the admission of this evidence denied appellant the right to due process of law, requiring that the conviction be reversed unless it can be said that the error was harmless beyond a reasonable doubt, which is not a conclusion that can be reached in this case. (*Chapman v. California, supra*, 386 U.S. 18.)

In summary, it is clear that the prejudicial impact of this evidence outweighs its probative value and therefore the trial court erred in admitting this evidence, requiring a reversal of the conviction entered below.

2. The Evidence Was Not Proper Rebuttal Evidence

As noted earlier, the evidence was not only inadmissible under the principles of Evidence Code section 352, but also constituted improper rebuttal evidence outside the scope of the California statutory scheme.

"Rebuttal evidence is generally defined as evidence addressed to the evidence produced by the opposite party and does not include mere cumulative evidence of the plaintiff's case in chief." (*Edgar v. Workmen's Compensation*

Appeals Bd. (1966) 246 Cal.App.2d 660, 665.)

Penal Code section 1093 sets forth the order in which the components of a criminal case must be presented: the reading of the information; the presentation of opening statements; the presentation of the prosecution case; and the presentation of the defense case. (Pen. Code §1093, subds. (a), (b), and (c).) Subdivision (d) of this section states that "The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." (Pen. Code §1093, subd. (d).)

In interpreting this section, this court has often held that rebuttal is "restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*People v. Carter* (1957) 48 Cal.2d 737, 753-754; *People v. Harrison* (1963) 59 Cal.2d 622, 628.) "Thus, proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime." (*People v. Carter, supra*, 48 Cal.2d, at p. 753.)

A prosecutor's abuse of the purpose of the restriction on rebuttal is misconduct. "[I]t is improper for the prosecutor to withhold evidence which is properly a part of his case in chief and offer it after the defense has closed its case." (*People v. Harrison, supra*, 59 Cal.2d, at p. 628.) "[The] People have no right to withhold a material part of their evidence which could as well be used in their case in chief, for the sole purpose of using it in rebuttal." (*People v. Miller*(1963) 211 Cal.App.2d 569, 575; *People v. Robinson* (1960) 179 Cal.App.2d 624, 631.) "The tactic of withholding with calculation a vital part of the People's case in chief for use in rebuttal, is frowned upon and will, under certain circumstances, be considered prejudicial error." (*People v. Contreras* (1964) 226 Cal.App.2d 700, 702.) "If the People have a number of witnesses who are able to identify the defendant as the perpetrator of an offense they should use them all in

their case in chief, or so many of them as they propose to use in the trial. They have no right to hold out half of them for use in rebuttal." (*People v. Gomez* (1963) 215 Cal.App.2d 314, 317.)

In determining whether the evidence in this case constituted admissible rebuttal evidence, it is important to determine precisely what this evidence was truly relevant to prove. An examination of the evidence of the assault on Keys, in light of what was actually proven by the defense, demonstrates that that this evidence was not rebuttal evidence because it did not address the defense evidence.

While the prosecutor claimed the evidence was necessary to rebut the testimony of Yablonski, it must be remembered that Yablonski testified that the West Side Wilmas did not get into fights with the Pirus, a local Afro-American gang which shared some of the same territory. The fact that appellant was in an altercation with a African-American inmate, the cause of which was purely a matter of speculation, did not rebut Yablonski's testimony.

Similarly, the prosecution stated that this evidence was necessary in light of the testimony of Guillory. However, Guillory merely testified he knew of no racial animosity on the part of appellant when appellant was in high school. Again, showing appellant was involved in a fight with a African-American inmate did not refute Guillory's testimony, absent a showing of that fight being motivated by racial animosity. Particularly in light of the fact that appellant allegedly was involved in a similar altercation with a non-Afro-American inmate, the prosecutor's contention that the incident with Keys was racially motivated is nothing more than speculation. Both simple logic and an examination of relevant case law demonstrates that this was not competent rebuttal evidence.

For example, in *People v. Carter*, *supra*, the defendant was charged with the murder of a Chico bartender named Carey. A large amount of physical and testimonial evidence was presented connecting the defendant with the crime. In addition, Carey's empty wallet, a wrench, and a red cap were found in Edgar

Slough, a watercourse near the defendant's house. The defendant testified, denied killing Carey, and denied that he had ever been to Edgar Slough. On rebuttal, the prosecution presented in evidence the red cap, and showed that it contained hairs which were indistinguishable from the defendant's hair.

On appeal, the defendant challenged this as improper rebuttal. The People argued that since the defendant denied on the stand that he had been to Edgar Slough or left the wallet or wrench there, the cap was properly admitted to rebut this testimony or impeach defendant's credibility. This court disagreed, stating that "proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*Id.* at pp. 753-754.) Applying this rule to the facts before it, this court stated as follows:

> The red cap found in Edgar Slough was crucial evidence tending to show that defendant had put the wallet and wrench in the slough and therefore had beaten and robbed Carey. Defendant's plea made it clear that he would not admit having gone to the slough, and his denial on the stand furnished no new matter for rebuttal. The evidence should have been put in as part of the case in chief. [Citation.]

(*Id.* at p. 754.)

In *People v. Daniels* (1991) 52 Cal.3d 815, a defendant was accused of killing police officers. The prosecution's case included the testimony of several witnesses indicating that the defendant had admitted the killings to them. The defendant presented expert testimony to the effect that a bullet wound to his right hand had damaged the ulnar nerve in such a way as to make it impossible for him to shoot a gun. (*Id.* at p. 859.)

In rebuttal, the prosecution presented evidence contradicting the expert testimony and also presented the testimony of a nurse named Gordon, who

testified that the defendant had said to her that "the only thing he felt bad for what he did to the police officers was their wives . . . . What he did to their wives." (*Ibid.*) Citing *Carter*, this court held that the nurse's testimony was improper rebuttal.

> In *Carter*, the defendant testified that he had not been present at the murder scene; the court nevertheless held that evidence showing that he had been present was improper rebuttal, since proof of his presence was an essential part of the prosecution case-in-chief. ([Citation].) The present case is an even stronger case for exclusion, since here defendant did not testify that he did not kill the officers, but only presented evidence, such as the injury to his hand, from which the jury might infer that he did not kill them. And the fact which the rebuttal evidence tended to prove – that defendant killed the officers – is obviously central to the criminal prosecution, and something which should be proved as part of the prosecution case-in-chief.

(*Id.* at pp. 859-860.)

In this case, as in *Carter* and *Daniels*, the prosecutor introduced rebuttal evidence which, if it had been truly relevant to show racial animus, should have been presented during his case-in-chief. In fact, the prosecution did introduce evidence relating to the possible racial motivation of the offenses, including evidence that Contreras heard appellant say that they had been "hunting for niggers." (9RT 1961-1962.) However, nothing in the defense case produced any new evidence or contention that the Keys evidence was competent to rebut.

As noted above, the fact that appellant was in a fight with Keys did not refute the testimony of Yablonski that the Wilmas did not get into fights with the Pirus. Nor did it refute the testimony of Guillory that he knew of no racial animosity on the part of appellant when appellant was in high school. Because rebuttal is "restricted to evidence made necessary by the defendant's case" (*ante*, at p. 196), the evidence of the Keys altercation was inadmissible on rebuttal. Moreover, as the defense argued below, a person's conduct in jail is not related to

his conduct in the outside world.

As explained above (*ante*, at p. 196), the fact that appellant was involved in an altercation with an Afro-American is not relevant to prove racial bias without other evidence indicating the cause of the altercation, a fact not proven, particularly in light of the fact that appellant was also involved in a similar altercation with an Asian inmate, thereby negating the inference of animosity towards Afro-Americans as a motive for the incidents.

Thus, in spite of the prosecution's characterization of the defense as having repeatedly bringing up a lack of racial animosity on the part of appellant (11RT 2527), as the defense correctly argued the fact that two people of a different race were in a fight did not show that the fight was motivated by race. (11RT 2528.)

Specifically, the fact that appellant punched Keys does not disprove Yablonski's testimony that the Wilmas did not fight the Pirus. Nor does it disprove Guillory's testimony that he did not know appellant to have exhibited racial animosity. Furthermore, as the defense correctly explained (10RT 2453), this proffered testimony did not rebut evidence the defense had presented because a person's conduct in jail is not related to his conduct in the outside world.

Finally, because no "good reason, in furtherance of justice" (Pen. Code §1093, subd. (d)), was shown, the court erred in allowing the prosecution to present this evidence which should have been part of the state's original case.

Because of the prejudicial impact of this evidence, in comparison to its probative value, as described above (*ante*, at p. 196.), it is clear that appellant was prejudiced by the introduction of this evidence. Therefore, a reversal of the judgment of conviction is required.

XI

THE PROSECUTOR'S MISCONDUCT IN ARGUMENT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS AND COMPELS REVERSAL.

The prosecutor committed several forms of misconduct in closing argument, including vouching for the veracity of a prosecution witness and presenting inconsistent factual arguments to the jury, thereby depriving appellant of his due process right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

A. Vouching for Witness

The prosecutor blatantly and improperly vouched for the veracity of prosecution witness Ernie Vasquez. In his arguments to the jury, the prosecutor mentioned the fact that Vasquez had identified a photograph of Juan Carlos Caballero as the person who was with appellants on the night of the crimes. The prosecutor then said, "What a coincidence. Because *I guarantee that is the truth.* What he testified to was corroborated." (14RT 3232.)

When the defense objected to this "guarantee," the judge overruled the objections, stating only, "Your objection is improper argument. State a legal objection." (14RT 3232.) The prosecutor's purported "guarantee" constituted clear misconduct, and the court erred in overruling the objection.

Later, regarding the tape made of appellants' conversation in the van, after the defense argued that portions were inaudible, the prosecutor stated, "You will hear it. I will back up my words. You will hear this. I will stake my reputation on that." (14RT 3404-3405.)

A defense objection to this comment was sustained. (14RT 3405.)

Returning to the subject a short time later, after being told he should not stake his reputation on his argument, the prosecutor noted, "I shouldn't say I state my reputation." (14RT 3411.)

Improper vouching for the strength of the prosecution's case "'involves an attempt to bolster a witness by reference to facts outside the record.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 206, quoting *People v. Williams* (1997) 16 Cal.4th 153, 257.) It is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. (*Huggins*, at 207.)

Vouching is prohibited out of the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors. (*United States v. Edwards* (9th Cir. 1998) 154 F.3d 915, 921.) The prohibition against vouching was designed to prevent prosecutors from taking advantage of the "tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the 'fundamental distinctions' between advocates and witnesses." (*Id.* at p. 922.)

In *United States v. Rosario-Diaz* (1st Cir. 2000) 202 F.3d 54 the court noted that prosecutors may not place the prestige of the government behind a witness by making personal assurances about the witness's credibility or indicating that facts not before the jury support the witness's testimony. (*Id.* at p. 65, see also *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273.)

Vouching by the prosecutor creates two related dangers. It can convey the impression that there was evidence known by the Deputy District Attorney, but not presented to the jury, which supports the charges. As such, it can impair the defendant's right to be tried solely on the basis of the evidence presented to the jury. Furthermore; vouching "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather its own view of the evidence." (*United States. v. Young* (1985) 470 U.S. 1, 18-19.) The prohibition against vouching is related to the rule that the prosecutor may not express his personal opinion about the guilt of the defendant. (E.g., see *People v. Kirkes* (1952) 39 Cal.2d 719; *People* v. *Edgar* (1917) 34 Cal.App. 459, 468.)

In analyzing whether arguments of the prosecutor constitute prejudicial vouching the relevant factors include the form of vouching, how much of an implication is created that the prosecutor has additional knowledge, the degree of personal opinion expressed; how much the witness's credibility had been attacked, and the importance of the witness's testimony to the case overall. (*United States v. Daas* (9th Cir. 1999) 198 F.3d 1167, 1178.) A court should look to the comments to determine what a jury would naturally take those comments to mean. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1303; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1067.)

It is clear that the prosecutor's comments fit the factors described in the preceding paragraph. The comment that the prosecutor was guaranteeing veracity of Vasquez came after the defense no longer had an opportunity to counter that improper comment by presenting further evidence.

Having "guaranteed" the truth of the testimony and staked his reputation on the evidence, no higher degree of personal opinion could have been expressed. The jury would have understood these comments to imply some knowledge outside of that presented to the jury by reason of which the prosecutor was able to make this type of guarantee.

If Vasquez's veracity was evident from his demeanor and the fact that his testimony comported with other evidence, there is no need for a guarantee that he was telling the truth. Indeed, it was only if the guarantor had additional knowledge not presented to the jury that his warranty was meaningful or necessary.

Vasquez's testimony was the core of the prosecution's case. Vasquez testified as an eyewitness to the crime that he saw the people in the car and they "might have been" appellant and Nunez. (7RT 1394-1395, 1407.) The jail house admissions Vasquez later described corroborated this weak identification.

However, in spite of the apparent importance of this evidence, there were serious problems with Vasquez's testimony. Vasquez was not the type of

character who would inspire confidence in the normal juror. Vasquez was first introduced to the jury as someone who was driving around near the crime scene late at night, using crack cocaine, and trying to sell a VCR that someone had "given" him. (5RT 1121-1123.)

The jury then learned he was arrested and jailed on a number of warrants and suspected vehicle theft. Vasquez then testified that he encountered appellant in jail and that appellant, a total stranger, confessed to him that he committed or participated in a dual murder. (6RT 1160, 1164-1166 1209.) He then testified he was transferred to the Lynwood Jail in order to be closer to his family, and here he happened to encounter codefendant Nunez, another total stranger, who also confessed to killing the victims in this case. (6RT 1214, 1225.) Apart from the inherent implausibility of this testimony, the jury also learned that Vasquez had hopes for the $50,000 reward being offered in this case and had also received a reduced sentence and other benefits for testifying.

Clearly, any reasonable jury would question the credibility of Ernie Vasquez. Moreover, jury instructions cautioned the jury to be wary of a witness who had a bias, interest, or motive (CALJIC No. 2.20; 37CT 10729) and to view the testimony of an in-custody informant with caution and to consider the extent to which it may have been influenced by the receipt or expectation of benefits from the party calling that witness (CALJIC No. 3.20; 37CT 10756).

As a result, the guarantee went directly to one of the most crucial pillars of the prosecutor's case.

By contrast, the jury was bound to have a high regard for the Deputy District Attorney, who was a representative of the People charged with the responsibility for protecting the public from crime. If the Deputy District Attorney was willing to guarantee the veracity of a witness, the jury was likely to accord great weight to that guarantee.

Likewise, the prosecutor staking his reputation on the evidence dealt with the issue of what had been said in the van when appellant and Nunez were

surreptitious taped. The defense argued that the tapes were inaudible and difficult to understand. This gap was filled in by the prosecutor's personal assurance that the conversation inside the van was the conversation he had presented to the jury.

The jury would have accepted the conversation of the two defendants as strong corroboration of the other evidence in the case if it believed that the conversation contained harmful admissions.

Thus, both of comments centered on core aspects of the prosecutor's case.

In summary, the prosecutor improperly vouched for the veracity of the witnesses, depriving appellant of the right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States

B. Arguing Inconsistent Factual Theories

As explained above (*ante*, at pp. 52-53), *In re Sakarias* (2005) 35 Cal.4th 140 held that it was improper for a prosecutor to argue two inconsistent factual theories in the separate trials of two defendants accused of participating in the same murder. In *Sakarias* the prosecutor argued in the trial of each defendant that that particular defendant had inflicted the more serious injuries on the victim. *Sakarias* explained that fundamental fairness does not allow the prosecution to attribute to two defendants an act which only one defendant could have committed because this results in the state urging for an increase in culpability in one of the cases on a false factual basis, which is inconsistent with the goal of a trial as a search for truth. (*Id.* at p. 155-156.) In short, in the absence of a good faith justification, "[c]ausing two defendants to be sentenced to death by presenting inconsistent arguments in separate proceedings ... undermines the fairness of the judicial *process and may precipitate inappropriate results.*" (Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) 89 Cal. L.Rev. 1423, 1425 (hereafter *Prosecutorial Inconsistency*).)

In this case, the prosecutor argued at the guilt/innocence phase that he did

not know and did not prove who fired the fatal shots, and then at the penalty phase argued that appellant was the shooter. (14RT 3214, 3222-3223, 17RT 4193-4295) No new evidence was introduced between the times that the prosecutor made these two arguments, and the prosecutor offered no explanation for this sudden change in factual theories at the end of trial.

It is true that in the guilt phase there was evidence of two admissions by appellant as to his involvement, but only one admission by Nunez. However, the fact that appellant made two alleged admissions gives no greater probative value to the evidence than if he had made one. "Saying the same thing twice gives it no more weight." (*Hammer* v. *Gross* (9th Cir., 1991) 932 F.2d 842, 852, J. Kozinski.) In any event, this evidence was all presented at the guilt phase, so no new evidence was admitted at the penalty phase that would allow for this shift of the People's theory of the case.

As a result of this shift in theory, the prosecutor used facts to increase appellant's culpability without proving those facts first in the guilt phase. Moreover, the prosecutor acknowledged that he had no idea who the shooter was, so his sudden inconsistent assertion that Satele was the shooter meant that one or the other theory was false. This was misconduct and is inconsistent with the theory that trials are a search for the truth. The fact that this shift in factual theory occurred in the penalty phase is not relevant. Both of the phases are part of the trial proceedings, and the damage to the truth-seeking function of the trial court occurs whether the two inconsistent theories are presented in two different trials or two different portions of one trial.

Furthermore, because of the trust that the jury is likely to place in the attorney for "the People of the State of California," any misconduct by the prosecution undermines the reliability of the verdict in violation of the Eighth and Fourteenth Amendments, which impose heightened reliability requirements in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gilmore v. Taylor, supra,* 508 U.S. 333, 334; *Johnson v. Mississippi, supra,* 486 U.S. 578,

584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

The misconduct was profoundly prejudicial to appellant. As explained in Argument I (pp. 32-33), only one person could have actually fired the shots that killed Robinson and Fuller. Because the prosecutor at the guilt/innocence phase presented no theory regarding which defendant actually fired the shots, the jury was never required to determine who the shooter was, and it was therefore easier for the jury to convict both defendants without grappling with difficult legal questions of aiding and abetting. As explained above, this is exactly what the jury did, finding that both appellant and Nunez personally discharged the weapon, even though it was clear from the evidence that only one person could have fired the firearm that night.

However, when the prosecutor suddenly asserted at the penalty phase, without any evidentiary support, that appellant was the shooter, his unexplained change of theory profoundly prejudiced appellant. As the prosecutor must have known, he was far more likely to obtain a death verdict against the shooter than against an aider and abettor, as that person is normally regarded as the more culpable defendant. By suddenly asserting that appellant was the shooter, the prosecutor was able to obtain a death verdict against him that he might not have obtained had the jury had a lingering doubt as to whether appellant actually fired the shots or was merely a passenger in the car.

Appellant was prejudiced at the penalty phase in the most obvious manner in that the prosecutor did not prove who the shooter was at the guilt phase, as the prosecutor acknowledged he had not. However, by later arguing in the penalty phase that appellant was the actual shooter the prosecutor made it much more likely that the jury to sentence him to death. (*Enmund v. Florida*, *supra*, 458 U.S. 782.)

Finally, appellant notes that in *Sakarias* this court explained that when "the available evidence points clearly to the truth of one theory and the falsity of the other, only the defendant against whom the false theory was used can show

constitutionally significant prejudice." (*In re Sakarias*, *supra*, 35 Cal.4th at 156.) Appellant has elsewhere argued that the most plausible view of the evidence is that Nunez, not appellant, fired the rifle. However, appellant submits that when the evidence does not conclusively point to the truth of one theory, the misconduct must be held prejudicial as to both defendants. To hold that neither defendant should obtain relief in such a case would not merely allow but encourage prosecutors to engage in misconduct with no relief for either party, even though one must have been prejudiced.

In this case, the evidence does not clearly point to who the shooter was. Therefore, it must be regarded as prejudicial to both.

C. Conclusion

For the foregoing reasons, it is clear that the prosecutor committed misconduct by vouching for the veracity of a prosecution witness and presenting inconsistent factual arguments to the jury, thereby depriving appellant of the Due Process right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

XII

GUILT AND PENALTY PHASE VERDICTS WERE RENDERED AGAINST APPELLANT BY A JURY OF FEWER THAN TWELVE SWORN JURORS; THE RESULTING STRUCTURAL TRIAL DEFECT REQUIRES REVERSAL

The judgment of conviction must be reversed because the verdicts rendered against appellant were rendered by fewer than the constitutionally mandated twelve sworn jurors. Here, the jurors were sworn to the statutorily prescribed oath for trial jurors and the alternate jurors were separately sworn to a different "alternate juror's oath." Soon after the jury was sworn, the court discharged a trial juror and replaced her with an alternate juror. During penalty deliberations, the court discharged two jurors in seriatim and replaced each with an alternate. In each instance, the court neglected to have the alternate jurors swear to the prescribed oath for trial jurors. Thus, at both the guilt and penalty phases of their trial, the jury that tried the cause was not comprised of the requisite twelve sworn trial jurors. This violation of appellant's constitutionally mandated entitlement created structural trial error requiring that the judgment of conviction be reversed without resort to prejudice analysis.

A. The Jury Selection Process And The Subsequent Seating Of Alternates As Trial Jurors

The prospective jurors in this case were divided into four groups of approximately 50 jurors. As to each group, the selection process began with the administration of the following acknowledgment and agreement required by Code of Civil Procedure section 232, subdivision (a):

> "You, and each of you,[32] do understand and agree that you will accurately and truthfully answer all questions propounded to you concerning your qualifications and competency to serve as a trial

[32] The phrase "and each of you" was omitted from the oath administered to the first of the four groups. (2 RT 330.)

juror in the cause now pending before this court, and that failure to do so may subject you to criminal prosecution."

(2RT 330, 354, 366-367, 376-377.)

Each group of jurors answered collectively in the affirmative. (2RT 330, 354, 366-367, 376-377.)

After the twelve trial jurors were accepted by the parties, the court invited the courtroom clerk to swear the panel, as is required by Code of Civil Procedure section 232, subdivision (b). The following oath was administered:

"You, and each of you, do understand and agree that you will well and truly try the cause now pending before this court and render a true verdict according to the evidence presented to you and the instructions of this court."

(4RT 846.)

The 12 trial jurors collectively answered, "I do." (4RT 846.)

The court and parties next agreed to select six alternate jurors. (4RT 847-848.) When the six alternates were chosen, the court clerk administered the following oath:

"You understand and agree that you will act as an alternate juror in the case now pending before this court by listening to the evidence and instructions of this court, and will act as a trial juror when called up to do so."

(4RT 856-857.)

The six alternate jurors collectively answered, "I will." (4RT 856-857.)

After the alternate jurors were sworn, the court excused the jurors for the weekend and ordered them to return on the following Monday. (4RT 859.)

Juror No. 5 (Juror No. 9889) remained behind in the courtroom and advised court and counsel that she was unable to serve as a trial juror because she socialized with law enforcement officers and was in frequent contact with her

brother, a deputy district attorney. Subsequently, the court found the juror was biased in favor of the prosecution and excused her for cause. (4RT 871-872.)

When trial reconvened, the court seated alternate Juror No. 1 (Juror No. 4965) as Juror No. 5. The juror's acknowledgment and agreement taken by the 12 original trial jurors and set forth in Code of Civil Procedure section 232, subdivision (b), was not administered to Juror No. 4965 at that time or at any later point in the trial. (4RT 876.)

Later in the trial, during penalty phase deliberations, the trial court excused two trial jurors for cause.[33] The court excused Juror No. 10 and replaced her with alternate Juror No. 2 (Juror No. 8971) (18RT 4463, 4470.) The court subsequently excused Juror No. 9 and seated alternate Juror No. 4 (Juror No. 2211)[34] in her place. Neither newly seated Juror No. 10 nor newly seated Juror No. 9 was ever administered the juror's acknowledgment and agreement taken by the 12 original trial jurors and set forth in Code of Civil Procedure section 232, subdivision (b), at the time either was seated as a trial juror or at any later point in the trial. (18RT 4470-4471, 4491-4492.)

B. The Right To A Jury Trial Encompasses The Right To A Jury Of Twelve Sworn Jurors

"The right to trial by jury in criminal cases derives from common law and is secured by both the federal and state constitutions. [Citation.]" (*People v. Trejo* (1990) 217 Cal.App.3d 1026, 1029; U.S. Const., Art. III, § 2, cl. 3, and the Sixth and Fourteenth Amendments; Cal.Const., art. 1, § 16.) A jury trial in a criminal case in a state court is now a federal constitutional right, unless the charge is of a "petty offense." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 88 S.Ct. 1444, 1447,

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[33] In arguments XVII and XVIII in this brief, Appellant asserts the trial court erred in discharging these deliberating jurors.

[34] Alternate juror number three was excused by the court for hardship reasons pertaining to his prepaid, preplanned vacation. (18 RT 4465-4466.)

20 L.Ed.2d 491, 496; 5 Witkin and Epstein, *Cal. Crim. Law* (3d ed.), Criminal Trial, §438.)

The federal constitutional guarantee of a trial by jury does not require trial by exactly 12 persons. Thus, a state criminal jury of six persons is not unconstitutional, though a state may not try a criminal defendant before a jury of five persons. (*Williams v. Florida* (1970) 399 U.S. 78, 103; *Ballew v. Georgia* (1978) 435 U.S. 223, 245.)

The California Constitution, however, mandates trial by twelve jurors in felony criminal cases:

> "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> "....
>
> "In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court."

(Cal. Const., Art. I, §16.)

"The [California] Constitution assures *the essentials of a common law jury trial in felony cases*, and these, not subject to legislative or judicial curtailment, are (a) the number of jurors, (b) impartiality of the jurors, and (c) unanimity of the verdict. (*People v. Howard* (1930) 211 C. 322, 324, 295 P. 333; *People v. Richardson* (1934) 138 C.A. 404, 409, 32 P.2d 433; *People v. Bruneman* (1935) 4 C.A.2d 75, 79; see *People v. Galloway* (1927) 202 C. 81, 92 [impartiality]; *People v. Diaz* (1951) 105 C.A.2d 690, 697 [impartiality]." (5 Witkin and Epstein Cal. Crim. Law (3d ed.), Criminal Trial, §437; emphasis added.)

Appellant, who was charged with murder, was entitled to be tried by a jury of twelve persons absent a waiver of that right. (*People v. Dyer* (1961) 188 Cal.App.2d 646.)

In criminal cases, the waiver of the right to be tried by a 12-person jury must be "expressed in open court by the defendant and the defendant's counsel." (Cal. Const., Art. I, §16.) This provision has been strictly construed not only to require a waiver by the defendant personally, but also to require expression of the waiver in words. (See *People v. Holmes* (1960) 54 C.2d 442, 443 ["the waiver must be so expressed and will not be implied from a defendant's conduct"].) An express personal waiver by the defendant of the right to a jury trial is required for a court trial. Anything less requires reversal of a resulting conviction. (*People v. Ernst* (1994) 8 C.4th 441, 448.) There was no equivalent waiver by appellant here.

Appellant has a constitutional right to a fair trial by an impartial jury under both the federal and California Constitutions. (*People v. Banner* (1992) 3 Cal.App.4th 1315, 1323-1324.) Although there is no state or federal constitutional provision requiring that the jury be sworn or dictating the content of the juror's oath, courts have held that an entire failure to swear the jury renders a conviction a nullity. (See, e.g., *People v. Pelton* (1931) 116 Cal.App.Supp. 789; *State v. Godfrey* (Ariz.App. 1983) 666 P.2d 1080, 1082; *Foshee v. State* (Ala.Crim.App. 1995) 672 So.2d 1387.) These courts reason that the oath is an important element of the constitutional guarantee to a trial by an "impartial" jury. "'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]" (*People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

If the entire failure to swear the jury renders a conviction a nullity, it follows that a defendant's constitutionally protected right to a unanimous verdict

would operate to render a conviction a nullity when it is reached by a jury with even one member who is not properly sworn.

In California, numerous provisions of the Code of Civil Procedure and Penal Code governing jury selection in criminal cases were repealed and replaced in 1989 with the "Trial Jury Selection and Management Act" (Trial Jury Act). (Code of Civ. Proc., §§ 190-237.)

Code of Civil Procedure section 192, a section within that act, states: "This chapter applies to the selection of jurors, and the formation of trial juries, for both civil and criminal cases, in all trial courts of the state." The Trial Jury Act thus governs the jury selection process in appellant's case. That this is so is acknowledged by one of the few provisions of the Penal Code dealing with jury selection not repealed by the Trial Jury Act. That provision, Penal Code section 1046, provides that criminal trial juries are formed in the same manner as are trial juries in civil actions.

Trial jurors are defined by Code of Civil Procedure section 194, subdivision (o), as follows: "Trial jurors" are those jurors *sworn* to try and determine by verdict a question of fact." (Italics added.)

A trial jury is defined by Code of Civil Procedure section 194, subdivision (p), as follows:

> "Trial jury" means a body of persons selected from the citizens of the area served by the court and *sworn* to try and determine by verdict a question of fact." (Emphasis added.)

This requirement that a trial jury in a criminal case be comprised only of jurors *sworn* to try the cause is echoed in Penal Code section 1093, which governs the order of proceedings at trial. The prefatory clause in that section states, "The jury having been impaneled and *sworn*, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court: . . ." (Pen. Code, § 1093, in relevant part; emphasis added.)

Further demonstration that a trial jury in a criminal case must be comprised only of jurors *sworn* to try the cause may be found in Penal Code section 1089, another of the few Penal Code provisions surviving the Trial Jury Act. Section 1089 establishes the procedure for the selection and seating of alternate jurors and expressly states not only the requirement that the jury must be sworn, but also expressly requires that the alternate jurors be given the same oath as the trial jurors, which was not done here. Penal Code section 1089 provides in relevant part:

> Whenever, in the opinion of a judge of a superior court about to try a defendant against whom has been filed any . . . information, . . . the trial is likely to be a protracted one, . . . immediately after the jury is impaneled and *sworn*, the court may direct the calling of one or more additional jurors . . . to be known as "alternate jurors."
>
> "The alternate jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already *sworn*, and be subject to the same examination and challenges. . . .
>
> "The alternate jurors shall be seated so as to have equal power and facility for seeing and hearing the proceedings in the case, *and shall take the same oath as the jurors already selected*, and must attend at all times upon the trial of the cause in company with the other jurors. . . .

(Pen. Code, § 1089; emphasis added.)

Thus, Penal Code section 1089, in consonance with all other pertinent legislation regulating criminal jury trials, requires that criminal trial jurors must be sworn to try the cause before them. (See, e.g., Code Civ. Proc., § 234, providing for alternate jurors in civil and criminal actions in language paralleling that of Penal Code section 1089.)

It is thus readily established that a trial juror or a member of a trial jury

must be *sworn* to try and determine by verdict a question of fact.[35]

C. Neither the Required Oath, Nor Its Equivalent, Was Administered Here

As explained above (*ante*, at pp. 209-210), Code of Civil Procedure section 232, subdivision (b), governs the swearing of trial jurors, requiring an oath that they will "truly try the cause now pending before [the] court, and a true verdict render according only to the evidence presented ...and the instructions of the court." (*People v. Chavez* (1991) 231 Cal.App.3d 1471, 1484.) In the present case, the acknowledgment set forth in Code of Civil Procedure section 232, subdivision (b), was never administered to Jurors Nos. 4965, 8971, and 2211, all alternate jurors who were subsequently seated as trial jurors.

Although Penal Code section 1089 requires that alternate jurors "shall take the same oath as the jurors already selected," the court in this case administered a different oath to the alternate jurors. (See *People v. Gore* (1993) 18 Cal.App.4th 692, 704; *People v. Burgess* (1988) 296 Cal.App.3d 762, 768.) That oath, set forth above and reproduced here to facilitate its review, fails to duplicate the trial juror's oath in important aspects. The oath taken by the alternate jurors did not advise

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[35] The "Trial Process" page of the "Jury Information Resource Center" posted at the official website of the California Courts (http://www.courtinfo.ca.gov/jury/step1.htm) informs the public and potential jurors about the significance and importance of the jurors' oath and the oath-taking process:

"The process of questioning and excusing jurors continues until 12 persons are accepted as jurors for the trial. Alternate jurors may also be selected. The judge and attorneys agree that these jurors are qualified to decide impartially and intelligently the factual issues in the case. When the selection of the jury is completed, the jurors take the following oath:"

"Do you, and each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?"

"As a juror you should think seriously about the oath before taking it. The oath means you give your word to reach your verdict upon only the evidence presented in the trial and the court's instructions about the law. You cannot consider any other evidence or instruction other than those given by the court in the case before you. Remember that your role as a juror is as important as the judge's in making sure that justice is done."

them of their primary duty as a juror, i.e., to render a true verdict "according only to the evidence presented to [them] and to the instructions of the court." Moreover, and equally as significant, the alternate jurors' oath failed to obtain the juror's agreement to render a verdict according only to the evidence presented and the instructions of the court. The alternate jurors at appellant's trial were sworn to the following oath.

> "You understand and agree that you will act as an alternate juror in the case now pending before this court by listening to the evidence and instructions of this court, and will act as a trial juror when called up to do so."

(4RT 856-857.)

Furthermore, ambiguity attends the language of the oath taken by the alternate jurors because it is not clear whether it binds the alternate juror to properly conduct him or herself as an alternate juror or binds the person to "act as a trial juror," establishing a further ambiguity, if called upon to do so.

Whichever the intended result, it is nevertheless clear that a significant aspect of the juror's oath as set forth in Code of Civil Procedure section 232, subdivision (b), is omitted, to wit, the agreement to render a true verdict according only to the evidence presented to them and to the instructions of the court.[36]

Because that is the case, the alternate juror's oath administered in this case may not be found to be the equivalent of the required oath.

A juror's obligation to base his or her decision on the facts and the law is also set forth in CALJIC No. 1.00. Appellant has reviewed this instruction as it was given to his jury to see whether the instruction might be viewed as a substitute

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[36] The importance of the juror's oath in the context of a criminal trial was recognized by this court in *People v. Holloway* (1990) 50 Cal.3d 1098. There, the Court held it is misconduct for a juror to receive information outside of court relating to the pending case because jurors in a criminal action are sworn to render a verdict according to the evidence and made specific reference to Code of Civil Procedure section 232, subdivision (b). (*Id.* at p. 1108.)

for the oath.[37] While the instruction informs the jurors that they must accept and follow the law as it is stated to them and that they must apply the law to the facts, the instruction is not a substitute for the oath because an important component of the oath, *the juror's agreement* to base his or her verdict only upon the facts and the law, is absent.

Code of Civil Procedure section 232, subdivision (b), requires that the oath, as stated therein and reproduced above, must be read to and agreed to by the jury as soon as jury selection is completed. (*People v. Chavez, supra*, 231 Cal.App.3d at p. 1484.) This was not achieved here.

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[37]. The court instructed the jury with CALJIC No. 1.00, as follows:

Members of the Jury:

"You have heard all the evidence, and now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.

"You must base your decision on the facts and the law.

"You have two duties to perform. First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. A "fact" is something proved by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

"You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

"You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty. You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences. (37 CT 10709-10710.)

In *People v. Cruz* (2001) 93 Cal.App.4th 69, the Court of Appeal considered a case in which the trial court had incorrectly administered the juror's oath by giving a version that did not ask the jurors to agree to follow the instructions of the court. The court in *Cruz* declined to find error, reasoning that statutory and case law separately established a juror's duty to determine the facts and render a verdict in accordance with the court's instructions on the law and further presuming that the jury had performed its "official duty" by following the instructions given. *Cruz* viewed both the court's instructions regarding the jury's duty and the juror's oath as mere reminders of this separate duty. *Cruz* also observed that appellant's contention that it is specious to rely on the trial court's instructions to the jury as a basis to conclude the jurors followed the law, unless they explicit agreed to follow the instructions, might have some plausibility but for the existence of the jury's separate duty to follow the court's instructions. (*Id.* at p. 73.)

Appellant respectfully disagrees and asserts that it is specious to rely on a juror's informed awareness of his or her duty, independent of the juror's sworn oath to follow the law and instructions of the court, to determine the facts and follow the law given by the court in rendering a verdict, just as it would be specious to contend that trial witnesses need not be sworn to tell the truth because witnesses have an independent duty to tell the truth in a court of law. The reality is that trial jurors today, and certainly jurors in Los Angeles County where appellant was tried, are drawn from a multiethnic, multicultural, multinational, polyglot stew. An understanding of a juror's duties is not a prerequisite to citizenship and the ensuing responsibilities of jury duty. If the functional mechanics of the trial process were so well known to all of us, i.e., if we were all aware of our duties as a juror to the degree contemplated in the court's reliance on that awareness, the California Courts official website would not find it necessary to explain these very duties to us. (See fn. 35, at p. 216.)

Further, the stating of an oath is not an empty formality. In other contexts, the courts have commented on the importance of an oath. For example, in listing the reasons why out-of-court statements are traditionally excluded because they are lacking in indicia of reliability, the United States Supreme Court listed the fact that such statements "are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, quoted in *People v. Garcia* (2005) 134 Cal.App.4th 521, 573.)

The importance of the oath and the impact it would be likely to have on jurors was also recognized by the Supreme Court in *Lockhart v. McCree* (1986) 476 U.S. 162. In rejecting studies proffered by the defendant, the court stated that the studies were based on the responses of individuals randomly selected from some segment of the population, not "actual jurors sworn under oath to apply oath the law to the facts of an actual case involving the fate of an actual capital defendant."

Likewise, the impact that a properly administered oath is likely to have on jurors was also recognized by the in *Nebraska Press Ass'n v. Stuart* 427 U.S. 539, 562, where the court explained "[s]equestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths."

Similarly, when a child testifies, the child is not required to have a religious belief or a detailed knowledge of the meaning of an "oath." However, the functional equivalent of an oath is required in that it must be shown that the child understands it is bad to lie and that some consequence may fall upon the child if he does not tell the truth. (*People v. Berry* (1968) 260 Cal.App.2d 649, 652.) Here, of course, there was neither an oath nor its functional equivalent, and the judgment cannot stand.

The juror's oath as set forth in Code of Civil Procedure 232, subdivision (b), serves a necessary function in ensuring a criminal defendant will receive the constitutionally mandated fair and impartial trial. The oath informs the juror of his duties and obligations and secures his agreement to carry out those duties and obligations.

D. Standard Of Review And Prejudice

Here, the rendering of verdicts at guilt and penalty phases of the trial by jurors who were not bound by the court to base his or her verdict only upon the facts adduced at trial and the law as provided by the court constituted structural error that requires automatic reversal. In *Arizona v. Fulminante*, *supra*, 499 U.S. 279, the United States Supreme Court discussed harmless error analysis and distinguished between "trial errors," which are subject to the general rule that constitutional error does not require automatic reversal, and "structural errors," which "defy analysis by harmless-error standards" and require reversal without regard to the strength of the evidence or other circumstances. (*Id.* at pp. 306-310.) *Arizona v. Fulminante* characterized trial errors as those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.) Structural errors, on the other hand, are "structural defects in the constitution of the trial mechanism . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.* at pp. 309-310.)

In *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, the United States Supreme Court held that a constitutionally deficient reasonable doubt instruction may amount to a structural defect in the trial mechanism. *Sullivan* explained why harmless error analysis (*Chapman v. California*, *supra*, 386 U.S. at p. 24) cannot be applied to such an error.

> "Harmless-error review looks . . . to the basis on which the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, 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. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee."

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

Because a constitutionally defective reasonable doubt instruction renders it impossible for the jury to return a verdict of guilty beyond a reasonable doubt, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." (*Id.* at p. 280.)

In the present case, the failure of the trial court to secure each of the twelve jurors' sworn oath to render a true verdict according only to the facts and the law makes it impossible to determine that the error was harmless beyond a reasonable doubt because it is impossible to assess "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) As appellant has noted above, the courts have recognized that the sworn oath is an important element of the constitutional guarantee to a trial by an "impartial jury." "'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to

show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]" (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

Thus, the failure of the trial court to ensure that appellant was tried by a jury all of whose members were sworn to carry out their duty to be a fair and impartial jury created structural error requiring that the guilt and penalty phase verdicts be set aside.

In *People v. Cruz*, *supra*, the Court of Appeal imposed upon the defendant the burden of proving the error prejudiced him. The court reasoned that the presumption that the jury had properly performed its official duty affected the burden of proof by imposing the burden upon the party against whom the presumption operates. (*People v. Cruz*, *supra*, 93 Cal.App.4th at p. 74.) However, *Cruz*' presumption the jury had properly performed its official duty was predicated upon its determination that statutory and case law establishes a juror's duty independent of the juror's oath. Appellant has observed above that in the reality of jury selection practices today it is specious to rely on such a separate duty.

Cruz noted that in *People v. Lewis* (2001) 25 Cal.4th 610, this court also placed the burden upon the defendant to show that he was prejudiced by the trial court's failure to administer the jury oath not to commit perjury during voir dire (Code Civ. Proc., § 232, subd. (a)). Appellant respectfully contends there is an important distinction in the prejudice that results from improperly administered oaths under subdivisions (a) and (b) of Code of Civil Procedure section 232. A defendant has the opportunity to mitigate any prejudice that flows to him from an omitted or improperly administered subdivision (a) oath through the voir dire process that permits court and counsel to vet both the prospective juror and his responses to the questions. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876 (where trial court failed to admonish prospective jurors against discussing case, forming opinion, viewing crime scene, or doing legal research, voir dire process can be used to excuse or rehabilitate offending prospective jurors).) (*Id.* at p. 909.) Under such circumstances, imposing the burden to show prejudice upon the

defendant seems appropriate. In contrast, defendants have no opportunity to assess whether jurors improperly sworn under subdivision (b) determined the facts only from the evidence adduced at trial and applied it only to the law as provided by the court. Thus, as with the prejudice flowing from error pertaining to the reasonable doubt instruction discussed by *Sullivan v. Louisiana, supra*, there is no object upon which to apply harmless error scrutiny. As *Sullivan* observed, the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 280.) Accordingly, error resulting from the omission or improper administration of Code of Civil Procedure section 232, subdivision (b), constitutes structural error warranting reversal of the judgment of conviction. Here, improperly sworn jurors participated in guilt and penalty phase verdicts, requiring reversal of the judgment of conviction.

Moreover, depriving appellant of the protection afforded under the principles here discussed is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest under state law in a jury properly sworn to render a true verdict according only to the evidence presented to them and to the instructions of the court (Code Civ. Proc. 232). (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma, supra*, 447 U.S. 343.)

Furthermore, as appellant has noted above, properly sworn jurors who have agreed to carry out their duty serve to ensure the accuracy of the truth-finding process. Jurors who are not sworn to carry out their duty increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Gilmore v. Taylor*, *supra*, 508 U.S. 333, 334; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.) This danger is particularly acute in the circumstances of this case, where the two unsworn alternates replaced sworn jurors and, in an alarmingly short period of time, returned death verdicts. Even if some form of harmless error analysis could properly be applied in this case, the substitution of these alternates and the rapid return of a death verdict strongly militates against any finding that the court's failure to swear these jurors was harmless. Reversal is required.

XIII

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS AT TRIAL RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR. AS A RESULT APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

A. Introduction

As will be explained, the various errors that occurred below combined to have a cumulatively prejudicial impact on appellant's Sixth Amendment right to a jury trial and his Fifth and Fourteenth Amendment rights to due process of law.

The primary convergence of the multiple errors at trial related to the issue of the requisite degree of intent necessary for the offenses, the enhancements, and the special circumstances alleged in this case. Two preliminary observations are in order in this area, and shall be discussed more fully below: First, many of the instructions, arguments, and verdict forms related to the issue of intent were flawed, thereby creating an inter-related impact for each of the errors. Second, the evidence at trial was ambiguous and weak on this crucial issue.

B. The Relevant Law

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Lincoln v. Sunn*, *supra*, 807 F.2d 805, 814, fn. 6 [cumulative errors may result in an unfair trial in violation of due process]; accord *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; see also *People v. Hill*17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution]; *Donnelly v. DeChristoforo*, supra, 416 U.S.637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process".)

Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Furthermore, when errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. In *People v. Williams*, *supra*, 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, was not harmless error. [Citations.] (See also *Harrington v. California* (1969) 395 U.S. 250, 255.)

A cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the court. This is because of the recognition that the curative effect of any instruction is uncertain and lingering prejudice can remain even after an admonition. Thus, if there are errors which individually may have been cured by instruction or admonition, the trace of prejudice may remain and be a factor in an analysis of cumulative prejudice. (*United States* v. *Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; *see also United States* v. *Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

In this case, the cumulative effect of these errors requires a reversal. This is especially so because the prejudice is geometrically multiplied because the errors were so inter-related. Therefore, they must be evaluated together and the prejudicial effect of each should not be considered separately from the prejudicial effect of the other.

C. The Inter-Related Nature Of The Errors Occurring At Trial.

The various errors that occurred at trial had a cumulative effect because they involved related issues, so that each error was compounded by the others. Combined with a weak prosecution case as to certain aspects of guilt, the cumulative impact of the errors requires a reversal of the judgment of the conviction entered below.

1. The Inter-Related Nature Of The Errors Relating To Intent

As noted above, many of the instructions, arguments, and verdict forms which related to or reflected upon the issue of intent were flawed. Some of the instructional errors simply bypassed the need for the jury to decide the crucial issue of intent. Others misstated or omitted necessary elements.

Although the requisite intent of an actual shooter, a role clearly played by only one defendant, differs from the intent of an accomplice, and although the intent of the accomplice may not be as obvious as that of the actual shooter, both defendants were found to be the actual shooter by a verdict forms that recited that each "personally and intentionally" discharged the one firearm used in the offense, thereby obviating the need for the jury to decide upon the intent of the accomplice. This represents an inconsistency in the verdict that in itself requires a reversal of the judgment. (See Argument I.)

Compounding this error in inconsistency of verdicts was the fact that the error occurred as a result of other, separate errors in instructions relating to both personal used of the weapon and the gang enhancement found to be true.

For example, a street gang allegation was alleged under section 186.22, subdivision (b), and that allegation was a necessary step in imposing the weapon enhancement alleged under section 12022.53, subdivision (e). However, the trial court simply gave the wrong instruction, using the instruction for the street gang substantive offense instead of the street gang enhancement that was alleged. The use of the wrong instruction allowed the jury to find that enhancement true without

making the finding of intent that would have been required under the correct instruction. (See Argument III.)

Compounding this error, the jury was again allowed to circumnavigate the necessary finding of intent when it was given the wrong instruction for the enhancement alleged pursuant to section 12022.53, subdivisions (d) and (e), with the court incorrectly failing to inform the jury as to the meaning of "intentionally and personally," and allowing a true finding on that enhancement if the jury believed the defendant was a principal in the commission of the crimes because he had been *charged* as a principal. (See Argument V)

As was discussed above, in Argument I, the finding that appellant personally used the firearm was itself predicated on the incorrect instructions for both the street gang enhancement and the weapons-use enhancement. Therefore, each of these errors was related to the other. The finding that appellant was the personal shooter, predicated upon incorrect instructions eliminating the element of intent, had the effect of improperly inflating appellant's culpability, as it is well-established that the actual killer is usually more culpable than an accomplice.

Once again, the issue of intent was improperly skirted by the court failing to redact CALJIC No. 8.80.1, as the CALJIC authors anticipated. This *again* allowed the jury to by pass the element of intent needed for the finding of the multiple murder special circumstance, allowing the jury to substitute that requirement with being a major participant with a reckless indifference to human life, an improper basis for liability for the special circumstance alleged. (See Argument IV.)

The errors described above all had the effect of lowering the prosecution's burden of proof by making it easier to convict appellant by removing the element of intent. Thereafter, other errors limited the jury's options and improperly inflated appellant's culpability, again making it easier for the jury to convict on improper grounds.

For example, with the need to find intent negated by the incorrect instructions, the jury was forced into "all-or-nothing option" when the court failed to

give instructions regarding the lesser included offense of implied malice, second degree murder. (See Argument II) As a result, the jury may have been forced into a first degree murder conviction, even though questions of intent were never otherwise resolved, if it wanted to convict, but lacked the options that would allow it to convict for the offense which it believed appellant committed. Ironically, as noted above, the court believed that an implied malice form of murder would be possible if the jury rejected the hate crimes allegation. However, when that eventuality occurred, the jury was left without the very option that the trial court believed would have been necessary at that stage.

In turn, this improper limiting of issues makes it important that the jury clearly articulate what their findings are as to the exact crimes for which it was convicting appellant. Nonetheless, the jury failed to find the degree of the crime, as mandated by section 1157. (See Argument VI.)

Subsequent errors improperly inflated appellant's culpability. For example, the court refused an instruction which would have informed the jury that merely being in the presence of someone who committed the crime was not sufficient evidence of guilt. (Argument VIII.) The jury may have considered this fact as sufficient to prove appellant's intent on the rationale that the prosecution expert testified that cruising a hostile gang's territory is proof of intent. Therefore, the jury should have been told that merely being in the presence of the others was not a sufficient ground for finding liability.

In a similar vein, if the jury gave an undue amount of weight to the fact that appellant was with the other parties, this would create an inference of guilt from appellant's association with Nunez. In such a case, the jury might be more inclined to convict appellant if it believed that Nunez's attempt to fabricate evidence demonstrated a consciousness of guilt which could reflect on appellant, a conclusion the jury would be tempted to make, unless the court limited the use of Nunez's attempt to fabricate evidence to Nunez, as the defense requested, a request denied by the trial court. (See Argument IX.)

Similarly, the court improperly overruled appellant's objection to the evidence of Kelly's attempt to bribe a witness into giving beneficial testimony. (Argument VII.) This improperly assisted the jury in filling the gaps in the State's case by finding a consciousness of guilt on the part of appellant.

The aspects of prosecutorial misconduct, as discussed in Argument XI, also compounded this incorrect finding of intent on the part of the non-shooter. For example, the primary evidence from which the jury may have found appellant was the shooter, thus obviating the need to find the more elusive type of intent required for the non-shooter, was the testimony of Eddie Vasquez, who testified that both defendants confessed to him that they were the shooter. A former member of a rival gang and a denizen of the streets and jails, Vasquez is hardly one to inspire confidence. Likewise, his story of running into the two crime mates by chance, in two separate jails, and having both confess, is simply too implausible to be believed.

However, the prosecutor, a representative of the State, vouched for Vasquez, making his story more palatable, and allowing the jury to find both appellant and Nunez fired the shots.

Likewise, the prosecutor's misconduct in arguing inconsistent theories compounded the error of inconsistent verdicts in penalty phase by inexplicably shifting his belief as to who the shooter was to name appellant.

Finally, appellant's culpability was once again inflated by the introduction of improper rebuttal evidence. This was a final portrayal of appellant as a violent and dangerous individual. The improperly inflating of appellant's culpability was clearly related to the lowering of the burden of proof, as described above, in obtaining appellant's conviction.

2. The Weakness Of The Evidence

The evidence as to intent was weak for several reasons. First, as the prosecution admitted, the identity of the actual shooter was not known. This is

important because the proof requirements as to intent for the actual shooter are different from that for a non-shooting aider and abettor. Unable to prove who the actual shooter was, the prosecutor would have difficulty proving facts relating to intent of the non-shooter, a gap filled in with gang evidence and allegations of a racial motivation.

With the allegation of a racial motivation rejected by the jury, the remaining evidence relating to the intent, the gang evidence, consisted mostly of the normal, generic gang evidence presented in hundreds of other cases – i.e., that gang members cruising other territories are going there for criminal purposes, if they went to that area with a firearm similar to the one used in this case it would be to try and kill someone, and this type of crime increases the status of anyone committing the crime. However, the probative value of the generic gang evidence, itself a questionable form of evidence, as explained above (*ante* at p. 67, see also *Mitchel v. Prunty*, *supra*, 107 F.3d 1337), decreases when it is remembered that the street gang enhancement was found to be true under incorrect instructions.

This gap, never filled by proper instructions or findings, was compounded by other instructional errors and flawed language in verdict forms which concerned proof of the required mens rea. As a result it is likely the jury (or some jurors) approached their task in determining appellant's individual culpability for the charges against him with an incorrect view of the law applicable to its deliberations.

D. Conclusion

From the foregoing, it is clear that the various errors at trial were interrelated so that the prejudice from one error compounded the prejudice from other, so that if a reversal is not required because of individual errors reversal is required because of their cumulative impact.

PENALTY PHASE ISSUES

XIV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO SET ASIDE ALL PRIOR DISCUSSIONS RELATING TO PENALTY AND BEGIN PENALTY DELIBERATIONS ANEW WHEN TWO JURORS WERE REPLACED BY ALTERNATE JURORS AFTER THE GUILT VERDICT HAD BEEN REACHED AND THE PENALTY CASE HAD BEEN SUBMITTED TO THE JURY. THIS ERROR DEPRIVED APPELLANT OF THE RIGHT TO A JURY DETERMINATION OF THE PENALTY AND THE RIGHT TO DUE PROCESS OF LAW

Appellant's Fourteenth Amendment right to due process of law, his Sixth Amendment right to an impartial jury, and his Eighth Amendment right to a reliable determination of penalty were violated when the trial court failed to instruct the jury that it was required to set aside and disregard all prior discussions relating to penalty and to begin penalty deliberations anew after two jurors were replaced by alternate jurors. Reversal is required

A. Replacement Of The Jurors And The Instructions Given

Jury deliberations began at 11:20 a.m. on June 26, 2000. (38CT 11121-11122.) The jury deliberated all day on June 27th, 28th, 29th. (39CT 11124-11127, 11130-11131.) Juror No. 10 was replaced on June 30th, and the jury began deliberations again at 9:20 a.m. The jury deliberated for another 40 minutes until the morning break. Resuming after the break, the jury deliberated for another 20 minutes, prior to sending a note to the judge mentioning the possible deadlock. At that time the jury was excused for the rest of the day. (38RT 11134-11135.)

After Juror No. 10 was replaced, the trial court addressed the jury, instructing them as follows:

"Members of the jury, a juror has been replaced by an alternate juror. The alternate juror was present during the presentation of all the evidence, arguments of counsel, and reading of instructions during the guilt phase of the trial. However, the alternate juror did nor participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point

"For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial. Your function now is to determine along with the other jurors, in the light of the prior verdict or verdicts and findings and the evidence and law, what penalty should be imposed.

"Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial. That being said, ladies and gentlemen, the twelve of you – I'm going to excuse you back into the jury room to deliberate.

(CALJIC No. 17.51.1; 38CT 11119; 18RT 4470.)

The jury began its deliberations with a new Juror No. 10 at 9:20 a.m. At 11:35 a.m., the jury foreperson sent a written note to the court disclosing that the jury numbers were divided at 11-1. The jury was excused for the day to July 3, 2000. (38CT 11133-11137.)

On Monday, July 3rd, court and counsel conferred over a written request from Juror No. 9 who asked to be excused from the jury because she felt the stress of continued service would be detrimental to the health of her unborn child. (3 Supp.CT 823; 18RT 4475.) The court discharged Juror No. 9 over the objections of the defendants and denied their motion for mistrial. (38CT 11138-11141; 18RT 4476-4484.)

After Juror No 9 was replaced, the trial court repeated the instruction it had given after No. 10 was replaced. (38CT 11118, 18RT 4491.) The jury began deliberations with a new Juror No. 9 at 10:45 a.m. Fifty minutes later, at 11:35 a.m., the jury announced it had reached its verdicts. The jury was excused for the

day. On July 6, the jury's verdicts setting the penalty at death for both defendants were read and recorded. (38CT 11138-11141; 18RT 4496-4497.)

These instructions given to the jury were insufficient admonitions on how the jury should conduct the deliberations with the newly constituted panel because they failed to require the newly reconstituted jury to disregard prior deliberations and begin anew.

B. The Relevant Law

The Sixth Amendment to the federal constitution guarantees the right to a "trial by jury" in "all criminal prosecutions." (*Duncan v. Louisiana, supra,* U.S. 145, 149-150.) In *Johnson v. Louisiana* (1972) 406 U.S. 356 and *Apodaca v. Oregon* (1973) 406 U.S. 404, five Justices concluded that in federal criminal cases this right includes the right to a unanimous verdict. Justice Powell, who cast the deciding vote, reasoned as follows:

> "[I]n amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law. At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a *unanimous jury verdict* to convict in a federal criminal trial.

(*Johnson v. Louisiana, supra,* 406 U.S. at 371, opn of Powell, J, emphasis added, footnote omitted).

The Supreme Court has not yet squarely held that the Sixth, Eighth and Fourteenth Amendments require a unanimous jury on penalty in a capital case. (see *Schad v. Arizona* (1991) 501 U.S. 624, 630.) However, appellant submits that the court's recent decisions compel the conclusion that unanimity is required in this context. (See *Apprendi v. New Jersey, supra,* 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584, 610; *Blakely v. Washington, supra,* 542 U.S. 296.) Justice Scalia, in particular, appears to have adopted the view that aggravating factors are

facts "that a unanimous jury must find beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 610.)

The California Constitution requires both a unanimous verdict in criminal cases and a verdict reached by 12 jurors through deliberations which are a common experience of all 12 jurors. (Cal.Const., art. I, section 16; *People v. Collins* (1976) 17 Cal. 687, 691-693.) "[U]nder our Constitution trial of a felony case by less than 12 jurors is valid only upon waiver as formal as that required for trial without any jury." (*Crump v. Northwestern Nat. Life Ins. Co.* (1965) 236 Cal.App.2d 149, 154.) This bedrock principle of law is reflected in numerous provisions which require full participation of all twelve jurors at the same time, in attendance at the same hearing, listening to the same evidence. Thus, even during periods of recess, the jury must not discuss the trial with anyone and must not deliberate further until all 12 jurors are together and reassembled in the jury room. (BAJI No. 15.40, 7 Witkin, *California Procedure.* 4th (1997) Trial, §292.)

Prior to 1933, substitution of a juror with an alternate was prohibited after final submission of a case to the jury. (*People v. Collins, supra,* 17 Cal.3d 687, 691.) Penal Code section 1089 now authorizes such a substitution upon a showing of good cause. However, while such substitutions are permissible, substitution of a juror after the case has been submitted to the jury creates special problems — problems that are compounded when the substitution occurs after a guilt verdict has been reached in a capital case and the case has been submitted to a jury which is considering the penalty. Indeed, the recognition that all jurors must equally participate in rendering the verdict is the reason that many jurisdictions do not permit substitution of alternates after the jury has retired to deliberate.[38]

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[38] See *People v. Ryan* (New York, 1966) 19 N.Y.2d 100, 278 N.Y.S.2d 199, 224 N.E.2d 710; *Woods v. Commonwealth* (Kentucky, 1941) 287 Ky. 312, 152 S.W.2d 997, 998-999; *People v. Burnette* (Colo.,1989) 775 P.2d 583, 588; *Claudio v. State* (Delaware, 1991) 585 A.2d 1278, 1285; *State v. Bobo* (Tenn.Crim.App 1989) 1989 WL 134712, 13.)

The federal rules also prohibit the substitution of jurors after deliberations had begun, although several federal cases had found harmless error when the federal rule was

Whenever an alternate juror is substituted for an original juror after deliberations have begun, the trial court must instruct the jurors sua sponte to set aside and disregard their prior deliberations and begin deliberations anew. (*People v. Collins*, *supra*, 17 Cal.3d at p. 694; *People v. Martinez* (1984) 159 Cal.App.3d 661, 664-665.) This instruction is found in CALJIC No. 17.51 which provides:

> "One of your number has been excused for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose. [¶] The People and the defendants have the right to a verdict reached only after full participation of the 12 jurors who return the verdict. *This right may be assured only if you begin your deliberations again from the beginning. [¶] You must therefore, set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.* [¶] You shall now retire to begin anew your deliberations in accordance with all of the instructions that I previously have given to you."

(CALJIC No. 17.51, italics added.)

In *People v. Collins*, *supra*, 17 Cal.3d 687, this court recognized that substitution of an alternate juror during deliberations may impinge on a defendant's constitutional right to trial by jury. *Collins* therefore held that the admonition to disregard previous deliberations and to begin anew is required for section 1089 to pass constitutional muster, basing its ruling on the right to a jury trial guaranteed under the California Constitution, Article I, section 16. (*Id.* at p. 692, fn 3.) This is essential in order for the jury's verdict to be the result of deliberations by all twelve jurors reaching that verdict. As this court stated in *Collins*:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the

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violated. (*United States v. Phillips* (5th Cir. 1981) 664 F.2d 971, cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); accord, *United States v. Kopituk* (11th Cir.1982) 690 F.2d 1289.)

> benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdict."

(*People v. Collins*, *supra*, 17 Cal.3d at p. 693.)

Thus, each juror must have the advantage of deliberating with the rest of the jurors, including the chance to review the evidence from the perspective of the other jurors. Likewise, each juror must be involved equally in the process of trying to convince the other jurors of his or her position. These aspects of the jury's deliberations are not possible if a juror joins in after the rest have been involved in the process, unless deliberations begin anew and the jury disregards prior discussions, a principle which must be explained to the jury. (*Id.* at p. 695.)

However, a problem is created in a capital case when a juror needs to be replaced after the jury has already reached a guilty verdict, but has not decided on the penalty. California law maintains a strong preference that a single jury try both guilt and penalty phases in order to ensure "that the decision-making process of a death penalty case is a coherent whole." (*People v. Fields* (1983) 35 Cal.3d 329, 352.) Additional reasons favoring the single jury approach were set forth in *Fields, supra*, as follows:

> "The preference for a single jury is by no means a one-sided matter; such a procedure may provide distinct benefits for both the prosecution and the defense. From the prosecution's point of view, the use of a single jury to determine both guilt and penalty may make it less likely that a juror's belief as to the inappropriateness of the death penalty will improperly skew the determination of guilt or innocence; as the drafters of the Model Penal Code's death penalty provision observed, "a juror's knowledge that he may not be in a position to control sentencing may induce him to hold out against

> conviction even when liability is plain." (1 Model Pen. Code, com. To § 210.6, pp. 146-147 (1980).) From defendant's perspective, the use of a single jury may help insure that the ultimate decision-maker in capital cases acts with full recognition of the gravity of its responsibility throughout both phases of the trial and will also guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations. (Cf. 1 Model Pen. Code, § 210.6(1)(f) and com., pp. 107, 134 (1980) [death penalty should not be imposed when "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt"].) Thus, there are a number of weighty considerations to support the statutory preference for a single jury in capital cases."

(*People v. Fields, supra*, 35 Cal.3d, at p. 352.)

In *People v. Cain* (1995) 10 Cal.4th 1, a juror had to be replaced by an alternate at the start of the penalty phase of the trial. The trial judge reminded the jury that although the alternate had been present throughout the presentation of the evidence and instructions during the guilt phase, the alternate had not participated in the deliberations as to guilt or the special circumstances. The judge further instructed the jury that the alternate must accept those findings as having been proved beyond a reasonable doubt.

The judge explained the concept of lingering doubt as a factor in possible mitigation, further instructing the jury as follows:

> "The People and the defendant have the right to a verdict on the matter of penalty which is reached only after a full participation of the 12 jurors who ultimately return the verdict. This right may be assured in this phase of the trial only if the alternate juror participates fully in the deliberations, including such review as may be necessary of the evidence presented in the guilt phase of the trial.
>
> "Therefore, the reasonable doubt of guilt and truthfulness of the charges and special circumstances as to which verdicts have been returned shall not be reexamined by the jury. However, for the purpose of determining if there is a lingering doubt concerning the guilt of the defendant on any charge as to which he has been found guilty, or a lingering doubt as to the truthfulness of any special

> allegation which has been found to be true, *the jury shall begin its deliberations from the beginning with respect to the evidence presented in the guilt phase of this trial. You are instructed to set aside and disregard all past deliberations, if any, concerning whether there is any lingering doubt as to the guilt of the defendant or the truthfulness of any special allegation and begin deliberating anew. This means that each remaining original juror must set aside and disregard any earlier deliberations concerning a possible lingering doubt as if they had not taken place.*"

(*Id.* 10 Cal.4th, at pp. 64-65; italics added.)

On automatic appeal, this court rejected the defendant's contentions that the trial court had erred in instructing the alternate to accept that the defendant's guilt had been proven beyond a reasonable doubt, and that the jury should have been told to "review every aspect of the evidence in the guilt phase that had any possible bearing on the penalty to be imposed." (*Id.* at p. 66.)

This court explained that the excusal of a juror for good cause did not require a retrial of the guilt phase, and therefore "[i]f the guilt phase is not retried, the penalty phase jury, including the new juror, must perforce 'accept' the guilt phase verdicts and findings. . . ." Consequently, reasonable doubt was no longer an issue and the jury as a whole had no cause to deliberate further on reasonable doubt as to guilt. (*Id.* at pp. 66-67.) As a result, this court explained, the instruction "correctly" stated that the alternate juror was to participate fully in the remaining deliberations, and that the jury should begin anew as to guilt phase evidence to the extent it reviewed that evidence in its penalty phase deliberations. (*Id.* at pp. 67-68.)

It is important to note that although *Cain* only addressed the issue of the jury beginning deliberations anew as to any possible issue of lingering doubt, this does not mean that the jury must not also begin deliberations anew as to any other fact or issue in dispute in the penalty phase. It appears that the issue of lingering doubt was the only aspect of this problem raised in that case.

However, applying the reasoning of *Cain* to other issues that might also remain unresolved, there is no reason why the same reasoning and principle should not apply to the rest of the case; namely that the jury must begin *all* penalty phase deliberations anew, that the remaining jurors must disregard the prior deliberations *in the penalty phase*, and that the jury must be so instructed as to this rule.

In considering this issue, it is important to understand the differences between CALJIC Nos. 17.51 and 17.51.1. CALJIC No. 17.51 is the instruction that must be given when a juror is substituted in during deliberations. That instruction tells the jury to begin deliberations anew, after disregarding all prior deliberations. The comment for that instruction in CALJIC refers to *People v. Collins*, *supra*, 17 Cal.3d 687, which deals with the substitution of an alternate juror *during* deliberations. In contrast CALJIC No. 17.51.1 deals with the situation where the juror is replaced *after* the guilt phase verdict but before the presentation of the penalty case. The comment for that instruction in CALJIC refers to *Cain*.

C. Application Of The Law

In this case, the failure of the trial court to correctly instruct the jury to begin deliberations anew deprived appellant of the chance of having the replacement jurors receive the benefit of the "perception and memory" of each of the other jurors, thereby upsetting the balance described in *Collins* and depriving appellant of having a verdict that is the result of full participation of all twelve jurors review the evidence in light of the memory and perception of the other jurors being equally involved in the deliberative process, as discussed by this court in Collins. (*Ante*, at pp. 237-238, *Collins*, *supra*, at p. 693.) Additionally, to the extent that the jury was obligated to reconsider any guilt phase issues that may have had an impact on penalty deliberations, such as issues relating to lingering

doubt, appellant was also deprived of the protections afforded under *People v. Cain, supra,* 10 Cal.4th 1.

There is a natural tendency among people to not want to re-hash matters that have previously been reviewed and possibly resolved. Unless the veteran jurors are told that they should start deliberations anew, it is unlikely that they would be inclined to cover all matters as fully as they had done so in the past. However, in the case of jury deliberations, these natural tendencies are exactly the pitfall that must be avoided. The new juror's views cannot be dismissed, even unconsciously, by the jurors who had been deliberating the matter for a longer time with the attitude and response that they had already rejected certain issues. Instructing the jury to begin deliberations anew instills in the jury the sense that merely because a matter was covered previously does not mean that the matter should not be the subject of deliberations with the new, replacement juror or should somehow be given short shrift the second time the subject presents itself.

In *People v. Renteria, supra,* 93 Cal.App.4th 552, during jury deliberations, an alternate juror was substituted in for a juror who had become ill. The Court of Appeal held that the trial court erred in failing to instruct the newly constituted jury that it was required to disregard its previous deliberations and begin new deliberations. Although Penal Code section 1089, defining the role of alternate jurors, does not specifically provide for such an instruction, that admonition is constitutionally required under California Constitution, Article I, section 16.

In *Renteria* the jury had deliberated some hours before the substitution was made, but reached a verdict some 30 minutes after the substitution. (*Id.* at p. 560.) The jury had declared that it was deadlocked shortly before the ill juror was discharged for being unable to serve anymore. The case depended on identification and the defendant could have been one of several people present. There were problems with the identification, including a recanting witness, a short opportunity to observe the perpetrator at night, with some discrepancies in the identification. Taking these circumstances into account, including the very short

time that elapsed between substitution of the alternate and the verdict, the *Renteria* Court stated that it could not find the error was harmless, and therefore reversed the conviction. (*Id.* at p. 561.)

As in *People v. Renteria, supra*, 93 Cal.App.4th 552, the circumstances in this case compel the conclusion that the court's failure to give the reconstituted jury a *Collins* instruction cannot be held harmless. All of the following must be considered in light of the fact that the decision the jurors were making would possibly be the most momentous decision of their lives, namely whether two other people would live or die.

It is with this fact in mind that the brevity of the deliberations takes on its meaning. First of all, the lengthy deliberations prior to the substitutions of the jurors and the brevity of deliberations after the substitutions strongly suggests that the jury did not begin deliberations anew. In order to reach penalty verdicts in this case, the jurors had to review all aggravating and mitigating factors as to both defendants, factors which were different for each defendant, including childhood experiences and other relevant evidence. They would then have to make the soul-searching decision that two young men should die. To assume that this decision was reached in twenty-five minutes for each defendant stretches the bounds of credulity.

This is particularly true when one considers exactly what the jury had to review and decide in this amount of time. The penalty phase itself required six days, and the testimony of 16 witnesses, including two experts witnesses who testified at length regarding the defendants' psychological and social backgrounds. It included evidence as to appellants' backgrounds and personal histories as well as evidence of the impact of these crimes on the victims' families. Other evidence included testimony from jail staff as to discipline problems with co-appellant Nunez. Furthermore, the jury had to decide whether co-appellant Nunez had committed two crimes as possible factors in aggravation, attempted escape (section 4532(b)(1)) and possession of a weapon by a prisoner (section 4502).

38CT 11107-11111.) Additionally, the newly constituted jury had to deal with any issues from the guilt trial that may have had an impact in the penalty phase, such as the presence of any possible lingering doubt.

In contrast, prior to the substitution of the juror, the original group of jurors began deliberations at 11:20 on June 26th, with deliberations continuing all day on June 27th, 28th, 29th, and one hour on June 30th, when they sent the note to the trial court, mentioning the possible deadlock. (38RT 11122, 11124, 11127, 11131.) Then, after having deliberated for three and a half days, the reconstituted jury, which should have been under the obligation to begin deliberations anew, reaches the possibly most momentous decision of their lives – whether two people should live or die – after twenty-five minutes for each defendant.

Under these circumstances, it is absurd to believe that the jury began its deliberations anew each time a sitting juror was replaced. Indeed, unless being instructed to do so, there is no reason to believe that it would do so. To the contrary, it is far more likely that the original jurors simply told the new jurors what had already been decided and secured their agreement without permitting the replacement jurors to participate in actual deliberations at all. For this reason alone, the court's failure to sua sponte instruct the reconstituted jury to begin deliberations anew cannot be held harmless. Moreover, the circumstances strongly suggest that the foreman used his position to attempt to remove the two jurors who were holding out for a life verdict, even suggesting to the court a possible basis for removing Juror 10 for cause, and possibly pressuring Juror 9 to request her own dismissal. (*Post*, at p. 278.) The death judgment simply cannot be permitted to stand.

Depriving appellant of the protection afforded under the principles discussed above is not only a violation of appellant's rights to due process and an impartial jury, but also a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma*, *supra*,

447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant had a constitutionally protected liberty in having the jury correctly instructed to set aside deliberations and begin the process anew as a means of ensuring that the verdict is the product of the deliberations of all twelve jurors. Indeed, as noted *above (*ante, *at p. 237*), in *People v. Collins, supra,* 17 Cal.3d 687, this court explained that failing to give this admonition would impinge on the right to trial by jury. Therefore, to deprive appellant of this protection is a violation of due process of law. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold appellant's conviction in violation of these established legal principles would also be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma, supra,* 447 U.S. 343.)

Finally, the participation of all twelve jurors helps ensure that the death penalty is imposed as a result of full and fair deliberations. As such, it is an essential part of ensuring the greater reliability of the verdict, as required in capital cases by the Eighth and Fourteenth Amendments of the Constitution of the United States. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gilmore v. Taylor, supra,* 508 U.S. 333, 334; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

D. Conclusion

For the foregoing reasons, appellant submits that the penalty verdict must be set aside because of the failure of the trial court to instruct the jury to begin deliberations anew and disregard prior deliberations after the substitution of two jurors.

XV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING A PROSPECTIVE JUROR FOR CAUSE DESPITE HER EXPRESSED WILLINGNESS TO CONSIDER IMPOSING THE DEATH PENALTY

The trial court committed reversible error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, violating appellant's rights to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, by excusing a prospective juror for cause despite her willingness to fairly consider imposing the death penalty.

A. The Relevant Law

The Sixth Amendment to the federal constitution guarantees the right of a jury trial to criminal defendants in state courts. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) This right is also secured by article I, section 16, of the state constitution. (Cal. Const., art. I, § 16.)

In *Witherspoon v. Illinois*, *supra*, the United States Supreme Court held that a sentence of death violated the Sixth and Fourteenth Amendments and could not be carried out where the jury that recommended it was chosen by excluding venire persons for cause simply because they voiced general objections to the death penalty. At the time, the relevant statute in Illinois allowed for challenges to prospective jurors who had "conscientious scruples against capital punishment." (*Id.* at p. 512.) The prospective jurors at issue in *Witherspoon* all had made clear that their reservations about capital punishment would not prevent them from making an impartial decision as to the defendant's guilt. (*Id.* at p. 513.)

The Supreme Court reasoned in *Witherspoon* that excluding all people with scruples against the death penalty from the jury eliminates a substantial portion of the population and results in a jury that is not representative of the community.

(*Id.* at pp. 519-520.) Therefore, *Witherspoon* held that it is not permissible to excuse prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," as long as they could obey their oath to follow the law. (*Id.* at p. 522.)

The Court modified the *Witherspoon* standard in *Adams v. Texas* (1980) 448 U.S. 38, a capital case involving the murder of a police officer. The Court explained that *Witherspoon* and its progeny "establish the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Instead, a state could only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*) Prospective jurors could **not** be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." (*Id.* at p. 50.) Rather, a prospective juror who opposed capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (*Id.* at p. 48.) Moreover, as the Court later made plain in specifically re-affirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 423.)

Witt explained that *Witherspooon* is not based on the Eighth Amendment prohibition on cruel and unusual punishment, but rather on the Sixth Amendment right to an impartial jury. (*Id.* at p. 423.) Thus, it is for the party seeking the exclusion to demonstrate through questioning that the potential juror lacks impartiality. (*Ibid.*)

In two decisions involving the erroneous dismissal for cause of death-scrupled jurors, this court has stressed the importance of adhering faithfully to

Witt. (*People v. Stewart* (2004) 33 Cal.4th 425; *People v. Heard* (2003) 31 Cal.4th 946). Thus, this court explained in *Stewart*:

> "the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra*, 469 U.S. 412, 105 S.Ct. 844. . . . A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law."

(*Stewart, supra*, at p. 447)

"'[T]he burden of demonstrating to the trial court that this standard [is] satisfied as to each of the challenged jurors' is on the prosecution, as the moving party." (*Stewart, supra*, 33 Cal.4th at p. 445, citing *Witt, supra*, 469 U.S. 412, 423.)

Stewart's death sentence was reversed because the trial judge granted the prosecution's motion to excuse for cause five prospective jurors based solely on the answers on juror questionnaires which expressed reservations about the death penalty. The trial judge declined to question the prospective jurors further.

Similarly, in *Heard,* the trial court erroneously excused for cause a prospective juror (identified as "H.") who had given answers on the questionnaire that reflected a philosophical opposition to the death penalty. When questioned on voir dire, however, the prospective juror had stated that he would do "whatever the law states." (*Id.* at p. 960.) This court explained that that the prospective juror's initial response on the questionnaire, "given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support H.'s excusal for cause." (*Id.* at p. 964.)

In summary, while a prospective juror may be excused for cause when the

juror indicates that his or her personal and/or religious beliefs would prevent the prospective juror from returning a verdict of death, mere generalized opposition to the death penalty is not sufficient ground for a dismissal for cause when the prospective juror indicates that he or she would be able to overcome those beliefs and render a verdict according to the law. In applying these principles to determine whether a juror is fit to serve in a capital case, the court should analyze the juror's *voir dire* as a whole rather than simply focus on isolated statements. (*People v. Mason* (1991) 52 Cal.3d 909, 953.)

B. Application Of The Law To The Facts Of The Case

Applying the foregoing legal principles to the instant case, it is clear that the trial court erred in allowing the challenges for cause made by the deputy district attorney to prospective Juror No. 2066.

After the prosecution made a motion to exclude Prospective Juror No. 2066 for cause based on her responses on the questionnaire, No. 2066 was questioned as to those responses. In response to Question No. 230A, which asked if the prosecution had proven first degree murder beyond a reasonable doubt, and the juror believed the defendant was guilty, whether she would refuse to convict to prevent the penalty phase from taking place, No. 2066 had replied, "I don't know yet." (3RT 618-619.) When asked by the trial court to clarify, No. 2066 said, "Undecided. I would kind of make it lenient." (3RT 619.)

In response to Question No. 230C, which asked if the defendant had been convicted of first degree murder with a finding of a special circumstance, whether the prospective juror would automatically vote for life imprisonment without considering aggravating or mitigating factors, on the questionnaire No. 2066 had replied on the questionnaire, "Yes." (3RT 619.) However, in the follow up question, No. 230E, which asked if the answer to the preceding question had been "yes," whether she would change her answer if instructed by the court that she had to consider and weight the aggravating and mitigating factors, No. 2066 had

answered, also on the questionnaire, "I might." (3RT 620.)

Seeking to clarify, the court noted that No. 2066 said in the questionnaire that she was "strongly opposed to the death penalty," but believed that there were "rare cases where a death sentence was appropriate." (3RT 620.) When asked, No. 2066 confirmed that was her view. (3RT 620.)

Asked again whether if instructed by the court to consider and weight the aggravating and mitigating factors, whether No. 2066 would be able to impose the death penalty if she felt it was warranted, No. 2066 answered, "I probably would be hesitant. I wouldn't want to vote for it the death penalty. (3RT 620-621.)

The prosecution then asked, "I take it that it's such a difficult decision for you...that you could not vote for the death penalty.?"

No. 2066 replied, "Yes." (3RT 621.)

Mr. McCabe, counsel for Nunez, then asked No. 2066:

> "Is it correct that after you hear all of the evidence you will follow the instructions on the law and do what the law requires you to do in this state based upon how you find the facts to be?"

To which No. 2066 replied, "I'll do my best." (3RT 622.)

The following exchange then took place:

> The Court: Okay. Let me get this straight in my mind. You feel not at ease with voting for the death penalty should you be required to do so. Right?
>
> Prospective Juror No. 2066: Yes
>
> The Court: But you would not automatically exclude that possibility if you feel the case is warranted, am I right?
>
> Prospective Juror No. 2066: If there were other alternatives, I would probably choose – look at those first before choosing the death penalty.
>
> The Court: All right, that sounds fair.
>
> When we go – in a case, when it goes to the penalty phase, there will only be two alternatives, as I understood it. One is the death penalty, one is life imprisonment without possibility of parole.
>
> Would you weigh the evidence to decide which alternative between the two you should choose? And if the evidence warrants that the

person should get life imprisonment without the possibility of parole, would you vote for that?

Prospective Juror No. 2066: Yes.

The Court: And if the evidence on aggravation and mitigation warrants that the imposition of the death penalty be imposed, would you be able to vote for death, knowing there is a possibility that you could chose life without the possibility of parole?

Prospective Juror No. 2066: Yes.

(3RT 622-623.)

Allowed to inquire, the following exchange then occurred between the Deputy District Attorney and No. 2066:

Mr. Millington: Ma'am, if confronted with the decision about death and other alternatives, would you look at the other alternatives?

Prospective Juror No. 2066: Right.

Mr. Millington: And with the other alternatives to death would you automatically choose the other alternatives?

Prospective Juror No. 2066: I would have to see what the other alternatives were.

(3RT 623-624.)

Asked if she would automatically vote for life in prison, No. 2066 replied, "Yes."

Mr. Millington: Even if I put on a bunch of aggravating factors about various things, would you still vote for that life sentence?" Prospective Juror No. 2066: Yes, I think I would."

(3RT 624.)

In response to questions from Mr. McCabe, No. 2066 indicated that she would never vote for death. (3RT 625.) However, in response to a follow-up question by Mr. McCabe and the trial court she indicated that there could be a case so bad that she could vote for the death penalty, although she would not want to do so. (3RT 626.)

In response to a question from Satele's trial attorney, Mr. Osborne, No. 2066 stated that if the prosecutor established that appellant was "a really bad

person and that person deserves the death penalty," she stated it would be hard for her to impose that penalty, and she did not know if she could do so. (3RT 627-628.)

The prosecution argued that No. 2066 should be excused for cause, as she had indicated that she would want to consider the alternatives to the death penalty, that alternative being life in prison without parole, which she would vote for as the lesser of two evils. (3RT 628.)

The defense argued that although she hesitated, she did say that she would consider the evidence and that she would make an honest decision. (3RT 629.)

Thereafter, the trial court excused No. 2066 for cause, stating that ruling was based on the trial court's observation of her demeanor and the answers she had given in her questionnaire and in open court.

Examining the responses of this juror leads to the conclusion that it was error to grant the prosecution's request to excuse her for cause.

In essence, No. 2066's belief was that it would be difficult to impose a death verdict. However, this manifestly did not preclude her from serving as a juror. As this court explained in *Stewart*

> "In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. . . . [A] prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror."

(*People v. Stewart, supra,* at p. 446; accord *Smith v. State* (1887) 55 Miss. 413, 415 ["Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man," quoted in *Witherspoon, supra,* at p. 515].)

No. 2066's answers were similar to those of prospective jurors from other cases who were found to have been wrongfully excused for cause. Namely, while

No. 2066 did express philosophical qualms about the death penalty, she stated that she could return a verdict of death.

Thus, No. 2066 is indistinguishable from the juror in *People v. Heard* who initially expressed anti-death penalty views on the juror questionnaire, but then reconsidered his views based on the trial court's explanation of the law.

Furthermore, No. 2066 clearly stated that if she were ordered to consider aggravating factors, she would do so.

Appellant submits that this is exactly the type of juror the state should want on a jury – willing to follow the law in spite of personal beliefs, able to change his or her mind to follow the instructions of the court, and honest enough to express views that may not be popular in the particular setting.

Although No. 2066 had answered questions in the questionnaire which could indicate a bias against the death penalty, this is not a sufficient basis for a challenge for cause when she ultimately indicated a willingness and ability to impose the death penalty when allowed to expand upon her answers after hearing the court's explanation of the law.

Because the prohibition against removing all jurors who may have moral qualms about the death penalty, even when those jurors have indicated a willingness to follow the law, tends to skew the jury panel in favor of death, this further impacts the reliability of the decision to impose the death penalty, in violation of Eighth and Fourteenth Amendments, which impose greater reliability requirements in capital cases. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gilmore v. Taylor, supra,* 508 U.S. 333, 334; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

As a result of the foregoing, it is apparent that the trial court erred in granting the prosecution's challenge for cause to Prospective Juror No. 2066 from the pool after a challenge by cause from the prosecution.

C. Prejudice

Because the *Witherspoon-Witt* standard is based on the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the improper exclusion of even one juror under the *Witherspoon-Witt* standard is reversible penalty phase error *per se* even if the prosecutor could have excused the juror by using one of his or her unexhausted peremptory challenges. (*People v. Stewart*, *supra*, 33 Cal.4th 425; *People v. Heard*, *supra*, 31 Cal.4th 946; *Davis v. Georgia* (1976) 429 U.S. 122; *Gray v. Mississippi*, *supra*, at p. 668.) Accordingly, reversal is required in this case without regard to the application of any harmless error standard.

XVI

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY WHEN IT OVERRULED APPELLANT'S CHALLENGE FOR CAUSE AGAINST JUROR NO. 8971 FOR IMPLIED BIAS AND MISCONDUCT

A. Background

The prosecution's theory, as expressed in the pleadings and in the prosecutor's opening statement and summation, was that appellants shot and killed Robinson and Fuller for the benefit of their gang, the West Side Wilmas. (37CT 10674-10676; 4RT 886;14RT 3220-3223.) The information, including gang benefit enhancement allegations contained therein (Pen. Code, § 186.22, subd. (b)(1)), was read to the prospective jurors at the commencement of the jury selection process. (See, e.g., 2RT 333.) In addition, the written jury questionnaire contained 21 questions devoted to the matter of gangs. (See, e.g., 37CT 10652-10654.) Accordingly, the prospective jurors were each aware that the case they were being called upon to try included evidence and allegations pertaining to criminal street gangs.

At the beginning of the jury selection process, the court gave certain instructions to the prospective jurors, including an instruction that the prospective jurors were not to discuss any subject connected with the trial among themselves or with anyone else. "You are admonished that you are not to converse with the other jurors or anyone else on any subject connected with the trial. It is also your duty as a juror not to form or express any opinion thereon until the case has been submitted to you for a decision." (2RT 336.)

However, during the jury selection process, the court learned that a prospective juror had described to other prospective jurors how he would resolve the "gang problem." During the inquiry that followed, the court learned that in fact two prospective male jurors had separately described their solutions to the

"gang problem" to other prospective jurors.

The record shows that Prospective Juror No. 9825 reported hearing an elderly, tall, slender Afro-American prospective juror say of gangs: "He would gather all the gangs, put them on and [sic] island, and let them rule themselves." (4RT 737-738.) Prospective Juror No. 6582 reported that a tall, medium to thin build, prospective juror who used a cane said to him: "He knew what he would do if he had his way. He would send out gang members on a Pacific Island and let them take care of each other." (4RT 742-744.) The juror in question was later identified as Prospective Juror No. 8971.

The other male juror who made a comment regarding gangs was Prospective Juror No. 2421, who reportedly said police should round up gang members and take them into the desert and finish up with them in a day. (3 RT 713-714; 4 RT 723.)

After hearings with Prospective Jurors Nos. 2421 and 8971, the court excused Prospective Juror No. 2421 after finding the juror had not complied with the court's instruction to not discuss the case with other jurors and to not form an opinion about the case. (4RT 727-728.) However, the court overruled the defense request that Prospective Juror No. 8971 be excused for cause for the same reasons.

At the hearing, Prospective Juror No. 8971 told the court he made the following statement on one occasion when he was out on the courthouse balcony: "I said one of the best solutions that could happen is that all these people that are involved in the gangs, take them out, put them on an island and let them be there, and let them do their own thing, and let them do their own thing without hurting innocent people." (4RT 747.) Prospective Juror No. 8971 said he stated this opinion, which he has held since 1981, to one person. (4RT 748.) The court did not ask the prospective juror whether he thought he could be an impartial juror, nor did the juror offer that evaluation. Defense counsel asked that the prospective juror be excused because he had considered matters concerning the case and discussed them in violation of the court's instructions and the prospective juror's

sworn oath. (4RT 749-751.)

The court found that the prospective juror's statement was an "innocuous comment" and not a willful violation of the court's instruction and made to only one other prospective juror. (4RT 751-752.) The trial court also denied the related defense motion for mistrial based upon the court's failure to excuse Prospective Juror No. 8971. (4RT 753.) After the jury was sworn, defense counsel expressed dissatisfaction with the "result of the picking," i.e., with the jury ultimately selected. (4RT 870.)

Prospective Juror No. 8971 eventually was seated as Alternate Juror No. 2, one of the six alternate jurors on the case. (4RT 851, 857.) The defense exhausted the six peremptory challenges to which it was entitled in the selection of alternate jurors. (4RT 855.) Subsequently, during penalty phase deliberations, Alternate Juror No. 2 (viz., Prospective Juror No. 8971) was seated as Juror No. 10 and was thus a member of the jury that returned multiple death verdicts against appellants. (38CT 10941-10944; 18RT 4463, 4470, 4497-4498.)

B. Analysis

"The right to trial by jury in criminal cases derives from common law and is secured by both the federal and state constitutions. [Citation.]" (*People v. Trejo* (1990) 217 Cal.App.3d 1026, 1029; U.S. Const., Art. III, § 2, cl. 3, and the Sixth and Fourteenth Amendments; Cal.Const., art. 1, § 16.) A jury trial in a criminal case in a state court is a federal constitutional right, unless the charge is of a "petty offense." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491, 496; 5 Witkin and Epstein Cal. Crim. Law (3d), Criminal Trial, §438.)

It is well established that a defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) "An impartial jury is one in which no

member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098) and every member is '"capable and willing to decide the case solely on the evidence before it.'" (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.)

An impartial jury serves to ensure accuracy in the truth-finding process. Improperly influenced jurors increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305; *Gilmore v. Taylor, supra*, 508 U.S. 333, 334; *Johnson v. Mississippi, supra*, 486 U.S. 578, 584-585; *Zant v. Stephens, supra*, 462 U.S. 862, 879.)

"To preserve a claim based on the trial court's overruling a defense challenge for cause, a defendant must show (1) he used an available peremptory challenge to remove the juror in question; (2) he exhausted all of his peremptory challenges or can justify the failure to do so; and (3) he expressed dissatisfaction with the jury ultimately selected. (*People v. Cunningham* (2001) 25 Cal.4th 926, 976; *People v. Crittenden* (1994) 9 Cal.4th 83, 121.)" (*People v. Maury* (2003) 30 Cal.4th 342, 380.) Accordingly, appellant's claim that the trial court erred in failing to excuse Prospective Juror No. 8971 is preserved for review.

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' (*Id.* at p. 1147.) A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. (*Ibid.*)" (*People v. Weaver, supra*, 26 Cal.4th 876, 910.)

Here, the record establishes that the trial court's findings and conclusions are not supported by substantial evidence. The court found and ruled:

> "I'm not going [to] excuse hi[m] for cause. It appears the conversation was an innocuous comment. This court finds that it is not a willful violation of the court's instruction not to talk about the case. They were just talking about issues in society. While admit[t]edly, it's not the best choice of issues, the only one person he talked [to] about it, obviously, was not influenced by it. [¶] You are welcome to use a [per]emptory. Nor was that person, did that person feel that that was a misconduct, that was never conveyed to the court. That being the case, are there any motions before we move forward?"

(4RT 751-752; see also 4RT 753.)

First, the court's finding was factually inaccurate. The court based its decision in part on the finding that Prospective Juror No. 8971 spoke to one juror. In fact he spoke to at least two separate jurors, Nos. 9825 and 6582, both of whom reported the juror hypothesized sending gang members to a Pacific island. The court's finding of one conversation with one juror is thus not supported by substantial evidence.

In addition, the court characterized the juror's statements about gangs as an "innocuous comment" made during a conversation about "issues in society." This conclusion is also not supported by substantial evidence. Rather, substantial evidence shows Prospective Juror No. 8971 had seriatim conversations about his resolution of the gang problem with two separate jurors. It reasonably follows from such a showing that the juror was not making "idle comment while waiting for the case to go forward," as the court characterized the juror's conduct in ruling on the defense mistrial motion. (4RT 753.) The record more accurately establishes that Prospective Juror No. 8971 had an entrenched (since 1981), biased opinion concerning gangs he was eager to share with other jurors despite the court's instruction that jurors not discuss trial-related topics. In fact, when the court asked whether anyone else was around when the statements were made,

Prospective Juror No. 9825 answered that though the statements were made in the jury room he and Juror No. 8971 were in a close conversation at the time. (4RT 736-738.) Juror No. 6582 reported he and Prospective Juror No. 8971 were in a "side-by-side" conversation when Juror No. 8971 said he would send gang members to a Pacific island and let them take care of each other. (4RT 742-743.) And, Prospective Juror No. 8971 remembered making these statements on the courthouse balcony (4RT 747), which suggests the occurrence of yet a third conversation with other unidentified prospective juror(s). The trial court has an obligation to determine whether the prospective juror will faithfully and impartially apply the law in the case. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1147.) That the court so found of Prospective Juror No. 8971 is implicit in the court's finding the juror should not be excused for cause. However, such a finding is unsupported by substantial evidence. The juror expressly stated that he had held his particular opinion about gang members since 1981, some 19 years before appellants' trial in 2000. This juror's conversations about gang members, the content of which reflect a decided viewpoint, made separately to two other jurors in violation of the court's express order against such a conversational topic, place the juror's impartiality in issue and yet the court made no inquiry of the juror as to his impartiality. The record fails to provide substantial evidence to support the conclusion of the juror's fairness and impartiality inherent in the court's refusal to excuse the juror for cause.

Although defense counsel could have been more probing in developing these facts, it must be understood that a defense attorney is in a precarious position questioning jurors who may take umbrage at implications in counsel's questions, and that juror will be deciding the fate of counsel's client. Recognizing this principle, the courts have held that the trial court has the primary duty to make such an inquiry. (See *Dyer v. Calderon* (1998 9th Cir.) 151 F.3d 970, 978; (*United States v. Boylan* (1st Cir. 1990.) 898 F.2d 230, 258.)

In such circumstances the trial judge fulfills his duty only if he "erects, and

employs, a suitable framework for investigating the allegation [of bias] and gauging its effects[.]" (*Ibid.*) Where juror misconduct or bias is credibly alleged, the trial judge cannot wait for defense counsel to spoon feed him every bit of information which would make out a case of juror bias; rather, the judge has an independent responsibility to satisfy himself that the allegation of bias is unfounded. Indeed, the failure of a trial court judge to ferret out possible jury bias has been described as an "ostrich-like" complacency in the part of the trial court (*Dyer, supra,* at 979.)

Accordingly, appellant respectfully asserts the trial court's findings are unsupported by substantial evidence and therefore not binding on this reviewing court and that on the evidence before it this court should find that the trial court abused its discretion in failing to excuse Juror No. 8971 for cause. This juror participated in penalty phase deliberations and the resulting verdicts of death. Accordingly, the penalty verdicts must be set aside.

XVII

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW WHEN IT DISCHARGED JUROR NO. 10 FOR MISCONDUCT

A. Introduction And The Chronology Of Penalty Phase Juror Discharges

During penalty phase deliberations, the trial court, in separate actions, discharged Jurors No. 9 and 10 for cause over the objections of both defendants.

In discharging the jurors, the court acted under the authority of Penal Code section 1089, which invests trial courts with the discretion to discharge jurors, either at their request or otherwise, on a finding of cause.[39] The trial court excused Juror No. 10 after finding she had committed misconduct by discussing the case with her mother and her friend. A few days later, the court excused Juror No. 9 at the juror's request after she expressed concern about the effect of the stress of continued jury service upon her unborn child.

Appellant sets forth here the sequence of the discharges in the chronological context of the deliberations because that chronology and the related record of the vote division among jurors is relevant to the discussion of prejudice set forth below. The facts and discussion relevant to the discharge of Juror No. 10 is set forth in this argument. The corresponding information pertinent to the discharge of Juror No. 9 is set forth in the argument that immediately follows, which adopts and incorporates this chronology by reference.

The jury began its penalty phase deliberations on Monday, June 26, 2000.

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[39]. Penal Code section 1089 provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefore, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

(38CT 11121-11122; 18RT 4386, 4433-4434.)

On Thursday morning, June 29,[40] the jury resumed its deliberations at 9:30 a.m. (38CT 11130-11131; 18RT 4437-4441.) At 10:10 a.m., the jury foreperson delivered a note to the court reporting the jury was divided 10-2 on the penalty verdict and at an impasse. (38CT 11132; 18RT 4443.) The court then excused the jury for the day. Some minutes later, at 10:35 a.m., the jury foreperson returned to the courtroom and in an addendum to his earlier note stated that Juror No. 10 had discussed the case with both her friend and her mother. (38CT 11130, 11132; 18RT 4443.)

On the next court day, June 30, 2000, the court and parties heard first from the jury foreperson and then from Juror No. 10. When the hearing ended, the trial court discharged Juror No. 10 for misconduct over the objections of counsel for both defendants. (38CT 11134-11137; 18RT4442-4459, 4467-4469.)

The jury began its deliberations with a new Juror No. 10 at 9:20 a.m. At 11:35 a.m., the jury foreperson sent a written note to the court disclosing that the jury numbers were divided at 11-1. The jury was excused for the day to July 3, 2000. (38CT 11133-11137.)

On Monday, July 3d, court and counsel conferred over a written request from Juror No. 9 who asked to be excused from the jury because she felt the stress of continued service would be detrimental to the health of her unborn child. (3 Supp.CT 823; 18RT 4475.) Following a hearing, the court discharged Juror No. 9 over the objections of the defendants and denied their motion for mistrial. (38CT 11138-11141; 18RT 4476-4484.) The jury began deliberations with a new Juror No. 9 at 10:45 a.m. Fifty minutes later, at 11:35 a.m., the jury announced it had reached its verdicts. The jury was excused for the day. On July 6, the jury's verdicts setting the penalty at death for both defendants was read and recorded. (38CT 11138-11141; 18RT 4496-4497.)

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[40]. The jury deliberated a full day on Tuesday, June 27, and on Wednesday afternoon, June 28. (38CT 11124-11127.)

The court's decision whether to discharge a juror under section 1089 is reviewed for abuse of discretion and is upheld if supported by substantial evidence. (*People v. Williams*, *supra*, 25 Cal.4th 441, 447; *People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Beeler* (1995) 9 Cal.4th 953, 975.) The juror's inability to perform must appear as a "demonstrable reality" and will not be presumed. (*People v. Johnson*, *supra*, 6 Cal.4th 1, 21.)

The most common application of the statute permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances. (*People v. Fudge*, *supra*, 7 Cal.4th 1075, 1100 [anxiety over new job would affect deliberations]; *People v. Johnson*, *supra*, 6 Cal.4th 1, 22 [sleeping during trial]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [sleeping during trial]; *People v. Dell* (1991) 232 Cal.App.3d 248, 254 [juror involved in automobile accident]; *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 629 [inability to concentrate]; *In re Devlin* (1956) 139 Cal.App.2d 810, 812-813 [juror arrested on felony charge], disapproved on another ground in *Larios v. Superior Court* (1979) 24 Cal.3d 324, 333.)

Appellant discusses why the trial court abused its discretion in discharging Juror No. 10 below. In the argument that follows, appellant discusses why the trial court's decision to discharge Juror No. 9 was not supported by substantial evidence and therefore constituted an abuse of discretion on the part of the court.

B. **Juror No. 10**

On Thursday, June 29, at a time when the jury was divided at 10-2 and at an impasse, the jury foreperson notified the court of the following: "Jury member #10 [name omitted] stated that she had confided with her friend & mother and that they sided with her doubts – possibly replacing her would be appropriate." The bailiff's accompanying notation indicates this sentence was added at 10:35 a.m. to an earlier note received by the bailiff at 10:10 that same morning.

The trial court took up this matter the next morning (Friday, June 30) in a hearing held in the presence of the parties. The court first verified with the jury foreperson, Juror No. 6, that he had authored the note and learned from him that he and other jurors had heard the comment by Juror No. 10, which had been made at the jury table. (18RT 4443-4444.)

Court and counsel then met with Juror No. 10, who readily confirmed that she had discussed issues relating to the case with a friend and with her mother on Wednesday night. The conversations took place at a time when the jury had completed two days of deliberations and at a time after, in the juror's view, the jury had reached its verdict.[41] (18RT 4445-4446, 4448.) Cautioned by the court to withhold information relating to the deliberation process in her answers to his questions, Juror No. 10 stated she did not tell either her friend or her mother the facts of the case; she did not tell them about specific evidence in the case; and she did not ask them about their views as to the death penalty. She did speak to them about the two defendants in the case. (18RT 4446.)

Juror No. 10 said she discussed the defendants with her mother for a minute or two at the end of a telephone conversation initiated by her mother. She did not reveal her vote on the verdict to her mother. (18RT 4447.) Neither did she describe to her mother the issues that were troubling her or her views on the death penalty. (18RT 4451-4452.)

Juror No. 10 said she spoke with her friend about the case for about five minutes during a conversation on other topics that lasted about 20 minutes. She did not discuss either the proceedings or the facts of the case with her friend. Instead she told her friend that the jury was going to turn its verdict into the court

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[41] Juror No. 10 reported to the court that the comments that were the subject of the court's concern had occurred after her mother had asked her how the case was going and she replied the case was done. (18 RT 4451.) Correspondingly, when the court asked Juror No. 10 whether she had revealed in her conversation with her friend the vote she planned to cast during the following day's deliberations, Juror No. 10 said, "No, No, No, No, No. We had already reached the verdict. Wednesday night we had reached the verdict." (18 R T 4448.)

the next morning and that she was still prohibited from revealing her vote. Using hand gestures, the friend asked whether she had gone one way or the other and Juror No. 10 said, "yeah," to one of the gestures. Her friend then made a statement relating to views on the death penalty. (18RT 4449-4451.)

Juror No. 10 confirmed that this was the extent of her discussions about the case with her friend and her mother. (18RT 4452.)

The prosecutor asked that the juror be discharged because she discussed her deliberations with outside sources. Significantly, the prosecutor stated, "It appears that the jury came to some sort of decision." (18RT 4453.) The trial court responded by pointing out that the jury was still deliberating and that the court had not yet received the jury's verdicts. The prosecutor responded by saying that even if the jury had not reached a formal decision it had reached "some sort of agreement" on Wednesday. (18RT 4453.) Then, although nothing in the colloquy between the court and Juror No. 10 tended to establish in any way that the juror had solicited counsel from either her mother or friend or that she had been influenced by the conversations, the prosecutor further argued for the juror's discharge by stating that she had sought counsel from outside sources, which had influenced her deliberations in the case. (18RT 4453.)

Counsel for Nunez disagreed with the prosecutor's reasoning. (18RT 4453.) Counsel pointed out that, but for the earlier-described incident with the friend's hand gestures, Juror No. 10 had received no advice or statement from anyone and, further observed there was no indication that the juror was acting upon any suggestions or advice she had received from outside sources. (18RT 4455.) Counsel further asked that the court seek clarification as to whether the jury had in fact reached a verdict on Wednesday afternoon because if such were the case Juror No. 10 would not have committed misconduct in her conversations. As a basis for his request for clarification, counsel pointed out that Juror No. 10 had said that she spoke with her mother and her friend after a decision had been reached and the case was over. Counsel further noted that at least one other juror

had inferentially corroborated the representation that a decision had been reached on Wednesday afternoon.[42] (18RT 4453-4454.)

Counsel for Satele stated that he had listened very closely to the responses made by Juror No. 10 to the court's inquiry. He heard the juror state several times that the deliberations were complete on Wednesday afternoon. Counsel joined in Nunez's request that the court inquire as to Juror No. 10's understanding of what the jury had accomplished on Wednesday and broadened the request to include an inquiry into what the other 11 jurors thought the jury had accomplished on Wednesday. (18RT 4454-4455.)

The trial court thereupon found on the basis of her statements that Juror No. 10 had committed misconduct. The court further found that the juror may have mistaken a jurors' vote for a verdict. (18RT 4455-4456.)

The court stated that it was guided by *People v. Daniels* (1991) 52 Cal.3d 815 and stated without further explanation that the juror's discussion with outside parties effectively precluded the court from giving further instructions or readbacks, which the court said tainted the process. (18RT 4456, 4458.) The court also found that the only thing Juror No. 10 disclosed to other jurors is that she confided in her mother and her friend. (18RT 4456.)

The court thereafter informed Juror No. 10 that he was excusing her from the case and ordered her not to discuss the case with anyone. (18RT 4458-4459.)

After the court discharged Juror No. 10, both defense counsel protested the removal of the juror once more. Counsel for Nunez requested that the trial court ask the foreperson about Wednesday afternoon's "so-called termination" of deliberations because the jury had reached a verdict. Counsel stated that it was improper to remove a juror after a jury had reached an impasse and was hung.

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[42]. Counsel's reference to a juror who said she couldn't serve after Thursday (18 RT 4453) appears to be to Juror No. 3 who earlier notified the court that she would not be able to serve after Thursday, June 29. (38 CT 11124; 18 RT 4438-4439.) Following a subsequent hearing, Juror No. 3 agreed to the court's request that she reschedule her vacation. (18 RT 4459-4462.)

(18RT 4467-4468.)

The trial court stated it would not ask that question of the foreperson because the foreperson's note stating the jury was hung was delivered to the court at 10:00 a.m. on Thursday while Juror No. 10 spoke with her mother and friend on the Wednesday night before. (18RT 4468.)

Counsel for Satele protested that the court's findings misstated what Juror No. 10 said, which was that the jury was at an impasse on Wednesday night before she went home. (18RT 4468.)

The court responded that even if the jury had been at an impasse at the end of the day on Wednesday, or even if the jury had an agreement at that time, so that the only thing the jury did on Thursday was that the foreperson wrote his note to the court, the court was still foreclosed from being able to further instruct the jury or get the jury to deliberate. (18RT 4469.)

On the morning of the following court day, July 3, 2000, the trial court revisited the issue of Juror No. 10. The court restated and clarified its ruling for the record. The court explained it had found good cause to discharge Juror No. 10 in the juror's demeanor and statements and further stated the juror's conduct raised a presumption of prejudice similar to that found in People v. Daniels, supra. Although the court's inquiry with the juror produced no evidence the juror had been influenced by her conversations with others, the court stated the fact that the juror had been influenced by her mother and her friend precluded the court from both offering the jury more instructions on testimonial readbacks and from permitting the juror to continue in the jury's deliberations. The court stated its reliance upon *People v. Keenan* (1988) 46 Cal.3d 478, 534, fn. 27, and upon *Lowenfield v. Phelps* (1988) 484 U.S. 231 in so concluding. (18RT 4473-4474.)

C. The Trial Court Abused Its Discretion In Discharging Juror No. 10; The Court's Finding of Juror Misconduct Is Not Supported by Substantial Evidence

It is well established that a defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.)

"An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway*, *supra*, 50 Cal.3d 1098) and every member is '"capable and willing to decide the case solely on the evidence before it."' (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips*, *supra*, 455 U.S. 209, 217; *In re Hamilton*, *supra*, 20 Cal.4th 273, 294.)

Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. (*People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *In re Carpenter* (1995) 9 Cal.4th 634, 650-655.) "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come 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, citations and fn. Omitted.) As the United States Supreme Court has explained: "Due process means a jury capable and willing to decide the case solely on the evidence before it." (*Smith v. Phillips*, *supra*, 455 U.S. 209, 217; accord, *Dyer v. Calderon*, *supra*, 113 F.3d 927, 935; *Hughes v. Borg* (9th Cir.1990) 898 F.2d 695, 700.)

However, the communication in this case is not the type of communication that mandates a juror being excused. As explained in *In re Hamilton, supra*, 20 Cal.4th 305-306 "when the alleged misconduct involves an unauthorized communication with or by a juror, the presumption [of prejudice] does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, i.e., the guilt or innocence of the defendant."

Furthermore, excusing the juror is not required where the communication is "brief, isolated, and ambiguous" with no substantial likelihood that the . . . incident [would have] caused [the juror] to develop actual bias against" the defendant. (*Ibid.*)

In this case, the communications were brief, isolated, and ambiguous. They were not likely to cause Juror No. 10 to change her views because, as noted above, she did not tell either her friend or her mother the facts of the case or ask them or receive from them their views as to the death penalty. Indeed, from what the juror said, it appears she thought that the case was over, except for the formality of reading the verdict. (18RT 4445-4446, 4448.)

Clearly, this is not the type of communication that would create a presumption of prejudice. Even if such a presumption could be argued for, it is clearly rebutted in that the juror thought the decision had already been made.

Under such circumstances it is clearly an abuse of discretion t remove a holdout juror.

If the trial court was concerned about this matter there were steps that should have been considered before removing a juror from a potentially deadlocked jury, including admonitions, which are commonly given to cure any improper conduct to which jurors may have been exposed. For example, in *People v. Osband* (1999) 13 Cal.4th 622, 675-676 when jurors overheard the police talking about the case in the hallway it was held not be prejudicial because the court admonished the jurors not to consider anything they heard.

Thus, this is not the type of communication that creates a presumption of prejudice mandating the removal of the juror.

Furthermore, courts have been mindful of the "'day-to-day realities of courtroom life' (*Rushen v. Spain* (1983) 464 U.S. 114, 119) and of society's strong competing interest in the stability of criminal verdicts (*Id.* at pp. 118-119); *Carpenter, supra*, 9 Cal.4th 634, 655.). It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' (*Smith, supra*, 455 U.S. 209, 217.) Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. (*Marshall, supra*, 50 Cal.3d 907, 950.) "'[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*Carpenter, supra*, 9 Cal.4th at pp. 654-655.)

As noted above, Penal Code section 1089 and Code of Civil Procedure section 233 specify that a juror may be substituted at any time before the jury returns a verdict if upon "good cause shown to the court [the juror] is found to be unable to perform his duty." (Pen. Code, § 1089.) Neither section 1089 nor Code of Civil Procedure section 233 define "good cause."

In *People v. Daniels* (1991) 52 Cal.3d 815, this court stated: "It is clear to us, however, that a juror's serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty. Misconduct raises a presumption of prejudice (*People v. Honeycutt* (1977) 20 Cal.3d 150, 156; *People v. Conkling* (1896) 111 Cal. 616, 628), which unless rebutted will nullify the verdict." (*People v. Daniels, supra*, at p. 863.) The juror's inability to perform must appear in the record as a demonstrable reality. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.)

In *People v. Daniels*, *supra*, and *People v. Ledesma* (2006) 39 Cal.4th 641, this court found substantial evidence of juror misconduct warranting discharge in the conduct of jurors who spoke about their respective cases with non-jurors. The juror conduct in these two capital cases is distinguishable from that of Juror No. 10 here with regard to the mental state with which the respective jurors entered into conversations with others, by the extent of information shared with non-jurors, and by the number of forbidden contacts in which the juror engaged.

In *Ledesma*, this court considered the matter of Juror Stephen W., who, like Juror No. 10, had been discharged by the trial court during penalty phase deliberations. During the trial court's inquiry into the matter, Stephen W. admitted he had violated the instructions of the court by discussing the case with his wife. Stephen W. said he had discussed the facts of the case with his wife because he needed to straighten things out in his head. She gave him an opinion. He said the discussion allowed him to think more clearly. In short, Stephen W.'s doubt about his opinion was removed after a discussion with his non-juror wife. This court agreed with the trial court that on these facts Stephen W. had committed willful and serious misconduct by discussing the case with his wife in violation of the court's admonition. This court held that the trial court's conclusion Stephen W.'s misconduct rendered him unable to perform his duty was supported by substantial evidence. (*Id.* at pp. 742-743.)

Stephen W.'s reported conduct differs in significant ways from that of Juror No. 10 in this trial. Stephen W. deliberately initiated a conversation with his non-juror wife in violation of the court's order to the contrary for the purpose of clearing his head about the case. He went over the evidence in the case with his wife, listened to his wife's opinion, and declared that his lingering doubt about his intended vote was removed after the conversation. In contrast, Juror No. 10 said she spoke about the case with her mother and her friend. She did not seek out either of them, nor did she initiate the discussion of the case in either conversation. Moreover, the juror's conversations were about a completed event, i.e., that she

had cast a vote earlier that day, and not for the purpose of determining how she would vote at a later time. (18RT 4445-4448.) Thus, there was no reasonable likelihood Juror No. 10 was influenced by either her mother or her friend. Importantly, unlike Stephen W., Juror No. 10 did not talk with either her mother or her friend about the facts of the case or about specific evidence in the case. She did not solicit their views on the death penalty. She did talk to them about the two defendants. (18RT 4446.) She specifically said that though she was troubled by the vote she had cast, she did not discuss her concern about the vote with her friend and further told her friend that she was still not permitted to disclose her vote. This reveals that Juror No. 10 did not act in intentional disregard of the court's order. However, she did respond to hand gestures made by her friend concerning the vote and her friend did state her views relating to the death penalty. (18RT 4450-4451.) She had no analogous discussion with her mother. (18RT 4452.) Both conversations were brief and neither was initiated by Juror No. 10. (18RT 4447, 4449.)

Significantly, the prosecutor and both defense counsel all agreed that Juror No. 10 believed the jury had reached an agreement on Wednesday well before the time she spoke with either her mother or her friend. When the court's questions to her seemed to suggest that she had sought out these conversations for the purpose of either reaching a decision about how to vote or to settle a question in her own mind about her vote, Juror No. 10 reacted quickly and firmly to disabuse the court of its belief.[43] This colloquy establishes that the juror's intent at the time of the conversations was *not* to disobey the court's order. It reasonably follows that, unlike Stephen W., Juror No. 10 did not intentionally engage in willful misconduct

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[43] "The Court: 'But you told her what you're thinking about making – ' [¶] Juror No. 10: '*No, No, No, No. We had already reached the verdict. Wednesday night we had reached the verdict.*'" (18 RT 4448; italics added.) "The Court: 'So did you talk about what was not sitting right with you?' Juror No. 10: '*Wait a minute. Wait a minute. No. I didn't talk about what was not sitting right with me*, but she said – She said what decision did you make?'" (18 RT 4450; italics added.)

in these conversations. Moreover, her conversations concerned the fact she had cast a vote, though not the nature of the vote, and were not intended to solicit input for purposes of deciding how she would vote. As counsel for Nunez told the court, there was no evidence that reasonably tended to show the juror had been influenced by the statements or questions of her mother and her friend. (18RT 4455.)

In *People v. Daniels*, *supra*, upon which the trial court stated its reliance, this court considered the trial court's removal of juror Lloyd Francis for serious misconduct. During the hearing that preceded the discharge, the trial court learned that Francis had discussed specific facts of the case with the manager of his apartment complex. The manager reported that Francis "'couldn't see how a man that was in a wheelchair could shoot another man and get out of the wheelchair and get another gun to shoot the other officer' and that Francis 'can't see how that nigger was able to kill two policemen.'" (*People v. Daniels*, *supra*, 52 Cal.3d at p. 863.) Other witnesses provided corroborating evidence of the conversation. The manager further reported that Francis had also read a newspaper article concerning the case during the trial. (*Id.*) This court found Francis' conduct constituted serious misconduct that is willful and stated that serious and willful misconduct provides good cause to believe the juror will not be able to perform his duty. (*Ibid.* at p. 864.)

The contrast in conduct between that of Juror No. 10 and Francis are manifest. Juror No. 10 did not reveal to either her mother or her friend information anywhere equivalent to the wealth of evidentiary detail reflected in the opinionated disclosures by juror Francis. Nor did Juror No.10 state her opinion of the prosecution's penalty phase case, as did juror Francis concerning the guilt phase evidence in his case. Contrary to the trial court's reasoning, *People v. Daniels*, *supra*, concerned as it was with serious and willful juror misconduct much more egregious than that under consideration here, fails to support the conclusion that discharge of Juror No. 10 was appropriate here.

Numerous cases clearly indicate the type of communication which is regarded as creating a presumption of prejudice because of a juror's communication with non-jurors.

In *People v. Zapien* (1993) 4 Cal.4th 929 a deliberating juror reported that the previous night he had inadvertently overheard a television news report announcing that the defendant had made "threats against the guards . . . if he were given the death penalty." The juror told the court he could base his verdict solely upon the evidence and still could be fair and impartial. (*People v. Zapien, supra*, 4 Cal.4th at p. 993.) This court held that substantial evidence supported the trial court's decision to keep the juror on the panel.

In *People v. Stanley* (2006) 39 Cal.4th 913, a sitting juror read a newspaper article recounting the prosecutor's opening argument describing the defendant's two-month string of Oakland area robberies and the defendant's complaint about the racial makeup of the jury during jury selection. (*Id.* at p. 946.) During the hearing that followed, the juror said he read through the entire article, recalled it "sort of summarized" the opening arguments and did so accurately, but then claimed he had no recollection of having read anything about the defendant's prior criminal record or the defendant's discussion with the court concerning the jury's racial makeup. The juror maintained nothing he had read would affect his ability to be a fair juror and the trial court found the juror credible and permitted him to remain on the jury. This court found the trial court's credibility determinations supported by substantial evidence and concluded the presumption of prejudice from the juror misconduct had been rebutted in the case. (*Id.* at p. 951.)

Similarly, in *People v. Honeycutt* (1977) 20 Cal.3d 150 a juror contacted an attorney and asked him about the law regarding the case. Likewise, in *Stockton v. Virginia* (4th Cir. 1988) 852 F.2d 740, 741 several jurors were eating at a dinner, when the owner approached them and told them "they ought to fry the son of a bitch." In *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608 involved allegations that

during the trial a juror had spoken to people who knew the defendant and they told him how the defendant was a violent person.

In such situations, it is likely that the juror would be improperly influenced by the outside conduct.

Here, where the juror had believed that the deliberations were over, this minimal contact does not create a presumption of prejudice requiring the juror to be excused.

Appellant respectfully submits that when viewed against the conduct of jurors in the cases described above the conduct of Juror No. 10 was neither willful nor serious nor substantial. Rather it appears to be inadvertent conduct not amounting to misconduct.

Viewed most critically for the sake of argument, and without regard to the trial record, Juror No. 10's conduct in discussing the case with her mother and her friend, and her consequent receipt of information outside the court proceedings may technically be considered "misconduct." However, because communication was not "about the matter pending before the jury, i.e., the guilt or innocence of the defendant," it cannot be said to give rise to a presumption of prejudice. (*Hamilton, supra*, 20 Cal.4th 305-306

> "'[W]hether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed. On the other hand, since jury misconduct is not per se reversible, if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct a reversal is not compelled.' [Citation.]"

(*People v. Williams* (1988) 44 Cal.3d 1127, 1156.)

> "[J]udicial discretion is . . . 'the sound judgment of the court, to be exercised according to the rules of law.' [Citation.] . . . [T]he term

> judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.] Moreover, discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]"

(*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Here, nothing in the colloquy between the court and Juror No. 10 established that either the prosecutor's burden had been lightened or that a defendant's affirmative defense had been adversely affected or that the jury's impartiality had been affected. Neither the prosecutor nor defense counsel made the analogous argument. Any presumption of misconduct on the part of Juror No. 10 was effectively rebutted on the record by the juror's explanation of the events to the court.

In this case, the trial court stated its reliance upon *People v. Keenan, supra*, 46 Cal.3d 478, 534, fn. 27, and upon *Lowenfield v. Phelps* (1988) 484 U.S. 231. (18RT 4473-4474.) The court's concern, as reflected in its reliance upon footnote 27[44] in *People v. Keenan*, appears to be that because Juror No. 10 had heard her friend's view on the death penalty the trial court was precluded from instructing the jury, which was then divided 10 to 2 and at an impasse, that the jurors could consider each others' opinions because Juror No. 10's opinion had been influenced by the comments concerning the death penalty made by her friend. However, as appellant has discussed above, the court's conclusion that Juror No. 10 was influenced by her friend's opinion is unsupported by substantial evidence. Moreover, an admonition would have cured any presumption of prejudice as occurred in the cases discussed above where jurors inadvertently read newspaper

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[44].*People v. Keenan* (1988) 46 Cal.3d 478, 534, fn. 27, states: "The United States Supreme Court recently approved instructions to a deadlocked capital penalty jury which were substantially similar to the instant court's charge that jurors must consider the opinions of other panelists and reach a verdict if possible without violation of individual judgment or conscience. (*Lowenfield, supra*, 484 U.S. [231].)

accounts or heard newscasts concerning the trial. The court's dismissal of the juror was precipitous and arbitrary.

And, as the chronological record of deliberations demonstrates, the dismissal prejudiced appellant because the jury, which had announced itself divided at 10 to 2 before the discharge of Juror No. 10, soon thereafter announced itself divided 11 to 1.

In addition, it is profoundly troubling that Juror No. 10 and later Juror No. 9 were dismissed following either the suggestion or the implication by the foreman that getting rid of these two jurors would avoid a hung jury. As noted above (*ante*, at pp. 263-264), on two occasions, after it appeared that the jury was deadlocked, the foreman sent a note to the court. In both notes he mentioned the possible deadlock, then suggesting a way of breaking the deadlock by getting rid of the holdouts, once raising the issue of potential misconduct as to Juror No. 10 and then raising the issue as to Juror No. 9's initial qualifications to be on the jury.

In the first note, after reporting the impasse of 10-2, and reporting Juror No. 10's conversation with her mother, the foreman stated, "possibly replacing her would be appropriate." (38CT 11132.) The next note from the foreman mentioned that there was a juror who felt God's judgment would go against her if the voted for death, asking whether that juror should have been placed on the jury, and adding that they were split 11-1" (38CT 11133.)

Appellant recognizes that the foreman had a duty to report misconduct by fellow jurors. However, the potential misconduct is the sole extent of his legitimate concerns, the remedy for the misconduct and the consequences of leaving the perceived-offending juror on the panel or removing that juror were not matters within the foreman's purview.

The two issues of juror misconduct and a possible deadlock should have the subject of separate discussions. Otherwise, the desire to avoid a deadlock and an expensive re-trial could influence the court's actions in regards to the offending

juror. Clearly, a trial court would view minor misconduct differently when the trial was not otherwise endangered.

As a result, this court must view the removal of Juror No. 10 in light of the possibility that that action was motivated at least partly by a desire, by the foreman and by the trial court, to avoid a hung jury. It is thus apparent that in dismissing Juror No. 10 the court erroneously dismissed one of two holdout jurors; and as discussed in more detail in the following argument, the court thereafter dismissed the other holdout. The conclusion is unmistakable that the court, in an effort to avoid a hung jury and a retrial, effectively removed the two jurors who stood in the way of a deadlock or, possibly, an acquittal. A conviction and sentence of death based upon this kind of judicial meddling with the composition of the jury is an outrageous violation of the most fundamental principles of due process. Appellant has further discussed the prejudice flowing from the erroneous discharge of Jurors Nos. 10 and 9 collectively in the argument concerning the erroneous discharge of Juror No. 9, which follows. Appellant incorporates the prejudice discussion here and respectfully refer the reader to that discussion.

An impartial jury serves to ensure accuracy in the truth-finding process. Improperly influenced jurors increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Gilmore v. Taylor*, *supra*, 508 U.S. 333, 334; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

The prejudicial impact of this error is discussed in detail in the following section of this brief, and is hereby incorporated into this argument by reference.

XVIII

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW WHEN IT DISCHARGED JUROR NO. 9 FOR CAUSE

A. Introduction and Chronology of Penalty Phase Juror Discharges

At a time when the jury was divided 11 to 1, and over the objections of counsel for both appellants that the jury was hung and that Juror No. 9 was the holdout juror, the trial court removed Juror No. 9 based upon her claim that the "high amount of stress" created by the case was detrimental to her health and that of her unborn child. The court replaced the juror with an alternate. Fifty-five minutes after the newly constituted jury began its deliberations it delivered verdicts of death for both appellants.

Rather than repeat the history of penalty phase deliberations here, appellant incorporates by reference the Introduction and Chronology of Penalty Phase Juror Discharges set forth in Section A of the preceding argument. (See Argument XVII.)

B. Juror No. 9

On June 20, 2000, shortly before the jury was given penalty phase instructions, the trial judge informed counsel that Juror No. 9 had called the courtroom to say that she was pregnant and going to the hospital with a medical emergency. Court and counsel agreed to recess the trial for the day. After the jury was excused, the trial court reported that Juror No. 9 had just called the courtroom to say that her husband would be delivering a doctor's note stating she would not be able to continue in the case. (17RT 4175-4177.)

Later that morning, the trial court shared the note from Dr. Michael Bianchi with the parties. The note stated that Juror No. 9 had a hemorrhagic cyst of the

right ovary with severe pain and was unable to serve as a juror for 48 to 72 hours. (3 SuppCT 817; 17RT 4225.) Counsel for both Nunez and Satele stated their preference to have the juror remain on the jury. (17RT 4225-4226.) The court decided to telephone Dr. Bianchi for further information about the juror's availability. Dr. Bianchi stated that in his "best medical opinion" Juror No. 9 would be able to return to jury duty "most likely within 48 to at the most 72 hours." He did not anticipate that she would have to be removed from jury duty or that she would be disabled past that time period. (17RT 4233-4234.) Thereafter, with the parties' consent, the court recessed the trial to allow Juror No. 9 to rest for a period of 72 hours. (17RT 4238.) Juror No. 9 returned for testimony from final witnesses, arguments of counsel, penalty phase instructions and deliberated with the other jurors for six days. (38CT 11046, 11122, 11125, 11127, 11131, 11135.)

On Friday, June 30, 2000, after the court had replaced discharged Juror No. 10 with an alternate and after the newly composed jury had commenced deliberations, the jury foreperson sent a note to the court, which was received at 11:35 a.m.

The note stated: "We have a juror that feels 'God' has the final judgment and that she feels 'God's' judgment on herself if she found death as her conviction would go against her on Judgment Day[.] My question is should she have been placed on the jury with special circumstances. We are at 11-1." (38 CT 11133.) The court chose not to make further inquiry, citing People v. Keenan, *supra*, 46 Cal.3d 478, and with the agreement of both defense counsel[45]. (18 RT 4474, 4485-4487.)

On Monday morning, July 3d, 2000, court and counsel considered the following note dated July 2, 2000, from Juror No. 9. The court read the note from Juror No. 9 into the record, as follows: "

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[45] The court was misplaced in its reliance on Keenan as a reason for not making further inquiry because that case holds that a trial court "must" conduct an inquiry into allegations of juror misconduct. (*Keenan, supra*, at p. 532.)

> Your Honor, respectfully, I am asking if I may be removed from this case. I feel the high amount of stress this case created will be detrimental to the health of my unborn child, as well as towards myself. Because I am considered high risk in this pregnancy, I want to make sure I do everything possible to increase my chances of being able to carry this baby full term. I wish to thank you for your time, effort, and compassion in the rendering of your decision. Sincerely, [signed by Juror No. 9]."

(18RT 4475.)

The court inquired whether counsel thought the court should hear from the juror. The prosecution asked the court to inquire as to the juror's health. Counsel for Nunez objected, stating: "Your honor, I think this jury is hung, and I think there's pressure being placed on one particular juror. I suspect it's this No. 9 is the juror in question, and I think this jury is hung, and I think what we're doing is moving other people in that may have a different viewpoint." (18RT 4476.)

Counsel for Satele reminded the court that the court had given the juror additional time in which to rest on a previous occasion and had spoken with the juror's physician and been assured that the juror was capable of continuing with her jury duty. Counsel contended there was no legal cause to inquire of the juror in the absence of a further statement by her doctor. (18RT 4476-4477.)

The trial court, relying once more on *People v. Keenan*, *supra*, called the juror in for an inquiry. (18RT 4477.) The court confirmed with the juror that she had written the note he had read into the record earlier (18RT 4479) and that the court had recessed the trial for three days on an earlier occasion to provide the juror with the opportunity for bed rest at a time when she was two months pregnant and experiencing pain as the result of a hemorrhagic cyst. (3CT 817; 18RT 4478.)

During the inquiry the court elicited the following information from Juror No. 9, who provided "yes" and "no" answers to questions that resulted in the following information. She had suffered a previous miscarriage at a time when she was in her fifth month of pregnancy. She thought that job-related stress had a

lot to do with the miscarriage. (18RT 4480.) She believed that her continued participation in the case would cause her stress. She said the case had caused her a great amount of stress, adding, "especially Friday" [i.e., Friday, June 30]. She believed being excused from the case would be in her best interests and in the best interests of her child. She believed she would be unable to discharge her duty in the case. (18RT 4480.) The juror stated she began to feel pains on Friday, but had not seen a doctor since then. (18RT 4481.)

After the juror was excused the prosecutor asked that she be discharged. (18RT 4481.) Counsel for Nunez argued against the juror's discharge. Counsel stated the jury had been accepted by the defense because of its gender makeup and because Jurors Nos. 9 and 10 were the only Afro-Americans on the jury.[46] Counsel pointed out that the juror had been cleared for jury service by her doctor and had not seen a doctor with regard to the present complaint. Counsel asked that she remain on the jury. Counsel further stated he believed the jury was hung and asked that a mistrial be declared. The mistrial motion was denied. (18RT 4482.)

Counsel for Satele objected to the discharge of Juror No. 9 because there was no evidence to support the juror's assertion of medical concerns. Counsel noted the juror had not seen a doctor and had not said that she had begun to hemorrhage, as she had on the earlier occasion. (18RT 4482-4483, 4487-4489.)

The trial court found good cause existed under Penal Code section 1089 and Code of Civil Procedure section 233[47] to excuse the juror. The court found the juror was unable to perform her duty; that she had suffered a miscarriage two

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[46] The court subsequently made the following record concerning the racial and gender composition of the jury: Juror No. 10, an Afro-American female was replaced by an Afro-American male. Juror No. 9, an Afro-American female was replaced by an Afro-American female. When Juror No. 9 was excused, six of the eleven jurors in the box were female jurors. (18 RT 4492.)

[47] Code of Civil Procedure section 233 states in relevant part: "If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall be designated by the court to take the place of the juror so discharged. . . ."

years ago in the fifth month of her pregnancy because of work-related stress, that she had suffered one hemorrhage, and that she had experienced pain on Friday, and that she was unable to perform her juror's duty because she was sick with a "stomach ache" related to the pregnancy. The court thereupon excused Juror No. 9. (18RT 4483-4484.)

Counsel for Satele asked the court to inquire whether the excused juror was the juror who was "holding out." The court denied the request. (18RT 4487-4489.)

The court then seated an alternate juror as Juror No. 9. The newly constituted jury began its deliberations at 10:45 a.m. At 11:35 a.m., the jury announced it had reached its verdicts. (38CT 11139, 11141.)

Subsequently, in his motion for new trial, counsel for Nunez once more argued that Juror No. 9 was a holdout juror whose discharge was not supported by good cause. (18RT 4564-4565.) In ruling the juror had been properly discharged, the trial court again noted the jury had previously suffered a hemorrhage and stomach pains and had a history of miscarriage. (18RT 4584.)

C. The Relevant Law

"The right to trial by jury in criminal cases derives from common law and is secured by both the federal and state constitutions. [Citation.]" (*People v. Trejo* (1990) 217 Cal.App.3d 1026, 1029; U.S. Const., Art. III, § 2, cl. 3, and the Sixth and Fourteenth Amendments; Cal.Const., art. 1, § 16.) A jury trial in a criminal case in a state court is now a federal constitutional right, unless the charge is of a "petty offense." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491, 496; 5 Witkin and Epstein Cal. Crim. Law (3d), Criminal Trial, §438.)

It is well established that a defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In*

re Hitchings (1993) 6 Cal.4th 97, 110.)

"An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway*, *supra*, 50 Cal.3d 1098) and every member is '"capable and willing to decide the case solely on the evidence before it."' (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips*, *supra*, 455 U.S. 209, 217." (*In re Hamilton*, *supra*, 20 Cal.4th 273, 294.)

An impartial jury serves to ensure accuracy in the truth-finding process. Improperly influenced jurors increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Gilmore v. Taylor*, *supra*, 508 U.S. 333, 334; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

In *People v. Cleveland*, *supra*, 25 Cal.4th 466, this court summarized the law regarding removal of a juror as follows:

> "Penal Code section 1089 provides, in pertinent part: 'If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears herefore, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.' (See also Code Civ. Proc., §§ 233, 234.) 'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror' must appear in the record as a demonstrable reality. [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) [¶] The most common application of these statutes permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1100

> [anxiety over new job would affect deliberations]; *People v. Johnson* (1993) 6 Cal.4th 1 [sleeping during trial]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [sleeping during trial]; *People v. Dell* (1991) 232 Cal.App.3d 248 [juror involved in automobile accident]; *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 629 [inability to concentrate]; *In re Devlin* (1956) 139 Cal.App.2d 810, 812-813 [juror arrested on felony charge], disapproved on another ground in *Larios v. Superior Court* (1979) 24 Cal.3d 324, 333.)"

(*People v. Cleveland, supra*, 25 Cal.4th at p. 474.)

Trial courts have also relied upon Penal Code section 1089 in removing jurors who, like Juror No. 9, asked to be discharged. In that context, this court found trial courts acted within their discretion in circumstances in which a juror was removed before trial and without conducting a hearing on the ground the juror's brother had died during the night (*In re Mendes* (1979) 23 Cal.3d 847, 852, or in the midst of the penalty phase because of the unexpected death of the juror's mother the previous night. (*People v. Ashmus* (1991) 54 Cal.3d 932, 986-987).

On the other hand, in *People v. Beeler, supra*, 9 Cal.4th 953, this court found the trial court acted within its authority pursuant to Penal Code section 1089 when it decided to continue penalty phase deliberations with a juror whose father had died. The court sent the juror back to deliberate for one hour until it was time for the juror to leave to go to the airport. The court determined that if the jury could not reach a verdict in that time the jury was to resume deliberations six days later upon the juror's return. In fact the jury reached its verdict within that time. Nothing in the record showed a "demonstrable reality" that the juror was unable to discharge his duties and there is no presumption that a juror who has suffered a loss in the family is unable to discharge the duties of a juror. (*Id.* at pp. 988-991.)

Here, of course, the "demonstrable reality" is that Juror No. 9 was the holdout juror as defense counsel advised the court in the discussion that preceded the juror's discharge. The jury, divided 11 to 1 before Juror No. 9 was replaced by an alternate, returned a verdict within 55 minutes in its newly constituted membership.

In *People v. Cleveland, supra*, 25 Cal.4th 466, this court determined that "a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence." (*Id.* at p. 483.) *Cleveland* also recognized that "often the reasons for a request by a juror to be discharged . . . initially will be unclear" and that "a court must take care in inquiring into the circumstances that give rise to a request that a juror be discharged. . . ." (*Id.* at pp. 483-484.)

In *Cleveland*, the trial court removed a deliberating juror for failing to deliberate. This court concluded the trial court abused its discretion in so doing because the record failed to establish as a "demonstrable reality" that the juror refused to deliberate. Rather, the record showed that the juror viewed the evidence differently from the way the rest of the jury viewed it. This court observed that the juror may have employed faulty logic and may have reached an "incorrect" result, but it could not be said he refused to deliberate. This court deemed the error prejudicial requiring reversal of the judgment. (*Id.* at p. 486.)

In the present case, the trial court found that Juror No. 9 was unable to perform her duty in that she had previously lost a child because of work-related stress, that the trial was causing her stress, that she had suffered a hemorrhage on an earlier occasion, and that she had experienced pain since the previous Friday. The court found that if the juror were to continue she would be endangering her life and that of her child. (18RT 4485.)

This record fails to support as a "demonstrable reality" the trial court's conclusion that Juror No. 9 was unable to perform her duty. When this juror had experienced pain during the penalty phase, she went to a hospital emergency room for treatment. When she experienced pains during penalty deliberations on Friday, June 30, she tried but was unable to see her doctor. The record is devoid of evidence that she made further attempts at seeking treatment over the weekend or went to a hospital's emergency room. During the juror's penalty phase medical emergency, the court consulted with the patient's doctor. At the time of the juror's

penalty deliberation complaints, the court did not consult with her doctor though the juror's failure to seek medical treatment over the weekend suggested that her reasons for seeking a discharge might be, in *Cleveland*'s phrasing, "unclear." (*People v. Cleveland, supra*, 25 Cal.4th at p. 484.) Significantly, when the trial court had consulted with the doctor during the juror's penalty phase medical emergency, the doctor had attributed the juror's pain to a cyst and not to stress, had discounted any suggestion the juror might not be able to complete her service, and stated what the juror needed at the most was 72 hours of rest.

The trial court discharged the juror after finding that continued jury service would endanger her life and that of her child. But, the record fails to support that the court's conclusions regarding the medical health of the juror and her unborn child are a "demonstrable reality." Indeed, the court's finding that the juror's health would be endangered by continued service is flatly contradicted by the written prognosis sent to the court by the juror's own physician.

In order to affirm a trial court's decision to discharge a sitting juror, "[the] juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.'" (*People v. Johnson, supra*, 6 Cal.4th 1, 21; *People v. Compton* (1971) 6 Cal.3d 55, 60; *People v. Marshall, supra*, 13 Cal.4th 799, 843.) As Justice Werdegar explained in her concurring opinion in *People v. Cleveland, supra*, "Repetition of the 'abuse of discretion' formula in this context is potentially misleading, for the substitution of a juror after the jury has retired to deliberate 'may trench upon a defendant's right to trial by jury. (U.S. Const., Amend. VI; Cal. Const., art. 1, § 16.)' (*People v. Collins, supra*, 17 Cal.3d 687, 692, fn. Omitted.) Thus, discharge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision. In light of this constitutional dimension to the problem, it is inappropriate to commit to the trial court – subject only to the deferential abuse-of-discretion standard of review on appeal – the important question of the substitution of jurors after deliberations

have begun." (*People v. Cleveland, supra*, 25 Cal.4th, at p. 487.) Thus, under the standard set forth in *Johnson*, *Compton*, and *Marshall*, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror was unable to discharge her duty.

Under these circumstances, the trial court abused its discretion in excusing Juror No. 9. The error is prejudicial and requires reversal of the judgment. (*People v. Cleveland, supra*, 25 Cal.4th at p. 486.)

Finally, as discussed above, the dismissal of both Juror No. 10 and later Juror No. 9 followed either the suggestion or the implication by the foreman that getting rid of these two jurors would avoid a hung jury. While the foreman may report perceived misconduct to the trial court judge, that is an issue that must be separated from the question of how to resolve a deadlock. Not all misconduct justifies removing jurors from the case. To allow the concern of a possible hung jury and retrial to enter this discussion necessarily taints the question of what to do with the offending juror.

As a result, this court must view the removal of Juror No. 9 in light of the possibility that that action was motivated at least partly by a desire to avoid a hung jury.

XIX

THE COURT ERRED IN ALLOWING THE JURY TO MAKE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE FINDINGS AS TO EACH COUNT. THIS ERROR REQUIRES THAT THE JUDGMENT OF CONVICTION BE REVERSED

In the verdict forms for each defendant, the jury found true the multiple murder special circumstance in relation to both Count 1 and 2. (38CT 10932.) Because there can only be one multiple murder special circumstance in a capital case, allowing the jury to find two multiple murder special circumstance improperly inflated the culpability of appellant and would have made the jury more likely to improperly impose the death penalty in violation of appellant's right to due process of law. Therefore, the imposition of the death penalty must be reversed. .

The prosecution alleged the special circumstance of multiple murder under Penal Code section 190.2(a)(3) in connection with both Counts 1 and 2. Thereafter, the jury returned true findings as to both. This is error under *People v. Harris* (1984) 36 Cal.3d 36, 67; *People v. Allen* (1986) 42 Cal.3d 1222, 1273.

In *Harris* this court held that to allege two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty. Nonetheless, the court held that this was harmless error absent some prejudice. Since *Harris*, this court has consistently held that when a defendant is charged with more than one multiple murder special circumstance and all are found to be true, all but one must be stricken. (See *People v. Sanders* (1995) 11 Cal.4th 475, 537; *People v. Champion* (1995) 9 Cal.4th 879, 936

Multiple murder is a single circumstance that applies equally to all the murders of which defendant is convicted. Because of the multiple killings, each of the murders is deemed more heinous. (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1564.)

The court explained that this is different from section 667.61, where the total sentence is affected by the number of multiple victim circumstances. Furthermore, "the court, rather than the jury, sentences the defendant under the One Strike law, so there is no danger of undue prejudice as a result of multiple findings under subdivision (e)(5)." (*Ibid.*)

The instant issue is similar to the improper admission of irrelevant character evidence in that allowing the jury to make more than one multiple murder finding serves no legitimate purpose yet operates to defendant's prejudice. Therefore, all that remains is the overly inflated aspect of multiple murder, improperly repeated. As with the case of improper character evidence that adds nothing of substance, this error violates the right to due process of law. (*McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993).) As a due process violation, this improper dual finding requires that the conviction must be reversed unless the reviewing court is able to declare a belief that the error was harmless beyond a reasonable doubt. (*Beck v. Alabama, supra,* 447 U.S. at p. 637-638; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Such a finding is not possible here.

In this case, the finding of dual multiple murder special circumstances greatly increased the danger that the jury would improperly inflate appellant's culpability. The information had originally charged three special circumstances: a hate crime allegation and two multiple murder allegations. The jury found the hate crime allegation to be not true. Thus, had the information properly alleged only one multiple murder allegation, as *Harris* and *Allen* require, the jury would have returned true findings as to only one special circumstances instead of two. It is highly probable that at least some of the jurors would have weighed two special circumstances more heavily against appellant than would have been the case had only one special circumstance been found. (See *People v. Harris*, *supra*, 36 Cal.3d at p. 67; *People v. Allen*, *supra*, 42 Cal.3d at p. 1273.)

Furthermore, the facts surrounding the replacement of Jurors 9 and 10 (see

Claims XVII and XVIII) strongly suggest that, prior to the replacement of these two jurors, the jury was deadlocked with respect to penalty. Had the jury found only two special circumstances instead of improperly finding three, it is far more likely that other jurors might have been persuaded to vote for life.

Moreover, as explained in previous sections of this brief, the case against appellant was already improperly inflated by the fact that the jury was improperly instructed regarding its obligation to determine the mental state of the aider and abettor, and the jury thus returned verdicts which implausibly found that both appellants had "personally used" the firearm. This finding of "personal use," which contradicted the prosecutor's own argument that he had not, and did not need to, establish which defendant fired the weapon, implied that appellant was the actual killer—a fact the jury was highly likely to consider as an aggravating factor in making its penalty decision.

Finally, the danger that appellant's culpability would be improperly inflated was already present due to the prosecution's over-charging of special circumstances. The jury heard a substantial amount of evidence relating to the defendants' alleged racial bias in support of the prosecution's contention that the crime was motivated by racial hatred. Although the jury found the allegation to be not true, this does not mean that the evidence was not profoundly prejudicial or that it did not impact the death verdict. The "not true" finding merely means that the jury could not unanimously find the allegation true beyond a reasonable doubt. At least some of the jurors may have believed the allegations and considered them in aggravation.

For all the foregoing reasons, there existed a grave danger that appellant's culpability would be improperly inflated in the penalty phase. Accordingly, the death penalty verdict must be reversed.

XX

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this court, appellant presentS these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[48] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that

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[48] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A Appellant's Death Penalty Is Invalid because Penal Code § 190.2 Is Impermissibly Broad

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"
>
> (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 21 special circumstances[49] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon, supra*, 34 Cal.3d 441.) Section

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[49]. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

190.2's reach has been extended to virtually all intentional murders by this court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[50] (See Section E. of this Argument, *post*).

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[50] In a habeas petition to be filed after the completion of appellate briefing, Appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, Appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. Appellant's Death Penalty Is Invalid because Penal Code § 190.3(a) As Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[51] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[52] or having had a "hatred of religion,"[53] or threatened witnesses after his arrest,[54] or disposed of the victim's body in a manner that precluded its recovery.[55] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should

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[51] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[52] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[53] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[54] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[55] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. Of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special

circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1 Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; Their Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this court's previous interpretations of

California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors. . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey, supra*, 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington, supra*, 542 U.S. 296; and *Cunningham v. California* (2007) 127 S.Ct. 856 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set

forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at p. 244.)

In *Cunningham,* the high court rejected this court's interpretation of *Apprendi,* and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra,* Section III.) In so doing, it explicitly rejected the reasoning used by this court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[56] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (18RT 4432),"an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made,

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[56] This court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

the jury must find that aggravating factors substantially outweigh mitigating factors.[57] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[58]

This court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this court held that notwithstanding *Apprendi*, *Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in

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[57] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* 59 P.3d at p. 460)

[58] This court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

Cunningham.[59] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.* pp. 863-863.) That was the end of the matter: *Black*'s interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra*, pp. 869-870.)

Cunningham then examined this court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* p. 870.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* at p. 869.)

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[59] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[60] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life

[60] Section 190, subd. (a), provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict."

(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.* 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the

answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[61])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[62] As the high court stated in *Ring*, *supra*,

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[61] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[62] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed

122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958)

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to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of

conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*(1976) 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this court to be an element of

due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons herefore." (*Id.* 11 Cal.3d at p. 267.)[63] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where

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[63] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is

comparative proportionality review – a procedural safeguard this court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review.

(See *People v. Fierro, supra,* 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this court. (See, e.g., *People v. Marshall , supra,* 50 Cal.3d 907, 946-947.) This court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

In this case, there was substantial evidence of unadjudicated criminal activity.

As to appellant Nunez, the prosecution introduced evidence of the following acts: 1) the battery of Esther Collins on September 16, 1997 (4RT 922, 924-926, 928); 2) manufacturing a sharp object while in custody (13RT 3106-3108); 3) the attempted escape of August 17, 2000, as described by Deputy Schickler, based on his testimony that appellant removed his handcuffs and performed jumping jacks while on the transport bus (16RT 3911-3917); 4) the attempted escape May; 18, 2000, based on the testimony of Deputy Baltierra that he found a heavy duty staple in appellant Nunez's mouth, an item that can be used as a handcuff key (16RT 3936-3940); 5) possession of a sharp instrument while in custody on May 15, 2000, based on the testimony of Deputy Estes that she found a razor blade hidden in a Bible appellant Nunez was carrying and bringing to court

(16RT 3927-3930).

As to appellant Satele, the prosecution introduced evidence regarding the battery of November 9, 1999, testified to by Deputy Arias 1999, describing the incident where appellant Satele approached a handcuffed inmate and hit him in the face. (13RT 3119-3124.)

The trial court listed these acts and instructed the jury that it could use them as aggravating factors. In doing so, the trial court instructed the jury that before a juror could use any of the incidents, the juror had to be convinced beyond a reasonable doubt that these acts occurred. However, the trial court also instructed the jury that it was not necessary for all the jurors to agree as to which criminal acts did occur. (17RT 4426.)

These violent acts of appellant Nunez were argued by the Deputy District Attorney as aggravating factors. (17RT 4321-4325, 4328.) The Deputy District Attorney also argued the incident involving appellant Satele's assault on another inmate as and aggravating factor. (17RT4323.)

These incidents were presented and argued as aggravating factors, upon which the jury could have based its decision to impose the death penalty, in spite of the fact that the jury never unanimously found these facts to be true.

The U.S. Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) The instruction containing these adjectives was read to the jury in this case. (18RT 4421.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra*, 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305; *Gilmore v. Taylor, supra*, 508 U.S. 333, 334; *Johnson v. Mississippi, supra*, 486 U.S. 578, 584-585; *Zant v. Stephens, supra*, 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or

defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing toward a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*"

(*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j), constituted aggravation instead of mitigation. (*Id.* 32 Cal.4th at pp. 727-729.) This court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[64]

The very real possibility that appellant's jury aggravated their sentence upon the basis of nonstatutory aggravation deprived appellant of an important

[64] There is one case now before this court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. See *People v. Cruz*, No. S042224, Appellants' Supplemental Brief.

state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated each appellant "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Defendants

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[65] as in *Snow*,[66] this court analogized the process of determining

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[65] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary*

whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[67]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal

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decision to impose one prison sentence rather than another." (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[66] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another*." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

[67] In light of the Supreme Court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

protection of the laws.[68] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

E. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. And Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. Of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. Opn. Of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

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[68] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra*, 536 U.S. at p. 609.)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. Of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*, *supra*, 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with

actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[69] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[69] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

XXI

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS AT TRIAL ALSO REQUIRES A REVERSAL OF THE VERDICT IMPOSING THE DEATH PENALTY ON APPELLANT

As discussed above (*ante*, at p. 226), even where individual errors do not result in prejudice, the cumulative effect of such errors may deprive the defendant of due process of law in violation of the Fourteenth Amendment to the United States Constitution and therefore require reversal. (*Lincoln v. Sunn*, *supra*, 807 F.2d 805, 814, fn. 6 [cumulative errors may result in an unfair trial in violation of due process]; accord *United States v. McLister*, *supra*, 608 F.2d 785, 788; see also *People v. Hill*, *supra*, 17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S.637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process".)

Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace*, *supra*, 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

The discussion in this brief of each error explained how each error prejudiced appellant and requires reversal of the death 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 generally* Goodpaster, *The Trial For 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"].)

This court must also assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Holt, supra*, 37 Cal.3d 436, 459.) Moreover, "the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright, supra*, 477 U.S. 399, 411 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Zant v. Stephens, supra,* 462 U.S. 862, 885.) The fact that there were multiple homicides is not dispositive in reaching the death penalty. Terry Nichols, convicted of killing 169 people in the bombing of the Alfred P. Murrah Federal Building, received a sentence of life in prison[70]. (see also, Welsh S. White, *Effective Assistance Of Counsel In Capital Cases: The Evolving Standard Of Care* 1993 U. Ill. L. Rev. 323, 365, fn. 290.)

When the above-described principles are applied in the context of this capital case, it is clear that the verdict of death must be reversed.

In this case, as discussed previously, there were serious questions as to the proof of intent on the part of the non-shooter. Because the jury erroneously found both defendants to have personally fired the fatal bullets, this negates the need to find intent on the part of the non-shooter.

This also impacts on the selection of the death penalty by the jury because it improperly inflates their individual culpability. Obviously, a jury is going to be more inclined to mete out the harsher punishment for a defendant who intends to

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[70] "Terry Nichols Receives 161 Life Sentences," Associated Press/August 9, 2004 http://www.rickross.com/reference/mcveigh/mcveigh37.html

kill. Such a person displays a higher degree of moral culpability than one who causes another's death unintentionally. Thus, an finding of intent to kill under improper instructions wrongly inflates culpability.

As to appellant, this was exacerbated when the prosecutor improperly switched horses mid-stream, and changed his previously expressed admission that he did not know who the shooter was, suddenly deciding that appellant fired the shots. Because this shift was made with no new evidence to support it, it constitutes misconduct.

However, by making appellant the shooter, it makes it easier for the jury to convict him and sentence him to death.

The circumstances of the dismissal and replacement of Jurors 9 and 10 further demonstrate that this case was a close one, and that even an error which might be found harmless in another case would be deemed harmful, and therefore reversible error, in this one. It is clear that the jury was deadlocked 10 to 2 prior to the dismissal of Juror 10, and then deadlocked 11 to 1 before the dismissal of Juror 9. Only when these two jurors had been removed did the jury return a verdict of death. Under these circumstances, in which life or death clearly turned on the removal of two holdout jurors and the luck of the draw of alternate jurors, affirming appellant's sentence of death would be arbitrary and capricious in the extreme. (*United States v. Huang* (9th Cir. 2006) 172 Fed. Appx. 155, 158 [fact that at one point two jurors felt jury was hopelessly deadlocked indicates error in admitting opinion testimony cannot be held harmless]; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 391 [failure to instruct on defense, coupled with fact jury was deadlocked on that issue, indicates error cannot be harmless].)

The improper removal of jurors 9 and 10 was related to other errors caused below. For example, failing to properly instruct the jury as how to proceed after jurors were replaced resulted in the jury not knowing that they had to disregard all prior deliberations and begin anew.

At that stage, the jury had previously been deadlocked. Having deliberated for four days before the alternates were seated would make it likely that the jury would not want to start all over. Therefore, the removal of the holdout jurors made it even more important that the jury be properly instruct on how to proceed.

The improper removal of the hold-out jurors also implicated the earlier errors under *Witherspoon* (Argument XV) and the improper denial of appellant's challenge for cause against juror No. 8971 (Argument XVI) by reason of the fact that the original jury was more likely to vote for death than had these errors not occurred.

Likewise, with the jury more inclined to vote for death, the improper inflation of appellant's culpability by reason of the erroneous finding of multiple special circumstances for multiple murder would be another improper weight on the scale of death. (Argument XIX)

In this case, as discussed previously, there were serious questions as to the proof of intent on the part of the non-shooter. Because the jury erroneously found both defendants to have personally fired the fatal bullets, the jury sidestepped the requirement that they make a finding as to the non-shooter's intent.

This error also affected the jury's penalty decision because the erroneous conclusion that both defendants fired the fatal shot improperly inflated their individual culpability. Obviously, a jury will be more inclined to mete out the harsher punishment for a defendant who intends to kill. Such a person displays a higher degree of moral culpability than one who causes another's death unintentionally. Thus, a finding indicating that both defendants fired the fatal shots wrongly inflated their culpability.

The harm to appellant from this error was then exacerbated in the penalty phase when the prosecutor improperly switched horses mid-stream, abandoning his previously expressed admission that he did not know who the shooter was and suddenly announcing that he believed appellant fired the shots. Because this shift

was made with no new evidence to support it, it not only constituted misconduct but also it made it easier for the jury to sentence appellant to death.

Appellant submits that the errors discussed above, individually and cumulatively, operated to appellant's prejudice, and that due process requires that the death penalty imposed below be vacated.

XXII

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS CO-APPELLANT THAT MAY ACCRUE TO HIS BENEFIT

Appellant William Satele joins in all contentions raised by his co-appellant that may accrue to his benefit. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant WILLIAM SATELE that the judgment of conviction and sentence of death must be reversed.

DATED:

Respectfully submitted,

_____

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 95,200 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2003 software which was used to prepare this document, I certify that the word count of this brief is 105,758 words.

DATED:

Respectfully submitted,

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DAVID H. GOODWIN

PROOF OF SERVICE BY MAIL (C.C.P. SEC. 1013.A, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 93579, Los Angeles, Ca 90093-0579

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

David H. Goodwin