CASE No. S 016883

IN THE
SUPREME COURT OF CALIFORNIA

PEOPLE v. JARVIS J. MASTERS

APPELLANT'S REPLY BRIEF

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

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ARGUMENT

I. THE DENIAL OF A LINEUP AND CRUCIAL CROSS-EXAMINATION OF WILLIS WAS PREJUDICIAL CONSTITUTIONAL ERROR

A. INTRODUCTION

The State's case against Jarvis Masters claimed that the murder of Sgt. Burchfield was planned by *four* individuals – the State's star witness Rufus Willis; and defendants Woodard, Johnson, and Masters. The State also charged that Masters played a role in sharpening the murder weapon. Meanwhile, the State withheld from the defense the fact that inmate Harold Richardson admitted that he was one of *four* planners of the murder. He identified himself, Woodard, Johnson, and Willis, and left out Masters. Richardson also admitted that he played a role in sharpening the murder weapon.

The defense, at the outset of the preliminary hearing testimony of Rufus Willis and before the defendants were brought in, asked Rufus Willis to describe Jarvis Masters, after he admitted that he did not know Masters by his name. The co-conspirator described by Willis bore no resemblance to Jarvis Masters, and instead closely described Harold Richardson whose identity as a principal co-conspirator was not yet known by the defense.

Recognizing that he suddenly possessed grounds for a lineup, defense counsel immediately asked for one. The State, without revealing the Richardson information, opposed the request. The magistrate thereupon ruled in favor of the State, based upon Willis' "testimony as to the number of times that he's met him [the fourth co-conspirator] on the yard . . . ." (PHRT 8408)[1] Willis was then permitted to see Masters at the defense table.

When the State finally revealed Richardson's admission, later during the preliminary hearing, Masters sought to recall Willis for further cross-examination. This request was also denied. Indeed, the defense was not even allowed to show Richardson to Willis to conclusively resolve Willis' mistaken identification.

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[1] Citations to the record will follow the usual format, using the following abbreviations:

1. "CT" refers to the Clerk's Transcript;
2. "RT" refers to the Reporter's Transcript;
3. "ACT" and "ART" to the Augmented Clerk's and Reporter's Transcripts (if preceded by a number, it refers to the edition of the augmented transcript);
4. "PHRT" to the Preliminary Hearing Reporter's Transcript;
5. A dated transcript (e.g., "1-10-88 RT") refers to a separately bound reporter's transcript.
6. "AOB" refers to Appellant's Opening Brief
7. "RB" refers to Respondent's Brief.

B. RESPONDENT'S ARGUMENTS

Respondent defends the denial of a lineup and denial of the cross-examination of Willis concerning Richardson. (RB 64-74) For purposes of clarity, appellant designates respondent's arguments as follows:

Respondent's Argument 1:	The error is non-reviewable since appellant has failed to identify any "trial prejudice" he may have suffered. (RB 69)
Respondent's Argument 2:	"The magistrate . . . did not abuse its discretion by finding that appellant had not shown a reasonable likelihood that Willis's identification was mistaken." (RB 72)
Respondent's Argument 3:	Appellant's motion for a lineup was untimely. (RB 71)
Respondent's Argument 4:	"[W]hether or not Willis's description fit Richardson . . . was irrelevant to whether the magistrate abused his discretion on the showing made to him." (RB 73)
Respondent's Argument 5:	"[T]he magistrate's failure to grant a lineup was not prejudicial in view of the trial evidence." (RB 73)

C. WHAT RESPONDENT DOES NOT DISPUTE

Respondent does not dispute the following factual and legal contentions made in Appellant's Opening Brief in conjunction with the appellant's request for a lineup:

1. The State's loss and destruction of physical evidence thwarted the defense pre-trial investigation. (See AOB 60-62)

2. The State's loss, destruction and concealment of potentially exculpatory evidence also thwarted the defense pre-trial investigation. (See AOB 62-63)

3. The State also thwarted the defense pre-trial investigation by concealing second tier (the site of the murder) informant and other BGF evidence. (See AOB 63-69)

4. At all relevant times, San Quentin showed no interest in exculpatory evidence. (See AOB 67-68)

D. RESPONDENT'S ARGUMENTS DO NOT SUPPORT THE DECISION BELOW

Appellant makes the following responses to respondent's arguments regarding the denial of a lineup and crucial cross-examination of Willis:

Respondent's Argument 1: The error is non-reviewable since appellant has failed to identify any trial prejudice he may have suffered. (RB 69)

Respondent argues that there was no "trial prejudice" as a result of the magistrate's ruling since "appellant had at his disposal a wide array of options" to test and attack Willis' identification of appellant:

> He could and did ask him to provide a description . . . . He could have put Richardson's description before the jury and argued that Willis's testimony fit Richardson better than appellant (an argument, we think, would have been frivolous) . . . . He could have shown that Willis made no identification at a lineup." (RB 69)

(a) The Richardson Description Evidence Would Have Been Excluded Without the Richardson Admission

Respondent appears to concede that the so-called "wide array" of trial options would have been primarily limited to Willis' cross-examination. Thus respondent notes, parenthetically, that any attempt by the defense to put Richardson's description before the jury "would have been frivolous." (RB 69) Respondent apparently recognizes that Richardson description evidence would have been excluded as too remote and speculative since Richardson's admission was excluded. *See People v. Hall* (1986) 41 Cal.3d 826, 834-35; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-37; *People v. Kaurish* (1990) 52 Cal.3d 648, 684-86; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-18. Thus respondent's "wide array of options" substitute for a once-in-a lifetime lineup is really nothing other than a single unsuccessful option: the right to cross-examine an adverse witness whose testimony was locked in place after he saw Masters in the courtroom.

(b) Respondent Ignores Reasonable Probabilities

Respondent's argument also ignores the obvious. Given the fact that Willis testified that he sometimes saw the individual at a distance of one or two feet, and testified that the fourth co-conspirator was five feet, seven inches tall, weighed 175 to 180 pounds, was chubby, and had a

bald/shaved head, and that the person looked old, wore glasses, and that he did not recall the person having a facial tattoo, for purposes of this appeal, it must be assumed that Willis would have identified a person bearing similar characteristics at a lineup. (See AOB 52) For the same reason, for purposes of this appeal, it cannot be assumed that Willis would have identified a 23-year-old slim, six foot one inch tall individual with a head of hair, who did not wear glasses, and who had a tattoo on his left cheek visible from twenty feet. (See AOB 52) **In short, for purposes of this appeal, Masters is entitled to the benefit of reasonable assumptions, based upon the record, that Willis would not have identified Masters at a lineup had it been ordered.**

This assumption concerning a reasonable probability completely refutes Respondent's Argument 1. Willis' insistence that he knew Masters as the one who played the role he ascribed to him would have rung hollow with a jury after (1) his total misdescription of Masters, (2) his admission that he did not even know Masters name (PHRT 8388-89), and (3) his inability to point him out in a lineup. Indeed, there is little likelihood that Masters would have been bound over for trial after a failed lineup.

Had Willis failed to identify Masters at a lineup, more likely than not, the State itself would have dismissed charges against Masters. Asked what he would have done had Harold Richardson

established that Masters was not a part of the conspiracy, the District Attorney testified that he would have dismissed the case against Masters:

> [I]f I believed that Mr. Richardson established, through corroborated evidence, that Mr. Masters was not part of this conspiracy, I wouldn't merely grant Mr. Richardson immunity, I would dismiss the case against Mr. Masters. (PHRT 14865)

Given the fact that Willis could not identify Masters, and did not even know his name, and given the fact that his identification of the fourth co-conspirator closely fit Richardson, Willis' inability to identify Masters in a lineup would have corroborated Richardson's admission that Richardson was the fourth co-conspirator. Thus, taking the District Attorney at his word, the State would have dismissed the case against Masters. Masters instead has been sentenced to death. That is "trial prejudice" in the extreme.

Respondent's Argument 2: "The magistrate . . . did not abuse its discretion by finding that appellant had not shown a reasonable likelihood that Willis's identification was mistaken." (RB 72)

(a) Respondent Repudiates Their Own Argument

Respondent's argument essentially repudiates respondent's first argument, which suggested that non-lineup methods of impeaching Rufus Willis are nearly as effective as a lineup. Their argument now discredits the persuasiveness of a completely effective cross-examination of Willis,

in which Willis *totally* misdescribed Masters, whose name he also did not know.

(b) Willis' Pliability Does Not Enhance His Credibility

Respondent belittles the significance of Willis' complete misdescription of Masters because of the "largely . . . leading nature of the questions . . ." (RB 72) Respondent's contention is both factually and legally incorrect. Willis, on his own, misdescribed Masters as "chubby," and "weigh[ing] about maybe 175, 180." (PHRT 8387) Willis, on his own, misdescribed Masters as having a shaved head. (PHRT 8389) While some of Willis' other answers were in response to leading questions, it is the law itself which allows leading questions to an adverse witness in the expectation that this leads to the truth. *Evidence Code sections* 764, 767. The fact that Willis was pliable in the hands of a cross-examiner does not somehow enhance his credibility.

(c) The Magistrate's Failure of Logic

Under *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, "[t]he right to a lineup arises . . . when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." Respondent concedes that Willis' identification was material. Respondent instead argues that "[t]he magistrate did not abuse his discretion by finding that

appellant had not shown a reasonable likelihood that Willis' identification was mistaken." (RB 72)

Willis' complete misdescription of Masters and his lack of familiarity with Masters' name, however, by itself, creates "a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." *Evans, supra*, 11 Cal.3d at 625. **If describing a slim, 6 foot one inch tall tattoo-faced, untonsured man who wears no glasses as a bald, chubby, five foot seven eyeglassed man without a tattoo on his face does not create a "reasonable likelihood" of mistaken identification, then no set of facts will ever qualify for a lineup.**

The magistrate relied on Willis' testimony that he had seen "Askari" many times to find that there was insufficient likelihood of mistaken identification. (PHRT 8408) Respondent now makes the same argument anew. Respondent's reasoning reflects a crucial failure of logic. *Since Willis clearly did not know Masters by name or appearance, the number of times he met an unnamed co-conspirator physically different than Masters was irrelevant to his identification of Masters.*

(d) Masters Was Just a Face in a Large Crowd

Respondent counters that Willis and Masters were confined in the same "cell block" on the same tier for nearly six months and shared the same exercise yard. According to the record, however, Carson section, their "cell block," was a Security Housing Unit in which the prisoners had

extremely limited contact with each other. (RT 10997, 11050-54) According to Willis' testimony at the preliminary hearing, he and "Askari" were housed in Carson section for five months, not six. (PHRT 8377-78, 8381-82) Willis allegedly saw "Askari" "maybe once" walking past his cell on the way to the showers, and saw or spoke to him "several times" on the exercise yard. (PHRT 8379-80, 8382-83) Two hundred and ten inmates were housed in Carson section during these months. (PHRT 7208)[2] Willis' lack of familiarity with Masters' name and his total misdescription of him supports the belief that Masters was yet another face in a large crowd.

There is also absolutely no significance in the fact that Willis testified that the co-conspirator he referred to as "Askari" was confined in cell 4-C-2, appellant's cell, on June 8, 1985. As the BGF lieutenant in charge of "intelligence," presumably Willis would have had access to this information. (CT 8387) Willis' testimony, in any case, took place more than two years after the killing of Sgt. Burchfield. By that time Willis would have been able to learn from multiple sources where Jarvis

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[2] Willis was emphatic that he only met (saw or spoke to) "Askari" "several times" on the exercise yard, repeating this answer three times. (PHRT 8379, 8380, 8383) He also contradicted himself and said that he saw "Askari" in the yard "twice a week" for "a few months." (PHRT 1398) Willis also expressed confusion about how many times he saw "Askari" on the way to the showers, but concluded that it was only "maybe once." (PHRT 8382) *As we point out above, however, the number of times he met someone physically different from Masters is irrelevant.*

Masters was confined in June, 1985. If the District Attorney's office, the District Attorney's investigator, or the CDC investigators had not provided this information to him, the information could have been acquired from reports provided to him, or from other prisoners. Indeed, respondent challenges Drume's credibility with exactly this argument. (RB 83) If this argument applies to anyone, it applies equally to Willis.

Clearly, there existed "a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." *Evans v. Superior Court, supra*, 11 Cal.3d at 625. If the facts of this case do not establish such a "reasonable likelihood" as a matter of law, then almost no set of facts will ever qualify, and the *Evans* right to a lineup will be meaningless.

Respondent's Argument 3: Appellant's motion for a lineup was untimely.[3] (RB 71)

(a) The Law Does Not Require Futile Motions

Respondent contends that appellant's argument that the motion for a lineup was made "as soon . . . as practicable" (*Evans v. Superior Court, supra*, 11 Cal.3d at 626) is "unconvincing" since defense counsel stated immediately prior to Willis' testimony that the identity of Masters as a co-

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[3] Respondent also argues that appellant made no showing "as to how his appearance had changed between June 1985 and July 1987." (RB at 71) There is absolutely no evidence in the record of a change in Masters' appearance during this time period. On the contrary, it is undisputed in the record that Masters looked the same at trial as he did in June of 1985. (RT 13107-08)

conspirator was "an issue." **Knowing that identity is "an issue," however, is far different than having sufficient grounds to make a motion for a lineup. *Evans* has requirements which must be met. Unless and until this Court is willing to overrule *Evans*, a trial court cannot impose an obligation to make the motion *before* the requirements are satisfied**. The law does not impose an obligation to make futile motions. Indeed, given the fact that appellant did not have a basis for making a lineup motion before Willis' mistaken identification, appellant would have been in bad faith in making the motion before Willis' misidentification.

(b) The Record Does Not Establish the Intent of the Defense Before the Preliminary Hearing

Appellant is also at a loss to understand how a statement that identity "is an issue," made twenty-two calendar days after the start of the hearing, clearly establishes counsel's intent *before* the hearing. To the contrary, even a glance at the huge Clerk's Transcripts for both the preliminary hearing and the trial will show that trial counsel litigated *everything* they believed could be litigated, whenever an issue arose. Given this, and given that counsel's statement was not made until the twenty-second day of the hearing, it is far more likely that the question of Willis' ability to identify Masters arose sometime during that twenty-two day period, or shortly before.

Significantly, nearly six thousand pages of discovery were turned over to the defense shortly before, or during the early days of the preliminary hearing, in direct violation of a discovery order. (2ACT 2239) Without a doubt, these thousands of pages of belatedly-produced discovery suggested myriad issues. Since these thousands of pages of discovery are not part of the record on appeal, and respondent has not filed a motion to augment the record, this Court is in no position to evaluate respondent's claim about defense counsel's intent prior to the preliminary hearing.

(c) Argument 2 Repudiates Argument 3

Respondent's Argument 2, moreover, repudiates respondent's timeliness argument. Thus, respondent's second argument claims that appellant lacked grounds for a lineup *after* Willis totally misdescribed Masters. Respondent must therefore concede that appellant lacked grounds for a lineup motion *before* Willis misdescribed Masters. Thus, by respondent's own logic, the motion was timely.

(d) Both the State and the District Attorney Thwarted the Defense Investigation

The issue of timeliness, moreover, does not exist in a vacuum. Respondent does not dispute that:

1. The State's loss and destruction of physical evidence thwarted the defense pre-trial investigation. (See AOB 60-62)

2. The State's loss, destruction and concealment of potentially exculpatory evidence thwarted the defense pre-trial investigation. (See AOB 62-63)

3. The State thwarted the defense pre-trial investigation by concealing second tier informant and other BGF evidence. (See AOB 63-69)

4. At all relevant times, San Quentin demonstrated absolutely no interest in evidence exculpating the defendants. (See AOB 67-68)

Perhaps the greatest offender was the Marin County District Attorney's Office. In ruling on a defense motion for sanctions against the District Attorney for failing to comply with the Municipal Court's March 26, 1987 discovery compliance deadline, the magistrate noted:

> [T]he San Quentin Lieutenant in charge of investigations, [*sic*] maintained one file at San Quentin. Neither the District Attorney nor his Investigator were aware of all the contents of the file at San Quentin, which in fact contained numerous statements of witnesses the prosecution intends to call, but which were never reviewed by the District Attorney . . . . [W]ithin the District Attorney's office, two files

> were maintained. One in possession of the assigned Deputy District Attorney, referred to as the "Central File." The other file was maintained by an Investigator and was never reviewed by the assigned prosecutor. This file contained numerous discoverable documents. In addition, the District Attorney's Investigator maintained personal notes prepared in the investigation of the case. The assigned prosecutor was not aware of the contents of these notes, many of which were admittedly discoverable. Finally, within the District Attorney's office, in the desk and filing cabinet of a prior Investigator, were documents and tape recordings, some of which had never been reviewed by the assigned prosecutor. (2ACT 2242-43)

The magistrate therefore publicly remonstrated the Deputy District Attorney in charge of the prosecution of this case:

> [T]he prosecutor seeks the execution of persons charged with capital offenses, and yet, he has failed to go to San Quentin Prison to review reports and documents in their files, has failed to review his own Investigator's files maintained with the District Attorney's office, and to review his Investigator's personal notes, all in light of a comprehensive discovery order. Such conduct, as a lawyer and officer of the Court, is inexcusable. His sanction is the public expression of that fact. (2ACT 2245-46)

One would have assumed that this public remonstration would have been enough to compel the State to turn over all potentially exculpatory evidence. It was not. Despite testimony under oath that everything had been turned over, more than six months later the James Lawless file appeared with Lawless' December 1985 letters disclosing his

intimate knowledge of the Burchfield conspiracy. (See AOB 65-69) Portions of this file are still missing. (See AOB 68) Presented with this new disclosure the magistrate stated:

> I would like to cite the whole prison in here for why . . . they shouldn't be held in contempt, and it's outrageous . . . ." (8-10-88 RT 325)

Given the fact that it is undisputed that both the State and the District Attorney thwarted the defense investigation, both prior to and during the preliminary hearing, and engaged in many acts of sanctionable misconduct, the State may not now blame the defense for delays in their investigation.

(e) Conclusions

Respondent's untimeliness argument must be rejected since:

1. The law does not require a motion to be made before grounds exist for making the motion.
2. The record does not establish the intent of the defense before receiving six thousand pages of discovery.
3. Respondent's second argument repudiates their untimeliness argument.
4. Given the fact that the State delayed the defense investigation, the State may not complain about delay presumably caused by the State.

Respondent's Argument 4: "[W]hether or not Willis's description fit Richardson . . . was irrelevant to whether the magistrate abused his discretion on the showing made to him." (RB 73)

Respondent argues that the fact that Richardson fit Willis' description of Masters is irrelevant to the issue of whether the magistrate abused his discretion since this fact was not revealed to the magistrate at the time of the lineup motion. (RB 73) Respondent is wrong for two reasons.

First, Richardson's description was revealed to the magistrate later in the preliminary hearing (PHRT 14819), and the defense sought to recall Willis to show him Richardson and have him identify Richardson as the person he confused with Masters. (PHRT 14840-43) This request was also denied. (PHRT 14841, 14843)

Second, as early as February 21, 1986, Masters' defense counsel had requested that the State produce all documents relating to Harold Richardson's involvement in the murder of Sgt. Burchfield. (2ACT 348-49) The People themselves had already identified Harold Richardson as a preliminary hearing witness. (2ACT 349, 361) Thus, Richardson's admission should have been promptly turned over to the defense when Richardson made his statements to prison authorities, and without the need for a court order. (CT 1908) *United States v. Bagley* (1985) 473 U.S. 667, 674-78. At a minimum, the Richardson documents should have

been turned over on or before the March 26, 1987 discovery compliance deadline. (2ACT 1394) The CDC, however, had no interest in turning over exculpatory information. (See AOB 65-68) The District Attorney was not any better. (*Supra,* at 14-16; 2ACT 2167, 2213, 2224, 2226, 2228, 2245)

Respondent argues that the District Attorney did not know about Richardson's confession at the time of the lineup motion. (RB 67, n. 43) Respondent's contention is not supported by admissible evidence, and is contrary to reasonable inferences which may be drawn from the record.[4]

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[4] It is inconceivable that a District Attorney prosecuting a murder of a correctional officer would not have known about an admission to the murder made to correctional authorities, especially since the admission was made to the correctional officer who was the District Attorney's principal repository of information. Respondent relies entirely upon a statement by the magistrate that the District Attorney did not possess certain unidentified Richardson documents. (PHRT 14686, 14689) The magistrate's statement, however, was both hearsay and lacking in foundation, and defense counsel never had an opportunity to look into the matter. The record itself confirms that the District Attorney worked closely with Lt. Spangler, *one of the Richardson interviewees*, and decided what CDC information to disclose. Spangler, who interviewed Richardson in August 1986, was the District Attorney's principal contact at San Quentin. (PHRT 2478-79, 2484-85, 2507, 2514, 2830) Spangler was the repository of all Burchfield investigative documents and most of what the District Attorney received came directly from him. (PHRT 2476, 2726) The District Attorney regularly received unexpurgated copies of Spangler's documents, and decided what to turn over, and when to turn it over. (PHRT 9752,9776, 10017-18, 10210, 10211, 10339-41, 10353-55, 10567) Indeed, it was the District Attorney who withheld the names of eight potential witnesses from the defense. (PHRT 10339-41)

The State, moreover, certainly knew about the Richardson confession, since at least August 1986, and what the State knew must be imputed to the District Attorney. *Strickler v. Greene* (1999) 527 U.S. 263, 281; *Kyles v. Whitley* (1995) 514 U.S. 419, 437-38.

The *Evans v. Superior Court* inquiry also does not limit itself to what the magistrate knew. The *Evans* inquiry, instead, requires a consideration of "whether fundamental fairness requires a lineup." *Evans, supra*, 11 Cal.3d at 625. Thus, in ruling on this issue this Court should take into account everything which should have been disclosed, as a matter of "fundamental fairness." Given the massive evidence of State and prosecutor delay in turning over exculpatory information and other discovery, prior to the lineup motion, "fundamental fairness" requires consideration of everything the State knew at the time of the lineup motion.

Respondent's Argument 5: "[T]he magistrate's failure to grant a lineup was not prejudicial in view of the trial evidence." (RB 73)

Respondent does not dispute that *Chapman v. California* (1967) 386 U.S. 18, 24, provides the appropriate standard of prejudice. (See AOB 76-77) Respondent, however, argues that there is no prejudice since, even with a lineup, the evidence at trial would have convicted Masters.

Respondent's argument, however, like their first argument, appears to be based upon the assumption that Willis would have identified

Masters at a lineup, had it been ordered. For the reasons noted above (*supra*, at 6), however, *it can hardly be assumed that Willis would have identified a person totally different from the person he described.* Willis clearly did not know what Masters looked like, and any assumptions to the contrary are not justified by the record.

As appellant has already pointed out, had Willis failed to identify Masters at a lineup, more likely than not, the State would have dismissed charges against Masters. (*Supra*, at 6-7) Under the *Chapman* standard, the State would have to disprove this reasonable probability beyond a reasonable doubt. Clearly, the State cannot meet this burden.

Even assuming, *arguendo*, that the State can meet this burden, they cannot prove beyond a reasonable doubt that the magistrate would have bound Masters over and that the jury would not have been influenced by Willis' inability to identify Masters at a lineup. Had the trial proceeded, Willis would have been thoroughly discredited.

The State also cannot prove beyond a reasonable doubt that the kites alone would have overcome all reasonable doubts in the minds of a jury. As evidence, the kites depended on Willis' credibility. The first Masters kite (People's Exhibit 150-C) and the Johnson kite never lent themselves to Willis' interpretation. (See AOB 39-41) Evidence in the record also supported a belief that the second Masters kite may have been a transcription of a Willis document. (See AOB 38-39) Had the

jury learned that Willis, after claiming that Masters was his fellow co-conspirator, could not even identify Masters at a lineup, they might have been inclined to believe Masters' claim that the second Masters kite was part of the same pattern of Willis behavior, i.e., that Willis fingered Masters because he was a powerless underling.

The fact that Willis knew Richardson's Swahili name at trial is utterly irrelevant. Presumably Willis had access to this information by the time of trial. The knowledge of Richardson's Swahili name at trial, in any case, does not alter the fact that Willis simply did not know what Masters looked like at the time of the lineup motion. Willis' 1989 knowledge of Richardson's name does not metamorphose into Willis' 1985 knowledge of Masters' appearance.

One cannot seriously argue that the denial of an indispensable lineup and crucial cross-examination, which could have shown at the outset that the prosecution had the wrong man, and resulted in the dismissal of the charges against Masters, was "harmless beyond a reasonable doubt." *Chapman v. California, supra*, 386 U.S. at 24.

II. THE RICHARDSON AND DRUME ADMISSIONS ARE ADMISSIBLE UNDER THE EVIDENCE CODE

A. UNCONTESTED APPELLANT'S OPENING BRIEF ARGUMENTS

Respondent does not contest the following arguments made in Appellant's Opening Brief concerning the admissibility of the Richardson and Drume statements under Evidence Code section 1230:

1. Richardson's admissions were surrounded by special indicia of reliability. (See AOB 105-07)
2. Richardson's oral admissions to Jeanne Ballatore, Lt. Spangler, and Broderick Adams are completely relevant. (See AOB 115-18)
3. Richardson's admission to Broderick Adams was against both his penal interest and his social interest. (See AOB 95, 101)
4. Charles Drume's admissions were against both his penal interest and his social interest. (See AOB 95, 101)
5. Charles Drume came forward early. (See AOB 104)
6. The passage of time did not change the death penalty and death risk characteristics of the Richardson and Drume admissions. (See AOB 105)

7. A finding of the reliability of the Richardson and Drume admissions is compelled by Evidence Code section 1042. (See AOB 90-92, 109-14)

8. Charles Drume's admissions are completely relevant. (See AOB 118)

9. The section 1230 trustworthiness requirement is satisfied by a finding that a reasonable man would not have made the statement unless he believed it to be true. (See AOB 102-03, n. 38)

Since respondent contests none of these arguments in Appellant's Opening Brief, the arguments may be deemed conceded.

B. THE TRIAL COURT DID NOT EXCLUDE RICHARDSON'S STATEMENTS AS UNTRUSTWORTHY

Respondent argues that the disputed issues should be reviewed under an abuse of discretion standard of review and that the primary question is whether the proffered statements were untrustworthy. By respondent's view, the trial court's determination that the proffered statements were "untrustworthy" must be upheld, absent an abuse of discretion. (RB at 81)

Contrary to respondent's suggestion, the trial court did not exclude Richardson's admissions as "untrustworthy." (RB at 81) The record, instead, establishes:

1. In denying the motion for severance, the court found that the Richardson and Drume statements were unreliable, because they were made, in Richardson's case, a year after the incident and in Drume's case still later. (12-13-88 RT 7) In denying a motion for reconsideration, the court found that Richardson statements were not against his penal interest. (CT 2430, 2436, 2647; 1-19-89 RT 12)

2. At trial, after reviewing the matter anew, the court did not rely upon a finding of unreliability and instead upheld the exclusion of the Richardson admissions on the ground that the admissions were a "non-statement." (RT 14718-19) The court also ruled that the admissions were not against Richardson's penal interest because "he was told and advised that it would not be used against him." (RT 14717)

3. The court buttressed its trial ruling that the Richardson admissions were a "non-statement" by also excluding the Richardson admissions under Evidence Code section 352; (RT 14718-19)

4. The court simply "let stand" its pre-trial exclusion of Drume's various admissions, based on the time lapse between the admission and the actual crime." (RT 15345, 15347) The

court also excluded the admissions under Evidence Code section 352. (RT 15345)

Since the trial court's pre-trial "unreliability" finding with respect to the Richardson admissions was (1) not adopted at trial, and (2) was inconsistent with an earlier ruling, the pre-trial "unreliability" finding is legally irrelevant to this Court's review of the court's trial ruling. At best, one can only speculate as to whether the trial court regarded Richardson's admissions as unreliable because of the passage of time.

C. THE TRIAL COURT'S EXCLUSION OF THE RICHARDSON AND DRUME STATEMENTS SHOULD BE REVIEWED *DE NOVO*

While decisions of this Court generally hold that a trial court's evidentiary determinations are subject to an "abuse of discretion" standard of review (*See, e.g., People v. Cudjo* (1993) 6 Cal.4th 585, 607; *Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900), that rule is subject to a number of corollaries and exceptions which apply in this case.

1. There Are No Disputed Factual Issues

Legal questions which do not involve factual disputes are reviewed *de novo*. *People Ex Rel Department of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144. What Richardson and Drume said to third parties is not disputed. *De novo* review is therefore required.

2. The Evidence is Documentary

Independent review is also appropriate where the evidence is essentially documentary and/or where the question below was handled as a law and motion matter with briefs supported by affidavits, declarations, and documents. *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 704; *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1165; *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1026 (disapproved on other grounds in *Shamblen v. Brattain* (1988) 44 Cal.3d 747, 749). In the instant case, the defense motion was essentially based upon documentary evidence. To decide the Evidence Code section 1230 question, this Court will review the same documents evaluated by the trial court.

3. The Trial Court Failed to Apply the Correct Legal Criteria

The deferential "abuse of discretion" standard of review does not apply when a trial court fails to apply the correct legal criteria, or when its decision is based upon erroneous legal assumptions. *Washington Mutual Bank, FA v. Superior Court (Briseno)* (2001) 24 Cal.4th 906, 914; *People v. Cudjo, supra,* 6 Cal.4th at 608; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797; *People Ex Rel Department of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal.4th at 1144.

The trial court's principal grounds for excluding the Richardson admissions was that his admissions were "non-statements." (RT 14718) Section 1230, however, applies to "statements by a declarant," and the Richardson and Drume admissions are clearly statements by a declarant, regardless of whether the statements mention Masters. *Evidence Code section* 1230.

As we note in Appellant's Opening Brief at page 115, the trial court presumably meant that the Richardson statements were irrelevant because they did not mention Masters. The Richardson statements, however, far exceeded the minimal requirements of relevance. In "criminal cases, any evidence that tends to support or rebut the presumption of innocence is relevant." *People v. Reeder* (1978) 82 Cal.App.3d 543, 552, quoting *People v. Whitney* (1978) 76 Cal.App.3d 863, 869. The fact that Richardson's statements do not directly name Masters, does not render them irrelevant. The admissions are relevant since they provide compelling evidence of misidentification and undermine principal aspects of the State's case.[5]

Given Willis' inability to name or describe Masters, and the fact that his description fit Richardson, and did not fit Masters, Richardson's admissions strongly supported the belief that the State had the wrong

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[5] By its silence on this question, respondent appears to concede the relevance of Richardson's oral statements.

man. Richardson, indeed, admitted to Broderick Adams that the State was trying someone else for his crimes. (RT 15773) The trial court itself described Richardson's statements as "extremely significant" to the misidentification issue. (8-8-88 RT 57)

The Richardson admissions also undermined three principal aspects of the State's case. The State's case against Masters was based on a claim (1) that he fashioned a knife, (2) that he voted for and planned the hit, and (3) that he was Chief of Security. As noted in our Opening Brief at pages 116-118, Richardson's statements undercut the first two of these elements, while Drume's admissions undercut the third.

Independent review is therefore required since the trial court's decision is based upon erroneous legal assumptions.

4. The Trial Court's Findings Suggest a Lack of Consideration of Essential Circumstances to Be Evaluated

Independent review is also appropriate where the record suggests a "lack of consideration of the essential circumstances to be evaluated." *See Marriage of Lopez* (1974) 38 Cal.App.3d 93, 117. The trial court's findings clearly suggest a lack of consideration of the essential circumstances to be evaluated in conjunction with its Evidence Code sections 1230 and 352 rulings:

- The trial court excluded the Charles Drume admissions "because of the time lapse between the admission and the

actual crime." (RT 15345, 15347) The court also noted that information concerning the incident was available at the prison and opined that Drume was unreliable because his statements went against the evidence. (12-13-88 RT 7-8; RT 15339-40, 15345) At no point, however, did the court actually apply the section 1230 trustworthiness test: whether "a reasonable man in [Drume's] position would not have made the statement unless he believed it to be true."

- In finding that the Richardson admissions were not against his penal interest, the court did not take into account Richardson's handwritten letter to Ballatore confirming his involvement in the Burchfield murder *after* the magistrate ordered his statements released and warned Richardson that his statements could be used against him. (CT 4953)
- The trial court also failed to consider Richardson's admission to Broderick Adams made after the magistrate's warning to him. Richardson's admission to Adams is a textbook statement against penal interest. (RT 15773)
- The trial court also failed to consider whether Richardson's statements were admissible as against his interest in avoiding hatred and social disgrace. (See AOB 97-101)

- Respondent does not dispute appellant's argument that the trial court's failure to grant an adverse inference, under Evidence Code section 1042, subd. (a), constitutes error. (See AOB 90-92, 109-114)
- The trial court's Evidence Code section 352 ruling also failed to take the above matters into account. (RT 14718-19)

5. The Trial Court's Failure to Follow Required Procedure

The deferential standard of review also does not apply when the trial court fails to follow required procedure in exercising its discretion. *See, e.g., People v. Green* (1980) 27 Cal.3d 1, 24; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1137 (requirement to make affirmative record that court exercised its discretion and weighed probative value against prejudicial effect under Evidence Code § 352); *Larwin-Southern Cal., Inc. v. JGB Inv. Co.* (1979) 101 Cal.App.3d 626.

In the instant case, the trial court's reliance upon Evidence Code section 352 was simply an afterthought. The trial court gave absolutely no explanation for its reasoning. This by itself constituted error warranting independent review. *People v. Green* (1980) 27 Cal.3d 1, 24;

Ramona Manor Convalescent Hospital v. Care Enterprises (1986) 177 Cal.App.3d 1120, 137.

The trial court also failed to decide whether Richardson's August 6, 1986 statements were against his social interest.

6. Constitutional Issues

Constitutional issues are reviewed *de novo*. *State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67. The application of Evidence Code section 352, under the circumstances of this case, presents a due process issue. "[I]t is fundamental in our system of jurisprudence that all of the defendant's pertinent evidence should be considered by the trier of fact." *People v. Mizer* (1961) 195 Cal.App.2d 261, 269. A defendant's "due process right to a fair trial requires that evidence, the probative value of which is stronger than the slight-relevancy category and which tends to establish a defendant's innocence, could not be excluded on the theory that such evidence is prejudicial to the prosecution. *People v. Reeder* (1978) 82 Cal.App.3d 543, 552. "Evidence Code section 352 must yield to defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value to his or her defense." *People v. Cunningham* (2001) 25 Cal.4th 926, 998.

7. Policy Considerations Favor Independent Review

"The deference given trial court decisions on appeal is a policy consideration that may be strengthened or weakened by other policy considerations." *California Civil Appellate Practice* § 5.28 (C.E.B. 2003). *See, e.g., Lawrence v. State* (1985) 171 Cal.App.3d 242 (denying application to file late tort claim against state contrary to policy of trial on the merits); *Eebersol v. Cowan* (1983) 35 Cal.3d 427, 435; *Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283.

Important policy considerations in this case strongly favor independent review. A sentence of death receives the automatic and direct review of this Court. Death is "profoundly different from all other penalties." *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *People v. Belmontes* (1988) 45 Cal.3d 744, 811. The imposition of the penalty of death demands the greatest reliability which the law can require. *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18 (O'Connor, J., concurring); *People v. Keenan* (1982) 31 Cal.3d 425, 430, citing *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 477 U.S. 625. Given the trial court's failure to apply the correct legal criteria, and its failure to consider all the circumstances which need to be evaluated, the greatest reliability which the law can require is provided by independent review.

8. Conclusions

For all of the above reasons, the trial court's exclusion of the Richardson and Drume admissions, made to at least ten individuals, should be reviewed *de novo.*

D. RESPONDENT'S ARGUMENTS

Respondent also argues that Richardson's August 1986 admissions to Jeanne Ballatore and Lt. Spangler were not against his penal interest since he was advised that his statements could not be used against him and since no *Miranda* warnings were issued. For purposes of this brief, appellant assumes that the Court will adopt this position.[6]

Respondent raises only the following additional arguments, which for purposes of clarity, are denominated:

Argument 1: It is "not at all clear . . . that Richardson reasonably believed" his August 8, 1988 letter could subject him to penal liability. (RB 83)

Argument 2: Richardson's August 6, 1986 statements were not against his social interest since Ballatore told him that she would do everything possible to keep the information confidential. (RB 82)

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[6] Appellant's Opening Brief argues that Richardson's statements were against his penal interest since Richardson's statements could have been used against him had he testified. (See AOB 96, n. 36)

Argument 3: It is "not at all clear . . . that Richardson reasonably believed "his August 8, 1988 letter could subject him to . . . social reprisal from the BGF." (RB 83)

Argument 4: The August 8, 1988 letter is legally irrelevant. (RB 83)

Argument 5: The exclusion of Richardson's admission to Broderick Adams may not be raised on appeal. (RB 79-80, n. 49)

Argument 6: Charles Drume's admissions were "unreliable." (RB 83-84)

Argument 7: "The speculative inferences appellant sought to draw from the . . . statements . . . justified the trial court's reliance on Evidence Code section 352 . . . ." (RB 85, n. 53)

E. RESPONDENT'S ARGUMENTS DO NOT SUPPORT THE EXCLUSION OF THE RICHARDSON AND DRUME ADMISSIONS

Respondent's Argument 1: It is "not at all clear . . . that Richardson reasonably believed" his August 8, 1988 letter "could subject him to penal liability." (RB 83)

It is not what Richardson believed that counts. The statutory test is whether "a *reasonable person* in [Richardson's] position would not have

made the statement unless he believed it to be true." *Evidence Code section* 1230 (emphasis added).

Respondent dismisses the magistrate's warning, arguing that it "is not at all clear from the circumstances and context of the letter that Richardson reasonably believed that the letter could subject him to penal liability. . . ." (RB 83) The trial court did not so find. *The trial court assumed that Richardson's statements were against his penal interest after the magistrate warned him, but rejected his statements as irrelevant.* (RT 14718-19)

Respondent's argument that the situation was "not at all clear" (RB 83) also flies in the face of the fact that the magistrate told Richardson that his statements could be used against him. Thus, Richardson's August 8 letter forcefully notes that the "Judge stated . . . that the info could be used and that I could actually be charged as a co-conspirator . . . " (CT 2625) A "reasonable person" would take a judge's warning very seriously. Richardson had a choice at that point. He could have remained quiet, but he chose not to. He chose, instead, to clarify his story. In doing so he again admitted that he was a co-conspirator in the murder of Sgt. Burchfield. *Richardson clearly believed that since he "actually could be charged" it was important to set the record straight* . The trial court itself was apparently of this view.

Respondent's Argument 2: Richardson's August 6, 1986 statements were not against his social interest since Ballatore told him that she would do "everything possible to keep the information confidential. " (RB 82)

Respondent provides only a minimal reply to appellant's argument that all of Richardson's statements were against his social interest. Respondent argues that since Ballatore told Richardson she would do "everything possible to keep the information confidential," Richardson had no reason to fear that the BGF would learn of its existence. (RB 82) The trial court made no such finding. Indeed, the trial court made no ruling whatsoever on appellant's claim that Richardson's statements were against his social interest.

Under Evidence Code section 1230, the test is whether Richardson's statements created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true. In the instant case, the trial court itself declared that Mr. Richardson was in danger. (6-27-88 RT 33) By debriefing, Richardson was placing his life at risk. It is also undisputed in the record that conditions at San Quentin at the time made this risk all the more extreme. Guards and prison officials could not be trusted. (RT 12824) Gangs had access to inmate files and could place inmates where they wanted them in prison. (RT 12701, 12776, 12778, 12780, 13010-12,

13015, 13043-44, 13179-80) Indeed, the Attorney General has admitted that Richardson was at grave risk for having snitched. (6-27-88 RT 26)

As noted in our Opening Brief, the fact that Richardson's statement was made during a debriefing made it more reliable than an ordinary statement against penal interest; if Richardson were to be found to be lying after debriefing, he would face the worst of all worlds as a snitch without the protection of protective custody. (See AOB 101) Respondent disputes none of this.

All of this also applies to Richardson's admission to Broderick Adams, with even greater force. A "reasonable person" in Richardson's position would not have made his statements to Broderick Adams unless they were true. *Evidence Code section* 1230. Respondent apparently concedes this.

Respondent's Argument 3: It is "not at all clear . . . that Richardson reasonably believed" his August 8, 1988 "letter could subject him to . . . social reprisal from the BGF." (RB 83)

As noted in our reply to respondent's Argument 1, it is not what Richardson believed that counts. The test is whether "a reasonable person in [Richardson's] position would not have made the statement unless he believed it to be true." *Evidence Code section* 1230.

It is absolutely clear that Richardson knew, when he wrote the letter, that anything he wrote could be disclosed. His letter specifically refers to the fact that the "Judge stated . . . that the info could be used . . . ." (CT 2625) In the face of this warning, Richardson's letter admits his role as a co-conspirator and names Johnson as the individual who speared Sgt. Burchfield, Daily and Ingram as co-conspirators involved in the planned disposal of the spear, and Gomez as a back-up co-conspirator. (CT 2625-26)

Richardson's letter subjected him to far more than the risk of "social reprisal." (RB 83) By naming his co-conspirators Richardson violated the BGF blood oath. The blood oath itself imposed a BGF death penalty:

> If ever I should break my stride
> And faulter at my comrades side,
> *This oath will kill me.*
> . . . .
> Should I betray these chosen few,
> *This oath will kill me.*
>
> (CT 4993; emphasis added)

As Lawrence Thomas, a former Criminal Activities Coordinator at San Quentin, declared: "When one turns against the Black Guerilla Family . . . the penalty for this betrayal is death." (CT 1218) (See AOB 99-101)

Respondent's Argument 4: Richardson's August 8, 1988 letter is irrelevant. (RB 83)

Respondent does not take issue with our argument that Richardson's oral admissions to Jeanne Ballatore and Broderick Adams were relevant since they corroborated Willis' misidentification and

contradicted the State's case against Masters. (See AOB 115-18) Respondent, however, contends that Richardson's August 8, 1988 letter "contained no relevant information as to appellant," arguing that the letter did not "adopt" those portions of the earlier statement left uncorrected:

> [T]he letter was written for the express purpose of reiterating that the original statement was made only after assurances were given that it would not be used or disclosed. The only thing "adopted" by the letter were the assurances of secrecy and non-use given in the first statement that rendered the original statement not against penal or social interest. The August 8 letter could not have transformed the inadmissible hearsay from the previous meeting into a declaration against interest when the purpose of the letter was to remind Ballatore of the very conditions that made the prior statement not against Richardson's interests. (RB 83)

To begin with, respondent's argument that the August 8 letter "was written for the express purpose of reiterating that the original statement was made only after assurances were given" is simply not true. The three-page letter served multiple purposes.

- The first eleven lines are introductory. (CT 2625)
- The next seven lines reminds Ballatore that she assured him that his statement would "only remain in his central file and would not be used in court." (*Id.*)

- The next three lines advise Ballatore that the "Judge stated that I was misinformed & that the info could be used & that I could actually be charged as a co-conspirator in that case." (*Id.*)
- The next thirty-one lines provides a critique of Ballatore's summary of his statement, in an attempt to set the record straight should he actually be charged as a co-conspirator. (CT 2625-26) **Richardson, in this portion of the letter, admits his role in the conspiracy**, and identifies the roles of inmates Johnson, Daily, Ingram, and Gomez.
- As for the final page and one-half, since it was redacted by the trial court, appellant is entitled to the benefit of a finding that the redacted portion of the letter served entirely different purposes from the earlier portions of the letter. (See AOB 90-92, 109-14)

Thus, contrary to respondent's argument, only a small portion of the August 8 letter deals with Ballatore's assurances.

Ballatore's assurances, moreover, are specifically referenced to explain that Ballatore's memorandum needs updating since it may be used in the courts. Thus, Richardson states:

> I reviewed the portion of the statements that I gave you. I was of the impression that you just generalized my statement since you had no idea it would be or could be used in a court of law. (CT 2625)

Richardson then proceeds to a discussion of the statement and notes something that was "left . . . out of my statement," i.e., that his role was to shoot Sgt. Morris with a zip gun the following day, but "the powder was lost." (CT 2625-26) After discussing this correction in detail, Richardson assures Ballatore that "if you knew [the statement] was going to be used in the courts you would have detailed it much more." (CT 2626)

Thus, assuming *arguendo* that Richardson's August 6, 1986 oral statement is not admissible as against penal or social interest, **the August 8, 1988 letter is admissible on its own since Richardson clearly admits his role in the conspiracy to murder two prison guards**. The August 8 letter therefore has probative value since the letter corroborates the entire body of misidentification evidence already in the record.

As the chart on page 52 of our Opening Brief demonstrates, Willis' description of the fourth co-conspirator closely matched Harold Richardson, and did not match Jarvis Masters at all. Without Richardson's admission of his involvement in the conspiracy, a defense based upon Richardson's culpability would have been properly excluded as too remote and speculative. People v. Hall (1986) 41 Cal.3d 826, 834-35; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-37; *People v. Kaurish* (1990) 52 Cal.3d 648, 684-86; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-18. Richardson's admission of his involvement,

however, brings this entire body of information to life. For this reason alone, the August 8 letter has significant probative value.

The August 8, 1988 letter, moreover, is part of an even larger body of properly admissible evidence. Contemporaneous with Richardson's writing of the August 8 letter, Richardson told Broderick Adams that the "K-9's have me on a hot one trying to accuse me of that thing on a K-9 in '85. I cleaned up my tracks and they got some other mother-fuckers for it." (RT 15773) Read in light of Richardson's admission of his role as a co-conspirator, in his August 8 letter, and the body of misidentification evidence brought to life by the August 8 letter, Richardson's forthright admission to Adams of his role in the 1985 murder of Sgt. Burchfield corroborates the misidentification lying at the heart of this case.

Richardson's August 8 letter, moreover, clearly admits that he gave a prior statement admitting his role in the conspiracy. He acknowledges that Ballatore "generalized" what he told her. (CT 2625) He even points out a detail "left out." In so doing he adopts Ballatore's generalization as an adequate generalization, subject to the detail pointed out by his letter. The logical inference could not be clearer. If respondent wishes to make their argument that the August 8 letter is irrelevant, they should make it to the jury, after the presentation of the Richardson admissions.

Respondent's Argument 5: The exclusion of Richardson's admission to Broderick Adams may not be raised on appeal. (RB 79-80, n. 49)

Respondent presents this argument entirely by way of footnote. Respondent argues that appellant failed to show that Adams was actually willing to testify, since the Broderick Adams evidence was referred to as a "statement." (RB 79-80, n. 49)

The defense, however, made it clear that "additional evidence" was being offered with respect to the Richardson admissions. (RT 15773) Thus, the defense notes that they would have brought Richardson in physically and shown him to the jury (RT 15773), and would have presented Broderick Adams' "statement" about what "Richardson said to him some time in August of 1988." (*Id.*)

The proffered Broderick Adams' testimony – that Richardson said the "K-9's have me on a hot one trying to accuse me of that thing on a K-9 in '85. I cleaned up my tracks and they got some other motherfuckers for it" (RT 15773) – was properly characterized as a "statement" since the proffered testimony was that simple.

Obviously, the proffered "statement" would not have been in the form of a declaration or affidavit. Had the defense intended to offer Broderick Adams' declaration, the defense would have referred to it as a "declaration." Offering a declaration, however, would have been

procedurally meaningless to the trial context of the case. The People, in any case, did not object to the form of the defense offer of proof.

A specific offer of proof, moreover, is not necessary when the trial court declares a line of testimony inadmissible, or otherwise indicates that it will not receive evidence on a subject. *Beneficial, etc., Inc. Co. v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517; *People v. Whitsett* (1983) 149 Cal.App.3d 213; *Castenada v. Bornstein* (1995) 26 Cal.App.4th 1818. By the time the defense made the Broderick Adams offer of proof, the trial judge had already declared the entire Richardson/Drume line of testimony inadmissible, on more than one occasion. (RT 14718-19, 14717, 14718-19, 15345, 15347, 15643, 15772-73)

Respondent's argument that Broderick Adams would have been concerned about exposing himself to criminal liability for stabbing Charles Drume is sheer speculation. Nothing in the record suggests that Broderick Adams had not already received a punishment for his misconduct. There is also nothing in the record that suggests that Adams would have been concerned about the matter at trial. Two years had passed since the stabbing incident. More likely than not, the District Attorney had decided not to prosecute Adams because of lack of proof, or Adams had been prosecuted and found guilty or innocent, or the matter had been completely dealt with through administrative sanctions. Had the matter been dealt with, Adams would have likely stuck to his position.

The stabbing of Drume, in any case, was not related to the Richardson admissions. It is not even clear that the issue would be in any way relevant to Adams' testimony.

Respondent also argues that error based on the Adams proffer is waived "because appellant never asked for a ruling on this proffer of this statement." Their argument is far fetched. Evidence Code section 354 does not require a party to ask for a ruling when a ruling has already been made. Here, the trial court made its ruling by simply standing by its prior ruling. (RT 14718-19, 14717, 14718-19, 15345, 15347, 15643, 15772-73)

People v. Brewer (2000) 81 Cal.App.4th 442, 459, cited by respondent, is not on point. In that case the appellant never asked for or obtained a ruling on the defense motion to quash a search warrant. In the instant case, by contrast, the court did make a ruling excluding the Richardson admission. The defense, however, wanted to make it clear that additional evidence would have been submitted in conjunction with the Richardson admissions. The court allowed the defense to clarify the record, without objection by the District Attorney. (See preceding record citations.) Thus, any objection by the People was waived.

The Broderick Adams testimony, in any case, was not being offered in isolation. It was, instead, being offered to show the court the entire body of evidence which was being offered in conjunction with, and in support of the admission of the Richardson admissions. In choosing

not to change its ruling, the court essentially re-affirmed its prior ruling with respect to all of the Richardson admissions.

Respondent's Argument 6: Charles Drume's admissions were "unreliable." (RB 83-84)

Respondent argues that the fact that all San Quentin prisoners heard about the crime within hours or days of the crime makes Drume's statements unreliable because he could have heard about the crime from gossip. This argument is fallacious. If everyone learned about the crime within hours or days of the crime itself, it makes no difference whether the Drume admission was made one week, one month, one year, or three years later. **The statement was against Drume's penal interest, not because of *when* Drume made the statement, but because Drume made the statement implicating himself**. Drume, in any case, came forward shortly after the murder of Sgt. Burchfield to save a second officer's life. (CT 5047)

Respondent is also completely mistaken in suggesting that Drume's information "was demonstrably false." (RB 83) Drume's reference to Andre Johnson as "Drake" hardly suggests that Drume was referring to anyone other than Andre Johnson. "Dray" is the phonetic second half of Johnson's given name and a common nickname for someone named Andre. "Drake" is simply a slight elongation of "Dray." Willis himself identified Johnson as "Dray." (RT 12855)

Drume also made it clear that he was referring to Johnson. Thus, Drume (a) identified Woodard by name, (b) identified Masters as "Thomas" and "Askari Left Hand," and (c) identified Drake as "the one you got now, the short one of the three." (CT 5055) According to Willis, Andre Johnson was five eight and a half. (PHRT 8368) It is undisputed in the record that Masters is six-foot one inch tall. (People's Exhibit 87)

Respondent's claim that Drume was unreliable because he used the name "Woodie" for "Woodford" demonstrates respondent's confusion. (RB 84) There was no defendant "Woodford." As for defendant Woodard, it is undisputed in the record that Drume identified him as both "Old Man Askari" and "Woodard." (CT 1914, 1916, 5053, 5054) Drume also knew Woodard as "Woodie," an obvious shorthand for Woodard. (CT 5046)

Respondent is also incorrect in suggesting that Masters was not known as "Thomas." (RB 84) Indeed, Masters had a "Thomas" tattoo on his hand. (RT 15339, 15347) Thus, Inspector Gasser reported that Drume was able to identify "Left Hand Askari as Thomas." (CT 1916)

Drume's inability to identify the Christian names of "Zulu" (Willis), or "Ferragerry" (Redmond) is also irrelevant. (RB 84) Willis did not know Masters' name at all. He didn't even know Masters' specific nicknames. (See AOB 38, 50) He couldn't even describe Masters. (See AOB 37, 50-53) Why should Drume be held to a standard four times higher than the

State's principal witness? The fact that Drume knew Willis and Redmond by their Swahili names simply suggests that their Swahili names, rather than their Christian names, were the names which were used by the BGF members. That is entirely consistent with the evidence.

Respondent argues that Drume's claims that he cut out and sharpened the murder weapon from the iron in his bed brace on the night of the attack was inconsistent with the physical evidence which showed that the murder weapon likely came from the angle iron in Carruthers' cell. (RB 84) It was never proven, however, that the weapon from Carruthers' cell was the murder weapon. (See AOB 11-14, 33-35) There was no blood on the weapon allegedly made from the angle iron in Carruthers' cell. (RT 11307; Defense Exhibit 1203) There were likewise no fibers matching Sgt. Burchfield's shirt and no useful fingerprints on the alleged murder weapon. (RT 11873-74, 11936) The State also lost chain of custody of the alleged murder weapon. (See AOB 12-13, 35-36) Although a second spear had allegedly been created, investigating officers either did not find it or destroyed it. (RT 11614, 11765-66, 13023, 13035, 15641) Other weapons were also lost. (See AOB 11, 13, 34-35)

Drume's *belief* that Wallace was still confined at San Quentin at the time he made his statement (RB 84) was simply irrelevant. Drume would have no way of *knowing* whether an inmate was still confined in another section of the prison.

The fact that Wallace was apparently on the third tier, along with Drume, rather than the second tier does not appear to have any evidentiary significance. (RB 84) Drume's point was that he sent the spear to Wallace for Wallace to send it down to Johnson. (CT 5053, 5056) Being two cells away on the third tier would allow Drume to send it to Wallace, who could in turn send it to the second tier. (CT 4946) Respondent's arguments are simply nitpicking, and should have been presented to the jury following the admission of Drume's declaration.

Respondent is flatly wrong in suggesting that Drume could not definitively exclude Masters from the yard meeting at which Burchfield's murder was planned. On February 23, 1988, Drume stated to investigator Barry Simon that "Thomas" (Masters' nickname tattooed on his hand (RT 15339, 15347)), a BGF member from "down south" (Masters was from Southern California)[7] who had tattoos on his face (Masters had tattoos on his face (PHRT 9109; Defendant's Exhibit 1214B; RT 11056)) did not participate in any meetings where a plan to murder an officer was discussed, and that as far as he knew, "Thomas" had nothing to do with the plan. (See AOB 88) This is far more definitive than Willis' testimony including Masters in the conspiracy, founded upon Willis seeing someone *not matching Masters' description* participating in the yard meetings.

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7 *See generally* AOB 298-301, 303-04, 315-18.

Respondent's Argument 7: "The speculative inferences appellant sought to draw from the . . . statements . . . justified the trial court's reliance on Evidence Code section 352 . . . ." (RB 85, n. 53)

This issue was fully addressed in our Opening Brief, and all that was said there need not be repeated. (See AOB 118-20) Respondent's argument, however, appears to be based upon a misunderstanding of the relevance of the Richardson and Drume evidence. Contrary to respondent's argument, the Richardson and Drume evidence includes far more than Richardson's failure to name Masters as a principal co-conspirator. It includes Richardson's admission that he was a co-conspirator. *It proves that the person who matched Willis' description of the fourth co-conspirator was not simply an inmate in the same section of the prison. It proves that the person who matched Willis' description was, in fact, a co-conspirator in the murder who knew details of the conspiracy.* Without this additional evidence, a defense based upon Richardson's culpability would have been properly excluded as too remote and speculative. *People v. Hall* (1986) 41 Cal.3d 826, 834-35; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-37; *People v. Kaurish* (1990) 52 Cal.3d 648, 684-86; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-18.

The Richardson and Drume admissions, moreover, are full of details exculpating Masters. Richardson admitted that he fashioned the knife, and identified the parties who planned and voted for the hit, leaving

out Masters. Richardson's statement to Broderick Adams admits that the State was trying someone else for his crimes. **Since Richardson's statements identify Woodard and Johnson , the other charged defendants, as actual co-conspirators, Richardson is clearly and affirmatively stating that Jarvis Masters has been wrongly charged.**

Drume's admission that he was the Chief of Security also undercut a principal leg of the State's case. (CT 1912, 1914, 5045-46) Indeed, Drume's statement to Barry Simon that Masters did not participate in any meetings where a plan to murder an officer was discussed, and had nothing to do with the plan, undercuts the State's entire case. (CT 5046-47)

F. THE ERROR WAS PREJUDICIAL

Respondent cites *People v. Gordon* (1990) 50 Cal.3d 1223, 1254 for the proposition that the *Watson* standard of prejudice applies to section 1230 rulings. That case involved the error of *admitting* a third party statement. *Id.* at 1253. *Gordon* is therefore clearly distinguishable. The erroneous *admission* of a third party statement does not deny a defendant any opportunities to put on his principal defense, the constitutional error at issue in this case.

Respondent's argument section is also out of place since our AOB Richardson/Drume Evidence Code argument (Argument III) does not discuss prejudice, as any evaluation of prejudice must to look at the

totality of excluded evidence. That discussion is found at pages 130-164 of Appellant's Opening Brief.

Respondent's prejudice argument, moreover, is highly selective and distorted. Thus, respondent argues that lack of prejudice is demonstrated by the absence of any truly exculpatory information in either the Richardson or Drume statements. Drume's statements, however, are highly exculpatory of Masters. His statements to Barry Simon eliminate Jarvis Masters as a co-conspirator. Richardson's statement to Broderick Adams, read in conjunction with his prior statements, also eliminates Masters as a co-conspirator.

Richardson's admissions also cannot be viewed in isolation. Coupled with the entire body of misidentification evidence, Richardson's admissions create grave doubts about whether the State charged the right man.

III. DENYING MASTERS THE OPPORTUNITY TO PRESENT HIS PRINCIPAL DEFENSE RESULTED IN PREJUDICIAL CONSTITUTIONAL ERROR

Appellant's Opening Brief at pages 130-164 addresses the question of whether the rulings below infringed Masters' constitutional right to present his principal defense. Appellant's analysis begins with certain language in *People v. Cudjo* (1993) 6 Cal.4th 585, 611 which arguably suggests that no such right may exist, and language in *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 and *People v. Cunningham* (2001) 25 Cal.4th 926, 999 which suggests that such a right may exist when there has been a "complete exclusion" of evidence intended to establish an accused's defense.

Appellant's Opening Brief then analyzes the leading United States Supreme Court decisions on this issue, starting with *Washington v. Texas* (1967) 388 U.S. 14; *Webb v. Texas* (1972) 409 U.S. 95; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis* v. *Alaska* (1974) 415 U.S. 308; *Green* v. *Georgia* (1979) 442 U.S. 95; *Crane* v. *Kentucky* (1986) 476 U.S. 683; *Olden v. Kentucky* (1988) 488 U.S. 227; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, and concluding with the recent decisions in *Simmons v. South Carolina* (1994) 512 U.S. 154; *Egelhoff v. Montana* (1996) 518 U.S. 37; *Lilly. Virginia* (1999) 527 U.S. 116; and *Shafer v. South Carolina* (2001) 532 U.S. 36. Finally, Appellant's Opening Brief

analyzes the federal circuit decisions in *Perry v. Rushen* (9 Cir. 1983) 713 F.2d 1447; *United States v. Crenshaw* (9 Cir. 1983) 698 F.2d 1060; *Franklin v. Henry* (9 Cir. 1997) 122 F.3d 1270; and *DePetris v. Kuykendall* (9 Cir. 2001) 239 F.3d 1057. An analysis of these cases leads to the conclusion that the decisions of the United States Supreme Court still guarantee a criminal defendant "a meaningful opportunity to present a complete defense," and hold that erroneous evidentiary rulings can rise to the level of a due process violation. (See AOB 139-42)

The federal circuit decisions also suggests a balancing test to implement these principles. (See AOB 142-48) Under that test, weight must be given to a valid state interest, but no weight is given to the state's interest when there is state law error. *Franklin v. Henry, supra,* 122 F.3d at 1273. On the defense side, the exclusion is deemed more likely of constitutional dimension when the exclusion goes to the "heart of the defense." *DePetris v. Kuykendall, supra,* 239 F.3d at 1062. Finally, when the evidence relates to the possible misidentification of defendant, greater weight is given to the defendant's interest when a witness has identified a third party as the culprit and/or the culprit himself has admitted a role which the state associates with the defendant. *Perry v. Rushen, supra,* 713 F.2d at 1454-55.

A. RESPONDENT IGNORES THE FEDERAL CONSTITUTIONAL ISSUE

The Attorney General chooses to ignore this entire discussion. Appellant's thirty-four pages of constitutional analysis is answered in three pages entirely devoid of constitutional analysis.

What does this mean? Is appellant's lengthy discussion of federal authorities sufficiently authoritative that nothing further need be said? If this is not the case, respondent does a disservice to this Court as an institution, and respondent's omission should not be overlooked.

B. RESPONDENT EFFECTIVELY ADMITS THAT MASTERS' DEFENSE WAS SEVERELY LIMITED

In lieu of engaging in constitutional analysis when an innocent man's life may be at stake, the Attorney General applies *Cunningham's* proto-constitutional analysis of whether there has been a "complete exclusion of evidence of an accused's defense," as opposed to "an error of law merely." 25 Cal.4th at 999.[8] (RB 89) The Attorney General argues

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[8] This Court's recent decision in *People v. Lawley* (2002) 27 Cal.4th 102, discusses *Cudjo, supra*, and *Chambers v. Mississippi* (1973) 410 U.S. 284 without any discussion of *Fudge, supra*, or *Cunningham, supra*, or any of the U.S. Supreme Court or federal circuit cases cited in Appellant's Opening Brief at pages 130-164. *Id.* at 153-54. In *Lawley* the third party admission of murder was admitted. What was excluded was an admission that the declarant killed the victim as part of an Aryan Brotherhood plot. In effect, the court held that a reasonable person in the declarant's position could have made the statement without believing it to be true. Implicating the Aryan Brotherhood was not against the declarant's penal interest (continued...)

that there has been no "complete exclusion" since the defense had ample opportunity to impeach Willis and to attack his ability to describe and identify appellant at trial. The Attorney General contends that the exclusion of the Richardson and Drume hearsay statements did not prevent appellant from attacking Willis' credibility by showing his motive to lie and by arguing that he had altered documents written by appellant. The Attorney General also suggests that the strongest challenge to Willis was the evidence that gunrail officer Lipton first identified the cell where Burchfield was standing when he was hit, as occupied by a Crip, an argument based on the theory that the BGF was not involved at all. (RB 89-90)

The obvious flaw in the Attorney General's argument is that the "blame it on the Crips" defense is the bogus defense Masters was forced to present. This was the only defense available since Masters was effectively precluded from putting on evidence of his real defense: that Richardson, not Masters, was the person identified by Willis as a co-

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[8](...continued)
since the declarant was the principal, not an aider. Implicating the Aryan Brotherhood was, instead, a "collateral assertion." 27 Cal.4th at 153. In the instant case, by contrast, Richardson's and Drume's identifications of their co-conspirators and their admissions of their involvement and presence at meetings with them are inculpatory *since the declarants were aiders and abetters in a conspiracy.* In contrast, there is no claim by the Attorney General that the Richardson or Drume admissions are "collateral assertions," in whole or in part.

conspirator, and that Drume, not Masters, was the BGF Chief of Security. Thus, despite respondent's protestations that there was no "complete exclusion," the Attorney General appears to concede appellant's principal point: that as a result of the trial court's rulings the strongest challenge to Willis needed to be based upon blaming it on the Crips, as opposed to the misidentification of Masters as a BGF participant.

The Attorney General also appears to concede that based upon the evidence admitted by the trial court, appellant's misidentification defense was constricted to showing:

1. Willis' inability to describe Masters prior to trial;
2. Willis' motive to lie against appellant and the BGF;
3. That Willis had altered documents written by appellant.

(RB 90)

Of these three points, the latter two have little to do with the misidentification defense. The document alteration issue, moreover, is minor, since the alteration only goes to the salutation in one of the kites [9] (see AOB 39-40), and the evidentiary significance of the alteration has really never been explained. *Thus, the Attorney General admits that as a result of the trial court rulings, appellant's principal defense – that*

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[9] People's Exhibit 150-C, the first Masters note, was written to "L-9," Rhinehart. The L-9 salutation, however, is in a different handwriting and appears to have been inserted into the letter. At the preliminary hearing Willis admitted that he himself inserted the "L-9" on the document. (See AOB 39-40)

Richardson, not Masters, perpetrated the acts described to Masters and that Drume was the Chief of Security – was effectively eliminated by the trial court.

C. THERE WAS A "COMPLETE EXCLUSION" OF THE MISIDENTIFICATION DEFENSE

The prejudicial effect of the trial court's rulings was enormous. Had the court allowed a lineup, it can reasonably be assumed, based on Willis' misidentification of Masters prior to the lineup request, that Willis would not have identified Masters. Thus, the case against Masters might have been dismissed.

Had the trial gone forward with the Richardson and Drume admissions, Masters would have been able to put on a complete misidentification defense which would have shown the jury that (1) Willis couldn't identify Masters; (2) the person Willis identified matched Richardson, not Masters; (3) Richardson admitted his role and left out Masters; (4) Drume, not Masters, was the Chief of Security; and (5) Richardson and Drume ascribed to themselves weapons sharpening roles which Willis associated with Masters.

By any measure, there was a "complete exclusion" of the misidentification defense in the sense that 90 percent of the probative evidence was either precluded or excluded. *People v. Cunningham, supra*, 25 Cal.4th at 999. Of the five points above noted, Masters was

allowed to put on evidence concerning the first point,[10] and that claim was blunted by Willis' identification of Masters at trial. Had Willis failed a lineup, however, and had the case gone forward against Masters, Willis' trial identification of Masters would not have been believed. Thus, even by the Attorney General's test, the trial court's rulings violated Masters' right to due process of law.

D. CONSTITUTIONALLY APPROPRIATE TESTS

Nonetheless, a "complete exclusion " test has no foundation in the Constitution. The due process prejudice created by excluding the thrust of defendant's principal defense – whether that be deemed 60 percent or 75 percent or 90 percent – is no different than the due process prejudice of excluding 100 percent of the principal defense. Indeed, a "complete exclusion" test ends up creating a false and entirely semantic issue as to what is meant by the word "complete."

A more constitutionally appropriate test is one which evaluates whether a "meaningful opportunity to present a complete defense" (*Crane v. Kentucky, supra*, 476 U.S. at 690) has been provided, whether the jurors "have the benefit of the defense theory" (*Davis v. Alaska, supra*,

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[10] Conceivably, Masters could have tried to put on evidence concerning the second point, but it would not have gone anywhere because it would not have been connected up. Moreover, an appropriate objection would have been warranted. *See People v. Hall* (1986) 41 Cal.3d 826, 834-36; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-18; *People v. Kaurish* (1990) 52 Cal.3d 648, 684-86.

415 U.S. at 317), whether evidence "central to the defendant's claim of innocence" has been excluded (*Egelhoff v. Montana, supra*, 518 U.S. at 53), whether "the heart of the defense" has been excluded (*DePetris v. Kuykendall, supra*, 239 F.3d 1057), or whether "evidence crucial to the defense" was excluded (*Perry v. Rushen, supra*, 713 F.2d at 1452), as opposed to a test evaluating whether there has been a "complete" exclusion of evidence of an accused's defense. By any standard, Due Process of Law was violated since the heart of appellant's real defense, based upon misidentification, was entirely precluded.

E. STATE INTERESTS WOULD NOT BE PREJUDICED BY ALLOWING THE LINEUP AND MISIDENTIFICATION EVIDENCE

Even this test, however, is not constitutionally complete since constitutional analysis generally takes into account weighing and balancing of interests at stake. Taken at face value, the Attorney General's brief implies that little is at stake for the State since the State can prove through the kites that Masters was guilty. (RB 73, 85-86, 90) If that is the case, a lineup and the admission of the Richardson and Drume statements would not have prejudiced the State. A lineup, indeed, under any scenario, would not have harmed the State in any way. Indeed, giving the defense a lineup would have turned the trial into a true search for truth.

Admitting the Richardson and Drume admissions would not have prejudiced the State. The Richardson admissions had a high degree of

corroboration. The trial court itself found that "Willis's testimony was corroborative of Richardson's statement to Ballatore." (8-8-88 RT 56-57) Richardson, moreover, closely matched Willis' description of the third co-conspirator. (See AOB 52) Admitting the Richardson and Drume statements would not have prevented the State from challenging the admissions through the testimony of Willis or Evans, or by reliance on the kites, or by arguing discrepancies or inconsistences in the admissions.

Appellant, by contrast, had everything at stake, both his life and his opportunity to present his principal defense and prove his innocence (or a reasonable doubt regarding his guilt). Allowing the lineup and admitting the Richardson and Drume admissions, moreover, would have turned the trial into a true search for the truth. The real issue – whether Willis misidentified Masters and whether Richardson was the person identified by Willis – would have become the focus of the trial, as it should have been. The false issue – whether the Crips did it – would have been out of the case. While both sides would have had to deal with shortcomings in the evidence,[11] the trial at least would have represented an honest effort

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[11] The only shortcoming of the Richardson and Drume statements to the agents of the State, most of whom were actively involved in investigating the crime, is that the State never bothered to ask Richardson or Drume directly whether Masters was a co-conspirator. Given the interest of both the State and the defense in having this information, the State's oversight is almost inconceivable. Indeed, it would appear that the State did not want an answer to this question

(continued...)

at finding out whether Jarvis Masters was guilty and deserved to be sentenced to death, or innocent as he claims.

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[11](...continued)
since the State had shown no interest in exculpatory information. (See AOB 67-68) It is therefore fair that the State live with the self-elected limitations of its own investigations.

IV. THE BOBBY EVANS' ERRORS REQUIRE REVERSAL

The sixth argument of Appellant's Opening Brief sets forth a compelling case for reversal. The State's principal corroborating witness, Bobby Evans, told the jury that nothing was promised for his testimony. Evidence discovered during jury deliberations, however, revealed both that Evans expected to be "taken care of" and that he *was* "taken care of" through a reduction of his sentence. The trial court, nonetheless, denied a defense request to reopen the evidence even while the jury waited to hear a read back of his testimony. (RT 16903, 17076, 17082) Shortly after that read back the jury returned their verdict of guilt. (CT 5120, 5124-25; see AOB 165, n. 50)

Respondent argues that there is no evidence that Bobby Evans' expectations of leniency were based upon an *actual* promise by the State. The State's argument is founded entirely upon a selective ignorance of the facts and a complete disregard of the law.

A. RESPONDENT IGNORES THE BASIC FACTS

The Attorney General omits reference to the following evidence which they completely fail to take into account in their argument:

1. Evans' prosecutor, William Denny, admitted that there was a policy in his office "to make inference or implication that we'll make a

deal, but not really word it specifically to a defendant or his counsel until after . . . the requested testimony of that witness." (RT 16987)

2. *Evans lied to conceal his bias in at least five ways, all of which were discovered after his testimony:*

- At appellant's trial he claimed no expectations of leniency. (RT 13672, 13673, 13808, 13863) Evans, however, specifically admitted to attorney Costain that he expected his *sentence* would be "taken care of." (Sealed RT of 1-5-90 at 2-4)
- Evans denied that SSU agent Hahn promised him anything. (RT 1362-73) Hahn, however, admitted that he told Evans that he would "take care of" keeping him out of state prison. (RT 21201, 21204-05)
- Evans denied that Hahn said he would help him postpone his sentencing. (RT 20538-39) Hahn, however, admitted that he told Evans that he would make efforts to postpone the Alameda County sentencing. (RT 17014, 21201)
- Evans denied that Hahn helped him obtain postponements. (RT 20537) Hahn, however, admitted that he spoke to the Alameda County District Attorney on four separate occasions to obtain sentencing postponements. (RT 17024)

- Evans denied that Hahn discussed a witness protection program for him. (RT 20547) Hahn, however, admitted that he had discussed a witness protection program with Evans. (RT 21212)

3. SSU agent Hahn *concealed his promises* to Evans and his activities on Evans' behalf:

- He told defense attorney Rotwein that he never promised Evans anything. (RT 17028) He made the same representation in an official memorandum turned over to the defense. (Masters' Exhibit 1230) Hahn, however, ultimately admitted that he told Evans that he would "take care of" keeping him out of prison and would make efforts to postpone his sentencing. (RT 21201, 21204-05)
- While his official writings document loans of $10 and $15, Hahn never documented any of his promises to Evans, any of his efforts to postpone his sentencing, his August and September 1989 phone conversations with the Marin County District Attorney Investigator, or his efforts to get him into a witness protection program. (RT 21213-15, 21217)

4. When Deputy DA Giuntini told Deputy DA William Denny to be sure that Evans was released on the 16-month sentence with credit for time served, Giuntini told Denny that he was acting on behalf of Hahn.

(RT 16947) **As a result of Giuntini's involvement on Hahn's behalf, Evans' 16-month sentence was reduced by four months**. (RT 16947)

5. On December 14, 1989, immediately after Evans' testimony, Hahn sent a memorandum to CDC requesting that Evans be released on parole for the remaining five and a half months of his parole violation sentence. **Shortly thereafter, Evans was released**. (People's Exhibit 268)

6. Each of the trial court's findings with respect to the defense motion to reopen the case were contradicted by undisputed facts:

- The trial court's finding that Evans' testimony should have alerted the defense to the possibility of an undisclosed promise was premised upon Hahn's testimony *after* the close of evidence. (See AOB 174)
- The trial court's finding that its *in camera* meeting with Mr. Costain revealed nothing new and nothing exculpatory was plainly incorrect. (See AOB 174-75)
- Finally, the trial court's finding that Hahn had nothing to do with the ultimate sentence was contradicted by the *undisputed* evidence that Hahn's efforts secured Evans a five-month reduction in his one-year state prison term for violating his parole and an early release on the underlying sentence. (See AOB 175-76)

7. In the opinion of the trial court, Bobby Evans' testimony was fairly critical in playing a part in the thinking of the jury. (RT 16912-13)

8. Hahn himself was of the opinion that Evans' testimony appeared to have turned the tide in favor of the prosecution and may have been the crucial factor in the outcome of the trial. (People's Exhibit 268, p. 2)

B. RESPONDENT DISREGARDS THE LAW

The Attorney General also disregards the following cases relied upon in the Appellant's Opening Brief Evans argument.

1. *Bagley v. Lumpkin* (9 Cir. 1986) 798 F.2d 1297, 1301, which stands for the proposition that where the prosecution witness lies at trial in order to conceal bias and prejudice, "it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial."

2. *United States v. Shaffer* (9 Cir. 1986) 789 F.2d 682, 690-91, which stands for the proposition that, "[w]hile it is clear that an explicit agreement would have to be disclosed because of its effect on [the witnesses'] credibility, it is equally clear that facts which *imply* an agreement would also have to bear on [his] credibility and would have to be disclosed." (Emphasis added)

3. *In re Martin* (1987) 44 Cal.3d 1, 50-51, which stands for the proposition that in determining if a prosecutor's misconduct has caused the defense witness to refuse to testify, the proper inquiry is into the *witness's perception* even where "the prosecution committed no misconduct aimed at [the witness] specially." (Emphasis added)

4. While the Attorney General cites *People v. Phillips* (1985) 41 Cal.3d 29, he conveniently ignores the fact that it stands for the proposition that whenever the possibility arises that offers of leniency by the government were exchanged for favorable testimony, and there is a conflict in the evidence on this issue, "'it is up to the jury to resolve the conflict and then to judge the credibility of the prosecution witness accordingly.'" *Id.* at 47.

5. *People v. Morris* (1988) 46 Cal.3d 1, 31, which stands for the proposition that "[w]hat matters here is not how the jury might have resolved these issues; what matters is that they were never given the opportunity."

6. *Smith v. Kemp* (11 Cir. 1983) 715 F.2d 1459, and *Brown v. Wainwright* (11 Cir. 1986) 785 F.2d 1457, 1465, which stand for the proposition that "the thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony." *Smith, supra*, 715 F.2d at 1467.

C. EVIDENCE OF EVANS' LYING TO CONCEAL HIS BIAS SHOULD HAVE BEEN DISCLOSED TO THE JURY

Since respondent does not take issue with the fact that Evans lied in at least five ways to conceal his bias, Evans' lies must be deemed undisputed. Since respondent also cannot and does not take issue with the proposition that Evans' credibility was for the jury to resolve (*People v. Morris* (1988) 46 Cal.3d 1, 31; *People v. Phillips* (1985) 41 Cal.3d 29; *Smith v. Kemp* (11 Cir. 1983) 715 F.2d 1459, 1467; *Brown v. Wainwright* (11 Cir. 1986) 785 F.2d 1457, 1465), the trial court's error in excluding this evidence of Evans' lying to conceal his bias is beyond dispute. *Bagley v. Lumpkin* (9 Cir. 1986) 798 F.2d 1297, 1301.

D. HAHN'S CONCEALMENTS SHOULD HAVE BEEN DISCLOSED TO THE JURY

While respondent puts their own gloss on Hahn's testimony, respondent appears to concede his "lack of candor." (RB 96) Since respondent cannot and does not take issue with the principle that Hahn's credibility was for the jury to resolve, the trial court's error in excluding the evidence of Hahn's concealments is also beyond dispute. *Bagley v. Lumpkin* (9 Cir. 1986) 798 F.2d 1297, 1301.

E. EVANS' PERCEPTION THAT THE STATE WOULD TAKE CARE OF HIM SHOULD HAVE BEEN DISCLOSED TO THE JURY

Since respondent does not dispute the evidence that Evans perceived that the State would "take care of" his sentence, this fact must also be deemed undisputed. (Sealed RT of 1-5-90 at 2-4) Since respondent does not take issue with the holding of *In re Martin* (1987) 44 Cal.3d 1, 50-51 (in determining whether a prosecutor committed misconduct, the proper inquiry is into the witness' perception) the trial court's error in excluding this evidence must again be deemed undisputed.

F. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE OF PROMISES AND INDUCEMENT TO EVANS

Contrary to respondent's argument (RB 96), the record contains both direct and circumstantial evidence of promises and inducements to Evans:

- Evans testified that Hahn *promised* that he would help him "down the line." (RT 13832, 13931)
- Costain testified that Evans expected that his two state prison sentences would be "taken care of." (Sealed RT of 1-5-90 at 2-4) This is evidence of an *inducement*.
- Evans' prosecutor, William Denny, admitted that there was a policy in his office "to make inference or implication that we'll

make a deal, but not really word it specifically to a defendant or his counsel until after . . . the requested testimony of that witness. (RT 16987) This is direct, uncontroverted evidence of a District Attorney policy of (1) making implied agreements to take care of witnesses, and (2) concealing evidence of the agreement until after the witness testifies.

- Evans' sentencing directly followed this pattern. His sentencing was postponed until after he testified. (RT 16878, 16947; People's Exhibit 268) Immediately after his testimony, and at the behest of SSU officer Hahn, Evan's sixteen-month state prison sentence was reduced by four months. Shortly thereafter, also at the behest of Hahn, Evans was released on parole for the remaining five and a half months of his parole violation sentence. (People's Exhibit 268; RT 16901, 16951, 17070)

G. THE CONNECTION BETWEEN THE STATE'S CONDUCT AND EVANS' EXPECTATIONS OF LENIENCY WAS FOR THE JURY TO DECIDE

While respondent concedes that Evans expected that his two state prison sentences would be "taken care of," respondent argues that there was no evidence that Evans' expectations were actually based upon a promise . (RB 94, n. 55) **Evans' perception that the State would**

"take care of" his sentence, however, was by itself, admissible. *In re Martin* (1987) 44 Cal.3d 1, 50-51. The record also contains direct and circumstantial evidence of promises and inducements to Evans. (*Supra*, at 70-71) Hahn promised to help Evans "down the line" (RT 13832, 13931), and promised to keep him out of state prison. (RT 21201, 21204-05) While the District Attorney's policy was to keep such promises vague, Evans clearly got the message. (RT 16987; Sealed RT of 1-5-90 at 2-4)

Respondent reminds us that Hahn insisted that the postponements he arranged were strictly to keep Evans out of prison, in order to guarantee his security. (RB 96) If Hahn's gloss were purely the case, however, the postponements would have continued after Evans testified since Evans' testimony did not change Evans' need for security. If anything, Evans' testimony increased the threat of reprisal. Thus, the only apparent reason for postponing Evans' sentencing would have been to hold it over his head for as long as was needed to ensure his cooperation. This, again, was consistent with the Oakland District Attorney's policy. (RT 16987)

The fact that the exact terms of the promises made to Evans were subject to dispute hardly means that the issue could be taken away from the jury. Both California and federal law hold that "it is up to the jury to resolve the conflict." *People v. Phillips* (1985) 41 Cal.3d 29, 47. *Accord,*

People v. Morris (1988) 46 Cal.3d 1, 31; *Smith v. Kemp* (11 Cir. 1983) 715 F.2d 1459, 1467; *Brown v. Wainwright* (11 Cir. 1986) 785 F.2d 1457, 1465.

H. EVANS' RELEASE AFTER HIS TESTIMONY WAS RELEVANT EVIDENCE OF A CONNECTION BETWEEN HIS RELEASE AND HIS EXPECTATIONS OF LENIENCY

Since the connection between the State's conduct and Evans' expectation of leniency was for the jury to decide, the jury needed to hear all the relevant facts. "[F]acts which imply an agreement . . . have to be disclosed." *United States v. Shaffer* (9 Cir. 1986) 798 F.2d 682, 690-91. "[T]he thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts . . . ." *Smith v. Kemp* (11 Cir.1983) 715 F.2d 1459, 1467. *Accord, Brown v. Wainwright* (11 Cir. 1986) 785 F.2d 1457, 1465.

1. "Actions Speak Louder Than Words" Is a Well Recognized Principle of Relevance

Evans release shortly after his testimony was certainly one of the "the facts" that the jury needed to know. While Evans, the Alameda County District Attorney, and James Hahn may have spoken the fewest possible words, their conduct spoke volumes. Indeed, "the common sense concept that 'actions speak louder than words'" is a "well settled" principle of relevance. *Crestview Cemetery Association v. Dieden* (1960) 54 Cal.2d 744, 753-54; *In re Malone* (1996) 12 Cal.4th 935, 954; *In re Menna* (1995) 11 Cal.4th 975, 990; *Staples v. Hawthorne* (1929) 203 Cal.

578, 588; *Seymour v. Salsberry* (1918) 177 Cal. 755, 759; *Cary v. Santa Ynez Land & Improv. Co.* (1907) 151 Cal. 778, 782; *People v. Adams* (1985) 175 Cal.App.3d 855, 863; *Automobile Salesmen's Union v. Eastbay Motor Car Dealers, Inc.* (1970) 10 Cal.App.3d 419, 422-24.

2. *In re Malone*

In re Malone (1996) 12 Cal.4th 935 is directly on point. Prosecution witness Charles Laughlin testified at Malone's trial that "he had received no promises in exchange for his testimony." *Id.* at 948. His claim was corroborated by two policemen who investigated a case against Laughlin. *Id.* at 949. While two cases against Laughlin were dismissed shortly before he testified against Malone, "both dismissals were officially stated to be for insufficient evidence, and . . . the prosecutors involved denied any link to Laughlin's informing activities . . . ." *Id.* at 951, 952.

The referee assigned by this Court, however, "believed that the government had impliedly promised some form of consideration for Laughlin's testimony, because of the timing of the dismissals and the evidence of leniency. Invoking the principle that "actions speak louder than words," this Court upheld the referee's findings:

> The referee also properly relied upon the circumstances of the escape and robbery charge dismissals as evidence consideration was impliedly promised and delivered. We agree with the referee that the timing of the dismissals and the lack of convincing

> explanations for dismissing the cases, especially the escape case, strongly suggest a link between Laughlin's assistance in pending murder prosecutions and the extraordinarily lenient treatment he received on his own pending cases. As the referee found, this is an instance when "'actions speak louder than words.'"
>
> *Id.* at 954

3. Similarities to *Malone*

In this case, as in *Malone*, the "circumstances" of the Bobby Evans sentence reductions as a result of James Hahn's interventions are "evidence [that] consideration was impliedly promised and delivered." *Id.* The State's explanation for Evans' early release – Bobby Evans' security interest – was not entirely convincing as the sole reason for his early release. Security interests did not cause his release prior to his testimony. Assuming *arguendo* that he was in danger in state prison, after his testimony he could have continued to reside in a county jail, or he could have served his time in another state, as Hahn himself suggested. (RT 21196)

Sadly, releasing Bobby Evans to the streets created the greatest security threat of all. Evans was a professional bank robber and hit man with a long history of felony violence. (RT 13694-98, 20542-47, 20576-82; People's Exhibit 268) In one year alone he stabbed ten individuals. (RT 13694) He had robbed more than fifteen banks. (RT 13696-97)

Every single time Evans had been released on parole in the past – on five separate occasions – he had violated his parole. (People's Exhibit 268, page 1) After his parole release in August 1988, he committed robberies and shot at least three individuals. (RT 13978, 20542-47, 20576-82; People's Exhibit 268) By any rational standard, Evans' deserved to be behind bars for the rest of his life. Thus, Evans' "extraordinarily lenient treatment" and the timing of the State's leniency suggested "some form of 'consideration.'" *In re Malone, supra*, 12 Cal.4th at 954.

4. The Newly Discovered Evidence Was Relevant

Clearly, the most plausible explanation for Bobby Evans' early release was that a promised benefit was being conferred. Promises had been made to Evans and Evans himself expected to be "taken care of." Even without more – but of course there was more – the timing of his release to his testimony suggested an exchange of consideration. Indeed, Hahn's December 14, 1990 letter to CDC clearly suggested that Evans be rewarded for his testimony. (People's Exhibit 268, p. 2) The jury therefore needed to know all the facts – his early release and Hahn's role in his release – so that they could decide the question for themselves. This evidence far exceeded the minimal requirements of relevance.

I. THE TRIAL COURT'S EXCLUSION OF NEWLY DISCOVERED BOBBY EVANS EVIDENCE IS SUBJECT TO INDEPENDENT REVIEW

Respondent argues that the trial court's exclusion of the newly discovered Bobby Evans evidence must be judged by the deferential abuse of discretion standard. (RB 96) Respondent is incorrect. The trial court's exclusion of the newly discovered evidence is, instead, subject to independent review.

1. Circumstances Requiring *De Novo* Review

While a trial judge's refusal to allow the re-opening of evidence is ordinarily subject to the abuse of discretion standard of review (*See, e.g., People v. Fuentes* (1994) 23 Cal.App.4th 1506, 1520), the deferential standard of review does not apply under all the circumstances of this case:

1. The deferential standard of review does not apply when a trial court fails to apply the correct legal criteria, or when its decision is based upon erroneous assumptions. *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 914; *People v. Cudjo, supra,* 6 Cal.4th at 608; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797; *People Ex Rel Department of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal.4th at 1144. The

deferential standard of review also does not apply when the findings of the trial court suggest a "lack of consideration of the essential circumstances to be evaluated" in exercising discretion. *Marriage of Lopez* (1974) 38 Cal.App.3d 93, 117 (trial court's failure to consider all the applicable circumstances in determining spousal support).

2. Constitutional issues are reviewed *de novo*. *State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.

3. "The deference given trial court decisions on appeal is a policy consideration that may be strengthened or weakened by other policy considerations." *California Civil Appellate Practice* § 5.28 (C.E.B. 2003). *See, e.g., Lawrence v. State* (1985) 171 Cal.App.3d 242 (denying application to file late tort claim against state contrary to policy of trial on the merits); *Eebersol v. Cowan* (1983) 35 Cal.3d 427, 435; *Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283.

2. Independent Review Is Required Since the Trial Court's Decision Is Founded upon Factual and Legal Errors

As above noted, and as noted to detail in our opening brief (see AOB 173-176), the trial court's denial of the defense motion to re-open was founded upon a combination of factual and legal errors:

(a) The trial court mistakenly assumed that Hahn testified during trial (see AOB 174);

(b) The trial court mistakenly concluded that attorney Costain revealed "nothing new" (see AOB 173-175);

(c) The trial court mistakenly concluded that "Hahn had nothing to do with the ultimate sentence, nothing" (RT 17609; AOB 174-75);

(d) The trial court mistakenly placed the burden on the defense to ferret out Hahn's and Evans' lies. (See AOB 183-187)

Deferential review therefore does not apply since the trial court's refusal to re-open was based upon false legal assumptions and the failure to consider the applicable factual circumstances. *Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th at 906, 914; *People v. Cudjo* (1993) 6 Cal.4th 585, 608; *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797; *People Ex Rel Department of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144; *Marriage of Lopez* (1974) 38 Cal.App.3d 93, 117.

3. The Review of Constitutional Issues Warrants Independent Review

For the reasons already noted in our opening brief, the issues underlying defendant's motion to re-open arise under the United States

and California Constitutions. (See AOB 176-88, 192-94) Thus, independent review is warranted for that reason alone. *State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.

4. Pivotal Decisions in a Death Penalty Case Deserve Independent Review

The California Legislature, California courts, and federal courts have recognized that the imposition of the death penalty demands the greatest reliability which the law can require. *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18 (O'Connor, J., concurring); *People v. Keenan* (1982) 31 Cal.3d 425, 430, citing *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 477 U.S. 625. Death is "profoundly different from all other penalties." *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *People v. Belmontes* (1988) 45 Cal.3d 744, 811.

The trial court's refusal to allow the defense to re-open newly discovered Evans evidence at the time of the Evans read back was a uniquely pivotal moment of the trial. As James Hahn himself said, "Bobby Evans' testimony appeared to have turned the tide in the State's favor," and may have been "the crucial factor in the outcome of the trial." (People's Exhibit 298 at p. 2) The exclusion of the evidence of Bobby Evans' dissembling, and the favors done for him, also played a major role

in the penalty phase of the trial. The defense penalty phase case was founded, in principal part, upon the excluded Bobby Evans evidence. (RT 20559-60) The trial judge, however, again refused to admit the evidence. (RT 18842-43, 18957, 18960, 20548-49, 20560-61, 20600-10, 21204, 21206) Thus, the exclusion of the Bobby Evans evidence played a *doubly* pivotal role in the judgment of death.

Given the critical role of the exclusion of the Bobby Evans evidence in the judgment of death, and the many clear errors made by the trial court, deferential reliance upon the judge's exercise of discretion would repudiate the constitutional reliability required when the sentence of death is imposed.

J. THE PENALTY PHASE EXCLUSION OF THE BOBBY EVANS EVIDENCE IS ALSO SUBJECT TO INDEPENDENT REVIEW

Respondent downplays the significance of the newly discovered Bobby Evans evidence with the following remarks:

> [I]t is telling that after appellant was allowed to present at the penalty phase all of the testimony about Evans's alleged inducements he believed he should have been allowed to present by reopening the guilt phase, the jurors still returned a verdict of death. They did so even after being told they could consider any lingering doubt or uncertainty as to appellant's guilt. (RT 22526.) It is hard to imagine more conclusive evidence that non-disclosure of any implicit agreement between Evans and Hahn was immaterial to the jury's

> assessment of appellant's guilt. Confidence in the outcome of appellant's trial is assured. (RB 97)

Respondent is wrong. Appellant was not "allowed to present at the penalty phase all of the testimony about Evans's alleged inducements he believed he should have been allowed to present by reopening the guilt phase . . . ." *Id.* **While Bobby Evans was allowed to testify further about his shootings, and James Hahn was allowed to deny, with impunity, promises and benefits for Bobby Evans, the defense was barred from putting on evidence of anything that happened after October 31, 1989.** (RT 18842-43, 18957, 18960, 20548-49, 20560-61, 20600-10, 21204, 21206) Since the trial court's penalty phase exclusion of the evidence was solely based upon a plainly incorrect standard of relevance, a deferential "abuse of discretion" standard of review would not apply. (*Supra,* at 73-78)

Since the penalty phase exclusion is subject to independent review, the guilt phase exclusion must also be subject to independent review. If the Court were to determine that relevant evidence should be heard by a jury since the evidence raises lingering doubts about Masters' guilt, those doubts should be addressed during a new guilt phase.

K. REVERSAL IS REQUIRED

Respondent argues that the "lack of candor by either Evans or Hahn" does not require reversal since the excluded evidence was not "material" and would not "have resulted in a more favorable verdict." (RB 97) Respondent's argument, however, ignores the basic facts and disregards the law.

The error below is beyond dispute:

1. Evans lied in five different ways. His credibility was for the jury to decide.
2. Hahn concealed his activities on Evans' behalf. His credibility was also for the jury to decide.
3. Evans' perception that the State would "take care of him" also needed to be disclosed to the jury so that they could evaluate his bias.
4. The connection between Bobby Evans' early release and his expectations of leniency was also for the jury to decide.

One can hardly imagine a clearer case of actual prejudice. Both the trial judge and James Hahn were of the view that Evans was a pivotal guilt phase witness. (RT 16912-13; People's Exhibit 268, p.2) Unable to reach a verdict, the jury asked for a read back of the Evans testimony and reached a verdict shortly after their read back . (CT 5124) The Bobby Evans error was then repeated during the penalty phase.

This case fully satisfies all the standards for reversal. Where the credibility of a key prosecution witness is at issue, the failure to disclose evidence which casts doubt upon the witness' credibility constitutes reversible error. *See, e.g., Reutter v. Solem* (8 Cir. 1989) 888 F.2d 578, 581-582; *Brown v. Wainwright* (11 Cir. 1986) 785 F.2d 1457; *Haber v. Wainwright* (11 Cir. 1985) 756 F.2d 1520, 1523. Where a key prosecution witness lies to conceal bias and prejudice, "it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial." *Bagley v. Lumpkin* (9 Cir. 1986) 798 F.2d at 1301. Moreover, even where the jury knows of a key witness immunity agreement, and thus the witness' potential bias, concealment of the *extent* of the benefits extended undermines confidence in the outcome of the trial. *United States v. Shaffer* (9 Cir. 1986) 789 F.2d at 690-691.

The judgment below must therefore be reversed.

V. THIS CASE MEETS THE STANDARDS FOR THE GRANT OF JUDICIAL USE IMMUNITY, AND THE COURT'S FAILURE TO GRANT IT WAS AN ABUSE OF DISCRETION AND A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

Respondent first asserts that appellant waived any issue of use immunity as to Drume, and questions whether the issue of the magistrate's and the trial court's refusals to grant judicial use immunity was preserved for appeal. (RB 98) Respondent also asserts that the futility exception to the waiver rule does not apply here. Appellant disagrees.

Since the trial court (1) would not grant the section 995 motion even after specifically finding that Richardson's confession was corroborated by Willis' description of "Masters" – which fit Richardson but not Masters; and (2) since later, in response to the prosecutor's preemptive request to preclude the granting of use immunity at trial, the court stated that it had no intention to grant immunity (RT 14709), for the defense to have raised it again would, indeed, have been futile. It was even more futile regarding Drume, since the case for immunity to Richardson was clearly the stronger, given the aforementioned Willis description of "Masters" which fit Richardson and the latter's confession in the context of a gang debriefing. In addition, respondent should not be heard to argue simultaneously that judicial use immunity is rarely, if ever granted, and has never been upheld in this state, and at the same time

argue that defense counsel should have repeatedly raised it to avoid waiver after the court had rejected it, twice. *See, e.g., Evidence Code section* 354, subd. (b); *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, n. 27 (failure to object to prosecutor's argument did not waive issue on appeal because objection "almost certainly would have been overruled"); *People v. Green* (1980) 27 Cal.3d 1, 34 (stating rule); *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033, citing *People v. Welch* (1993) 5 Cal.4th 228, 237 (futility excuses failure to object to probation condition).

Respondent also asks that this court resolve the question of judicial immunity, in favor of the elimination of any possibility of a grant of judicial use immunity. (RB at 102 *ff*) It is sufficient, respondent argues, to rely on the appellate process to remedy any prosecutorial misconduct reflected in discriminatory grants of immunity. (*Id.* at 106-107) But the appellate process is itself weighted in favor of upholding convictions; all of the presumptions favor the judgment. Thus, even where a clear case is presented of prosecutorial misconduct, the evidence excluded by the prosecutor's failure to grant immunity – which could for a juror or entire jury be sufficient to prevent a finding of guilt – will often not be sufficient prejudice to warrant a reversal. We are concerned with fair trials, not appellate remedies, and denying the trial court this option denies to the trial court the opportunity to level the playing field when there may be no

other way to do so (e.g., as in this case, as an alternative to admitting hearsay).

In this case, for example, while the unadorned evidence of Willis' misidentification of Masters had little effect, if Richardson had been granted immunity and had testified that it was he, not Masters, who did all those things that the prosecution ascribed to Masters, then an acquittal would have likely been forthcoming and Masters would not even be before this Court in this proceeding.

Respondent further rails against the intrusion into the charging function that an inquiry entails in determining the propriety of granting judicial use immunity, listing a parade of horribles that might ensue, and seeks to bolster his argument by the "fact" of rampant inquiries spreading throughout the trial courts, without presenting any authority that this is so. (*Id.* at 102-103) We think respondent protests too much. Far from sweeping too broadly, *Government of Virgin Islands v. Smith* (3 Cir. 1980) 615 F.2d 694 sets forth imposing standards, which are anything but easy to meet by a defendant seeking judicial use immunity. It should not be forgotten, moreover, that what is at stake here arises from a defendant's due process right to present a defense. In this case, the very heart of Masters' defense – that he was not involved in the conspiracy as Willis described it – depended entirely on state-imprisoned witnesses who had

made admissions exculpating Masters – as admitted by the State[12] – and to whom the prosecutor would not give immunity despite clearly having no inclination to prosecute (respondent's reliance upon the *theoretical* possibility of a prosecution sometime in the future notwithstanding).

In addition, the State should not be heard simultaneously to argue against a trial-level inquiry into possible prosecutorial misconduct and against the *Smith* standards, which do not depend on misconduct. Certainly, if the trial court had before it the series of questions set forth in *Smith,* a far more focused hearing, with minimal intrusions into the prosecutor's decision-making process, could have occurred. The magistrate or court would have had to determine (1) whether Richardson's testimony would have been essential;[13] (2) whether there was a strong governmental interest countervailing against a grant of immunity;[14] (3) whether it was essential to Masters' case, as it so obviously was; and (4) if it were found to be ambiguous, not clearly

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12 That Richardson's statements were exculpatory as to Masters was admitted by the State in a brief submitted on behalf of the Department of Corrections. (CT 230)

13 Appellant, of course, asserts that determining whether or not Richardson intended to exclude Masters from the planning group, and in particular an affirmative answer, was the very heart of his defense.

14 Beyond, as mentioned above, the theoretical possibility that Richardson, like every BGF member who was somehow or could be linked to the murder, could sometime in the future face theoretical prosecution for it.

exculpatory, cumulative or found to relate only to the credibility of the government's witnesses. Whether or not it was clearly exculpatory, of course, was precisely the question that only Richardson could answer following the grant of use immunity. At minimum, the magistrate or the trial court should have conducted an *in camera* hearing with only Richardson and his counsel present to determine the answer to this question. If Masters was intended to be excluded by Richardson, the court could have then granted the immunity for the purpose of obtaining Richardson's testimony. This is but one example of how this could work in a way that draws a reasonable balance between a defendant's due process right to present a defense and respondent's holy grail of unlimited prosecutorial discretion.

To summarize, a defendant has a due process right to present a defense, and if it depends on the testimony of an uncharged co-conspirator whom the prosecutor will not immunize, *Smith* provides a method for determining eligibility of a grant of judicial use immunity which minimally intrudes upon the prosecutorial function while providing a defendant – here, a man on trial for his life – the basics of a fair trial, the right to present a witness who may be able to exculpate him entirely.

VI. THE COURT'S EVIDENTIARY RULINGS FURTHER RESTRICTED APPELLANT'S RIGHT TO PRESENT A DEFENSE

Appellant challenged three other evidentiary rulings as contributing to the violation of his right to present a defense. (*See generally* AOB 215-239; RB 111-119) This Reply Brief will stand on the opening brief regarding the court's exclusion of John Irwin's testimony during the guilty phase, the sustaining of the prosecution's objection to Correctional Officer McKinney's attempt to answer affirmatively the question of whether slain inmate Montgomery was a Crip leader, and Lieutenant Kimmel's proffered testimony regarding an anonymous note, which he identified as coming from a Crip, suggesting their responsibility for the Burchfield slaying.

Respondent's view of the prejudice flowing from those errors, however, requires further comment. Respondent seems to believe that being given a "meaningful opportunity to *challenge* every aspect of the State's case" (RB 118; emphasis added) is somehow the equivalent of affording "a meaningful opportunity to present *a complete defense.*" *Crane v. Kentucky* (1986) 476 U.S. 683, 690. If respondent is right, then the constitutional right to present a defense consists of nothing more than the right to cross-examine the prosecution's witnesses. "A complete defense" must, at minimum, mean the right to present relevant, competent evidence of appellant's innocence. Yet appellant in this case was

repeatedly, persistently, and entirely stymied in his attempts to do so, and if that does not rise to the level of a constitutional violation, then the Sixth Amendment right to present a defense has no meaning in the courts of California. Moreover, in light of the striking contrast between the court's admission of general information about the BGF and its rejection of John Irwin's testimony, it was also a denial of appellant's due process rights. (*See* AOB at 217, 239-42.)

VII. THE GANG EVIDENCE ISSUE WAS NOT WAIVED, AND NO AMOUNT OF ARGUMENT WILL SUBSTITUTE FOR THE COURT'S REVIEW OF THE CHALLENGED EXHIBITS

Respondent claims that appellant's failure to discuss each and every offending document individually amounts to waiver on appeal. (RB 122) The cases respondent cites, however, are inapposite. In *People v. Earp* (1999) 20 Cal.4th 826, 884 (mistakenly cited by respondent as p. 844), the court rejected the point raised by appellant because of the absence of "*legal* argument" (*id.*; emphasis added), which was certainly not the case here. So, too, with *People v. Stanley* (1995) 10 Cal.4th 764, 793, which similarly rejected appellant's failure to provide legal argument.

A discussion of each document piecemeal, moreover, would be pointless, for it was the overall impression left by the mass of documents cited which violated appellant's constitutional rights. Just as this court makes determinations based on the whole record – for example, regarding assertions of insufficiency of the evidence (*Stanley, supra*, at 793) – appellant seeks review of the overall impression created by the entire group of exhibits complained of here.

It must be remembered that it was the trial court which initially characterized some of these materials as "so prejudicial in this county that it might outweigh probative value." The issue raised in appellant's brief is simply whether the court's later inclusion of the partially, but insufficiently,

redacted materials constituted prejudicial error, a matter for this court's judgment rather than any careful parsing by appellant or respondent.

VIII. THE JURY SEPARATION PRODUCED SUCH A DISTORTION OF THE TRIAL PROCESS THAT OBJECTION WAS NOT REQUIRED TO PRESERVE THE ISSUE

Respondent relies on *People v. Bolden* (2002) 29 Cal.4th 515, 561, in which this Court rejected an argument similar to the one made here: that a 13-day holiday break in the *Bolden* jury's deliberations was not a due process violation such as to overcome the failure of counsel to object. *Id.*, citing *People v. Johnson* (1993) 19 Cal.App.4th 778, 790-92 (no reversible error where trial court interrupted jury deliberations for 17 calendar days, including nine court days, during December holidays); *People v. Vasquez* (9 Cir. 1994) 17 F.3d 1149, 1159 (no denial of due process where trial court interrupted jury deliberations for 18 calendar days during December holidays).

Neither the cited cases, nor respondent's argument, however, discuss the due process arguments made in Appellant's Opening Brief. (*See* AOB 275-291) Nor do they discuss the point made therein that the 18-day break created such a distortion of the trial process as to not require objection to preserve the issue. Moreover, two facts distinguish this case from the cited cases: First, the initial agreement with the plan for the break came when the court and the parties believed that it would occur during presentation of the evidence. (*See* AOB 275; RT 10623-24) During the next discussion, when the possibility of a much earlier end to

the evidence raised the possibility that deliberations might begin earlier than planned, the court suggested that it might have to revise its plans and keep the jury longer. (RT 15190, AOB 276) Thereafter, the court suggested the break might come just before or just after the jury was instructed. (RT 15282-85; AOB 276-77) Thus, while the holiday was long-planned, the fact of its taking place in the middle of deliberations came about rather late in the game – after, in fact, counsel had objected to splitting the arguments from the instructions. (RT 15306)

Second, the trial court, although it asked jurors about their availability during the week before Christmas, *failed* to ask about the week between Christmas and the New Year's holiday, when they may well have been able to meet, reducing substantially the length of the break.

At bottom, appellant relies on and refers the Court to his due process argument, as elucidated in *People v. Santamaria* (1991) 229 Cal.App.3d 269, 275, *et seq.* Neither the *Johnson, Bolden*, nor the *Hamilton* opinions have distinguished *Santamaria* after engaging in a due process analysis, and appellant stands by his underlying point: that the extreme distortion of the judicial process occasioned by the 18-day break in deliberations in the context of *this* case, given the volume and complexity of evidence and sheer length of the trial, amounted to a due process violation of the sort which did not require an objection but does require reversal.

IX. THE CUMULATIVE ERROR WAS INDEED PREJUDICIAL

Respondent makes the surprising argument that "no error occurred at the guilt phase." (RB 132) Besides the sheer unlikelihood of an error-free trial, the contrary is true – that not only was there error, but the error was at minimum cumulatively prejudicial and, in fact, severely deprived appellant of his constitutional right to present a defense. (*See* AOB 292-94)

X. THE COURT'S REFUSAL TO REPLACE OR VOIR DIRE THE JURY FOLLOWING THE WOODARD PENALTY TRIAL WAS AN ABUSE OF DISCRETION

Respondent points out, correctly, that it was appellant's counsel who first raised the concerns about a joint penalty trial; and that counsel for both defendants agreed to separate and serial penalty trials, although each expressed concern about being second. (RB 137-38) Of course, they agreed to that procedure only after the trial court refused to sever appellant's guilt phase trial from Woodard's. In addition, they agreed to the procedure before trial, and any dangers inherent in separate and serial penalty trials were still speculative. By the end of the Woodard penalty trial, however, counsel presented to the court the no longer speculative particulars regarding the prejudice to Masters which had arisen during the Woodard penalty phase. And to the extent that the prejudice may have been speculative, it was precisely the court's refusal to allow voir dire of the jury that created this difficulty. (*See* AOB at 364-68; *and see* RT 18846-54 [argument on motion for new jury] and 18854-56 [alternative motion to voir dire jury].) The State should not now, therefore, be heard to complain that the prejudice is speculative.

The cases cited by respondent are distinguishable. In *People v. Taylor* (2001) 26 Cal.4th 1155, 1174, a joint trial rather than serial penalty trials was held, and the only prejudice asserted involved possible racial

and prior criminal record comparisons. *Id.* at 1173-74. In *People v. Ervin* (2000) 22 Cal.4th 48, appellant Ervin's sole complaint – after the fact – was that the mitigating evidence introduced on his behalf during the penalty phase (which he tried to have severed after failing to gain severance before the guilt phase) was "eclipsed" by the mitigation introduced on behalf of his two co-defendants. *Id.* at 95. In *People v. Kraft* (2000) 23 Cal.4th 978, the defendant's only complaint regarding the failure to impanel a new jury to decide the penalty was that the guilt phase jury, having found him guilty of 16 first degree murders with special circumstances, would not be in a position to judge him fairly. *Id.* at 1069.

People v. Bradford (1978) 15 Cal.4th 1229, involved problems which arose during guilt phase deliberations, when two jurors evidently made strong assertions of their views after the jury had reviewed only about 30 percent of the evidence and declared their refusal to further deliberate. This Court upheld the trial court's refusal to impanel a second jury for the penalty phase, or to voir dire the jury before it commenced. In *Bradford*, however, after admonishment and re-instruction, the jury successfully deliberated together for another ten days before reaching their verdict of guilty, evidencing the cessation of the asserted problem and rendering nugatory the need to either replace the jury or conduct voir dire. *Id.* at 1352-54. Thus, although the opinion speaks of the "mere speculation that good cause to discharge the jury thereby may be

discovered" (*id.* at 1355), there is in *Bradford* affirmative evidence that the asserted problem with the jury had been solved. In addition, unlike the instant case, *Bradford* did not involve a jury which had spent over seven weeks following their guilty verdict awaiting a co-defendant's penalty trial, a period during which they may have been exposed to unknown and potentially prejudicial influences, which by itself warranted voir dire. (*See* CT 5124 [guilt phase verdict rendered on January 8, 1990], and CT 5342 [jury hears first Woodard penalty evidence on February 28, 1990, seven weeks and two days later].)

Similarly, there was no more than speculation in *People v. Fauber* (1992) 2 Cal.4th 972, in which counsel sought to re-open voir dire because he did not know, when the jury was being selected, that a co-perpetrator would testify and had not been able to ask the juror's about their possible bias from this. *Id.* at 845. And in *People v. Gates* (1987) 43 Cal.3d 1168, defendant's counsel asserted no more than "general allegations of prejudice and general publicity regarding crimes and criticism of the judicial system" in seeking either a second jury or additional voir dire before the penalty phase. *Id.* at 1198.

The facts of this case stand in stark contrast to the foregoing cases, both in that appellant asserted not one or two, but eleven particulars, only two of which respondent has contradicted (compare AOB 364-68 with RB 142-43), including specific evidence introduced at the

Woodard penalty trial which was prejudicial to Masters. This goes far beyond the mere speculation asserted by respondent, and, unlike *Bradford*, in which the court's admonishments were demonstrably effective, the court in this case had no basis on which to refuse at least the voir dire of the jurors who had been exposed both to prejudicial evidence during the Woodard penalty trial and, before it, to over seven weeks of potentially prejudicial influences. The court's failure to do so, which effectively prevented the parties, and now this Court, from knowing whether prejudice inhered, was, in the context of *this* case, an abuse of discretion.

XI. *RING v. ARIZONA* REQUIRES REVERSAL OF THE JUDGMENT OF DEATH

In his opening brief, appellant made both a specific argument against the admission of his unadjudicated crimes – and in particular the charges of two prior uncharged crimes – and a wide-ranging constitutional claim, based on the due process clause and the Fifth and Sixth Amendments. (*See generally*, AOB 330-362, 398-454) Respondents answer, not surprisingly, references the court's prior cases which had rejected similar constitutional and legal claims. (RB 129-136.) Appellant now reasserts his arguments, bolstered by the United States Supreme Court's decision in *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), which applied *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) to death penalty determinations.

More specifically, appellant challenged as unconstitutional the state's failure to require that aggravating factors be found beyond a reasonable doubt by a unanimous jury. (AOB 335-337) Respondent did not reply to this contention, which may be deemed a concession. Regardless, *Ring* and *Apprendi* settle the issue in appellant's favor.

The court has also rejected this contention. *See, e.g., People v. Martinez* (2003) 31 Cal.4th 673, 669-670; *People v. Prieto* (2003) 30 Cal.4th 226, 262-264; *People v. Smith* (2003) 30 Cal.4th 581, 642; *People*

v. Snow (2003) 30 Cal.4th 43, 126, n. 32. Nevertheless, appellant believes that the death penalty determination scheme employed in California violates the underlying principles embodied in *Ring* and *Apprendi*, and, as asserted in his opening brief, that this case is the poster child for the underlying unfairness – and unconstitutionality – of allowing jurors to make individual, private, determinations of the factual basis for imposing the death penalty.

Although this argument applies more broadly in the more general context of appellant's later arguments regarding the constitutionality of the death penalty scheme, it is appropriate that they be fully fleshed out here, in relation to the two most damaging elements of the prosecution's prior crimes presentation.

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. (CT 6854)

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, that they outweigh mitigating factors, or that death is the appropriate sentence." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi* and *Ring*.

In *Apprendi*, *supra*, 530 U.S. at 478, 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. In *Ring*, *supra*, 536 U.S. 584, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. *Id.* at 589, 609

While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the state bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. *Ring*, 536 U.S. at 602, interpreting *Apprendi*, 530 U.S. at 482-482 as follows: "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." California's death penalty scheme as interpreted by this Court therefore violates the federal constitution.

A. IN THE WAKE OF *RING*, ANY AGGRAVATING FACTOR 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").

This reference to the moral dimension of the death determination, however, is completely consistent with a reasonable doubt requirement. Indeed, "beyond a reasonable doubt" has traditionally *meant* "to a moral certainty." *See, e.g., People v.* Cash (2002) 28 Cal.4th 703, 740; *People v. Dougherty* (1953) 40 Cal.2d 876, 896; *People v. Miller* (1916) 171 Cal. 649, 651. This Court has repeatedly "upheld the efficacy" of "to a moral certainty" as a measure of "beyond a reasonable doubt." *People v.*

Slaughter (2002) 27 Cal.4th 1187, 1205; *People v. Bonin* (1998) 18 Cal.4th 297, 300.

California statutory law and jury instructions, moreover, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. Penal Code section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "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). Indeed, this Court acknowledged that fact-finding is part of a sentencing jury's responsibility; its 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. Accordingly, while the jury's role is "not merely" to find facts, finding facts is the necessary precursor to its normative determination.

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, the jury must find that aggravating factors outweigh mitigating factors.[15] 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 findings.[16]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see §190.2(a)), *Apprendi* does not apply. This holding is based on a truncated view of California law. As

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15 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 not merely discretionary weighing, 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.

16 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.)

section 190, subd. (a),[17] indicates, the maximum penalty for *any* first degree murder conviction is death.

Ring specifically rejected Arizona's identical contention. Just as when a defendant was convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." *Ring*, *supra*, 536 S.Ct. at 604. California Penal Code section 190 provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death. Which penalty is to be applied "shall be determined as in Sections 190.1, 190.2, 190.3, 190.4 and 190.5." § 190, subd. (a). Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (§ 190.2), and death is not an available option unless the jury makes the further factual findings required by section 190.3, i.e., that one or more aggravating circumstances exist and that the aggravating circumstance(s) outweigh the mitigating circumstances.[18]

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[17] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprison-ment 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."

[18] The fallacy of the *Anderson* Court's reasoning in this regard is highlighted by the fact that by the same rationale, a conviction of first degree murder provides a maximum penalty of death; therefore, once the jury has returned a verdict of first degree murder, the finding of any alleged special circumstance does not increase the (continued...)

The fact that Arizona's statutory scheme permitted a judge to make the additional factual findings necessary to impose the death penalty therefore does not distinguish it from California's scheme in way that matters under the *Ring* analysis. Both refer to "aggravating circumstances" that must be determined by the "trier of fact." The Arizona statute provides:

> In determining whether to impose a sentence of death or life imprisonment, the *trier of fact* shall take into account the *aggravating and mitigating circumstances* that have been proven. The *trier of fact* shall impose a sentence of death if the *trier of fact* finds one or more of the *aggravating circumstances* enumerated in subsection F of this section and then determines that there are no *mitigating circumstances* sufficiently substantial to call for leniency.
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> Ariz. Rev. Stat Ann. § 13-703(E); emphases added.

Similarly, Penal Code section 190.3 mandates that the *trier of fact*,

> [S]hall impose a sentence of death if the *trier of fact* concludes that the *aggravating circumstances* outweigh the *mitigating circumstances*. If the *trier of fact* determines that the *mitigating circumstances* outweigh the

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[18](...continued)
maximum penalty and would not need to be found true beyond a reasonable doubt by a unanimous jury. *Ring* requires that the factual findings required by both sections 190.2 and 190.3 be subject to the same rigorous standard.

aggravating circumstances the *trier of fact* shall impose [LWOP].[19]

Emphases added.

Simple logic dictates that in order for aggravating circumstances to "outweigh" mitigating circumstances, there must be at least one aggravating circumstance to place on the scale. Section 190.3 thus requires, just like Arizona's statute, a finding that there is at least one aggravator, and then that the aggravators factors outweigh the mitigators. Section 190.3 moreover requires that, "In determining the penalty, the *trier of fact* shall take into account any of the following *factors* if relevant," and then lists each of the circumstances that can be aggravating or mitigating.

In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed: "The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth

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[19] This Court has held that despite the "shall impose" language of 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose LWOP. *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277, *People v. Brown* (1985) 40 Cal.3d 512, 541.

Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.'" *Ring*, *supra*, 536 U.S. at 606 (citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539).

As the high court stated in *Ring*, *supra*:

> Capital defendants, no less than non-capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.
>
> 536 U.S. at 589.

> 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.
>
> 546 U.S. 609.

B. THE REQUIREMENTS OF JURY AGREEMENT AND UNANIMITY FOLLOWING *RING*

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process by which normative determinations are made. The U.S. Supreme Court made clear in *Ring*, *supra,* that such determinations must be made by a jury, and cannot be attended with fewer procedural protections than decisions of much less consequence.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. *Penal Code sections* 1158, 1158a. Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (*Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly not less (*Ring*, 536 S.Ct. at 609).[20]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[21] *See generally* United States Constitution, Amends. IV, V, VI, XIV. Requiring jury unanimity for findings resulting in a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – its inequity violates the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment clauses of the state

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20 Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848, subd. (k).

21 The first sentence of Article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." *People v. Wheeler* (1978) 22 Cal.3d 258, 265 (confirming the inviolability of the unanimity requirement in criminal trials).

and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-16, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.
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> *Richardson*, *supra*, 526 U.S. at 819.

These reasons are doubly true when the issue is life or death. Where a statute (like California's) permits a wide range of possible

aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do, and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail, and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. *People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643. This does not, however, preclude either jury unanimity nor abandonment of reasonable doubt. *Ring* makes clear that the foundational findings prerequisite to the sentencing decision in a California capital case are precisely the types of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

XII. APPELLANT PRESERVES HIS CONSTITUTIONAL OBJECTIONS TO CALIFORNIA'S DEATH PENALTY SCHEME

Respondent is correct that most (but certainly not all) of appellant's arguments relating to the California death penalty scheme (AOB 398-511) have been raised and rejected by this court numerous times. They are raised again, and elaborated upon, for the sake of preserving them for federal review, and in case the Court at some point decides to revisit them.

CONCLUSIONS

For all the reasons set forth herein and for all the reasons set forth in Appellant's Opening Brief, the judgment below must be reversed.

Dated: November 20, 2003

Respectfully submitted,

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