SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. JOHN MYLES, Defendant/Appellant.	No: S097189 APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
SAN BERNARDINO COUNTY
SUPERIOR COURT CASE NO. FSB10937

THE HONORABLE MICHAEL A. SMITH, JUDGE

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DEATH PENALTY

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I. INTRODUCTION

In the opening brief, appellant John Myles established that, as a result of numerous trial court errors, he was denied his rights to due process, a fair trial, trial by jury, counsel of his choice, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution. Of course, respondent claims there were no errors committed during appellant's trial, and that if there was any error, it was harmless or forfeited. However, these claims rest on speculation and guesswork, disregard of the evidence, and misapprehension of applicable law. As a matter of law, numerous serious prejudicial errors occurred in the instant case. Reversal is required.[1]

II. ARGUMENT

A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR OF CONSTITUTIONAL MAGNITUDE WHEN IT DENIED APPELLANT'S SEVERANCE MOTIONS.

In the opening brief, appellant demonstrated that the trial court committed

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[1] In this brief, appellant may not have expressly replied to all of respondent's arguments. However, unless expressly noted to the contrary, the failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

prejudicial error of constitutional magnitude when it denied his motions to sever the Ricky Byrd case from the Pepper Steak Restaurant case. (AOB 64-70.) Respondent claims there was no error. (RB 28-36.) Respondent's argument is not meritorious.

"Improper joinder...rise[s] to the level of a constitutional violation...if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial..." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn.8, 106 S.Ct.725, 730, fn.8; accord, *People v. Soper* (2009) 45 Cal.4th 759, 783, 89 Cal.Rptr.3d 188, 209 [same, citing *Lane*]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 231, fn.17, 57 Cal.Rptr.3d 92, 106, fn.17 [""[E]rror involving misjoinder "affects substantial rights" and requires reversal...[if it] results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict."""]) Here, the joinder of the Byrd case with the Pepper Steak case denied appellant his right to a fair trial.

In deciding whether to grant a severance motion, the trial court should consider the following factors: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. (*People v. Mendoza* (2000) 24 Cal.4th 130, 161, 99 Cal.Rptr. 2d 485, 504.)

In this case, the above-stated factors required severance. As explained in the opening brief, there was no cross-admissibility of evidence in the two cases, as respondent acknowledges. (RB 34-35.) ["...there may not have been cross-admissibility of evidence between the two incidents..."]) Regardless of the relative strengths of the two cases, the inflammatory facts surrounding the Pepper Steak incident were certain to adversely arouse the jurors' emotions against appellant such that objective weighing of the facts in the Byrd case was impossible. And, the Byrd case alone was not a capital case. It became one solely because it had been joined with the Pepper Steak case. This significant factor counseled strongly in favor of severance. (See, *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454, 204 Cal.Rptr.700, 708; *People v. Soper, supra,* 45 Cal.4th at 780, 88 Cal.Rptr.2d at 207.)

Respondent claims there was no error in failing to sever the two cases because of the supposedly "legitimate goal of the conservation of judicial resources and public funds." (RB 34-35.) However, these goals must be carefully weighed against the risk of prejudice to the defendant and must not be "elevate[d]...above an accused person's right to a fair trial." (*People v. Earle* (2009) 172 Cal.App.4th 372, 408-409, 91 Cal.Rptr.3d 261, 290-291.) A defendant's fundamental right to a fair trial is an "overriding right." (*United States v. Hayes* (11th Cir.1982) 676 F.2d 1359, 1366.) "[J]ustice, not judicial economy is the first principle of our legal system. And under no circumstances may well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental

right of a criminal defendant to a fair trial." (Id.) Here, the trial court improperly allowed conservation of judicial resources to prejudicially trample appellant's overriding right to a fair trial.

Despite respondent's argument to the contrary (RB 35-36), appellant suffered great prejudice from the failure to sever the two cases. The highly emotionally charged Pepper Steak case adversely and improperly influenced the jury in deciding the Byrd case. Appellant was given the death penalty in the Byrd case which, absent the joinder of the two cases, he would not have received in that case. And, had the cases been tried separately, with the Pepper Steak judged as a single capital case, appellant would have been far less likely to have received the death penalty in the Pepper Steak case because he was not the person who actually killed Mr. Malouf. As a matter of law, appellant suffered severe prejudice as a result of the denial of his severance motions.

Regarding the same jury hearing two separate cases, a "prejudicial constitutional violation" occurs where, as here, the defendant's trial has been "'...render[ed]... fundamentally unfair and hence violative of due process'... The prejudice is shown if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict." (*Sandoval v. Calderon* (9th Cir.2001) 241 F.3d 765, 771.) The highly inflammatory nature of the Pepper Steak shooting and the jury's already-rendered verdict in that case would certainly carry over and adversely influence that same jury in the Byrd trial. It was therefore impossible for the jury to impartially and fairly evaluate and weigh

the evidence in the Byrd case.

Respondent contends that the trial court's instructions were "sufficient to dispel" the prejudice from the joinder of the two cases. (RB 36.) However, as stated in *Jackson v. Denno* (1964) 378 U.S. 368, 388, fn.15, 84 S.Ct. 1774, 1787, fn.15, "'The naive assumption that prejudicial effects can be overcome by instructions to the jury, ...all practicing lawyers know to be unmitigated fiction.'"

Respondent argues that it is "only Myles' cynicism, motivated by self-interest," that could lead one to question the effectiveness of a cautionary jury instruction. (RB 36.) Not so. As the United States Supreme Court in *Jackson v. Denno, supra,* recognized such instructions do not overcome "prejudicial effects." (Id; accord, *People v. Gibson* (1976) 56 Cal.App.3d 119, 130, 128 Cal.Rptr.302, 308 ["It is time that we face the realism of jury trials and recognize that jurors are mere mortals...We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner."]) It is this recognition by the courts of human frailties that shows that the jury could not make a fair and reliable determination of appellant's guilt despite the cautionary instruction.

The trial court's denial of appellant's severance motion was extremely prejudicial and violated his rights to due process, a fair trial, a jury trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. Reversal of the conviction in the Ricky

Byrd case (count 1) and the penalty determination as to both murders is required.

B. THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR WHEN IT DENIED APPELLANT'S REASONABLE REQUEST FOR A SKI MASK LINEUP.

Regarding the Pepper Steak incident, the suspect who was in the restaurant area, whom the prosecution claimed was appellant, was wearing a ski mask. Thus, appellant reasonably requested a lineup at which the individuals would be wearing ski masks. The trial court denied the request. This denial was wrong, severely prejudicial to appellant, and violated his constitutional rights. (AOB 71-74.) Respondent's contrary contentions (RB 36-41) are not well-taken.

Evans v. Superior Court (1974) 11 Cal.3d 617, 625, 114 Cal.Rptr.121, 126 holds that "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate." The 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." (Id.) Respondent does not argue that eyewitness identification was not a material issue. And, there was certainly a reasonable likelihood that a ski mask lineup would *tend* to resolve any likelihood of a mistaken identification.

Respondent's main contention is that the request for a ski mask lineup was not timely because it came almost four years after the incident. Citing *People v. Baines* (1981) 30 Cal.3d 143, 148, 177 Cal.Rptr.861, 864, respondent argues that "the 'value of a

pretrial lineup is substantially diminished once a preliminary examination has been conducted and a direct confrontation between a defendant and his accusers has occurred.'" But, the *Baines* Court did not state that a post-preliminary examination lineup motion was precluded in all cases. And, at the preliminary examination in this case (1RT 21-184), none of the eyewitnesses to the Pepper Steak incident testified or confronted or identified appellant. Thus, the main premise of *Baines*' holding and respondent's argument is absent in this case.

Further, in *Baines*, the defendant moved for a lineup only two weeks before trial. Here, appellant's motion was filed on March 15, 2000 (1CT 232-249) and was denied on May 11, 2000. (1CT 298.) Trial did not start until almost seven months later, on December 6, 2000. The *Baines* Court stated that "'motions which are not made until shortly before trial'" were untimely. (30 Cal.3d at 148, 177 Cal.Rptr. at 864.) Here, appellant's motion was made in a timely manner vis-a-vis the trial date.

As explained in the opening brief, the denial of appellant's motion for a ski mask lineup was prejudicial. Rogers testified that appellant was not present at the Pepper Steak Restaurant; thus, the identity of the robbery suspect was plainly in dispute. (10RT 2267-2268.) The suspect in the restaurant area wore a ski mask which masked his face; the witnesses did not get an unobstructed view. Even though the suspect's mask may have slipped enabling Donna Malouf to see a portion of his face, the suspect's face was still partially obscured. Although a live lineup had been held on April 30, 1996, the potential

suspects were not wearing ski masks covering their faces. Thus, the April 1996 lineup was not an accurate or fair depiction of the actual incident. The witnesses had had no contact with appellant prior to the incident, which was a traumatic and stressful event, and which, as appellant's eyewitness expert testified, increased the chance of inaccurate identification. If the witnesses at a live lineup could not identify appellant while wearing a ski mask, that inability would readily call into question the accuracy and reliability of their other identifications of appellant. Being unsure of the accuracy and reliability of the witnesses' identification, the jury would have had a reasonable doubt of appellant's guilt.

Citing *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195-1196, 18 Cal.Rptr.2d 293, respondent claims appellant has forfeited the ski mask lineup issue by not challenging the denial by a pretrial writ petition. (RB 39-40.) *Reid*, however, did not involve a request for a lineup in a criminal or capital case. Nor did it involve a defendant's fundamental rights to due process and a fair trial. It involved the denial of a request to dismiss a civil case for failure to prosecute. Because of its disparate facts, *Reid* is inapposite here. (*Chevron v. U.S.A., Inc. V. W.C.A.B.* (1999) 19 Cal.4th 1182, 1195, 81 Cal.Rptr.2d 521, 528 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."]; and see *Premium Commercial Services Corp. v. Nat'l. Bank of Calif.* (1999) 72 Cal.App.4th 1493, 1497-1499, 86 Cal.Rptr.2d 65, 67-69, which did not "adopt *Reid*'s reasoning.")

"It is indisputable...that when the People seek to deprive an accused of his liberty based on identification evidence such can only be done by procedures which accord to him due process of law." (*Evans v. Superior Court, supra,* 11 Cal.3d at 621, 114 Cal.Rptr. at 124.) The procedure adopted by the trial court, i.e., limiting appellant to a lineup which did not accurately duplicate the conditions at the scene, prejudicially violated his constitutional rights. Reversal is required.

C. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S *MARSDEN* MOTION.

In the opening brief, appellant demonstrated that the trial court abused its discretion when it denied his *Marsden*[2] requests to dismiss attorney Nacsin and appoint new counsel. (AOB 74-80.) Appellant's contrary arguments (RT 41-47) are not well-taken.

The Sixth and Fourteenth Amendments require appointment of new trial counsel (1) when counsel is not providing adequate representation and/or (2) where the defendant and counsel have become embroiled in an irreconcilable conflict. (*People v. Hart* (1999) 20 Cal.4th 546, 603, 85 Cal.Rptr.2d 132, 167; *Stenson v. Lambert* (9th Cir.2007) 504 F.3d 873, 886.) Respondent agrees. (RB 45.)

As explained in the opening brief, the facts establish an irreconcilable conflict between appellant and attorney Nacsin. As a result of this conflict, the ability of the two

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[2] *People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal.Rptr.156.

to cooperate and work together effectively had irretrievably broken down. Indeed, in a classic case of understatement, respondent recognizes that, "Mr. Nacsin could have been more artful in explaining to Myles the way he was defending him." (RB 46.) Even if, arguendo, Nacsin was affording appellant adequate representation, the irreconcilable conflict between the two men made it impossible for them to work together such that the Sixth Amendment right to counsel was satisfied.

In arguing that appellant's *Marsden* was properly denied, respondent relies on the fact that two other attorneys had been replaced. (RB 46-47.) However, there is no indication that these replacements were made for anything other than proper, legitimate purposes. The inference respondent would have this Court draw, that appellant's motions were merely for an improper purpose, is not supported by the record.

As a matter of law, the trial court abused its discretion when it denied appellant's *Marsden* motions. Reversal is required.

D. THIS COURT SHOULD INDEPENDENTLY REVIEW THE REPORTER'S TRANSCRIPTS OF THE IN CAMERA PROCEEDINGS TO DETERMINE WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S *BRADY/ PITCHESS* MOTION.

In the opening brief, appellant argued that this Court should review the reporter's transcripts of the in camera hearing on appellant's *Brady/Pitchess* motion, a hearing from which appellant and his counsel were excluded. (AOB 81-83.) Respondent agrees that this Court should undertake the requested review. (RB 47-50.) Therefore, to ensure that

appellant's constitutional rights were not violated, this Court should review the in camera hearing transcript and documents considered by the trial court.

E. THE TRIAL COURT, AS A MATTER OF LAW, COMMITTED ERROR OF CONSTITUTIONAL PROPORTION WHEN IT PREJUDICIALLY INSTRUCTED THE PROSPECTIVE JURORS IN VOIR DIRE NOT TO BE INFLUENCED BY ANY SYMPATHY FOR APPELLANT; AS A RESULT, REVERSAL IS NECESSARY.

Appellant demonstrated that the trial court prejudicially erred when, during voir dire, it told the prospective jurors that "you're going to be here *during the course of this trial through the various phases,*" that the jurors may have feelings of sympathy, but that they must "set aside any of those feelings of sympathy or empathy or compassion on either side." (AOB 83-92; italics added.) Respondent's contention that there was no error (RB 51-57) is not meritorious.

Initially, claiming that the instruction "was a correct statement of the law," respondent argues that appellant has forfeited the issue of the propriety of the "no sympathy" instruction because he did not object at trial. (RB 54.) However, telling the prospective jurors to disregard sympathy, empathy, or compassion "through the various phases" of the trial is not a correct statement of the law. During the penalty phase, a jury in a capital case may properly consider sympathy and compassion as reasons to spare the defendant's life. (*People v. Robertson* (1989) 48 Cal.3d 18, 52, 255 Cal.Rptr.631, 650; *People v. Edwards* (1991) 54 Cal.3d 787, 834, 1 Cal.Rptr.2d 696, 726; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330, 105 S.Ct.2633, 2640.) Because it was legally

wrong to tell the prospective jurors that sympathy was to be set aside throughout all the phases of the trial, appellant was not required to object to preserve the issue for review. (Penal Code sec.1259; *People v. Hannon* (1977) 19 Cal.3d 588, 600, 138 Cal.Rptr.885, 892.)

Respondent argues that the instruction was proper because it supposedly "was designed to orient the potential jurors to the possibility that they might see the families of the defendants and the victims in the courtroom on a regular basis during the course of trial" (RB 54) and that the jurors "should make an objective decision based solely on the facts and the law." (RB 56.) But, the prospective jurors were never informed of these alleged purposes. Instead, they were instructed to set aside any sympathy "during the course of this trial." The "course of this trial" necessarily included the penalty phase.

Respondent claims that any possible prejudice was cured because, after the presentation of evidence, an instruction was given allowing the jury to consider sympathy at the penalty phase. (RB 55-56.) But, the instruction given to the penalty phase jury at the end of the case that it could consider "...any sympathetic or other aspect of the defendant's character or record..." (14RT 3171-3172) did not correct the pre-trial "no sympathy" instruction nor did it inform the jurors that it was wrong. And, although the jury was told to disregard any jury instruction given to it in the guilt or innocence phase of the trial which conflicted with the sympathy principle (14RT 1372), it was *never* told to disregard the previously given "no sympathy" instruction given at the beginning of the

case.

As a matter of law, the "no sympathy" instruction given to the prospective jurors during voir dire rendered it "...reasonably likely that the jurors were misled about the scope of their discretion in determining penalty." (*People v. Mayfield* (1993) 5 Cal.4th 142, 181, 19 Cal.Rptr.2d 836, 851; accord, *Boyde v. California* (1990) 494 U.S. 370, 110 S.CT.1190; *California v. Brown* (1987) 479 U.S. 538, 541, 107 S.Ct. 837, 839.) Thus, as explained in the opening brief, appellant was severely prejudiced and his rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California analogues (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 2227, 2229) were violated. Reversal is required.

III. ARGUMENT: GUILT PHASE ISSUES

A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT PERMITTED THE PROSECUTION TO INTRODUCE A THREATENING TELEPHONE CALL MADE TO WITNESS KAREN KING.

In the opening brief, appellant showed that he was prejudiced when Karen King, a critical prosecution witness in the Pepper Steak case, testified that she had received a threatening telephone call telling her not to go to court. There was no evidence that appellant was in any way connected with this call, although that is certainly the inference the prosecution wanted the jury to draw. (AOB 92-99.) Respondent argues that there was no error. (RB 57-62.) Respondent is mistaken.

Respondent implicitly agrees that the evidence of the threatening telephone call was not admissible on a consciousness of guilt theory because the call was not in any way tied to appellant or Rogers. (RB 60.) Although the trial court instructed the jury the telephone call evidence was limited to the issue of King's credibility (8RT 1726-1727), the instruction could not have effectively dispelled the incriminatory consciousness of guilt inference the jurors would naturally draw.

As explained in the opening brief, appellant was prejudiced by the evidence of the threatening telephone call. (AOB 98.) Reversal is therefore required.

B. APPELLANT SUFFERED SEVERE PREJUDICE AS A RESULT OF THE TRIAL COURT'S RULING ALLOWING AN EMOTIONAL DONNA MALOUF TO REMAIN IN THE COURTROOM.

Appellant demonstrated that his trial was rendered fundamentally unfair by the trial court's rulings that Donna Malouf could have a support person while she testified and that a visibly emotional Donna Malouf could remain in the courtroom after she completed her testimony. (AOB 99-110.) Respondent's contrary claim (RB 62-69) is not meritorious.

"The right to a fair trial includes the right to a trial free from audience demonstrations which may contaminate or prejudicially affect the jury." (*People v. McGuire* (Ariz.1987) 751 P.2d 1011, 1013.) "'A criminal defendant has the right to be tried in an atmosphere undisturbed by public passion.'" (*People v. Houston* (2005) 130 Cal.App.4th 279, 311, 29 Cal.Rptr.3d 818, 844.) A witness's emotionally charged

conduct or improper conduct can be exceedingly prejudicial to a defendant. As the Court in *Wilson v. Sirmons* (10th Cir.2008) 536 F.3d 1064, 1114 recognized, a "...witness['s]... emotionally charged display...might be unduly prejudicial." (Accord, *United States v. Mitchell* (9th Cir.2007) 502 F.3d 931, 971 [A person's courtroom conduct may be "'so inherently prejudicial as to pose an unacceptable threat' to a defendant's right to a fair trial, meaning that 'an unacceptable risk is presented of impermissible factors coming into play.'"])

A trial spectator's actions are not evidence and thus are not a proper consideration for a jury. (See, *People v. Prince* (1988) 203 Cal.App.3d 848, 855, 250 Cal.Rptr.154, 158 [courtoom "conduct was not evidentiary..."]; Evidence Code sec.140.) Nevertheless, the jurors would gaze with rapt attention at all the emotion-laden actions of the slain police officer's widow.

"'[T]he presumption of prejudice from jury contact with inadmissible evidence is...strong[ ] in the context of a capital case. "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment."'" (*People v. Lucero* (1988) 44 Cal.3d 1006, 1023, 245 Cal.Rptr.185, 194.) Here, Donna Malouf had a support person while she testified. While such is allowed, the jury nevertheless very well could have inferred that she was so devastated by her loss that she could not answer questions without a sympathetic person nearby. Such an inference is harmful to a defendant. And, while Donna Malouf may not

have yelled as she sat in the spectator section of the courtroom, she did nod her head in agreement with other witnesses, and had emotional outbursts during trial, which were visible to and observed by the jurors. These understandable, but improper actions necessarily engendered great sympathy for her sad plight and a corresponding significant antagonism toward appellant. The presence in front of the jury of an emotionally distraught, sobbing widow prejudicially affected the jury's ability to properly deliberate and render an unbiased, fair judgment.

Citing Evidence Code section 777, respondent argues that the trial court properly permitted Donna Malouf to remain in the courtroom. (RB 68.) But, "...the defendant's right to a fair trial takes precedence over public access both in 'certain classes of proceedings where danger of prejudice is strong but case-by-case proof of its existence appears difficult...and where a defendant satisfies a court that the presence of a particular individual during all or part of a trial violates his right to a fair trial." (*People v. Adams* (1993) 19 Cal.App.4th 412, 435-436, 23 Cal.Rptr.2d 512, 525-526.) Appellant's overriding right to a fair trial takes precedence over Donna Malouf's right to remain in the courtroom.

Respondent argues there was no prejudice because Donna Malouf's "emotions were quiet and controlled." (RB 69.) Not so. She nodded her head in agreement with the testimony of a prosecution witness. (7RT 1441.) She was openly crying and being held and comforted by her support people while seated in the first row of the spectator section.

(8RT 1561.) Malouf's conduct "was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." (*Holbrook v. Flynn* (1986) 475 U.S. 560, 572, 106 S.Ct.1340-1347.)

The trial court's decision to allow Donna Malouf to remain in the courtroom was prejudicial to appellant and violated his constitutional rights to due process and a fair trial. Reversal is required.

C. THE CONSTITUTIONAL REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT WAS UNDERMINED BY THE MIS-LEADING CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS; REVERSAL IS REQUIRED.

Appellant demonstrated that the circumstantial evidence instructions undermined and weakened the constitutional requirement that the jury determine guilt beyond a reasonable doubt. (AOB 110-116.) Respondent argues that the instructions were proper. (RB 69-73.) Respondent is wrong.

The jurors were instructed that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (2CT 403, 438, 528; 3CT 695; 11RT 2380-2381; 12RT 2755-2756; 14RT 3163-3164.) These instructions effectively told the jurors that, if there was an interpretation of the evidence that "appear[ed]" to be "reasonable" and that pointed to appellant's guilt, but no "reasonable" interpretation that pointed to appellant's innocence, it was the jurors "duty" to convict appellant. These instructions thereby created a substantial risk that appellant would be convicted based

upon less than the constitutionally-required standard of proof beyond a reasonable doubt and based upon the juror's view of what was reasonable rather than upon the facts. Thus the jurors were instructed to convict appellant if they merely concluded that the evidence could "reasonably" be interpreted to show that defendant was guilty and no other "reasonable" interpretation of the evidence had been offered. The effect of these instructions was particularly prejudicial in appellant's case.

The concept of "proof beyond a reasonable doubt" is an elusive and difficult one, and it may often be confusing to jurors. Moreover, as the United States Supreme Court has recognized, detailed instructions concerning circumstantial evidence (such as those given in appellant's case) are confusing to the jury. (*Holland v. United States* (1954) 348 U.S. 121, 139-140, 75 S.Ct. 127, 137-138; see *People v. Magana* (1990) 218 Cal.App.3d 951, 955 n.2, 267 Cal.Rptr. 414, 416, n.2.)

Here, the jurors were told that "proof beyond a reasonable doubt" meant that they must have "an abiding conviction of the truth of the charge." (2CT 422.) Unless someone had served as a juror in a criminal case before, it is unlikely that he or she had ever heard that phrase before or had any clear understanding of what it meant. On the other hand, each of the jurors likely had used the word "reasonable" regularly, and had a relatively settled understanding of what that word meant. In any event, they certainly understood that "reasonable" means something quite different from what "an abiding conviction" (with which they were instructed) is intended to convey in criminal jury instructions.

A reasonable juror, uncertain about what "an abiding conviction" means, would rely upon the simpler, more familiar language of the challenged instructions for direction about how to resolve the State's circumstantial case. The prejudicial, misleading impact of the instruction was compounded by reiteration of the instruction. Having repeatedly heard this instruction, a reasonable juror would conclude that, if a "reasonable" interpretation of the evidence suggested appellant's guilt and no "reasonable" interpretation demonstrated his innocence, the jury had no choice but to convict appellant or sentence him to death, notwithstanding the explicit commands of the reasonable doubt instruction.

In *People v. Osband* (1996) 13 Cal.4th 622, 55 Cal.Rptr.2d 26, this Court concluded that the instructions would not mislead the jury to believe that it could convict the defendant where the evidence did not show the defendant was guilty beyond a reasonable doubt. (13 Cal. 4th at 679, 55 Cal. Rptr. 2d at 63.) But the *Osband* Court apparently did not consider whether the instructions would mislead the jurors regarding the fundamental meaning of "guilty beyond a reasonable doubt." In fact, the instructions which appellant complains of here tell the jurors it is their "duty" to convict the defendant on less proof, if it is "unreasonable" to interpret the evidence as showing the defendant's innocence, and "reasonable" to interpret it as showing his guilt.

Confused by the concept of "an abiding conviction," a juror could easily conclude from the circumstantial evidence instructions that "beyond a reasonable doubt" means "the lack of any reasonable interpretation of the evidence showing the defendant's

innocence." Indeed, given the circumstantial aspects of the State's case, the erroneous instructions likely had even greater impact. The effect of the confusion inherent in CALJIC 2.90 (the reasonable doubt instruction) is to impermissibly shift the burden of proof to the defendant, requiring that once the prosecution has made out a "reasonable" case for guilt the defendant must present a "reasonable" case for his innocence. The circumstantial evidence instructions thereby severely undermine the constitutional requirement of proof beyond a reasonable doubt.

In *People v. Magana, supra,* 218 Cal.App.3d 951, 267 Cal.Rptr.414, the Court of Appeal concluded that the challenged instructions merely tell the jurors to "reject interpretations of circumstantial evidence that are so incredible or so devoid of logic that they can, beyond a reasonable doubt, be rejected." (218 Cal. App. 3d at 956, 267 Cal. Rptr. at 417.) If the instructions actually said that, they might well be constitutional. What they say, however, is that an "unreasonable" interpretation must be rejected in favor of a "reasonable" one; no reasonable juror would interpret "unreasonable" to mean "so incredible or so devoid of logic that they can, beyond a reasonable doubt, be rejected." In the absence of any affirmative showing by a defendant of a "reasonable" case for his innocence, the circumstantial evidence instructions permit a finding of guilt upon a lesser quantum of proof than required by the beyond a reasonable doubt standard.

The circumstantial evidence and reasonable doubt instructions served to confuse and mislead the jurors regarding the burden of proof. As a result, appellant's rights under

the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their California counterparts were prejudicially violated. Reversal is required.[3]

D. THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY SUA SPONTE REGARDING INTOXICATION.

Appellant argued that the trial court committed prejudicial error by not instructing the jury sua sponte regarding the effect of intoxication on specific intent. (AOB 116-122.) Respondent contends there was no error. (RB 73-77.) The contention is unavailing.

Respondent contends there was no credible evidence that appellant was intoxicated. (RB 74.) Not so. Substantial evidence showed that, when appellant perpetrated the Pepper Steak offenses, he was under the influence of PCP. Rogers had been drinking and doing drugs before the incident. (10RT 2226.) Appellant was with him; thus it is readily and reasonably inferred that appellant was also drinking and using drugs. Appellant was high on PCP -- "shermed out" -- when he returned to Winkler's apartment after the incident. (9RT 1792.) Also, appellant's unreasonable rage and threats of violence at the restaurant is further evidence of intoxication. As a matter of law, there was sufficient evidence to warrant an intoxication instruction. Respondent tacitly concedes that evidence of voluntary intoxication is relevant. Thus, a voluntary

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[3] Appellant acknowledges that this Court has previously rejected this argument. However for the reasons stated above and in the opening brief, this Court's position should be reconsidered.

intoxication instruction was warranted, and should have been given sua sponte by the trial court in this specific intent case.

The failure to give the instruction was prejudicial. A defendant may very well perform the physical acts necessary to complete an offense yet, because of intoxication, lack the specific intent to commit the offense. The instruction would have focused the jury's attention on the issue of appellant's condition, and would have allowed them to find that his intoxicated state prevented him from forming the necessary specific intent.

The trial court prejudicially erred by not instructing sua sponte with the voluntary intoxication instructions. Reversal is required.

IV. ARGUMENT: PENALTY PHASE AND SENTENCING ISSUES

A. THE ADMISSION OF VICTIM IMPACT EVIDENCE WAS IMPROPER BECAUSE IT WAS NOT LIMITED TO THE FACTS KNOWN BY APPELLANT WHEN THE OFFENSE WAS ALLEGEDLY COMMITTED.

In the opening brief, appellant demonstrated that the victim impact evidence introduced in this case was improper because (1) it was not limited to the facts or circumstances known to appellant when the crime was committed; and (2) judicial enlargement of Penal Code section 190.3, subdivision (a) to allow such extensive evidence is impermissible and unconstitutional. (AOB 122-128.) In his brief (RB 146-147), respondent states that this Court has rejected arguments similar to appellant's in its prior cases. Appellant acknowledges this fact but urges this Court to reconsider its earlier decisions and to limit the scope and narrow the definition of what constitutes admissible

victim impact evidence. Further, respondent does not address appellant's core argument, i.e., that a capital defendant cannot fairly and consistent with due process be held responsible for harm beyond his knowledge.

"Victim impact" evidence is admitted in nearly every, if not all, capital cases, virtually unfettered. A reasonable construction of "relevance" for section 190.3, subdivision (a) purposes must encompass and be limited by the defendant's knowledge. It is time for this Court to define the limits of such evidence to bring it in line with both the federal and state constitutions.

B. THE UPPER TERM FIREARM USE ENHANCEMENTS ON COUNTS ONE AND THREE MUST BE REDUCED TO THE FOUR-YEAR MID-TERM.

The aggravating factors the trial court relied on to impose the upper term on the firearm enhancements on counts 1 and 3 were not found true by the jury nor were those facts admitted by appellant. Thus, the upper term sentence violated constitutional jury trial principles, as explained in *Cunningham v. California* (2007) 549 U.S. 276, 127 S.Ct.856 and *People v. Sandoval* (2007) 41 Cal.4th 825, 831-832, 62 Cal.Rptr.2d 588, 592-593. Therefore, the sentence on that enhancement should be reduced to the mid-term. (See AOB 128-134.) Respondent assumes that the trial court committed *Cunningham* error, but argues that remand for resentencing is not required because, or so respondent contends, "...of the likelihood that on remand the trial court would impose the same 10-year aggravated sentence..." (RB 85; and see RB 81-85.) Respondent's argument should be rejected.

In *Chioino v. Keenan* (9th Cir.2009) 581 F.3d 1182, the Court of Appeals ruled that, where *Cunningham* error has occurred, the reviewing court should not correct the error on its own. Rather, "...because *Cunningham* set out the right to a particular sentencing procedure rather than a substantive right to a particular sentence, the appropriate remedy for a *Cunningham* violation is to remand for a new sentencing hearing that utilizes a constitutional procedure...[A] remand to the...trial court for resentencing under the procedures delineated in *Sandoval* was...required." (581 F.3d at 1186.) Thus, this Court should remand for resentencing on the firearm enhancements.

Respondent argues that remand is not necessary because "...had the jury been asked to make a special finding that Myles used a firearm, it would have done so." (RB 84.) But, for upper term, aggravation purposes, the question is whether the firearm use was "'distinctively worse than the ordinary.'" (*People v. Black* (2007) 41 Cal.4th 799, 817, 62 Cal.Rptr.3d 569, 582.) Here, this Court cannot say that the jury would have found appellant's firearm use to be distinctively worse than the usual murder case wherein a firearm is used.

Respondent also claims that, because appellant had prior convictions, the trial court would have used them to justify the upper term sentence. (RB 84-85.) But, this is mere speculation. Given the drastic nature of appellant's sentence on other charges, the trial court may very well see fit to impose only the mid-term on the firearm enhancements.

This Court cannot say with any assurance that the trial court would likely impose an upper term sentence for the firearm enhancements on counts 1 and 3. Remand for resentencing is therefore required.

V. ARGUMENT: OTHER ISSUES

A. PENAL CODE SECTIONS 190.3 AND 190.2 VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE CALIFORNIA CONSTITUTION.

1. The aggravating factors in penal code section 190.3 are unconstitutionally vague.

Appellant demonstrated that the entirety of Penal Code section 190.3 was unconstitutionally vague because the statute, as a whole and each of its separate sub-sections individually, fails to provide sufficiently specific aggravating factors so as to preclude the trier of fact from considering facts not relevant to the penalty determination. (AOB 135-139.) Citing, inter alia, *People v. Young* (2005) 34 Cal.4th 1149, 1207-1208, respondent claims that section 190.3 is not impermissibly vague. (RB 86.) This appears to be the holding of *Young*. However, regarding the choice of penalty, this Court acknowledged that the aggravating factors relied on by the trier of fact in determining penalty:

> "Must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination.
>
> To meet these dual criteria, sentencing factors should

> not inject into the individualized sentencing determination the possibility of 'randomness' or 'bias in favor of the death penalty.' [Citation.] Inappropriate for consideration in the sentence selection process would be any aggravating factor that was either 'seriously and prejudicially misleading,' or that invited 'the jury to be influenced by a speculative or improper consideration[ ], such as the race or political beliefs of the defendant that are without any bearing on moral culpability." (*People v. Baciagalupo* (1993) 6 Cal.4th 457, 477, 24 Cal.Rptr.2d 808, 820; footnote deleted.)

(Accord, *Tuilaepa v. California* (1994) 512 U.S. 967, 974, 114 S.Ct. 2630, 2636 ("...a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process..."])

This Court has recognized that factors such as those in section 190.3 "...violate the Eighth Amendment...if they are 'insufficiently specific or if they direct the sentencer to facts not relevant to the penalty evaluation." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 478, 24 Cal.Rptr.2d 808, 821.) And, even though the United States Supreme Court has upheld factors (a), (b), and (i) of section 190.3 (*Tuilaepa v. California, supra,* 512 U.S. 967, 114 S.Ct. 2630), the crucial issue is the interplay among *all* factors and how they are applied during the trier of fact's deliberations. While each discrete factor, standing alone, may appear constitutional, the combined effect of all factors renders the scheme unconstitutional. As stated by justice Blackmun in his dissent in *Tuilaepa*:

> "[T]he Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes constitutional muster. But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness

who is exposed to the death penalty and who receives it."
(512 U.S. at 995, 114 S.Ct. at 2647.)[4]

Further, *Tuilaepa*'s holding that factors (a), (b) and (i) were proper because they are not "propositional" (512 U.S. at 974-975, 114 S.Ct. 2636), even if arguably correct, is *not* applicable to the remaining factors, all of which (except possibly factor (k)) call for a "propositional" answer, e.g., a "yes" or "no," to the statutory question "Whether or not..." the factor is present. Depending on the answer, the factor is either aggravating or mitigating. Thus, under *Tuilaepa,* all factors except (a), (b) and (i) are "propositional," and thus violative of the Eighth Amendment. And, nothing in the statutory scheme ensures that the trier of fact will not treat the absence of ostensibly mitigating factors as aggravation to be weighed on death's side of the scale.

The entirety of section 190.3, without isolating its discrete factors, falls squarely within the type of constitutional violation discussed by Justice Blackmun and outlined in *Bacigalupo.* Appellant requests that this Court's holding regarding section 190.3 be reconsidered. As a matter of law, section 190.3 as a whole is unconstitutionally vague. Appellant's sentence must be reversed.

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[4] *Tuilaepa* did not decide whether section 190.3 as a whole violates the Eighth Amendment. Nor did it consider factors (c), (d), (e), (f), (g), (h), (j) or (k). Thus, it is inapposite regarding these issues. (*San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 55 Cal.Rptr.2d 724 ("Cases are not authority, of course, for issues not raised and resolved.")

2. Factor (a) of Penal Code section 190.3 is unconstitutional as violative of the Eighth and Fourteenth Amendments.

As shown in the opening brief (AOB 139-143), factor (a) of Penal Code section 190.3 is unconstitutional because it is vague, standardless, subjective as to the trier of fact, arbitrary and weighted heavily toward imposition of the death penalty. In *Tuilaepa v. California, supra,* 512 U.S. at 975, 114 S.Ct. at 2637, the Court found that factor (a) was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence." Relying on *Tuilaepa,* this Court has ruled that factors (a), (b) and (i) are constitutional. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 187-190, 51 Cal.Rptr.2d 770, 831-883.)

Appellant submits these cases are wrongly decided, result in the violation of fundamental, unconstitutional rights and, thus, should not be followed by this Court. (*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, n.7, 150 Cal.Rptr.435, 441, n.7 ["'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused.'"]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679, 312 P.2d 680, 685 ["...decisions should not be followed to the extent that error may be perpetuated and that wrong may result."])

As Justice Blackmun stated in his dissent in *Tuilaepa,* the use of "...the 'circumstances of the crime' [factor (a)] as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide...[is] something this Court condemned in *Godfrey v. Georgia...*" (512 U.S. at 988, 114 S.Ct. at 2643.) And, because factor (a) "...lacks clarity and objectivity, it poses an unacceptable risk that a sentencer

will succumb either to overt or subtle racial impulses or appeals... The California sentencing scheme does little to minimize this risk." (512 U.S. at 992, 114 S.Ct. at 2645.) Clearly, factor (a) encompasses *every* fact which could possibly exist in *any* homicide; thus, it is vague and overly broad.

Respondent appears to be correct that this issue has been decided against appellant. (RB 86.) However, for the reasons stated herein and in the opening brief, appellant respectfully contends that these cases were wrongly decided and should be reconsidered.

3. Penal Code section 190.3's unitary list of aggravating and mitigating factors violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Penal Code section 190.3 allowed the trial court to engage in an undefined, open-ended consideration of non-statutory factors and permitted the prosecutor to claim mitigating factors were really aggravating, thereby violating appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 143-172.) Respondent's contrary contentions (RB 86-91) should be rejected.

Penal Code section 190.3 does not properly guide the trier of fact's sentencing discretion nor does it tell the trier of fact which factors are aggravating and which are mitigating.[5] In the instant case, this deficiency, coupled with the prosecutor's closing arguments implicitly urging the trier of fact to consider mitigating evidence as

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[5] Appellant recognizes that the claim has been rejected by this Court. (*People v. McPeters* (1992) 2 Cal.4h 1148, 1192, 9 Cal.Rptr.2d 834, 857.) However, he respectfully requests that this point be reconsidered.

aggravating, permitted the jury to impose the death sentence in an arbitrary, unprincipled manner. (*Gregg v. Georgia* (1976) 428 U.S. 153, 192, 96 S.Ct. 2909, 2934.) And, given the vagueness of the statute, the jury undoubtedly gave great aggravating weight to the relative absence of mitigating evidence.

The failure of section 190.3 to guide the jury's sentencing discretion is exemplified by factor (i) regarding age. (See AOB 145-147.) As Justice Blackmun stated in *Tuilaepa*:

> "The defendant's age as a factor, applied inconsistently and erratically, ...fails to channel the [trier of fact's] discretion. In practice, prosecutors and trial judges have applied this factor to defendants of virtually every age..." (512 U.S. at 988, 1114 S.Ct. at 2643.)

The vague nature of the sentencing factors permits the factor to be used either way, thereby undermining the guided discretion which capital jurisprudence requires.

The vague, rudderless nature of the factors to be considered by the trier of fact is also illustrated by factors (d) and (h) regarding extreme mental or emotional disturbance and impairment due to mental disease, deficit or intoxication. (AOB 147-151.) Regarding factor (d)'s use of the word "extreme," the trier of fact is effectively precluded from finding anything but "*extreme*" disturbance to be mitigating. Indeed, the absence of "extreme" but still severe disturbance could be viewed as aggravating. This, however, is error since factors (d) and (h) "can only be mitigating." (*People v. Montiel* (1993) 5 Cal.4th 877, 944, 21 Cal.Rptr.2d 705, 745.)

Regarding factor (h), impairment due to mental disease or defect, it allows the prosecutor to argue and the trier of fact to consider that the absence of such disease or defect is aggravating. In appellant's case, the trier of fact would reasonably believe that, because evidence of such impairment is mitigating, its absence here is aggravating. However, this is not necessarily so.

Appellant argued that the vague, imprecise nature of section 190.3 allowed the prosecutor to argue that mitigating factors are actually aggravating. In *Zant v. Stephens* (1983) 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, the Court held that due process is violated when an aggravating label is attached to mitigating evidence. In such a case, *Tuilaepa* is not controlling even if the statutory factors are not "propositional." As stated in *People v. Williams* (1997) 16 Cal.4th 153, 272, 66 Cal.Rptr.2d 123, 202:

> "We do not agree that *Tuilaepa* necessarily forecloses defendant's claim of error based on *Zant*. For one thing, the high court cited *Zant* with approval in *Tuilaepa*... More importantly, nothing in *Tuilaepa* indicates that high court would without qualification, extend its approval of 'competing arguments' about what significance to assign the age of the defendant in a particular case, under section 190.3, factor (i), to other statutory factors. It is not clear, in short, that *Tuilaepa* undermined *Zant*'s suggestion that states may not, consistently with due process, label as 'aggravating' factors 'that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness.'"

The gist of appellant's claim is that the unitary list of aggravating and mitigating factors, with no explanation or means to discern which were aggravating and which were mitigation, leads to precisely the kind of arbitrary, unguided discretion prohibited by *Zant,*

Lockett and *Woodson.* To the extent that state law professes to provide the necessary guidance to ensure that the death penalty is not freakishly or wantonly imposed (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726), the statute's failure to properly guide the trier of fact with respect to mitigating and aggravating factors is tantamount to depriving appellant of his rights under state law. This amounts to a violation of federal due process under *Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.

4. All factors listed in Penal Code section 190.3 and CALJIC No. 8.85 are unconstitutionally vague and result in unreliable sentences.

Appellant demonstrated that *all* the enumerated factors of section 190.3 are vague, arbitrary and misleading to the jury so as to result in an unreliable penalty determination in violation of the Eighth and Fourteenth Amendments. (AOB 143-153.) Citing, inter alia, *People v. Farnam* (2002) 28 Cal.4th 107, 191, 121 Cal.Rptr.2d 106, 177-178, respondent claims that this issue has been decided against appellant. Respondent appears to be correct. (RB 87.) Nevertheless, appellant requests this Court to reconsider that decision in light of the arguments made herein and in the opening brief.

5. The individual aggravating factors must be proved beyond a reasonable doubt.

In the opening brief, appellant demonstrated that California's death penalty scheme is unconstitutional in that it fails to require that the trier of fact find (1) the existence of the individual aggravating factors beyond a reasonable doubt; (2) that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt; and (3) that death be

found to be the appropriate penalty beyond a reasonable doubt. (AOB 153-156.) Respondent's contrary argument (RB 91-92) is not well-taken.

The failure to specify that all aggravating factors be proved beyond a reasonable doubt, that aggravation must be weightier than mitigation beyond a reasonable doubt, and that death must be found to be the appropriate penalty beyond a reasonable doubt, violates federal principles of due process (see *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767, 102 S.Ct. 1388; *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068; *State v. Wood* (Utah 1982) 648 P.2d 71), equal protection, and the Eighth and Fourteenth Amendment requirement of heightened reliability in the death determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414, 106 S.Ct. 2595; *Beck v. Alabama* (1980) 447 U.S. 625, 100 S.Ct.2382.)

However, even if it were not constitutionally necessary to place a heightened burden of persuasion on the prosecution, some consistent burden of proof at the penalty phase would need to be established to ensure that the trier of fact, be it a jury or the judge, faced with similar evidence, would return similar verdicts, that the death penalty would be evenhandedly applied, and that capital defendants would be treated equally from case to case. "Capital punishment [must] be imposed fairly, *and with reasonable consistency,* or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, 102 S.Ct. 869 (Emphasis added.) In cases in which the aggravating and mitigating evidence is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one defendant should live and another die simply because one trier of fact assigns the ultimate burden of

persuasion to the state, and another assigns it to the defendant. (*O'Neal v. McAninch* (1995) 513 U.S. 432, 443, 115 S.Ct. 992.)

At the very least, then, the Eighth and Fourteenth Amendments require the application of a defined and consistent burden of proof. The failure of the California death penalty statute to define such a burden of proof renders the scheme arbitrary and capricious. As such it violates the state and federal constitutional requirements of due process (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229), equal protection, and the federal prohibition against cruel and unusual punishment

Although decisions such as *People v. Bradford* (1997) 14 Cal.4th 1005, 1059, 60 Cal.Rptr.2d 225, 259 and *People v. Crittenden* (1994) 9 Cal.4th 83, 152-153, 36 Cal.Rptr.2d 474, 515 have rejected this argument, appellant believes the points raised herein and in the opening brief are more persuasive, and on that basis asks that these decisions be reconsidered.

6. Appellant's constitutional rights were violated by the trial court's failure to render unanimous written findings regarding the applicable aggravating factors.

In the opening brief, appellant contended that the trial court must be required to render written findings regarding the applicable aggravating factors, and that the failure to do so violated his fundamental rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 157-158.) Based on those contentions, the authorities cited by respondent (RB 92), stating that written findings are not required, are wrongly decided and should be reconsidered.

7. California's death penalty scheme is unconstitutional because it fails to provide for intercase proportionality.

Where a state's capital punishment scheme "operate[s] in an arbitrary and capricious manner," the fact that, as here, a defendant is sentenced to death whereas others similarly situated receive life without possibility of parole establishes "disproportionality violative of constitutional principles." (*People v. McLain* (1988) 46 Cal.3d 97, 121, 249 Cal.Rptr.630, 644; accord, *McCleskey v. Kemp* (1987) 481 U.S. 279, 306-307, 107 S.Ct. 1756, 1775.) As shown in the opening brief (AOB 158-160), this state's entire capital punishment system is arbitrary and capricious in its operation; as such, it is unconstitutional because of disproportionate imposition of the death penalty. In addition, the lack of proportionality review violates the requirement that all potential mitigating factors be considered by the sentencer, deprives the death-sentenced defendant of meaningful appellate review, and results in an unreliable, arbitrary and capricious application of the death penalty. Accordingly, the lack of review offends the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment and deprivation of due process. (*Gregg v. Georgia, supra,* 428 U.S. 153, 193-195; see also *Parker v. Dugger* (1991) 498 U.S. 308, 314-315, 321, 111 S.Ct. 731.)

In *Pulley v. Harris* (1984) 465 U.S. 37, 104 S.Ct. 871, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." As Justice Blackmun subsequently observed, however, that

ruling was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thus "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.' As litigation exposes the failure of these factors to guide the [trier of fact] in making principled distinctions, the court will be well advised to reevaluate its decision in *Pulley v. Harris.*" (*Tuilaepa v. California, supra,* 512 U.S. at 995, 114 S.Ct at 2647.) (Blackmun, J., dissenting.))

The time has come for *Pulley v. Harris* to be reevaluated, for, as discussed elsewhere herein and in the opening brief, the special circumstances of the California statutory scheme do *not* perform the constitutionally required narrowing necessary for death penalty eligibility. The current overbreadth of the special circumstances undermines the basis of the Supreme Court's approval of this state's lack of proportionality review. The various parts of California's death penalty scheme are not "working together to determine with rationality and fairness who is exposed to the death penalty and who receives it." (*Tuilaepa v. California, supra,* 512 U.S. at 995, 114 S.Ct. at 2647 (Blackmun, J., dissenting.))

If, *arguendo,* this Court determines that California's death penalty scheme is not arbitrary and capricious, the scheme is nevertheless unconstitutional as a result of its failure to require intercase proportionality. Although this Court has decided the proportionality issue contrary to appellant's position (see, *People v. Crittenden, supra,* 9 Cal.4th at 156, 36 Cal.Rptr.2d at 518), appellant requests reconsideration based on the

arguments made herein and in the opening brief.

8. California's capital punishment scheme fails to provide sufficient and adequate safeguards.

In the opening brief, appellant argued that California's death penalty scheme is unconstitutional because it fails to provide numerous safeguards against the arbitrary, unwarranted, unreliable imposition of the death penalty. These safeguards include (1) written findings as to the aggravating factors found by the jury; (2) proof beyond a reasonable doubt of the aggravating factors; (3) jury unanimity on the aggravating factors; (4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; (5) a finding that death is the appropriate punishment beyond a reasonable doubt; (6) a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision; and (7) a definition of which specified relevant factors are aggravating, and which are mitigating thereby greatly lessening the chance of an arbitrary or capricious death judgment. (AOB 160-162.) As respondent points out, this Court has ruled such safeguards unnecessary. (RB 93-95.) Nevertheless, appellant requests that this Court reconsider its position.

9. California's capital sentencing scheme fails to perform its constitutionally mandated narrowing function.

a. Penal Code section 190.2's special circumstances are overly broad.

Penal Code section 190.2 contains 22 special circumstances which qualify a defendant for the death penalty. These numerous circumstances encompass virtually all

first degree murders. As explained in the opening brief (AOB 162-172), section 190.2 is so overbroad that it fails to "circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. 862, 878, 103 S.Ct. 2733, 2743.) Respondent claims section 190.2 sufficiently narrows the class of defendants eligible for the death penalty. (RB 93-95.) Respondent, however, is wrong.

In *People v. Baciagalupo, supra,* 6 Cal.4th at 465, 24 Cal.Rptr.2d at 812, this Court stated with respect to the "narrowing" aspect of capital sentencing in general:

> "'Narrowing' pertains to a state's 'legislative definition' of the circumstances that place a defendant within the class of persons eligible for the death penalty. To comport with the requirements of the Eighth Amendment, the legislative definition of a state's capital punishment scheme that serves the requisite 'narrowing' function must 'circumscribe the class of persons eligible for the death penalty.' Additionally, it must afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not. A legislative definition lacking 'some narrowing principle' to limit the class of persons eligible for the death penalty and having no objective basis for appellate review is deemed to be impermissibly vague under the Eighth Amendment." (Citations omitted.)

(Accord, *Godfrey v. Georgia* (1980) 466 U.S. 420, 428, 433, 100 S.Ct. 1759, 1764, 1767; *Zant v. Stephens, supra,* 462 U.S. at 878, 103 S.Ct. at 2743.

Section 190.2 fails to accomplish a constitutionally acceptable narrowing function because it does not limit or confine the class of offenders eligible to receive the death penalty. Virtually every first degree murder comes within its coverage. Rather than limiting the class of offenders to whom the death penalty is an option, section 190.2, in

reality, circumscribes and limits the class to whom the death penalty is *not* applicable. Section 190.2 therefore improperly effects a *reverse* of the type of narrowing required by the Constitution.

California law fails to narrow the pool of defendants eligible for the death penalty. For example, the law attaches overly broad eligibility for the death penalty to multiple murder offenses. (See *State v. Middlebrooks* (Tenn.1992) 840 S.W.2d 317, 343-346, *cert. dismissed,* 510 U.S. 124 (1933)). It thus violates the Eighth Amendment's requirement that a death penalty statute "genuinely narrow the class of persons eligible for the death penalty and...reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra,* 462 U.S. at 877.) There are two components to a determination of whether a specific special circumstance is sufficiently narrow.

First, because relative culpability should be determined by consideration of *mens rea* as well as *actus reus,* the narrowing factor must focus upon the defendant's mental state, not just the act which was committed. (See *Enmund v. Florida* (1982) 458 U.S. 782, 800, 102 S.Ct. 3368 [appropriateness of death depends on the accused's culpability and "American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical" to the degree of culpability]; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 108 S.Ct. 546 [court clearly and explicitly relied upon the heightened intent standard in the Louisiana statutory scheme's definition of first degree murder in concluding that the state had sufficiently narrowed the class of death-eligible

from those cases in which he or she is not.] See *Furman v. Georgia, supra,* 408 U.S. 238; *United States v. Cheely* (9th Cir.1994) 36 F.3d 1439, 1445.)

Second, the narrowing factor must not be overly broad, so as to permit death eligibility under the same factor for defendants whose crimes are of disparate levels of culpability. If, as with California's law, the death eligibility factor encompasses different levels of culpability, the narrowing is not rational. (See *Furman v. Georgia, supra,* 408 U.S. 238; *Lowenfield v. Phelps, supra,* 484 U.S. at 244-246; *United States v. Cheely, supra,* 36 F.3d at 1445.)

The potential for intolerable arbitrariness exists under the California felony-murder special circumstance. A jury could sentence to death someone who committed a murder in the course of a burglary or robbery, while another could reject the death penalty for someone who committed ten deliberate, premeditated first degree murders. This special circumstance thus encompasses a broad class of death eligible defendants without providing guidance to the sentencer as to how to distinguish among them, creating the potential for impermissibly disparate and irrational sentencing in violation of *Furman.*

The virtually all-inclusive provisions of section 190.2 fail to properly limit the class of defendants eligible for the death penalty; thus, California's death penalty scheme is unconstitutional.[6]

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[6] Appellant recognizes that his Court has previously held that the "narrowing" provisions of California's death penalty are constitutional. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 842-843, 42 Cal.Rptr.2d 543, 592.) However, as shown herein and in the opening brief, such decisions are wrongly decided and should be reconsidered.

b. The use of a special circumstance not only to render a defendant death eligible but also as an aggravating factor violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

In the opening brief, relying mainly on *State v. Middlebrooks, supra,* 840 S.W.2d 317 and *State v. Cherry* (N.C.1979) 257 S.E.2d 551, appellant demonstrated that the use of a special circumstance to render a defendant death-eligible under Penal Code section 190.2 and also as an aggravating factor pursuant to Penal Code section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments by granting the trier of fact virtually unbridled discretion in imposing the death penalty and in rendering California's death penalty scheme unconstitutionally weighted in favor of death. This is because a defendant (such as appellant) found guilty under a felony-murder theory is automatically eligible for the death penalty whereas a defendant who kills with premeditation and deliberation is not automatically eligible. (AOB 168-169.) Respondent's claims to the contrary (RB 93-95) are not meritorious.

In *State v. Middlebrooks, supra,* 840 S.W. 2d 317, the Tennessee Supreme Court held that a sentencing scheme similar to the double use of a felony-murder special circumstance violated the Eighth Amendment:

> "...[W]hen the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance...[based on felony murder]...<u>does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment</u> to the U.S. Constitution and...because it duplicates the elements of the offense. As a result, we conclude the... [Tennessee statutory aggravating factor]...is unconstitutionally applied under the Eighth Amendment to the

> U.S. Constitution... [F]elony murder continues to be a death eligible offense. However, a finding of an aggravating circumstance other than...[the Tennessee felony murder statutory aggravating factor]...is necessary to support death as a penalty for the crime." (*State v. Middlebrooks, supra,* 840 S.W. 2d at 346; emphasis added.)

Significantly, respondent does not address the dispositive holdings of *Middlebrooks* or *Cherry*. Nevertheless, even if the sentencing schemes at issue in *Middlebrooks*, *Cherry* and *Collins v. Lockhart* (8th Cir.1985) 754 F.2d 258 are somewhat different, they are sufficiently similar to California's to render the courts' analyses and holdings authoritative and persuasive guidance on the issue.

The double use of a felony-murder as both a special circumstance and an aggravating factor impermissibly subjected appellant to a much greater chance of being sentenced to death. This aspect of California's sentencing scheme violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

c. California's death penalty scheme unconstitutionally affords the prosecutor complete discretion in determining whether a penalty hearing will be held.

Appellant demonstrated that, in violation of the Eighth and Fourteenth Amendments, Penal Code sections 190 through 190.5 give the prosecutor unbridled discretion in determining whether a penalty hearing will occur. This complete discretion results in wholly arbitrary imposition of the death penalty. (AOB 169-171.)

Under California law, when a defendant is statutorily death-eligible, the individual prosecutor has complete discretion to determine whether a penalty hearing will be held.

As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, 253 Cal.Rptr.55, 96, this creates a substantial risk of county-by-county arbitrariness. There can be no doubt that under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with factually similar offenses in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status.

In application, the arbitrary and wanton prosecutorial discretion allowed by the California scheme in charging, prosecuting and submitting a case to the trier of fact as a capital crime merely compounds the disastrous effects of vagueness and arbitrariness inherent in the California statutory scheme. Like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina* (1976) 428 U.S. 280, 303, 96 S.Ct. 2978, this unprincipled, broad discretion is contrary to the principled decision making mandated by *Furman v. Georgia, supra,* 408 U.S. 238.

Respondent correctly notes that this issue has been decided against. (RB 95.) However, for the reasons stated above and in the opening brief, appellant requests this Court to reconsider this issue.

d. The cumulative effect of errors attendant to sections 190.2, 190.3 require reversal.

The cumulative (and individual) effect of the errors made in connection with

appellant's penalty phase hearing regarding sections 190.2 and 190.3 violated his rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and their California analogues. (AOB 171.) (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.) The serious deficiencies in California's death penalty scheme result in "random" imposition of the death penalty and "bias in favor of the death penalty." (*Stringer v. Black* (1992) 503 U.S. 222, 235-236, 112 S.Ct. 1130, 1139.) California's scheme is *not* "...neutral and principled so as to guard against bias or caprice in the sentencing decision," as required by *Tuilaepa v. California, supra,* 512 U.S. at 973, 114 S.Ct. at 2635. As a result, reversal is required. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341, 105 S.Ct. 2633, 2646; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, 107 S.Ct. 1821, 1824.)

e. Conclusion

As shown, Penal Code sections 190.2 and 190.3 violate the Fifth, Sixth, Eighth and Fourteenth Amendments and analogous provisions of the California Constitution. Although this Court has held otherwise, and the *Tuilaepa* Court held that factors (a), (b) and (I) passed constitutional muster, appellant respectfully submits that these decisions are wrong and requests that they be reconsidered.

B. THE NUMEROUS PREJUDICIAL VIOLATIONS OF STATE AND FEDERAL LAW CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, THUS NECESSITATION REVERSAL.

In the opening brief, appellant established that the numerous violations of State

and Federal law in his case also constitute violations of international law, which, for this reason, require reversal. (AOB 172-190.) Respondent does not respond to this argument, other than to cite several cases and comment, "This Court has already rejected these contentions..." (RB 95-96.) But, for the reasons stated in the opening brief, these cases are wrongly decided on this point and should be reconsidered.

C. THE CUMULATIVE IMPACT OF ALL THE ERRORS MADE IN THE GUILT AND PENALTY PHASES VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS; REVERSAL IS NECESSARY.

It is well-settled that the cumulative effect of seemingly independently harmless errors may render a trial inherently unfair. (*People v. Hill, supra,* 17 Cal.4th at 844-847, 72 Cal.Rptr.2d at 681-682; *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469.) As shown in this brief and the opening brief, numerous prejudicial errors occurred at the guilt and penalty phases of appellant's trial. If, *arguendo,* none standing alone requires reversal, when the cumulative prejudicial impact of all the errors is considered, it is clear that appellant's rights to due process, a fair trial, to a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and their California analogues were prejudicially violated. Respondent's contrary claim (RB 96-98) is meritless. Reversal of the entire judgment is therefore required.

Here, numerous prejudicial errors occurred. Appellant's severance, lineup, and *Marsden* motions were denied. Donna Malouf's continued presence in the courtroom engendered great bias against appellant. Prejudicial evidence was erroneously admitted.

The trial court committed damaging instructional error. Errors were made in the penalty phase. All the errors in this case combined in an exceedingly prejudicial manner to render appellant's trial fundamentally unfair.

Respondent argues, "the record does not contain numerous errors." (RB 97.) Respondent is wrong. Here, as in *People v. Hill, supra,* 17 Cal.4th at 847, 72 Cal.Rptr.2d at 683, the manifold errors in this case "...created a negative synergistic effect, rendering the degree of overall unfairness to the defendant more than that flowing from the sum of the individual errors." As in *Hill,* appellant "...was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial." (*Id.*) (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.)

VI. CONCLUSION

For the reasons stated above, and in the opening brief, reversal is required.

Dated: November 4, 2009

Respectfully submitted
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CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Reply Brief contains 11,647 words.

I declare under penalty of perjury that the above is true and correct.

Dated: November 4, 2009

John F. Schuck

PROOF OF SERVICE

I, John Schuck, declare:

I am a citizen of the United States and a resident of the County of Santa Clara; I am over the age of eighteen years and am not a party to the within action; my business address is 4083 Transport Street, Suite B, Palo Alto, California 94303.

On November 5, 2009, I served the within:

APPELLANT'S REPLY BRIEF

on the following interested persons in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as follows:

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I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

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Executed at Palo Alto, California on November 5 2009.

John F. Schuck