SUPREME COURT COPY

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. STANLEY BRYANT, DONALD FRANKLIN SMITH and LEROY WHEELER Defendants and Appellants.	Superior Court No. No. A711739 California Supreme Court No. S049596

APPELLANT DONALD SMITH'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNT

THE HONORABLE CHARLES M. HORAN, PRESIDING

David H. Goodwin, State Bar #91476
P.O. Box 93579
Los Angeles, Ca 90093-0579
(323) 666-9960
Attorney for appellant Donald Smith

DEATH PENALTY

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Cal. Const., art. VI, § 11; Pen. Code, § 1239[1], subd. (b).)

INTRODUCTORY STATEMENT

Appellant Donald Smith and co-appellants Stanley Bryant and Leroy Wheeler were sentenced to death after being convicted of four counts of murder. A fourth defendant, Jon Settle, tried for the same offenses in the same trial, later entered a guilty plea to four counts of voluntary manslaughter after the jury was deadlocked eleven to one on his guilt.

The prosecution's theory was that Bryant's[2] family operated a large–scale narcotics organization, which employed the other defendants. The victims were

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

[2] Many of the people involved in the case are members of the Bryant and Settle families. Several witnesses, not related to appellant, also had the last name "Smith." As used herein "appellant" refers to Donald Smith. Co-defendants Bryant, Wheeler, and Settle are referred to by their last name. Other people with the

killed when one of them, Andre Armstrong, a former Bryant family employee, went to speak to Bryant about compensation for having "taken the rap" for a murder and an assault Armstrong had committee for the Bryant family.

Ten other defendants, four of whom were originally were charged with offenses which made them eligible for the death penalty, were severed from the case[3].

The evidence against appellant consisted primarily of the accomplice testimony of James Williams, originally a capital defendant, who received immunity for his testimony. Commenting on the weakness of the case against appellant, the trial judge noted several times that apart from Williams's testimony, no evidence linked appellant to the offense nor was there corroboration for Williams's testimony.

A substantial portion of the trial involved proving the scope of the narcotics organization. Because there was no physical evidence linking appellant to the crime, the vast majority of the evidence and exhibits at trial did not relate to appellant's guilt. Evidence connecting appellant to the organization came primarily from Williams and was insubstantial, especially when compared with not only the other defendants in this appeal, but also to other severed defendants.

As a result, large portions of the trial not relevant to appellant are only summarized as it becomes relevant to specific issues raised by appellant.

Many of the errors at trial were a result of the fact that the case was simply too big to try, echoing concerns expressed by one of the early judges assigned to the matter.

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[3] Appendix A consists of a list of the severed defendants originally charged in this case. The defendants who were also charged with the murders and with death-eligible special circumstances include Tannis Curry, Antonio Johnson, Nash Newbill, and James Williams. Tannis Curry, Bryant's ex-wife, is at times referred to by her first name to avoid confusion with Keith Curry, her second husband, another witness in this case.

The case was tainted by the fact of a joint trial with other defendants, against whom there was a disproportionately large amount of evidence, by the court room misconduct of Settle, who represented himself, by the improper admission of hearsay, by the improper admission of evidence of other crimes committed by appellant and other people, much of this evidence introduced as a result of the joint trial, and by the incorrect jury instructions given to explain the purpose of "other crimes" evidence.

The prejudice was compounded by the misconduct of the prosecutor contributing to, or capitalizing on, these errors.

As will be shown, many of the errors were interrelated, increasing the level of prejudice.

STATEMENT OF THE CASE

A. Guilt Phase

Appellant and co-defendants Bryant, Wheeler, and Settle were tried for four counts of first degree murder and one count attempted murder. (Pen. Code § 187, subd. (a), counts 1 through 4, inclusive, and Pen. Code §§ 664/187, subd. (a), Count 5).[4] (CT 1696-1705, 4770-4771, 4744-4756, 4780-4788.) The multiple-murder special circumstance of section 190.2, subdivision (a), paragraph (3) was alleged as to each defendant. (CT 4946-4954.)

James Williams and Tannis Curry, Bryant's ex-wife, were both originally charged as capital defendants for the same crimes and special circumstances as appellant. They were granted immunity in exchange for their testimony. (CT 4968-4973, 5254, RT 12278, 13051-13052, 16093-5-16093-6.)

At trial, there were several errors relating to accomplice testimony, including the following:

1. There was insufficient evidence to corroborate accomplice testimony (Argument I-A);

2. The court failed to correctly instruct the jury that Williams and Tannis were accomplices as a matter of law or that Tannis may have been an accomplice (Argument I-B);

3. The court erred in failing to re-open jury deliberations when the jury submitted a question regarding the determination of accomplice status, a question that related to the testimony of Williams and applied to appellant, after the jury had convicted appellant but was still deliberating as to Settle,. (Argument I-C);

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[4] Appellant was also charged with other offenses, eventually severed from the instant trial, including conspiracies to commit murder (Pen. Code §§ 182/187, subd. (a)), to operate a major narcotic sales business (Health & Saf. Code § 11352), to flee to avoid prosecution (Pen. Code § 32), and to sell or transport a controlled substance (Health & Saf. Code § 11352(a)). Similar counts were alleged against Bryant, Wheeler, and Settle.

4. The court erred in instructing the jury that an aider and abettor may be a principal in the offense only if that person is "equally guilty." (Argument I-D);

5. The court erred in telling the jury that only "slight" evidence was needed to corroborate accomplice testimony. (Argument I-E)

6. The court erred in failing to exclude Tannis Curry from the instruction given to the jury in CALJIC No. 2.11.5[5]. (Argument I-F)

The trial court severed the non-capital defendants and all counts other than the murders and the attempted murder from this case. (CT 10749, 11162; RT 4105, 4251.)

After the court granted Settle's request for self-representation, the court denied a request by Bryant and appellant to sever Settle's case. (CT 13756; RT 6071-6088, 6129, 6144.) (Argument II.)

The court also denied appellant motion requesting that his case be severed from that of Bryant and Wheeler. (CT 1917, 2743-2745, RT 4592-4595.) (Argument III.)

Over defense objections, the prosecution was allowed to introduce evidence under Evidence Code section 1101 of other bad acts of appellant, including evidence that appellant had shot Keith Curry, Bryant's ex-wife's second husband, and the fact that appellant was arrested in possession of a large amount of cocaine after a high-speed chase. (Argument IV.)

The jury was given improper instructions as to how it could use evidence of other bad acts of appellant and the other defendants. (Argument V.)

Throughout the trial, numerous items of hearsay evidence were introduced, although there were no exceptions that would have allowed for the introduction of this evidence. (Argument VI.)

Over appellant's objections, the prosecution was allowed to introduce gruesome photographs of the death scenes of the victims. (Argument VII.)

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[5] CALJIC No 2.11.5 instructs the jury not to speculate as to why other people who may have been involved in the offense were not being brought to trial.

Through out the trial, the prosecution engaged in various forms of misconduct, including, but not limited to, making misrepresentations to the court, arguing facts for which there was no basis in the evidence, and engaging in an appeal to the fears and emotions of the jury. (Argument VII.)

The trial court erred in admitting evidence of gruesome and inflammatory death photographs of the victims' bodies. (Argument VIII.)

Over appellant's objections, he was required to wear a "REACT" stun belt, although there was no showing of necessity for that device at to appellant. (Argument IX.)

The trial court erred in refusing to make inquiries into the ability of a hearing-impaired juror to hear the testimony and arguments presented in this case. (Argument X.)

The trial court committed error in repeatedly informing the jury as to the expense of the trial. (Argument XI.)

The instructions given to the jury improperly allowed the jury to find guilt based only upon a finding of motive. (Argument XII.)

The trial court erred in not instructing the jury to limit its consideration of the evidence against appellant to the evidence that had been introduced in the prosecution's case in chief. (Argument XIII.)

The jury found appellant guilty of four counts murder and one count of attempted murder. Counts 1 and 2 were found to be murder in the second degree. Counts 3 and 4 were found to be murder in the first degree. The jury found the special circumstance allegation of multiple murders to be true. (CT 15270-15275, 15406-15407, 15419-15424; RT 17074-17076.)

The jury also found co-defendants Bryant and Wheeler guilty of four counts of first degree murder and one count of attempted murder, finding to be true the multiple-murder special circumstance. (CT 15248-15249, 15260-15269, 15276-15277, 15403-15418; RT 16930-16931, 17070-17072, 17072-17074.)

The jury was unable to reach a verdict on any counts alleged against Settle, and a mistrial was declared as to Settle. (CT 15443, 15454; RT 17137-67 to 17137-69, 17137-70.)

B. Penalty Phase

The trial court erred in excusing two prospective jurors for cause despite their willingness to fairly consider imposing the death penalty. (Argument XV.)

The trial court improperly coerced a death verdict after the jury had twice declared itself deadlocked and then erroneously substituted an alternate when a juror had to be excused, and it was not practicable for the jury to begin its penalty deliberations anew. (Argument XVI.)

The trial court erred in ruling on the automatic motion under section 190.4 to modify the sentence. (Argument XVII.)

The prosecutor engaged in misconduct in denigrating the mitigating evidence presented by the defense. (Argument XVIII.)

The trial court committed numerous instructional errors relating to the jury's decision to impose the death penalty. (Arguments XIX-XXIII.)

The jury returned verdicts of death for Wheeler and Bryant for each of the four counts of first degree murder. (CT 15252-15259, 15789-15794, 15851-15852, 15855-15858; RT 18674-18675, 18747-18749.)

Thereafter, the jury returned a verdict of death for appellant for Counts 3 and 4. Appellant was given two consecutive sentences of fifteen-years to life in prison for the second degree murders and a term of nine years for the attempted murder. The court imposed the death penalty for Bryant, Wheeler, and appellant. (CT 15250-15251, 15853-15854; 15858-15859, 16218-16226, 16230-162321, 16241, 16235-16254; RT 18825-18829, 18761-18762, 18805-18811, 18761-18762, 18823-18829.)

C. Events Occurring After Sentencing

The trial court denied the automatic motion to reduce the death penalty to life in prison.

On January 9, 1996, Settle pled guilty to four counts of manslaughter and one count of attempted murder and received a total sentence of twenty-one years and four months in prison. He was granted 2,452 days custody credits. (CT 16171, 16179, 16233.)

Antonio Johnson and Nash Newbill, two of the original capital defendants, plead guilty to conspiracy to commit a crime, and were sentenced to five years in prison. Johnson received 44 days custody credits, and Newbill received 2123 days custody credits. (RT 16227-16228.)

STATEMENT OF THE FACTS

GUILT PHASE

A. Crime Scene Evidence and Witnesses to the Murders of Andre Armstrong, James Brown, Loretha Anderson, and Chemise English, and the Attempted Murder of Carlos English

On August 28, 1988, Lucila Esteban was living at 11433 Wheeler Avenue in Lake View Terrace. At around 5:00 p.m. she saw a man holding a rifle and running down the driveway of the house at 11422 Wheeler, across the street from her house, to a red car. The man shot into the passenger side of the car, ran to driver's side, shot out the window, got in the car, and drove away. (RT 8436-8437, 8439-8440, 8445-8446.)

Earlier, Esteban had noticed the red car slowly driving down the street, as if the driver was looking at the numbers of the houses, before stopping at 11442 Wheeler. (RT 8438-8439, 8454.)

After the red car drove off, Esteban saw a white El Camino pull up to the space where the red car had been parked. The driver of the El Camino went into 11422 Wheeler, returned carrying some packages, and drove off. (RT 8447-8448.) Esteban then saw an older green car pull out of the garage area of the house. (RT 8449.)

Manuel Contreras was visiting his sister who lived next door to Esteban. He heard a noise that he thought was a car getting a flat tire. (RT 8501, 8506 8521.) A few minutes later he heard what he thought was a shotgun being fired four times. (RT 8501.) Going to the front of the house, he saw a black male with a shotgun near the driver's side of a red car. (RT 8502-8503, 8505.) The man was over six feet tall, with short hair, between 20 and 30 years old, and of "medium size." (RT 8503.)

After the red car drove away, Contreras saw a heavy black man with long hair and a mustache and beard come out of the house, get into a white El Camino, and drive off in the same direction as the red car. (RT 8506-8508B.)

After the El Camino left, a green car came out of the garage, with two people in the front seat and two people in the back seat of the car. The people in the back looked like they were holding onto and leaning against each other. (RT 8510A.)

Jennifer Daniel lived on the cul de sac adjacent to the 11400 block of Wheeler Avenue. (RT 11847-11848.) Daniel was sitting on her front porch, when she heard what sounded like three muffled gunshots coming from inside 11442 Wheeler. (RT 11849-1850.) About a minute later, she heard a second series of shots that did not sound muffled, but sounded like it was coming from outside. (RT 11851-11852.) Daniel looked down the street and saw one car backing out of the driveway, and a red car coming down the street from the direction of 11442 Wheeler Avenue. (RT 11852-11853.)

Daniel tried to get the license plate of the red car, a Toyota Camry, only managing to get three digits, 2, F, and P, which she gave to the police. (RT 11860-11861, 11856-11858, 11869.) She described the driver as a black male, with short hair, a white T-shirt, with a medium build, towards the skinny side, between 18 and 30 years old. (RT 11833-11859.) She identified a photograph of Wheeler as the person that she saw driving the car. She also identified Bryant as that person[6]. (RT 11862-11865.)

At around 5:00 p.m., Dwayne Brown was in his yard at 11311 Osborne Street with Kim Brown, a friend, when a neighbor came by and asked if he knew who owned a car that was parked in her driveway. (RT 8567-8570.) Dwayne

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[6] She testified she did not get a good look at the driver. On two prior occasions, she was unable to make an identification from pictures she was shown. (RT 11881-11883.) The first identification was of Bryant, the morning she testified, seven years after the murder. (RT 11884.) She was positive, but mistaken, that Bryant was the person she saw. (RT 11893.)

went over to the car which was the red car seen at Wheeler Avenue. The rear window had been smashed out. Dwayne noticed three bodies in the car, later identified as Carlos English, Chemise English, and Loretha Anderson. A lot of blood was in the car. (RT 8570-8572, 8575-8576.)

Carlos woke up and started crying, and Kim pulled him out of the car. (RT 8573.) Carlos had blood and scratches on him. (RT 8574.)

Officers Lynn Blees and Carol Posner were the first Los Angeles Police Department (LAPD) officers to respond to a call regarding 11442 Wheeler Avenue. (RT 8534.) They were told there had been shooting, and that a man had fired shots into a red car, got in the car, and drove off. (RT 8533-8534.) Shattered vehicle glass was found in the street. (RT 8535.)

A large pool of blood was on the front porch of 11442 Wheeler Avenue. (RT 8535-8537.) A steel-grate type of door was open, and Bless saw what appeared to be a large chunk of scalp, several bullet holes, and hair in the entry area. (RT 8538.)

A piece of glass recovered from Wheeler Avenue was compared glass from the red car at Osborne Street, was found to have similar characteristics, and could have come from the same source. (RT 12005-12006.)

Detective Vojtecky of the LAPD also responded to Wheeler Avenue, which he described as heavily fortified. The front door had a metal grate, which opened into a 4 by 4-foot porch area, with another metal door at the entrance of the house, forming a sally port between the two doors. (RT 8603-8604, 8611, 8613-8614.)

Vojtecky observed the blood on the porch, bloody shoe prints, drag marks from the blood on the porch, into the sally port, and into the rear of the house near the garage. He also observed the piece of scalp and hair lying in the sally port area. (RT 8214, 8586, 8593-8594, 8591, 8597-8598, 8601-8603, 9598-9599.) Bullet fragments and expended shotgun casings were found inside the house. (RT 8599-8600.)

Blood spatterings were on the wall, and there were two large pools of blood near the front door. (RT 8600.) An empty, open safe was in the closet. (RT 8600.) A bullet hole was observed in the shower door. (RT 8601.)

Some of the blood at the front door and the piece of scalp were later determined to have belonged to James Brown, also known as Tommy Hull, one of the victims. The piece of scalp had been blown off Brown's head by a gunshot blast. Other blood was consistent with blood from Andre Armstrong, another victim. (RT 8335-8336, 8362, 8365-8366, 8751, 13538-13587.)

Expended shotgun casings and .45 caliber casings were in the living room near the hallway, the entryway, and the kitchen. (RT 8621-8624.) Fragments from other bullets and shotgun rounds were also found in the house, including fragments found in the sally port and double-O buckshot pellets in a linen closet along the west side of the hall. (RT 8624-8625.) The trajectory of the pellets in the linen closet indicated that the shotgun had been fired in the bathroom with the pellets going through the shower wall. (RT 8625.)

No toothpaste, cosmetics, or similar items were found in the bathroom. (RT 8654-8655) The refrigerator was mostly empty and no foodstuffs were in the cabinets. (RT 8655.)

A list of phone and beeper numbers with initials and/or names was found on the wall of the kitchen. (RT 8699.)

A document referred to as "a ninety-minute schedule," a list of names, was found on a piece of paper on the wall of the living room. (RT 8694.)

Other items of property seized at Wheeler Avenue included various papers in different parts of the house. Identification papers, a bank book, and a gas bill for Anthony Arceneaux with address 11236 Adelphia was found. Also found was mail addressed to Jeff Bryant, a piece of paper with name "Tommy" and a phone number, post-its with numerical notations, mail addressed to William and Andrew Settle and Nash Newbill,. (RT 8694-8698, 8708-8709, 8762-8763, 8778-8780.)

A shotgun wadding and three copper-jacketed .38 or .357 caliber rounds were recovered from the floor of the Camry. (RT 8674-8775.)

On September 1, 1988, Vojtecky went to Lopez Canyon, about 4.7 miles from the Wheeler Avenue residence, where he saw two badly decomposed bodies, later identified as Armstrong and Brown. One of the bodies had an injury to the skull. The hair on that body was similar in length and texture to the scalp found at Wheeler Avenue. (RT 8712-8714.)

On Armstrong's body they found his address book, which contained the Wheeler Avenue address along with the name Stan Bryant, and phone numbers later connected to various people in the case. (RT 8746-8749.)

On Brown's body they found a piece of paper with the Wheeler Avenue address and a phone number, later traced to William Settle for the Wheeler Avenue residence. (RT 8749, 11089-11090.)

Bryant's name and phone number for his Judd street address appear in Brown address book. (RT 8754.)

Anthony Paul, a firearms examiner, examined the photographs of Anderson. The abraded marks and scarring on Anderson were consistent a shotgun having been fired through the window of the car, causing the glass to become "secondary missiles," striking Anderson. (RT 13154-13155.) Paul examined five shell casings and an expended shotgun casing found in the entrance way of the Wheeler Avenue house and two in a trash can in the dining room. (RT 13162-13164.) The casings recovered from the scene had been fired through three different shotguns. (RT 13163-13166, 13175-13177, 13185-13186.)

He examined the three projectiles recovered from the Camry and two projectiles recovered from the body of Anderson. He determined that all were fired through the same gun. (RT 13173-13175.)

B. Cause of Death

Dr. James Ribe, conducted the autopsies on Armstrong, Brown, English and Anderson. (RT 8280-8282, 8295.) English died from a bullet wound to the nape of the neck. The gun would have been less than 12 inches away from English when it was fired. (RT 8288-8289, 8299.)

Ribe removed numerous buckshot projectiles from Anderon's side and two handgun bullets from her body. (RT 8302-8303.) Ribe also observed "blast abrasions" caused by a shotgun blast, on her face and arm and two shotgun wounds. A shotgun wound to the right side of her abdomen was "fatal." He testified it was fired from less than four feet away. (RT 8305-8307, 8315, 8521.)

Armstrong was in "moderate state" of decomposition, with partial destruction of his eyeballs and distortion of his facial features, early mummification of his skin, extensive slipping of top layer of skin, and extensive maggot activity. (RT 8337-8338.) Because of the state of the body, it would not have been possible to see a gunshot wound on his abdomen. (RT 8339.)

Armstrong had a shotgun wound to the right side of his head above the ear, fired from close range, and a piece of his scalp had been blown away (RT 8340, 8341, 8354.) Two pieces of wadding from a shotgun were found in Armstrong's head. (RT 8343.) He also had a fatal shotgun wound to the center of his chest. (RT 8344-8345, 8347.) An exit hole in Armstrong's back was probably caused by a handgun. (RT 8346.)

Brown had both entrance and exit wounds to his back. (RT 8353.) There was a contact wound to Brown's chest, with the bullet exiting his back after passing through his heart and lung. (RT 8369-8371.) The wounds to his back consisted of a wider spread of shotgun pellets, indicating the shotgun was further away when fired. (RT 8353.)

C. The Motive - The Murder of Gentry and the Shooting of Goldman

On May 27, 1982, Ken Gentry was fatally shot at an apartment complex at 12601 Pierce Street in Pacoima. On April 23, 1982, Reynard Goldman was shot and injured while leaving his house. (RT 9257, 9284-9285.)

Armstrong, Bryant and Bryant's brothers, Jeff and Roscoe Bryant, were arrested for the Gentry homicide, although only Armstrong was tried for the crime. (RT 8790-8791, 8803-8804, 8808-8809, 9144-9146.) He was convicted of first degree murder for the shooting of Gentry and assault with a deadly weapon on Goldman. (RT 9398-9400.) After the conviction was reversed on appeal, he pled guilt to voluntary manslaughter and assault with a deadly weapon and was sentenced for a term of nine years. (RT 9401-9402.)

On July 16, 1988, Armstrong was paroled from Folsom Prison into the custody of Missouri law enforcement officers. On July 21, 1988, Armstrong was released from custody in Missouri. (RT 9403-9404.)

Armstrong had $13 on him and was living in a 1970's Cadillac when he was arrested. (RT 8813, 9324-9335.) There was nothing to indicate that he had received $15,000.00 shortly before his arrest, as he had no cash, jewelry, bankbooks, or other significant property. (RT 8814-8815.)

Detective Harley investigated the homicide of Charles Gentry, Ken Gentry's father, about a year after Ken Gentry's homicide. He interviewed Armstrong to see if the two crimes were connected[7]. Armstrong told Harley that the Bryants had paid him $2,000 to shoot Goldman and $15,000.00 to kill Gentry (RT 9405-9408, 9439-9440, 9442.)

[7] People's Exhibit No. 74, a tape of the Armstrong interview, was played for the jury. (RT 9415, 9417.)

1. The Gentry Murder

Barron Ward was with Gentry when Gentry was shot. (RT 9009.) Gentry was working on his car, when a Volkswagen drove into the parking lot. (RT 9010-9012.) Barron approached the VW to see if the passenger wanted some "weed." As he got near the car, the driver pulled a gun and pointed it at Barron who ran away. (RT 9012-9014.) Barron heard several shots. (RT 9014, 9019.) About two minutes later, he returned to the front of the apartment, where he saw Gentry lying on the ground. (RT 9014, 9016.)

About 15 or 20 minutes later, Barron saw a green Cadillac go by. At trial, he testified that he did not remember seeing Bryant, although earlier he had identified Bryant as the driver of the Cadillac, calling him Jeff. (RT 9020-9023, 9033-9034, 9047-9048.) Barron previously had expressed reluctance about testifying because of possible harm that might befall him if he were to become a witness. (RT 9027-9028, 9045-9047.)

Benny Ward was also with Gentry when Gentry killed. (RT 8923-8924.) When interviewed, Ward said that prior to the shooting Gentry said, "There goes those niggers that I got a beef with." Benny saw a Bryant in a brown Cadillac going westbound on Pierce Street. (RT 8986-8987.) At trial, Ward did not recall seeing the Cadillac or hearing Gentry making these statements. He testified that the officers who interviewed him were "feeding" him information that they wanted him to say. (RT 8926-8927-8940.)

Before the shooting, Gentry's stepsister, Sofina Newsom, saw a Cadillac and a Volkswagen slowly drive by on Pierce Street near the parking lot where Gentry was working on his car. (RT 9148, 9155-9156, 9157-9159-9160, 9187-9188, 9199-9200.) Bryant was driving the Cadillac. (RT 9158, 9172-9173.) Shortly after Gentry was shot, Newsome saw Jeff and Bryant drive by the parking lot. (RT 9166-9176.)

Previously, Gentry had told Newsome about being involved in a bad dope deal. Gentry said that he had vandalized Roscoe Bryant's van. (RT 9170.)

Rhonda Miller identified Armstrong in a line-up as the person who left the scene in a VW after Gentry was shot. (RT 9066-9067, 9069-9071, 9090-9091, 9093.) Before the preliminary hearing in the Armstrong case, Miller was visited by two women, Rochelle (Rolo), Jeff Bryant's former girlfriend and Tannis Curry, who was married to Bryant at that time. Rochelle gave Miller an envelope of money, saying it was from Jeff. At first, Miller refused to take the money, later accepting it when Alvin Brown, Miller's boyfriend, got mad that she refused the money. (RT 9094-9100, 9098-9103, 13056.)

At Armstrong's preliminary hearing, Miller recanted her identification of Armstrong. (RT 9104.) At trial in this case, she testified that that recantation was not the truth. (RT 9105.)

On June 3, 1982, Detectives David Stachowiski and Larry Tucker interviewed G.T. Fisher. (RT 8640-8641.) Fisher said that he, Gentry, and Michael Flowers were friends, they had bought some bad dope from Roscoe Bryant, and they went back to get a refund, which Roscoe refused to give them. In retaliation, about a week before Gentry was shot, they stole Roscoe's van and "trashed" it. They were seen taking the van. (RT 8642-8648.)

In another interview, Fisher said Bryant drove by with Armstrong before the Gentry homicide, and that he saw Bryant nod in Gentry's direction and point out Gentry to Armstrong. (RT 9370-9372.) At trial, Fisher denied making these statements. (RT 8883-8887, 8895, 8899, 8957-8958.) Vojtecky was present during an interview of G.T. Fisher on February 22, 1995, when Fisher expressed concerns about testifying. (RT 9369-9370.)

Detective Tucker testified that he interviewed Flowers who repeated Fisher's story. (RT 8860-8862.) At trial, Flowers also denied making the statement. (RT 8828-8829, 8830-8839.)

2. The Assault on Goldman

Reynard Goldman knew Bryant and Jeff. He used to buy cocaine from Jeff. (RT 9243-9244, 9246-9247.) When Goldman quit using cocaine, he owed $50 to Jeff. (RT 9250-9251.) Although Goldman made efforts to pay Jeff, he was unable to do so, and eventually Jeff accused Goldman of avoiding him. Jeff said that Goldman should either pay him or get a gun. (RT 9252-9253, 9290.)

About a week later, as Goldman was leaving his house, a man who had been sitting in front of his house fired several shots at Goldman, hitting Goldman in the head and arm. (RT 9253-9254, 9257-9258.) He identified a photograph of Armstrong as the person who shot him. (RT 9285-9255.)

Before the preliminary hearing on the Goldman/Gentry case and the trial in this case, people associated with the Bryant family attempted to dissuade Goldman from testifying. (RT 9261-9266, 9304-9305-9308.)

D. The Bryant Family Organization

In late 1984, LAPD Detective Dumelle became aware of the Bryant family, which had become the focus of the narcotics division's attention in the Northeast San Fernando Valley. (RT 9635-9636, 9663.) The organization employed between 150 and 200 people. Its members included Jeff, Stan, Roscoe, and Ely Bryant, Antonio Johnson, William Johnson (AKA Amp), Ladell Player, Lawrence Walton, and members of the Settle family. (RT 9635-9636, 9703-9704, 9952-9953, 9891.)

Jeff Bryant headed the organization. (RT 9662-9663.) Detective Lambert believed that Bryant ran the organization when Jeff was in prison. (RT 9944-9945.)

Nash Newbill was a high-ranking member of the organization. On Newbill's business card he was described as the manager of Neighborhood Billiards at 13179 Van Nuys Boulevard, owned by John Bryant. (RT 9949, RT 9606.) In an

interview with the police in 1992, Bryant gave Neighborhood Billiards as his business address. (RT 9341.)

At the time of the murders, 11442 Wheeler Avenue had been quit claimed to Nash Newbill. (RT 9916.)

Prior to trial, William Settle had entered a guilty plea, admitting to being the bookkeeper for the Bryant organization. (RT 9937.)

The people who worked for the Bryant family got paid vacations, $1,000.00 per week, and use of a company car. They were told not to dress in a flashy manner, so as to avoid attracting the attention of the police. (RT 11216, 11219, 11242.)

Alonzo Smith[8], who had worked at one of the drug houses run by the Bryants, told the police that Bryant and his brother, Ross, kept the competition away. (RT 11217.) Alonzo said that Bryant treated Wheeler like a brother. (RT 11219.) He said that Bryant was running the operation in 1988, while Jeff was in custody. (RT 11222, 11231.)

If people wanted to purchase drugs, they would pay for the drugs at one location, and then be directed to another location where they would pick up the drugs. (RT 10547-10550.)

There were also "roving sales" locations that would be shifted in order to avoid detection. A dealer would call the pool hall to report when he moved his location. (RT 10559-10560, 10691-10692.) A company car, a little red Toyota, was used to make quarter kilo deliveries to purchasers. (RT 10584-10585.)

E. Raids on Drug Houses

1. Pre-Homicide Searches

In 1985, names of the Bryant family "continually popped up" during an investigation by Detective Uribe and his partner, Detective Dumelle, into "rock

[8] Alonzo Smith is not related to appellant Donald Smith. (RT 10468.)

houses" in the Lake View Terrace/Pacoima area. Typically all of the rock houses were "well fortified," with electronically controlled cages at the front of the house. (RT 9536-9537.)

a. De Haven Avenue and Judd Street

On June 27, 1984, residences at 10743 and 10731 DeHaven Avenue in Pacoima were searched. (RT 9582.) At 10743 De Haven, Jeff's residence, the police recovered a small amount of a substance resembling cocaine and close to $6,500 in currency. (RT 9583, 9594, 9598.) At 10731 DeHaven, Eli Bryant's residence, they found a safe in the bedroom containing $20,000.

On April 18, 1985, Dumelle obtained search warrants for Jeff Bryant's house, where he found a half kilo of white powder used to cut narcotics. Also found were tax documents and payment books for the three houses at 13031 and 13037 Louvre and 11442 Wheeler Avenue. (RT 9636-9637, 9596, 9598, 9638-9640.)

b. 11442 Wheeler Avenue

On January 12, 1985, Ernest Guzman, a narcotics detective, served a search warrant on 11442 Wheeler Avenue, a single-family residence with bars on all the windows and the front door equipped with a black steel-grated door. (RT 9983.) A SWAT team gained entrance by prying open the front door. (RT 9984.) After passing through the front door, one had to pass through a second steel-grated door.

Guzman found 46 bindles of a substance resembling cocaine in the toilet. A carton labeled battery acid was in the bathroom. (RT 9985, 9987-9988.) Because of the scarcity of furniture, clothes, and food, it appeared that nobody was living in the house. (RT 9986.)

11442 Wheeler Avenue was searched again on March 22, 1985. (RT 9647-9649.) Inside the house there were a couple of crock-pots tipped over with an oily substance around them. Also found were "pays and owes," documents reflecting

narcotic transactions. Kenny Reaux was in the house. (RT 9652.) Again, the residence had sparce furnishings and/or food. (RT 9653.) Cocaine found in the crock-pot weighed close to four ounces. (RT 9660.)

The use of a crock-pot and hot oil as a means of destroying evidence and the cages in the entrance to the houses were unique features to houses associated with the Bryants. The Bryant rock houses were also unique in that people did not live in the houses, which were used only for business. (RT 9657, 9643, 9791-9793.)

c. 13031 Louvre Street

At the search of Jeff's residence on June 27, 1984, Jeff's vehicle was stopped and searched and keys were seized. (RT 9588, 9590, 9596, 9596-9577.) The police then went to 13031 Louvre Street, which they could enter with the keys taken from Jeff. The front wooden door was covered with a steel frame with black screening material. (RT 9589, 9590, 9596-9597.)

The house was heavily barred and fortified. (RT 9588-9589, 9591.) In the house, the police found baggies of cocaine, a crock-pot with hot oil with about 75 individual bindles in the oil, and papers in Jeff Bryant's name. (RT 9591, 9593, 9597.) There was little furniture and no clothes, food, or cooking utensils in the residence. (RT 9593.) Danny Miles, the person in the house did not have any keys on his person, and had been locked in the house. (RT 9594.)

At that time, Jeff and Florence Bryant owned the residence. (RT 9597-9598.)

On March 5, 1985, the residence at 13031 Louvre Street was raided again. The house had a cage at the front door, which the SWAT team removed. (RT 9550-9552.) Kenny Reaux was in the residence. (RT 9552.) The police found a spilled crock pot containing cocaine and Wesson oil. (RT 9553-9554.) There was no food, pots or pans, or clothes in the house. (RT 9553.) "Pays and owes" were found in the house. (RT 9554.)

In 1985, Edward Kadar, a carpenter, was hired by Antonio Johnson to work on two houses on Louvre Street and one on Wheeler Avenue, which had been raided by the police with a battering ram. Kadar strengthened the fortifications on the house. Kadar was paid by Bryant, who also had a locksmith work on the house. (RT 9676-9678, 9680-9682, 9683-9687.)

d. 13037 Louvre Street

On February 6, 1985, a search warrant was served on 13037 Louvre Street, a "rock house," with the windows and doors heavily barred and an electronically controlled cage on the front of the house. The SWAT team used a battering ram to enter through a bedroom wall. (RT 9641-9642, 9644.) Inside the house, the police found equipment to convert powder cocaine into rock cocaine. (RT 9644-9645.) Also found were "pays and owes." (RT 9646.) The property was in Jeff's name. (RT 9646.) Shortly after the entry into the house by the police Antonio Johnson arrived at the house, saying that it was his residence. (RT 9647.)

e. Search of Stan and Jeff Bryant's Residences

On April 18, 1985, warrants were served on Jeff and Bryant's houses. (RT 9539.) At Bryant's house the police recovered a calendar with Roman numerals and writing on it, similar to one recovered during an earlier raid at 10301 Louvre Street. (RT 9540, 9543.) Also recovered were papers relating to the arrest of Reaux at 11442 Wheeler Avenue. (RT 9540-9543, 9545-9548.)

2. Post-Homicide Searches

a. Adelphia Street and Fenton Street

On September 29, 1988, the residence at 11236 Adelphia was searched. (RT 9787-9790.) At the front door of the location there was a caged area similar

to the one at Wheeler Avenue. (RT 9790-9791.) The Adelphia house was listed under the name of Eddie Barber, a high-ranking member of the organization.

Inside the residence the police found a metal pot containing oil, a triple-beam scale, and a slip of paper with phone numbers. (RT 9781, 9794.) Also found were baggies containing cocaine, and inventory records of drug sales. (RT 9795-9800.)

During surveillance at the Adelphia residence and a house on 11649 Fenton Street, it was observed that people would go to the door at Fenton, stay a short period, and then go to Adelphia, where they would also go to the front door for a short period, before returning to their cars. (RT 9785-8787.)

Papers found at Adelphia corresponded to papers recovered from the house at Fenton Street, containing inventory control information. The buyer would pay money at a residence on Fenton Street, receive a post-it note, and pick up the drugs at Adelphia. (RT 9800-9805, 9813.)

Narcotics recovered at Adelphia, particularly the ½ ounce quantities, had rounded edges as if they were cut like a cookie. If you put two together, they were the approximate size of the bottom of a Pyrex beaker. (RT 9836-9827.)

On September 29, 1998, a search warrant was also served at the 11649 Fenton Avenue residence, also a fortified residence with a caged area at the front door. (RT 9695, 9697-9698.) In the living room was a table with several telephones, currency, and various papers. (RT 9698-9699.) Lawrence Walton was arrested inside the residence. (RT 9699, 9831.)

The Fenton property was in the name of Eddie Barber. (RT 9835.) $1,407 was seized. (RT 9798-9799.) Fenton was the "slip" house, where money was taken in. As money accumulated, it would be picked up and taken to 11442 Wheeler Avenue. (RT 9823.)

b. Carl Street

On October 14, 1988, a residence at 11943 Carl Street was searched. (RT 9806.) The front entrance of Carl Street had an iron door that led into an alcove, forming a cage with another door. (RT 9814.) In the house, a notebook was found containing financial records showing an accounting of money taken in. (RT 9816.) Also seized were papers in a form similar to inventory and accounting documents seized at other locations. (RT 9820-9821.)

Some of the papers found had the notation "SLM" which Detective Lambert testified stood for "Slim," Wheeler's moniker. (RT 9828.) Another had the notation "SB," for Bryant, indicating he withdrew $1,000. (RT 9829-9830.) Lambert identified Exhibit 96 as a page from the material seized at Carl Street, showing drug transactions. Lambert testified that "L" on the document stands for Wheeler. (RT 9958-9959.) Other papers included utility and phone bills in the names of people in the Bryant organization and delinquent parking notices in the names of Nash Newbill and Antonio Johnson. (RT 10138-10140, 10148-10151.)

No clothing was found at the Carl Street location. (RT 9820.) Items associated with drug sales and manufacture were found at Carl Street. (RT 9832-9833, 9836.)

The houses on Wheeler, Fenton, Carl, and Adelphia and a house on Vanport Street[9], are within a three-to-four square mile area of each other. (RT 9811.)

F. Andre Armstrong – Post-Prison, Pre-Homicide Activities with Brown

After Armstrong was released from prison, he stayed with his sister Deborah Marshall in St. Louis. (RT 10471-10473.) Although she did not know anyone in

[9] Another drug house with traits similar to the other Bryant houses. One witness testified that she transported containers to that house for Settle. For a while the house was in Settle's name. (RT 9106-9108, 9747-9750, 9757-9758, 10661-10663.)

the Los Angeles area, when she got her phone bill for that period, there were several calls to Southern California. (RT 10474.)

Delores Brown, Armstrong's mother, was also living in St. Louis. (RT 10510-10513.) Before Armstrong left for Los Angeles, he told her that he was going back to Los Angeles because he had some money coming to him. (RT 10513.)

Angela Armstrong, Armstrong's other sister, last saw Armstrong in August of 1988. (RT 10517.) Earlier that year she had received Western Union money orders totaling about $2,000 from a person named Stan that she did not know. (RT 10517-10518, 10524.) Armstrong had called her from prison and told her that Stan would be sending her the money. (RT 10525.)

Valerie Mitchell met James Brown, whom she knew as Tommy Hull, when she was living in Marina, California in 1988. She was dating him on an "off and on" basis. (RT 11366-11368.) Mitchell later found out that he was selling cocaine. (RT 11369-11370.) When she started dating Brown, he gave her a list of names and phone numbers to call if he was ever arrested, which she put in her telephone book. (RT 11731-11372.) That list had the names and phone numbers for "Drew" and "Stan." (RT 11372-11373.)

Albert Owens was stationed at Ford Ord in February of 1988, when he met Brown, who was selling cocaine at the time. (RT 11464-11466.) Owens drove Brown to Los Angeles. Before they left for Los Angeles, Brown made a phone call, addressing the person on the other end of the line as "Stan," and telling him what time they would arrive, and (RT 11466-11467.)

When they arrived in Los Angeles, Brown directed Owens to 7654 Laurel Canyon, George and Alonzo's Smith's apartment. (RT 11467-11469.) Brown then made another phone call, again addressing the person called as Stan, and saying that they were there. (RT 11470.) About half an hour later a man identified by Owens as Andrew Settle arrived at the apartment with a bag containing baggies of cocaine weighing nine ounces, which he handed to Brown, who gave the man $4,500. (RT 11471-11475.)

Owens made about three other trips to Los Angeles with Brown, with Brown making call to someone named Stan before leaving, and Andrew Settle arriving to make the delivery after they arrived in Los Angeles. (RT 11476-11478, 11480-11482, 11510-11518.)

Andrew (Drew) Greer was a friend of Brown and Armstrong. (RT 11568-11570.) After Greer was released from prison, he joined Brown in Marina, where Brown was living. (RT 11574-111578.) Greer met Armstrong about two or three weeks before the murders. (RT 11604.) When he first met Armstrong, Armstrong was living with Tannis Curry. (RT 11605-11609.)

Owens made two trips to Los Angeles to pick up cocaine with Greer. Brown would call Stan, and Greer and Owens would go to Los Angeles to pick up the cocaine, calling Andrew Settle when they arrived, and getting cocaine from him. When they returned to Marina, they gave the cocaine to Brown. (RT 11520-11525, 11585, 115852-11585.)

Greer made other trips to Los Angeles. On the second trip he also brought a .45 automatic from Brown, who instructed them to give it to Stan. (RT 11590-11592.)

On a couple of occasions, Owens drove Brown to Western Union so Brown could send money to someone named Stan. (RT 11541.) Greer also took Brown to a Western Union office to pick up money from Stan. (RT 11599-11603.)

When Brown moved into the apartment in Marina, he moved in with Anderson (Kitty) and her two children, Chemise and Carlos English. (RT 11527-11528.)

Armstrong said that Brown was going about his drug operation all wrong because he was dealing on a small level, and they should be dealing in bulk. He thought they should move to Los Angeles. (RT 11530-11531.)

Armstrong told Greer that Bryant owed him money for a "hit" that Armstrong had done for him, and that he was going to get that money. (RT 11607.)

When Tannis left Northern California, she left with Armstrong. (RT 11608.) A couple days later, Greer, Brown, Anderson, and her two children moved to Southern California. (RT 11609.) Brown made arrangements with Bryant for them to move into the Laurel Canyon apartment. (RT 11610-11611.)

On Friday, August 26, 1988, they drove to Los Angeles in a U-Haul and a Toyota. (RT 11609-11613.) Greer, Anderson, Brown, and the children went to Beverly Garden Hotel in Universal City. (RT 11614-11616.) The next morning, Brown and Anderson picked Greer up in the red VW, and they went to Neighborhood Billiards to try to find Bryant. (RT 11616-11618.)

They stayed at the pool hall 20 minutes before leaving. While they were there someone in a white Audi came and spoke to Brown. That person was driving a car similar to a car later identified as belonging to Wheeler. (RT 11620-11622.)

The next morning Armstrong and Brown picked up Greer, and they went to Tannis's apartment. (RT 11623-11624.) Armstrong called Bryant. He told the others that they were supposed to go meet Bryant at about 4:00 and pick up $500 to clean up the apartment. (RT 11629-11630, 11636.) Armstrong told Tannis to get some guns, and Tannis went and got a pistol, which she put in her purse. (RT 11631.)

They then went to Tannis's aunt's apartment. They remained there a short time before leaving. Armstrong told Tannis to follow them. When they got in the car, they saw that Tannis had gone back into her aunt's apartment. When Greer told them that Tannis was not following them, Armstrong said that everything was "cool." (RT 11633-11634.)

Greer decided that he wanted to go back to Laurel Canyon rather than going to meet Bryant. (RT 11634.)

Armstrong and Brown took Greer back to Laurel Canyon. When they got there, Anderson came out on the porch, saying that the kids were hungry. Brown told them to get in the car, and they would get something to eat. They got in the car and drove off without Greer. (RT 11635-11636.)

That was the last time that Greer saw them. (RT 11636-11367.)

G. The Testimony of James Williams

James Williams, He denied being involved in the homicides. (RT 12387.)

In 1988, Williams was started working as a member of an organization he referred to as "the family." (RT 12109-12110.) Williams joined the organization when his best friend, Lamont Gillon, introduced him to Nute (Nash Newbill), who hired him to work at the pool hall. (RT 12115-12118.) Williams testified that when he joined the organization Bryant was the boss. (RT 12110-12111.)

Williams met Wheeler, whom he also knew as "Slimm," when they were in seventh grade. (RT 12111-12112.) Wheeler was a member of the organization when Williams joined. (RT 12112.) Williams also recognized appellant, although he did not know appellant's last name in August of 1988. He had seen appellant on two or three occasions. (RT 12113-12114.) He had not met Settle prior to August 28, although he had heard Settle's name mentioned. (RT 12114.)

Williams's first job at the pool hall was directing addicts to spots where they could pick up drugs. (RT 12120.) Later, Newbill promoted Williams and Gillon to the count house on Wheeler Avenue, where he worked until August 28th. If someone wanted to purchase drugs, they would go to the count house. Williams would count the money, and then he would make a call and direct the customer to meet with the person on the other end of the phone at another location. Later, Williams would get a call saying the buyer had arrived, and Williams would make a note of the competed purchase. (RT 12130-12131, 12141, 12149.)

Arceneaux and Wheeler were also working in the count house at that time. (RT 12132.)

Williams had met Bryant while working at the pool hall. Bryant would usually come to the count house on Sundays at around 2:00 p.m. (RT 12148.)

The Wheeler house was only used for large quantities of nine ounces of cocaine or more. (RT 12151-12152, 12158-12159.) The customers buying at

Wheeler were not directed to another location. Rather, the drugs would be delivered to them, after they left the count house. (RT 12154-12155.)

The ledgers and records of drug transactions found at Carl Street and Wheeler Avenue were the types of forms that Williams filled out working at the count house. (RT 9842-9843, 12155-12157.) Williams would write down the customer's name, the amount purchased, and initial the form. (RT 12158.)

On the ledgers "Amp" is Amp Johnson, "S.L.M." is Slimm (Wheeler), and "Will" was William Settle. (RT 12161-12164.)

When Williams was working at Wheeler Avenue, they had a "company car" that would pick him up at the pool hall and take him to and from work. (RT 12177, 12179.) Wheeler picked Williams up for work on August 28th at the pool hall in Wheeler's Audi. (RT 12179-12180.)

The list of phone and beepers numbers found on the wall of the kitchen at Wheeler Avenue (*ante*, at p. 12, RT 8699) was in case someone working at the house had to contact a "family" member. (RT 12213-12215.)

On Tuesdays, which were the paydays, Williams would get his money from the safe. Some of the other people would come by the house for their money. (RT 12228-12230.)

On two or three occasions, appellant came and picked up money. Williams did not know what appellant did in the organization. (RT 12230.) People involved in the narcotics end of the business made more than the $500 per week that Williams and the other people in the count house made. (RT 12231.) Appellant made $1,000 per week. (RT 12231.)

Prior to August 28th, the only contact Williams ever had with appellant was when appellant stopped by the house to pick up money. (RT 12234.)

About a month after Williams started working, the procedure for answering the door was changed. Bryant gave Williams a silver .45, telling him he was to be armed when he answered the door. (RT 12235-12236.)

A couple of weeks prior to August 28th, Williams attended a meeting that Bryant ran at the pool hall. Bryant told everyone what changes would be made. The pool hall would be shut down, and customers would take their money to one house where they would get a slip of paper that they could redeem for drugs at a second house. (RT 12243-12244.) People would work ninety-minute shifts at the pool hall, to make sure that all the customers got news of the new system. The "ninety minute-schedule" found at Wheeler Avenue (*ante*, at p. 12) was the schedule of these work shifts. (RT 10713, 10758, 12244-12245.)

Williams worked one of the 90-minute shifts, telling people that in the future they should go to a house on Fenton Street. (RT 12245.)

Once a location had $1,000, they would call Williams, and part of Williams's new duties included going to collect money to take it to Wheeler Avenue. (RT 12246-12247.)

On August 28th Williams worked his normal shift at the pool hall and then went to work at Wheeler Avenue. (RT 12253.) Wheeler gave Williams a lift to the house. (RT 12282-12284) At around 2:00 p.m., Bryant called and said he was coming over. (RT 12285-12286.) Bryant arrived in a blue Hyundai, which he parked in the garage. (RT 12286-12287.)

Bryant went into the bedroom. (RT 12286.) At one point, as directed to by Bryant, Williams called Arceneaux, who was supposed to relieve Williams on the next shift, and told Arceneaux not to come in. (RT 12289-12290.)

Eventually Wheeler, appellant, and Settle showed up separately, all going into the back room with Bryant. (RT 12292, 12299-12300, 12294, 12300, 12302-12303.) Williams testified that it was unusual for appellant to show up at the Wheeler Avenue house. (RT 12294.)

Bryant took a money counting machine and an adding machine that had been in the Wheeler Avenue residence to the garage. (RT 12294.) When he came back he was carrying a duffel bag, which he took to the back room. (RT 12295.)

A while later a gun went off in the back of the house. Bryant came out and asked whether Williams thought that the neighbors could have heard the shot. (RT 12304-12305.)

At one point, Williams heard a shotgun being cocked, and he turned around and saw Settle with a shotgun. (RT 12305-12306.) Williams never asked what was going on because he figured that it was none of his business. (RT 12307.)

Some time later, appellant, Bryant, and Wheeler came out into the living room. Bryant told Williams that he was expecting some company. Williams was to stand by the window, and holler when the men arrived. When told to do so, Williams was to let Bryant out of the house, using the buzzer in the kitchen. (RT 12307-12310.)

Williams saw that Wheeler and appellant each had a gun. (RT 12311.)

Bryant then told Williams that after Williams buzzed Bryant out the door, Williams was to go the front of the house, where there would be a green car that he should move to the garage. He was then supposed to walk off the property and take a bus to the pool hall, looking around to see if anyone was looking at what was happening. (RT 12312-12314, 12317-12318, 12311-12312, 12318-12321.)

Williams testified that he had an idea of what was going on, but thought that it was too late to say anything because he was "in too deep" and it would not be safe. (RT 12321-12322.)

Williams also heard Bryant and Wheeler talking about going to a 7-11. (RT 12324.)

Soon after that, Williams was in the kitchen, and someone shouted out that the people were there. (RT 12328.) Williams saw two men walking to the house. When the men got to the front door, Williams heard someone buzz them in. (RT 12331-12333.) Bryant said he had to get some groceries from the car, and called out for Williams to buzz him out, which Williams did. (RT 12333-12334.)

As Williams started walking out the back, he heard gunshots and a scream. (RT 12335-12337.) Williams went out the garage, past a blue Hyundai. As he got

to the sidewalk, he almost ran into Wheeler, who was holding a shotgun. (RT 12337-12339.) Wheeler was moving "pretty fast." (RT 12339.)

Williams found the green car, which he moved to the garage. (RT 12340-12342.) As Williams was getting into the green car, he heard Wheeler say, "A bitch in the car. Get out of the car, bitch." (RT 12342.) Williams then heard the sound of glass breaking. (RT 12343.) When Williams got to the garage with the green car, Bryant was standing next to the Hyundai. (RT 12343-12342.)

As Williams was walking to the bus stop, Wheeler drove past him in a red car. He then noticed Bryant driving the blue Hyundai. Settle and Smith then drove by in the green car that Williams had pulled up to the garage. All of them went in the direction of Kagel Canyon to the foothills. (RT 12352-12356.)

Several days after these events, Williams moved back home to Harrisburg, Pennsylvania. (RT 12366-12367.) Before he left, William Settle told him it was going to be "hot," and Bryant had suggested that Williams take a vacation out of town for about six months. (RT 12367-12368.) William Settle told him that he had been identified at the scene on Wheeler Avenue. He told Williams to contact him, and they would give him the money they owed him. (RT 12368.) He also said that if Williams needed anything they would send it to him. (RT 12368, 12370.)

After Williams made reservations to leave, he called William Settle, and they arranged for Lamont to pick up $2,000.00 for Williams. (RT 12369-12370.) William Settle also sent Williams $500 after Williams moved back to Pennsylvania. (RT 12370-12373.)

In Pennsylvania, Williams got a job. He stole some money, forging his boss's signature on time cards. (RT 12386.) He was dealing cocaine in Harrisburg, and was convicted for possession of cocaine and possession of a firearm. (RT 12531-12532, 12386-12387.)

After he was arrested in Pennsylvania, the Harrisburg police told Williams that he was wanted in Los Angeles on six murders. (RT 12373.) Williams said

that he had not killed anyone, and he agreed to be interviewed. (RT 12374.) At that time he told them that Bryant, Wheeler, "Don," and Johnny were the people who were involved. He did not know "Don's" last name. (RT 12374, 12775-112778, 12780.)

Williams testified that he thought he would not have received immunity if the police thought he was the shooter. (RT 12552.)

H. The Shooting of Keith Curry and the Bombing of Curry's Car

In 1984, the year he started selling cocaine, Keith Curry met Tannis Bryant, who said she was married to Bryant, but she was thinking of leaving him. (RT 11316-11317, 11330-11332.) She left Bryant in 1985 and moved into an apartment on Clyborne. Curry started spending three or four night a week with Tannis. (RT 11317-11318.)

One morning, after spending the night with Tannis, Curry got in his car and started to back up, when a pipe bomb that had been placed under the car exploded, injuring Curry on his thigh (RT 11318-11319, 11787-116789.)

Sometime after that, Curry married Tannis. (RT 11323.)

On September 28, 1987, Curry was driving his car on Vanport, when he noticed someone behind him flashing his lights. (RT 11320-11321.) Curry pulled over, and saw that appellant was the driver of the other car. He had met appellant through Tannis. Appellant was married to Tannis's sister, Elaine. (RT 11322-11323.)

Curry had never had any problems with appellant. (RT 11323, 11327.) Appellant started talking to Curry, asking him how he was. Appellant appeared calm. (RT 11324.) Curry heard two shots coming from appellant's car and realized that he had been shot in the neck and arm. (RT 11324-11325.)

Curry was not aware of anyone being angry with him at the time that his car was blown up or when he was shot by appellant. (RT 11326.)

Tannis testified that she remembered the incident where Curry's car was blown up, but she denied speaking to Bryant about that incident, and denied that Bryant told her that he put the bomb under Curry's car. (RT 13058, 13082-13083.)

In April of 1986, Gwendolyn Derby was at Mis Liz's Beauty shop. She knew Tannis Curry. (RT 13095-13096.) Tannis told Derby that her ex-husband admitted that he had placed a pipe bomb underneath her current boyfriend's car. Tannis said her ex-husband had said he would do it again until the boyfriend was dead. (RT 13097-13098.)

At the time of this trial, Pierre Marshall was serving a 30-year sentence in federal prison for narcotics offenses. (RT 11748, 11757.) Marshall knew Curry, and knew that Curry was involved with Tannis. (RT 11749.)

Marshall heard there were rumors that something might happen to him because he had dated Rochelle (Rolo) Bryant on one occasion, so he met Bryant at a Burger King to discuss those rumors. (RT 11749-11751, 11753.)

Marshall denied that Bryant recounted a list of things he had done to Keith Curry. (RT 11752-11753.) Marshall also denied that Bryant made motions mimicking a person who had been paralyzed. (RT 11752.)

Vojtecky testified that in May of 1992, he interviewed Marshall regarding the Burger King meeting. Marshall told Vojtecky that when Marshall sat down at the table, Bryant began holding his hands in a deformed fashion around his head, mimicking, laughing, and saying, "Remember how that nigger got paralyzed." Marshall told Vojtecky that he knew that Bryant was talking Keith Curry. (RT 11791-11792.)

I. The Arrest of Appellant in 1987

On September 29, 1987, Sergeant Charles Lofton of the Highway Patrol was working with his partner Michael Vandemark. In the early morning hours, he saw a white Renault, driven by appellant, speeding and weaving on the 101 freeway. Lofton activated his lights to stop the Renault, and the Renault pulled off the

freeway at Tampa. After the Renault stopped, Loften got out of his car to approach the car, when the car took off going northbound on Tampa Avenue. (RT 10099-10101, 10109-10110.) Lofton began a high-speed pursuit of the Renault through various portions of the San Fernando Valley. (RT 10102-10104.)

At various times, Lofton and Vandemark saw plastic baggies, a white powdery substance, and bits of paper being thrown from appellant's car. Appellant was holding a notebook book, tearing out pages, and throwing them out of the window. (RT 10105, 10123-10125.) After about 40 minutes, Lofton rammed the Renault's rear, causing both cars to stop. (RT 10108-10109.)

Inside appellant's car, Lofton found a .357 revolver and a quarter of a kilo of rock cocaine in 18 smaller plastic baggies. (RT 10112-10114.)

When Lofton first saw appellant, they were about 15 miles from Pacoima, heading away from Pacoima. (RT 10117.)

It was stipulated that Curry was shot at 9:05 p.m. on September 28, 1987. Appellant arrested five hours later. At that time, he had a revolver with no live rounds, but one expended casing. Appellant was not in Los Angeles County when the bomb went off under Curry's car. (RT 13656-13657, 13660.)

J. The Testimony of Settle

Jon Settle described his family and job as a mechanic. (RT 15531-15533.) During one period when he was injured, his brother, William, made him an offer, which Jon accepted. Under the deal they reached, Settle could live in William's house, while William used Settle's house on Vanport to sell drugs. (RT 15333.)

The day of the murders, Bryant called Settle about buying an old car. (RT 15615.) Bryant also said that he needed some brakes on his Toyota. Bryant asked Settle what cars were available as a loaner, and Settle told him that a Pontiac Bonneville was available for $900. Later, Bryant and Wheeler went to Settle's in a red jeep, and they dropped off the Toyota for Settle to work on. (RT 15539-15540.)

About an hour and a half later, Frank Settle and Wheeler arrived in the Jeep, picked up the Toyota, and paid Settle for working on the Toyota. (RT 15540-15541, 15556-15558.)

The Toyota was the car that Williams had previously identified as the "company car," which the police found parked in front of the Wheeler Avenue residence the evening after the murder. (RT 12179, 14373.)

Settle testified that he was never in the Wheeler Avenue house. (RT 15541.)

After the murders, nothing changed in Settle's life. He was still fixing cars. He got married in September, and when he returned from his honeymoon he found that his house was boarded up and the police had served a warrant on his house. His brother, Kenny, an attorney, told him the search was for weapons. (RT 15544-15546.)

Kenny told him not to get involved because there were so many people involved in the case he would spend years in jail waiting for trial.

Settle knew Bryant for about 20 years. (RT 15592.) Settle thought William Settle was the bookkeeper for the organization. (RT 15592-15593, 15597.)

Settle testified that he received $2,500 for putting his house up for appellant's bail after appellant was arrested in 1987. (RT 15605.)

K. Miscellaneous Evidence

Western Union records reflect that between January and March of 1988, a person named Stan Bryant, whose address was listed as 12719 Judd Street, Pacoima, sent money orders for $2,100 to Anna Armstrong. Other money orders were sent to James Brown and other people associated with the Bryant organization. (RT 10448-10450, 10452, 10456-10463.)

Armstrong's address book had Bryant and Ross Bryant's address and phone number, as well as the address and phone number for 11442 Wheeler Avenue. (RT 10729-10731, 10730, 11089-11090, CT 16823.) The book also has the num-

ber for the pool hall as well as the numbers for appellant, Tannis Curry, Mona Scott[10], and Francine Smith[11]. (RT 10731-10738, 10741.)

After appellant was arrested for the Curry assault, the bail was set at $200,000. Appellant's residence was listed as 11100 Strathern, apartment 8. Bryant was listed as a reference to secure appellant's presence. (RT 11399-11403.) Along with appellant's family, Settle put up properties for the bail, with the premium paid by Donald Smith, Sr., appellant's father. (RT 11403-11404, 11412-11414, 11415-11417.) The signature on the bail indemnity papers matched Settle's handwriting. (RT 13024, 13026-13027)

Judicial notice was taken that on January 21, 1989, during the preliminary hearing, Wheeler and Bryant were ordered to provide handwriting exemplars for comparison to documents in this case, and that they refused to do so. (RT 13023.)

Phone bills revealed the following phone calls in 1998:

From appellant's house to Bryant's house there were 16 calls in January, 6 calls in February, 24 calls in March, 12 calls in April, 8 calls in May, 4 calls in June, 24 calls in July, and 11 calls in August. The last call was on August 27th at 7:16 p.m. (RT 13457-13458.)

From Bryant's house to appellant's house there were 25 calls in January, 7 calls in February, 11 calls in March, 11 calls in April, 17 calls in May, 12 calls in June, 30 calls in July, 21 calls in August, and 19 calls in September. (RT 13458-13459.)

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[10] Mona Scott was a friend of Armstrong. (RT 9493.) Bryant gave her money to cover expenses that she incurred receiving calls from Armstrong when he was in prison. He also gave her money to pay for expenses so she could visit Armstrong. (RT 9496-9499, 9501-9504.)

[11] Bryant arranged and paid for Francine Smith to visit Armstrong in prison. After she attempted to buy drugs at the Lourve Street drug house with altered currency, she was beaten up. Bryant, who was standing nearby when she was beaten, later told her she was lucky to be alive, because if he had not know her so well she would be dead. (RT 9447-9450.)

The month that Armstrong was released from prison (July), there were fifty-four calls that month between Bryant's and appellant's residences. (RT 13459-13460.)

From appellant's house to 11442 Wheeler Avenue, there were 3 calls in February, 9 calls in March, 7 calls in April, 20 calls in May, 10 calls in June, 9 calls in July, 11 calls in August. The last call was August 28th at 12:44 a.m.[12] (RT 13466-13467.)

From 11442 Wheeler Avenue to appellant's house there were 4 calls in January, 8 calls in February, 7 calls in March, 7 calls in April, 14 calls in May, 21 calls in June, 21 calls in July, 25 calls in August. (RT 13458-13459.) The last call was on August 27th at 8:39 p.m. (RT 13468-13469.)

From Wheeler's car phone there were numerous calls in July and August to Bryant, to 11442 Wheeler Avenue, to the pool hall, and various family members. (RT 13474-13477.)

There were 4 calls from Wheeler's phone to Neighborhood Billiards on September 1st, the day the bodies were discovered in Lopez Canyon. (RT 13478.)

On the day that Armstrong was released from prison, and the day that Armstrong's sister picked up a money order at Western Union, there was a series of phone calls between the following locations Armstrong's mother's home, Bryant's residence, appellant's house, Armstrong's sister's house, and Wheeler Avenue. (RT 13480-13486.)

Calls were also made between appellant's residence and Armstrong's mother's and sister's houses and the residence when Armstrong and Brown were living in Salinas. (RT 13486-13488.)

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[12] According to the schedule, Wheeler would have been working that shift at that time. (RT 13468.) Gillon or Arceneaux would have been on duty at time of two other calls from appellant's house to 11442 Wheeler Avenue. (RT 13510.)

Between August 26th and August 28th there were a series of phone calls between Bryant, appellant, Wheeler's residences and the Wheeler Avenue house. (RT 13389-13398.)

Wilbert Babineaux the father of Tannis and Attella, appellant's wife. (RT 13514.)

In 1982, Karen Flowers had been dating Armstrong and Gentry. The phone number that she had for Armstrong was appellant's telephone number. (RT 15035-1538, 16011-16012.)

On September 3, 1988, Mike Macarelli was a car salesman at North Hollywood Toyota. (RT 12845-12846.) He took a blue 1988 Hyundai in trade on a 1988 red or burgundy Toyota Corolla. (RT 12847-12848.) The purchase contract for the car was found at 11943 Carl Street. (RT 12847-12848.)

Keith Seals, the finance manager of North Hollywood Toyota, identified Bryant, Wheeler, and Antonio Johnson as the men that were present when the transaction was made. (RT 12851-12852.)

Seals had the Hyundai detailed before the police borrowed it. (RT 12869-12870.) Later, William Lewellen, a criminalist with the LAPD's Scientific Investigation Division, applied luminol and phemolpthalein to the Hyundai. He noted a presumptive positive reaction indicating the presence of blood in the area of the rubber inlay on the floor mat. (RT 12872-12877.)

PENALTY PHASE

A. Prosecution's Case

On October 16, 1991, Scott Maus a deputy sheriff assigned to the L.A. County jail, went to the lower TV room, in response to a message regarding a fight between inmates. Arriving there he saw appellant and two other inmates, Holiday and Furnace, fighting. Furnace was holding Holiday so he could not get away, and appellant was hitting Holiday. (RT 17452-17455, 17463.) Holiday had a bloodied nose and three fresh puncture wounds to his back. (RT 17457.) Two

metal shanks were found in the toilet, about six to eight feet from the area where the three were fighting. (RT 17459-17461, 17478-17480.)

Maus did not see appellant with the shanks, nor did he see appellant near the area where the shanks were found. (RT 17469-17470.)

On another occasion, a broken and sharpened CD, which could be used as a shank, was found under the mattress in appellant's cell. (RT 17490-17495.)

On July 30, 1982, Roselyn Lubel was living at 8735 Cedros Avenue in Panorama City. When she returned to her house at around 5:20 p.m., she noticed that the door was ajar. (RT 17500-17502.) Opening the door to her bedroom, she saw a man in that room. (RT 17502-17503.)

The next thing she knew was that she was sitting on her couch. She was bruised and her head was bleeding. (RT 17503-17504, 17581.) Later, the police later returned some jewelry to her which had been missing from her house. (RT 17504.) (RT 17505.)

Hazel Cohen testified that she dropped off her mother, Roselyn Lubel, and her grandmother, in front of their residence. When she returned from parking the car, she saw appellant standing in the door of her mother's condominium. Cohen looked into the condo and saw that her mother was hurt. Appellant ran off. Cohen's mother and grandmother were lying on the floor. (RT 17576-17577.)

Appellant was detained by some neighbors a short distance away. (RT 17577-17578.) Lubel's property was in his pockets. (RT 17509.)

Appellant had been previously convicted for an assault against Darla Faile, a twenty-three-year old female, in her apartment at 8936 Cedros Avenue, around midnight on December 16, 1982. (RT 17509-17510.)

Mark Moffet, a deputy at the Los Angeles County Jail, searched appellant's cell on June 5, 1991, and found a shank made from a melted plastic cup. (RT 17527-17529.) Appellant also had a school card in the name of another inmate who had been released. That card was contraband as to appellant. (RT 17531-17536.)

B. Defense Case

Dr. Hoagland is a clinic psychologist. He does psychological and neuro-cognitive assessments, evaluating mental status and emotional status and intellectual or cognitive abilities. (RT 18132-18134.) He did an assessment of appellant. (RT 18135.)

He administered a Wechsler Adult Intelligence Test on appellant. The average score is 100. Below 90 is considered subnormal. Appellant's verbal was 85, his visual and visual motor skills were 88, and his full scale I.Q. was 84. Overall, appellant was in the low 12 or 13th percentile. (RT 18136-18137.)

He also obtained appellant's school records from third grade, and found the results corresponded to the results he obtained in tests he did on appeallant. These reflected the following results: verbal was 86, motor I.Q. was 94, full scale I.Q. was 89. (RT 18138-18139.)

In the first grade appellant tested high. Although the test used is now considered to be obsolete. (RT 18139-18140.)

Appellant also is dyslexic. (RT 18141.) Appellant told him that he did not learn to read until the 7th grade. (RT 18141.) Appellant's current phonic skills were on a second grade level. (RT 18141.)

Appellant's current spelling and writing skills are in the bottom 1 percentile. He has poor math skills. (RT 18142.)

Appellant also suffered from an attention deficit hyper-activity disorder, a neurological condition resulting from a deficiency of chemicals in the frontal lobe of the brain. This condition makes it difficult to concentrate. It also causes a person to have little control over impulses. (RT 18143-18144.) Appellant's early records display many symptoms of this condition. (RT 18144-18147.)

Appellant also displayed other areas of neurocognitive deficits, such as impaired memory functioning, a retarded ability to hear and integrate words, and other symptoms. (RT 18148-18149.)

Hoagland summarized that appellant is of subnormal intelligence, dyslexic, with ADHD, with deficits in his cognitive functions. (RT 18149-18150.)

He also performed a multi-phasic personality inventory and a Rorshach test. Appellant's pychopathological and emotional difficulties were so severe that he is vulnerable to psychotic deterioration. He may become disorganized and have delusions or hallucinations. He was also seriously anxious and depressed. He is introverted, shy, lacking in confidence, and socially withdrawn. (RT 18151-18155.)

Donnette Smith, appellant's sister, lived with her paternal grandparents, and appellant lived with their maternal grandparents when they growing up. (RT 18312-18313.) She moved back with their parents when she was six and appellant was four. (RT 18313.) Their father was in the military, and they just saw him at night. (RT 18315.)

Later they moved to Pacoima, when their father was stationed in Greenland. (RT 18317.) She testified that she was molested by their father when she was young. (RT 18318.)

Once appellant's father was beating appellant while appellant was tied to and hanging from a pole in the garage. Appellant was naked and their father was beating him with extension cord all over his body, back, buttocks legs. (RT 18321-18322.) He also beat appellant with a belt buckle, once cutting appellant's penis with the belt buckle. (RT 18322.) The beatings took place at least once a week. (RT 18323.) Appellant also saw his sister being molested by their father. (RT 18323.)

ARGUMENTS

GUILT/INNOCENCE PHASE ARGUMENTS

I
APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE OF SEVERAL RELATED ERRORS ARISING FROM THE INTRODUCTION OF ACCOMPLICE TESTIMONY. THESE ERRORS, INDIVIDUALLY AND COLLECTIVELY, HAD THE EFFECT OF DENYING APPELLANT DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS THEY ALSO DEPRIVED APPELLANT OF HIS RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE AS GUARANTEED BY THE EIGHTH AMENDMENT

Appellant's conviction must be reversed because of several related errors arising from the introduction of accomplice testimony.

Williams's testimony was the only evidence connecting appellant to the murders.

Even though Williams, who testified against appellant under a grant of immunity, was originally charged as a co-defendant *with the same murders in which he later implicated appellant,* the trial judge concluded that Williams was ***not*** an accomplice as a matter of law for purposes of the rule that accomplice testimony is not sufficient to sustain a conviction unless it is corroborated. The trial judge therefore erroneously denied appellant's motion for judgment of acquittal, even though he conceded the corroboration requirement was not satisfied.

Appellant contends that applying the proper legal definition of "accomplice," and thereby triggering the corroboration requirement, there was not sufficient evidence to sustain appellant's conviction.

The trial judge instead decided that whether Williams was an accomplice was a question for the jury. The jury instruction, however, improperly suggested that Williams would have to be "equally guilty" for the jury to treat him as an

accomplice. Because the definition of "accomplice" was too narrow, there was a substantial danger the jury did not find Williams to be an accomplice and did not apply the corroboration requirement.

The jury was also improperly instructed that if it found Williams was an accomplice, only "slight" evidence was required to corroborate Williams's testimony, which relieved the prosecution of its burden to prove appellant's guilt beyond a reasonable doubt.

The significance of this issue, and the jury's confusion about it, was underscored by the jury's questions -- *after* it had convicted appellant but was still deliberating as to Settle's guilt -- about the definition of accomplice and the reasonable doubt standard. The trial judge refused to reopen the case when the jury's questions exposed its misunderstanding of the law governing the issue that was dispositive of appellant's guilt or innocence. When the judge gave legally correct clarifying instructions, the jury hung as to Settle's guilt, and he later pled guilty to manslaughter. Appellant was sentenced to death.

Finally, Tannis Curry, Bryant's ex-wife was either an accomplice as a matter of law or may have been an accomplice. However, none of the instructions given to the jury ever explained this fact or informed the jury as to the consequences of her possible accomplice status. Therefore, if the jury found that Williams *was* an accomplice, it could have found corroboration for his testimony in the testimony of another accomplice, contrary to the rules governing corroboration of accomplice testimony.

These errors denied appellant due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution. They also deprived appellant of his right to a reliable determination of the facts in a capital case as guaranteed by the Eighth and Fourteenth Amendments to the Constitution.

A. THE CONVICTION MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CORROBORATE ACCOMPLICE TESTIMONY

"On the testimony of two or three witnesses a man shall be put to death, but no one shall be put to death on the testimony of only one witness." Deuteronomy 17:6, Numbers 35:30

1. Introduction

Appellant's convictions must be reversed because there was not sufficient evidence to corroborate James Williams's testimony[13]. The trial court applied the wrong legal standard in ruling that Williams was not an accomplice for purposes of the rule requiring corroboration of accomplice testimony. As the trial court recognized, apart from Williams's testimony, there was no evidence connecting appellant *with the offense itself*, as required by the rules governing accomplice testimony. The evidence was therefore insufficient to sustain appellant's conviction, and the trial court erred in denying appellant's motion for judgment of acquittal.

2. Sufficiency of the Evidence Standard

The presumption of innocence and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that the People prove every element of the crime charged, beyond a reasonable doubt. (See Pen. Code, § 1096; *Sandstrom v. Montana* (1978) 442 U.S. 510, 520; *In re Winship* (1970) 397 U.S. 358, 364.)

The federal standard for sufficiency of evidence is set out in *Jackson v. Virginia* (1979) 443 U.S. 307, 319:

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[13] Because Williams was the main witnesses against appellant, this section of the brief focuses on his testimony and accomplice status. However, as will be discussed, Tannis Curry was also an accomplice and the same principles apply to her as well.

> "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution."

This standard is applicable to California cases. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

On appeal, the court must review the entire record in a light favorable to the judgment below and determine whether substantial evidence supports the conclusion of the trier of fact that the prosecution sustained its burden of proving each element of the crimes charged. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) To be "substantial," the evidence must reasonably inspire confidence. (*People v. Morris* (1988) 46 Cal.3d 1, 19, overruled on other grounds, *In re Sassounian* (1995) 9 Cal.4th 535, 544, fn. 5.)

A finding based on conjecture or surmise cannot be affirmed. (*People v. Memro* (1985) 38 Cal.3d 658, 694-695.) Even a strong suspicion is insufficient to support a finding of guilt. (*People v. Thompson* (1980) 27 Cal.3d 303, 324.)

3. The Motion Pursuant to Section 1118

After the close of the prosecution's case, appellant made a motion for a judgment of acquittal pursuant to section 1118.1 In the written motion, appellant explained that Williams was an accomplice because he did various acts facilitating the murder, and he did these acts with the requisite knowledge and intent. These acts included opening the door to allow Bryant to leave before the shooting started, backing the car into garage after the murders, and serving as a lookout for witness as he left the scene. (CT 14967.)

The defense asked the court to take judicial notice of the fact that the prosecution filed the same charges against Williams that it had filed against appellant. Mr. Novotney, one of appellant's trial attorneys, explained that the test of an accomplice is "liable to prosecution," which is what happened, "he was prosecuted." (RT 14446-14447)

The court rejected the argument that Williams was an accomplice merely because he was charged in the offense. (RT 14448-14449) Instead, the court stated three times that an accomplice is someone *who is also guilty* of the offense for which the defendant is charged. (RT 14448). The defense also argued that Williams was an accomplice because he was an aider and abettor. (RT 14451.) The defense argued that, other than Williams's testimony, there was no evidence connecting appellant to the offenses for which he was being tried, as distinguished from other offenses like the drug offenses or the Curry shooting. (RT 14451.)

In particular, the defense pointed out, there was no fingerprint evidence, no evidence of flight, no admissions, no weapons traced to appellant, and no proof that appellant was even present at the time of the crime. (RT 14451.) The defense argued that the phone calls at most showed that appellant was an accomplice to drug sales. (RT 14451-14452.)

The prosecution maintained that Williams was not an accomplice because he testified that he had no knowledge of what the others were planning to do. (RT 14452.) The prosecution further argued that if Williams was an accomplice the evidence of the phone calls to appellant and the fact that appellant was one of the people that Bryant would rely on to commit homicides was sufficient corroboration of Williams's testimony. (RT 14453.)

The defense replied that Williams's testimony that he did not want to be there because he knew that something was going to happen showed sufficient knowledge to make him an aider and abettor. (RT 14454.)

The court denied the motion for judgment of acquittal, stating that it could not be said that Williams was an accomplice as a matter of law, because there was

not sufficient evidence to show that Williams shared the requisite intent. (RT 14455.) The court believed the evidence was in conflict, and the jury could find Williams to be either an accomplice or an "innocent dupe." (RT 14454.)

Although the court denied the motion for judgment of acquittal, it agreed that the case against appellant was "very close", and that, apart from Williams's testimony, the only evidence against appellant was the Curry shooting and the phone calls between appellant's apartment, the Wheeler Avenue house, and Bryant's residence. The court added that if you took Williams's testimony out of the picture and asked whether "of all the people in the world" one would suspect appellant based on the other evidence, the answer would be "no." (RT 14456-14457.) The court reiterated its belief that if one did not consider the testimony of Williams, *there was not enough evidence to believe that appellant was involved.* (RT 14457-14458.) In particular, the court stated

> "So it may well be that if Mr. Williams is an accomplice, I think your argument is a good argument. I really do. *I don't think you can add these things up and say this is corroboration that Smith committed the homicide.* It would tend to submit a link. But I cannot, in all honesty, say in my own mind I could go out and look for Mr. Smith." (RT 14458, italics added.)

Indeed, the court agreed that there was nothing, other than Williams's testimony, to indicate that appellant had ever gone to the Wheeler Street address. (RT 14457.)

The court concluded that "to be honest" it was making the ruling that it did because it did not believe that Williams was an accomplice as a matter of law. If the jury did find that Williams was an accomplice, however, the court believed the jury would have to acquit. (RT 14458.)

4. Legal Principles Governing Accomplice Testimony

Accomplice testimony, for good reason, has historically been viewed with great suspicion. Thus, although the rules of evidence generally provide that the

testimony of any one witness is sufficient proof of any fact, there is an exception for accomplice testimony. Penal Code section 1111 states:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof...."

The purpose of section 1111 is to prevent convictions based solely on untrustworthy evidence. (7 J. Wigmore, Evidence, (1978 Chadbourn ed.) § 2056.)

> "The requirement of section 1111 of the Penal Code that accomplice testimony must be corroborated is a convincing indication of the legislative intent and policy that such evidence is to be regarded as untrustworthy and not to be believed unless fortified by other evidence tending to connect a defendant with the commission of the offense charged." (*People v. Dail* (1943) 22 Cal.2d 642, 655.)

The distrust of accomplice testimony is particularly well-placed when the accomplice testifies in the expectation of immunity. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Coffey* (1911) 161 Cal. 433, 438.)

First and foremost – accomplices are distrusted because they have an overwhelming motive to shift blame to their co-perpetrators to save their own skin. (*People v. Guiuan* (1998) 18 Cal.4th 558, 574-575 (conc. opn. of Kennard, J.) See also *Williamson v. United States* (1994) 512 U.S. 594, 601 (1994) - noting that an accomplice's strong motivation "to implicate the defendant and to exonerate himself," makes his "statements about what the defendant said or did . . . less credible . . ." (citing *Lee v. Illinois* (1986) 476 U.S. 530, 541; see also *People v. Duarte* (2000) 24 Cal.4th 603)

Cases such as *Williamson and Lee* have specifically noted that the statements made by a co-defendant at the time of his arrest are particularly untrustworthy because that is when the desire to exonerate himself and the motive to begin fabrication arises. It is for this reason that confessions that cast most of the

blame on others are considered to be highly unreliable[14]. (E.g. see *Lilly v. Virginia* (1999) 527 U.S. 116, 117.)

In her concurring opinion in *People v. Guiuan, supra*, 18 Cal.4th 558, Justice Kennard explained:

> "`A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From the Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony.'" (Citation.) (*Id.*, at p. 570, quoting *Phelps* v. *United States* (5th Cir. 1958) 252 F.2d 49.)

Because accomplices are liable to prosecution for the same offense, they have a powerful motive to aid the prosecution in convicting a defendant, with the hopeful expectation that the prosecution will reward the accomplice's assistance with immunity or leniency. (*Id.* at p. 572, Kennard, J., concurring) Accomplices are rarely persons whose veracity is above suspicion; their participation in the charged offense is itself evidence of bad moral character. *(Id.* at p. 574.) (Kennard, J., concurring) Moreover, an accomplice's first hand knowledge of the details of the crime allows for the construction of plausible falsehoods not easily disproved. (*Id.* at p. 575 (Kennard, J., concurring)

The danger of obtaining crucial testimony from criminals was similarly noted in *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1083 where the court noted that

> "because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government." (*Id.*, at p. 1124.)

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[14] At the time that Williams first blamed appellant, he was a suspect and defendant under arrest. He was confessing to selling drugs, while blaming others for the murder.

Testimony from accomplices and "snitches" who receive a deal for their testimony has been a frequent cause of wrongful convictions, as the Innocence Project has illustrated in its study of cases in which the defendant was later exonerated by DNA tests. (*Id.*, at p. 1124, fn. 6.)

The long-standing rule that a conviction must not rest on accomplice testimony alone is thus supported by empirical evidence. The law properly requires corroboration to sustain a conviction.

Because Section 1111 is designed to prevent the conviction upon suspect evidence, the lack of corroboration enhances the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of Eighth and Fourteenth Amendments which has greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334.) (1976) 428 U.S. 280; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Furthermore, depriving appellant of the protection afforded under the principles discussed above is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in Penal Code section 1111 because it provides that "no conviction shall be had" on uncorroborated accomplice testimony. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478). To uphold his conviction, when there was no proper corroboration for the accomplice testimony, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Indeed, Judge Horan denied appellant's motion to dismiss, even though he believed there was no corroboration for Williams's testimony because he erroneously defined "accomplice" as somebody who was guilty of the same offenses. (RT 14448-14449.) Had he not applied this incorrect legal standard, i.e. had appellant's right under section 1111 been recognized, the case against appellant would have been dismissed.

Finally, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Darden v. Wainwright* (1986) 477 U.S. 168, 181-182.)

5. The Determination of Accomplice Status

Penal Code section 1111 defines an accomplice as ". . . one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

"Liable to prosecution" means "properly liable," which requires that there is "probable cause" to believe that the person has committed the offense in issue. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 7591 *People v. Cowan* (1940) 38 Cal.App.2d 231, 242.)

Contrary to the trial court's ruling, a witness need not be "also guilty" of the same offense with which the defendant is charged to be considered an accomplice. Even a person who has been tried and acquitted of the same offense as the defendant may still be an accomplice for purposes of section 1111: "The test is not whether she (the alleged accomplice) was subject to trial and conviction at the time she testified, but whether, at the time the acts were committed, and as a result of those acts, she became 'liable to prosecution for the identical offense charged against the defendant.'" (*People v. Gordon* (1973) 10 Cal.3d 460, 469, citation omitted).

Under the narrowest view, an accomplice must have "guilty knowledge and intent with regard to the commission of the crime." (*People v. Gordon, supra,* 10

Cal.3d 460, 466 -467.) As will be shown (*infra*, at p. 55), Williams knew that a crime was going to happen and continued to follow Bryant's instructions that would help bring the crime to fruition.

Furthermore, to be charged with an identical offense, the witness need not be the actual perpetrator, but may be a principal under section 31; that is, the direct perpetrator *or* an aider or abettor. (*People v. Fauber* (1992) 2 Cal.4th 792, 833.) At common law, an "accomplice" includes all *particeps criminis*, whether they be principals in the first or second degree, or mere accessories before, or after the fact. (*People v. Coffey, supra*, 161 Cal. 433, 439.)

Section 31 takes an expansive view of who is subject to prosecution for an offense: a principal in the offense includes "all persons concerned in the commission of a crime..., and whether they directly commit the act constituting the offense, or aid and abet in its commission...." This has been the definition of an accomplice for almost a century. (*People v. Coffey, supra*, 161 Cal. at 440.)

Because a person who is an accomplice to one crime, may be properly convicted of any offense that is a foreseeable result of the crime that the accomplice intended to aid, a person is "liable to prosecution" even if it could ultimately be proven that he did not have the pre-knowledge and specific intent needed for the charged offenses ultimately committed.

As explained in *People v. Croy* (1985) 41 Cal.3d 1,

> "[A] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, is sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator." (*Id.*, at p. 12, fn.)

In *People v. Solis* (1993) 20 Cal.App.4th 264, after a confrontation with some rival youths, the defendant went driving around the area where the

confrontation had occurred. As they drove past some youths, appellant's accomplice, whom appellant knew was armed, leaned out the window and fired shots, killing one person. Solis admitted knowing that the shooter had a gun, but denied knowing that the shooter would use it for any purpose other than to shoot in the air to scare the opposing gang. (*Id.*, at p. 267-269.) Solis was nevertheless convicted of second-degree murder, based on a theory of aiding and abetting.

Hence, if it is reasonably foreseeable that a serious crime may result from what commences as another offense, even if that offense is merely a misdemeanor, then the criminal accessory may be held responsible for the eventual felony, including murder. (*Id.*, at p. 273.)

Also relevant to the instant case, a person can be convicted of second degree felony murder for "a homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the ... felonies enumerated in Pen. Code section 189)...." (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1296, quoting *People v. Ford* (1964) 60 Cal.2d 772, 795 overruled on other grounds in *People v. Satchell* (1971) 6 Cal.3d 28.)

Whether a felony is inherently dangerous is determined by viewing the felony in the abstract, not by focusing on the particular facts of the case. (*People v. Pearch, supra*, 229 Cal.App.3d at 1296, *People v. Patterson* (1989) 49 Cal.3d 615, 621.) *People v. Burroughs* (1984) 35 Cal.3d 824 described an inherently dangerous felony as one which "cannot be committed without creating a substantial risk that someone will be killed." (*Id.*, at p. 833.) Subsequently, in *People v. Patterson, supra,* 49 Cal.3d 615, 627, the Supreme Court adopted a new standard holding an inherently dangerous felony "is an offense carrying 'a high probability' that death will result."

6. Why Williams Must be Regarded as an Accomplice

Under the foregoing principles, Williams must be regarded as an accomplice as a matter of law. First, the language of section 1111 provides that a

is an accomplice if he is "liable to prosecution" for the identical offense charged against the defendant.

Williams was originally charged with precisely the same crimes and special circumstances as appellant. (CT 4968-4973.) Williams was not only "liable" to prosecution for the murders, he *was actually prosecuted.* The prosecution of Williams was terminated only when the state made a strategic decision to allow Williams to testify in exchange for immunity. Williams was therefore a defendant charged with the identical crimes until he reached an agreement to testify.

Likewise, if the test of accomplice status requires that the witness had "guilty knowledge and intent with regard to the commission of the crime" (*People v. Gordon, supra,* 10 Cal.3d 460, 466 -467), Williams qualifies as an accomplice.

When he was interviewed in Pennsylvania, Williams admitted that before the murders happened he "had an idea" that something was going down because everyone was walking around with gloves on cocking guns. (4 SUPP CT 45.) Likewise, when interviewed by an investigator for the District Attorney's Office, Williams said that he knew a killing was going to happen "at this time [prior to the shooting]" and he *believed "someone was going to die."* (RT 14914, 14919.)

Nonetheless, he continued to help Bryant by serving as a lookout before and after the murder, buzzing Armstrong and Brown into the sally port area, and moving the car.

Having been charged with the crime, and having assisted in the crime, with knowledge that it was going to occur, Williams is an accomplice as a matter of law.

That Williams may have been afraid of the other defendants is not relevant because it is well-established that duress is not a defense to murder. (*People v. Son* (2000) 79 Cal.App.4th 224, 233.)

The trial court's insistence that Williams must be "guilty" of murder to be an accomplice is not only directly contrary to *Gordon, supra,* it also defeats the very purpose of the statute -- to ensure that the testimony of erstwhile defendants,

who have been granted immunity or other favorable treatment by the prosecution, is taken with a healthy grain of salt. The trial court's construction of the statute would allow the prosecution to control whether their cooperating witnesses would be treated as accomplices and whether their testimony would be subject to the corroboration requirement and cautionary instructions. As long as the prosecutor dropped charges against the witness, he or she could not be "guilty" of the same offenses as the defendant, and his or her testimony would be accorded the same weight as any other witness. This would perversely treat as most credible those witnesses who received the ***most*** favorable treatment in exchange for their testimony – exactly the opposite of what the statute and common law intended. (*People v. Tobias*, *supra*, 25 Cal.4th at p. 331; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Dail*, *supra*, 22 Cal.2d at p. 655; *People v. Coffey*, *supra*, 161 Cal. 433, 438.)

This is precisely the issue that confused the jury (*infra*, Argument I-C), as evidenced by its question after returning the verdict as to appellant, but while continuing deliberations as to Settle, asking whether someone who had once been charged with a crime but was not tried was an accomplice. At the time the verdict was reached as to appellant, the jury did not understand this crucial principle.

The trial court also reasoned that Williams was not an accomplice as a matter of law because he denied having advanced knowledge that the murders would occur. To treat the witness' self-serving exculpatory statements as dispositive of his accomplice status is also inconsistent with the purpose of the statute.

Indeed, if this were the standard, then neither Bryant, Wheeler, nor Settle would be accomplices, because they all denied their guilt.

In fact, apart from Williams's self-serving testimony, the evidence against him would have been at least as strong as, if not stronger than, the evidence against appellant. Williams worked for the Bryant family dealing drugs, and he admitted being present at the murders. The jury rejecting his self-serving

testimony would place Williams in the same situation as if he had not testified. In such a case the evidence would show that Williams was a drug dealer for an organization that employed its dealers (Wheeler and Settle) to commit murder.

Other facts also point to Williams's guilt. He fled immediately after the murder, showing consciousness of guilt (Pen. Code § 1127c.), and knowing a murder was about to happen he acted as a lookout for Armstrong and Brown prior to the murders, buzzing them into the sally port, and helping move the cars to transport the bodies while the murder was going on.

Thus, had the prosecution not given Williams immunity he would not only have been "liable to prosecution," he could have been convicted of these offenses.

Even if the evidence were not sufficient to establish Williams's direct knowledge of the murders, he should have been deemed an accomplice as a matter of law either because (1) he was an accomplice to other, related offenses for which appellant was also tried and/or (2) because the murders were a natural and probable consequence of William's involvement in the Bryant criminal organization.

Section 1111 defines accomplice status according to the offense "charged against" the defendant as opposed to "the offense for which the defendant is tried."

In this case, appellant was charged not only with murder but also with one count of operating a narcotics ring based on his participation in the drug business (Pen. Code § 182, Health and Saf. Code § 11352) and one count of conspiracy to avoid prosecution and/or conceal a crime (Pen. Code § 32/182) based on the post-homicide events, including Williams leaving town to help cover up the murder. (CT 4807-4811.) It was undisputed that Williams was selling drugs for Bryant, i.e. participating in the narcotics ring, and that he left town after the murders to thwart prosecution for the crimes. He was therefore liable to prosecution for the same offenses charged against appellant, i.e., he is an accomplice.

The words in the statute must be given "their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601; see also *People v. Cicero*

(1984) 157 Cal.App.3d 465, 477; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 49-50 – ["Whenever possible, we must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless."].)

This court may not substitute "is liable to prosecution for the identical offense charged against" with the phrase "is liable to prosecution for the identical offense for which the defendant is being tried." To re-write the statute in this manner would render the phrase "charged against" meaningless[15].

This case presents compelling reasons to follow the literal interpretation of the "charged against" language to include the original offenses charged against appellant, including the charge of participating in the narcotics organization: The only reason the court severed the narcotics ring offense from the murders was because of the practical problems of trying so many defendants together. (RT 3923-3933, 3943, 3974-3978, 3796.)

It was purely fortuitous that the court, in addition to severing out the non-capital defendants, also severed the counts involving sales of narcotics. If the court had severed only the parties, the case against appellant would have consisted of four counts of murder, one count of attempted murder, and one count of participating in a narcotics ring. In that situation, Williams would have been an accomplice because of his role in the operation of the narcotics ring. If the murder and drug charges had been tried jointly, Williams's credibility could not have been "bifurcated" so that he was considered an accomplice when he testified as to one

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[15] In the alternative, if there is some question as to the meaning of section 1111, this Court should interpret the section in a manner favorable to appellant. It is another basic rule of statutory construction that in criminal law any doubts as to the meaning of a statute must be resolved in the defendant's favor. (*In re Tarter* (1959) 52 Cal.2d 250, 257. "[W]hen language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute." (see also *People v. Davis* (1981) 29 Cal.3d 814, 828-829.)

crime but not when testifying as to another[17]. It is therefore purely arbitrary for Williams to be stripped of his accomplice status, and accorded greater credibility as a witness, solely because some charges in the case were severed before trial as a matter of case-management convenience. Such a result would be inconsistent with *Gordon, supra,* which establishes that accomplice status is determined as of the time of the crime, not the trial. Such a result would be inconsistent with the very essence of the accomplice rule, which evaluates a witness's testimony on the basis of his actions, rather than on the fortuity of a chance procedural event or condition affecting pre-trial motions.

Williams was an accomplice based on his role in the Bryant drug organization, and he remained an accomplice notwithstanding the severance of that one charge.

Williams's status as an accomplice is even more apparent when his conduct is evaluated under the principles relating to aiding and abetting.

As explained above, the trial court held that Williams was not an accomplice because he denied knowledge of the plan to kill Armstrong and Brown.

However, under the principles of accomplice liability, even without this specific knowledge, Williams could have been convicted of murder under the theory that the homicides were a natural and probable consequence of serving as a lieutenant in a major drug cartel.

The question in this case is whether being engaged as a narcotics dealer in one of the largest narcotics rings in Southern California, in which killings, beatings, threats, and witness intimidation were routine business practices – as the

[17] When he testifies that he buzzed Armstrong in, was he describing letting in a drug customer or a murder victim? When he testified about the company car, was he testifying about going to work in the count house or his actions on the day of the murder? What standard should the jury use in evaluating this testimony?

prosecution argued (RT 16430S-16430T) – was likely to result in someone's death.

Williams went to work at the drug house that day intending to sell narcotics as part of the most violent drug organization in the city. While he was there, a turf war over the business came to fruition and some people were murdered. Such violent disputes are arguably a natural and probable consequence of the type of business in which Williams was knowingly employed.

Further, even if the specific intent for first degree murder cannot be vicariously attributed to Williams as an accomplice, he could still be liable for *second degree* murder if the murders were a direct result of the commission of a felony inherently dangerous to human life -- participation in a violent, large-scale narcotics trafficking organization, where firearms are tools of the trade. (*People v. Glaser* (1995) 11 Cal.4th 354, 358.)

It must be remembered that appellant was convicted of two counts of second degree murder. If Williams could have been convicted of second degree felony murder rule for participating in a felony inherently dangerous to human life – selling narcotics as part of a major drug cartel - then he is guilty *of the identical offense for which appellant was convicted.*

Consequently, even accepting Williams's testimony in full, he would still be an accomplice as a matter of law because is guilty of the same offense for which appellant was convicted.

Contrary to the trial court's view, it is not necessary that a jury ***ultimately*** find – by conviction -- that both the witness and the defendant have identical liability for each and every charge. This would lead to the absurd results, described above, wherein the jury would be asked to treat the witness's testimony skeptically as to some charges but not others.

For example, appellant was not convicted of the same offenses as Wheeler and Bryant. Can it seriously be contended that appellant is not an accomplice in this offense?

Likewise, in the penalty phase, the jury was instructed that in the Gentry murder, Armstrong was an accomplice as a matter of law. (RT 15834.) Armstrong was the actual shooter in that murder. However, if one were to apply the overly strict standard of "identical offense" that the trial court applied with respect to Williams, Armstrong would not be an accomplice of the people who hired him to commit murder because ultimately Armstrong was only convicted of voluntary manslaughter.

Therefore, it must be recognized that if a witness is an accomplice to some of the charged counts, he must be regarded as an accomplice for the case as a whole.

In this case, Williams *was charged with the identical offenses* as appellant. There was enough evidence so that he could have been convicted of the identical offenses. He was without a doubt an accomplice in many of the other offenses that were originally charged against the appellants in this case and the original, severed defendants. His role as an accomplice to those offenses, under an aiding and abetting/natural and probable consequences test, could have supported a conviction for the same offenses for which appellant was ultimately convicted.

Therefore, he must be regarded as an accomplice.

7. The Reason for the Accomplice Rule Applies to Williams.

All the reasons for distrusting accomplice testimony apply to Williams:

As noted, accomplices are distrusted because they have an overwhelming motive to shift blame to others in order to save themselves. Williams testified that he thought he would not have received immunity if the police thought he was the shooter. (RT 12552.) At that time, he then cast blame on the others.

On another occasion, Williams told people that if he had known that no one had identified him he would never have given a statement to the police. (RT 11916.) Therefore, he only reason Williams decided to talk was because he

thought that he had been identified as being involved in the murder and that by giving a statement shifting the blame to others he could be off the hook.

Williams was not a savory character. At best, he was a long time drug dealer. Apart from his days of dealing for the Bryants, he has two felony convictions for narcotics and having a gun during a narcotics offense. (RT 12277-12278.) After he fled California, Williams got a job, at which he stole money by forging his boss's signature on time cards. (RT 12386.) Williams was facing the death penalty, charged with four counts of murder. His statement to police minimized his own responsibility, claiming that he did not know the murders were going to happen, that he just happened to be there, and that he had no role in the murder except as an unwilling aid. He shifted all of the blame to appellant, Bryant, Wheeler, and Settle. In exchange for his testimony, Williams received immunity from prosecution. This is precisely the type of case for which the rule requiring corroboration for accomplice testimony was created.

As the defense argued, one must consider what would have happened if Williams had not made the statement in Pennsylvania, but had asserted his right to silence, and remained a defendant. (RT 16698-16699.) Had this happened, there would have been sufficient evidence to convict Williams of four counts of murder. This is true *whether or not* Williams had taken the stand on his own behalf, as the jury could have rejected his denial of guilt in the same manner in which they rejected the denial of guilt testified to by Bryant and Wheeler.

If the reason accomplice testimony is suspect is because the accomplice has a vested interest in minimizing his role, there was never a clearer illustration of that than James Williams, a man who escaped death because he minimized his role.

By relying on the very story that Williams gave to save his skin as the reason ***not*** to consider him an accomplice, the trial court stood the accomplice testimony rule on its head. To determine accomplice status based on the

self-serving statement ignores the reason for distrusting that statement, and enshrines the accomplice's self-serving statement as accepted truth.

Based on the foregoing, the trial court erred in failing to find Williams an accomplice as a matter of law.

8. Williams's testimony Was Not Sufficiently Corroborated

Judge Horan was correct in concluding that if Williams was an accomplice, his testimony was not sufficiently corroborated to sustain appellant's conviction. Appellant's motion for judgment of acquittal therefore should have been granted and the conviction must be reversed.

a. General Principles Relating to Corroboration

The prosecution has the burden of producing independent evidence to corroborate the testimony of an accomplice. (*People v. Cooks* (1983) 141 Cal.App.3d 224.) The accomplice's testimony must be sufficiently substantiated so as to establish his credibility and satisfy the jury that he is telling the truth. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Szeto* (1981) 29 Cal.3d 20, 27; *People v. Martinez* (1982) 132 Cal.App.3d 119, 132.)

The corroborative evidence "must relate to some act or fact which is an element of the crime" so that it directly connects the defendant to the charged offense. (See e.g, *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1128; *People v. Zapiens* (1993) 4 Cal.4th 929, 982). It must be sufficient, without aid from the testimony of the accomplice, to implicate the defendant. If the remaining evidence requires interpretation and direction by the accomplice's testimony to give it value, the corroboration is not sufficient. (*People v. Reingold* (1948) 87 Cal.App.2d 382, 392-393; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.)

Corroboration of an accomplice's testimony as to non-inculpatory facts is also insufficient because "if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of

facts sworn to by him." (*People v. Lohman* (197) 6 Cal.App.3d at 766, quoting *People v. Morton* (1903) 139 Cal. 719, 724.).

Evidence that only gives rise to a suspicion, even a "grave" suspicion, of guilt will not corroborate an accomplice's testimony. (*People v. Szeto*, *supra*, 29 Cal.3d at p. 43; see CALJIC Nos. 3.10-3.13, 3.18.)

Extrajudicial statements of accomplices are also insufficient to corroborate accomplice testimony because, although the out-of-court statement is not part of the testimony, it still "comes from a tainted source." (*People v. Andrews* (1989) 49 Cal.3d 200, 214; *People* v. *Belton* (1979) 23 Cal.3d 516, 524-526.)

Therefore, Williams's prior statements therefore may not be considered as corroboration. (*People v. Andrews*, *supra*, 49 Cal.3d 200 citing *People v. Bowley* (1963) 59 Cal.2d 855, 859.);

Likewise, accomplices cannot corroborate each other. (*People v. Garceau* (1993) 6 Cal.4th 140, 182, *citing People v. Clapp* (1944) 24 Cal.2d 835, 837.) Thus, the testimony of Settle, Bryant, or Wheeler cannot be used to corroborate Williams. As will be discussed (infra Argument I-F), Tannis Curry, Bryant's ex-wife, who may have been involved is setting up Armstrong for murder, was also an accomplice, so evidence originating from her may not be considered as corroboration for Williams's testimony.

b. Examples of Insufficient Corroboration

Association with other people involved in the crime *is not sufficient corroboration.* "It is not with the thief that the connection must be had, but with the commission of the crime itself." (*People v. Robinson* (1964) 61 Cal.2d 373, 400, *In re Ricky B.* (1978) 82 Cal.App.3d 106,111.)

Thus, in *People v. Falconer*, *supra*, 201 Cal.App.3d several intruders attempted to steal marijuana plants from the victim. One of the intruders testified that the defendant had planned the raid and did several acts in furtherance of the plan, returning with the others to commit the robbery. (*Id.*, at p. 1542.) The cor-

roborating evidence established that the defendant was the father of one of the intruders, that he visited the victim's residence before the robbery, and knew the victim grew marijuana. (*Id.*, at p. 1543.) This evidence was held insufficient as a matter of law to corroborate the accomplice's testimony because it only connected the defendant with the perpetrators, not with the crime. (*Id.*, at pp. 1543-1544.)

Similarly, in *People* v. *Robinson*, *supra*, 61 Cal.2d 373 the only evidence inculpating the defendant were his fingerprints on a car involved in the offense, the fact that he gave conflicting and evasive replies when accused of involvement in the offense, and an adoptive admission, which implicated him. This Court held that none of those three items, independently or cumulatively, were sufficient to corroborate the statements of the accomplice. (*Id.*, at p. 398.)

"Evidence of mere opportunity to commit a crime is" also "not sufficient corroboration." (*People v. Boyce* (1980) 110 Cal.App.3d 726, 737.) Thus, evidence that the defendant knew the victims, their schedules, and where they lived, that he was a friend of one of the participants in the scheme, and that he had been to his home at about the same time that the stolen goods were delivered was not sufficient corroboration, because it established only that he had the opportunity to commit the offenses. (*Id.*, at p. 736-737.)

c. Examples of Sufficient Corroboration

Accomplice testimony may be corroborated by "direct physical evidence that does not rely on witness credibility." (*People v. Narvaez* (2002) 104 Cal.App. 4th 1295, 1305.) In *Narvaez,* evidence that the defendant, who had no apparent source of money, had gone on a spending spree in Las Vegas and was found to be in possession of large amounts of cash bundled in the same manner as money stolen in the robbery was sufficient corroboration. (*Id.*, at p. 1305.)

Although *Narvaez* stated that the relationship of the parties may be *considered* in determining whether there is sufficient corroboration for accomplice testimony, *it did not say that such evidence was sufficient by itself.* [18].

In *People v. Andrews*, *supra*, 49 Cal.3d 200, 211 sufficient corroboration was found where the defendant's fingerprints were found on the floor of the murder scene an inch from the body, and the defendant admitted his guilt to other people. (*Id.*, at p. 211.)

In *People v. Zapien*, *supra*, 4 Cal.4th 929, 982 corroborating evidence included the fact that the defendant was seen shortly after the murder with blood on his person, he left town on a bus, the victim's car was found abandoned at the bus station, and the defendant's fingerprint was found on the gearshift lever, indicating that he was the last person to have driven the vehicle. (*Id.*, at pp. 982-983.)

Sufficient corroboration thus generally consists of physical evidence – such as possession of stolen property or fingerprints -- or admissions that connect the defendant to the particular crime. The allegedly corroborating evidence presented in this case, as the judge correctly observed, fell far short.

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[18] *Narvaez* cited two cases, *People v. Henderson* (1949) 34 Cal.2d 340 and *People v. Williams* (1954) 128 Cal.App.2d 458 for the proposition that evidence concerning the relationship of the parties "may be taken into consideration by the jury in determining the sufficiency of the corroboration of an accomplice's testimony" (*Narvaez* , at p. 1205). However, in both cases there was other corroboration beyond the relationship of the parties. In *Henderson*, witnesses testified that the defendant and accomplice were together most of the day preceding the attempted robbery and a few hours before the robbery. A non-accomplice witness testified that she sold the type of gun used in the robbery to the defendant and it was taken from her home shortly before the robbery. (*Henderson*, *supra*, at p.343.) Thus, Henderson was connected to facts relating to the offense – the weapon used. In *Williams*, the defendant's car, loaded with stolen goods, was found at the scene of the burglary, he attempted to avoid detection, gave an assumed name when apprehended, and he was in possession of other stolen goods.

9. The Acts Relied on Herein are Insufficient for Corroborative Purposes

In this case, the acts relied on by the prosecution as corroboration for accomplice testimony merely tended to connect appellant to the other defendants and to the victims, but not to the offense.

As explained above, the sufficiency of the corroborative evidence is determined by viewing the case without the accomplice testimony. (*Ante*, at p. 63, CALJIC No. 3.12) If the remaining testimony does not implicate the defendant *in the charged crimes*, the corroborative evidence is insufficient.

Of the scores of non-accomplice witnesses presented, very few had any relevance to appellant. Most of the trial involved the details of the drug business, such as the arrests at the other crack houses and the manner in which the business operated. This evidence proved the ultimate motive – protecting the business from a takeover. It also connected the Wheeler Avenue house to the Bryant family in the similarity of the way in which Bryant family houses were run.

None of this connected appellant to the offense.

Apart from the suspect testimony of Williams there are four possible items of evidence which arguably corroborate his testimony: 1. Evidence of the Curry shooting; 2. Evidence arising from appellant's arrest, particularly the possession of cocaine; 3. Evidence relating to phone calls between appellant, Armstrong, Bryant, and the Wheeler Avenue drug house; and 4. Evidence that Settle may have helped bail appellant out of jail.

Appellant contends some of the evidence, such as evidence of the Curry shooting or the drugs possessed by appellant at the time of his arrest were inadmissible. (See Section IV, below.)

However, *even if properly admitted*, individually and/or collectively, this evidence only connects appellant to the parties, not *to the offense*.

For example, the evidence of the Curry shooting suggests that appellant may have worked for Bryant, but it does not connect him to *this* particular crime. The connection *to this crime* is particularly important because the Bryants had

other people who did this type of work,[19] as seen by the fact that there was no claim that appellant was involved in the bombing or second shooting of Curry, the beating on Francine Smith, or any of the other acts of violence attributed to the family.

Establishing that appellant was one of 150 to 200 employees of the Bryant family (RT 9891), many of whom allegedly committed acts of violence for them, does not show appellant committed ***this*** offense.

Similarly, the evidence that appellant possessed cocaine and that Settle bailed him out of jail may suggest that appellant worked for Bryant but does not connect him to this offense.

Finally, the fact that appellant made phone calls to Armstrong and Bryant, Wheeler, and the Wheeler Avenue and that Armstrong used appellant's phone number as his own[20] only proves that appellant was selling drugs for the organization and that he, Bryant, Wheeler, Armstrong, and other people knew each other; it establishes no connection to the crime.

Thus, all of the evidence mentioned above is merely four ways of showing that appellant knew the various parties involved in this case and had some association with them. However, as Judge Alex Kozinsky has explained, "Saying the same thing twice gives it no more weight." (*Hammer v. Gross* (9th Cir., 1991) 932 F.2d 842, 852.)

This case is therefore similar to *People v. Falconer*, *supra*, 201 Cal.App.3d 1540, where evidence showing only a relationship between the parties was deemed to be insufficient corroboration.

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[19] Antonio Johnson, one of the original capital defendants, for example, was a long time member of the family according to his probation report. His fingerprints were found at the Wheeler Avenue residence. (RT 13282-13283.) At a minimum, he helped clean up after the murders. There were also "strong suspicions" that he may have been involved in other acts of violence for the family. (CT 16327.)

Newbill, another of the original capital defendants, was also a major participant in the Bryant organization; his fingerprints were also found at the murder scene.

[20] The testimony of Karen Flowers.

In fact, even the evidence of appellant's relation to the Bryant organization was comparatively weak. Appellant was not one of the people on the list of employees found at Wheeler Avenue. His name was not on the ninety-minute schedule of work shifts for Wheeler Avenue. Compared to others, whose names popped up continually in the course of the trial, appellant is most notable for the lack of evidence connecting him to the family. His name was not on any of the paperwork, such as utilities bills, deeds, invoices, receipts, work orders, or any other paper work connected to the business.

The association evidence in the form of phone calls and evidence of prior relationships between Smith and other people involved in the case is analogous to gang membership, which is insufficient to serve as a basis for liability. (See *Mitchell v. Prunty* (1997) 107 F.3d 1337, 1342, [evidence of gang membership in itself is not proof of guilt as an aider and abettor] overruled on other grounds in *Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242.)

Again, all this evidence does is connect appellant to a large class of potential suspects, not to the offense itself. For the foregoing reasons, appellant submits that there was insufficient evidence to corroborate the accomplice testimony.

10. The Trial Court's Errors in Finding Williams was not an Accomplice

In ruling that Williams was not an accomplice as a matter of law, the trial court applied an incorrect legal standard, stating three times that an accomplice is someone who is also guilty of the same offense as the defendant. As discussed above, this defeats the purpose of the accomplice testimony rule by exempting from the rule those who receive the most favorable treatment – having all charges dropped -- in exchange for their testimony. The trial court's reliance on Williams's self-serving, exculpatory testimony to conclude that Williams was not an accomplice is similarly contrary to the purpose of the rule. Accomplice testimony is suspect and thus requires corroboration precisely because the law recognizes that co-perpetrators have a powerful incentive to minimize their own culpability

recognizes that co-perpetrators have a powerful incentive to minimize their own culpability and incriminate others, particularly when they are receiving favorable treatment – such as complete immunity from prosecution -- in exchange for their testimony.

Similarly, Judge Horan stated that Williams was not an accomplice because there was not sufficient evidence to show that he shared the requisite intent. (RT 14455.) However, "sufficient evidence" is the standard to be applied in determining whether there is enough evidence to sustain a verdict. It is not the standard for the determination of accomplice status under section 1111. Rather, the statutory test for an accomplice is whether the person is "liable to prosecution, i.e., whether there is probable cause to believe he is an accomplice. (*Ante*, at p. 52-53.)

Finally, the trial court's rationale that there was not sufficient evidence that Williams shared the requisite intent was also legally incorrect for another reason. (RT 14454.) Because Williams could have been found guilty of the offenses for which appellant was convicted as an aider and abettor or under a second-degree felony murder theory, he did not have to have the specific intent required for first degree murder.

In summary, Williams should have been treated as an accomplice. He was charged with the same offenses as appellant, and the only reason he was not tried with appellant was because he entered a deal, receiving immunity in exchange for his testimony minimizing his own role in the offenses while incriminating appellant. This is precisely the type of case to which the accomplice testimony rule is intended to apply.

The trial court correctly concluded that if Williams was found to be an accomplice the jury would have to acquit appellant, as there was insufficient evidence to corroborate his testimony. (*ante*, at p. 48; RT 14458.)

Deference is due to the trial court's conclusion in this type of matter because of the fact that he trial court saw the testimony and because of " '[its]

powers of observation, their understanding of trial techniques, and their broad judicial experience' ". (*People v. Hardy* (1992) 2 Cal.4th 86, 160; *People v. Sanders* (1990) 51 Cal.3d 471, 501.).

Because Williams was an accomplice, and because there was no corroboration, convictions must therefore be reversed.

B. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT WILLIAMS AND TANNIS CURRY WERE ACCOMPLICES AS A MATTER OF LAW

As shown in the prior section, Williams must be regarded as an accomplice as a matter of law. Consequently, the trial court erred in refusing instructions requested by the defense pursuant to CALJIC No. 3.16 that would have informed the jury that Williams was an accomplice as a matter of law and required the jury to find corroboration relating to the offense. (RT 16208.)

Similarly, as will be shown, Tannis Curry was an accomplice as a matter of law, and therefore the court erred in not informing the jury of that fact.

1. The Relevant Law

The defense requested that the jury be instructed that Williams was an accomplice as a matter of law. The court denied this request, stating that there was a dispute in the evidence as to "when he came upon the knowledge" that the murders were occurring or going to occur. (RT 16208-16209.)

Regardless of when Williams "came upon the knowledge," he met the statutory definition of "accomplice:" He was liable to prosecution for the offenses charged against appellant, and he knew the murders were happening when he was helping facilitate them.

Similarly, Tannis was originally charged as a capital defendant. She was not only "liable to prosecution for the identical offense," she was prosecuted, before receiving immunity. It appears that Tannis was supposed to go with Armstrong to the fatal meeting as Armstrong's backup. Tannis's role appears to be the identical role that the prosecution has assigned to appellant, luring Armstrong to his death as a guarantee that he would be safe because of her presence. (RT 13841-13842, 16551.)

As a result, Tannis must be regarded as an accomplice as a matter of law.

CALJIC No. 3.16 must be given by the trial court when a witness is an accomplice as a matter of law. Failure to give this instruction allows a jury to convict without the needed corroboration. (*People v. Robinson, supra*, 61 Cal.2d 373, 394-396; *People v. Dailey* (1960) 179 Cal.App.2d 482, 485-486.)

It has long been established that trial court must properly instruct the jury on the correct principles of law which are necessary to the correct factual resolution of the case:

> " 'The general rule is that the trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence, even though not requested to do so, but need not instruct on its own motion on specific points developed at the trial.' [Citation.]" (*People v. Harris* (1989) 47 Cal.3d 1047, 1096; *People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

When a judge fails in his or her duty to assure the jury's proper conduct and determination of questions of law involving "constitutional requirements," the due process clause of the Fourteenth Amendment is implicated. (*McDowell v. Calderon*, (9th Cir. 1997) 130 F.3d 833 at 839; *Estelle v. McGuire* (1991) 502 US 62.)

The practice of instructing the jury to be skeptical of accomplice testimony was developed to ensure the fairness of the trial and the reliability of the verdict. (*Phelps v. United States, supra*, 252 F.2d 49, 52; *People v. Graham* (1978) 83 Cal.App.3d 736, 742.)

"Fundamental fairness" is the essence of the due process protection provided by our state Constitution. (See *People* v. *Ramos* (1984) 37 Cal.3d 136, 153). The "Due Process Clause" of the federal constitution similarly "ensures fundamental fairness in the determination of guilt at trial." (*Albright v. Oliver* (1994) 510 U.S. 266, 283; *accord United States* v. *Valenzuela-Bernal* (1982) 458 U.S. 858, 872; *Spencer* v. *Texas* (1967) 385 U.S. 554, 563-564.)

Thus, although the administration of justice is generally left to the individual states, the action complained of will constitute a violation of the Due Process

Clause because if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (internal quotations marks omitted.) (*Montana v. Eglehoff* (1996) 518 U.S. 37, 43; *Patterson v. New York* (1977) 432 U.S. 197, 201-202.)

The historical role of the accomplice cautionary instruction is well documented. (See *People v. Guiuan, supra*, 18 Cal.4th 558, 572-573.) The concept is recognized as an important component of the defendant's right to a fair trial and to a reliable jury verdict. (*Ibid.*)

Even those states that do not require corroboration of accomplice testimony to sustain a conviction do follow the common law requirement that the jury must be instructed to review the uncorroborated testimony of an accomplice with caution. (O'Meally, Edmund J., *Survey of Maryland Court of Appeals Decisions*, Maryland Law Review (1983) p. 573, fn. 20, citing 7 J. *Wigmore, Evidence, supra*, § 2060, at 451). Thus, *it is universal* that *some* form of instruction should be given to the jury when it is considering accomplice testimony[20]. In this case, because the jury was not told that Williams was an accomplice, the jury did not have to find corroboration ***or*** view his testimony with caution.

Because some form of prophylactic measure is universally required for accomplice testimony, the failure to instruct the jury in this case that Williams was an accomplice as a matter of law "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The failure to inform the jury that Williams was an accomplice as a matter of law therefore violated due process.

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[20] In fact, the universally recognized need to question accomplice testimony extends beyond American jurisprudence. (See Peiris, Corroboration In Judicial Proceedings: English, South African And Sri Lankan Law on The Testimony of Accomplices, 30 INT'L. & COMP. L. Q. 682 (1981.))

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

This error also deprived appellant of a jury determination of his guilt or innocence, as guaranteed by the Sixth Amendment to the Constitution, because the jury was not properly instructed to make the factual determinations necessary for a conviction. (*In re Winship*, *supra*, 397 U.S. 358.)

2. Prejudice

It is well established that an error in an instruction will require a reversal when the jury is misdirected or misled upon an issue vital to the defense and the evidence "does not point unerringly to the guilt of the person accused." (*People v. Rogers* (1943) 22 Cal.2d 787, 807.)

In this case, because Williams's testimony was central to the prosecution's case, it was essential that the jury be correctly instructed as to his status. Whether Williams was an accomplice determined whether the jury would follow the corroboration requirement and whether it would treat Williams's testimony with the skepticism required by CALJIC No. 3.18.

As the trial court acknowledged, the case against appellant was "very close," and there was no evidence to corroborate Williams's testimony. (*ante*, at p. 48).

Indeed, the lack of evidence connecting appellant to the murders is striking.

> "The absence of evidence, like Sherlock Holmes' curious incident of the dog in the nighttime which did not bark, may have as great an impact on the substantiality of a case as any which is produced, for the absence of evidence which would normally be forthcoming can undermine the solidity of the proof relied on to support a finding of guilt." *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839, citing *People* v. *Hall* (1964) 62 Cal.2d 104, 111, referring to (2 Doyle, *Silver Blaze*, in *The Annotated Sherlock Holmes* (Baring-Gould ed. 1967) pp. 277, 280.)

What evidence would normally be forthcoming that is lacking from this case?

It is true that appellant is related to Bryant by marriage. This may explain a certain level of contact between them. However, appellant's name is largely absent from the evidence concerning the Bryant family business.

For example, Detective Lambert prepared chart of Bryant organization. Although he placed most of the players in the organization, he did not include appellant in this group. (RT 2430.) Similarly, Detective Dumelle identified an impressive number of people associated with the Bryant family. Appellant's name was not among them. (RT 9635-9636, 9663, 9703-9704, 9952-9953, 9949.)

The evidence regarding appellant's purported role in the Bryant family organization paled in comparison to the evidence concerning other people, some charged, some not charged, some originally charged as capital defendants, some granted immunity.

Walton, one of the drug dealers for the family, recognized appellant, but did not know anything else about him, and never saw him with the other people involved in this case. (RT 10705-10709.)

Walton was present at a meeting at the pool hall to discuss changes in the manner of operations. (RT 10689-10690.) Appellant was in the pool hall at the time, but Walton was uncertain if appellant was involved in the meeting. (RT 10690, 10709-10710.) While all those participating in the meeting initialed the ninety-minute schedule, appellant's name is not on the schedule. (RT 8694, 10690, 12248.) This creates a strong inference that appellant was not involved in the meeting, lessening further his involvement with the organization.

Similarly, appellant's phone number is not on the beeper list found on the kitchen wall of Wheeler Avenue, a list which contained many of the other participants in the organization. (RT 8696, Item 30 of Exhibit 39.) A photo album recovered from Wheeler contained pictures of many of the employees of the Bryant family. (RT 12008-12011.) Appellant's picture was not in the album.

Other than Williams, none of the witnesses tied appellant to the Bryant drug business; none of the slew of witnesses who testified about the organization had seen appellant at any of the drug houses.

Ladell Player and Reynard Tillman were shown hundreds of pictures of people, many of whom (including Bryant, Wheeler, Settle, Nash, Johnson, A. Settle, and Tannis) they were able to identify by name and the person's role in organization. (RT 10341-10342, 10373-10374.) In contrast, they did not know appellant and were not able to place appellant as a member of the organization. (RT 10353, 10376-10377, 15813-15814.)

Appellant's name is not on the trail of deeds or bills related to any of the properties associated with the Bryant business. Appellant was not arrested or ever seen in any of the "uniquely Bryant" crack houses.

The lack of evidence concerning the crime itself is similarly deafening in its silence. Although, according to Williams, appellant arrived at Wheeler Avenue separately from the others. (RT 12294), no one saw him arrive. No one identified him leaving. The prosecution's theory was that appellant left the scene in the car containing the bodies of Armstrong and Brown. What happened to the car in which appellant allegedly arrived is not known.

Although Williams testified that appellant had been in the Wheeler Avenue residence before, nothing in the house could be traced to appellant. There was no physical evidence connecting appellant to the scene, such as fingerprint evidence, documents, or other real evidence. No traces or objects from the crime scene were ever linked to appellant.

No weapons connected with Wheeler Avenue were traced to appellant -- unlike Bryant[21].

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[21] An expended .45-caliber casing was found in the garbage can in the kitchen at Wheeler Avenue. (RT 8624.) Ballistics indicated that it was fired from People's Exhibit No. 152. (RT 13166-13172.) Greer identified that gun as a gun that he brought to Los Angeles from Brown to give to Bryant. (RT 11590-11592.)

Thus, as Judge Horan recognized, the prosecution's case against appellant depended almost entirely on Williams's testimony. Judge Horan believed the jury would have to acquit if it found Williams to be an accomplice. (RT 14457-14458.) Because Williams's accomplice status was a dispositive issue in the case, the failure to instruct that Williams was an accomplice as a matter of law was highly prejudicial.

Moreover, the prosecutor exploited the trial court's error by arguing to the jury in closing that in order for Williams to be an accomplice he had to be guilty of the same crimes as the defendants. (RT 16505.) For the reasons explained above (*ante*, at p. 52-53) this was an incorrect statement of the law.

A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. (*People v. Talle* (1952) 111 Cal.App.2d 650111 Cal.App.2d at p. 677.) Thus, when a prosecutor exploits errors from trial during closing argument, the error is far more likely to be prejudicial to the defendant. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Brady* (1987) 190 Cal.App.3d 124, 138; *People v. Hannon* (1977) 19 Cal.3d 588, 603; *Garceau v. Woodford* (9th Cir. 2001) 275 F3d 769, 777.)

The jury deliberated 19 days before reaching a verdict on appellant's case[22], and requested a readback of Williams's testimony – both further indications of how close the case against appellant was and how vital Williams's testimony was. (*See People v. Williams* (1971) 22 Cal.App.3d 38-40; *People v. Marcus* (1978) 82 Cal.App.3d 477, 480).

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[22] (RT 162875, 162877, 162880, 162883-16892 16940-16944, RT 16960-1, 16960-3, 16960-5, 16961, 162996-16992, 17008-1, 17008-3, 17008-5, 17028, 17033, 17035, 17036-7, 17038, 17040-17047.)

The importance of Williams's accomplice status was underscored, as discussed further in Section I-C, *infra*, by the jury's questions, after convicting appellant but still deliberating as to Settle, which show that it did not understand the instructions defining "accomplice." Jury questions during deliberations, relating to crucial issues in the case, are compelling indicia of prejudice. (*People v. Markus* (1978) 82 Cal.App.3d 477, 482.) The jury in this case asked specifically about the effect of the prosecution dropping charges against a witness originally charged with the same crime as the defendant, and whether lack of corroboration constituted reasonable doubt. (RT 17105H, 17105N, CT 15440-41.) The trial court acknowledged that the jury's questions appeared to relate to Williams. (RT 17195K.) After the trial court correctly answered that whether a person was an accomplice depended on the facts surrounding the crime, not the charging decisions of the District Attorney (RT 17105H), the jury was unable to convict Settle and hung. The jury was ignorant of these principles when deliberating as to appellant.

Furthermore, even if this Court does not agree that Williams is an accomplice, it cannot be denied that the reasons that make accomplice testimony suspect apply to Williams. A confirmed criminal, present and engaging in nefarious conduct at the scene of quadruple homicide, in the illegal employ of the ring-leader who orchestrated the murders, working his way up the cartel's ladder, with a motive to minimize his role and implicate others, and receiving immunity from capital charges in exchange for his testimony, Williams is not a pillar of veracity.

The net result is the testimony of Williams is highly suspect, even if he is not an accomplice, and any evaluation of the strength of the case must be made with the recognition that regardless of Williams's actual legal status, all the reasons that apply to making accomplice testimony suspect apply to Williams.

The failure of the trial court to instruct the jury that Williams was an accomplice as a matter of law was therefore prejudicial error, depriving appellant of

the right to a reliable jury determination of the issues and the right to due process of law. The conviction and sentence entered below must be reversed.

C. THE TRIAL COURT ERRED IN REFUSING TO REOPEN JURY DELIBERATIONS, PURSUANT TO SECTION 1161, WHEN, AFTER THE JURY RETURNED A VERDICT AGAINST APPELLANT, BUT WHILE THE JURY WAS DELIBERATING AS TO SETTLE, THE JURY HAD QUESTIONS ABOUT ACCOMPLICE STATUS AND REASONABLE DOUBT.

The trial court erred in refusing to reopen jury deliberations when the jury's questions, after it had convicted appellant but was still deliberating as to Settle, demonstrated that the jurors had not understood the court's instructions defining "accomplice," an issue that the court acknowledged was pivotal to a determination of appellant's guilt or innocence.

1. The Jury Questions and Hearing Below

After verdicts were returned as to appellant, while the jury was deliberating as to Settle, the jury sent several notes to the court. The first note asked, "If somebody is charged with a crime but not brought to trial, is he automatically an accomplice in that crime?" (RT 17105H, CT 15440.)

In the same note, the jury asked, "Can there be aiding and abetting after the crime was committed?" (CT 15440.)

The same day the jury sent a note stating:

> "I. Page 56 of the instruction states 'A defendant cannot be guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence. Doesn't this constitute reasonable doubt if there is no corroboration of same in your mind?
> II. "If you have reasonable doubt, you are required to vote not guilty. Is that the law?" (CT 15441, RT 17105N.)

The defense requested that the deliberations as to appellant be reopened because the jury misunderstood the law on the issue most critical to appellant's defense. (RT 17105E.)

Discussing the jury's questions, the court stated that it thought that a person would be an accomplice based on the facts that existed surrounding the crime, not

by what happens later, and that a person shown to be a principle is an accomplice whether or not he was charged. The court also opined that the District Attorney could not control who is an accomplice through the charging process. (RT 17105H.)

The court suggested that the jury appeared to be trying to determine if Williams was an accomplice. (RT 17105K.)

As to the question of whether one could aid and abet an offense after the crime occurred, the court noted that there were possibilities where this could occur if someone agreed to the act before the crime, in order to facilitate the crime. (RT 17105I -17105J.)

The court stated that it could ask the jury if this was what it was trying to determine, and thereafter would be able to answer the question giving the jury the specific guidance that it needed. The prosecution was opposed to this idea, while appellant's counsel stated that the defense favored that inquiry. (RT 17105K.)

Subsequently, the court answered the jury's questions as follows:

To the question whether a person had to be charged in order to be an accomplice, the court informed the jury that the fact that a person is not brought to trial does not mean that person is not an accomplice, and that a person is an accomplice based on his actions, not whether he is tried. (RT 17105S.)

To the question whether a person can be an accomplice based on actions after the crime, the court informed the jury that if the person agreed to commit those acts before the crime, intending to facilitate the crime, the person would be an accomplice. (RT 17105S-17105U.)

To the question regarding reasonable doubt, the court repeated the reasonable doubt instructions given earlier, informing the jury that reasonable doubt is not doubt based on speculation, bias, emotion, or other factors. (RT 17105W.)

To the question whether a reasonable doubt required corroboration, the court stated that this was a rule of law, not relating to reasonable doubt. In this

regard, the court explained that if the jury thought a witness was an accomplice, and believed that accomplice beyond a reasonable doubt, the rule of law precluded a conviction. (RT 17105X.)

The court answered in the affirmative the question whether a juror had to vote not guilty if that juror had a reasonable doubt. (RT 17105Y.)

After the court answered these and other questions from the jury, appellant's attorney again asked that the deliberations be reopened as to appellant, as it was "painfully clear" that the jury had not understood the law regarding accomplice testimony, which had been appellant's sole defense. (RT 17105BB-17105CC.)

The court denied the request stating that it seemed that one juror was having problems with the issue of corroboration, on the assumption that Williams was an accomplice. (RT 17105CC)

2. The Relevant Law and Its Application to the Case

Section 1161 provides, in pertinent part "When there is a verdict of conviction, in which it appears to the Court that the jury have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict..."

The language of the statute makes its purpose clear: If after a verdict it becomes likely that the jury may have been mistaken in its understanding of the law, the case should be re-opened.

Section 1161 is more than a minor statutory provision. When the language of a jury's request for guidance demonstrates that the jurors are confused about the law due process requires the court to clarify that law for the jury. (*McDowell v. Calderon, supra*, 130 F.3d 833, 837.)

The statute reflects the fact that in dealing with complex issues of law a lay jury may become confused or misapprehend the law. A defendant's fate, especially in a capital case, should not be set in stone once a verdict is read, when

it becomes clear, before the jury is discharged, that the verdict was likely based on a misunderstanding of the law.

The significance of the questions posed by the jury cannot be overstated in this case. As discussed above, the central issue in appellant's case was whether Williams was an accomplice for purposes of the corroboration requirement and cautionary instruction. Judge Horan believed that if Williams was treated as an accomplice, there was not sufficient evidence to sustain a conviction.

The jury's question shows they did not understand the very concepts on which a determination of appellant's guilt or innocence depended. Indeed, when the law was explained correctly, the jury was unable to convict Settle whose guilt or innocence was similarly highly dependent on Williams's testimony.

When deliberating appellant's fate, the jurors did not even understand that "If you have reasonable doubt, you are required to vote not guilty." (CT 15441, RT 17105N.)

They did not know whether the fact that the prosecution had dropped charges against a person precluded him from being an accomplice and thus eliminated the need for corroboration. The court answered correctly that the prosecutor's decision whether to try a person does not influence whether that person was an accomplice. When informed of the proper principles of law, the jury was not able to convict.

If the proceedings had been reopened as to appellant, after this important clarification of the law, the jury would likely have concluded – as at least one juror apparently did with respect to Settle -- that Williams was an accomplice and there was not sufficient corroboration of his testimony.

Finally, the jury did not understand whether acts performed after the shooting can make one an accomplice. This was a critical issue with respect to Williams.

While deliberating as to appellant, the jury was apparently under the misapprehension that Williams was not an accomplice because when he moved

the car and served as a lookout after the shooting, the crime was "over" – the shots had been fired. Believing that Williams was not an accomplice because he did not help the others until the crime was complete, these jurors could have voted to convict appellant based on Williams's testimony alone, even if they believed his testimony was not corroborated.

As Judge Horan explained ***after*** appellant was convicted, a person who agreed before the crime to facilitate its commission by assisting after the fact *would* be an accomplice. This issue was crucial because Williams admitted he knew *something* was going to happen, that people were going to be killed (RT 12321-12322); and that Bryant gave Williams instructions on how to help with the crime after the shooting – move the car, see if anyone is watching. Following the court's correct instruction, at least one juror apparently concluded that Williams was an accomplice and, finding no corroboration of his testimony, voted to acquit Settle.

Each of the jury's questions reveals a misunderstanding of the law that was potentially dispositive of the case. If the trial court had properly granted appellant's motion to reopen deliberations, thereby ensuring that the jury was applying the correct law, appellant could well have been acquitted.

It is important to note that the trail court's reasoning at the time that it denied the motion was not rational. In particular, Judge Horan denied the request to re-open deliberations, stating that it seemed that one juror was having problems with the issue of corroboration, on the assumption that Williams was an accomplice. (RT 17105CC)

This was not what the jury was asking. The jury questions did not have to do with the level of corroboration if Williams was an accomplice. Rather, the questions were directed to determining whether someone was an accomplice. This is clear from the question about whether the decision to try a person was relevant to the determination of whether he was an accomplice.

Likewise, the question as to whether acts performed after the crime could make a person an accomplice is more relevant to the determination of accomplice status, rather than the question of whether there was corroboration.

In fact, this reasoning of the trial court is in conflict with the court's earlier statement that it believed the jury appeared to be trying to determine if Williams was an accomplice. (RT 17105K.)

It was *only after the request for re-opening deliberations had been argued* that Judge Horan changed his view as to the purpose behind the jury's questions, adopting a view that would make the questions relevant to corroboration, as opposed to the determination of accomplice testimony.

Misleading or ambiguous instructions violate due process where there is a reasonable likelihood that the jurors misunderstood the applicable law. (*Boyde v. California* (1990) 494 U.S. 370, 381-381.) In this case, the jurors' questions demonstrate a more than reasonable likelihood that the jury did not understand the law as had originally been explained to them in the instructions they had received.

As noted above, the presumption of innocence and the Due Process Clause require that the People prove every element of the crime charged beyond a reasonable doubt. (*Ante*, at p. 45.) Here, the jury's question shows they did not understand the correct application of the reasonable doubt standard. The failure to properly instruct the jury also deprived appellant of a jury determination of his guilt or innocence in violation of the Sixth Amendment right to a jury trial. (*ante*, at p. 45.) Similarly, the jury's patent confusion concerning several instructions crucial to the outcome of the case undermines the reliability required for death verdicts, contrary to the Eighth and Fourteenth Amendments. (*Ante*, at p. 51.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Finally, as noted above (*ante*, at p. 51-52), depriving appellant of the protections afforded under the principles discussed above is itself is a deprivation of due process, because a misapplication of state law leads to a deprivation of a lib-

erty interest, in violation of the Due Process Clause, when that right is of "real substance."

Because appellant had a compelling interest in having the jury deliberate with a clear and accurate understanding of the law applicable to crucial issues in the case, the court's refusal to re-open deliberations under section 1161 deprived appellant of a state right of real substance, thereby violating appellant's right to due process of law.

The judgment entered below therefore must be reversed.

D. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT AN AIDER AND ABETTOR MAY BE A PRINCIPAL IN THE OFFENSE IF THAT PERSON IS "EQUALLY GUILTY."

The trial court erred in instructing the jury that an aider and abettor may be a principal in the offense if that person is "equally guilty." This instruction had the effect of removing the issue of Williams's status as a principal in the offense from the jury's consideration, thereby depriving appellant of the rights to a trial by jury and to due process of law by lessening the degree of proof required to convict appellant.

1. The Instructions Given and the Problem Created

In this case, the jury was told that an accomplice is someone "who is subject to prosecution for the identical offense charged against the defendant...by reason of aiding and abetting." (CALJIC NO. 3.10, given at CT 15510.) The jury was also told that persons who are regarded as principals and "equally guilty" include those who aid and abet. (CALJIC No. 3.00, given at CT 15507.)

Taken together, these instructions could have led the jury to believe that Williams had to be "equally guilty" to be an accomplice. This misstates the law because someone could be charged with the same offense, but ultimately not found guilty and still be an accomplice.

Likewise, someone could aid and abet an offense, and therefore be a principal, but be guilty of a *lesser* offense, i.e., not *equally* guilty. It is true that section 1111 defines an accomplice as someone "liable to prosecution for the *identical* offense." But this is not the same as "equally guilty". "Guilt" is different from "liable to prosecution," and the standards that determine those two concepts, as well as the parties that make those two determinations, are different.

For example, someone may be "guilty" of the crime, in that he actually committed the offense, and yet not prosecuted because the District Attorney determined that there was not enough legally admissible evidence to pursue the

case. Al Capone and others figures from history were clearly guilty, but not "liable to prosecution" due to a lack of admissible evidence.

Conversely, someone may be "liable to prosecution" because there is sufficient admissible evidence to believe he committed the offense, i.e. probable cause, and he may be tried and acquitted. He would not be "equally guilty," although he would be an accomplice under section 1111. (*Ante*, at p. 53.)

Likewise, for any number of reasons, the District Attorney may decide to accept a plea to a lesser offense, thereby rendering the other defendant "guilty" of a lesser crime. In fact, this is precisely what happened to Settle who was allowed to plead to manslaughter after the jury was unable to reach a verdict as to his guilt. Thus, in the end, Settle was "guilty" of a lesser crime, but he was "liable to prosecution" for the identical offenses as appellant, Bryant, and Wheeler, having sat at the same defense table with them for six years.

Because someone can be "liable to prosecution" for, but not "equally guilty" of, the relevant offense, the instruction incorrectly told the jury how to determine accomplice status.

2. The Relevant Law

It appears that the only case to deal with this issue has been *People v. Woods* (1992) 8 Cal.App.4th 1570. In that case, the Court of Appeal explained that because an accomplice may be convicted of a lesser offense than the perpetrator based on the natural and probable consequences doctrine, the "equally guilty" language of CALJIC 3.00 is misleading and inaccurate.

In *Woods*, the court explained that under section 31 an aider and abettor is liable vicariously for any crime committed by the perpetrator that is a reasonably foreseeable consequence of the criminal act originally contemplated by the perpetrator and the aider and abettor. As a result, an aider and abettor could be guilty of a lesser crime than the crime that the perpetrator eventually committed.

This would occur if the ultimate crime committed was not a reasonably foreseeable consequence of the act aided and abetted. (*Id.*, at p. 1577.)

In this case, the jury could have found that Williams was aiding and abetting in the narcotics organization. Even if they did not find first degree murder to be a reasonably foreseeable consequence of the sale of cocaine, a jury could still conclude that Williams was a principal to second degree murder for engaging in an act inherently dangerous to human life. (*Ante*, at p. 54.) Williams would therefore be a principal in the offense for which appellant was convicted, and yet not "equally guilty" of all offenses.

The fact that appellant did not object to this instruction below does not preclude him from raising this issue at this time. Under section 1259, an appellate court may review "any instruction given...even though no objection was made...if the substantial rights of the defendant were affected thereby." (*People v. Carpenter* (1997) 15 Cal.4th 312, 380-381; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1291.)

Furthermore, as noted above (*ante*, at p. 71-72), a trial court must correctly instruct the jury on general principles of law relevant to the issues raised by the evidence, even though not requested to do so.

In this case, those principles include correctly instructing the jury on all aspects of accomplice and principal liability. This is especially important on the issues having any type of relationship to the status of Williams, the prosecution's star witness.

Because the trial court incorrectly narrowed the definition of accomplice, the jury may have determined that Williams was *not* an accomplice because he was not "equally" guilty, in either a legal or moral sense. The jury could then have convicted appellant because it believed that Williams's testimony did not need to be corroborated.

However, had the jury been correctly instructed it would likely have reached a different conclusion, deciding that Williams was an accomplice and

concluding, as Judge Horan did, that there was no other evidence connecting appellant to these crimes, so that he must be acquitted.

This error had the effect of improperly lessening the prosecution's burden of proof. Because accomplice testimony requires a greater level of proof, to exclude Williams from that category, thereby eliminating the need for corroboration, lowered the standard required for conviction and allowed appellant to be convicted solely on Williams's testimony.

"An error in instruction which significantly misstates the requirement that proof of guilt be beyond a reasonable doubt 'compels reversal unless the reviewing court is 'able to declare a belief that it was harmless beyond a reasonable doubt.' " (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472 quoting *Chapman v. California* (1967) 386 U.S. 18, 24.)

The error in this case cannot be deemed harmless beyond a reasonable doubt because, as Judge Horan recognized, whether Williams was found to be an accomplice likely determined whether appellant was convicted or acquitted.

Because this instruction misstates the principles of law to be applied to an issue that was dispositive of appellant's guilt or innocence, the reliability of the ultimate determination of guilt was also undermined, in violation of the Eighth and Fourteenth Amendments. (*Ante*, at p. 51.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Finally, as noted above (*ante*, at p. 51), depriving appellant of the protections afforded under the principles discussed above is itself is a deprivation of due process of law, because a misapplication of a state law on this crucial issue violated a right of "real substance" and therefore deprived appellant of due process of law.

The judgment of conviction entered below must accordingly be reversed.

E. THE COURT ERRED IN TELLING THE JURY THAT IT COULD CONVICT APPELLANT IF THERE WAS SLIGHT EVIDENCE TO CORROBORATE ACCOMPLICE TESTIMONY

The trial court erred in telling the jury that the evidence needed to corroborate accomplice testimony "is sufficient...even though it is slight and entitled, when standing alone, to little consideration." (CT 15514.) This is because this instruction allowed the jury to convict on a standard lower than the beyond a reasonable doubt standard required for criminal convictions.

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. 358, 364.)

In *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, the court instructed that once a conspiracy was proved, the government need only introduce "slight evidence" of a particular defendant's involvement. Although the instruction given also stated that the prosecution still had to establish beyond a reasonable doubt that each member had the requisite intent to join the conspiracy and that mere association was insufficient, the Court of Appeal held that the instruction was reversible error as it could "only be seen as suffocating" the reasonable doubt requirement. (*Id.* at p. 500.)

Likewise, in *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, the court reversed a conviction where the court gave a "slight corroboration" instruction similar to the one in *Gray*. The court stated that the "slight evidence" language

> "should not be used in the charge to a jury....Despite the lack of provable prejudice to defendant's case because of other instructions giving the reasonable doubt standard, however, the erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt." (*Id.* At pp. 1255-1256; see *United States v. Partin* (5th Cir. 1976) 525 F.2d 1254.)

Not even an instruction telling the jury that "substantial evidence" of corroboration is required passes constitutional muster. As explained in *United States v. Durrive* (7th Cir. 1990) 902 F.2d 1221, 1229, fn. 6:

> "It would be improper for a district court to charge a jury that only substantial evidence is needed to connect a person with a conspiracy. Such an action would only confuse the jury and would likely undermine the fundamental requirement of proof of guilt beyond a reasonable doubt for all elements of a crime...[W]e...admonish district courts against giving any instructions that could dilute the government's burden."

Applying these principles to this case, the issue is whether the language "slight and entitled to little consideration" violates appellant's rights to due process, a fair trial, a jury trial, and fundamental fairness under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and similar provisions of the California Constitution.

This Court is bound by the holdings of the Supreme Court in *Winship* that due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. As explained in *People v. Monge* (1997) 16 Cal.4th 826, at 844 "cogent reasons must exist before we will construe the Constitutions differently" and "depart from the construction placed by the Supreme Court of the United States." (*Id.*, at p. 844, quoting *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353, internal quotations omitted.)

Although the decisions of lower federal courts are not "binding" on this court, they do "provide persuasive...authority." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292.)

Pursuant to the above-referenced federal authorities, it was error of constitutional magnitude for the trial court in the instant case to instruct the jury that the evidence required to corroborate accomplice testimony need only be "slight, and entitled, when standing alone to little consideration," because this impermissibly

relieved the prosecution of its duty to prove appellant's guilt "beyond a reasonable doubt." Therefore, reversal is required per se, without a showing of prejudice. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282.)

Even if, a showing of prejudice were required, it would be met in this case. As the trial judge correctly acknowledged (*ante*, at p. 48), there was virtually no evidence, other than Williams's testimony, linking appellant to the crime. Thus, if the jury had been properly instructed, they might well have failed to convict.

Furthermore, given the sound reasons for treating accomplice testimony with great caution, allowing the jury to convict with only "slight" corroborative evidence defeats the Eighth Amendment requirement of heightened reliability in capital cases. (*Ante*, at p. 51.) Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 643; *Darden v. Wainwright*, *supra*, 477 U.S. 168, 181-182.)

Finally, as discussed above (*ante*, at p. 51-52), depriving appellant of the protections afforded under the principles discussed above is a misapplication of state law that constitutes a violation of a right of "real substance," and is thus a deprivation of a liberty interest protected by the Due Process Clause.

As noted, the most crucial question in this case, if the jury found Williams to be an accomplice, was whether his testimony was sufficiently corroborated. Having the jury correctly instructed as to the nature of the needed corroboration was therefore crucial to appellant's case and must be regarded as a matter of "real substance."

For the foregoing reasons, the judgment of conviction entered below must be reversed.

F. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE TANNIS CURRY FROM THE INSTRUCTION GIVEN TO THE JURY CONTAINED IN CALJIC NO. 2.11.5

1. The Factual Basis for Including Tannis from CALJIC No. 2.11.5

The trial court erred in failing to exclude Tannis Curry from the instruction contained in CALJIC No. 2.11.5.

CALJIC No. 2.11.5:

> "There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial.
>
> "There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendants on trial."

This instruction was given to the jury, along with a modification added to the end, "The second paragraph of this instruction does not apply to the testimony or prior statements of James Williams." (CT 15477; RT 16387-16388.) However, Tannis was not mentioned in instruction or the modification.

Like Williams, Tannis should have been excluded from the instruction. It cannot be doubted that she "may have been involved in the crime" for which appellant was being tried and may have even been an accomplice as a matter of law.

It appeared that she was a lure for Armstrong. It was planned that Tannis would go with Armstrong and Hull to the fatal meeting with Bryant. Apparently, Tannis was the only one in the Armstrong camp to be armed. At the last minute, for some unexplained reason, Tannis did not follow Armstrong and the others, as had been planned. (RT 11631-11634.)

As a possible lure, Tannis served the same role which the prosecution argued that appellant played. (RT 16493, 16551.)

Furthermore, Tannis, originally charged as a capital defendant, received immunity in exchange for her testifying. Therefore, Tannis comes within the

definition of an accomplice as someone who is properly liable to prosecution. (*Ante*, at p. 52.)

Indeed, even if Tannis was not an accomplice, she should have been excluded from this instruction because people who should be excluded from the instruction is wider than "accomplices," covering anyone who "may have been involved."

The purpose of the CALJIC No. 2.11.5 is to discourage the jury from irrelevant speculation about the reasons for not prosecuting all those who might have participated in the offenses. (*People v. Cain* (1995) 10 Cal.4th 1, 35; *People v. Cox* (1991) 53 Cal.3d 618, 668.)

In *People v. Sully* (1991) 53 Cal.3d 1195 this Court recognized that this instruction must be clarified when an accomplice testifies. Thus, CALJIC No. 2.11.5 should not be given when a non-prosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility. (*People v. Williams* (1997) 16 Cal.4th 153, 226; *People v. Rankin* (1992) 9 Cal.App.4th 430, 437; *People v. Hardy*, *supra*, 2 Cal.4th 86, 189.)

This is particularly important when the unjoined perpetrator has been given immunity, where the witness's motive to testify and interest may be the reason why he is not being prosecuted. Unless CALJIC No. 2.11.5 is modified to inform the jury that the instruction does not apply to a witness who has received a benefit, the instruction prevents the jury from properly considering factors which bear on that witness's credibility.

As explained above, extrajudicial statements of accomplices may not be used to corroborate accomplice testimony. (*Ante*, at p. 64.)

Apart from the suspect testimony of Williams, the most important part of the prosecution's case against appellant is the evidence of the Curry shooting, evidence which makes appellant a heavy for Bryant. Tannis's extrajudicial statements proved Bryant's motive to kill Curry, a fact which the trial court believed was an essential "underpinning" in the case against appellant. (*Infra*, at p. 133.)

Tannis's credibility is crucial to the prosecution, and the jury must properly instructed as to how to evaluate her testimony. Excluding her from this instruction has the effect of telling the jury that they cannot consider the fact of her immunity, which was a proper factor for their consideration.

As noted above (*ante*, at p. 73), a trial court must instruct the jury on the correct principles of law raised by the evidence, and errors in instructions may be raised on appeal without an objection by trial counsel. (*People v. Carpenter*, *supra*, 15 Cal.4th 312, 380-381; *People v. Fitzpatrick*, *supra*, 2 Cal.App.4th 1285, 1291; *People v. Godwin* (1995) 31 Cal.App.4th 1112, 1116.)

Therefore, the fact that the defense did not object to excluding Tannis from this instruction does not preclude appellant from raising this issue in this appeal.

This question could have serious implications on the credibility of the witness and therefore the reliability of the ultimate determination of guilt. Therefore, this error lessened the reliability of the outcome of the trial by increasing the possibility that the jury may improperly not consider the impact of immunity on Tannis. This would violate the reliability requirements mandated under Eighth and Fourteenth Amendments. (*Ante*, at p. 51.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637, 643; *Darden v. Wainwright*, *supra*, 477 U.S. 168, 181-182.)

Finally, because a misapplication of a state law leads to a deprivation of a liberty interest, a violation of the Due Process Clause when that right is of "real substance" (*Ante*, at p. 51-52), depriving appellant of the protections afforded under the principles discussed above is itself is a deprivation of due process of law.

Correct jury instructions as to how prosecution witnesses' testimony is to be viewed are surely a matter of "real substance," particularly in a case such as this where anything that may affect the determination of accomplice status is cru-

cial to the case, as Judge Horan believed this evidence was. Therefore, this error had the effect of depriving appellant of due process of law.

From the foregoing it is clear that the court erred in not including Tannis in the final paragraph of CALJIC No. 2.11.5.

2. Prejudice

The failure to correctly modify CALJIC No. 2.11.5 must be viewed as prejudicial.

It is particularly important that the jury be meticulously instructed on all principles relating to credibility issues when it comes to Tannis for the following reasons:

First, whether or not he was an accomplice, the jury may have qualms about sending someone to death on the word of a character like Williams. Therefore, a finding that appellant was the "hit man" for the family would go a long way in convincing them of appellant's guilt[23].

However, as will be shown, the crucial logical underpinning of this evidence, in the eyes of the trial court, was evidence originating from Tannis. (*Infra*, at p. 133.) Her status and credibility are therefore crucial to the case.

If the jury is not properly instructed on how to deal with her testimony, if the jury improperly speculates as to why she was not being tried, the case against appellant undergoes a radical transformation.

As noted previously, this was a very close case, with the court commenting on the weakness of the evidence. The lack of evidence against appellant as detailed above weighs heavily in finding that errors in instructions will be prejudicial.

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[23] As will be explained below in Section IV, the admission of the evidence of the Curry shooting was an error in its own right.

Because this error allowed the jury to evaluate Tannis's testimony without considering the fact that she was given immunity, it had the effect of lessening the State's obligation to prove appellant guilty beyond a reasonable doubt.

As previously noted (*ante*, at p. 91), an error in instruction which significantly misstates the requirement of proof of guilt by beyond a reasonable doubt "compels reversal unless the reviewing court is 'able to declare a belief that it was harmless beyond a reasonable doubt."

Because of the closeness of this case and the importance of Tannis's testimony, it is not possible to reach such a conclusion.

3. Summary

From the foregoing, the trial court erred in failing to exclude Tannis Curry from the instruction given to the jury contained in CALJIC No. 2.11.5. The failure to correctly instruct the jury in this area constitute prejudicial error, mandating a reversal of the judgment of conviction entered below.

II

THE DENIAL OF A DEFENSE MOTION TO SEVER APPELLANT'S CASE FROM THAT OF JON SETTLE DENIED APPELLANT THE RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW, THE RIGHT TO COUNSEL, AND THE RIGHT TO A RELIABLE DETERMINATION OF A CAPITAL CASE, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introductory Statement[24]

After Jon Settle exercised his right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, the defense made several motions for a severance. (CT 13756; RT 6071-6088, 6129, 6144.) The denial of those motions deprived appellant of a fair trial, due process of law, the right to counsel, and the right to a reliable capital sentencing determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution.

As will be shown, when the request for a severance was made, the defense predicted that Settle would not abide by rules which govern the conduct of attorneys. The court stated it could and would prevent Settle from any engaging in any misconduct.

Thereafter, Settle engaged in a series of actions that would have been regarded as misconduct, had they been done by an attorney. Nonetheless, when this occurred, the court failed to admonish him or attempt to alleviate any potential prejudice to appellant, for fear of infringing on Settle's rights.

As a result, the failure to sever Settle's case had the effect of denying appellant the fundamental constitutional rights listed above.

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[24] This section only discusses those severance issues related to the fact that Settle elected to represent himself. Had Settle not represented himself, there still would have been the need to sever appellant's case. Other severance issues related to Settle are discussed below in the section dealing with the error in not severing appellant's case from that of the Bryant and Wheeler.

B. The Severance Motions and Hearings, Below

After Settle exercised his right to represent himself, Mr. Jones, counsel for Bryant, made a motion to sever Settle's case. (RT 6129.) Recognizing that Settle had the right "to go to hell in a hand basket while singing 'I did it my way,'" [25] Mr. Jones expressed concern that Settle, as a pro per, was going to take Bryant to Hades in the same basket. (RT 6135-6137.)

The court stated that Settle's defense was he was not at the scene of the murder, a fact which Settle confirmed. (RT 6140-6141.) Settle indicated that his defense would be "extremely antagonistic" to the other defendants, and that it might affect their right to a fair trial, because he intended to "assign the proper responsibility to the respective defendants." (RT 6143-6144.)

Mr. Novotney joined the severance motion. (RT 6144.) .

Deputy District Attorney McCormick stated that the suggestion Settle would create an inconsistent defense was not well founded, because it is something that could not be known until later. Therefore, the court could not get past the first prong of the antagonistic defense standard, because there was no showing of that factor. (RT 6145-6146.)

Mr. Gregory, appellant's second counsel, pointed out that attorneys are under ethical guidelines and subject to sanctions if those guidelines are violated. In contrast, a pro per defendant in a capital case is not under that type of constraint. In a rhetorical question, Mr. Gregory asked whether the court would fine Settle if Settle violated the ethical restraints that would normally be imposed on attorneys. Because of this factor, Mr. Gregory argued there was a serious danger to the fair trial of the other defendants. (RT 6147-6148.)

The court denied the motion, citing the role of joint trials, judicial efficiency, and the burden on the prosecution and witnesses of multiple proceedings. (RT 6192-6193.) The court also noted that joint trials have been viewed as serv-

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[25] Slightly misquoting *People v. Nauton* (1994) 29 Cal.App.4th 976, 981.

ing the interest of justice "by avoiding inconsistent verdicts," which is particularly important in capital cases. (RT 6193.)

As to the concerns of the defense regarding what Settle might do as pro per, the court stated that was always the danger in multiple defendant cases, and the court assumed that Settle would abide by the rules of law. (RT 6195.)

This issue was raised again, after Settle made a motion for protective custody based on his accusations that he was in danger from the other defendants. The defense had expressed concern because of the possibility that Settle might fabricate evidence if it was in his interest. Ms. Gulartie, Bryant's other attorney, explained that the defense had the right to know who made those threats. If the information was true, the defense needed to know it for trial. On the other hand, if the information was not true, the defense needed to know it because it should know if Settle would fabricate evidence. (RT 6378-6379.)

At this time, Mr. Harris, counsel for Wheeler, informed the court that he believed the court was "sadly mistaken" if the court believed it could prevent Settle from engaging in misconduct. The court informed Mr. Harris that *Mr. Harris* was sadly mistaken if he believed that the court *could not* prevent Settle from engaging in misconduct. (RT 6381.)

Mr. Harris explained that with Settle acting as his own attorney, he may make statements that could not be cross-examined, and it would not be possible to "unring" the bell. (RT 6381.) The court stated that the matter was a "simple thing," in that Settle had to comply with court's orders or he would lose his pro per status. (RT 6381.)

During the voir dire of the jury, Mr. Jones expressed concern over Settle's input in joint challenges, stating that since Settle did not appear to know what he was doing it would hinder the process for the other defendants. Mr. Jones requested that the court allow Mr. Leonard, Settle's standby counsel, to be involved in jury selection. The court stated that it would "love" to have Mr. Leonard involved, but it was not going to do have Mr. Leonard involved in a "quasi-active

role." The court noted that Settle was pro per, and the court could not bring stand-by counsel into the proceeding. (RT 6588-6589.)

From start to finish Settle engaged in misconduct, as counsel for the other defendants predicted. When this happened, for fear of prejudicing Settle's case, the court failed to admonish him or make any attempt to minimize any impact that the misconduct may have had.

Settle engaged in improper conduct from his Opening Statement on, prompting the court to admonish him for improper argument. (RT 8158, 8178.)

Later, prior to Settle beginning his Closing Argument to the jury, Mr. Novotney asked the court to "review" Settle's argument to make sure that he would not be arguing facts not in evidence. The court refused this request, saying that if Settle engaged in such conduct the court would admonish the jury. (RT 16588-16589.)

This issue was raised several other times during trial. Because some of the renewals of this motion related to specific acts of misconduct on the part of Settle, the procedural facts surrounding the renewals of this motion are discussed below in the subsections dealing with specific misconduct. (*infra*, at pp. 110-120, Argument II-D.)[26]

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[26] In addition to the specific acts of Settle complained of herein, Settle engaged in other acts of misconduct. For example, Settle engaged in various forms of gamesmanship, "futzing" around, in the words of Mr. Jones (RT 15800-15801), in his tactics and decision as to whether or not to testify.

Because these actions did not prejudice appellant, they are not raised as part of this issue. These incidents are indicative, however, of the trial court's inability to control Settle's actions.

The details of these actions of Settle are discussed in Section II of Wheeler's Opening Brief. Appellant specifically incorporates that portion of Wheeler's Opening Brief as a part of this argument.

C. The Relevant Law

Initially, it should be noted that severance motions in capital cases should receive heightened scrutiny for potential prejudice. (*People v. Keenan* (1988) 46 Cal.3d 478, 500.)

Furthermore, it is important to bear in mind the fact that a trial court judge is charged with the authority, power, and duty to control the proceedings "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Penal Code § 1044.) This includes the responsibility to guard against "any conduct calculated to obstruct justice." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 883.)

Under both the general rules relating to the severance of cases and the specific rules relating to pro per co-defendants, the trial court failed to live up to its obligations in this area.

1. General Principles of Law Relating to Severance Motions

Section 1098 provides that when two or more defendants are jointly charged with an offense, they must be tried jointly, unless the court, in its discretion, orders separate trials. In determining whether a motion to sever (or consolidate) has been properly denied, an appellate court must initially look at the facts as they were developed when the motion was heard. (*People v. Isenor* (1971) 17 Cal.App.3d 324, 334, see also *People v. Johnson* (1989) 47 Cal.3d. 1194, 1230.)

However, joinder laws must never be used to deny a criminal defendant's right a fair trial. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.) Regardless of any statutory preference for joint trials, a court retains the power to sever cases, otherwise properly joined, "in the interests of justice." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.)

Although this Court in *People v. Massie* (1967) 66 Cal.2d 899 identified several factors that should be considered in considering a severance motion, no

court has ever intimated that those factors are exclusive. (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938) Therefore, any facts which may have impinged on appellant's right to a fair trial may be considered.

Even if it is determined that under the facts as they appeared at the time, the trial court had not abused its discretion in denying separate trials, the denial of a severance may still require a reversal if the reviewing court determines that "because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; *People v. Turner* (1984) 37 Cal.3d 302, 313.)

Appellant submits that the facts known at the time that the request for a severance was made indicate that the trial court abused its discretion. Furthermore, events occurring after the motion also contributed to the denial of appellant's right to a fair trial. Therefore, a reversal of appellant's conviction is required under both standards.

2. Particular Problems Relating to Joint Trials with a Pro Per Defendant

In addition to the general rules governing the issue of severances (*infra*, Argument III-B), unique concerns are raised when one defendant opts for self-representation. These concerns are heightened in the setting of a capital trial, thereby presenting particular conflicts of competing rights and interests.

As will be shown, according to the trial court, Settle engaged in a pattern of "gamesmanship" during the trial. This may have served Settle's interest: His *Faretta* rights outweighed the State's interest in an accurate trial. But Settle's right of self-representation cannot defeat appellant's right to a fair trial.

The fact that a State's interest in judicial economy cannot be used to deny a defendant his right to a fair trial (*ante*, at p. 104), is particularly true where the cost of a second trial is mandated not by the desires of the defendant, but by the conflicting rights of the pro per.

Faretta recognizes that in most cases a defendant would be better served by having an attorney. Nevertheless, *Faretta* recognizes a right to self-representation on the premise that it is the defendant who will have to bear the consequences of his own decision. His choice may be to his detriment, but it remains his choice. (*Faretta*, at p. 834.)

Thus, Faretta holds that personal autonomy "requires that [a criminal defendant] be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open.'" (*United States v. Denno* (2nd Cir. 1965) 348 F.2d 12, 15, quoted in *Faretta*, dis. opn. p. 849.)

As the dissent in *Faretta* points out, however, the emphasis on personal autonomy ignores the principle that the State's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." (*Faretta*, dis. opn., at p. 849, quoting *Berger v. United States* (1935) 295 U.S. 78, 88.)

In a multi-defendant case in which one defendant elects to go pro per, the danger is not only that he may go to prison under his own banner, nor that justice may not be accomplished in the pro per's case. Rather, the danger is that justice will be denied to the unwilling co-defendant, led to prison under the pro per's proudly held banner.

In short, while the proverb regarding having a fool for a client has been elevated to a constitutional right (*Faretta*, dis. opn. p. 853; *People v. Nauton* (1994) 29 Cal.App.4th 976, 981), there is no right for one party to impose a fool as co-counsel for his co-defendant.

Following the principle that "the direction of a blow is less important than the wound inflicted," the law recognizes that the conduct of counsel for a co-defendant can violate a defendant's constitutional rights (see *People v. Hardy*, *supra*, 2 Cal. 4th 86, 157; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095-1096 [co-defendant reference to facts not in evidence and defendant's failure to testify at preliminary hearing requires reversal]; *People v. Jones* (1970) 10 Cal.App.3d 237, 243-244.) The same principle applies with greater force when a co-defendant

represents himself, posing an even greater danger that the defendant's constitutional rights will be violated.

Because a co-defendant's antagonistic actions may mirror those of a prosecutor, it has been held that "the analysis applicable to prosecutorial misconduct, if not a perfect template, is at least a useful guide for the review of misconduct committed by counsel for a co-defendant." (*People v. Estrada*, *supra*, 63 Cal.App.4th 1090, 1096.)

Indeed, Mr. Leonard, Settle's former attorney, referred to Settle at sentencing as the "fourth prosecutor." (CT 7085 in Vol 24 of CT 24 of 24.)

While antagonistic defenses alone do not compel a severance, they are a factor in determining whether a severance should be granted. (*People v. Turner*, *supra*, 37 Cal.3d 302, 312; *People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) This case presented more than a simple potential for antagonistic defenses.

Because Settle represented himself, and there was a clear conflict between the defendants, defense counsel could not cooperate or coordinate with Settle. For example, during jury selection, the court chided counsel for appellants for passing a note to Settle. The court stated that Settle believed he had a conflict with appellants, and it was inappropriate for defense counsel to advise him. (RT 7518-1519, 7522-7523.)

Later in the trial, Mr. Gregory explained to the court that Settle had asked Mr. Gregory for advice in the past, and Mr. Gregory had declined because he was representing appellant. (RT 15525-15526.) The court agreed, stating, "That is what I have told all counsel. It is a horrible idea from the beginning of the case to consult with Mr. Settle at all. I pointed that out." (RT 15526.)

Although there is no constitutional right to have a co-counsel with whom one's attorney may cooperate, the state should not be able to ***create*** a situation, through denial of a severance, where it is affirmatively inappropriate to consult with co-counsel.

3. Prior Cases Discussing Pro Per Co-Defendants

When a co-defendant chooses to represent himself in circumstances that threaten to violate the co-defendants' due process rights, the remedy of the represented co-defendants is not to deny another's constitutional right to self-representation, but rather to grant a severance. (*Thomas v. Superior Court* (1976) 54 Cal.App.3d 1054, 1059, fn. 6.)

As the dissent in *Thomas* noted, at p. 1061, a felony trial in which a defendant is representing himself is a veritable breeding ground for interruptions, disruptions and endless admonitions to the jury to disregard improper questions or statements by the defendant[27].

Similarly, noting that the joint trial of a pro se defendant and a represented co-defendant is "pregnant with the possibility of prejudice," the Tennessee Supreme Court in *State v. Caruthers* (Tenn. 2000) 35 S.W.3d 516, quoting *United States v. Veteto* (11th Cir. 1983) 701 F.2d 136, reversed the conviction and death sentence of a defendant who had been tried along with a pro per co-defendant. Citing several non-capital federal cases, the Tennessee Court held that, although such joint trials are not prejudicial per se, the trial court should employ "certain precautionary measures . . . to minimize the possibility of prejudice," including the appointment of standby counsel, warning the pro se defendant he will be held to the rules of law, and instructing the jury that remarks made by the defendant in his role as a lawyer are not evidence. (*Caruthers*, *supra*, at 553 citing *United States v. Veteto*, *supra*, 701 F.2d 136, 138-139). In some cases, the court recognized, "even these protective measures will not be sufficient to prevent 'the possibility of prejudice from ripening into actuality.'" (*Ibid.*)

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[27] The dissent in *Thomas* did not disagree with the fact that a pro per defendant represents a danger of denying a co-defendant a fair trial. Rather, the dissent believed that the co-defendant should not have been granted pro per status in that situation.

Thus, in *Caruthers,* the Court found that, the precautions the trial court had attempted to employ did not prevent prejudice. In particular, the court found that the conduct of the pro per defendant prejudiced the co-defendant in *Caruthers* because the pro per engaged in offensive mannerisms in front of the jury and elicited incriminating evidence from witnesses. (*Caruthers*, at p. 553-554.)

Similarly, in *United States v. Oglesby* (7th Cir. 1985) 764 F.2d 1273 the Eleventh Circuit adopted the reasoning of *Veteto* in recognizing the dangers of a co-defendant going pro per and the need for protective measures[28].

Here, as in *Caruthers*, the trial court's precautions were not sufficient to avert prejudice to the pro per's co-defendant. In this case, the trial court was afraid to enforce its own rules.

Thus, while Settle was *warned* that he would be held to the rules of law, the court failed to take any remedial action when Settle *actually engaged* in misconduct that was highly prejudicial to appellant, for fear of infringing on Settle's right to represent himself. (RT 15473, 15800-15801.) Severance was the only solution to this Catch-22.

D. Specific Acts of Misconduct by Settle

In addition to the improper argument in his opening statement (*ante*, at p. 104), Settle engaged in the following acts of misconduct, none of which the court took any action to prevent or correct.

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[28] Several other cases, while espousing similar principles have failed to find prejudice from the failure to sever the pro per's case from that of the represented defendant. (See *People v. Miller* (4th Cir. 1988) 854 F.2d 656 - no prejudice found where trial court "strictly policed" the pro per's conduct; *United States v. Sacco* (2nd Cir. 1977) 563 F.2d 522 - no prejudice because everything done by the pro per defendant was exculpatory for both defendants; *State v. Canedo-Asorga* (1995) 79 Wash.App. 518, 903 P.2d 504 - represented defendant did not contend that any ramifications of prejudice actually resulted.

1. Settle Commits Perjury

Before Settle testified, Mr. Jones, counsel for Bryant, warned that if Settle testified "all hell would break loose." (RT 15505.)

Mr. Gregory, co-counsel for appellant, expressed concern that if Settle testified in a narrative, the rules of evidence would not be followed. The court simply indicated, incorrectly, as it turned out, that those rules would be complied with. (RT 15524-15525.)

Settle testified, denying that he was ever in the Wheeler house, and denying any involvement in the offenses. (RT 15541.)

However, when Settle later entered his guilty plea, a factual basis for the plea was found, with the court stating there was a "strong likelihood that the defendant [Settle] was involved inside the house with the two male victims...." (RT 19.)

Both of these could not be true. Thus, there is a "strong likelihood" that Settle lied at trial, i.e. committed perjury.

Although "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. . . that privilege cannot be construed to include the right to commit perjury. [Citations.]" (*Harris v. New York* (1971) 401 U.S. 222, 225-226.)

If Settle had been represented by counsel, his attorney could not have knowingly assisted him in doing so. The California Rules of Professional Conduct require an attorney to "employ, for the purpose of maintaining the causes confided to the [attorney] such means only as are consistent with truth" and prohibits him from seeking "to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." (Rules Prof. Conduct, rule 5-200; see also Bus. & Prof. Code, § 6068.)

When an attorney knows that his client is going to commit perjury, counsel may call the client to testify in a narrative manner but may not rely in closing

argument on any of the defendant's false testimony. (*People v. Johnson* (1998) 62 Cal.App.4th 608 *Id.*, at pp. 620-631.)

California has adopted the narrative approach as the best means of reconciling the right of a defendant to testify, the duty of representation, and the ethical obligations of attorneys as officers of the court.[29] (*Id.*, at p. 629, citing *People v. Guzman* (1988) 45 Cal.3d 915.)

However, the narrative approach *cannot* work if the defendant, proceeding pro per, commits perjury as a witness and then argues the false facts as his own attorney.

Even if the trial judge had believed Settle was committing perjury, he could not risk impugning Settle's defense in front of the jury. A court may comment on the evidence and credibility of witnesses as necessary for the proper determination of the case. However, there is a fine line which the court should not cross beyond which it is considered misconduct by disparaging or discrediting the defense or creating an impression it is allying itself with the prosecution. (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-207.)

Thus, a court may comment on testimony, "so long as its remarks are accurate, temperate, and 'scrupulously fair.' " [Citation.] (*People v. Miller* (1999) 69 Cal.App.4th 190, 203-204.) But in doing so, the court should not express its views on the ultimate issue of guilt or otherwise "usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses." (*Idid.*)

This places the trial court in an untenable position. Unable to rely on any prophylactic measure to remedy Settle's perjury, if Judge Horan believed that Set-

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[29] Other approaches discussed in *Johnson* are not possible when the defendant is pro per. (e.g. - persuading the client not to commit perjury (*Nix v. Whiteside* (1986) 475 U.S. 157, 166), withdrawal from representation (Rules, rule 1.16(a)(1); American Bar Association's Model Code of Professional Responsibility Model Code, DR 2-110(B)(2)), and/or disclosure to the court (Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, (1994) 47 Vand. L.Rev. 339, 424-426).)

tle was committing perjury, he was also unable to comment on that fact as that would convey to the jury the fact that the court thought Settle was lying, which would necessarily imply that he believe Settle was guilty.

Thus, all mechanisms designed to combat perjury are disabled when a co-defendant represents himself.

Because the trial court was afraid to interfere with Settle's testimony, his right to testify became a "right" to commit perjury and "corrupt[ed] . . . the truth-seeking function of the trial process." (*Cf. United States v. Agurs* (1976) 427 U.S. 97, 103 [30])

The trial court also hamstrung the defense in its efforts to question certain allegations made by Settle, thereby preventing the defense from revealing possible perjury in which Settle had likely engaged.

As explained above (*ante*, at p. 102), at one point Settle requested that he and his family be given protective custody because of threats originating from the Bryant family. (CT 14252.)

The defense requested that it be allowed to question Settle about the basis of that allegation, arguing that its veracity had an impact on other rulings of the Court. The court denied this request. (RT 6378-6380.)

However, just as the defense is entitled to a trial free of perjured testimony to the jury, the defense should be entitled to rulings from the trial court not tainted with false and/or untested allegations.

Although this request occurred before trial, during the hearing on Settle's request regarding security for his family, it remained crucial for the defense to determine the veracity of these allegations. Because Settle eventually testified to

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[30] Although Settle is not a "state actor," and while the prejudice to appellant arose from state inaction, in the form of the failure of the court to grant a severance, rather than state action, in the form of as prosecutorial misconduct, the end result is the same in that appellant was deprived of his right to a trial conducted free of perjury.

(and argued) matters that were detrimental to the defense, the jury was entitled to know if Settle was willing to lie to the Court, as he later proved to be.

Likewise, it is permissible to impeach a witness with evidence that the witness been willing to make allegations against others about in the past. (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 600; *People v. Randle* (1982) 130 Cal.App.3d 286.) Therefore, this evidence would have been relevant to impeach Settle when he later testified, incriminating the other defendants. Unable to question the veracity of Settle, the defense is unable to impeach Settle when the need arose.

Thus, the defense should have been allowed more leeway in questioning Settle at the time that he made the allegations regarding danger to his family from the Bryant organization.

2. Settle Engages in De Luna Error

In his Opening and Statement and Closing Arguments Settle again demonstrated that it was the court that was "sadly mistaken" when it believed that it could prevent Settle from engaging in misconduct.

In his first appearance before the jury, Settle explained that he was representing himself because a trial is a truth seeking process and the best way to get to the truth is through the defendant. He further acknowledged that a defendant has a right to remain silent, but ***he*** was going to give up that right to answer any questions. (RT 8157-8158.)

At the start of his Closing Argument, Settle stated that the other three defendants and Williams were the ones who were involved in the killing. (RT 16592.) Almost immediately thereafter, Settle repeated the argument, "I'm here representing myself because it is a truth-seeking process, and I feel that the best way to get to the truth is through the defendant." (RT 16592-16593.)

Settle thus invited the jury to infer that the defendants who appeared with lawyers and/or who did not testify were guilty. Donald Smith was the only non-testifying defendant.

This incident occurred minutes after the trial court rejected defense counsel's request for a preview of Settle's argument, reasoning that it could admonish Settle if he engaged in misconduct. (RT 16588-16589.) Although an admonition would not have been sufficient, because "one `cannot unring a bell,'" (*United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 666, citations omitted), the court failed even to do that much.

If the prosecution had made such an argument it would have been patently improper. The right against self-incrimination includes the right to not testify and the right that no comment shall be made to the jury on the fact that the defendant has not testified. (*Chapman v. California, supra*, 386 U.S. at 20-21; *Griffin v. California* (1965) 380 U.S. 609, 613-614.) To allow comment on silence "...is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Griffin v. California, supra* at 614.)

The right to have no inference of guilt drawn from one's failure to testify also bars one co-defendant from commenting on another defendant's silence. This rule was recently re-affirmed in *People v. Coffman* (2004) 34 Cal.4th 1, 81, where the court held that an attorney for one defendant may not question another defendant about the second defendant's invocation of his right to silence after arrest.

Settle's comment that he was representing himself because that is the best way to aid the truth-seeking process immediately followed his comments that the other defendants were the ones who were involved in the killing. (RT 16592-16593.) This direct contrast clearly was an attempt to benefit himself at the expense of the other defendants. This is exactly the type of inference that was disapproved of in *United States v. Patterson* (9th Cir. 1987) 819 F.2d 1495, 1506, cited with approval in *People v. Hardy, supra*, 2 Cal.4th at p. 157.)

Furthermore, these comments were an attempt to implicitly urge the jury to draw a prohibited inference of guilt of appellant and the others by means of a direct comparison of his innocence as reflected in his testimony, in contrast to the others' guilt, which he had just previously alluded to. This is distinguishable from *Hardy*, where the court did not find error because this was not the inference the attorney in *Hardy* was attempting to make. (*Id.*, at p. 160.)

In *De Luna v. United States* (5th Cir., 1962) 308 F. 2d 140, one defendant testified on his own behalf, while the other defendant asserted his right not to testify. In argument, the attorney for the testifying defendant made several references to the fact that only his client testified, saying at one point, "Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross-examination..." (*Id.*, at 142, fn. 1). At that stage of the argument, the attorney did not mention the non-testifying defendant by name. *There was only the implied comparison* between the two defendants. Nonetheless, that implied comparison deprived the non-testifying defendant of his right to a fair trial. Noting the tension between the testifying defendant's right to present a defense and the non-testifying defendant's right to have a trial free from improper comments on silence, the court concluded that the only way to ensure each defendant justice was to try them separately. (*Id.* at 143, 155)

In *People v. Hardy*, *supra*, 2 Cal.4th 86 the court found that the comments by the testifying counsel did not constitute a comment on the other defendant's silence. In reaching this conclusion, this Court gave deference to the trial judge "who was sensitive to defendants' *Griffin* claim," but concluded that "All [the attorney] is saying is that [the testifying defendant] has nothing to hide and that's why he got up on the witness stand and testified." Thus, this Court stated the attorney was "not insinuating defendants were guilty because they remained silent," the impermissible inference under *Griffin.* (*Hardy*, *supra*, at p. 160.)

Furthermore, in the preceding section of the opinion, the *Hardy* Court had held that although the statements of the prosecutor had constituted *Griffin* error,

the comments were not prejudicial because of the overwhelming evidence against the defendant, including, but not limited to the evidence of "an interlocking web of admissions from numerous persons," including evidence of the non-testifying defendant's admissions and other evidence implicating the defendant in the offenses. (*Hardy, supra,* at p. 154.)

Coffman must be distinguished from this case because in that case it was held that the remark, although error was a "brief and mild reference" which was unlikely to cause prejudice in view of the overwhelming evidence. (*People v. Coffman, supra,* at p. 82.)

The trial court in this case faced an even greater dilemma than the trial judge in *De Luna*, because Settle was representing himself. While any attorney -- prosecutor or defender – would know that comments on silence are strictly forbidden, Settle, proceeding pro per, could not be expected to know the rules. He therefore strayed quickly into forbidden territory, arguing overtly that the other defendants were guilty and citing as confirmation the fact that he alone was representing himself and giving up his right to remain silent, in order to bring out the "truth." While this Court suggested in *Hardy* that a trial court could restrain a co-defendant's counsel from commenting on other defendants' failure to testify, the trial court in this case failed to take any steps to remedy the situation as it might have done if the comment had been made by Settle's attorney[31]. (see also *People v. Jones supra*, 10 Cal.App.3d 237, 243-244.)

Settle's misconduct not only violated appellant's right not to testify, it also violated his right to counsel. Just as no adverse inference may be drawn from a defendant's exercise of his right to remain silent, "comment which penalizes exercise of the right to counsel is also prohibited." (*People v. Coffman, supra,* at p. 62; *People v. Crandell* (1988) 46 Cal.3d 833, 878); *Bruno v. Rushen* (9th Cir. 1983) 791

[31] In *De Luna* the court rejected this approach, suggesting that if one attorney's duty required him to comment on the silence of another defendant, the only solution to the conflict of rights was separate trials. (*Id.*, at p. 155.)

1193, 1195; *United States v. McDonald* (5th Cir. 1980) 620 F.2d 559, 564 ("It is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel.") To say that Settle was representing himself because he believed the best way to get to the truth was through self-representation asks the jury to draw a positive inference from his self-representation, which, necessarily, creates a negative inference towards those who exercise their right to counsel. Any such "evidentiary use" of a defendant's exercise of his right to counsel – whether by a prosecutor or a co-defendant -- is a violation of the Sixth and Fourteenth Amendments. (*People v. Coffman, supra*, at p. 73)

Again, while admonitions to the jury would not have been effective to cure such an egregious violation of appellant's right to counsel, the trial court here made no attempt to remedy in Settle's misconduct.

3. Settle Argues Facts Not in Evidence

Settle again crossed ethical lines when he argued facts that were not in evidence.

In one instance Settle argued to the jury that appellant's job at the Carl Street rock house was to put the cocaine into packages after it was weighed out. This was allowed over an objection by appellant's trial counsel that there was no evidence as to this fact. (RT 16612-16613.) The motion to sever was renewed, and a motion for a mistrial was made after Settle's summation to the jury. Appellant joined in that motion. (RT 16634-16635.)

These assertions tied appellant to the Bryant family organization and thereby corroborated Williams's testimony, but they were not based on facts "in evidence."

When the defense objected to Settle's argument, the trial court acknowledged the fact that "from time to time" Settle lapsed into arguments for which there was no evidence in the record. (RT 16626.) Nonetheless, contrary to its promise to do so, the court failed to prevent Settle from such misconduct.

Similarly, Settle argued that it was either himself or appellant who killed Brown. (RT 16631.) In fact, there was no evidence as to which person among Wheeler, appellant, or Settle shot either Armstrong or Brown. Settle was again arguing facts not in evidence, this time in an effort to shift blame to appellant. Because the jury was unable to reach a verdict on Settle, it appears that at least one member of the jury was persuaded by Settle's improper argument.

Arguing facts not in evidence deprives a defendant of a fair trial and violates "a fundamental rule known to every lawyer." (*United States v. Beckman* (8th Cir. 2000) 222 F.3d 512; *United States v. Wilson* (4th Cir. 1998) 135 F.3d 291, 298; 3 Wright, *Federal Practice and Procedure: Criminal*, § 555, p. 273 (2d. ed. 1982). The error is more egregious when the party making the argument implies first-hand knowledge of the facts, thereby making him or herself an unsworn witness. Such argument violates ethical standards applied to lawyers and violates the defendant's constitutional rights to confrontation and cross-examination. Settle's failure to abide by the ethical rules governing the conduct of attorneys is exactly what the defense predicted when it requested a severance. (*Ante*, at p. 101-102.)

For example, in *People v. Gaines* (1997) 54 Cal.App.4th 821 the prosecutor argued to the jury that a potential alibi witness, who did not testify, would have impeached defendant if he had testified, that the defense had caused that witness not to testify, and that the People had tried to get the witness on the stand. This was determined to be reversible error where none of these facts were based on any evidence presented in court and presenting them in closing argument had the effect of denying the defendant the rights to confrontation and cross-examination. (*Id.*, at p. 825.)

In cases where the attorney for a party has first-hand knowledge of the facts of the case, there is a special danger that the attorney may end up acting in the role of an "unsworn witness" in his arguments to the jury. (*United States. v. Locascio* (2d Cir. 1993) 6 F.3d 924, 933.) This may give his client an unfair advantage, because he "can subtly impart to the jury his first-hand knowledge of the events

without having to swear an oath or be subject to cross examination." (*Ibid.*; *See also United States v. McKeon* (2d Cir.1984) 738 F.2d 26, 34-35.)

By analogy, a pro per defendant has a similar advantage, one which Settle improperly used in this case.

In a case where there is only one defendant, when a defendant wants to represent himself, the concerns recognized in *Locascio* are outweighed by the defendant's right of self-determination. However, when a co-defendant is added to the picture, the danger of prejudicing the state by this type of conduct also now prejudices a co-defendant.

It is because of these concerns that an attorney may be disqualified from the case, in spite of a presumption in favor of the accused's chosen counsel. (*United States. v. Locascio, supra*, 6 F.3d at p. 931.)

Although the trial court again agreed that Settle's comments were not based on the evidence, it refused to admonish the jury to disregard any of Settle's arguments for fear of violating Settle's right to represent himself.

Thus, the court, having denied defense counsel's request for a preview of Settle's argument, with the promise to admonish the jury if misconduct occurred, failed to take any remedial steps when Settle engaged in misconduct exactly as the defense had predicted. Appellant was therefore denied a fair trial because the trial court was unable to balance the competing rights of Settle and his co-defendants.

4. Settle's Shenanigans with Distad

Another example of Settle's gamesmanship and willingness to manipulate the rules occurred when the court allowed Settle to speak to the witness Una Distad[32] in the presence of the District Attorney.

The prosecution had previously said that Distad was terrified of Settle, and Settle wanted to talk to her and tell her it was all right for her to testify truthfully.

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[32] Distad transported containers for Settle to a house on Vanport address where she had purchased drugs. (RT 9740-9742, 9747-9750, 9757-9758.)

Settle agreed that the Deputy District Attorney could be present when he spoke to Distad. (RT 9724-9726.) Settle also wanted to tell Distad, prior to her testifying, that the statement she had made to the police had been tape recorded. The court held that this would not be proper and told Settle not to inform Distad of that matter. Settle agreed not to do so. (RT 9726.)

After Settle spoke to Distad, the prosecution informed the court that Settle, "did absolutely everything" he was told not to do with the witness. (RT 9736.) In particular, instead of telling Distad that it was all right with Settle if she testified, Settle told her she had a right to an attorney and did not have to testify. He never told her that she should testify truthfully, as he had represented his intentions to the court. Furthermore, contrary to the court's orders he told her that her previous statement to the police had been tape recorded. (RT 9736.)

5. Failure of the Trial Court to Take Specific Corrective Measures

Judge Horan's most glaring error was in failing even to consider the danger, recognized by cases such as *Thomas v. Superior Court*, *supra*, 54 Cal.App.3d 1054, that one defendant's decision to represent himself will infringe on the other defendants' right to a fair trial.

As noted above, the trial court believed that the concerns of the defense were no different from concerns raised in any multiple defendant case. (*Ante*, at p. 102.) Thus, he failed to appreciate any of the problems that are unique to cases where a co-defendant elects to represent himself. Therefore, he was unable to deal with those problems when they arose.

Here, although the trial judge repeatedly assured the other defendants that it would protect their rights by controlling Settle's behavior, the court was afraid to punish Settle when the need arose, or otherwise reign in his misconduct, for fear of prejudicing *Settle's* defense. Because the trial court refused to grant a severance, the burden of prejudice arising from the misconduct was borne by appellant, rather than Settle.

Thus, a mistrial was required because "controlling" Settle was not the "simple" matter that the trial court thought it would be. (*Ante*, at p. 101, RT 6381.) Rather, the court's response of simply telling Settle not to engage in unethical conduct was completely ineffective.

For example, as noted above (*ante*, at p. 117-118), at times Settle argued facts which were not in evidence. The defense asked the court to admonish the jury regarding Settle's statements that were not based on facts in evidence. The Court agreed that some of his remarks were not based on the evidence but did not wish to tell jury to disregard Settle's remarks, so it refused to admonish the jury at that time. Instead, the court stated that it would do so at the end of Settle's argument and after every attorney's argument. (RT 16625-16626.)

After Settle's argument, the court stated:

> "Let me admonish you as I did during the People's argument and I should have during Mr. Gregory's, if I did not. But the statements you are hearing now, as I reminded you yesterday, are not evidence. You heard the evidence in the case. You are now hearing argument." (RT 16663.)

In fact, the court *had not* given such an admonition after the People or Mr. Gregory's argument, both of those arguments having preceded Settle's argument.[33]

The court also admonished the jury that what they had heard was argument, not evidence, after the arguments for Wheeler and Bryant and the People's final argument. (RT 16688, 16782, 16851-16852.)

Even more egregious, the court also overruled defense counsel's objection This objection was well-taken and should have been sustained. This ruling denied appellant right to cross-examine a witness, since Settle was effectively testifying against appellant, without being under oath or subject to cross-examination, purporting to explain appellant's role in the company business. Appellant should not have been denied his right to a fair trial by the court's failure to properly han-

[33] The prosecution's argument ended at RT 16655. The proceedings for the day concluded at RT 16662.

dle Settle's misconduct. Settle, and not his co-defendants, should have paid the price for Settle's refusal to follow the rules.

In contrast, when appellant's counsel, Mr. Gregory, made a misstatement of the facts during closing argument, there was an immediate objection, and he was forced to correct the error at that time, rather than have it linger in the juror's mind. (RT 16579.) Obviously, it is more effective to catch a misstatement at the time and correct it then, rather than hope the jury remembers each inaccuracy when the admonition is given an hour later. Thus, the effectiveness of the remedy for Settle's improper argument was diminished if not negated entirely by the court's effort to protect his right to self-representation.

At the very least, Settle should not have been given *favorable* treatment of his misconduct. Rather, the court should have taken the same steps to correct Settle's errors that it had taken to correct appellant's counsel.

E. Prejudice

Appellant was clearly prejudiced by the failure of the trial court to sever Settle's case.

The instant matter must be distinguished from cases such as *People v. Hardy*, *supra*, 2 Cal.4th 86, 160 where the court found there was no prejudice caused by the co-defendant's improper comment on the silence of a defendant because of the overwhelming evidence presented in that case. (*Ante.*, at p. 115.)

Rather, as discussed above (*ante*, at pp. 61-62, 75-79), the evidence against appellant was very weak, consisting of accomplice testimony or testimony that should be suspect because of its source.

In such a situation, as in *State v. Caruthers*, *supra*, Settle's shenanigans could well have tainted the jurors' perception of *all* of the "defense team," regardless of which members actually engaged in the misconduct. (*Caruthers*, at p. 553, fn. 35.)

Although the court was correct in noting the preference for joint trials to avoid avoiding inconsistent verdicts (RT 6193), ironically, Settle's misconduct in this case resulted in a hung jury as to him, while tainting the verdicts against appellant, thus defeating the goal of achieving a just result with judicial economy.

In this close case, the errors caused by the court's failure to sever Settle's case, including the uncorrected admission of perjured testimony, Settle's improper comments on appellant's assertion of his rights to an attorney and against self-incrimination, Settle's arguing of facts not in evidence, and Settle's other misconduct were all likely to tilt the balance against appellant.

Because, Settle's actions infringed on appellant's of right to a fair trial, his right to cross-examine witness, his right to an attorney, and his right to remain silent, as discussed above, appellant submits that the proper standard for judging prejudice is *Chapman v. California, supra*, 386 U.S. 18, which holds that for a denial of a federal constitutional right, reversal is required unless the state can prove the error was harmless beyond a reasonable doubt. The errors in this case were not harmless

First, Settle's assertion that appellant was the shooter and was involved in "rocking" cocaine would confirm in the jury's mind appellant's connection to both the organization and the murder. The jury might give credence to this information in the belief that Settle either had inside knowledge of the organization or had information from his family members who were involved in the Bryant organization.

Second, Settle repeatedly asked the jury to draw two impermissible inferences – innocent people testify and innocent people do not need an attorney. In so doing, Settle contrasted himself with his co-defendants, implying that people who have an attorney and are afraid to testify must be guilty.

Third, the trial court's delay in admonishing the jury to disregard Settle's improper argument of facts outside the record in the same manner in which the court admonished appellant's counsel negated the effectiveness of the remedy.

For the foregoing reasons, the failure to sever Settle's case deprived appellant of rights of "real substance" in violation of the Due Process Clause. Furthermore, as described above, Settle's misconduct was bound to have an effect on the verdict, thereby lessening the reliability of the outcome of the trial in violation of the reliability requirements of the Eighth and Fourteenth Amendments. (*Ante*, at p. 51.)

The error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Combined with the weakness of the prosecutions case, it must be concluded that the failure to sever appellant's case from Settle's was clearly prejudicial.

F. Summary

The trail court denied the motion for severance in the mistaken belief that the concerns raised by the defense were no more serious than those present in any multiple defendant case and that the court could compel Settle to abide by the rules. (RT 6195.)

In fact, this case was unique because: 1. The situation of pro per co-defendants in a capital case is very rare and creates unusual problems; 2. This case was already too large and unwieldy; 3. Settle chose to represent himself, making it exceedingly difficult for the trial court to police his conduct and prevent prejudice to appellant without infringing on Settle's right to self-representation; 4. In a capital case, the incentives for Settle to exceed the bounds of proper conduct were high, the risk of prejudice to appellant even higher, and the stakes were literally life or death for the losing party.

Settle's misconduct, and the trial court's inability to remedy it, demonstrate that the failure to sever Settle's case deprived appellant of a right to fair trial, thereby mandating a reversal of the judgment of conviction entered below.

III

THE TRIAL COURT ERRED IN DENYING A DEFENSE MOTION TO SEVER APPELLANT'S CASE FROM THAT OF THE OTHER APPEALING DEFENDANTS. THIS ERROR DENIED APPELLANT OF THE RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW, AND THE RIGHT TO A RELIABLE DETERMINATION OF A CAPITAL CASE, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The trial court erred in denying a defense motion to sever appellant's case from that of the other appealing defendants. This error denied appellant a fair trial, due process of law, and the right to a reliable and individualized determination in a capital case, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution.

As a result of the joint trial, appellant's case was prejudiced in several ways, including the following:

Because of the size of the case, it was not possible to avoid confusion of the issues or for the court to conduct the trial in a manner that was free of prejudice to appellant. Thus, evidence was introduced that was admissible only against Bryant and/or Wheeler, but which the jury was allowed to consider against appellant and which had a spill over effect on appellant's trial because of the fact that improper instructions were given to the jury. The cases against Bryant and Wheeler were stronger than the case against appellant. The tactics employed by Wheeler and Bryant's defense prejudiced appellant.

A. The Motions and Hearings, Below

On April 3, 1991, appellant objected to a prosecution motion for consolidation, arguing that a joint trial would deprive him of a fair trial and due process of law based on the following: 1) The danger a verdict because of "guilt by association"; 2) The relative strength of the case against, and involvement in the organization, of Bryant, Wheeler, and Settle, as opposed to the weakness of the case

against appellant; 3) Likely confusion resulting from evidence admissible only against other defendants, and the inability of the jury to compartmentalize that evidence in determining appellant's guilt, compounded by the insufficiency of limiting instructions; 4) The massive nature of the case, and the impossibility of keeping track of all the limited evidence. Appellant argued this would deprive him of the right to a fair trial on his "personal guilt" and "individual culpability." (citing *United States* v. *Haupt* (1943, 7th Cir.) 136 F.2d 661, cited in *People* v. *Massie, supra*, 66 Cal.2d 899, 917 fn. 20.) (CT 1917, 1943-1946, 1949-1950.)

The motion further explained that proof of the conspiracy aspect of the case would involve substantial evidence of "other crimes" relating to the organization, evidence that would not be admissible in a separate trial against appellant. (CT 1951-1952.)

The prosecution argued in response that because appellant's contribution to the family was through violence, and because the theory of the case was that Armstrong was killed because he was trying to blackmail the family, much of the "other crimes" evidence would be admissible in a trial against appellant, even if the cases were not tried jointly. (CT 1990-1991.)

Later, appellant filed a motion for severance on substantially similar grounds. (CT 2743-2745.) At the hearing on that motion, appellant expressed concern that there would be evidence of witness intimidation on the part of Wheeler and Bryant, and that there was a danger that the jury would "lump everyone together." (RT 4592-4593.) In response, the prosecution argued that the jury would be instructed to consider each of the defendants separately, and it is presumed that juries follow instructions. (RT 4594.)

The defense further argued the paucity of evidence against appellant in relation to the stronger evidence against other defendants, and the danger that he might be convicted because he was tried with the other defendants or because he had family ties to some of the other defendants. (RT 4594-4595.)

The court denied the motion to sever, explaining that it would give limiting instructions before and after the various items of evidence were heard, thereby negating any harm from a joint trial. (RT 4595.)

B. The Relevant Law

In addition to the law regarding severance, as discussed in the previous section of this Brief, which appellant incorporates herein, other principles of law are relevant to a determination whether the trial court erred in not severing appellant's case from that of Bryant, Wheeler, and Settle.

A severance should be granted when there is a danger of prejudice to a defendant resulting in a confusion of issues due to factors such as evidence being admissible only as to one defendant or prejudicial association of one defendant with another. (*People v. Cummings*, *supra*, 4 Cal.4th 1233, 1286, citing with approval factors listed in *People* v. *Massie*, *supra*, 66 Cal.2d at p. 917.).

When some evidence is admissible against only one defendant, a joint trial presents unique dangers of prejudice to the other defendant. As the court stated in *People v. Chambers* (1964) 231 Cal.App.2d 23, 33:

> "Relaxed standards of criminal trial consolidation invite procedural and evidentiary possibilities invasive of defendants' rights....The possibility becomes fairly acute when damaging evidence is received which is admissible against one defendant but not against others...
>
> "Thoughtful judicial opinions have voiced misgivings as to jurors' ability to segregate evidence into separate intellectual boxes, each containing a single defendant....Exposed to the realities of depth psychology, judicial clichés carving jurors' minds into autonomous segments may waver and fail. At the minimum, the admission of damaging evidence applicable to less than all the defendants calls for firm judicial supervision and strong, carefully drawn instructions." (citations omitted, see also *People v. Massie*, *supra*, at p. 916, fn 17.)

In *Jackson* v. *Denno* (1964) 378 U.S. 368, 388 fn. 15, the Supreme Court stated that "[t]he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should

not consider but which they cannot put out of their minds." (*Id.*, at p. 388-389; *United States v. Antonelli Fireworks Co.* (2d Cir. 1946) 155 F.2d 631, 656, comparing the situation to that of "the boy told to stand in the corner and not think of a white elephant." cited in *Massie*, at p. 917, fn. 17.)

Although *Zafiro* v. *United States* (1993) 506 U.S. 534 involved the federal rules of criminal procedure governing severance, the opinion makes clear that the federal policy in favor of joint trial is still constrained by constitutional requirements. Thus, the Court warned that joinder may create "a serious risk that... would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Id.*, at p. 539.)

This danger is heightened in a complex case such as this, in which the defendants have different degrees of culpability. (*Ibid,* citing *Kotteakos v. United States* (1946) 328 U.S. 750, 774-775, and *Bruton v. United States* (1968) 391 U.S. 123.)

Furthermore, there is an increased danger of confusion causing prejudice in conspiracy cases. As stated by the Supreme Court:

> "As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself." (*Krulewitch v. United States* (1949) 336. U.S. 440, 453.)

Nor is it possible that the most perfectly crafted jury instructions will obviate the likelihood of confusion of issues. The belief that the jury will be able to follow instructions in such circumstances is recognized as a "naive assumption" and "unmitigated fiction." (*Ibid.*; *United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1118; *Blumenthal v. United States* (1947) 332 U.S. 539, 559. It is recognition of these truths that often mandates a severance when some evidence is inadmissible as to a co-defendant. (e.g. *Bruton v. United States*, *supra*, 391 U.S. 123.)

Another factor strongly arguing for severance is the danger of a conviction because of prejudicial association with the co-defendants. *People v. Chambers*, *supra*, 231 Cal.App.2d 23 explained that separate trials should be granted if there is a danger of a conviction on the basis of guilt by association, and that a conviction possibly resulting from the association of the defendant with the co-defendant violated the defendant's right to due process of law. (*Id.*, at p. 28.) "Guilt by association is a thoroughly discredited doctrine; personal guilt...[is] a fundamental principle of American jurisprudence, inhibiting a central place in the concept of due process." (*Id.*, at p. 28-29, citing *Uphaus v. Wyman* (1959) 360 U.S. 72, 79; *Bridges v. Wixon* (1945) 362 U.S. 135, 163.)

Guilt by association has the effect of depriving a defendant of a right to a fair trial on his "personal guilt" and "individual culpability." (*United States v. Haupt*, *supra*, 136 F.2d 661, cited in *Massie* at 917 fn. 20.)

It has long been recognized that conspiracy cases present an unusually heightened danger of guilt by association.

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. (*Krulewitch v. United States*, *supra*, 336 U.S. 440, 454, con. opn.)

Zafiro v. *United States*, *supra*, 506 U.S. 534 held that the fact of mutually exclusive and conflicting defenses is not prejudicial per se. (*Id.*, at p. 538.) Likewise, "defendants are not entitled to severance simply because there might be a better chance of acquittal in separate trials." (*Id.*, at p. 540.) However, the court noted that in spite of the strong policies favoring joinder, severance may be required when there is a serious risk that a specific trial right of one of the defendants would be compromised or that joinder might interfere with the jury making a reliable judgment. Notably, *Zafiro* illustrated this principle by stating that:

> "such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. (*Id.*, at p. 538-539.)

The reason for this is a recognition of the fact that the government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. (*Delli Paoli v. United States* (1957) 352 U.S. 232, 248.)

In this case, much of the prosecution's case and arguments depended on the existence of a vast conspiracy. Because of the massive amount of evidence offered against the defendants, including the illegal actions of the co-defendants and other people, much of which would not have been offered against appellant in a separate trial, there was a substantial likelihood of confusion on the part of the jurors, the exact danger anticipated in *Zafiro*. Indeed, as will be shown, at times it was not possible even for the attorneys and the trial court judge to keep all of the facts in perspective. If the judge and attorneys cannot keep the evidence straight, clearly the jury would be confused, creating the very danger which *Zafiro* described.

Furthermore, this case goes beyond evidence being admitted which would not have been admitted had appellant been tried alone. Rather, this case includes appellant being tainted by the misconduct of others *at trial.*

C. Application of the Law

Many of the concerns expressed by appellant's attorneys bore out, negatively affecting appellant's right to a fair trial, and demonstrating that a severance should have been granted and that appellant was prejudiced by the joint trial with Bryant, Settle, and Wheeler.

Some of these concerns were foreseeable in the earliest days of the trial, when one of the first judges on the case expressed concern that the case was becoming "unwieldy" and questioned "the ability of a jury to segregate and separate out all the defendants and all the charges." (RT 481.)

Indeed, the Honorable J.D. Smith subsequently severed the non-capital defendants because he realized and repeatedly stated that the case was too big to try. (RT 3923-3933, 3943, 3974-3978, 3796.) Although the severance of other defendants and counts did reduce the size of the case, it still remained too large to manage without a substantial risk of prejudice.

All of these concerns manifested themselves in specific forms as the case progressed.

1. Admission of Evidence Not Otherwise Admissible Against Appellant

The most prejudicial effect of the refusal to sever appellant's case resulted from the admission of evidence against appellant which would not have been admissible if appellant had been tried alone. (See Argument IV, below.) This was compounded by the fact that the jury instructions given regarding this evidence were improper and insufficient. (See Argument V, below.)

(a) Evidence of the Curry Shooting

The evidence relating to the Curry shooting is perhaps the most graphic example of the confusion resulting from the size and complexity of the case. As explained in greater detail below (see section IV), that evidence was not admissible against appellant and was only admitted because the court and parties were not able to keep track of the logical foundation required for that evidence. This confusion would not have occurred had appellant been tried separately.

Briefly, the prosecution claimed that appellant shot Curry at the behest of Bryant. The trial court had ruled that evidence of the Curry shooting and bombing was not admissible against appellant unless it could be shown that Bryant was angry at Curry because Curry was sleeping with Tannis. The trial court considered

this to be the logical "underpinnings" for the admissibility of this evidence. (RT 11158.) Bryant's anger at Curry was proven through Tannis's statement that Bryant had admitted placing a bomb under Curry's car. (RT 13096-13098, *ante*, at p. 34.)

Because Bryant's statement to Tannis was admissible against Bryant as an admission under Evidence Code section 1220, but inadmissible against appellant, the jury was correctly instructed to consider it *only against Bryant.* (RT 13086.)

Therefore, the necessary predicate for introducing the evidence against appellant was never established. Nonetheless, the jury was allowed to consider the evidence of the Curry shooting against appeallant, even though the condition for its relevance and admissibility against appellant was never satisfied.

This was a violation of due process because the admission of "other acts" evidence violates due process when "there are no permissible inferences the jury may draw from the evidence." (*Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1103.) Without its logical underpinnings, there was no permissible inference for this evidence.

As the court below stated, unless the jury knew that Bryant was mad at Curry, this evidence does not "make any sense at all." (RT 11158.)

If appellant had been tried alone, the court would have excluded the evidence because it was admissible only against Bryant, who would not have been a party. And the prosecution would not have been able to depict appellant as the hit man for the Bryant family.

The jury's hearing evidence that was properly admissible as to only one defendant is precisely the situation deplored in *Jackson* v. *Denno, supra,* 378 U.S. at p. 388 n. 15. Although this evidence was offered after the court ruled on the severance request, an appellate court may look at the facts that developed after the motion in order to determine if a gross unfairness has occurred as a result of the failure to sever. (*People v. Cleveland, supra,* 32 Cal.4th 704, 726.)

The erroneous admission of this evidence against appellant is one such example of a gross unfairness.

(b) Other Evidence not Admissible Against Appellant

The voluminous character evidence against the other defendants, which occupied the vast majority of the trial, also posed a substantial danger of prejudice to appellant, as recognized in *People v. Chambers*, *supra*, 231 Cal.App.2d 23, at pp. 27-28.

Much of this evidence would not have been admissible had appellant been tried separately. Excluding the testimony of Williams regarding the incidents in the Wheeler Avenue house on the day of the murder, the evidence against appellant in this marathon trial occupies only a small portion of the record. A huge amount of evidence was introduced regarding the Bryant organization and the running of a slew of fortified crack houses[34]. . Papers found at the properties and other evidence connected the Bryant and Settle families and Wheeler to those locations. (*Ante*, at pp. 20-24.) Other evidence established the similarity of the Wheeler house to the other crack houses. This evidence may have had some purpose in showing that the Wheeler Avenue residence was one of the Bryant drug houses. Likewise, it may have shown the nature and scope of the organization, providing a motive for Armstrong and Bryant in their ambitions in the business

While some evidence of the scope of the organization may have been admissible at a separate trial of appellant, the massive volume of evidence concerning the bad acts of other people would, at some point, have been considered cumulative and unduly prejudicial under Evidence Code section 352.

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[34] Located at 10743 and 10731 DeHaven, 13031 and 13037 Louvre Street, 11649 Fenton Street, 11943 Carl Street, and the pre-murder raid at 11442 Wheeler Avenue.

Likewise, the evidence relating to Francine Smith[35] had minimal, if any, probative value as to appellant's guilt. Nonetheless, in a joint trial it became a part of the evidence that the jury could consider against appellant.

Similarly, Alonzo Smith testified that he made arrangements with Bryant to get some drugs to sell. (RT 10884-10890.) Although it is questionable how this would tend to prove appellant shot the victims in this case, the court refused to limit admissibility of Byrant's statement to Alonzo Smith to Bryant. (RT 10888.)

In summary, this trial was largely concerned with the other bad acts of other people, with the likelihood that appellant would be tainted by those acts.

2. Guilt by association

In this case, there was also a substantial danger that appellant would be convicted because of his association with Bryant and Wheeler, especially in light of the prosecution's arguments regarding the nature of the organization and the fact that it acted with impunity and terrorized the community. (e.g., RT 16430S-16430T.) These arguments tended naturally to invite the jury to lump all participants together and convict in order to clean up the streets by locking up anyone associated with the business.

The danger of guilt by association was also increased dramatically by appellant being forced to sit at the same table for the six months of trial, with other conspirators, including its current boss of the drug organization that the prosecution compared in closing summation to the "Mafia." (RT 16430T.)

It has been recognized as a "psychological reality" that a weak case against one defendant is improperly bolstered by "a mass of evidence" relevant to only to the co-defendants. (*Castro v. Superior Court* (1970) 9 Cal.App.3d 675, 692.) In this case there was far more evidence against Bryant, Wheeler, and Settle

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[35] Francine Smith received expenses from Bryant to visit Armstrong in prison. Bryant was standing nearby when she was beaten up after she tried to buy drugs at the Lourve Street drug house with altered currency. (RT 9447-9450.)

than there was against appellant in the form of evidence connecting them to the organization, to the Wheeler Avenue house, and to the drug business. Therefore, there was a substantial likelihood that appellant would be improperly tainted by that evidence.

3. **Misconduct of Others Defendants at Trial**

Appellant was also prejudiced by the stream of misconduct from his co-defendants, sharing the same table as appellant. In addition to the shenanigans of Settle described above, Bryant, Wheeler, and their attorneys engaged in substantial misconduct in the course of the trial. Even if such behavior could not be predicted before trial, this Court may consider the misconduct because it resulted in a gross unfairness which deprived appellant of a fair trial and violated due process of law. (*Ante*, at p. 105, (*People v. Cleveland, supra*, 32 Cal.4th 704, 726.)

These events and facts would be guaranteed to leave a negative impression on the jury, as recognized by cases such as *Carruthers* (*ante*, pp. 108-109). For example, during Bryant's testimony, the trial court felt compelled to issue a rather stern warning to Mr. Harris and Mr. Jones, the attorneys for Wheeler and Bryant, stating that it was not he first time that the court had done so, about what the court considered inappropriate and unprofessional conduct in that they were loudly laughing and making noises when the jury was present. (RT 15501-15502.)

Likewise, Wheeler appeared to be audibly laughing at one of the witnesses. He then made noises that prompted Judge Horan to threaten to remove him from the court room. Many of these events occurred in the presence of the jury. After he was admonished to behave himself, he repeated this conduct, causing the court to ask the jury to step into the jury room, so that the court could again admonish him. When the court tried to control Wheeler, he used a string of vulgarities, prompting the court to temporarily remove him from the courtroom. (RT 17324, 17326, 17327-17329.)

Furthermore, as with Settle, it appears that Wheeler and Bryant fabricated a defense and committed perjury in denying guilt[36].

This is the very type of conduct that taints the perception of defense attorneys and of criminal defense in the public's collective consciousness. Although the court could not control Wheeler's defense, appellant should not have been prejudiced by his co-defendant's bad behavior and perjured testimony. This was not merely an "inconsistent defense" which may not be grounds for a severance. It was an unethical defense, which unfairly tainted appellant.

Other misconduct of Wheeler and Bryant were bound to leave a negative impression on the jury. For example, Wheeler claimed not to remember telling Givens, his girlfriend, not to say anything if she was questioned by the police, in spite of the fact that this statement appears on a tape recording. Even when the tape was played for the jury, Wheeler testified that he read it in the transcript but did not hear it on tape. (RT 13975-13976.)

Wheeler had an explanation for everything. For example, he did not make frequent calls to Bryant, as reflected in the phone bills. Rather, everyone else used his car phone. (RT 14041-14043.) Wheeler did not know why he had the Laurel Canyon apartment in his address book. (RT 14044) A $200 debt listed in his expense book was owed to his sisters, who are seven years old. (RT 14046-14047.) Wheeler claimed to be budgeting his money to buy a house, yet he blew $1,000 on rims for the tires on his car. (RT 14079) Wheeler testified that Provine was working at the Wheeler Avenue house, but he could not explain why Provine's name did not appear on one document of all those recovered. (RT 14141.)

While he admitted working for the Bryant family, Wheeler claimed that Williams was his boss. (RT 13916, 13919-13920.) According to Wheeler, Wil-

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[36] Respondent can only contend that Wheeler and Bryant were not committing perjury if respondent believes that they were telling the truth, in which case the prosecution is trying to execute two innocent people. As to Wheeler, it emerged at the penalty phase that he had admitted to his appointed psychiatrist that he was involved in the shooting, contrary to his testimony in the guilt phase. (RT 17887.)

liams was also the enforcer for the organization and ranked higher than Wheeler, but Wheeler could not explain why he had all the nice stuff and Williams had a broken down old car. (RT 13933, 14144-14145.) Wheeler denied being close to Bryant in spite of all the phone calls and other connections. (RT 14146.)

Like the sailor going to jail, Wheeler had an excuse for everything.

Wheeler's completely implausible testimony could only convince the jury he was a liar, and thereby bolster the Williams's testimony and the rest of the prosecution's case, having a spill over effect on appellant's trial.

Bryant's testimony was equally incredible. Like Wheeler, Bryant attempted to explain away or express ignorance of every piece of evidence the prosecution presented.

According to Bryant, William Settle ran the business and was giving Bryant $1,500 per week to use the pool hall. (RT 15170.) Bryant did not know who bought the houses on Fenton or Adelphia, and did not know whether Jeff supplied Eddie Barber with the money to buy those houses. (RT 151170.) Bryant admitted paying for the cages on the drug houses, but he put them in at his brother's request. (RT 15178-15179.) He was at the Wheeler Avenue house every day during 1988, *except August 28th.* (RT 15181.) He had the keys to the Wheeler Avenue house because Williams gave them to him. (RT 15320-15322.) The records relating to the business that Bryant had in his possession belonged to Jeff. (RT 15265-15266.) When he sent the money to Armstrong and other people in prison it was for Jeff. (RT 15192-15195, 15203, 15204.) The people who had contact with the Bryant from prison did so because they were friends of Jeff. (RT 15240-15241.) He was holding incriminating papers found in his possession for either Jeff or William. (RT 15250-15252.) His name is on the paper work because he was doing things for William. (RT 15208-15209.)

If Bryant couldn't deny things, he couldn't remember them. For example, he did not remember going with Johnson to trade in the Hyundai. (RT 15223.)

Furthermore, Wheeler and Bryant contradicted each other. The jury had to conclude at least one of them was lying, if not both. Meanwhile, appellant was caught in the middle, tainted by the perjury of at least one co-defendant.

To convict Bryant and Wheeler, the jury had to conclude that they were lying. Their perjury gave Williams credibility and confirmed the public perception that criminal defense attorneys, including appellant's attorneys, are hired guns who will do anything to win. This also gives credibility to Settle's improper argument that the best way to get to the truth was to represent oneself (*ante*, at p. 113), thereby bolstering the inference of guilt for those exercising the right to counsel.

Had appellant been tried alone he would not have been burdened with the misconduct of others.

Indeed, the prosecution's arguments stressed perceived lies and/or perjury committed by the other defendants. For example, the prosecution compared Wheeler and Bryant's testimony regarding Williams: Wheeler testified Williams was the boss of his group, while Bryant testified Williams worked in the pool hall. (RT 16502.)

The prosecutor then stressed the contradictions between Wheeler's defense and the defenses of Bryant and Settle, arguing that Wheeler testified he never saw Bryant at the Wheeler Avenue house, while Bryant testified that he was there every day. Likewise he stressed other contradictions, such as Wheeler testifying William Settle was just a book keeper, while Bryant claimed William ran the organization. (RT 16831.)

Later, the prosecution recounted Wheeler's obvious lies when interviewed by police the first time regarding how many times he was at the Wheeler Avenue house. (RT 16828-16829.)

The prosecution stressed what it considered to be the obvious provable perjury of Wheeler, urging the jury to listen to the tape of Williams and Givens where Wheeler told Givens not to say anything to the police, and then on the wit-

ness stand testified that he told her to tell the police everything. (RT 16508-16509.)

In short, it would appear that someone, or everyone, *except for appellant* -- who did not testify -- was lying[37].

Thus, appellant was unfairly prejudiced by his co-defendants' misconduct at trial.

4. Error in Instructions

In refusing to sever appellant's case, the court seemed to accept the prosecution's argument that any prejudice could be averted or cured by limiting instructions. (*Ante*, at p. 126.)

In fact, the court erred in giving instructions regarding evidence of other bad acts. (Infra, Argument V.) Even assuming arguendo that proper instructions were given, this ignores the well-established principle that while limiting instructions may lessen prejudice, they are not "panaceas." (People *v. Bigelow* (1984) 37 Cal.3d 731, 757.) Where "the practical and human limitations of the jury system cannot be ignored" (*Bruton v. United States*, *supra,* 391 U.S. 123, 135-136), the fiction of jury instructions must give way to reality. As will be shown, to assume that the jury in this case was able to properly follow instructions elevates the "unmitigated fiction" to a new level in the genre. (*Ante,* 128.)

There were simply too many wrongful acts for the parties, court, attorneys, and jurors to keep straight. The court rejected limiting instructions that would have more accurately covered these acts, because the proposed instructions took three pages just to list the other crimes evidence. (RT 16320-16321.) Rather than specifying which acts could be used against which defendant and for which purposes, the court simply gave the jury a generic instruction which did not even cor-

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[37] The prosecution's theory was that "every single word [Wheeler] told ... was a lie." (RT 16508.)

rectly identify the use for which particular items of evidence were introduced. (See Argument V, below.)

This is similar to *Chambers* where prejudice was found because the instructions dealing with other bad acts did not clearly specify which bad acts could only be considered against one defendant, thereby failing to adequately to protect the other defendant from the effect of "prejudice-arousing evidence" applicable only to the codefendant. (*Chambers*, at pp. 33-34.).

As noted above, the danger that the jury will not be able to correctly apply the evidence, even with proper instructions, is grounds for severance. (*Ante*, at pp. 127-128.) This danger is more likely to bear fruit where, as here, the instructions themselves are inadequate.

When the volume of evidence is so complex that even the court and attorneys are not able to keep the evidence straight (*ante*, at pp. 131-132.) it belies reality to believe that the jury will be able to do so.

The experience at trial thus bore out the concerns of both the defense attorneys and the earlier trial court judges who concluded that the case was simply not manageable and that the jury would never be able to keep the facts properly isolated.

5. Use of Restraints on Appellant During Trial

Appellant was also prejudiced by the joint trial because he was forced to wear a stun belt as a form of restraint during the trial[38] based solely on considerations which applied to other defendants. (RT 6376 6347, 6348-6349; *infra*, Argument IX.

The size of the case and the notoriety of the "Bryant" family generated security concerns that would not have arisen in a separate trial of Smith. The fact that two out of four defendants had a history of dangerous, in-custody conduct was

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[38] The use of restraints on appellant itself was an error requiring a reversal of the judgment. (See Argument IX, *infra*.)

also an important factor in determining what security measures should be employed.

Had appellant been tried alone, those risks would have been eliminated.

Furthermore, there was no danger posed by appellant from a history of witness intimidation or behaving badly in court, other reasons which may be considered in the decision to employ additional security measures such as the stun belt.

It is a fundament right to be tried free of unnecessary restraints. (*Infra*, Argument IX.) When the issue of courtroom security arose, there was nothing in the record relating specifically to appellant that would have justified the use of the stun belt. Because the security risks posed by the Byrant family, rather than appellant's own conduct, prompted the trial court to make appellant wear a stun belt, appellant was unfairly prejudiced by the court's refusal to sever his case from Bryant and Wheeler.

As discussed below, the fact that one juror may have seen the restraints is prejudicial. Likewise, prejudice may be found from the mere psychological restraints inherent in being forced to wear a stun belt. (*Infra*, Argument IX.) Therefore, appellant was prejudiced to the extent that the co-trial with Bryant and Wheeler justified the use of these enhanced security measures.

6. Appellant was Deprived of Right to be Tried Solely on the Evidence Presented in the State's Case in Chief.

Finally, as discussed below (*infra*, Argument XIII), appellant did not present a defense. At the close of the prosecution's case, appellant rested. Mr. Novotney explained that because the defense was resting, there would be no rebuttal that could apply to appellant. (RT 13891.) Mr. Novotney explained that appellant was entitled to have the jury consider the State's case against him as it existed at the close of the prosecution's case in chief, and therefore any evidence

coming in after that time should not apply to appellant. (RT 13891-13892, RT 13894.)

The court denied this request and refused to instruct the jury not to consider any further evidence against appellant.

If appellant had been tried alone, the case would have concluded at that point, and the jury's determination of appellant's guilt or innocence would not have been tainted by the extensive rebuttal evidence triggered by the co-defendant's dubious defenses. The refusal to grant a severance thus deprived appellant of the right to have his case resolved solely on the evidence presented by the prosecution.

7. Errors Arising in the Penalty Phase

The errors resulting from the failure to sever appellant's cases also prejudiced appellant with respect to the penalty phase.

For example, as discussed below (*infra*, at p. 366) as part of CALJIC No. 8.85, the jury was told that in determining the penalty as to a "defendant" it "shall consider *all* of the evidence which has been received during *any* part of the trial of this case, *except as you may be hereafter instructed.*" (Italics added.)

This instruction was not appropriate in a joint trial in which huge sections of the evidence were legally relevant to just one defendant or another. In the guilt phase certain evidence had been introduced that was limited to the other defendants. For example, both Bryant and Settle had made admissions regarding the murders. (*Infra*, at pp. 148-149.) At the time the jury was told that these statements were limited to those defendants. (RT 9276-9277, 10371, 10913-10914.)

Those restrictions should have continued to apply in the penalty phase. At the later stage, however, the jury was told to consider all evidence except as "hereafter" instructed otherwise. The jury was never given any further limiting instructions.

The result is that evidence which the court understood was not admissible against appellant could be considered against appellant at the stage when his very life depended upon it.

The prosecution's theory of the case was that the Bryant organization was one huge terrorist group inflicting violence on the community. Because the jury was not instructed that such evidence still was not relevant to appellant, acts of violence committed by the Bryant family, such as the beating of Francine Smith, could have been considered "circumstances of the crime," and therefore part of the evidence against appellant.

Likewise, as discussed above (*ante*, at pp. 135-136), there was substantial misconduct on the part of the other defendants, including acting up in court and possible perjury in defense testimony. There was no comparable misconduct on the part of appellant, and it is inconceivable and intolerable that appellant should be tainted by the actions of others.

This is particularly true in the penalty phase where a person's life hangs in a delicate balance. As will be discussed in greater detail below, in appellant's case this balance was as fine as a jury split six-six on penalty, announcing on two occasions that it was deadlocked.

If appellant was tainted in any way by the actions of the other defendants not attributable to appellant, this delicate balance can shift ever so slightly to produce a radically different result.

8. Prejudice

The core of a court's analysis is the effect of joinder on the ability of the jury to render a fair verdict. Prejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual and independent basis. (*United States v. Tootick* (9th Cir. Cir. 1991) 952 F.2d 1078, 1082.)

In so far as the failure to sever appellant's case from the cases of Bryant and Wheeler deprived appellant of the right to a fair trial, appellant submits that

the only proper standard for judging prejudice is *Chapman v. California, supra,* 386 U.S. 18 requiring reversal unless it can be shown that the error was harmless beyond a reasonable doubt. Such a showing is not possible in this case. In fact, rather than a lack of prejudice, it is possible to make an affirmative showing that the appellant was *likely to be* prejudiced.

The fact that the devastating Curry evidence, which was never properly admitted against appellant, came in as a result of the joinder is strong proof that the denial of the severance was prejudicial. (Argument IV, *infra, see People v. Ortiz* (1978) 22 Cal.3d 38, 47.) The Curry shooting was crucial to the prosecution's effort to depict appellant as the "hit man" and "high level dope murderer" for the family. (RT 16491-16492, 16552.) This evidence may have been the most important evidence corroborating Williams's testimony. Even if Williams is not an accomplice, his testimony is suspect (*ante*, at pp. 61-62), and the Curry evidence improperly gives it credibility.

If this evidence is not admitted, the most damning evidence against appellant evaporates.

Appellant was also prejudiced by evidence and argument concerning the effect of the Bryant organization on the city of Los Angeles, much of which would not have been relevant and admissible against appellant in a separate trial. (RT 16475-16476.)

Similarly, the jury heard evidence of numerous other alleged crimes of Bryant and Wheeler that were not relevant to appellant. As noted above, one of appellant's arguments for severance was that Bryant, Wheeler, and other defendants – but ***not*** appellant – were charged with a conspiracy to dissuade witnesses from testifying (*ante*, at p. 126), which would be heard by a joint jury trying appellant. Likewise it was argued that the proof of the conspiracy aspect of the case would involve substantial evidence of "other crimes" relating to the organization, evidence that would not be admissible in a separate trial against appellant. Although the counts involving the drug trafficking and dissuading

witnesses were severed at the time that the non-capital defendants were severed (RT 4247-4248), this did not obviate the need to sever appellant's case, because evidence of Bryant's efforts to dissuade witnesses was still admitted, as was a substantial amount of evidence relating to the overall conspiracy to run a narcotics organization.

The prejudice arising from the introduction of this slew of evidence relating to the organization was compounded by the arguments of the prosecution as to the scope and nature of the organization, which were portrayed to the jury in the most dramatic terms. (e.g. RT 16430P-16430W.)

Likewise, the constant flow of witnesses who had to be "Greened[39]" was extremely prejudicial, raising the implication that these witnesses were afraid to testify because of the scope of the Bryant family organization. Because there was no evidence connecting appellant to witness intimidation, had appellant been tried alone, this spectacle would not have occurred.

Again, the fear of these witnesses was argued by the prosecution not only to give credibility to their prior inconsistent statements, but also to suggest the brutality, scope, and reach of the Bryant family. (e.g. RT 16430T.) As the person the prosecution painted as the hit man for the family, appellant would surely be tainted by the evidence of witness intimidation, even though he had nothing to do with threats against the witnesses.

Likewise, just prior to discussing appellant's relationship with Bryant, the District Attorney referred to Tannis's conversation in the beauty parlor where she said that Bryant planted the bomb under Curry's car. (RT 16546.) That

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[39] *California v. Green* (1970) 399 U.S. 149 – allowing for the admission of prior inconsistent statements as substantive evidence.

Witnesses who had to be "Greened" because they were afraid to testify included John Allen, G. T. Fisher, Michael Flowers, Barron Ward, witnesses to aspects of the Gentry shooting, and Laurence Walton, William Johnson, Pierre Marshall, and Ladell Player, drug dealers who worked with the Bryant family. (RT 8902-8093, 8860-8862, 8974-8977, 9228-9231, 10134-10136, 10566-10567, 10570, 11791.)

conversation was not admissible against appellant, and had appellant been tried alone it would never have been admissible. In fact, there was no evidence connecting appellant to the bombing. However, the juxtaposition of these two arguments would surely tie appellant in the jury's mind to that incident.

As previously noted, when a prosecutor exploits erroneously admitted evidence during closing argument, the error is far more likely to be prejudicial to the defendant. (*People v. Woodard*, *supra*, 23 Cal.3d at p. 341.) The likelihood that the jury erroneously considered evidence not properly admissible against appellant was further exacerbated by the trial court's failure to repeat the limiting instructions that had been given earlier when it instructed the jury at the end of the trial on the use of other crimes evidence.

As explained in *Chambers* the weakness or strength of the case is a factor in determining prejudice.[40] As discussed above (*ante*, at pp. 75-79), the evidence against appellant was very weak, consisting of accomplice testimony or testimony that should be suspect because of its source. (*ante*, at pp. 61-62.) The remaining evidence did not connect appellant to the offense, as Judge Horan explained. (*Ante*, at p. 48.) Furthermore, much of that remaining evidence was itself inadmissible against appellant. To the extent that this Court finds that any of the evidence complained of in this brief is in fact inadmissible, that fact must be considered in evaluating the actual strength of the case against appellant. (Argument IV, *infra*.) When, as here, a case is close, even a small degree of error at trial is enough to influence the jury to wrongfully convict, requiring reversal on appeal. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.) In this close case, because of the failure to sever the case, evidence was wrongfully admitted against appellant, compounded by jury being incorrectly instructed on how the evidence could be used. Furthermore, the misconduct of

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[40] Other cases have recognized the propriety in evaluating the strength of the prosecution's case in determining prejudice. (e.g., *People v. Gatlin* (1989) 200 Cal.App.3d 39; *People v. Ortiz*, *supra*, 22 Cal.3d 38, 46-48; *People v. Massie*, *supra*, 66 Cal.2d, 899, 921; *People v. Mendoza* (2000) 24 Cal.4th 130.)

the other defendants has the grave danger of tainting appellant in the jury's evaluation, especially when a conspiracy theory increases the danger of guilt by association.

This case is distinguishable from cases such as *People v. Mendoza, supra*, 24 Cal.4th 130, where the court found that there was no prejudice from the failure to sever counts. *Mendoza* found no prejudice because the evidence that was admitted as a result of consolidation was "fleeting and minor." Consequently, in that case there was a minimal risk of confusing the jury. (*Id.*, at p. 163.) In contrast, in the instant case, some of the prosecution's most important evidence -- evidence of the Curry shooting and bombing -- was improperly placed before the jury because of the joinder of the cases.

The relative strength of the case against the defendant, as compared to the strength of the case against the co-defendants is an appropriate factor in evaluating prejudice.

In this case the evidence against appellant paled when compared to the evidence against Bryant, Wheeler, and Settle. For example, in addition to the evidence mentioned above, Bryant was implicated by evidence including the following facts:

- Bryant's fingerprints were found on the phone and the door jamb at the rear bathroom at Wheeler Avenue. (RT 13266-13266, 13269, 13270-13272.)
- Bryant's involvement in the drug operation was established by numerous witnesses who testified they sold drugs for Bryant and/or that he was the boss of the organization. (RT 9993, 9632, 9719-9720, 10235-10237, 10239-10240, 10688-10689, 10884-10908.)
- Documents connecting Bryant to the business and people associated with the business were found in Bryant's possession, including drug sales inventories and the list of shifts at the Wheeler house. (RT 13366-13371, 13378, 13398-13404.)

- Bryant plead guilty to conspiring with Reaux to sell drugs from Wheeler Avenue on an earlier occasion. (RT 9729-9732.)
- The keys to Wheeler Avenue were found among Bryant's possessions. (RT 13553.)
- Bryant was seen behind counter at the pool hall, the hub of the organization. (RT 9660, 9669-9662.)
- Bryant gave money to Francine Smith and Mona Scott to pay for the expenses of visiting Armstrong in prison and sending money to Armstrong. (RT 9447-9449, 9481-9485, 9487, 9489-9490, 9495-9495, 9496-9499, 9501-9504.)
- Bryant was present when Francine Smith was beaten after trying to cheat one of the crack-houses. (RT 9450-9451.)
- Ladell Player had told Bryant he had been past Wheeler Avenue the day after the murders and had seen police tape and blood. Bryant replied they had a problem, but Bryant had taken care of it. (RT 10370-10371.)
- After the murders Bryant made an admission to Alonzo Smith that "Tommy had to go." (RT 10916.)

The evidence against Wheeler included the following :

- Wheeler admitted selling drugs from the Wheeler Avenue house, which was confirmed by other witnesses. (RT 11219, 10253, 10241, 13928, 13931.)
- Wheeler's prints were found on the door of a hallway closet at Wheeler Avenue. (RT 13275-13278, 13279-13280.)
- In Wheeler's calendar book he had the names, addresses and phone numbers of various locations associated with the narcotics business. (RT 11192-11194, 11196, 11199- 11201.)

The evidence against Settle included the following:

- Settle was seen in the pool hall and many people testified they bought drugs from him. (RT 9267, 9267-9268, 9740-9742, 9747-9750, 9757-9758, 10055-10056, 10063-10064, 12010, 12013, 15806-15807.)
- Before the murders, Goldman heard Settle say that Armstrong would not be around too much longer, in response of a comment that someone had made about Armstrong making demands on the family. (RT 9276-9278.)
- Settle's initials were found at the Wheeler Avenue residence next to the phone in the kitchen. (RT 10759-10760.)
- Financial and inventory records of narcotic trafficking were found in Settle's briefcase. (RT 12010.)
- Settle's confessed ownership of the Vanport residence, one of the Bryant family crackhouses. (RT 9771-9772, 15333.)

Compared to the weakness of the case against appellant as discussed above (*Ante*, at pp. 75-79), it is clear that there was a substantial difference in the quantity and quality of evidence against the other defendants.

Therefore, reversal in required.

Furthermore, as noted above a greater degree of reliability is required in capital cases. The joinder of defendants in this case allowed for the introduction of perjured testimony and a vast amount of evidence not admissible against appellant, confusing the facts and issues, and thereby depriving appellant of the right to a reliable determination mandated in capital cases. (*Ante*, at p. 51.)

Additionally, by grouping appellant with the rest of the defendants, the failure to grant a severance also violated appellant's right to an individualized sentencing determination in violation of the Eighth and Fourteenth Amendments. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Finally, all of these rights – the right to a perjury free trial, the right to have the jury not confused by improperly admitted evidence and incorrect instructions, the right to be free of unnecessary restraints, the right to be free from inferences based on guilt by association – are rights of real substance under state law, and appellant had a liberty interest in those rights, the deprivation of which violated the Due Process Clause. (*Ante*, at p. 51-52.)

D. Summary

The trial court's refusal to sever appellant's case from the case of Bryant and Wheeler rendered appellant's trial fundamentally unfair in violation of the Due Process Clause of the Constitution of the United States. Therefore, the judgment of conviction entered below must be reversed.

IV

THE EVIDENCE OF THE ASSAULTS ON CURRY AND OTHER CRIMINAL ACTS OF APPELLANT AND OTHER PERSONS WERE IMPROPERLY ADMITTED UNDER EVIDENCE CODE SECTIONS 210, 300, 352 AND 1101. THE IMPROPER ADMISSION OF THIS EVIDENCE DEPRIVED APPELLANT OF THE RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO CONSTITUTION. IT ALSO VIOLATED APPELLANT'S RIGHT TO A RELIABLE DETERMINATION IN A CAPITAL CASE, GUARANTEED BY THE EIGHT AMENDMENT.

The trial court erred in admitting evidence of other uncharged, wrongful acts of appellant and other individuals to prove the charged offenses. This included evidence of the Curry shooting and bombing, the details of appellant's arrest for the Curry shooting, and other evidence relating to the operation of the Bryant organization. The admission of this evidence was improper under Evidence Code sections 210, 300, 352, and 1101 and deprived appellant of the right to a fair trial under the Fifth and Fourteenth Amendments Constitution.

The error in admitting uncharged acts was compounded by the giving of erroneous instructions, an independent grounds for reversal in itself. (*Infra*, Argument V.)

Because of the weakness of the case against appellant, the admission of this evidence was prejudicial, requiring a reversal of the judgment of guilt.

A. The Motions, Hearings, and Rulings, Below

The evidence of other bad acts was the subject of numerous hearings at various stages of the trial.

1. The Hearings Relating to the Assaults on Curry

In the first hearing regarding the assaults on Curry the prosecution stated it wished to prove the following: Curry was sleeping with Tannis. One day, Curry's car blew up after he got in the car. Sometime later he was driving down the street when appellant pulled up next to him and shot him, for no apparent reason. After he was released from the hospital, Curry was in bed when a man jumped through the window and shot him again. The person who shot Curry the second time was never identified. (RT 10936-10937.)

The purported relevance of this evidence was to place appellant in the organization as the person that Bryant turned to when he felt that someone should be killed. (RT 10937.)

The defense objected to this evidence on the grounds that it was irrelevant and that it should be excluded under Evidence Code section 352, arguing that it did not have a tendency to show appellant's complicity in the charged offense. The defense explained that other evidence would be introduced to show that appellant was involved in the drug operation, and that the Curry evidence would be substantially more prejudicial than probative. (RT 10939-10940.)

The defense also explained that there was a question as to whether the first shooting of Curry was within the scope of the drug operation. If it was not within the scope of that operation, it would constitute propensity evidence, prohibited by Evidence Code section 1101, subdivision (a). (RT 10941.)

The court agreed that whether there was a contract on Curry by Bryant was beyond the scope of Curry's personal knowledge. (RT 10942-10943.) The prosecution admitted there was no evidence to tie the car bomb or the second shooting of Curry to appellant, except for the fact that it happened shortly after Tannis and Curry got together. (RT 10943-10944.)

The court stated that this evidence would tend to show that appellant did Bryant's bidding. (RT 10945-10946.) In response to the defense argument that

appellant was already tied to the operation, the court stated that this connected him in a specific way and was therefore relevant. (RT 10946-10947.)

The defense explained that the "connecting evidence" between appellant and Bryant was missing, and that it was speculation to assume that appellant shot Curry at Bryant's behest. (RT 10947.)

The court stated that it would not allow evidence of the second shooting, as that was highly speculative. (RT 19949.) However, it would allow the evidence of the bomb incident, which it believed was circumstantial evidence that there was a plan to kill Curry. (RT 10949-10950.) The court stated the evidence was relevant to show the relationship between appellant and Bryant. (RT 10950.)

Appellant renewed his objection under *People v. Ewoldt* (1994) 7 Cal.4th 380 (hereinafter *Ewoldt*), arguing that the evidence was prohibited evidence of predisposition. (RT 11150-11152.) The defense explained that if the evidence was being offered to prove a common plan, *Ewoldt* requires a certain level of similarity which was missing between these incidents. (RT 11152.) It was further argued that the actual inference created by this evidence was to prove identity, which requires a greater degree of similarity than was present herein, as the charged and uncharged offenses were very dissimilar. (RT 11153-11155.)

The court stated that in order for the evidence to be relevant, the prosecution needed to prove the logical "underpinnings," that Bryant was aware that Curry and Tannis were sleeping together, and Bryant was angry about it. This predicate had to be established, the court correctly reasoned, for this evidence "to make any sense at all." (RT 11158.)

The prosecution informed the court that it had a witness who overheard Tannis say that Bryant admitted to her that he had Curry shot. (RT 11161.)

In the hearing pursuant to Evidence Code section 402, Curry testified that he had met appellant through Tannis, his relationship with appellant was always casual, and there had been no problems or threats prior to the shooting incident. He had no idea why appellant would shoot him. (RT 11271-11272.)

After Curry testified, counsel for appellant explained that from Curry's testimony it appeared that there was no evidence connecting these incidents to Bryant. The evidence was therefore inadmissible under section 1101(a). (RT 11280.) Furthermore, because the prosecution was offering this evidence not to show common plan, but rather to show appellant's participation in the organization, and hence his identity as the shooter in the instant case, *Ewoldt* requires the greatest showing of similarity for the evidence to be admissible, a standard which was not met by this evidence. (RT 11281.)

The court held it would allow the evidence with the exception of the second shooting incident. The court reasoned that the first two incidents – the shooting by appellant and the car bomb -- raised a logical inference that Bryant was the root of the assaults and that appellant acted at his behest. (RT 11292-11293.) The court did not believe that the attack on Curry was unrelated to the rest of the case, because there is no explanation why appellant would shoot Curry "out of the blue," unless it was at the request of Bryant. (RT 11294.)

The court agreed that the issue against appellant was "one primarily of who did it..." (RT 11295-11296.) However, if the issue was whether Bryant hired appellant to kill Armstrong, the fact that Bryant hired appellant to kill another person on a prior occasion would be probative in this case. (RT 11295-11296.)

The court stated that this evidence also went to the identity of the shooters in this case. (RT 11296-11297.) As to the similarities, the court noted that both incidents involved Tannis, the people shot in both incidents were friends of appellant, and that appellant shot them without an apparent motive.

Prior to Curry's testimony, the trial court admonished the jury as to the permissible use of the evidence, stating

> "This type of evidence may only be considered by you on the issue of the existence of any *intent* which is a necessary element of the crime charged, the *identity* of the person who committed any crime with which the defendant is accused, any *motive* for the commission of the charged offenses and

as it may tend to *prove the relationship* between Mr. Bryant and Mr. Smith in this case." (RT 11314, italics added.)

2. The Hearings Relating to Evidence of the High-Speed Chase and the Cocaine in Appellant's Possession at the Time of his Arrest.

Appellant also made a motion to exclude evidence relating to the facts surrounding his arrest, including the car chase, his possession of cocaine, and the gun used in the Curry shooting. The defense argued that the evidence was not relevant, suggesting that it might be relevant to show that appellant was involved in a drug organization, but did not tend to prove that he was involved in the murder. Therefore, this was a form of propensity evidence barred by Evidence Code section 1101, subdivision (a). (RT 10033-10035.)

The defense explained that it expected there would be testimony that the cocaine found on appellant was in a half-ounce wafer that was "peculiar" to the form in which Bryant-family cocaine was sold[43]. However, the defense believed that the cocaine had been destroyed and questioned whether the prosecution would be able to prove that fact. (RT 10035.)

The prosecution contended the cocaine in appellant's car was in half-ounce bindles, which was how the Bryant family sold cocaine, according to Detective Lambert. (RT 10036-10037.)

The court held that the drugs were relevant, and the chase went to the issue of whether appellant knowingly possessed drugs. Furthermore, the gun was relevant to show that appellant was willing to arm himself to protect the drugs. (RT 10038.) The court stated the fact that appellant possessed drugs that were packaged in a manner common to Bryant family narcotics was relevant to show ties to the group, a motive to commit the charged offense, and a willingness to identify

[43] The prosecution had contended that Bryant-family cocaine was packaged in a unique cookie shape from being formed by beakers. (RT 3906, 8102, 9716.) Evidence was introduced regarding Bryant-family cocaine being sold in this shape. (RT 10249-10250, 9836-9827.)

himself with Bryant. The court noted that the closer a person is to the organization, the more likely it is he did the charged crimes. (RT 10039-10040.)

Later, appellant made a motion for a mistrial or, in the alternative, to strike the testimony relating to appellant's arrest on the grounds that at the time the evidence was introduced the prosecution had indicated that it would tie appellant to the Bryant family organization by reason of the "distinctive cookie shape" of the cocaine. The court agreed with this assessment. (RT 14459.) The defense contended that since this had not been done the foundation for the evidence was not present.

The court denied the motion stating that there had been evidence that the Bryants sold nine-ounce units of cocaine, which was the amount appellant had in his possession. (RT 14460.)

3. Evidence of Criminal Acts of People Other Than Appellant

Additionally, it must be recalled that a vast amount of evidence was introduced regarding the structure and organization of the Bryant organization. This included evidence of the operation of the various crack houses, the beating of Francine Smith when she attempted to pass counterfeit money at one of the crack houses, the attempted bribery of Rhonda Miller, and other illegal activities of the Bryant family. Unlike the typical situation where evidence of other crimes is introduced against a defendant for a specific limited purpose -- i.e., to prove intent or identity – in this case the much of the evidence of other criminal activities introduced in the guilt phase of this case had no admissible purpose whatsoever as to appellant.

Thus, unlike the situation where evidence of a prior commercial burglary is introduced to prove that when the defendant walked out of the store with half a dozen cassettes in his jacket, it was unlikely that it was a mistake, where, under Evidence Code §352, the trial court balances the impermissible inference of crimi-

nal propensity with the probative inference of intent, many of the other crimes evidence introduced here had no probative value as to appellant, only prejudice.

As will be discussed below (*infra*, at p. 223), the prosecution argued the facts of the Bryant family organization's impact on the community at great length. All of this evidence was being offered for some purpose which was never clearly delineated.

No instruction, no matter how well crafted, no matter when given, no matter often repeated, would have enabled the jurors to put this evidence in a compartment labeled "Smith." As the Third Circuit once observed, "A drop of ink cannot be removed from a glass of milk." (*Government of the Virgin Islands v. Toto* (3d Cir. 1976) 529 F.2d 278, 283.) Here, the trial testimony consisted of vast amounts of contaminated material, with no prospect of an effective purifying mechanism.

B. The Relevant Law.

1. Evidence Code sections 210, 350, 352, and 1101

Only relevant evidence, evidence having "any tendency in reason to prove...[a] disputed fact that is of consequence to the determination of the action" is admissible. (Evid. Code §§ 210, 350.) Furthermore, under Evidence Code section 352, a trial court has discretion to exclude relevant evidence if its probative value is outweighed by the probability that its admission will "create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Evidence Code section 1101, subdivision (a) bars "propensity" evidence – evidence of a person's character, including evidence of specific acts, to prove conduct on a specified occasion in conformity with the actor's character. Under subdivision (b) such evidence is admissible if relevant to establish some fact other than conduct, such as intent or common plan.

In People v. *Ewoldt, supra,* and *People* v. *Balcolm* (1994) 7 Cal.4th 414 (hereinafter *Balcolm*) this Court warned that such evidence should only be admitted with "caution" after "extremely careful analysis," because of the danger that a jury will convict because of past criminality. (*Ewoldt* at p. 404 and *Balcolm* at p. 422, citing *People* v. *Smallwood* (1986) 42 Cal.3d 415 and *People* v. *Thompson* (1988) 45 Cal.3d 86, 109; *see also* Bernard Jefferson, California Evidence Benchbook (3d ed.) § 33.23 p. 709.)

Ewoldt and *Balcolm* hold that the admissibility of such evidence hinges on the particular inference that the prosecution wishes to create. As stated in *People* v. *Thompson, supra,* 27 Cal.3d 303, at p. 316:

> "The court 'must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong..[citation.]' "

The failure to properly determine the actual desired logical inference leads to what has been called "an invitation to specious reasoning." (*People* v. *Valantine* (1988) 207 Cal.App.3d 697, 704.)

Differing degrees of similarity are required for different uses of evidence of uncharged acts. The least degree of similarity is required to prove intent. A greater degree of similarity is required to prove common design or plan. The greatest degree of similarity is needed to prove identity. (*Ewoldt* at pp. 402-404, *People v. Kipp* (1998) 18 Cal.3th 349, 369.)

Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a " `pattern and characteristics . . . so unusual and distinctive as to be like a signature.' " (*Ewoldt,* at p. 403, *Kipp,* at p. 370; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 122.)

In order to prove a common plan the uncharged act must demonstrate "not merely a similarity in the results, but such a concurrence of common features that

the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (2 Wigmore, Evidence, *supra*, § 304, p. 249.) (*Ewoldt*, at p. 402, emphasis added.)

Ewoldt and *Balcolm* are peppered with the requirement of a substantial degree of similarity for evidence admitted as proof of common plan. Ewoldt explained that for this use prior cases had required that the incidents be "*markedly similar*" and bear "*striking similarities*" (*Ewoldt* at 394-396, 399; see also *Balcolm*, at pp. 421, 427, - "in a *manner quite similar* " "probative value ... *stems from the similarity*. Italics added.)

In applying the "extremely careful analysis" required for this type of evidence, this Court has stressed that the trial court should *examine what issues are actually in dispute*.

> "[I]n most prosecutions ... it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that...the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value...[T]herefore, *it is imperative that the trial court determine specifically what the proffered evidence is offered to prove*, so that the probative value of the evidence can be evaluated for that purpose." (*Ewoldt*, at p. 406, italics added.)

This Court went on to state:

> "Our holding does not mean that evidence of a defendant's similar uncharged acts that demonstrate the existence of a common design or plan will be admissible in all (*or even most*) criminal prosecutions. In many cases the prejudicial effect of such evidence would outweigh its probative value, *because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute.* [Citation]." (*Ewoldt*, at p. 405-406, italics added.)

As discussed below, the risk of unfair prejudice in this case greatly outweighed the probative value, if any, of the disputed evidence. Likewise, the evidence did not meet the levels of similarity required for its proffered uses. Therefore, this evidence should not have been admitted.

2. Due Process Prohibits the Introduction of this Evidence

The introduction of this evidence also violated appellant's right to due process of law, because its only true relevance was to show that appellant acted in conformity with his prior bad acts.

As the Fifth Circuit has explained, "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*United States* v. *Myers* (5th Cir. 1977) 550 F.2d 1036, 1044)

The United States Supreme Court has indicated, without expressly deciding, that the use of other crimes evidence to prove criminal propensity violates due process. In *Spencer v. Texas* (1966) 385 U.S. 554, a bare majority of the Supreme Court held that the introduction of the defendant's prior convictions in a non-bifurcated capital proceeding did not violate due process, but only because the jury was instructed expressly that the evidence could not be considered in assessing the defendant's guilt and because the evidence was of a documentary nature and therefore less inflammatory. (*Id.*, at p. 561, 562.; accord *Marshall v. Lonberger* (1983) 459 U.S. 422)

In *Estelle v. McGuire*, *supra*, 502 U.S. 62, 75, fn. 5, the Court similarly declined to reach the due process issue, because the jury was instructed that prior crimes could not be considered to prove propensity to commit the charged offense. (*Id.*, at p. 75.)

Thus in *Spencer,* like the subsequent *McGuire,* and unlike the instant case, a due process violation was averted by appropriate limiting instructions. As will be shown in the following section of this brief, the instructions given in this case were

manifestly insufficient to inform the jury as to the correct use of other crimes evidence.

Similarly, the Due Process Clause, as interpreted by the United States Supreme Court, demands that even inferences - not just presumptions - be based on a rational connection between the fact proved and the fact to be inferred. (*Ulster County Court v. Allen* (1979) 442 U. S. 140, 157; *Leary v. United States* (1969) 395 U.S. 6, 46.)

Furthermore, in *McKinney* v. *Rees* (9th Cir. 1993) 993 F.2d 1378 the Ninth Circuit explained that the use of "other acts" evidence to prove conduct in conformity "is contrary to firmly established principles of Anglo-American jurisprudence." (*Id.,* at p. 1380.) The court referred to *Brinegar* v. *United States* (1949) 338 U.S. 160, wherein the United States Supreme Court stated:

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." (*Brinegar*, *supra*, at p. 174, quoted in *McKinney*, *supra*, at p. 1381.)

McKinney subjected the disputed evidence to "close scrutiny" to determine whether the inferences that could be drawn from the evidence were relevant to a material fact in the case or whether it led only "to impermissible inferences about the defendant's character." (*Id.*, at p. 1381.)

In *McKinney* the court held that several of the items of evidence introduced were not relevant to any fact other than character and the inference that the defendant acted in conformity with that character. (*Id.*, at pp. 1381-1884.) Because the evidence gave rise to no permissible inferences, and "drawing propensity inferences from 'other acts' evidence of character is impermissible under a historically grounded rule of Anglo-American jurisprudence," the admission of such evidence

violated the right to due process of law. (*Id.*, at p. 1384, citing *Jammal* v. *Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 and *Dowling* v. *United States* (1990) 493 U.S. 342, 352.)

The *McKinney* court found a violation of due process because the evidence in question was "emotionally charged" and painted the defendant as "a young man with a fascination with knives and with a commando lifestyle" – an image that "prey[ed] on the emotions of the jury" and made them more willing to believe that he "would kill his mother in her sleep without much apparent motive." (*Id.*, at p. 1385.) Under these circumstances, the court concluded,

> "it is more than reasonably likely that the jury did not follow its instructions to weigh all the evidence carefully, but instead skipped careful analysis of the logical inferences raised by the circumstantial evidence and convicted McKinney on the basis of his suspicious character and previous acts, in violation of our community's standards of fair play." (*Ibid.*; see also *United States v. Lewis* (9th Cir. 1986) 787 F.2d. 1318, 1323 ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond moral capabilities.")

This Court has also assumed, without deciding, that the utilization of other crimes evidence to prove propensity violates the federal due process clause. (*People* v. *Garceau* (1993) 6 Cal.4th 140, 185-187.)

As will be shown, the only relevance of the other crimes evidence in this case was for the impermissible inference of conduct in conformity with character. The resulting portrait of appellant as a hit man was far worse than the image of McKinney honing and playing with knives.

C. Application of Law to Facts

Applying the law discussed above to the instant case, it is clear that there were multiple errors in admitting evidence of other bad acts.

1. Failure in the Foundation for the Evidence of the Shooting and Bombing of Curry.

As explained previously (*ante*, at p. 153), the trial court recognized that unless the prosecution could prove that Bryant was angry at Curry, the evidence of any of the Curry assaults would have no probative value with respect to appellant's guilt in this case.

However, the logical foundation needed for this evidence "to make any sense at all," in the court's words, *was never established against appellant.*

To prove Bryan's animosity toward Curry, the prosecution introduced a hearsay statement of Bryant wherein he told Tannis that he placed a bomb under Curry's car. (RT 13097-13098.) That evidence was admissible against Bryant under Evidence Code section 1220 as an admission.

However, the trial court properly realized the evidence of this statement was *not* admissible against appellant, and told the jury the evidence could only be considered against Bryant. (RT 13086.) Thus, the predicate for the admission of the Curry incidents was never established as to appellant, and the jury should not have been allowed to consider those incidents as evidence against him because its logical basis had not been proven

The jury, however, was told – without condition or limitation -- that it could consider the Curry assaults against appellant.

Evidence is not admissible unless it is relevant. (Evid. Code § 350.) Moreover, to allow the jury to consider evidence, like the other crimes evidence in this case, when its logical relevance was not established violates due process under *Ulster County Court v. Allen*, *supra*, 442 U. S. 140, which requires a rational connection between the fact proved and the fact to be inferred. (*Ante*, at p. 159.)

The trial court conditioned the admissibility of this evidence on the prosecution laying a foundation to establish its relevance. The court reminded the prosecution during the offer of proof regarding appellant's arrest (discussed below) that the prosecution had promised to prove that the narcotics were packaged

in a manner unique to the Bryant family but had not yet done so. (RT 11299-11300.) Thus, the court, in rather strong terms, informed the prosecution that it was assuming the offers of proof of the foundational facts were made in good faith, and the court expected the prosecution to live up to them. (RT 11300-11301.) In fact, as to appellant, the prosecution failed to live up to its offer of proof. Therefore, the admission of this evidence was in error.

The evidence of the Curry bombing suffers from an additional logical flaw. The evidence of the bombing stands in a similar position to the evidence of the second Curry shooting. The court realized that unless there was evidence that appellant did the second shooting, that evidence should not be admitted against him for any purpose. The same should have been true of the bombing evidence: *Unless there was evidence appellant did the bombing, it should not have been admissible against appellant.*

As to the bombing, appellant stands in the same position as Wheeler and Settle: There was no evidence they were involved in the bombing, and the jury was not allowed to use the evidence against them. No such limitation was imposed as to appellant, even though there was no evidence appellant he was involved in the bombing. (RT 11313.)

Indeed, the failure to parse out the specific inferences and the people to whom the evidence was admissible and relevant leads to the specious reasoning cautioned against by *People* v. *Valantine*, *supra*, 207 Cal.App.3d 697, 704. (*Ante*, at p. 158.) For example, without such limitations on the possible inferences to be drawn from the evidence, the jury could reason that appellant was also involved in the bombing of Curry's car, based on the fact that appellant was employed by Bryant, and Bryant was involved in planting the bomb.

If the evidence is not logical, it necessarily fails to pass muster under section 352, which requires a balance of the probative value against the danger of undue prejudice. If the probative value is zero, it is automatically outweighed by prejudice.

Likewise, it necessarily fails any section 1101 test, as that necessarily incorporates a section-352 analysis, *plus* a ban on propensity evidence. Therefore, if the relevance aspect of the evidence fails, it is inadmissible under section 1101.

Moreover, because the logical basis of the Curry shooting was not established, but the jury was still allowed to consider the evidence against appellant, the introduction of this evidence was likely to cause confusion and mislead the jury, requiring its exclusion under Evidence Code section 352.)

2. The Failure to Meet Standards of Admissibility for the Evidence of the Shooting and Bombing of Curry.

Not only was there a failure in the foundation required for the admission of this evidence, but even if the foundation had been established, the evidence failed to meet the standards for admissibility laid down by this Court for the particular uses for which it was admitted.

For example, the trial court told the jury that it could consider this evidence for identity. As noted above, *Ewoldt* requires a very high degree of similarity, a signature-like resemblance, for evidence to be used to prove identity. The precise reasoning of identity evidence is that the charged crime and the uncharged crime have unusually distinct traits which make it likely that the same person did both offenses. However, because the evidence did not have this "signature like" similarity, it was not admissible for this use.

Likewise, this evidence was allowed to prove "common plan." However, that use also requires a high degree of similarity between the acts that is lacking in this case. While the result was similar – someone appellant knew was shot – this is not the "concurrence of common features" required for this evidence under *Ewoldt*[42]. However, as noted above (*ante*, at pp. 158-159) The mere similarity in

[42] *Ewoldt* and *Balcolm* are examples of a "concurrence of similar features." In *Ewoldt*, the fact that the defendant's two wives, who had life insurance policies,

result *is not a sufficient showing* for the use of evidence of other acts for common plan. Therefore, this evidence did not have the degree of similarity required for this use.

Therefore, the evidence was not admissible to prove identity or common plan.

Furthermore, according to the prosecution, the Bryant family had many people doing its dirty work. For example, there was no allegation that appellant was involved in the second shooting or the bombing of Curry. Nor was there any indication or allegation that appellant was involved in the beating of Francine Smith or the various threats to witnesses to the Gentry shooting or any of the other slew of crimes introduced in this case.

Consequently, by itself, the fact that appellant was involved in one act of violence at the behest of the Bryants, the first Curry shooting, cannot be used to show he was involved in a second, unrelated incident. Without more, guilt of one crime is not evidence of guilt of a second offense.

Likewise, the court was incorrect when it told the jury that it could consider this evidence to prove intent, since that requires that the other evidence of intent be ambiguous. In *People* v. *Kelly* (1967) 66 Cal.2d 232, 242-243 the defendant was charged with oral copulation of his step-son. Evidence the defendant had previously engaged in sodomy with other boys was held to be inadmissible to prove lewd "intent" towards the victim, because the acts in issue were unambiguous. Consequently, the court held that where the acts are unambiguous, and the defen-

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drowned in a bathtub after receiving injuries in unrelated incidents was "markedly similar." (*Ewoldt* at 394-395, 399.) In *Balcolm* in both crimes the defendant wore similar clothing, went to an apartment complex in the early morning, sought out a lone woman unknown to him, and gained control over her at gun point, initially professed only an intention to rob the victim, waiting until he had moved the victim to a remote location before expressly announcing his intention to rape her, committing a single act of intercourse, and in both instances stealing the victim's ATM card, obtaining her PIN, and escaping in her automobile." (*Balcom*, at p. 423.)

dant does not raise the issue of intent, evidence of other crimes is admissible only if they were performed with the same victim or are not too remote and are similar to the offenses in question so that they show a common scheme.

This was not a case where intent (or mistake) was an issue. There was nothing ambiguous about the alleged acts. (*People* v. *Haslouer* (1978) 79 Cal.App.3d 818, 829.) In this case, the very nature of the wounds eliminates any question of intent. (*People v. Williams* (1965) 233 Cal.App.2d 520, 521.)

Although it does not appear that this Court has discussed the requisite degree of similarity required to prove the relationship of the parties, one of the uses allowed below, appellant submits that the use of this evidence should depend on the *precise* inference that the prosecution wishes to establish. Thus, if the prosecution only wishes to show that the parties knew each other, a very low degree of similarity should be required.

However, in this case the *specific* inference that the prosecution wished to prove was that appellant and Bryant had a specific relationship that is evidence of the fact that they acted together in a specific way on this occasion. Appellant submits that this use is similar to common plan or modus operendi, and therefore should meet the "substantial similarity" standard mandated for those uses.

Similarly, if the showing of the relationship of the parties is to prove a commonality of interests, in this case a common motive to kill Armstrong, a similar degree of similarity should be required to that required for common plan. The reason for this is that the common motive to be inferred would depend on common interests or common endeavors. The fact that Brant *has a particular motive on one occasion* cannot be a basis for an inference of a like motive on behalf of appellant, unless a common interest in the second incident is present.

Even if there is some possible legitimate inference, Evidence Code Section 352 requires the probative value to substantially outweigh the danger of undue prejudice. If there is any doubt about the evidence it must be excluded. (*People* v. *Thompson*, *supra*, 27 Cal.3d at p. 317; *People* v. *Kelly*, *supra*, 66 Cal.2d at 239;

People v. *Sam* (1969) 71 Cal.2d 194, 203.) In this case, the weakness of the logical inference leads to a conclusion that its probabitve value is outweighed by its prejudicial impact.

In summary, the evidence of the Curry bombing and shooting failed to meet the standards of admissibility under Evidence Code sections 352 and/or 1101.

3. Evidence of the Cocaine in Appellant's Possession at the Time of his Arrest and Evidence of the High-Speed Chase

The trial court erred in admitting the evidence relating to the cocaine found in appellant's possession at the time of his arrest and evidence of the high-speed chase.

a. Evidence Relating to the Cocaine

As with evidence regarding the Curry shooting, the evidence regarding the cocaine should have been excluded because the prosecution failed to establish the logical relevance of the cocaine found in appellant's possession.

Specifically, the prosecution never proved that the cocaine had the unique, cookie-shape characteristic of "Bryant family" cocaine, as argued at the hearing on this issue. Again, the trial court had made its ruling partly upon representations that the prosecution would establish this factual predicate. In fact, at the time of the hearing on the Curry shooting, Judge Horan chastised the prosecution for failing to establish the foundation for admission of the cocaine evidence. (*Ante*, at pp. 163-164.)

Nonetheless, as the defense had predicted when the motion was heard, the prosecution never did live up to its promise to lay a relevant foundation for this evidence, and the trial court failed to remedy the situation.

The evidence concerning the size and packaging of the cocaine failed to link it dispositively to the Bryant family. While there was testimony that the Bryant family packaged its drugs in grams or nine-ounces packaging (RT 9960-9967),

there was no testimony that ***only*** the Bryants sold in nine-ounce bags. The evidence concerning the Bryant family crack houses is an instructive contrast: the prosecution established the unique nature of the fortifications of the houses, the fact that the houses were only used for dealing, and the presence of crock-pots to destroy evidence rapidly. It is only because of the fortifications and other unique features were observed at the Adelphia house that the evidence of Adelphia was relevant. If the only fact known about Adelphia was that someone was selling drugs out of the house, that would not have been enough to connect it to Bryant, and it would not have been admissible.

Likewise, unless the nine-ounce package was "unique" to the Bryants, it cannot connect appellant to the Bryants by reason of the fact that he possessed cocaine in that amount.

As noted above, irrelevant evidence must be excluded. Because the predicate necessary to establish the logical relevance of this evidence was never established, the evidence itself was not admissible. It also fails to satisfy the standards for either 352 or 1101, the probative value of the evidence was zero or minimal and thus automatically outweighed by its prejudicial effect. (*Ante*, at p. 164.)

Even if there were some probative value for this evidence, the inference is very weak. For example, as noted above, the trial court held that the evidence of cocaine in appellant's possession went to the issue of whether he knowingly possessed drugs. However, whether appellant knowingly possessed drugs was hardly an ultimate issue in this case, and does not show that he was involved in murder.

As noted above, this Court has directed trial courts to determine what is actually in dispute and what the evidence is actually offered for. (*Ante*, at p. 159.)

The fact that appellant may have been willing to possess drugs does not have a significant probative value to prove any fact in dispute in this case, such as the fact that appellant was involved in the murder of Armstrong, that would outweigh the natural prejudice from this type of evidence.

Similarly, the court stated that the evidence that appellant was armed when he was arrested after the chase was relevant to show that he was willing to arm himself to protect drugs. However, the fact that someone is willing to arm himself to protect drugs in his possession is not particularly strong evidence of the fact that he would be engaged in the type of plan presented by the Armstrong/Brown killing.

Furthermore, allowing the jury to consider the evidence, despite the lack of logical relevance, was bound to cause confusion and mislead the jury, thereby rendering it inadmissible under Evidence Code section 352.

Finally, to allow the jury to consider this evidence when its logical basis has failed violates due process under *Ulster County Court v. Allen, supra*, 442 U.S. 140 which requires a rational connection between the fact proved and the fact to be inferred. (Ante, at p. 161.)

b. Evidence Relating to the Chase

As explained, prior to his arrest appellant led the police on a forty-minute, high-speed chase through the San Fernando Valley, which the trial court believed was relevant to show appellant knowingly possessed drugs. (*Ante*, at p. 155.)

Balancing the prejudicial effect against the probative value of this evidence, it is clear that the court abused its discretion. Although the evidence may have been relevant to show appellant knowingly possessed drugs, appellant was not charged with that offense. Nor was it seriously disputed that appellant possessed drugs at the time of his arrest. He was seen tossing powder out the window and still had bags of cocaine when he was arrested. *The fact of the chase added nothing of relevance to the case.*

Likewise, the fact that appellant knowingly possessed drugs on September 28, 1987, did not make it more likely that he helped plan the murder of Armstrong.

Finally, it was stipulated that appellant shot Curry five hours before he was arrested. (*Ante,* at p. 35.) The reason for the chase was obviously because appel-

lant had just shot someone, still had the weapon, and was trying to elude the police. The fact that he knowingly possessed drugs was thus so insignificant as to be truly irrelevant.

The car chase evidence was therefore irrelevant: it did not have a tendency in reason to prove a disputed fact *of consequence* to the determination of the action.

As with the evidence relating to the cocaine itself, the introduction of the car chase evidence was likely to cause confusion and mislead the jury. (Evid. Code § 352.)

Finally, to allow the jury to consider this evidence when its logical basis has failed violates due process under *Ulster County Court v. Allen, supra*, 442 U.S. 140 which requires a rational connection between the fact proved and the fact to be inferred. (Ante, at p. 161.)

D. Prejudice

As noted previously, the case against appellant was very weak to the extent that the trial judge doubted whether there was evidence connecting appellant to the offense apart from Williams' testimony. Even if Williams is not an accomplice, his testimony was suspect. (*Ante*, at pp. 61-62, 75-79.)

Without Williams' testimony appellant is just one of the 150 employees in the drug organization, any of whom may have been willing to advance their positions in the organization by helping to protect the business. There was far greater evidence connecting Settle to the Bryant family, but the jury was unable to reach a verdict as to his guilt, in spite of the fact that Williams placed him at the scene of the crime. Likewise, without Williams' testimony, the evidence against appellant was very similar to the evidence against the other original capital defendants, such as Curry, Johnson, and Newbill, against whom the murder charges were dismissed.

Other than the evidence of prior misconduct, the only evidence against appellant was his frequent telephonic communication with the various parties, which shows no more than the fact that he knew the people involved in this case.

Thus, the prosecution exploited the erroneously admitted evidence of the Curry incident, the drug possession, and the high-speed chase to bolster its otherwise weak case by depicting appellant as a drug-dealing hit man with no regard for the lives of others.

In closing argument, the prosecution referred to the Curry shooting and evidence of the cocaine found in appellant's possession. (e.g. RT 16492-16493, 16549-16552.) The prosecution described appellant to the jury as the "hit man" for the family, "Stan Bryant's creature," and a "high level dope murderer." (RT 16552, 16553, 16554.) As with the rest of the case, the majority of the prosecutor's argument did not address facts that were relevant to appellant's guilt. These facts included the crime scene evidence, evidence relating to the other crack houses and the structure of the Bryant organization, and evidence relating to the other three defendants. Except for references to the testimony of Williams and the telephone records showing phone calls from appellant's residence to other people involved in the case, virtually all of the prosecutor's arguments focusing specifically on appellant related to evidence of other crimes. (e.g. RT 16492-16493, 16550-16553.) Although these references to appellant's other crimes are not extensive within the framework of the entire argument, that is because appellant's role in the case was not extensive. However, the fact that the prosecution's argument *relating to appellant* relies so heavily on other crimes evidence reveals how much of a role this evidence played in attempting to prove *appellant* was involved in the murder. The prosecution's use of the improper evidence during closing argument, makes the error far more likely to be prejudicial to the defendant. (*People v. Woodard, supra*, 23 Cal.3d at p. 341.)

The inherently prejudicial nature of other crimes evidence – its tendency to sway the jury and create an overwhelming urge to convict notwithstanding reason-

able doubt -- is exactly the reason behind Evidence Code section 1101 and its counterparts in every Anglo-American jurisdiction.

The image the prosecution created in this case -- of a cold-blooded killer, willing to shoot down a friend in a calculated surprise attack, and of a drug dealer careening down the streets of the valley in a high-speed chase, tossing drugs out the window -- was far more prejudicial than the image found harmful in *McKinney.*

In *People v. Yeoman, supra,* 31 Cal.4th 93, 122, this Court explained that where the defendant concedes identity, the erroneous admission of evidence for that purpose is harmless. (*Id.*, at p. 122.) In this case, because identity was the *very* issue that appellant was contesting, it was prejudicial to tell the jury that it could use all of this evidence to prove identity when it did not meet the requirements for that use.

Because of their audience appeal, high-speed chases are a high-publicity crime, likely to further antagonize the jury in this case.

As noted above, the introduction of propensity evidence rendered appellant's trial fundamentally unfair in violation of the right to due process of law. Similarly, the fact that this type of character evidence "is contrary to firmly established principles of Anglo-American jurisprudence" (*ante*, at p. 161), is based on the fact that such evidence is universally viewed as highly prejudicial. Therefore, the misuse of this evidence deprived appellant of a state right of real substance, the denial of which constituted a due process violation. (*Ante*, at p. 51-52.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Likewise, because the logical basis for much of this evidence was never established, the use of such evidence also violates due process. (*Ante*, at p. 161.)

All of these due process violations must be evaluated under the standard of *Chapman* v. *California*, *supra*, 386 U.S. 18, which requires the state to prove that a federal constitutional error was harmless beyond a reasonable doubt.

If other crimes evidence is wrongfully admitted, even proper jury instructions can fail to cure the harm.

> "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. 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." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130 *Id.*, at pp. 129-103; see also, *People v. Karis* (1988) 46 Cal.3d 612, 636.)

In fact, was will be shown (*infra*, Section V), the instructions given were *not* correct, thereby aggravating the error in admitting the evidence. Consequently, the only prophylactic measure that saves this type of evidence from violating due process failed in this case.

All of these facts, including the inherently prejudicial nature of this evidence, make it impossible to conclude that the presumption of prejudice can be rebutted.

Furthermore, the trial court's failure to properly examine the evidence introduced in this case and to properly determine its correct use led to "specious reasoning" (*ante*, at p. 159) that undermined the reliability of the jury's verdict in violation of the Eighth Amendment, thereby requiring reversal of the instant case.

Finally, the error was prejudicial even under *People v. Watson*, (1956) 46 Cal.2d 818, because of the weakness of the case, the inflammatory nature of the evidence, the questionable nature of the inferences, the reliance by the prosecution on these errors during argument to the jury, and the misdirection of the jury due to errors in instructions, as discussed in other sections of this brief.

Therefore, a reversal of the judgment is required.

V

THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY REGARDING THE PROPER USE OF EVIDENCE RELATING TO OTHER BAD ACTS. THIS ERROR EVIDENCE DEPRIVED APPELLANT OF THE RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENT, THE SIXTH AMENDMENT RIGHT TO COUNSEL, AND THE EIGHT AMENDMENT RIGHT TO A RELIABLE DETERMINATION IN A CAPITAL CASE

The trial court erred in failing to properly instruct the jury regarding the proper use of evidence relating to other bad acts. This error evidence deprived appellant of the right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, the Sixth Amendment right to counsel, and the Eighth Amendment right to a reliable determination of the facts in a capital case.

A. Introduction

Even if the evidence of other bad acts was properly *admitted*, the trial court erred in failing to give proper instructions to the jury regarding the correct *use* of this evidence. As explained (*ante*, at p. 160.), because correct instructions may be the only thing that saves character evidence from violating the right to due process of law, it is imperative that the jury be correctly limited in the use of this type of evidence.

In this case, there were two telling hearings that illustrate the problem presented by this issue. First, as noted above, at the earliest stages of the case, the court expressed concern over the ability of a jury to compartmentalize the evidence that would be presented. (*Ante*, at p. 131, RT 481.) Although the non-capital defendants were severed, this observation proved prophetic given the vast amount of other crimes evidence that would still eventually have to be sorted out by the court and jury.

Second, when the court addressed this issue at the time instructions were discussed, the court noted that Ms. Gulartie, Brant's attorney had provided a *partial* list of other crimes evidence which was three pages long. (RT 16320-16321.)

Ms. Gulartie's three-page list would have been a good starting point to devise proper jury instructions, because for each item of other crimes evidence, the jury needed to be told to which defendant it was relevant and for what purpose or purposes it could be considered. As will be shown, this was not done, thereby depriving appellant of due process of law.

B. The Relevant Law

As noted above (*ante*, at p. 73), a trial court must correctly instruct the jury on general principles of law relevant to the issues raised by the evidence, even though not requested to do so.

The Ninth Circuit has explained the need for complete instructions, stating:

> "A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions." (*McDowell* v. *Calderon*, *supra*, 130 F.3d 833, 836.)

Thus, it is imperative that the trial court correctly identify the specific purpose for which other crimes evidence is being offered and instruct the jury as to the correct use of the evidence once it has been admitted.

The fact that the court gave most of CALJIC No. 2.50, the generic instruction for this type of evidence is only the starting place. The court had a duty to modify that instruction so that each item of evidence would be used for the correct purpose.

For example, identity is one permissible use of other bad acts evidence. However, *Ewoldt* and other cases teach that not every bad act may be used for

identity. The jury instructions must therefore make clear which bad acts may be considered as evidence of identity and which may be considered only for other purposes, purposes which must be clearly identified.

It defeats the purpose of the rules of evidence if, for example, evidence is admissible to prove motive but inadmissible to prove identity, and the evidence is *introduced* only for motive, but the jury is then instructed to consider the evidence for motive *and* identity. That is what happened in this case.

As Justice Jefferson has explained, "it is error for a trial judge to give CAL-JIC instruction No. 2.50 and list *four separate issues* upon which the evidence is being received and which the jury may consider unless the evidence is relevant and admissible with respect to *each* of such four issues." (*People v. Swearington* (1977) 71 Cal.App.3d 935, 947.) Therefore, it is error to give instructions regarding the use of other crimes evidence to prove "identity" when identity is not in dispute. (*Id.*, at p. 947.)

Consequently, in giving CALJIC No. 2.50 a court must "be careful to limit the issues upon which such evidence is relevant and admissible by striking from the instruction those issues upon which the evidence is not admissible." (*Id.*, at p. 849.)

Similarly, when other crimes evidence is admissible against one defendant, the jury must be instructed that it can only consider that evidence against that defendant, and the jury must be limited from considering it against the other defendants. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 837.)

Thus, it has been stated that in order to ensure "a fair hearing or trial, due process, and the presumption of innocence" the trial court must not only instruct on the relevant principles of law, but must equally "refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Armstead* (2002) 102 Cal.App.4th 784, 792, quot-

ing *People v. Saddler* (1979) 24 Cal.3d 671, 681, internal quotation marks omitted.)

Because evidence of other offenses "is admissible only in certain exceptional situations where it is relevant to an issue," comments on such evidence for purposes other than the exception for which it was admitted are "generally improper and highly prejudicial." (*People v. Armstead, supra*, 102 Cal.App.4th at p. 793.)

Consequently, instructing the jury to use the evidence for a purpose other than the one for which the evidence was admitted violates the right to due process of law. (*Id.*, at p. 794.)

Furthermore, it has been recognized that to change the use for which the evidence may be considered between the time that the evidence is introduced and the time of jury instructions also violates the right to effective assistance of counsel, as guaranteed by the Sixth Amendment. (*Ibid.*)

The instructional errors in this case allowed the jury to improperly use the evidence of other bad acts. Considering the due process implications involved in the introduction of character evidence, combined with the universal recognition of its prejudicial impact, the failure to prevent the improper use of this evidence clearly deprived appellant of a state right of real substance, the denial of which constituted a deprivation of the right to due process of law. (*Ante*, at p. 51),

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Likewise, instructing the jury that it could use such evidence for improper purposes distorts the jury's deliberations, particularly when the evidence of the other bad acts is crucial to the prosecution's case. This is bound to impact the verdict, thereby violating the Eighth Amendment requirement of heightened reliability in capital cases. (*Ante*, at p. 51.)

C. Instructions Requested and Given

When jury instructions were discussed towards the end of trial, appellant's counsel requested limiting instructions on the evidence regarding the Curry shooting and the cocaine found on appellant when he was arrested. The defense explained that at the time that the evidence was introduced, there was "somewhat of a limiting instruction," "but we didn't really delineate the purpose for which it could be introduced. Therefore, the defense requested an instruction informing the jury that the only relevant use of that evidence was "for the purposes of identifying [appellant] as a member of drug activities and for no other purpose." (RT 16211-16212.)

At that time, the court informed Mr. Novotney that Ms. Gularitie was drafting instructions regarding other crimes evidence. (RT 16212.) Later, the court explained that Ms. Gulartie had provided a partial list of instructions regarding evidence of other bad acts which the court noted took three pages. (RT 16320-16321.)

Eventually, the jury was instructed with a modified version of CALJIC No. 2.50. (RT 16393, CT 15488-15489.) This version informed the jury that the other acts evidence could not be used to prove the defendant was a bad person or had a disposition to commit the crime. The instruction further told the jury that there had been evidence which showed that "the defendant" committed other crimes. Evidence of those crimes could only be considered for the limited purposes of proving a variety of facts, including proving common plan, intent, identity, motive, and the charged offense was part of a large continuing plan."

At no time was the jury instructed that it could *only* consider evidence of a particular defendant's crime against that defendant. In fact, as will be shown, the jury was told at least once that it could consider an offense by Bryant against appellant, even though there was no evidence that appellant was involved in that offense.

D. The Error in the Instructions Relating to the Incidents Involving Curry

The most egregious example of error relating to the Curry incidents was that the jury was expressly told it could use the bombing evidence against appellant for anything. *Even though the prosecution admitted there was no evidence to tie the bomb incident to appellant.* (RT 10943.)

Just as the court told the jury it could not consider this evidence against Wheeler or Settle (RT 11313), and just as the court realized that Bryant's admission as to the bombing had to be limited to Bryant (RT 13086), so it should have instructed the jury it could not consider the bombing evidence against appellant. However, the jury was told it could use that evidence against appellant. (RT 11314.)

Thus, one is confronted with the inherently impossible mental condition of Bryant's admission to the involvement in the bombing is limited only to Bryant, but the jury may consider the bombing to show the relationship of Bryant and appellant.

The type of mental gymnastics required for this type of reasoning brings to mind the comments of Mr. Justice Cardozo:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed." (*Shepard* v. *United States* (1933) 290 U. S. 96, 104.)

In *United States v. Hitt* (9th Cir. 1992) 981 F.2d 422, at p. 424, the court noted that "It is bad enough for the jury to be unduly swayed by something that the defendant did; it's totally unacceptable for it to be prejudiced by something he seems to have done but in fact did not do."

Therefore, it was error to allow the jury to consider the Curry bombing incident as evidence against appellant.

The other problem with both the bombing and shooting incidents arises from the fact that the jury was instructed it could use the evidence for the wrong purpose, namely, that the evidence could be used to show intent and common plan in the current case. As explained above, the evidence of the Curry shooting, the chase, and the cocaine lacked the signature-like resemblance or the concurrence of common features needed to prove identity or common plan. (*Ante*, at p. 165.)

Assuming, *arguendo*, the evidence of the shooting was permissible and the requisite foundation had been established for the original use, the court did not hold that the evidence could be admitted for *other* purposes such as intent or common plan. Rather, at the time the evidence was admitted, it was admitted solely to prove the relationship of Bryant and appellant.

Nonetheless, at the end of the trial, months after the evidence was introduced, the jury was told it could consider the evidence of the bombing and shooting for these other purposes, including intent and common plan.

Even if the jury could remember the original purpose for which this evidence had been admitted, it was now being told to use that evidence for different purposes, in itself an error of constitutional magnitude. (Ante, at p. 178.) This renders it impossible that the jury would have been able to either remember or distill the proper purpose for which this evidence was introduced. This is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (*Nash v. United States* (2nd Cir. 1932) 106 F.2d, 1006, 1007.)

From the foregoing, it is clear that the trial court erred in the instructions given to the jury regarding the assaults on Curry

E. The Error in the Instructions Relating to the Gentry Shooting, the Goldman Shooting, to the Cocaine Found at the Arrest of Appellant and the Pursuit of Appellant

As with the evidence of the Curry shooting, the jury was told that it could use evidence of other bad acts for purposes for which those acts were not admitted. As discussed above, when the admissibility of the evidence was discussed, the trial court held that the following items of evidence were relevant for the following purposes:

The evidence of the cocaine in appellant's possession was relevant to show that appellant knowingly possessed drugs, was willing to arm himself to protect the drugs, to show his ties to the Bryant organization, a motive to commit the charged offense, and a willingness to identify himself with Bryant. (RT 10038-10040.)

The Gentry murder, for which Armstrong, as the shooter "took the rap" for the Bryants, was relevant to prove "motive, premeditation, and intent." (RT 8729.) The incident where Armstrong shot Goldman, because Goldman owed the Bryants money, was relevant to prove intent and motive. (RT 9217-9218, 9226.)

Assuming, arguendo, that all of these rulings were correct, the purposes for which the court admitted the evidence were still considerably narrower than those allowed by the court's ultimate instructions, which told the jury that it could consider ***any*** of the bad acts evidence for "common plan, intent, identity, motive, and the charged offense was part of a large continuing plan."

Thus, to use but one example, the Goldman and Curry shootings were admitted for the very limited purposes described above, but were not admitted as part of a common plan or motive. However, as with all of these acts, the jury was given instructions that allowed it to use the evidence for these purposes for which it had not been introduced.

This shift in permissible use violates two of the principles of law discussed above: 1. It is impermissible to admit evidence of bad acts for one purpose and

then instruct the jury at the end of trial that it can be used for other purposes (*Ante*, at p. 178-179); 2. When various items of evidence are admissible for different purposes, the jury must be separately instructed as to the permissible use of each item of evidence. (*Ante*, at p. 177.)

F. The Failure to Limit the Jury's Consideration to the Defendant Who Committed the Specific Bad Acts

Another problem with the instruction given is that the jury was told it had received evidence that "the defendant" had committed crimes and that it could use evidence of those crimes for specified purposes. Unfortunately, the jury was never told that it could only use the evidence against the specific defendant who committed those crimes.

In fact, in many ways the jury was led to believe the opposite, namely that it could use evidence of one defendant's crime in its consideration of the case of the other defendants.

The most obvious example of this was the evidence of the Curry bombing. As the prosecution and Judge Horan agreed, there was no evidence that appellant was involved in that offense. Nonetheless, the jury was instructed that it could consider that crime to prove Bryant's relationship to appellant. (*Ante*, at p. 156.)

Obviously, it is logically impossible to use the Curry bombing to prove Bryant's relationship to appellant and not consider it to prove *appellant's* relationship to Bryant. Hence, the criminal act of Bryant – attempted murder – was used against appellant, even though no one has suggested appellant was involved in that act.

Similarly, a proper instruction on the Gentry murder would have informed the jury that the Gentry murder was relevant to *Bryant's* motive. While appellant's relationship to Bryant may have been provable by other evidence, and while appellant's motive to commit this crime may be provable by evidence of his relationship to Bryant, the Gentry murder cannot be used to show *appellant's* motive.

Much of the prosecution's case was based on the theory that the Bryant family was a monolith that acted in concert to sell drugs, terrorize the community, run crack-houses, and commit other crimes.

Therefore, absent specific instructions to the contrary, the jury would naturally consider the actions of one as the actions of all. There is no reason to assume that the jury would naturally understand the principle of *United States v. Hitt, supra*, 981 F.2d 422 that it is improper to consider the bad acts of one defendant against the other.

This problem was exacerbated by the fact that the vast majority of the trial involved evidence of other crimes, committed by the other defendants.

Other crimes evidence that seems to have slipped under the radar included all of the evidence of the crack houses, the acts of violence against people in the community, and all the acts of attempted witness tampering such as the attempts to convince Miller and Goldman not to testify and the inference, from the number of other witnesses who recanted, of intimidation by the Bryant family.

Some evidence had a very specific purpose. For example, Rolo Bryant, Jeff Bryant's former girlfriend, tried to pay a witness not to testify in the trial involving Armstrong for the murder of Gentry. This attempt to influence a witness may be admissible in judging the credibility of any statements made by Miller after that event. Also, if shown that Bryant authorized those actions, it could be used to show a consciousness of guilt on his part. Unfortunately, the jury instructions did not specify the proper uses for the evidence, but rather indicated that the jury could consider this, like all of the other crimes evidence, for any of the enumerated purposes, including the identity of the persons who killed Armstrong.

Another example of the possible misuse of other crimes evidence involved the evidence of the crack houses. Evidence regarding the Carl Street crack house, for example, could have been relevant for any number of purposes, including the following chain of inferences: The house contained papers in Bryant's and Wheeler's names. From this one could infer that Bryant and Wheeler were in-

volved in the narcotics business, for which the house was being used, from which one could infer that Bryant and Wheeler were also involved in the Wheeler Avenue crack house, from which one could infer that they were involved in the charged murders.

As will be discussed below (*infra*, at p. 224), the prosecution argued the facts of the Bryant family organization's impact on the community at great length. Because this was all evidence of other bad acts of other people, it was important for the jury to understand why that evidence was being admitted. Indeed, this evidence was the vast majority of all the evidence introduced in the case. But its relevance was never properly explained to the jury.

Unfortunately, the prosecution's arguments created a danger of lumping all participants together in the criminal enterprises of the Bryant family. The prosecution repeatedly argued the horrible nature of the organization, how the organization operated for years beyond the ability of the police to control it, becoming "the biggest most violent drug organization that anyone could imagine." The prosecution argued that the Bryant family was an organization that "perpetuated itself by intimidation, blowing up people, threats, beating up people, killing people. (e.g. 16430N, 16430P, 16430S, 16475-16476, 16490-16491.)

Furthermore, given the prosecution's theory that appellant was a hit man for the Bryant organization, the man that did Bryant's dirty work, it was imperative that the jury be correctly instructed on the permissible uses of the extensive evidence of bad acts committed by other people.

Several times during the trial, appellant's requests for limiting instructions were denied. For example, Alonzo Smith testified that in 1986, he was trying to set up his own drug business, and he was introduced to Bryant. Arrangements were made for Bryant to get some drugs for Alonzo to sell. (RT 10884-10888.)

At the time this evidence was introduced, Mr. Gregory explained to the Court that Alonzo was repeating statements attributable to another defendant, and Mr. Gregory requested a limiting instruction. That request was refused. (RT

10884-10888.) Alonzo then went on to explain his other dealings selling drugs for Bryant. (RT 10888-10903.)

This evidence may have been relevant for any number of purposes, such as to show Bryant's involvement in the family business or the scope of the business as an organization worth protecting. However, it was not admissible to show that the defendants, of which appellant was one, were members of a criminal organization.

Consequently, the jury should have been instructed that it could consider this evidence only against Bryant and only for a limited purpose.

In short, throughout the trial a vast amount of evidence was introduced regarding the wrongful acts of other people. Even if that evidence was properly admitted, reversal is required because the court failed to instruct the jury on the proper and limited use of that evidence against only the defendant who committed the acts in question.

G. The Failure to Give Limiting Instructions, Sua Sponte, to Evidence of Bad Acts

The court further erred when it failed to give any limiting instruction to much of the evidence of other bad acts, such as the operation of the crack houses by the Bryant organization, and other acts that would prove the nature and scope of that organization. Clearly, this evidence was not admissible to show that appellant was a bad person or that he had a propensity to commit the crimes charged in this case. Rather, the evidence may have been relevant for other purposes, which were never defined.

Appellant acknowledges the fact that no limiting instructions were requested for much of the evidence of other bad acts, including evidence relating to the other crack houses, the beating of Francine Smith, and other acts relating to the scope of the Bryant organization. This Court has held that generally there is no *sua sponte* duty to give limiting instructions. (*People v. Collie* (1981) 30 Cal.3d

43, 63.) However, *Collie* recognized that in cases where the evidence was so prejudicial and extensive, the general rule relieving a trial court of the duty to *sua sponte* instruct would not apply. Thus, *Coolie* stated:

> "There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence." (*Id.* 30 Cal.3d 43, at 64; *People v. Clark* (1992) 3 Cal.4th 41, 131.)

This is such a case for three reasons:

First, the sheer volume of the evidence of other bad acts was overwhelming. Crack house after crack house, beating after beating, a slew of witnesses intimidated, followed by a bribed witness. The proportion of evidence dedicated to other bad acts, relevant only for limited purposes, require that the jury be informed as to how that evidence should be used.

Second, this case largely depended upon conspiracy theories. Some members of the Bryant organization were being held liable for the acts of other members. The motives of one became the motive of all. The association of one member with another, such as Settle helping appellant make bail, became evidence of a uniformity of efforts to kill Armstrong and the others.

When a case relies so heavily on a "birds of a feather" framework, it is important that evidence which has a limited relevance is not used for all purposes.

Third, as noted above, appellant requested a separate trial noting the "massive nature of the case and the impossibility of keeping track of all the limited evidence" which would operated to deprive him of a fair trial. (*Id.*, at p. 126.) If the court was going to deny the request, it was incumbent on the court to take that extra step to see that appellant would not be prejudiced by the needs of judicial economy.

From the start, it was recognized by at least one judge that the case as filed was "too big" to try. (*Ante*, at p. 131.) Even after the severance of the non-capital defendants, the danger remained of it being impossible for the jury to categorize and compartmentalize all evidence. As it was, the trial lasted so long that a juror still on the case got a summons to report for jury duty. In a display of levity, not realizing that truer words were seldom spoken, Judge Horan explained that it was an indication that "you know you have been in trial too long." (RT 18128.)

When a case lasts "too long" it is not realistic to expect that the jurors will remember the limiting instructions given as to one item of evidence months earlier. Therefore, it is imperative that the instructions given at the end of the trial accurately reflect the correct legal principles necessary for the proper use of the evidence.

Consequently, it should have been imperative that the jury be correctly instructed on the relevant principles of law and logic beyond the instructions given in a "normal" case.

H. The Improper Use of Character Evidence in the Penalty Phase

As discussed above (*ante*, p. 142), in the penalty phase, as part of CALJIC No. 8.85, the jury was told that in determining the penalty on a "defendant" it "shall consider *all* of the evidence which has been received during *any* part of the trial of this case, *except as you may be hereafter instructed.*" (Italics added.)

If some evidence was not admissible against appellant in the guilt phase, it remained inadmissible as to appellant in the penalty phase.

Under the general instructions given, the jury could have the selected the penalty based on appellant's participation in the Bryant drug business. Being told that it could consider "all" of the evidence, unless limited by future instructions, would allow them to consider evidence such as the beating of Francine Smith or the bribery of Miller by Jeff Bryant's wife, acts in which appellant was not involved. .

Rather than correctly limit the jury's consideration of appellant's penalty to evidence that was admitted in relation to appellant, the jury was told that in the penalty phase it could consider evidence which was not even admitted against appellant in the first place.

I. Prejudice

Appellant was prejudiced by the erroneous, confusing, and contradictory instructions given to the jury regarding other crimes evidence. At best, when given correctly, limiting instructions are a necessary evil of the jury system, a fiction created by the need for lay jurors to apply complex rules of legal relevance.

At worst, improper instructions render the right to a jury as valuable as a chef's receipt with vinegar substituted for milk.

While the efficacy of instructions to cure errors at trial is dubious -- "the essence of sophistry and lack of realism," (*Ante*, at p. 174.) – for the legal fiction to operate at all, the jurors must *at least be given correct instructions* on how to use evidence. Furthermore, it is presumed that jurors follow instructions. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1044; *People v. Garcia* (1995) 41 Cal.App.4th 1832, 1835.) Thus, when a jury is mis-instructed as to the permissible use of evidence, the likelihood becomes overwhelming that the evidence will be misused.

The importance of correct instructions has led to the rule that misleading or ambiguous instructions violate due process where there is a reasonable likelihood the jurors misunderstood the applicable law. (*Estelle v. McGuire*, *supra*, 502 U.S. 62, 72; *Boyde v. California*, *supra*, 494 U.S. 370, 381-381.)

Insofar as these incorrect instructions violated appellant's right to due process of law, the proper standard for judging prejudice is *Chapman v. California*, *supra*, 386 U.S. 18, which requires reversal unless it can be shown that the error was harmless beyond a reasonable doubt.

As with other errors, because of the probable effect of these instructions, reversal is necessary even if the lesser standard of *Watson* is applied.

As noted above (*ante*, at p. 173), if the evidence is admitted for an improper purpose, that error is more likely to be prejudicial when the desired inference is one that is being contested by the defense. In this case, the defense contested identity. To admit any of these items of evidence to prove identity, when none of them met the "signature-like" requirement for that use, would therefore strike at the very heart of the defense. To the extent that appellant was contesting other issues, such as intent or common plan, the jury was also directed to use the evidence for improper purposes.

Jury instructions must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire*, *supra*, 502 U.S. 62, 72.) The instructions in this case played into other errors and weaknesses in the case. Instead of having a curative effect, these instructions aggravated the problem by misdirecting the jury to employ impermissible inferences: Appellant's shooting of Curry became proof of the identity of Armstrong's killer. The value of the drug business and crack houses; the Goldman and Gentry murders, and other evidence that should have been considered only for *Bryant*'s motive, became evidence of everyone's motive. The evidence could also be used improperly to prove intent, fillings gaps in the prosecution's otherwise weak case, most prejudicially bolstering the weak evidence of identity.

Other crimes evidence is admitted with caution because it is inherently prejudicial. Given, the closeness of this case, as recognized by the trial court, and the suspect nature of the testimony of Williams, the primary evidence against appellant (*ante*, at pp. 61-62, 75-79), the improper instructions given for this vast amount of evidence of other bad acts must be viewed as prejudicial.

Therefore, the judgment entered below must be reversed.

VI

THE TRIAL COURT ERRED IN ADMITTING NUMEROUS HEARSAY STATEMENTS WHICH DID NOT QUALIFY UNDER ANY EXCEPTION TO THE HEARSAY RULE. THE ADMISSION OF THIS EVIDENCE DEPRIVED APPELLANT OF THE RIGHT TO CROSS-EXAMINE WITNESSES AND THE RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS. THIS ALSO DEPRIVED APPELLANT OF HIS RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE AS GUARANTEED BY THE EIGHTH AMENDMENT

The trial court erred in admitting numerous hearsay statements which did not qualify under any exception to the hearsay rule, in violation of both evidentiary rules and federal constitutional rights: specifically, the hearsay rule, the Sixth Amendment right to confront witnesses, the Fifth and Fourteenth Amendment rights to due process, and the Eighth and Fourteenth Amendment rights to a reliable determination in a capital case. These errors were prejudicial and require a reversal of appellant's conviction.

The hearsay erroneously admitted included the statements of Armstrong, Francine Smith, Mona Scott, Ken Gentry, and G.T. Fisher, as well as written material purporting to be records relating to drug transactions and evidence of "to-send" money forms of Western Union.

A. General Principles of Relevant Law[43]

The hearsay rule is codified in Evidence Code section 1200 which defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Hearsay is inadmissible unless it qualifies under an exception to the rule. The proponent of the evidence has the burden of proof that a statement comes within an

[43] Principles of law dealing with specific items of hearsay introduced below are discussed in the sections of this Brief dealing with those specific issues.

exception to the hearsay rule. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.)

Each hearsay exception has its own foundational requirements that must be met before the statement may be admitted. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

Additionally, the Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Sixth Amendment has been made applicable to the States through the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 403-405; *Davis v. Alaska* (1974) 415 U.S. 308, 315.) Read literally, this would exclude all hearsay. However, the United States Supreme Court has interpreted the Sixth Amendment as incorporating many exceptions to the hearsay rule as exceptions to the Confrontation Clause. (*Ohio v. Roberts* (1980) 448 U.S. 56, 63.)

The Confrontation Clause reflects a preference for "face-to-face confrontation," and cross-examination is considered to be "a primary interest secured" by Confrontation Clause. The ability to test evidence through cross-examination is "so important that the absence of proper confrontation at trial calls into question the ultimate `integrity of the fact-finding process.'" (*Ohio v. Roberts, supra*, 448 U.S. 56, 63, citing *Mattox v. United States* (1895) 156 U.S. 242-243; *Chambers v. Mississippi, supra*, 410 U.S. 284, 295.)

Recently the United States Supreme Court distinguished "testimonial evidence" from other forms of hearsay. Using that distinction, the Court held that testimonial evidence can be admitted consistent with the Confrontation Clause only if the witness was unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 1354, 1374 (*Crawford*).) The Court ruled that, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Ibid.*) The Court

did not attempt to define all types of statements that might come within the category of "testimonial," but it held that, at a minimum, "testimonial" statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*)

Where non-testimonial hearsay is at issue, *Crawford* held that the Sixth Amendment, consistent with *Ohio v. Roberts*, *supra*, 448 U.S. 56 (*Roberts*), affords States more flexibility in developing hearsay law. (*Crawford, supra*, 124 S.Ct. at p. 1374.) In *Roberts*, the Supreme Court held that hearsay would be admissible where the prosecution demonstrated the unavailability of the declarant whose statement it wishes to use against a defendant and where the hearsay bore certain "indicia of reliability," either because it falls within a "firmly-rooted exception to the hearsay rule" or because it has "particularlized guarantees of trustworthiness." (*Roberts, supra*, at p. 65; *Snyder v. Massachusetts* (1934) 291 U.S. 97,107.) The *Roberts* factors are apparently still applicable to non-testimonial evidence.

As explained below, some of the hearsay statements introduced violated the principles of *Crawford*. Other hearsay items did not possess the foundational requirement for any hearsay exceptions, nor were there any facts that established their reliability.

Furthermore, although the defense did not raise any objections to some of this evidence at trial, this does not preclude appellant from raising these issues on appeal, because the introduction of this evidence violated appellant's right to confront witnesses, as guaranteed by the Confrontation Clause. Where an important federal constitutional right is sought to be preserved, the lack of an objection does not waive the issue. (*People v. Matteson* (1964) 61 Cal.2d 466, 468-469; *People v. Underwood* (1964) 61 Cal.2d 113, 126; *People v. Hinds* (1984) 154 Cal.App.3d 222, 237.)

In the instant case, in addition to violating appellant's right to confront witnesses, because confrontation ensures the reliability of the fact finding process

(*Ohio v. Roberts*, *supra*, 448 U.S. 56, 63-64.), the trial court's erroneous admission of this large volume of hearsay testimony lessened the reliability of the jury's determination of appellant's guilt in violation of the Eighth and Fourteenth Amendments. (*Ante*, at p. 51.)

Furthermore, to the extent that the introduction of some of these hearsay statements only violated state evidentiary law, as opposed to the Confrontation Clause, this still resulted in a denial of the right to due process of law because the vast amount of improperly admitted hearsay evidence was a right of real substance, the denial of which served to act as a deprivation of the right to due process of law. (*Ante*, at p. 51.)

B. The Statements of Armstrong to Detective Harley, Francine Smith, and Mona Scott, and the Motions Regarding Those Statements

On July 23, 1983, as part of an investigation into the murder of Gentry's father, Detective Harley interviewed Armstrong. Armstrong told Harley that the Bryants had paid him $2,000 to shoot Goldman. (RT 9407-9408, 9439-9440.) He said he shot Goldman and Gentry for the Bryants because of a dope deal for which the Bryants had not been paid. He said that the Bryants were going to pay him $15,000 each for shooting Gentry, Winifred Fisher, and Flowers. He did not say whether he had been paid the money to shoot the others. Armstrong said that the Bryants had recently sent Armstrong and Armstrong's wife money in addition to the amount that they paid him. He expected the Bryants to take care of his wife because he could tell on the Bryants or have them killed if they did not. (Supp.3rd CT 10475-10478, 10482, 10505-10506, 10518, 10528-10529.)

The prosecution sought to use Armstrong's taped statement to prove the underlying motive in the case namely: that Armstrong believed the Bryants owed him for "taking the rap" for the Gentry murder, and that he intended to collect that debt by taking over a piece of their business when he got out of prison. It was the

prosecution's theory that Armstrong was killed when he approached the Bryants to achieve this goal. The defense objected on the grounds that the statement was hearsay, for which no exception existed. (CT 2978-2980, 14296-14394)

The prosecution contended that the statements wherein Armstrong admitted the Gentry and Goldman shootings were declarations against interest, and the statement that the Bryants were obligated to him and that he intended to take over their business was a statement of an existing mental state and a statement of a present intent to do a further act, both of which were admissible under Evidence Code section 1250 and *People v. Alcalde* (1944) 24 Cal.2d 177. (CT 14302-14203.)

The defense argued that the evidence could not be a declaration against interest because at the time of the statement Armstrong had already been convicted and sentenced for the offenses. He was not placing himself at risk of greater punishment and in fact hoped that the police would help him obtain early release in exchange for his cooperation. The defense argued that the cases cited by the prosecution involved statements made by defendants who still faced prosecution for the offenses they admitted in their statements. (CT 14498.)

The defense also emphasized that any exceptions to the hearsay rule require a showing of trustworthiness. The defense argued that this appeared to be Armstrong "shooting off at the mouth." Furthermore, this statement was made five years prior to the homicide and thus had at best a "tenuous" connection to Armstrong's state of mind five years later. (RT 7973-7974, 7977.)

The court agreed that it was tenuous without additional information that Armstrong's intent to take over the business was relayed to the defendants. (RT 7974.) The prosecution explained that the threat was communicated to Bryant by two sources who would testify to that fact. (RT 7977-7978.)

The court allowed the prosecution to introduce Armstrong's statement regarding the Gentry murder and Goldman assault to show "the genesis" of the instant offenses, namely, the fact that Armstrong believed that he was owed something. (RT 7979.)

The tape of the Armstrong's interview, Exhibit 74, was admitted into evidence and played for the jury[44]. (RT 9414-9415, 9417.) In the tape, Armstrong described how he was hired to kill Gentry for $15,000.00 by the Bryants because Gentry and the others had damaged Roscoe Bryant's van. (Supp.3rd CT 10478-10479, 10497.) He described how he killed Gentry, and explained it was his intention to take over the Bryant's business after he got out of prison. (Supp.3rd CT 10512-10513, 10521-10522.)

This statement was later used by the prosecution in arguments to the jury to explain the origins of the murder of Armstrong and the others on the theory that Armstrong was killed when he later approached the Bryants seeking compensation for having taken the rap for the Gentry murder. (RT 16403L-16430M.).

C. The Relevant Law Regarding Armstrong's Statement

The admission of the taped interrogation of decedent Andre Armstrong violated appellant's Sixth Amendment right to confrontation. This case falls squarely within the letter and reasoning of *Crawford v. Washington, supra*, 124 S.Ct. 1354, which demands that, with regard to testimonial hearsay, the defendant had a prior opportunity to cross-examine the declarant. (*Id.*, at pp. 1365-1367, 1369.)

While the Court in *Crawford* left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it specifically held that "statements taken by police in the course of interrogations are [. . .] testimonial" for Confrontation Clause purposes. (*Id., supra*, at pp. 1364-1365, 1374.) The reason for this stems from the fact that current police interrogations bear a striking resemblance to examinations by justices of the peace in England, which, according to *Crawford*, was one of the evils the Confrontation Clause sought to remedy. (*Id.*, at p. 1364.)

Likewise, the *Crawford* Court recognized that a person making a statement

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[44] That tape is reproduced at Clerk's Transcript, Supplemental 3, volume 40 of 41, pp. 10473-10545

to government officers "bear testimony in a sense that a person who makes a casual remark to an acquaintance does not." Therefore, this is the type of remark which was the concern of the Framers in guaranteeing the right of confrontation. (*Ibid.*)

Thus, because it was a testimonial statement, within the meaning of *Crawford*, a discussion of whether the tape recording of Armstrong's interrogation comes within a hearsay exception or shows indicia of reliability is irrelevant to the analysis of whether there was a Sixth Amendment violation: a prior opportunity to cross-examine was a necessary condition for its admissibility (*Id.* at p. 1366-1367), and appellant had no such prior opportunity to cross-examine Armstrong. The admission of the taped interview at appellant's trial therefore violated appellant's Sixth Amendment right to cross-examine witnesses.

In tracing the concerns of the Framers' insistence on confrontation as a crucial aspect of trial, *Crawford* gave special notice to the need to confront witnesses who were conspirators with the defendant. (*Id.*, at p. 1360.) This reflects the concerns regarding the reliability of accomplice testimony. (*Ante*, at pp. 49-50.) Since Armstrong was being questioned regarding a crime in which he was an accomplice with the Bryants, the concerns of *Crawford* take on an even greater urgency, particularly as Armstrong only served to benefit by making this statement.

Thus, Armstrong's statement, like the one in *Crawford*, falls squarely within the core function and concerns of the Confrontation Clause.

Furthermore, even without *Crawford*, which is dispositive of the issue, Armstrong's statement was not properly admitted under the two hearsay exceptions were argued as a basis for admitting, statements reflecting an existing state of mind and declarations against interest.

1. Statements of Existing State of Mind

The exception for statements reflecting an existing state of mind is codified in Evidence Code section 1250 which provides in pertinent part:

> "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action;" (b) *This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.*" (Italics added.)

However, that "exception is limited to out-of-court statements describing a relevant mental state being experienced by the declarant *at the time* the statements were made." (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 14.1, pp. 383-384.)" *People v. Whitt* (1990) 51 Cal.3d 620, 643-644, italics in original.

In the seminal case *People v. Alcalde*, *supra*, 24 Cal.2d 177, which preceded the enactment of the Evidence Code, this Court considered the admissibility of a decedent's statement that she was planning to go out with a man named Frank on the night she was killed. This Court held that the elements essential to admissibility are that the declaration must tend to prove the declarant's intention at the time it was made and it must have been made under circumstances which give reliability to the statement. (*Id.*, at pp. 187-188.) *Alcaclde* concluded that the decedent's statement of her intent and the logical inference to be drawn there from, that she did what she said she was intending to do, were relevant to the issue of the guilt of the defendant." (*Ibid.*)

Other cases have grafted additional conditions onto this hearsay exception. Thus, a victim's out-of-court statement of emotion is admissible only when the victim's conduct in conformity with that emotion is in dispute. If that dispute is not present, the statements are irrelevant. (*People v. Nigeria* (1992) 4 Cal.4th 599, 621.)

Likewise, in *People v. Hernandez* (2003) 30 Cal.4th 835 the victim's statement reflecting his state of mind was admissible when the victim's state of mind was directly relevant to an element of an offense, such as where the victim's fear

fear of the defendants made it unlikely that the victim would have voluntarily associated with the defendants. (*Id.*, at pp. 872-873; see also *People v. Waidla* (2000) 22 Cal.4th 690, at pp. 725-726.)

In such cases, one could infer from the declarant's state of mind, as reflected in the statement, the occurrence of events happening near the time of the declaration.

Finally, statements of events and feelings experienced *before* the interview, or the declarant's explanation of the reasons and purpose for his intent are not within the exception and are not admissible to show intent. (*Sheehan v. Scott* (1905) 145 Cal. 684, 690; *People v. Whitt*, *supra*, 51 Cal.3d at 642 -643.) Therefore, even if Armstrong's statement that he intended to confront Bryant was admissible, the other statements as to why he was going to do so are not admissible under this exception.

2. Declarations Against Interest

The hearsay exception for declarations against interest is codified in Evidence Code section 1230 which provides in pertinent part:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest..., or 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.

The theory behind the exception is that one will not speak falsely or mistakenly where this would be prejudicial to oneself. (See *Wallace v. Oswald* (1922) 57 Cal.App. 333, 337.) Therefore, if a reasonable person in the declarant's position would not consider the statement as exposing oneself to risk of criminal liability or other social disgrace, the statement is not one against interest. (*People v. Huggins* (1986) 182 Cal.App.3d 828, 832.)

Furthermore, a statement that is both "inculpatory" and "exculpatory," in that it admits some complicity but places the major blame on another, does not meet the test of trustworthiness and is inadmissible. (See *People v. Shipe* (1975) 49 Cal.App.3d 343, 354; *People v. Coble* (1976) 65 Cal.App.3d 187, 191.)

Likewise, the exception does not apply where the declaration is made after the declarant has been convicted of the offense. (*Shipe*, *supra*, at p. 353; *Coble*, *supra*, at pp. 192-193.)

Finally, specific portions of the overall statement may not be against interest, and therefore should be excluded. Those portions are hearsay for which no exception exists. Thus, in *People v. Duarte*, *supra*, 24 Cal.4th 603, at 612, this Court explained that the exception for declarations against interest does not include "collateral assertions" within the statement Those portions of a statement that are not specifically disserving to the interests of the declarant are not within the scope of the exception. (*Ibid.*, quoting *People v. Leach* (1975) 15 Cal.3d. 419, 441.)

D. Application of the Law to Armstrong's Statement

Initially, it should be noted that the prosecution's use of Armstrong's statement went far beyond the two possible uses described above in that they included information that was not within the purview of the relevant statutory exceptions.

For example, in the statement Armstrong says that he would not kill children. This had nothing to do with either declarations against interest or the state of mind exception. Nonetheless, the prosecution used the statement in closing argument for the truth of the matter asserted contrasting the shooter of Chemise and Carlos English with Armstrong, who said he would not kill children even for two million dollars. (RT 16430-O)

Thus, portions of the statements were clearly beyond the scope of any exception and should have been excluded.

1. Armstrong's Statement Consists of Multiple Levels of Hearsay

Another problem is created by the admission of Armstrong's statement, namely, that the statement involves multiple levels of hearsay, the statement of Armstrong to Harley, containing statements of another person who is not identified. In particular, Armstrong said that he shot Goldman because Goldman had not paid the Bryants for drugs that Goldman had bought. This necessarily incorporates the statement made to Armstrong when he was hired, explaining why he was being hired to shoot Goldman.

Similarly, by saying that he was hired by the Bryants to shoot Gentry, he is necessarily incorporating the statements of which ever member of the Bryant family hired him.

However, that the declarants of those internal statements is not known. Because the other Bryants were involved in that incident, it cannot be assumed that the declarant was Stan Bryant. Even if the statements are somehow attributed to Stan Bryant, it is an admission as to him, but it is not admissible against appellant.

The multiple hearsay rule of Evidence Code section 1201 provides that when a statement contains another statement, both statements must qualify for admission under a hearsay exception. This makes sense: If Statement One is inadmissible because it does not fall within an exception, it should not become admissible because it is repeated by someone else in Statement Two. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1205.)

Because there is no exception for the statements contained within Armstrong's statement to Detective Harley, it should have been excluded under the hearsay rule.

2. Statements of Existing State of Mind

An examination of the circumstances under which they were made demonstrates that Armstrongs statement does not fall within the hearsay exception pro-

ovided for by Evidence Code section 1250 for several reasons.

First, section 1250 specifically excludes statements of memory and belief. The vast majority of the statements contained in Armstrong's interview are not statements of what he intended to do, but statements of why he intended to do it, all of it based on his memory and version of the events that landed him in prison. As explained above (*ante*, at p. 198), these portions of the statements are not within the hearsay exception and should have been excluded.

Furthermore, even those sections where Armstrong says what he is going to do are not within the exception, because the exception only covers statements of intent to do acts close to the time the statement is made. In this case, Armstrong's 1983 statement, made when he was serving a life sentence, was offered to show his state of mind ***five years later***, in 1988[45]and his intent to do an act after he got out after having served his sentence of life in prison.

Most importantly, this statement bears no indicia of reliability. Here, the police were interviewing a convicted felon, at one point, offering him a benefit if he could help them. (CT 14500.) In *People v. Whitt, supra*, 51 Cal.3d at 643 this Court excluded this very type of statement from the exception on the grounds that the statement lacked any indicia of reliability, particularly when the declarant might receive a benefit based on his declaration.

This is also exactly the situation condemned in *Crawford, supra,* 124 S.Ct. at 1372, where Sylvia, the declarant, was questioned "in police custody" while "herself a potential suspect in the case." Sylvia's statement implicated her hus-

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[45] Although there does not appear to be a fixed, outer time limit for this type of declaration to be admissible, the logic behind the exception is more compelling if the act is accomplished near the time at which the intent to do the act was expressed, as recognized by the early cases recognizing the exception. (E.g. *People v. Fong Sing* (1918) 38 Cal.App. 253, 259 - "When a person leaves his house, his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like other material facts." (citation omitted.)

band in an assault. (*Ibid.*) The Supreme Court found that introducing such a statement against the husband at trial was precisely the kind of "abuse at which the Confrontation Clause was directed." (*Ibid.* at 1374)

Finally, appellant submits that similar problems infect the statements Armstrong made to Francine Smith and Mona Scott to the effect that that the Bryants owed him for being the fall guy. (RT 9453, 9469, 9509-9512, 9515-9516.) As with the statements to the police, these statements were primarily statements of memory and belief of past events. Furthermore, none of them were based on any intent to do any action in the near future.

Therefore, these statements are not within the exception to the hearsay rule contained in section 1250.

3. Declarations Against Interest

Armstrong's statements also fail to pass the test for declarations against interest.

Armstrong made these statements after he has been convicted and was no longer subject to criminal prosecution. (CT 14500, referring to page 19, line 1 -14 of Armstrong's statement.) If he was making the statement expecting that the detectives would help him get parole in the future as a result of the statement, under *Shipe* and *Coble*, *supra*, making this "confession" is not against his penal interest.

Armstrong's statements thus do not qualify as a declaration against interest, and should have been excluded as inadmissible hearsay.

E. Statement of Gentry to Ward

As noted (ante, p. 16), Benny Ward was with Gentry prior to the shooting and heard Gentry say, "There goes those niggers that I got a beef with." Benny saw a Cadillac going westbound on Pierce Street. Bryant was in the Cadillac. Gentry then said, "It is a nigger named Stanley." At trial, Ward denied making

this statement, and the statement was introduced through the testimony of Detective Tucker to whom Ward had made the statement. (RT 8926-8927.)

The defense objected to the introduction of this evidence, stating that it did not believe that the statement qualified as a spontaneous statement, the statement was ambiguous, and it did not appear to have been made in response to the first sighting of Bryant. (RT 8980.)

The prosecution contended that this was admissible under the exception to hearsay rule for "spontaneous statements." (RT 8979.)

The court overruled the objection, believing that because Gentry expressed a desire to arm himself it was the type of act "which might cause a bit of a fright." (RT 8980-8981.)

The statement was subsequently introduced through the testimony of Detective Alfred who interviewed Ward after Gentry's murder. (RT 8985-8987.)

The exception for spontaneous statements is governed by Evidence Code section 1240 which allows for the admission of statements that describe an event perceived by the declarant and was made spontaneously while the declarant was under the stress of excitement caused by an event relating to the declaration and perception. (1 Witkin, *California Evidence*, 4th ed. (2000) § 173.)

This statement does not qualify under this exception because there was no showing and no basis to conclude that Gentry was upset when he made the statement. Although there is no one fact that is determinative of whether a statement is an excited utterance, there must be *some* facts present which indicate that the declarant is making the statement under the influence of some startling event.

For example, evidence that a declarant had just witnessed a robbery at gunpoint and still appeared "nervous" or "distraught" presented a reasonable basis to conclude declarant was emotionally upset when the statement was made. (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 180.

Likewise, when the statement was made while the declarant was crying and shaking after having witnessed a murder it was held to be a spontaneous statement

within the exception to the hearsay rule. (*People v. Brown* (2003) 31 Cal.4th 518, 540; See also People v. *Hughey* (1987) 194 Cal.App.3d 1383, 1388.)

In the instant case, there was no showing that Gentry was under the stress of any event. He may have had a dispute with the Bryants, but neither Gentry nor Ward said anything that would indicate the existence of a mental state remotely similar to those described by the cases interpreting section 1240.

In short, at the time he made the statement, Gentry did not appear to be distraught, he remained in the parking lot, did not attempt to flee, and continued working on his car. There was no reason to conclude that he was any more upset than anyone would be at seeing someone with whom he had an argument with in the past. This statement therefore did not qualify under any exception to the hearsay rule and should not have been admitted into evidence.

F. Statement of Winfred Fisher

The defense objected on hearsay grounds to Detective Stachowiski repeating statements Winfred Fisher had made during the investigation of the Gentry homicide. The court asked the prosecution what exception would allow for the admission of the statement, and the prosecution stated that it would ask the witness a question that would lay the foundation. The prosecution asked if Fisher was dead, and Stachowiski replied that he was.

The court then asked Mr. Novotney if he wanted more, and Mr. Novotney replied that he did not. The witness was then allowed to recount Fisher's statement. In the statement, Fisher said that he, Flowers, and Gentry had bought some bad drugs from the Bryants. When they demanded a refund, and the Bryants refused, Fisher, Flowers, and Gentry vandalized Roscoe Bryant's van. They were seen vandalizing the van, and Gentry was murdered shortly thereafter. (RT 8641-8642, 8463-8468.) This statement established the Bryants' motive for the Gentry murder. (RT 8643-8648.)

The declarant's death is not, by itself, a sufficient foundation for any hearsay exception. Therefore, because the proponent of the evidence failed to meet the burden of establishing the foundation for any applicable exception, this evidence was not admissible[46].

Furthermore, Fisher's statement was made to the police while they were investigating a criminal case. It therefore constituted testimonial hearsay under *Crawford*. Because there was no prior opportunity to cross-examine Fisher, the admission of his statement violated the Confrontation Clause.

G. Statement of Gentry to Newsome

Over the objection of the defense, the prosecution was also allowed to elicit testimony from Newsome that Gentry had told her about the bad drug deal and ripping off Roscoe Bryant's van.

The prosecution contended that Gentry's statement admissible as a declaration against interest. The defense maintained there was no exception that would allow this statement to be admitted. (RT 9168-9170.)

This statement did not qualify as a declaration against interest. Gentry simply recounted how someone had ripped him off for drugs and he had retaliated in a relatively mild way.

Considering the crowd with which Gentry associated, it was not likely that the person to whom Gentry made the statement would subject Gentry to criminal or civil liability or socially ostracize Gentry for these actions. Therefore, the foundation showing that this was against some type of interest was never established.

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[46] In this area, appellant was deprived of effective assistance of counsel, to the extent that the defense wished to exclude this evidence, as is evident by the fact that the defense objected to the evidence, and then failed to continue to object after the prosecution failed establish an exception that would allow for the admission of the statement.

This statement therefore was not properly admitted under the statement against interest exception.

H. Western Union Records

A substantial amount of evidence was introduced regarding money orders sent from Bryant and associates of Bryant to Armstrong, relatives of Armstrong, and former employees of the Bryant family who had been imprisoned. As explained at trial, the procedure for sending a money order through Western Union involves the customer filling out the application form, listing his or her name, address, and phone number. (RT 10438.) The original applications are destroyed after six months, although the information is "inputted" into a computer. (RT 10442-10445.) The Western Union material was introduced into evidence as Exhibit 109. (RT 10437.)

It has expressly been held that the "to-send-money" forms from Western Union, the forms filled out by the customers, are not admissible as business records. (*United States v. Arteaga* (9th Cir. 1997) 117 F.3d 388; *United States v. Cestnik* (10th Cir. 1994) 36 F.3d 904, 908-909.)

The business records exception to the hearsay rule does not permit the introduction of statements made by *customers* of the business unless the employee was responsible for verifying the statements. (*United States v. Arteaga*, supra, 117 F.3d 388, 395.)

The rationale behind the business records exception rests on the special indicia of reliability of that type of record. As explained in the Notes of Advisory Committee on Proposed Federal Rules of Evidence, business records are considered reliable because of systematic checking, regularity and continuity which produces habits of precision, the actual experience of the business in relying upon the records, or by a duty to make an accurate record as part of a continuing job. (See also, Graham, Michael H., *Modern State and Federal Evidence* (1988) p. 205; *Bender, Computer Law*

(1997) § 601[3], p. 6-6.) None of these duties or habits are imposed on a customer.

In fact, in the criminal world, it could be argued that there would be a tendency *not* to accurately list information to agencies and businesses which keep records of cash transactions. Thus, the Western Union exhibits, which depended on the veracity of the client who filled out the application were not admissible under the business records exception.

I. Written materials relating to drug transactions

At trial, the prosecution introduced a huge amount of written material, purporting to be records relating to drug transactions. These materials were hearsay, not within any exception to the hearsay rule.

These documents included the following:

A series of papers found at the Carl Street drug house, including various papers that appeared to be tally sheets of drug sales, some of which were identical to a documents found at Wheeler Avenue residence, a notebook with financial records, day-by-day accountings of money taken in listed according to the person who supplied the money and the denominations, and drug sales records from June 1, 1988 to August 27, 1988, reflecting sales in excess of $1,000,000. (RT 9816-9819, 9842-9843, 9958.)

Other materials consisted of multiple pages of paper, apparently records of drug sales and adding machine receipts. (RT 10158-10163, 12916-12917, 12916-12917, 12943.)

It was never proven who wrote the vast majority of these items.

All of these items were introduced for the truth of the matter contained in these writings, as evidenced by the arguments of the District Attorney relying on these documents.

Superficially, it would appear that these records qualified under the business records exception to the hearsay rule. However, none of the foundations for that exception were established[47].

That exception is codified in Evidence Code section 1271, which provides that a writing that is made as a recording of an event is not made inadmissible by the hearsay rule to prove the truth of the matter asserted in the statement if four foundational requirements are established: 1) the writing was made in the regular course of a business; 2) it was made at or near the time of the event; 3) the custodian or other qualified witness testifies to its identity and the mode of its preparation; and 4) the sources of information and method and time of preparation were such as to indicate its trustworthiness.

The prosecution made no attempt to produce evidence of any of these foundational facts.

No showing was made as to the regularity of the making of these records, as to how soon they were made after the event described in the documents, as to who made the notations or provided the information, how or when these documents were prepared, or any other information relating to the source of information or method of preparation.

Needless to say, the "custodian of records" for the Bryant family did not testify at trial.

The reason for the reliability of business records, which justifies the exception to the hearsay rule, is lacking in the case of drug dealers' records.

> "The business records exception was not devised to allow unreliable hearsay to be introduced merely because it was reduced to a writing in a book of records. The theory of admissibility is that either the 'entrant' (who entered the record, e.g. the bookkeeper or his accountant) or the 'informant' (e.g. [the] person handling the transac-

[47] Rather than discuss every possible exception to the hearsay rule at this stage, appellant will only focus on the business records exception. If respondent contends that the records qualify under some other exception that will be addressed in Appellant's Reply Brief.

tion) had knowledge of the facts from his personal observation." (Witkin, *California. Evidence*, *supra*, p. 749, § 772.)

The mere fact that financial records are found in a location where drugs are sold does not mean that those records meet the accounting standards imposed on businesses. Indeed, to hold that these records have some reliability would be to suggest a level of credibility customarily not accredited to the criminal classes. (e.g. Evidence Code § 788.) While it may be admissible for such records to be offered for a non-hearsay purpose, such as showing the nature of the business, in this case they were offered for the truth of the matter asserted in the documents, with the prosecution arguing the contents of those records as true.

Several courts have recognized the fact that drug records and drug ledgers are inadmissible hearsay. For example, in *United States* v. *Ordonez* (9th Cir. 1984) 737 F. 2d 793 the Ninth Circuit held that the use of drug ledgers violated the Confrontation Clause in a narcotics conspiracy case, when the prosecution failed to establish certain foundational facts necessary for the introduction of hearsay evidence.

The *Ordonez* Court rejected various theories of admissibility including theories that the ledgers were exceptions to the hearsay rule either as co-conspirator's statements, adoptive admissions, or business records. The *Ordonez* Court stated that there were several problems that were applicable to *any* theory of admissibility with the evidence, problems applicable to the evidence in this case. (*Id.*, at p. 799-801.)

First, it could not be determined from the ledger entry whether the declarant recorded past or present facts. Second, it could not be determined whether the declarant had personal knowledge of the facts he recorded. Third, because the declarant was not identified, the trier of fact could not determine whether the entries reflected clear or faulty recollection. Fourth, there was no evidence that the statements were truthful. (*Ibid.*)

Finally, the *Ordonez* court held that although no Confrontation Clause objection was made, a contention that the government failed to comply with the Confrontation Clause involves substantial rights which must be reviewed even in the absence of a timely objection. (*Ibid.*)

The flaws in the foundation of the evidence in *Ordonez* are equally applicable to this case where there was no showing as to who made these writings, when they were made, or the circumstances under which they were made.

The only California case to cite *Ordonez* appears to be *People v. Harvey* (1991) 233 Cal.App.3d 1206. *Harvey* reached a different result on two grounds.

In *Harvey*, in a non-jury trial for conspiracy to sell narcotics, a narcotic enforcement agent was allowed to testify as to drug ledgers and "pay and owe" sheets reflecting sales of narcotics. He testified that this type of document was frequently found in the possession of drug dealers. (*Id.*, at pp. 1215-1216.) The trial court stated that drug narcotics dealers tend to keep records, and the presence of the records was circumstantial evidence that cocaine sales were taking place. (*Id.*, at p. 1220.)

The Court of Appeal held that the proper inquiry was whether the evidence was "*received* to show these transactions actually occurred as stated." (*Ibid.*, italics in original.) If so, the evidence was hearsay. On the other hand, if it was received as circumstantial evidence of sales of cocaine, it was not hearsay. (*Ibid.*)

Because the trial court indicated that it was receiving the evidence for the latter purpose, the Court of Appeal held that the evidence was admissible. Thus, in *Harvey*, the ledgers were expressly *not* received for the truth of the matter asserted.

In contrast, in the instant case, the records were received for the truth of the matter contained in those writings. For example, in this case the prosecution argued that the drug organization made 1.6 million dollars in three months prior to murders. This estimate of profits was based on the drug ledgers found at the houses. (RT 16470.) Later, the prosecution argued that Bryant had a reason to

protect the business (RT 16500), again referring to the success of the business as reflected in the records.

Furthermore, *Harvey* was tried before a judge who expressly indicated that he was only considering the evidence for its non-hearsay purpose. In this case, it was argued for the truth of the matter asserted in the statements, and the jury was never told that the evidence could have a non-hearsay purpose, the only purpose for which it could properly have been considered.

In summary, because these items of evidence did not fall within any exception to the hearsay rule, the admission of these records was error.

J. The Statement Of Armstrong's Address

During rebuttal, Karen Flowers, who had dated both Gentry and Armstrong around the time that Gentry was killed, testified that she gave a phone number to the police that she had been given as the number where she could reach Armstrong. The telephone number that Flowers had for Armstrong was 893-7912, a number listed to appellant's residence. (RT 15024-15026, 15035-15037.)

Appellant objected to this evidence on hearsay grounds. (RT 15037.) Mr. Novotney further explained that it appeared that this evidence was being offered because Armstrong had given the phone number to Flowers. Mr. Novotney incorrectly stated that the hearsay exception had been met as to Flowers, but that it had not been established as to Armstrong's statement. (RT 15998.)

After the court overruled the objections, with the court expressly reserving the objection, it was stipulated that in 1981 and 1982, appellant had given his phone number and address as (818) 893-7912 at 9010 Cedros Avenue. It was further stipulated that this was the phone number that Karen Flowers told Detective Tucker that she had for Armstrong. (RT 16001-16002, 16005-16006, 16010-16012.)

The evidence of the phone number relies on two prior statements. First, someone telling Flowers that this was Armstrong's phone number and second,

Flowers telling police it was Armstrong's number. Both statements were hearsay, not within any exception.

As to the first statement, it is not even clear whether Armstrong or someone else gave that number to Flowers. Inherent in the foundational requirements of every exception to the hearsay rule is the need that there be some known source for the declaration and/or some means of assessing reliability. Because there is no source for this evidence, no foundation was established[48].

As to Karen Flower's statement to police, the only possible exception is for prior recollection recorded, which is codified in Evidence Code section 1237. In order to qualify for admission under that exception the proponent must show that the writing 1) Was made at a time when the fact recorded occurred or was fresh in the witness's memory; 2) Was made by the witness or under the witness's direction; 3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and (4) Is offered after the writing is authenticated as an accurate record of the statement.

None of these foundational facts were established.

As noted (*ante*, at pp. 191-192), proponents of hearsay have the burden of proving that the foundational facts have been established. Because no foundation was established, the evidence was inadmissible.

K. The Taped Statement of Williams

After his arrest, Williams made several statements to the police. Towards the end of trial, the prosecution offered to play one of those statements for the jury. Counsel for appellant objected on the grounds that the statement was hearsay and portions of that statement were not admissible under any exception to the hearsay rule.

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[48] In the event that respondent contends that this statement meets some hearsay exception, respondent will address that contention in Appellant's Reply Brief.

In particular, Mr. Novotney objected to the portion of the tape where Williams stated that appellant and Settle drove the bodies away after the murders. In the tape Williams also said that appellant and Settle put the bodies in the trunk of the green car they were driving. (4 SUPP CT 64.)

The objection was based on the fact that this was speculation on the part of Williams. (RT 16057-16058.)

The court allowed this portion of the tape, reasoning that it may be hearsay, but it would be admissible to rebut implications that Williams was making things up by showing the ease with which he answered questions in the early interview, to bolster his credibility. (RT 16073-16076.)

The tape was then played for the jury. (RT 16085-16088.)

Although the court recognized that the statement was hearsay, there was no suggestion that it fell within any exception. The fact that evidence relevant only allows it to pass the first test for admissibility. Thereafter, it must still meet any additional requirements imposed by Evidence Code, including the hearsay rule. (3 Witkin, Cal. Crim. Law 3d (2000) Punishment, Chapter IX. Punishment, § 484.)

The fact that Judge Horan believed the evidence was relevant to Williams's credibility did not make it admissible, because it did not fall within any exception to the hearsay rule.

L. The Statement of Johnson

At trial, appellant objected to the prosecution playing a tape of an interview with William (Amp) Johnson, one of the members of the Bryant organization. Mr. Novotney explained that when asked if he knew appellant, Bryant, or Wheeler, Johnson only denied knowing Wheeler. Johnson then expressed a fear of testifying, saying that they could "reach out and touch him" when he was at prison in Pelican Bay. (RT 10041-10042.) Mr. Novotney explained that appellant was mentioned in the question, so that Johnson's answer implied he knew appellant.

However, there was no showing that Johnson had personal knowledge of appellant. (RT 10043.)

The prosecution maintained that Johnson's answer constituted an adoptive admission that he knew appellant. (RT 10043.)

The court held that the tape was admissible and that any ambiguity could be cleared up on cross-examination. (RT 10045.)

Later, the objection to the tape of Johnson was renewed. At that time Mr. Novotney objected to Johnson's statement on the tape that the police did not have the wrong people in custody, only that there were additional people involved. The defense explained that unless Johnson was a witness to the murders, this would have to be based on either hearsay or speculation, and was therefore inadmissible. (RT 10202-10204.)

The court noted that one of the defendants on cross-examination had asked if Johnson had made a statement about the police having the wrong people, and there was no objection. The court agreed that the statement probably reflected an "opinion...without foundation." (RT 10205.)

The prosecution agreed that the statement was hearsay, but believed that it cleared up "misleading" information that was before the jury. (RT 10206.) The prosecution conceded that a limiting instruction would be required. (RT 10206-10207.)

The court ruled that it would play the tape but tell the jury that the statement as to whether the right or wrong people were in custody was only to be considered as it bears on Johnson's state of mind and his willingness to testify. (RT 10210-10211.)

For some reason, however, when the tape was played for the jury the court actually instructed the jury that it could consider the evidence of inconsistent statements not only for the purpose of credibility, but also for the truth of the matter asserted in the statement. (RT 10216-10218.)

Thereafter, the tape was played for the jury[49]. (RT 10220.)

The error in admitting this statement is multi-fold.

Evidence Code section 702 requires that a person have personal knowledge as to any matter to which he testifies, and that this "must be shown before the witness may testify concerning the matter."

Although Johnson's statement may qualify as a prior inconsistent statement, this only gets the proponent past the hearsay objection. For hearsay evidence to be admissible under any exception it must be trustworthy and the witness must have personal knowledge of the events[50]. (*People v. Tatum* (2003) 108 Cal.App.4th 288, 289.)

If the witness could not testify to a particular fact at trial because he lacked personal knowledge, he should not be allowed to do so as a hearsay declarant, one more step removed from cross-examination.

Thus, the fact that part of the statement was an adoptive admission, the grounds upon which the court admitted the statement, does not make the statement admissible unless Johnson had personal knowledge as to who the guilty people were, in order to say that they were or were not in custody.

Furthermore, the theory behind "adoptive admissions" is that if a person hears something and does not refute it, he thereby adopts the statement and makes it his own. The exception as codified in Evidence Code section 1221 only applies, however, to "evidence of a statement offered against a party .... if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

Thus, while Johnson may "adopt" the statement, he was not a party to the action, and therefore this exception does not apply.

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[49] A transcript of the tape, People's Exhibit No. 106, is found at CT 10601.

[50] Technically, this is an issue regarding the personal knowledge requirement. However, as it relates to hearsay issues, it is incorporated in this section of the brief.

Finally, the reason for the admission of the statement was fundamentally flawed. The statement was allowed to correct the impression, created by other inadmissible evidence, that Johnson had said the police had the wrong people in custody. (RT 10205-10206.) If there was an error in allowing *that* evidence, the remedy should have been to strike it, admonish the jury, or counter it with *admissible evidence.* The fact that inadmissible evidence is presented to the jury is not a proper reason for allowing other inadmissible evidence.

M. Prejudice

As discussed above (*ante*, at pp. 75-79), the evidence against appellant was very weak, consisting of accomplice testimony or, at the very least, testimony that should be suspect because of its source. (*ante*, at pp. 61-62.) Therefore, the erroneous introduction of evidence is more likely to have a prejudicial effect, both individually and cumulatively.

The statements improperly admitted were relied on by the prosecution in closing argument at many different stages, including references to the value of the business based on the drug ledgers and the horrific effect of the organization on the community, references to the statements of Armstrong establishing motive, references to Johnson's statement regarding the wrong people being in custody, and references to the fact that Karen Flowers had appellant's number for Armstrong. (RT 16430L-16430M, 16475.)

As previously noted, when a prosecutor exploits erroneously admitted evidence during closing argument, the error is far more likely to be prejudicial to the defendant. (*People v. Woodard, supra*, 23 Cal.3d at p. 341.)

By improperly filling in gaps in the prosecution's case, by connecting appellant to the offense itself, by giving further evidence of the size and scope of the organization, and by the prosecution's emphasis on this evidence in argument, all of the inadmissible hearsay improperly bolstered the otherwise very weak case against appellant.

Armstrong's statement was one of most prejudicial. This statement was crucial to show the motive and origin of the crime. If Armstrong was just visiting his former friend, there was no need to kill him. Only if Armstrong is trying to shake down Bryant, does the prosecution's theory make sense. Only then does appellant's role as a hit man for the organization make sense.

The prosecution made frequent reference to Armstrong's statement, explaining that "Armstrong was the primary person they wanted to kill here for the reasons you know." (RT 16430L.) Armstrong's importance to the case, as established by the statement to Detective Harley, was later stressed by the prosecution at several stages of argument[51].

As noted, *Crawford* explained that inherent in the confrontation clause is a skepticism of possible accomplices seeking favorable treatment. (*Crawford.*, at p. 1360, *ante*, at p. 198.) In this case, Armstrong was an accomplice to the Gentry murder, looking to receive a benefit from the police. Therefore, the reasons behind *Crawford* are particularly compelling in this case.

The unreliability of accomplice testimony, including "testimonial" hearsay statements, combined with a lack of opportunity to cross-examine the declarant, further undermines the reliability required by the Eighth Amendment in capital cases. (*Ante*, at p. 51.)

Because the introduction of this evidence violated appellant's right to confront witnesses and his rights to due process of law and a reliable determination of guilt in a capital case, it must be judged under the standard established by *Chapman v. California*, *supra*, 386 U.S. 18, requiring reversal unless it can be shown that the error was harmless beyond a reasonable doubt. (*Ante*, at p. 123, see also *Delaware v. Van Arsdell* (1986) 475 U.S. 673.) However, even under the lesser

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[51] The prosecution made repeated references to this statement. Some of those references are reproduced in the brief filed by counsel for appellant Wheeler. (Appellant Leroy Wheeler's Opening Brief, pp. 254.) For the sake of brevity, counsel for appellant joins in those statements, rather than repeat them in full.

Watson standard it is clear that appellant was prejudiced.

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

In addition to Armstrong's statements, the statements of Francine Smith, Scott, Gentry, Newsome, and Fisher show the historical basis for Armstrong's killing of Gentry and connect the Bryants to that murder, as the genesis of the underlying offense, thereby suppling the prosecution's historical narrative of the case.

Without that narrative, constructed through multiple items of inadmissible evidence, the jury could have questions about the motives of the various people involved in this case. The prosecution's theory was that appellant was the "hit man" for the Bryants and that his motive thus derived from theirs. If Armstrong was not trying to shake down the Bryants, appellant's motive evaporates. Under the prosecution's theory of the case, Armstrong's statements, more than any other item of evidence, supplied a putative motive for appellant.

This theory of motive was further supported by the value of the business, which made the organization worth fighting for, which itself was improperly proven through the use of the drug ledgers and other documents relating to the organization.

The drug ledgers bolstered the prosecution's arguments about the scope of the business and its effect on the city of Los Angeles and the community, itself an improper argument and a form of misconduct. (*Infra*, Argument VII-B.)

Furthermore, appellant was being tried as a part of a huge drug cartel. Much of the prosecution's case was based on the reach of the organization as spreading terror and control through intimidation. Thus, the statement that the Bryant organization could reach out and touch Johnson, even in the notorious Pelican Bay, the most secure of all prisons, made appellant part of this very organization, though the witness had no personal knowledge of such facts.

Combined with the other arguments about the size, scope, and strength of the Bryant family, this evidence created great pressure on the jury to get appellant

off the streets.

Appellant was tied Armstrong through the phone number given to Flowers, a key to the prosecution's contention that appellant was the "lure," the friend of Armstrong, fatally betraying him. (RT 16551, 16796-16797.) This not only increased appellant's culpability, it made him seem more reprehensible, suggesting he was willing to kill a friend for money.

This inadmissible evidence bolstered the evidence of the Curry shooting, possibly the single most damaging item of evidence introduced against appellant.

The statements of Williams and Johnson, purporting to tie appellant directly to the crime itself would have been particularly prejudicial if Johnson's hearsay statement was taken as corroboration of Williams's testimony under the accomplice testimony rule, even though that statement was not based on personal knowledge.

Indeed, the court's error in accidentally instructing the jury that Johnson's statements could be used for the truth of the matter asserted, rather than the intended use of merely reflecting Johnson's state of mind (*ante*, at p. 215-216), heightens the prejudice because the jury was *told* to use the evidence for the wrong purpose. This error, reflecting the confusion of the trial court, is further evidence of the need to have severed the case in order to have made it more manageable. In itself, this relates to the error in not severing the case, so that it would be more manageable. (*Ante*, Argument III.)

In summary, the prosecution relied heavily on hearsay throughout the case to prove the origins of the case, to show the scope of the Bryant organization, and to tie appellant to the crime itself. Combined with the weakness of the case, this improperly admitted evidence must be regarded as prejudicial.

Therefore, the judgment below must therefore be reversed.

VII

THE PROSECUTION COMMITTED VARIOUS ACTS OF MISCONDUCT, VIOLATING APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The prosecution committed numerous acts of misconduct, including making appeals to sympathy, fears and passion and making factual misrepresentations to the court thereby depriving appellant of his rights to due process of law and a reliable capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. General Principles Relating to Prosecutorial Misconduct

A prosecutor's ethical duties are clear:

> "As the representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the orderly administration of justice as a servant and representative of the law. Hence, a prosecutor's duty is more comprehensive than a simple obligation to press for conviction." (*People v. Kelley* (1977) 75 Cal.App.3d 672, 680; *People v. Pitts* (1990) 223 Cal.App.3d 606, 690-735.)
>
> "A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People* v. *Hill* (1998) 17 Cal.4th 800, 819, internal quotation marks omitted; see also *People* v. *Gionis* (1995) 9 Cal.4th 1196, 1214.)

A prosecutor's improper arguments may violate due process. (*Donnelly v. DeChristoforo*, supra, 416 U.S. 637, 643.)

Prosecutorial misconduct requires case by case analysis. Improper prosecutorial argument, for example, takes many different forms, the specifics of which will always be fact-dependent. Because of its protean nature, classifying prosecutorial misconduct has been compared to pinning down gelatin with a thumbtack. (See *People v. Estrada*, *supra*, 63 Cal.App.4th 1090, 1100 [excusing contempora-

neous objections where misconduct is subtle].) Thus, the Supreme Court need not have addressed the identical factual circumstance at issue in a case in order for it to have created "clearly established" law governing that case. (*MacFarlane v. Walter* (9th Cir. 1999) 179 F.3d 1131, 1139.)

When it is especially improper or prejudicial, prosecutorial misconduct can constitute plain error, which is reversible even in the absence of an objection. In *Viereck v. United States* (1943) 318 U.S. 236, 247-248 the Court stated that the trial court should have prevented appeals to passion *even absent a request from the defense.* (See also *United States v. Smith* (9th Cir. 1992) 962 F.2d 923, 933-934.)

Likewise, *Gall v. Parker* (6th Cir. 2000) 231 F.3d. 265 held a defendant's trial was rendered fundamentally unfair by the prosecution's closing argument, which was "laced with improper, prejudicial statements" -- a mischaracterization of the testimony and disparaging the defense. The Court stated that the distortion of the evidence was "particularly irresponsible," and the conviction was reversed for plain error without an objection having been made by the defense[52]. (*Id.*, at pp. 312-313.)

From the foregoing it is clear that a prosecutor's argument to the jury may cross into the realm of misconduct and may deny a defendant the right to a fair trial.

B. Presenting Arguments that Constitute Improper Appeals to Emotion

A prosecutor's appeal to emotion, sympathy, and/or passion is a "paradigm" of prosecutorial misconduct. (Lawless, *Prosecutorial Misconduct*, 2d ed. 1985; see also *Drayden v. White* (9th Cir. 2000) 232 F.3d 704; *United States v.*

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[52] Appropriate to the instant case, in *Gall*, in the "Overview of Case," the court noted "This is indeed a tragic case. The primary tragedy is that a young girl's life was taken in the most cruel and grisly fashion. ... And naturally, the death and Gall's culpability engendered an understandably outraged and angry public as well as a prosecution determined to convict. *In these situations, it is a court's duty to ensure that amid the tragedy, anger and outrage over hideous acts perpetrated, a fair and constitutional trial takes place.*" (*Id.*, at p. 277, italics added.)

Koon (9th Cir. 1994) 34 F.3d 1416, 1443; *Copeland v. Washington* (8th Cir. 2000) 969 F.3d 570; *People v. Parmelee* (1934) 138 Cal.App. 123; *People* v. *Talle*, *supra*, 111 Cal.App.2d at 675.)

The Supreme Court has warned against unfair and cynical emotional appeals, stating that a defendant is deprived of the right to a fair trial by the arguments of a prosecutor who "indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." (*Viereck v. United States*, *supra*, 318 U.S. 236, 247.)

In this case, the prosecution presented arguments that would have the natural tendency to appeal to the passions of the jury.

Early in argument, the prosecution began an appeal to passion and emotion. Twice saying it was a horrible case, "as horrible as it gets," the prosecution informed the jury "You don't see more of an evil act than you see here." (RT 16430N.) Drawing a distinction between Armstrong, a professional hit man himself, and the current defendants, the prosecution pointed out that Armstrong liked kids, he worked at a Baptist children's foundation, and while he would kill women, he wouldn't kill children, even "for two million dollars and a house in ...Morocco." (RT 16430-O)

The prosecution then went on to describe how the Bryant family operated in Los Angeles County for 10 years at a minimum, how the police shut down the houses, but the dealers were bailed out in five minutes and were back on the streets, "bigger and bigger and bigger." (RT 16430P.)

Again, the prosecution stated how this was "the biggest most violent drug organization that anyone could imagine and one that you would wish did not exist." (RT 16430S.) The police made raids with battering rams, so the organization adapts to put steel doors on interior rooms to further slow the police. (RT 16403S-T.)

The prosecution stated how it was an

> "...organization that has existed for a long, long time in this county getting on by selling dope, poisoning their fellow citizens, intimidation, threats, paying off witnesses, killing people, blowing up people, beating people.
>
> "The worst you can imagine, folks, and they have been getting away with it for years." (RT 16430T.)

The prosecution then drew a multi-paragraph comparison to the Mafia and organized crime. (RT 16430.)

The prosecution repeated the argument about the effect of the Bryant organization on the city of Los Angeles. (RT 16475-16476.) Later, the prosecution again returned to the theme of the "harm to society" caused by the Bryant organization and how it "perpetuated itself by intimidation, threats, by paying off witnesses, by beating up people, by blowing people up, and by killing people." (RT 16490-16491.)

Later the prosecution again referred the effect of the organization on the community of Los Angeles, and how its presence was felt every day. (RT 16476.) In closing, the prosecution again reminded the jury how horrible the case was, concluding, "But it's as important a case to L.A. County as any jury will see and it's important to the citizens of this County and the people everywhere as any case will be." (RT 16554.)

The arguments regarding the scope of the Bryant family and its effect on the County of Los Angeles were clearly improper in the guilt phase of trial. The *horrific effect* of the crack houses on the community had no probative value in proving who killed the victims. Nonetheless, the prosecution argued how the police had to conduct raids with battering rams, how the organization poisoned the community, comparing it to the Mafia, and stressing how important the case was to the community. This naturally creates fear and emotion on the part of the jury, coupled with urging them to convict not because of evidence as to who shot Armstrong and the others, but to cauterize the injury by convicting the defendants.

The prosecution's contention that Armstrong liked children and worked with a church group was even less relevant to a determination of guilt or innocence.

The frequent reference to how bad the family was is similar to the use of gang evidence. While there may be valid uses for such evidence, the potential prejudice from its misuse mandates that the courts be vigilant in ensuring the prejudicial factor does not overwhelm any probative value. (E.g. *People v. Perez* (1981) 114 Cal.App.3d 470, 479; also, compare *People v. Contreras* (1983) 144 Cal.App.3d 749 [gang evidence relevant to prove identity when the evidence had established that the group perpetrating the attack was a particular gang, and that someone matching appellant's description and having the same gang nickname had participated in the offense] and *People v. Cardenas* (1982) 31 Cal.3d 897 [prejudicial nature of gang evidence outweighed where it was of minimal value and cumulative to the issue of witness bias when it was already shown the defendant and the witness lived in the same neighborhood and had the same group of friends, the very fact that the prosecution had been trying to prove with the evidence of mutual gang membership].)

The same danger is present here with the constant reliance on the horrific nature of the Bryant organization. However, in this case the danger is exacerbated because the prosecution is expressly arguing the nature and effect of the business, while in many gang cases the evidence of the gang is introduced to prove motives such as gang affiliation and motive, but the horrific effect of the gang itself is not argued. In this case, the increase in prejudice corresponds to the decrease in relevance.

C. Presenting Arguments Which the Prosecution Knew Had No Factual Basis

In this case, during various hearing when the admissibility of evidence was being discussed, the prosecution made a series of misrepresentations which were crucial in the determination of whether the disputed evidence should be admitted.

The most damaging of these misrepresentations occurred when the prosecution was arguing for the admission of evidence relating to appellant's arrest.

As explained above, at the time that the motion regarding appellant's arrest was argued, when the parties were discussing the admissibility of the cocaine, the defense explained that it anticipated that there would be testimony that the cocaine found was in the wafer form that was "peculiar" to the Bryant-family cocaine, but, the defense believed that the cocaine had been destroyed and questioned whether the prosecution would be able to prove that fact. (RT 10035.) Although this was an important matter, the prosecution did nothing to correct the erroneous assumption on which the defense was relying. This was a particularly important matter, as it appears that this was one of the facts which the court was considering when it ruled on the issue. (*Ante*, at p. 155.)

It has been held in other contexts that the prosecution has a duty to correct false impressions under which the court or jury may be operating regarding crucial matters, even when those matters are inadvertently brought out by the defense such as the foundational evidence regarding the cocaine. (*People v. Batts* (2003) 30 Cal.4th 660, 675.)

Even the mere implication of facts which the prosecution knows that it cannot prove is misconduct. Thus, it is improper for a prosecutor to ask a witness a question that implies a harmful answer to the defendant unless the prosecutor has reasonable grounds to anticipate the answer will confirm the implied fact, or the prosecution is prepared to prove the fact by other means. (*People v. Price* (1991) 1 Cal.4th 324, 481; People v. Warren (1988) 45 Cal.3d 471, 480.)

Appellant submits that it was similarly misconduct for the prosecution to fail to correct this false impression that was so crucial to the resolution of this case.

Furthermore, the ability to trace to cocaine to the Bryant family was the key to the admission of very crucial evidence. Should the jury have decided that Williams was an accomplice, it might have looked to this evidence as corroboration,

even though it would have been improper to do so because the evidence did not relate to an element of the offense, as required for corroborative evidence. However, in the minds of the jurors, as to appellant, this evidence and the Curry evidence may have been the most important part of the trial.

The next item of evidence that was the subject of misrepresentation was the evidence relating to the statement made by Armstrong when interviewed by the police.

As noted previously (*ante*, at p. 195), when the subject of the admissibility of Armstrong's interview was being discussed, the court stated that the relevance of Armstrong's state of mind was tenuous unless there existed additional information that Armstrong's intent to take over the business was relayed to the defendants. (RT 7974.) The prosecution represented to the court that the threat was communicated to Bryant by two sources who would testify to that fact. (RT 7977-7978.)

In fact, no witnesses testified to this fact.

This evidence was crucial in proving the motive in this case, a motive which in itself was crucial to the case and relied on extensively by the prosecution. In relation to appellant, the evidence is even more significant, because without this motive on behalf of the Bryant organization, appellant's motive as the alleged hit man for that organization evaporates.

Therefore, this evidence comes in only as a result of a misrepresentation as to what the prosecutor would prove.

The third instance of the prosecution securing the admission of highly prejudicial evidence was the arguments presented regarding the crime scene photographs. The admission of some of these photographs was secured by misrepresenting the facts that the prosecution intended to prove through the photographs.[53] Specifically, the prosecution argued that the pictures of Brown were relevant and

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[53] By itself, the admission of many of the photographs was also prejudicial error. (*Infra*, Argument VII.)

important to the prosecution's case, because the prosecution believed that Brown was killed in the car by a gunshot wound to the head as a coup de grace. (RT 8268.) The prosecution then failed to present any such evidence at trial. Surely, on the eve of trial, the prosecution knew its theory of the case and how it was going to prove its theory. The prosecution must have known that there would be no evidence to support this assertion.

In fact, it is almost impossible for Brown to have been killed in the car. His scalp was blown off in the cage, and he suffered a severe shotgun wound at such close range that it left a "muzzle stamp," the result of a contact wound to Brown's chest. (RT 8369-8370.) There never was a contention that any of the wounds were inflicted in the car.

It strains credibility to assert that at this stage the prosecution intended to present witnesses to prove Brown was killed in the car, with the coroner having testified at all of the preliminary hearings, with the huge poster boards of exhibits of the death photographs prepared before trial, with the pools of blood at Wheeler Avenue, and with no witness to testify that fact.

Therefore, it was clearly fictionalization and a fabrication to say that these photographs were relevant for this purpose. To assert this "fact," when the prosecution must have known it would not be proven, can only be regarded as an attempt to mislead the court in the court's exercise of its discretion on crucial rulings.

Another example of the prosecution's use of facts that were not in evidence is the prosecution's cynical use of the fact that Armstrong worked with children at the Baptist church and how Armstrong would not kill children, even for two million dollars. This "evidence" appears to derive from Armstrong's self-serving statement to the police. (See CT 10500-19502 – Vol. 40 of Vol. 41 Series, Supplemental 3 – Confidential Under Seal.)

However, Armstrong's statement should have come in only to show his state of mind regarding his intent to confront the Bryants, and was not admitted for

the truth of the matter asserted in the statement. Therefore, there was nothing in the record from which to infer that these statements were true.

Indeed, the prosecution itself argued that Armstrong's statements were not being admitted for the truth of the matter, but for the non-hearsay purpose of proving Armstrong's state of mind[54]. (*Ante*, at p. 198.) Therefore, the prosecution knew there was no evidence supporting this fact.

Besides being an argument which had no support in the record, the argument that Armstrong loved children and worked with kids at the church was a cynical appeal to sympathy in a case where the defendants were accused of murdering a child.

A deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice" and violates the due process. (*Mooney* v. *Holohan* (1935) 294 U.S. 103, 112; *Giglio v. United States* (1972) 405 U.S. 150; *Darden v. Wainwright, supra*, 477 U.S. 168 at p, 181-182.)

Thus, it has been recognized that the prosecution may not present argument asserting facts that are not in evidence. (*United States v. Wilson, supra*, 135 F.3d 291, 298 – prosecution's presenting arguments not based on the evidence may deprive a defendant of a fair trial and violates "a fundamental rule known to every lawyer."; See also *United States v. McClinton* (11th Cir. 1998) 135 F.3d 1178, 1189; 1189– trial attorneys know arguments are confined to evidence; see also American Bar Association Standards for Criminal Justice, The Prosecution Function, Standard 3-5.5 (3d. ed, 1993) (hereinafter ABA Standards).)

Closely related to the prohibition against deceptive arguments is the universally recognized rule against fictionalization. Thus, the National Prosecution

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[54] Of course, with all the evidence presented at trial, it is possible that this was a good faith mistake by the able prosecutor. However, if the prosecutor was unable to remember which evidence was admitted for which purpose, it is unlikely that the jury would be able to do so, which would be further proof of the need for a severance.

Standards (2d ed.), issued by The National District Attorney's Association clearly state that a prosecutor should not allude to facts *unless there is a reasonable basis for believing such evidence will be tendered and admitted.* (*Id,* Standard 76.1.)

In *Frazier v. Cupp* (1969) 394 U.S. 731 the prosecutor referred to anticipated testimony from a co-defendant who had plead guilty. The prosecutor had spoken to the witness's probation officer, and was lead to believe the witness would testify. At trial, the witness invoked his right against self-incrimination, and therefore did not testify. The Court held that the prosecutor could have had a good faith belief that he would be able to present the evidence that he had described in his opening statement. (*Id.*, at p. 733.) Although the Court affirmed the judgment, the court expressly stated that some statements of prosecutors in argument could rise to constitutional error, but it did not believe that that had occurred in that case, where there existed a good faith belief that the evidence would be admitted, where the comments were brief, and the jury was admonished to disregard that aspect. (*Id.*, at pp. 733, 737.) However, *Cupp* also must stand for the converse of that proposition, namely that prejudicial prosecutorial misconduct will occur if there is no good faith belief that the evidence will be presented, if the comments are not brief, and if jury is not admonished to disregard the statements.

Unlike *Frazier v. Cupp, supra,* 394 U.S. 731, where there was no prejudice arising from the misrepresentation of the prosecution, in this case there could be no good faith belief that this fact would be proven, the evidence improperly admitted was extensive and crucial to a determination of appellant's guilt or innocence, and the jury was not admonished to disregard the evidence that was wrongfully admitted as a result of these misrepresentations.

Although the situation of misrepresentations of fact arises more commonly with the prosecutor asserting facts which are not supported by evidence in arguments to the jury, appellant submits that the same standards apply when the prosecution is presenting argument to the trial court while the court is considering motions and objections.

Indeed, if anything, a higher standard should apply. Misrepresentations to the trial court will result in the trail court not being able to make the proper and intelligent ruling necessary for the exercise of its discretion. Misrepresentations to the court will result in the jury being polluted by evidence which it should not have heard.

In summary, the prosecution presented arguments for which it knew there was no basis in any facts that would be presented at trial. This was misconduct which was clearly intended to, and very likely had, a negative impact on the jury.

D. The Use of Improper Legal Arguments

A prosecutor's bad faith misstatement of the law is also misconduct. (*People v. Calpito* (1970) 9 Cal.App.3d 212, 222; *People v. Jones* (1962) 205 Cal.App.2d 460.)

In this case the prosecution committed misconduct by arguing that Williams was not an accomplice because an accomplice "has to be subject to prosecution for exactly the same crimes, meaning *he has to be guilty* of these crimes."

Counsel for appellant objected to this statement, on the grounds that it was a misstatement of the law. The Court replied, "Well, he has to be shown to be an accomplice by the evidence, I think within, the confines of ..." (RT 16505.)

As explained above, an accomplice does not have to be "guilty" of the offense. Rather, he has to be subject to prosecution. Not everyone who is "subject to prosecution" is guilty. (RT 16505.)

The Deputy District Attorney must have known the difference between these two concepts. It could only have been a desire to confuse the jury that motivated this misstatement of the law.

This was a crucial area of the law. As discussed above (*ante*, at p. 81), after the verdicts for appellant, while still deliberating on Settle, the jury asked, "If somebody is charged with a crime but not brought to trial, is he automatically an accomplice in that crime." (RT 17105H, CT 15440.)

Thus, the jury was having a problem with the correct law at the time that it was deliberating as to appellant's guilt. To misstate the law in this area can only have further misled the jury and had a negative effect on deliberations.

E. Prejudice

Appellant incorporates those aspects of prejudice discussed above, including those addressing the weakness of the state's case, as they may be applicable to this argument. Additionally, there are aspects of prejudice that are specifically relevant to this issue.

Throughout the trial, in various different ways, the prosecution sought to drive home the dangerous nature of the Bryant family and the need to convict, regardless of any doubts the jury may have been entertaining.

A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." (*Harbans v. LaMarque* (N.D.Cal.,2004) WL 187498; *United States v. Agurs*, *supra*, 427 U.S. 97, 108; *Smith v. Phillips* (1982) 455 U.S. 209, 219; *People v. Frye* (1998) 18 Cal.4th 894, 946.)

Furthermore, conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; (*People v. Hill*, *supra*, 17 Cal.4th 800.)

A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson*, *supra*, 60 Cal.2d 803, 805.) Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. (*People v. Talle*, *supra*, 111 Cal.App.2d 650, 667.)

Thus, the arguments regarding the horrific nature of the Bryant family and its catastrophic effect on the community were bound to have a strong impact on the jury. This impact was magnified because for months the jury heard that the

prosecutor represented "the People." Therefore, it was the People who told the jury about the horrific effects of the Bryant family on the People of Los Angeles. It was the People that told the jury about the millions of dollars taken in by the Bryants. It was the People who argued for a conviction because of the fear in the community, the disregard for the law, and the other negative effects the Bryant family had on the County of Los Angeles.

Furthermore, state law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Cooper* v. *Sowders* (6th Cir. 1988) 837 F.2d 284, 284-288; *Menzies* v. *Procunier* (5th Cir. 1984) 743 F.2d 281, 284-288.)

Therefore, in determining whether a prosecutor's remarks require reversal, courts must consider those comments and arguments in the context in which they were made. (*United States v. Young* (1985) 470 U.S. 1, 11, 18.)

In the context of this case the prosecution's misconduct was crucial to a resolution of the issues.

For example, if the prosecution made a misrepresentation to the court during the time that the motions were being heard, the court could not exercise its discretion in this area properly. Thus, appellant was deprived of a reasoned decision by the court because the court was misled as to the intended use of the death photographs. As a result of that misrepresentation the grisly pictures of the victims were introduced.

Similarly, if the prosecution knew it would not be able to connect appellant to the Bryant family by means of the unique cookie-shaped wafer, it should not have allowed this false impression to stand.

Because there was virtually no other corroboration of appellant's involvement in the murder, his connection to the Bryants was the major issue in the case. The only legitimate evidentiary purpose of the cocaine was to show appellant's connection to the organization. If the cocaine could not be traced to the Bryants,

that issue should have been resolved differently. To allow the court to function under such misapprehension of what the prosecution would prove was misconduct[55].

Likewise, the evidence of the high-speed chase preceding appellant's arrest hinged in turn on a misrepresentation for its admissibility. That chase, and the danger inherent in such an incident, was another example of the prosecution's attempt to portray appellant in the most callous light possible. However, it is not relevant to the issue of who killed Armstrong unless the fruit of the chase, the cocaine, connects appellant to the Bryants.

Thus, because of this misrepresentation, the image of appellant was further polluted when the jury was told about the dangerous high-speed chase and that appellant was a major drug dealer. (RT 11299-11300.)

The right to have a jury not swayed by misconduct is clearly a matter of great importance. This is particularly true when the misconduct is of a nature that is bound have an effect on the jury by causing it to render a decision based more on emotion than reason.

Consequently, depriving appellant of the protections afforded under the principles discussed above is itself a deprivation of due process of law, because such a misapplication of a state law leads to a deprivation of a liberty interest, a violation of the Due Process Clause when that right is of "real substance". (*Ante*, at p. 51-52.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Finally, as noted above (*ante*, at p. 51), in capital case, there is a constitutional requirement of heightened reliability. Prosecutorial misconduct that appeals to jurors' fears and emotions or distorts the evidence undermines the reliability of the process in violation of Eighth and Fourteenth Amendments.

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[55] As noted previously, the court later chastised the prosecution for failing to live up to its promise to prove this crucial fact. (RT 11299-11300.)

Therefore, appellant submits that the prosecutor's actions were misconduct, depriving appellant of the right to due process of law, and requiring that the judgment entered below be reversed.

VIII

THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352, DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY ADMITTING INFLAMMATORY, GRUESOME, AND CUMULATIVE PHOTOGRAPHS OF THE VICTIMS' BODIES

The trial court abused its discretion under Evidence Code section 352, depriving appellant of due process of law, a fair trial, and a reliable penalty determination in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, by admitting inflammatory, gruesome, and cumulative photographs of the victim's body.

A. The Hearings, Motions, and Evidence Admitted Below

The defense objected to showing the jury photographs of the victims Loretha Anderson and her baby daughter, Chemise English, during the Opening Statement on the ground that they were inflammatory. The court overruled the objection, stating that there was a good chance that the photographs would be admissible in the prosecution's case-in-chief and therefore could be used in the Opening Statement. (RT 8078-8079.)

The defense also objected to the photographs of Armstrong and Brown, stating that it was willing to stipulate to the identity and cause of death of Armstrong and Brown and that the piece of scalp from Wheeler Avenue came from Brown's head. (RT 8260-8261, 8265.)

The defense argued that these photographs were very gruesome as they depicted the bodies after they had been outside in 100-degree heat for several days, were infested with maggots, and partially eaten by animals. (RT 8264-8265, 8267.)

The prosecution stated that this was the first time the defense offered to stipulate that the scalp came from Brown, as the defense had claimed previously that the scalp came from the actual killer, who had somehow been harmed by Armstrong and/or Brown, and that the photograph thereby related to some type of self-defense argument. (RT 8266.)

The prosecution argued that the position of the wounds, as reflected in the photographs, was important because the prosecution believed that Brown was killed in the car by a gunshot wound to the head as a coup de grace. (RT 8268.)

As to the photographs of Chemise, the prosecution argued it was important to show how she was positioned to show the deliberateness of the shooting. (RT 8271.)

The court overruled the objections, except as to one picture depicting the removed spinal cord from Chemise. The court stated that while the other photographs were "grisly," they were not too grisly, and they related to the cause of death. (RT 8274-8275.)

Later, the defense again objected to photographs which depicted the decomposed bodies of Armstrong and Brown, arguing the coroner had already testified as to the state of decomposition of the bodies, and that the photographs were particularly gruesome, cumulative, inflammatory, and designed to prejudice the jury. The court's attention was specifically drawn to one photograph of a face with a "skeletal grimace with the lips drawn back away from the teeth." (RT 8716-8717.)

The prosecution explained that the pictures showed more than the position of the bodies, in that they also reflected the position of the shoes and clothing found near the bodies[56]. (RT 8716-8717.)

The court sustained the objection to photograph A in People's Exhibit No. 47, but overruled the objection to the other photographs. (RT 8718-8720.) The

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[56] Why these facts were relevant is not clear from the prosecution's argument.

defense renewed these objections when the exhibits were admitted at the end of trial.

Later, the defense objected to the X-ray and another set of photographs of Chemise on the grounds of relevance[57]. The prosecution explained that these photographs depicted the cause of death and were therefore relevant. The court overruled the objections, stating that the photographs depicted the wounds, and were not too graphic. (RT 13795-13798.)

A defense objection to the photographs of Loretha was partly overruled, after the prosecution explained that those photographs depicted the paths and number of the different wounds received by Loretha. (RT 13798-13801.)

The defense also objected to the series of photographs contained in People's Exhibit No. 12, pictures of Armstrong's body after it had been badly decomposed in the heat. (RT 13802.) The prosecution explained that the photographs were relevant because the coroner had testified as to the state of decomposition of the bodies and the resulting difficulties that he had in determining the number and pattern of the gunshots. (RT 13803.) The court partially overruled the objection, removing only one photograph from the sequence. (RT 13803-13804.)

A similar objection was made as to People's Exhibit No. 16, photographs of Brown, with the defense again arguing that the pictures were unduly prejudicial given the state of decomposition of the body. (RT 13804.) The prosecution argued that these photographs depicted the muzzle stamping described by the coroner. (RT 13804-13805.)

The defense also objected to People's Exhibit No. 19, another series of photographs, on the grounds that it was too prejudicial, as all the exhibit did was portray several clumps of hair. (RT 13806-13806.) The prosecution explained that the photograph depicted how the portion of scalp was removed "traumatically" by a shot gun blast. (RT 13806.)

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[57] At this time, it was agreed that an objection by one party would be deemed as an objection by all, unless otherwise indicated. (RT 13797.)

The court noted that it was hard to imagine how the hair could have been removed other than "traumatically." (RT 13806.) The court sustained the objection as to two of the photographs (C and D), but overruled the objection as to the others. (RT 13806.)

The defense also objected to some of the photographs in People's Exhibit Nos. 46 and 47, photographs from Lopez Canyon, arguing that the photographs were repetitive. The defense pointed out photograph E, which showed the maggot infested wound. (RT 13810-1381.)

Although the court acknowledged that the photographs were "grisly," the court stated it had earlier found that the probative value outweighed the prejudicial impact, and therefore overruled the objection, with the exception of photograph D, which it excluded. (RT 13812-13813.).

B. The Relevant Law

Under Evidence Code section 352 a court has discretion to exclude evidence when its probative value is outweighed by the probability it will create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code §352.)

In several cases courts have found an abuse of discretion in allowing photographs of the bodies of murder victims. Thus, "[w]hen allegedly gruesome photographs are presented, the trial court must decide whether their probative value outweighs their probable prejudicial effect." (*People v. Love* (1960) 53 Cal.2d 843, 852.) Such evidence can have such a powerful effect that "[u]nnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment." (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997.)

Thus, "photographs should be excluded where their principal effect would be to inflame the jurors against the defendant because of the horror of the crime..." (*People v. Chavez* (1958) 50 Cal.2d 778, 792.)

"Autopsy photographs have been described as 'particularly horrible,'

> and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant." (*People v. Marsh, supra*, 175 Cal.App.3d, at p. 998; quoting *People v. Burns* (1952) 109 Cal.App.2d 524, 541.)

In *People v. Marsh, supra,* the prosecutor argued that the autopsy photographs were relevant to show the amount of force used to inflict the fatal blows. (*Id.*, 175 Cal.App.3d, at p. 997.) The court held that although cause of death was the central issue in the case, the coroner's testimony was adequate to make the prosecution's point, and therefore, the photographs were more prejudicial than probative and their introduction into evidence was error.

> "Here, the jury was not enlightened one additional whit by viewing these seven gory autopsy photographs. The oral testimony of the autopsy surgeon describing his findings comprehensively advised the jury of his observations and why he concluded there were multiple fatal impact sites which could not have been caused by a fall from the sofa to the hearth. The primary cause of death..., was never disputed..... Here, where the uncontradicted medical testimony identified the precise location and nature of the injuries the autopsy photographs have little, if any, additional probative value." (*Ibid.*)

The court also observed that autopsy photographs are often far more prejudicial than probative because much of the revulsion that they induce in the viewer is caused not by the wounds themselves but by the activities of the autopsy surgeon. The court noted that the photographs in the case before it were "gruesome solely because of the autopsy surgeon's handiwork; . . . In other words, their inflammatory nature has been greatly enhanced by the manner in which the surgeon chose to 'pose' the body portions." (*Id.*, at p. 998, see also *People v Poggi* (1988) 45 Cal.3d 306, at 322-323 - trial court improperly admitted two photographs of the murder victim, one depicting the victim while still alive and a second autopsy photograph showing incisions that the surgeons made performing a tracheotomy.)

Similarly, in *People v. Smith* (1973) 33 Cal.App.3d 51, the defense objected

to the introduction of three color photographs of the bodies of two victims, particularly to one which depicted a woman's semi-nude, mutilated bloody corpse. The Court of Appeal found that the photographs "have a sharp emotional effect, exciting a mixture of horror, pity and revulsion" and held that the trial court had erred in admitting them. (*Id.*, at p. 69.)

The court stated that such photographs must be analyzed in terms of an "evidentiary mosaic," rather than as isolated evidence. (*Ibid.*) In view of the testimony of the coroner and the other evidence, the court found the photographs to have been far more prejudicial than probative.

> "In this case there were ample descriptions of the positions and appearances of these two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification. (Citation omitted.) The Attorney General points to no added probative value possessed by these exhibits. They supplied no more than a blatant appeal to the jury's emotions. Their prejudice-arousing effect heavily outweighed their probative value. The trial court erred in admitting them." (*Ibid.*)

Some cases have also addressed factors to be considered in determining the admissibility of this type of evidence. In *People v. Anderson* (2001) 25 Cal.4th 543, 592 the court noted that the fact that bodies were found relatively quickly argued for their admissibility, as the photographs did not show the remains in a state of decomposition, which would make them more gruesome, and therefore more prejudicial.

Other cases found no error where the photographs were not particularly gruesome because the wounds had been cleaned up and were shown to the jury in a "clinical setting." (*People v. Staten* (2000) 24 Cal.4th 434, 462-464.)

Likewise, it is not error to admit this type of evidence when the photographs are particularly probative, such as when they are admitted in the penalty phase to show the deliberate and brutal nature of the crime. (*Id.*, at p. 462-464 - 18 stab wounds reflect very intentional nature of killing.)

Similarly, in *People v. Scheid* (1997) 16 Cal.4th 1, the shocking nature of the photograph *itself* was relevant because by portraying the scene it helped explain the mental state of the two witnesses who found the victims, and the witnesses' mental state when they first made statements to the police had been an issue in the case. (*Id.*, at p. 16.)

On the other hand, admission of irrelevant and lurid photographs may render a trial fundamentally unfair in violation of the Due Process Clause. (See, e.g., *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548; *Jammal v. Van De Kamp*, *supra*, 926 F.2d 918, 919.)

The wrongful admission of prejudicial and inflammatory photos also violates the Eighth Amendment prohibition on cruel and unusual punishment, extended to the states through the Fourteenth Amendment, which encompasses the right to a fair and reliable determination in a capital case. (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at 605.) Gory and grisly pictures can overwhelm the jurors and consciously or unconsciously affect their ability to calmly and rationally deal with the case as a whole.

Furthermore, the right to have a jury not swayed by unduly prejudicial evidence is clearly a matter of great importance. Gruesome photographs undermine the jury's ability to coolly and rationally weigh the evidence, particularly when the photographs are of children, such as Chemise. Consequently, depriving appellant of the protections afforded under the principles discussed above is itself a deprivation of due process of law, because such a misapplication of a state law leads to a deprivation of a liberty interest, a violation of the Due Process Clause when that right is of "real substance". (*Ante*, at p. 51-52.)

Finally, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

C. Application of the Law to the Facts of this Case

The foregoing cases establish that when the depiction of a victim's injuries is unnecessary for the resolution of disputed issues, introduction of gruesome photographs of the victims is error. In this case, even the reasoning that the photographs were necessary to show the nature of the wounds is questionable, because the decomposition of Brown's and Armstrong's bodies rendered the photographs of questionable value for that use.

Furthermore, many of the reasons the prosecution gave for the relevance of the evidence are dubious. For example, as discussed above (*ante*, Argument VII-C, pp. 227-228), it appears that the prosecution misrepresented the facts that it intended to prove when it argued that the pictures of Brown would be used to show that he was killed in the car by a gunshot wound to the head as a coup de grace[58]. (RT 8268.) By making this misrepresentation as to what it intended to prove, as a basis for admitting these photographs, the prosecution deprived the court of its ability to even rationally decide whether the photographs were admissible, as the court was acting under a misunderstanding of what was in dispute, a misunderstanding caused by the prosecution. Therefore, the court was not able to exercise its discretion properly.

Likewise, the prosecution argued that the photographs of Brown's scalp were admissible because the defense had previously suggested the scalp came from the actual killer and was therefore relevant to a self-defense claim. (*Ante*, at 240.)

At the time that this issue was raised, however, the defense had made clear that no such claim would be made at trial. Because the definition of "relevant evidence" includes evidence that is relevant to prove "any *disputed* fact," the prosecution should not have been allowed to introduce evidence to disprove a nonexis-

[58] This misrepresentation itself was a form of misconduct. (See Argument VII-C.)

tent issue. (Evid. Code § 210, italics added.) Because this was no longer disputed, it was no longer relevant.

The prosecution also argued that the position of the wounds and the manner in which they were inflicted was important. In fact, however, the position and manner in which the wounds were inflicted had little or no probative value in establishing the intentional nature of the killings, particularly given that there were multiple fatal wounds inflicted. Certainly, there is no additional relevance to photographs of the maggot-infested remains. If the position of the wound could somehow be of significance, the photographs with decomposition of the bodies are of no relevance.

This case must be contrasted with *People v. Navarette* (2003) 30 Cal.4th 458 where this Court explained that a photograph of the victim's naked chest was relevant "to show the dense concentration of stab wounds" to the heart area for the inference that the killing was intentional. Likewise, a photo showing the victim with her pants around her ankles and her hands and feet tied together was relevant to show the victim was immobilized before being killed, also allowing an inference that the killing was intentional. (*Id.*, at p. 495.)

Similarly, in this case the prosecution argued that the pictures of Chemise were important to show how she was positioned to show the deliberateness of shooting. (RT 8271.) However, the defense was not disputing that the shooting of Chemise was deliberate. The additional probative value of the photograph itself, to an undisputed issue is negligible, after the coroner already described the wound.

Thus, in this case the objectionable photographs had little or no probative value as to any ***disputed*** issue in the case.

Likewise, in this case there were none of the factors found in other cases that would mitigate the prejudice inherent in this type of evidence, such as cases where the photographs did not portray the bodies in a state of decomposition or cases where the wounds were shown in a clinical setting after being cleaned up

and having the gore removed. (See, respectively, *People v. Anderson, supra*, 25 Cal.4th 543, 592 and *People v. Staten, supra*, 24 Cal.4th 434, 462-464.)

The danger of undue prejudice was particularly acute in this case because of the grisly and emotional nature of the photographs, which showed the decomposed, and maggot-infested, partially eaten bodies of Armstrong and Brown. Thus, the negligible probative value of these photographs was substantially outweighed by the danger of undue prejudice they posed. The trial court therefore abused its discretion under Evidence Code section 352 by admitting these photographs, and this error rendered appellant's trial fundamentally unfair, in violation of his state and federal constitutional rights, including his rights to due process and to a reliable penalty determination under the Eighth and Fourteenth Amendments,.

D. Prejudice

As noted above (*ante*, at p. 242), the introduction of this evidence violated appellant's right to due process of law. When a trial court's error infringes upon the federal constitutional rights of a criminal defendant, the error is subject to review under the standard of *Chapman v. California, supra*, 386 U.S. 18, 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt.

The error in this case cannot be found harmless based on the strength of the prosecution's case (See *People v. Hines* (1997) 15 Cal.4th 997, 1046).

As discussed above (*ante*, at pp. 75-79), the evidence against appellant was very weak, consisting of accomplice testimony or testimony that should be suspect because of its source. (*Ante*, at pp. 61-62.) The remaining evidence did not connect appellant to the offense. (*Ante*, at p. 48.)

Similarly, as discussed above, the prosecution relied heavily on an appeal to passion and fear, itself a form of misconduct. (*Ante*, Argument VII-B, p. 226-227.)

In such a case, the prosecution's use of gruesome pictures –a dead baby and

her mother, maggot-infested, partially eaten bodies, decomposed bodies, bloated by the heat, with a skeletal grimace – can easily tip the scales, leading jurors to improperly resolve their reasonable doubts based on inflamed emotions.

Thus, the trial court's error was sufficiently prejudicial to compel a reversal, even assuming that it was mere state law evidentiary error rather than federal constitutional error. (See *People v. Poggi* (1988) 45 Cal.3d 323.)

E. Summary

The trial court's decision to allow introduction of inflammatory, gruesome, cumulative, and totally unnecessary photographs of the victims' bodies was an abuse of discretion, depriving appellant of due process of law, a fair trial, and a reliable penalty determination in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant's convictions must therefore be reversed.

IX

THE USE OF THE STUN BELT AND OTHER SECURITY MEASURES EMPLOYED BY THE TRIAL COURT, WITHOUT THE REQUIRED SHOWINGS OF NECESSITY INFRINGED ON APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The trial court's decision to use a stun belt on appellant, without any finding of necessity, was directly contrary to this Court's decision in *People v. Mar* (2002) 28 Cal.4th 1201. The improper use of the stun belt, along with other security measures employed by the court impinged on appellant's right to present a defense and suggested to the jury, via non-evidentiary information, that appellant was a dangerous person who could only be controlled by the most drastic means. These measures infringed on appellant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth amendments.

A. The Proceedings Below and the Security Measures Taken at Trial

At the start of trial, the court informed the parties that the case would require added security throughout the trial. Six to seven deputies were in the courtroom at all times and nine were present at the commencement of jury deliberations. (RT 6194-6195, 6202, 6298, 16865, 18782.)

The courtroom was on the ninth floor of the courthouse and had its own metal detector in addition to the one at the entrance of the courthouse. Spectators, witnesses, and counsel had to pass through both metal detectors. (RT 6442, 6567, 6651, 7468-7469.)

Over appellants' objections, the court ordered that all the jurors' names would be withheld. (RT 6194, 6203, 6207, 6358-6359, 7980-7982.) While they were at the courthouse, the jurors were not free to roam in or leave the courthouse or be outside the company of the bailiffs. Breaks were taken in a special room, they parked in a secret location, and were escorted by bailiffs to and from the

courtroom by way of a route known only to the jurors and court personnel. They were not permitted to leave the courthouse, but were fed in the building at the court's expense. (RT 6194-6196, 6365, 6651-6653, 7980-7988, 8057-8072.)

In a hearing out of the presence of counsel and the defendants, before the prosecution's opening statement, the court explained to the jury that the unusual measures were needed to safeguard them from media and witness contact. (RT 8057-8072.)

Prior to trial, the court informed the parties that it intended to order that the defendants either wear a leg chain or a "react belt," a device worn under one's shirt with electrodes, controlled by a deputy who can shock the wearer in order to immobilize him or her. It was further explained that the belt "is not at all visible to the jury." (RT 6200-6201.)

The bailiffs explained they had little experience using the stun belt. (RT 6200-6202.) One deputy explained that the belt was the size of a belt used to protect the back when lifting, with a square box that was worn and could be covered by a sweater or other garment. Deputies had access to a control unit that would immobilize the wearer when the control was activated. (RT 6200-6202, 6205-6206.) The court explained that the benefit of the belt was that it was not visible to the jury unless it became necessary to activate it, and "then it becomes quite obvious." (RT 6201.)

Appellant objected to the use of any restraints, stating that there had been no showing of need for restraints as to appellant, as there was no showing that appellant had ever been a problem, as the law requires in order to justify restraints. (RT 6206.)

At the next hearing, counsel for Bryant informed the court that she had learned from the Sheriff's Department that the "react" belt" when activated pumped about 50,000 amps of electricity into the kidneys. (RT 6344-6345.)

Appellant renewed his objection, pointing out that there had been no showing relating to need, as appellant had not been "acting up." (RT 6346.) Counsel

for appellant told the court that his client was allowed to remain out of custody for the Curry offense and had surrendered when ordered to do so. (RT 6350.)

The court explained the belt would only be activated if needed because of an attempted escape or other disruption. The prosecution agreed that these measures were necessary. (RT 6347.) The prosecution informed the court that as to Wheeler it believed the measures were justified because of allegations relating to Wheeler's post-custody attacks on an inmate and a deputy. (RT 6347.)

The prosecution explained that Bryant had been in possession of excessive amounts of unauthorized, property and had "incident cards" for non-violent activities (RT 6348-6349.)

The prosecution also attempted to justify the need for restraints because of the nature of the case, and the fact that appellant had been convicted of the attempted murder of Curry. (RT 6348-6349.) Prior to the jury panel being brought in, appellant, preserving his prior objections to shackling in any form, asked to wear the react belt rather than leg shackles. (RT 6373-6375.)

The court explained that the belts would not be seen by the jury. (RT 6376.) The Court stated that it was ordering restraints because of various factors, including the nature of the case, the ill will between some of the defendants, and incidents of violence on the part of one or two of the defendants while they were in custody, not specifying which defendants. (RT 6376.)

Appellant wore the stun belt for the duration of trial.

During voir dire, one of the prospective jurors wrote in her questionnaire that she could see something under the sweater of one of the defendants. (AUG CT 1032.)

Later, at the end of the guilt phase, the court had to interview one of the jurors when the concern arose whether the juror was discussing the "security" arrangements with someone on the telephone in the special room that had been made available for the jury during their breaks. (RT 17001-17002, 17006.) Thereafter,

the court again referred to the "security" arrangements that the jury had to endure. (RT 17005-17006.)

During Wheeler's motion for a new trial, the court agreed that jurors probably became aware of enhanced security in form of deputies who were intended to blend in with the court. (RT 18788.) The court also re-iterated the fact that during voir dire one juror noticed a lump on appellant's back, inquired about it, and was told not to worry about it. (RT 18788-18789.)

B. The Relevant Law

In *People v. Mar*, *supra*, 28 Cal.4th 1201, this Court determined that the principles of *People v. Duran* (1976) 16 Cal.3d 282 and other cases which governed the use of traditional types of physical restraints also apply to the use of a stun belt.

> At the outset, Mar described the stun belt as
>
> ... powered by two 9- volt batteries connected to prongs which are attached to the wearer over the left kidney region.... [¶] The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures. [Citations.]' " (*Id.*, at pp. 1214- 1215.)

Mar held that compelling a defendant to wear a stun belt while testifying on his own behalf was erroneous and prejudicial in light of the distinct features and risks presented by a stun belt. This conclusion was based on the fact that as a relatively "new device with unique attributes" (*Id.* at p. 97) the stun belt could have "psychological consequences that may impair a defendant's capacity to concen-

trate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury." (*Ibid.*)

Mar applied long-held rules and principles to the relatively new stun belt. *Mar* explained that *Duran* and *People v. Harrington* (1871) 42 Cal. 165 had adopted limitations dating back to common law on restraining a defendant without a showing of necessity that such restraints are necessary. Such restraints impair the defendant's ability to concentrate on, and assist in, his defense. (*Harrington*, at p. 168, *Mar* at p. 1216.)

Mar cited the problems inherent in restraints, recognized by *Duran*, including prejudicing the jurors, the "affront to human dignity," and the effect a defendant's decision to take the stand. (*Mar*, at p. 1216, quoting *Duran*, at p. 290.) It was this factor which caused *Duran* to state that its principles applied to both "visible" and "concealed" restraints. (*Id.*, at pp. 291-292.)

As a result, Mar held that in determining what security measure to employ, trial courts should adopt "the least restrictive measure that will satisfy the court's legitimate security concerns." (*Ibid.*)

Furthermore, Mar adopted the rule from prior cases that the decision to use a stun belt or other security devise is a function of the trial court, and while the trial court may consider the advise of either the prosecution or the bailiff, it is the function of the court determine what measures are necessary. (*Mar*, at p. 1217, citing *Duran*, *supra*, 16 Cal.3d 282, 293, fn. 12.)

Mar also reaffirmed the rule that the decision to use restraints must be based on specific information relating to security in the particular case and that the mere fact that the defendant is accused of a violent crime is not sufficient to justify the use of restraints. (*Mar*, at pp. 1220-1222.)

This Court noted that the detrimental effect of restraints goes beyond prejudice from the jury seeing the restraint.

> "Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury."
> (*Id.*, at p. 1219.)

Mar listed the types of conduct that in the past had justified the use of restraints. This Court then reaffirmed the principle that the "showing of nonconforming behavior" justifying restraints "must appear as a matter of record," and the use of restraints absent such a showing is an abuse of discretion. (*Id.*, at pp. 1216-1217.)

Mar also recognized the well-established due process concerns that have served as the basis for limiting the use of restraints which were not proven to be necessary. (*Id.*, at p. 1217.) This is a concern that the federal courts have also recognized. (e.g. *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 716 "Generally, a criminal defendant has a constitutional right to appear before a jury free of shackles."; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1826-1827.) The constitutional underpinning of this issue has been recognized since *Harrington* which proclaimed: "Should the Court refuse to allow a prisoner on trial for felony to *manage and control, in person, his own defense*, . . ., he would manifestly be deprived of a *constitutional right*, and a judgment against him on such trial should be *reversed*." (*Id.*, at p. 168, emphasis added.)

The United States Supreme Court held in *Illinois v. Allen* (1970) 397 U.S. 337 that a trial judge confronted with the "disruptive, contumacious, stubbornly defiant, obstreperous" defendant could maintain the appropriate courtroom atmosphere in at least three constitutionally permissible ways: (1) bind and gag him, therefore keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promised to conduct himself properly. (*Id.*, at pp. 343-344.) *However*, the Court held that no person should be tried while shackled and gagged except as a "*last resort*." (*Id.*, at p. 344, italics added.)

Importantly, the United States Supreme Court has also recognized that the use of shackles had a negative effect *beyond* the impact on a jury which might become aware of the shackles and the use of shackles was itself "an affront to the very dignity and decorum of the judicial proceedings that the judge is seeking to uphold." (*Ibid.*) Moreover, a defendant's primary advantage of being present at the trial, his ability to communicate with his counsel, was greatly reduced in a condition of total restraint. (*Ibid.*)

These principles have been repeatedly reaffirmed and applied to all forms of restraint. (*People v. Livaditis*, *supra*, 2 Cal.4th 759, 774 [temporary leg brace]; *People v. Price*, *supra*, 1 Cal.4th 324, 403 [invisible single belly chain]; *People v. Medina* (1990) 51 Cal.3d 870, 897.)

Defendants have been accidentally shocked by the stun belt. (See, *e.g.*, *State v. Filiaggi* (Ohio 1999) 714 N.E.2d 867, 872, *cert. den.*, 120 S.Ct. 821.) One prisoner was incapacitated when the belt inadvertently shocked him as he was communicating with his attorney. (Dahlberg, "The React Security Belt: Stunning Prisoners and Human Rights Groups Into Questioning Whether Its Use is Permissible Under the United States and Texas Constitutions" (1988) 30 *St. Mary's L.J.* 239, 247 (hereafter Dahlberg.) The belt's primary effect on prisoners is psychological.

The belt imposes on the wearer "'total psychological supremacy.'" (*Id.*, at pp. 252, 268, 280.) Wearing a belt that packs a 50,000 volt punch produces a "tremendous amount of anxiety." (*Id.*, at p. 252.)

The lower federal courts have been equally consistent in rejecting the use of restraints on a defendant, absent a showing of need.

In *Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586, in ruling on a habeas petition, the Court of Appeal reiterated that, absent a showing of need, shackling a defendant was prejudicial where there was an insufficient showing of the need for restraints, which were observed by one juror. The court noted that if one juror saw the shackles, it is likely that other jurors saw them. But if even one juror is biased

by the sight of the shackles, prejudice can result. (*Id.*, at p. 588.) The *Dyas* court explained that this stems from the requirement that a defendant is entitled to a jury of 12 unbiased jurors. (*Parker v. Gladden* (1996) 385 U. S. 363, 366.)

Citing *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, *Dyas* explained that two other factors increased the risk of prejudice. First, the defendant had been charged with a violent crime, increasing the risk that "the shackles essentially branded [her] as having a violent nature." (*Dyas*, at p. 588, citing *Rhoden*, at p. 637.) Second, the evidence against Dyas was not overwhelming. (*Ibid.*)

Other jurisdictions have adopted identical reasoning to reach the same results described above. (see *Wrinkles v. State* (Ind. 2001) 749 N.E.2d 1179; *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297 – recognizing stun belt's impact on a defendant's right to communicate with counsel and take part in the proceedings in a meaningful manner; *State v. Castro* (1998) 69 Haw. 633, 645, 756 P.2d 1033,1042.)

The law is thus clear that the use of restraints, including a stun belt, without a showing of particular need, violates a defendant's right to a fair trial and to present a defense, even when there is no showing that the jury actually saw the restraint.

C. Application of the Law to the Instant Case

The trial court's ruling requiring appellant to wear shackles violated the principles laid down by this Court, the Supreme Court, the Ninth Circuit, and other courts and jurisdictions that have dealt with this issue.

Other than the facts that this was a violent crime and that appellant was being tried with Bryant, Wheeler, and Settle, there was no showing that would justify the need for additional restraints for appellant because of anything that appellant had done.

However, the fact that the charged offense is a violent one does not justify the use of physical restraints. (*Duran, supra,* 16 Cal.3d at pp. 292-293.)

Appellant had appeared in court for four years with no problems that would mandate this type of measure[59].

In fact, it appeared that in giving the defendants the options of wearing the stun belt or wearing chains, the court rejected the possibility of a single leg chain, in favor of waist and leg chains, except for Settle, who needed to keep his hand free to write. (RT 6297-6298.)

While a defendant has a right to represent himself, by choosing self-representation, he does not gain additional rights. Appellant should have had the same right to participate in his defense and aid his counsel as Settle had as pro per. Furthermore, appellant was entitled to the same emotional freedom from the fear of a sudden, accidental activation of the REACT belt as was Settle.

Indeed, if the court were concerned purely with security, the only concern allowed in this calculation, than the other defendants should have been subject to the same security conditions as Settle. As there were no security factors that related to one and not the other, a decision that Settle did not have to be burdened with this type of security device necessarily leads to the conclusion that neither did appellant.

Likewise, if the court's sole concern was security, there did not appear to be any reason why security needed to be increased when trial started. The danger of a escape or attack by one of the defendants was just as likely before voir dire. The fact that no additional security measures were needed prior to the actual trial is compelling evidence of the fact that there was no need to impose further restraints.

In particular, the fact that appellant was being tried with the other defendants cannot justify the use of a stun belt. If, as the court noted (RT 6376), restraints were needed because of the animosity between other defendants[60] or the

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[59] Appellant's first appearance was on February 19, 1991. The hearings regarding this issue were on January 18, 1995. (CT 1804, 14263.)

[60] An apparent reference to Settle claiming that he had been threatened by the Bryants (RT 6378-6380.)

fact that defendants other than appellant had been accused of violent conduct while in custody, this cannot be held against appellant, so as to impair his right to a trial free of unnecessary restraints. Thus, unproven allegations of *Wheeler's* violence while in custody cannot justify imposing restraints on appellant. Likewise, the untested claims of Settle may not be used to justify the use of restraints, particularly when appellant was not allowed to question Settle as to the veracity of those allegations.

This Court recently recognized that providing incentives to those in custody to modify their behavior serves important purposes. (*In re Young* (2004) 32 Cal.4th 900, 909.) It surely violates this principle to allow the misconduct of one defendant to be considered in determining whether restraints are needed for another.

In this case, there were a host of less intrusive measures that could have been used. First, a judge is empowered to impose sanctions summarily for the willful disobedience of any lawful order as a contempt of court, even when only a single misconduct occurs in court. (Code Civ. Proc. § 1209, subds. (a)(1), (2), (4), (5), (8); *Pounders v. Watson* (1997) 521 U.S. 982, 985-986, 988, 989-991.)

Second, the defendant can be warned that the judge may admonish the jury to the defendant's detriment, should misconduct occur. Many defendants will be deterred by the judge's admonishment, as it is the defendant who has the most to lose by a disrespectful appearance and disruptive conduct before the trier-of-fact.

Third, additional security personnel may be deployed in the courtroom without adverse inference. (*Holbrook v. Flynn* (1985) 475 U.S. 560, 568-569, 571.)

A manifest need arises only upon a showing of unruliness, an announced intention to escape, or evidence of any nonconforming or planned nonconforming conduct that disrupts or would disrupt the judicial process if unrestrained. The imposition of a physical restraint without a record showing of manifest need con-

stitutes an abuse of discretion. (*People v. Hill*, *supra*, 17 Cal.4th 800, 841; *People v. Cox*, *supra*, 53 Cal.3d 618, 651; *People v. Duran*, *supra*, 16 Cal.3d at p. 291.)

The showing of manifest need by nonconforming behavior in support of the trial court's etermination to impose restraints "must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence." (*People v. Duran*, *supra*, 16 Cal.3d at p. 291.)

In this case there was no showing that appellant engaged in any conduct towards the deputies, court, attorneys, other defendants, or any other party that indicated that he was a danger. Rather, the court initially stated that this type of security was needed "because a case like this, this many defendants and these kinds of [unspecified] allegations floating around, we will have a lot of security here." (RT 6202.)

Such unspecified allegations are insufficient to impose this type of restraint which endangers fundamental constitutional rights. A trial court is "'obligated to base its determination on *facts*, not rumor and innuendo[. . .].'" (*Mar, supra*, 28 Cal.4th at p. 1218, quoting *People v. Cox*, *supra*, 53 Cal.3d 618, 651-652, italics added in *Mar*.)

In this case, it would appear that the court simply gave complete deference to the bailiffs. However, it is the trial court, not law enforcement personnel, who must make the decision that an accused be restrained in the courtroom. (*People v. Hill*, *supra*, Cal.4th at p. 841.) Where, as here, the trial judge failed to determine independently whether a manifest need existed, the court abdicated its responsibility and abused its discretion. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 841-842.)

All of the rights implicated by the improper use of the stun belt are rights of great importance - the right to participate in the defense and assist counsel without a fear of being shocked, the right to simply concentrate on the proceedings without major psychological distractions, and the right to dignity. Therefore, depriving appellant of the protections afforded under the principles discussed above is itself

is a deprivation of due process of law, because a misapplication of a state law leads to a deprivation of a liberty interest, a violation of the Due Process Clause, when that right is of "real substance." (*Ante*, at p. 51-52.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Conversely, the inability to participate in one's defense and assist counsel will adversely affect the reliability of the outcome, because the defense will be handicapped in its efforts. Thus, this error lessened the reliability of the outcome of the trial in violation of the Sixth, Eighth and Fourteenth Amendments. (*Ante*, at p. 51.)

D. The Error Requires a Reversal

In this case, the record shows appellant was actually prejudiced, even though, as discussed below, no such showing of prejudice is required for reversal.

The fact that one juror did see the stun belt (*ante*, at p. 249) is sufficient to support a finding of prejudice. (*Dyas v. Poole*, *supra*, 309 F.3d at p. 588.) As *Dyas* further noted, the fact that during voir dire a prospective juror may indicate he or she would not be affected by the shackles is not determinative in any manner, as jurors will not be aware of the effect that this would have on their perceptions. (*Id.*, at p. 589, citing *Holbrook v. Flynn, supra,* 475 U.S. 560, 570 "little stock need be placed in jurors' claims" that they will not be prejudiced.")

Furthermore, even if no juror became aware of the belt, because of the psychological disadvantages placed on a defendant wearing a stun belt, *Mar* held that the use of a stun belt is similar to the forced administration of antipsychotic medication, the subject of *Riggins v. Nevada* (1992) 504 U.S. 127 which eschewed structural-trial error categorization.

Riggins challenged his robbery and murder convictions on the ground that the State of Nevada unconstitutionally forced an antipsychotic drug upon him during trial. Because the Nevada courts failed to make sufficient findings to support

the drug's forced administration, the United States Supreme Court reversed. (*Id.*, at p. 129.)

Riggins was not required to show how the trial would have proceeded differently if he had not been given Mellaril. (*Id.*, at p. 137.) "Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative." (*Ibid.*) "Like the consequences of compelling a defendant to wear prison clothing," (*Estelle v. Williams* (1976) 425 U.S. 501, 504-505) "or of binding and gagging an accused during trial," (*Illinois v. Allen*, *supra*, 397 U.S. 337, 344), "the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript." (*Riggins v. Nevada*, *supra*, 504 U.S. at p. 137.)

What the United States Supreme Court would "not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril." (*Ibid.*) Even if the Nevada Supreme Court was right that expert testimony allowed jurors to assess Riggins' demeanor fairly, "an unacceptable risk of prejudice remained." (*Id.*, at p. 138.)

Appellant submits that *Riggins* governs this case and requires automatic reversal because efforts to prove or disprove actual prejudice from the record would be futile. Guesses whether the outcome of the trial might have been different if appellant's motion had been granted would be purely speculative. The precise consequences of forcing the stun belt restraint upon appellant cannot be shown from a trial transcript. What cannot be ignored is a strong possibility that his defense was impaired due to the involuntary stun belt restraint. An unacceptable risk of prejudice remains that jurors were not allowed to assess appellant's demeanor fairly. Reversal is required. (*Id.*, at pp. 129, 137-138.)

Similarly, *Mar* noted that one effect of the use of restraints may be the impact on the defendant's decision as to whether he should testify on his own behalf. (*Ante*, at p. 254.) Appellant did not testify, and it cannot be determined whether

the fact that he was wearing the stun belt had any role in the making of this decision.

Indeed, if *Harrington* recognized the natural tendency of old-fashioned shackles to "confuse and embarrass" a defendant and impair his ability to participate in his defense (*People v. Harrington*, *supra*, 42 Cal. at p. 168), how much more of an impediment would be the realization that one has 50,000 volts strapped to one's kidney, knowing from jailhouse tales that accidents do happen?

The anxiety of knowing that one is subject at any time to a paralyzing blast to the kidney would only be geometrically increased after hearing from the bailiffs that they had little experience using the device. (RT 6200-6202.)

Here, the stun belt unconstitutionally infringed on appellant's rights to the presumption of innocence, to a fair trial, to consult with counsel, and to conduct his own defense personally without the restraint's significant adverse effects. (*Rock v. Arkansas*, *supra*, 483 U.S. at pp. 49, 51, 52, 57, 62; *Faretta v. California*, *supra*, 422 U.S. at p. 819, 834; *Illinois v. Allen*, *supra*, 397 U.S. at p. 344; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Spain v. Rushen*, *supra*, 883 F.2d at pp. 713, 720-721.)

Respondent has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) *Chapman* instructs the reviewing court to consider what effect the error had upon the guilty verdicts in the case at hand. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Ibid.*, original emphasis.)

The unconstitutional restraint was not harmless beyond a reasonable doubt since the guilty verdicts actually rendered in this trial were not surely unattributable to the error. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

The fact that at least one juror was aware of the increased security compels a finding of prejudice. (*Dyas v. Poole*, *supra*, 309 F.3d at p. 588.) The risk of prejudice was increased because appellant was charged with a violent crime. (*Ibid.*)

Moreover, the prosecution's case against appellant was very weak, primarily consisting testimony from a suspect source, with little or no corroboration . (*Ante*, at pp. 48, 61-62, 75-79.) Furthermore, the jury had a difficult time reaching a verdict, as reflected in the 19 days that it took to reach verdicts against appellant. (*Ante*, at p. 77.)

Against this backdrop, the prosecution attempted repeatedly throughout the trial to make the jurors afraid of the defendants, creating a serious risk that the jurors' reasonable doubts would be improperly obscured by fear and emotion.

During the guilt/innocence phase, Detective Vojtecky testified over defense objection that before trial he would take varying routes between the courthouse and the police station because of security concerns that he had. (RT 10755-10757.) If a veteran and armed member of the police force was afraid to take the same route to court, the jury was clearly given the message to be afraid.

Throughout the trial, the prosecution deployed a score of witnesses[61] to testify about the drug business of the organization. As to each of these witnesses the prosecution was allowed to develop a theme that their lives were in danger by reason of their testimony against the Bryant family. The prosecution emphasized this

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[61] These witnesses were G.T. Fisher (RT 8887), Barron Ward (RT 9027), Rhonda Miller (RT 9077), John Allen RT 9228-9233, 9337-9339, 9348-9350), Reynard Goldman (RT 9264), Francine Smith (RT 9455-9456), Una Distad (RT 9726, 9741-9742), William Johnson (RT 10215-10218, 10220-10222, People's exh. 216, CT3 10601-10617), Ladell Player (RT 10233, 10248, 10252-10253, 10338-10339, 10488-10492, People's exh. 216, CT3 10546-10570), Laurence Walton (RT 10681-10682, 10688-10689, 10698-10700, People's exh. 216, CT3 10468-10472.), George Smith (RT 10781-10791, 10836-10837), Alonzo Smith (RT 10986-10987), Pierre Marshall (RT 11773, 11781-11782), James Williams (RT 12494, 12604, 15768).

theme and the theme of the dangerousness of the Byrant family repeatedly from opening statement to opening and closing arguments. (RT 8084, 8087, 8089, 8104, 16448-16449, 16474-16489, 16804, 16807-16809, 16824.)

As discussed above (*ante*, Section VII-B, pp. 220-222), the prosecution improperly argued in the guilt phase that the Bryant organization terrorized the community with impunity, shooting and killing all with whom it had quarrels. Given Vojtecky's concerns and all the other security measures employed, there was a substantial danger that the jury would be improperly influenced by anything related to safety and security.

Under these circumstances the state cannot prove beyond a reasonable doubt that the trial court's improper use of a stun belt did not on contribute to the verdict.

E. Summary

The trial court's decisions regarding the use of the stun belt and other aspects of courtroom security was an abuse of discretion, depriving appellant of due process of law, a fair trial, the right to counsel, the right to participate in his defense, and a reliable penalty determination in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Therefore, the judgment entered below must be reversed.

X

THE PRESENCE OF A HEARING IMPAIRED JUROR DENIED APPELLANT THE RIGHTS TO A JURY TRIAL, TO TRIAL COUNSEL, TO A FAIR TRIAL, AND TO A RELIABLE DETERMINATION IN A CAPITAL CASE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

Appellant was denied a right to a jury trial by the fact that one of the jurors was hearing impaired and did not have a fully functioning hearing device for the entire trial. Furthermore, as will be shown below, as a result of the trial court's failure to ensure that the juror could hear all of the evidence and arguments, it is possible that this juror received "evidence," arguments, and instructions that were different from that of the other jurors. Appellant was therefore deprived of the right to trial by jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution.

To balance the rights of a hearing-impaired person to serve as a juror with a criminal defendant's right to a fair trial, it is essential that the court take all appropriate measures – including providing effective technological assistance to make sure the juror is able to fulfill his or her duties

As will be shown, because the court failed to appreciate the nature of the problem, in this case the court failed to protect appellant's constitutional rights.

A. The Hearings Below

The problem relating to the hearing-impaired juror became apparent at several stages of the trial.

After the jury was sworn, Juror No. 412 informed the court that he/she had a hearing problem. The court informed the juror that the court would get a headset for him/her. (RT 7947.) The court nevertheless proceeded with the trial, without

waiting for the headset to arrive. After Opening Statements[62] and in the middle of the testimony of the first witness, the court informed the juror that the hearing device was on the way and would be there shortly. (RT 8473.)

Thus, the juror was without the essential equipment during critical stages of the trial.

The record further reflects that when someone stepped between the device and the headphones, it would cause static and cut off the device temporarily. (RT 8478-8479.) Thus, the trial court also failed to take adequate remedial steps when it became apparent that the hearing device was malfunctioning.

Subsequently, during the testimony of the coroner there was some unidentified problem with the hearing device. However, the juror informed the court that he/she could read Judge Horan's lips. At that point, Judge Horan inexplicably told the juror to take off the headset when there was a side bar. (RT 8510-8511.) This was an insufficient reaction because taking off the headset would prevent the juror from *hearing* what was happening, but would not prevent the juror from *seeing* what was being said. Therefore, this "solution" aggravated, rather than solved, the problem.

Later in trial, the juror still appeared to be having problems with the device, but again informed the court that he/she could read lips. (RT 10436.)

The problem was mentioned again during the penalty phase when battery was apparently wearing out, causing the device to malfunction. (RT 18059.)

The court failed to determine how long the batteries had been low or what effect this had on the juror's ability to receive information at that or any other time.

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[62] The prosecution's Opening Statement began at RT 8083. The Opening Statement by appellant's trial counsel began at RT 8232.

B. The Relevant Law

An accused has a constitutional right to a trial by an impartial jury. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, § 16; 294 *Irvin v. Dowd* (1961) 366 U.S. 717, 722 (*Irvin*); *In re Hamilton* (1999) 20 Cal.4th 273, 293 (*Hamilton*); *In re Hitchings* (1993) 6 Cal.4th 97, 110.) Additionally, as noted above, in capital cases the Eighth Amendment imposes greater requirements of reliability. (*Ante*, at p. 51.) Having a juror who may not hear all of the evidence, arguments and deliberations, violates both of these principles.

An impartial jury is one in which no member has been improperly influenced (*Hamilton*, at p. 294; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112) and every member is "*capable* and willing to decide the case solely on the evidence before it." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554; *Hamilton*, at p. 294, italics added, internal quotation marks omitted.) Furthermore, the right to a jury includes the requirement that a defendant is entitled to a jury of 12 jurors. (*Parker v. Gladden*, *supra*, 385 U.S. 363, 366.)

A trial court may discharge a juror who "becomes ill, or upon other good cause shown to the court is found to be unable to perform his [or her] duty..." (Pen. Code § 1089, 5th par.)

Several other states that have examined this problem have concluded that the presence of a hearing-impaired juror deprives a defendant of due process of law and the right to an jury if it becomes evident that the juror is not able to hear the testimony. For example, in *State v. Turner* (1994) 186 Wis.2d 277, 521 N.W.2d 148, after it became apparent that several jurors were having hearing problems, the judge questioned the jurors to discover that at least one juror had missed portions of the trial, although he stated that he felt he heard enough to be able to reach a fair verdict. (*Id.*, 521 N.W.2d at p. 151.) The court held that this denied the defendant a due process of law and a right to a jury. (*Ibid*; accord *Commonwealth v. Brown* (1974 Pennsylvania) 321 P.Super. 431, 332 A.2d 828; *State v. Hayes* (2001) 270 Kan. 535, 17 P.3d 317.)

Likewise, the trial court has a duty to control the proceedings in order to reach "an effective ascertainment of the truth." (Pen. Code § 1044.)

Obviously, unless a juror is able to perceive what is happening in the court room, a right to a jury trial can become nothing more than a formality. "The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.)

Although more frequently juror misconduct involves an intentional disobedience of a court order or instruction, "a juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require similar examination for probable prejudice." (*Hamilton*, at p. 295.) Thus, juror "misconduct" may be found even when the conduct is unintentional. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 938.) Therefore, juror misconduct may result from "inattentiveness." (*Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at p. 411.)

With a few narrow exceptions, evidence that the internal thought processes of the jurors were biased is not admissible to impeach a verdict. However, the jury's impartiality *may* be challenged by evidence of "statements made, or *conduct, conditions*, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly," but "[n]o evidence is admissible to show the [*actual*] effect of such statement, conduct, condition, or event upon a juror ... or concerning the *mental processes* by which [the verdict] was determined." (Evid. Code, § 1150, subd. (a), italics added; see *Hamilton*, at pp. 415-416; *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350.)

The focus on the events and conditions of misconduct, rather than the actual thought processes of the jurors, is intentionally geared to serve various policies, including eliminating unreliable proof of thought processes and deterring juror harassment by losing counsel. (*Hamilton*, at pp. 416, fn. 17.)

As a result, "ample evidence" that on one or more occasions a juror had been sleeping justifies a finding of good cause for his removal on the grounds that

the juror was "found to be unable to perform his duty" under Code of Civil Procedure section 233. (*People v. Johnson* (1993) 6 Cal.4th 1, 21) A juror sleeping during trial has been compared to a juror's exposure to newspaper articles regarding the trial, a form of juror misconduct. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1234.)

Misconduct raises a rebuttable "presumption" of prejudice. The presumption is necessary because parties are barred by statute from establishing the actual prejudicial effect of the incident under scrutiny. (*Hamilton*, at p. 416; *People v. Nesler* (1997) 16 Cal.4th 561, 578.)

Whether a verdict must be overturned for jury misconduct or irregularity is governed by the substantial likelihood test, an objective standard. The verdict will not be disturbed if the entire record indicates there is no reasonable probability of prejudice, i.e., "no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*Hamilton*, at p. 417; *Hitchings, supra,* 6 Cal.4th 97, 118.)

Once a court is put on notice of the possibility of juror misconduct, the court has a duty to make a reasonable inquiry to determine if the juror should be discharged. The failure to make this inquiry must be regarded as an erroneous abuse of discretion. (*People v. Burgener* (1986) 41 Cal.3d 505, 520.)

A hearing is required when the court possesses information which, if proved to be true, would constitute "good cause" to doubt a juror's ability to perform his or her duties and would justify his or her removal from the case. (*People v. Bradford, supra*, 15 Cal.4th 1229.)

In *Burgener*, this Court found that it was error not to conduct a hearing into allegations by the jury foreman that another juror was intoxicated, although the court refused to reverse the verdict because of a lack of record as to whether the juror was actually intoxicated and/or the effect of that intoxication. It is important to note that in *Burgener*, this Court specifically stated that the lack of a record was the result "of defense counsel's preference that the court conduct no inquiry." In

that case, the court had suggested conducting an inquiry, but the defense requested that it not do so. (*Id.*, 517, 521.)

The "mere suggestion" of juror "inattention" does not require a formal hearing disrupting the trial of a case. (*People v. Espinoza*, *supra*, 3 Cal.4th 806, 821; *People v. DeSantis*, *supra*, 2 Cal.4th 1198, 1234.) In *Espinoza*, the defense counsel stated that "he thought" the juror "appeared" to be asleep. This Court held that counsel's "mere speculation" was insufficient to obligate the court to conduct any further inquiry. (*Id.*, at p. 821.) Rather, "[a] juror's inability to perform as a juror must "appear in the record as a demonstrable reality." (*People v. Johnson*, *supra*, 6 Cal.4th 1, 21; *People v. Compton* (1971) 6 Cal.3d 55, 60.)

Similarly, if the judge appears alert to the danger of a juror sleeping and makes specific observations and finds that the jurors were awake it is not reversible error to fail to hold a formal hearing. (*People v. DeSantis*, *supra*, 2 C.4th at pp. 1233, 1234.) In this case, the trial court did not seem to be aware of the nature of this problem and the danger that it created that the juror may not receive all the information being presented.

"[U]nder our Constitution trial of a felony case by less than 12 jurors is valid only upon waiver as formal as that required for trial without any jury." (*Crump v. Northwestern Nat. Life Ins. Co.* (1965) 236 Cal.App.2d 149, 154.) This bedrock principle of law is reflected in numerous provisions which require full participation of all twelve jurors at the same time, in attendance at the same hearing, listening to the same evidence.

Even during periods of recess, the jury must not discuss the trial with anyone and must not deliberate further until all 12 jurors are together and reassembled in the jury room. (BAJI No. 15.40, 7 Witkin, *California Procedure*. 4th (1997) Trial, §292.)

Similarly, it is a form of "misconduct" for one juror to receive additional or different information than the other jurors. It is for this reason that jurors are all instructed to rely on a single official translation of documents in other languages,

rather than allow a juror, who may speak that other language, to translate the document for himself. (E.g. *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303-304.)

Likewise, when an alternate juror is seated, the jury is to be instructed with CALJIC No. 17.51, a sua sponte instruction that informs the jury that both sides have the right to a verdict reached "only after full participation of the twelve jurors who return the verdict," and that this right can be assured only if deliberations resume "again from the beginning." (CALJIC No. 17.51 (6th ed. 1996).) Although section 1089 does not mention the need for this admonition, the need for this instruction is a recognition of the requirement that "a defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity." (*People v. Collins* (1976) 17 Cal.3d 687, 693; *People v. Renteria* (2001) 93 Cal.App.4th 552, 558.)

Surely, when the trier of fact is physically precluded from hearing or seeing the same evidence, arguments, jury instructions, and jury deliberations this must negatively affect the ability to reliably determine guilt based on that evidence, instructions and deliberations.

C. Application of the Law to the Case

Initially, it is important to distinguish this case from cases such as *People v. Burgener*, *supra*, 41 Cal.3d 505, where the defense expressly requested that no inquiry be made or no action taken to address the potential problem. In this case, the defense did not acquiesce in the failure to inquire into this problem.

Likewise, this case must be distinguished from those cases where the court was not on notice of the problem. In this case, having been appraised of the problem, the court allowed the juror to sit through Opening Statements prior to obtaining the hearing device.

Applying the above-discussed principles to the issue of the hearing impaired juror in this case it is clear that a reversal is required.

In resolving this issue, the inquiry must focus on events and conditions, rather than on the actual thought processes of the juror. (*Ante*, at p. 266.) The issue is therefore whether the juror was likely to have missed information or received additional information as a result of his/her condition and abilities.

Clearly, if the juror were not missing information, he/she would not have asked for the device initially. Had the court refused appellant the right to make an Opening Statement, or had the court ordered counsel to begin the Opening Statement prior to one juror arriving, it would have been reversible error. Nonetheless, the court allowed the juror to sit through appellant's opening statement without making sure that he/she could hear counsel.

To have a juror miss parts of the defense violated appellant's right to counsel ***and*** his due process right to present a defense. (*People v. Mizchele* (1983) 142 Cal.App.3d 686, 691; *Chambers v. Mississippi, supra*, 410 U.S. at p. 302; *Washington v. Texas* (1967) 388 U.S. 14, 19.)

Furthermore, having a lip-reader on the jury created a danger of the juror receiving information that other jurors did not receive, and that none of the jurors were *supposed* to have received, because he could eavesdrop on side bar conferences. The trial court here failed to instruct the juror that he or she should not read lips during side bar conferences.

Not only does the juror "hear/see" more by reason of an ability to lip-read, he or she will "hear/see" differently.

In speaking, the visual formation of the mouth is only one of the factors that make up sound. Other, non-visible factors contribute to the formation of sound. For example, simple aspiration, the manner in which the air is expelled, makes the difference between the pairs of letters B and P, D and T. The non-visible formation of the tongue produces the difference between A and E, L and R, and H and K. If the lip-reader is not looking directly at the speaker, the problems are more pronounced. (*Linguistics Theory, Foundations, and Modern Development, http://www.geocities.com/Athens/Acropolis/1470/chap-2-4-4.html;* see also

Neil Bauman, Ph.D, *Speechreading (Lip-reading)* (2000) http://www.hearinglosshelp.com/speechreading.htm.)

Furthermore, although it has been held that a possibility of a juror sleeping does not mandate a formal hearing when the judge is alert to the nature of the problem (*ante*, at p. 268), the same cannot be said for the present case.

In this case, Judge Horan *misunderstood* the issue. Thus, when informed that the juror could reads lips during sidebars, Judge Horan attempted to remedy the problem by telling the juror to turn off the headset at those times. (RT 8510-8511.) In fact, it was when the juror was *not* relying on the device during side bar conferences that this aspect of the problem arose. Turning down the volume only aggravated the situation. The correct answer would have been to tell the juror not to look.

Thus, it is likely that this juror received less, additional, *and* different information from that received by the other jurors. Therefore, if a hearing impaired juror is seated, the court must not only ensure that the juror has the technology to receive the same information as other jurors, the juror must also be admonished against using lip-reading skills to obtain *additional* information.

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

The right to jurors who are capable of hearing and understanding the entire case implicates many different fundamental rights, from the right to counsel, to the right to present a defense, to the right to have 12 jurors hear the evidence and arguments and deliberate together.

Finally, as noted above (*ante*, at p. 51-52), depriving appellant of the protections afforded under the principles discussed above is itself is a deprivation of due process, because a misapplication of state law leads to a deprivation of a liberty interest, in violation of the Due Process Clause, when that right is of "real substance."

D. Prejudice

In *Collins*, addressing the fact that all the jurors may not have had equal participation in the trial, this Court held that the failure to give CALJIC No. 17.51 violated the California Constitution, article I, section 16, rather than the federal Constitution. (*Collins*, at p. 692, fn. 3.) Therefore, *Collins* adopted the *Watson* standard that requires a reversal only if it is probable that the defendant would have achieved a better result but for the error. (*Collins, supra*, at p. 697, fn. 5.) In *Collins*, this Court held that the case did not have to be reversed because of the strength of the evidence against the defendant. (*Ibid.*)

A similar result cannot be reached hear, considering the inherent weakness of this case, as discussed above. (*Ante*, at pp. 75-79.)

Furthermore, because this error impacted on so many constitutional rights, appellant submits that the only proper standard for judging prejudice is *Chapman v. California, supra*, 386 U.S. 18, requiring reversal unless it can be shown that the error was harmless beyond a reasonable doubt.

The impact that the presence of a hearing impaired juror has on the right, the right to counsel, the right to present a defense, and all other trial rights, is too enormous to judge under the standard of *Watson.*

Both the federal and the state constitutions guarantee that a defendant is entitled to be tried by twelve, not eleven, impartial and unprejudiced jurors. Thus, a "conviction cannot stand if even a single juror has been improperly influenced." (*People v. Nesler, supra*, 16 Cal.4th 561, 578, citations omitted.) In this case, one juror could not participate equally with the other jurors. Therefore, the judgment entered below must be reversed.

XI

THE TRIAL COURT ERRED IN TELLING THE JURY THAT THE COST OF THE TRIAL WAS "ASTRONOMICAL." THIS ERROR DENIED APPELLANT THE RIGHTS TO A JURY TRIAL AND TO A RELIABLE DETERMINATION IN A CAPITAL CASE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The trial court erred in repeatedly telling the jury that the cost of the trial was "astronomical," thus suggesting that a failure to convict would be a massive waste of public resources. Because the cost of trial is irrelevant to the guilt or innocence of a defendant, appellant was denied the right to a jury trial and the right to a reliable determination in a capital case.

A. The Trial Court's References To The Cost Of Trial

Prior to trial, out of presence of the parties, the court addressed the jury regarding the security measures that were in effect. At that time, in cautioning the jury about contact with outside sources, the court informed the jury that the cost of this trial was "astronomical." (RT 8059.) Later, the court again explained to the jury that the arrangements that had been made for getting them into the building and for other arrangements were done at considerable expense[63]. (RT 9567.)

The court stated that it was not taking these measures lightly and that "we certainly do not need to get into any more expense than we have to but it is appropriate for the reasons that [the court] stated earlier. (RT 957.)

The expense of the trial was again brought to the jurors' attention at a later hearing. Because evidence had been introduced that the Bryant family had hired attorneys when employees were arrested, in response to a defense request, the

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[63] This occurred in a hearing from which the defense was excluded. After that hearing, the defense objected to the court having addressed the jurors without the defense being present. (RT 9566-9567.)

court instructed the jury that the then-current defense attorneys were court appointed. (RT 11356.)

Finally, in answer to a jury question, the court re-explained an admonition regarding the attorneys not being hired by the "family," telling jury that death penalty defendants never have private counsel because it is too expensive. (RT 11363-11365.)

In summary, several times during this trial the jury was told about the cost of this case.

B. The Relevant Law

In *People v. Gainer* (1977) 19 Cal.3d 835 this Court held that reference to the expense and inconvenience of a retrial is irrelevant to the issue of a defendant's guilt or innocence and is thus impermissible. (*Id.,* at p. 852, fn. 16.)

The issue of whether a jury should be informed of the costs of trial appears to arise most frequently in a "*Allen*-type charge" (*Allen v. United States* (1896) 164 U.S. 492), wherein the trial court is attempting to extract a verdict from a deadlocked jury.

In any context, however, references to the cost of trial – particularly by the judge – are irrelevant and prejudicial, and thus inadmissible under Evidence Code sections 210 and 352 prejudicial. In *People v. Barraza* (1979) 23 Cal.3d 675, this Court noted that even an implicit reference to the expense of trial "may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government. [citation]" (*Ibid.*) The prejudice could only be more acute in a case such as this where the jury was told on multiple occasions, in a variety of ways, how expensive this trial was.

The Supreme Court's test for coercive jury instructions is whether in its context and under all the circumstances of the case the statement was coercive. (*Jenkins v. United States* (1965) 380 U.S. 445, 446; *Marsh v. Cupp* (9th Cir. 1976) 536 F.2d 1287, 1290.)

The fact that these comments did not come at a stage when the jury appeared to be on the verge of deadlock is not relevant. In *People v. Pitts*, *supra*, 223 Cal.App.3d 606, after a lengthy trial, the Court of Appeal labeled as the "most egregious single act of misconduct" the prosecution's argument to the jury that one vote for the defense would "wipe out six months of trial." (*Id.* at pp. 694-695.)

Pitts held although this was not a direct reference to costs of re-trial per se, it was still improper, because "[t]he idea was planted in the jurors' minds that anyone not voting for conviction would be nullifying a great deal of hard work and rendering vain the personal sacrifice of all." (*Id.* at pp. 694-696.)

Furthermore, the jurors were California and Los Angeles County taxpayers. Thus, the expense of retrial would fall on them directly. In *United States* v. *Trutenko* (7th Cir. 1973) 490 F.2d 678 the prosecutor in an insurance fraud case had noted the effect on insurance premiums of such crimes. The court held: "...[T]he comment was an appeal to the pecuniary interest of the jurors, unquestionably an unacceptable predicate for an argument in a criminal trial." (*Id.* at 679.) Similar arguments were condemned in *United States* v. *Smyth* (5th Cir. 1977) 556 F.2d 1179 (fraud against the United States) and *United States* v. *Blecker* (4th Cir. 1981) 657 F.2d 629, 635-636 (presentation of false claims to government agency).

Likewise, in *State* v. *Majors* (Kan. 1958) 323 P.2d 917, the conviction was reversed for improper arguments including reference to the county`s financial investment in the case: "[The prosecutor] should not appeal to the self-interests of the jurors including their social, class and business prejudices [cite] and *neither should he appeal to their self-interests as taxpayers*. [Cites.]" (*Id.* at 920 (emphasis added.)

Likewise, in condemnation cases, the California courts have recognized the impropriety of reminding jurors it is their money that is being spent. "...[T]he vice [is] the appeal to self-interest, which violates the fundamental concept of an objec-

tive trial by an impartial jury." (*People ex rel. Dept. of Public Works* v. *Graziadio* (1964) 231 Cal.App.2d 525, 533-534, *see, also, Garden Grove School Dist.* v. *Hendler* (1965) 63 Cal.2d 141, 143[64] (*Cf. Hart* v. *Wielt* (1970) 4 Cal.App.3d 224, 234 [improper to suggest award to plaintiff would prevent plaintiff from being a "burden on the taxpayers."])

Because repeated references to the cost of the trial put additional pressure on the jury to convict without regard to reasonable doubt the reliability of the verdict and sentence, particularly in a close case such as this, is undermined in violation of the Eighth and Fourteenth Amendments. (*Ante*, at p. 51.)

C. Prejudice

Appellant's right to due process was violated by the court's repeated comments about the "astronomical" cost of trial, which improperly pressured the jury to convict appellant regardless of any doubt about his guilt. This error is therefore governed by *Chapman v. California*, *supra*, 386 U.S. 18 requiring reversal unless it can be shown that the error was harmless beyond a reasonable doubt.

Appellant is aware of the case of *People v. Andrews*, *supra*, 49 Cal.3d 200 wherein this Court affirmed the conviction where the jury had been informed of the expense of trial, stating that the comments "merely constituted an attempt by the trial court to stress the importance of obeying the court's admonitions." (*Id.*, at pp. 220-221.) However, the instant case should be distinguished from *Andrews* for several reasons.

First, this case involved more frequent references to the costs of trial, with the jury being told of that fact in the early, middle, and late stages of trial.

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[64] See also, cases condemning arguments that capital sentencing juries should consider the expense of life incarceration. "Protection of the public fisc is not a proper justification for capital punishment." *Tucker* v. *Zant* (11th Cir. 1985) 724 F.2d 882, 890; *Brooks* v. *Kemp* (11th Cir. 1985) 762 F.2d 1383); *Tucker* v. *Kemp* (11th Cir. 1985) 762 F.2d 1480; *State* v. *Busby* (1985 La.) 464 So.2d 262; *State* v. *Jordan* (1956) 80 Ariz. 193, 294 P.2d 677.

Second, apart from the unusual security measures, which the court called to the jury's attention, the months of trial, and the six defense attorneys and two prosecuting attorneys would make it obvious to the jury that this was no ordinary trial and no ordinary expense. Third, *Andrews* involved a much stronger case against the defendant, with this Court finding "ample corroboration" in that the defendant admitted killing the victim, and his palm prints were found on the floor next to the body of another victim. In contrast, in this case, the Judge Horan commented several times on the weakness of this case, a fact born out by the fact that the evidence against appellant was particularly lacking. (*Ante*, at pp. 48, 75-59.)

In this case, the fact that a retrial was not expressly mentioned is not important because the jury was obviously informed of the expense of the trial, specifically to impress upon them the danger of doing anything that would require starting the process over again from the beginning.

In light of the weakness of the case against appellant any additional pressure on the jury to convict for improper reasons must be regarded as likely to tip the scales.

Consequently, it cannot be concluded that informing of the jury of the cost of the trial did not affect the jury's decision to convict. Therefore, the instant case must be reversed.

XII

THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

A substantial portion of the prosecution's case was devoted to the motive of the Bryant family in protecting its assets from Armstrong. This included all evidence relating to the value of the business and the scope of the operations of the organization. As a result, instructions relating to motive were particularly important. Likewise, the importance of motive played a significant role in Mr. Davidson's opening jury argument. (RT 16430L-M, O, 16431, 16446, 16456.)

The court gave a modified version of CALJIC No. 2.51 to address this point. That version was constitutionally flawed as it placed a burden on the defense to show absence of motive to prove innocence. Further, it was defective because it did not clearly tell the jury that motive alone is insufficient to prove guilt.

The instruction as given to the jury read:

> "Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled." (RT 16396, CT 15492.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of a motive in order to establish innocence. The instruction therefore violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

As noted, CALJIC No. 2.51 told the jury that motive could establish that the defendant was guilty. However, it is established that motive alone is insufficient to prove guilt, since due process requires substantial evidence of guilt. (*Jack-*

son v. Virginia, supra, 443 U.S. 307.) Motive alone does not meet this standard. (*State v. Dreiling* (Kan. 2002) 54 P.3d 475, 491; *State v. Doyle* (Kan. 1968) 441 P.2d 846, 859-860; *Holland v. Com.* (Va. 1949) 55 S.E.2d 437, 440; *People v. Isby* (1947) 30 Cal.2d 879, 888 [186 P.2d 405.) A conviction based on motive alone would be speculative and conjectural (see, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

This instruction stood out from the other evidentiary instructions given to the jury in this case, which included an admonition that that category of evidence was insufficient to establish guilt. (See RT 16385, CT 15471 [CALJIC No. 2.06 - Efforts To Suppress Evidence: "However, this conduct is not sufficient by itself to prove guilt ...."]; see also CALJIC Nos. 2.03 [Consciousness of guilt—Falsehood], 2.05 [Efforts Other Than By Defendant to Fabricate Evidence], 2.06 [Efforts to Suppress Evidence] and 2.52 [Flight After Crime] all containing similar language RT 16384-16385, 16396, CT 15469-15471, 15493.)

Because CALJIC No. 2.51 did not have such an admonition, coupled with the significance it carried in the prosecution's case, and compounded with the inherently prejudicial weight that a jury is likely to give to evidence of other misconduct reflected in much of the evidence that made up "motive evidence" (*ante*, at p. 174.) it prejudiced appellant during deliberations. The instruction omits any caution about the sufficiency of motive evidence and allows the jury to determine guilt based solely upon motive. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would have said so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [68 Cal.Rptr.2d 648] (conc. opn. of Brown, J.).)

This court has recognized that differing standards in instructions create erroneous implications:

> "The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide,

> left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder." (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, in the context of the use that could be made of various categories of evidence, CALJIC No. 2.51, as used herein, regarding motive evidence highlighted the omission from the instruction that it was insufficient to establish guilt. Thus the jury would have understood that if it found the defendants had a motive to commit any or all of the charged offenses that motive alone could establish guilt.

This is particularly troublesome in this case in light of the weakness of the case and the lack of corroboration as to appellant's involvement. (*Ante*, at pp. 48, 75-79.)

Clearly, the motive evidence did not connect appellant directly to the offense, particularly since appellant's motive was derivative of Bryant's motive. If the jury believed Williams was an accomplice, this instruction allowed the jury to use motive as corroboration, even though it would not legally sufficient for that purpose because it does not relate to an element of the offense.

Consequently, the instruction violated appellant's constitutional rights to due process of law and a fair trial by jury. (U.S. Const., 5th, 6th and 14th Amends.) The instruction also rendered the resulting verdicts unreliable in violation of the Eighth and Fourteenth Amendments.

Furthermore, by telling the jury that the absence of motive could be used to establish innocence, CALJIC No. 2.51 placed the burden of proof on appellant to show a motive other than that postulated by the prosecution's theory of the case. That is, the instruction confirmed that the jury could establish or defeat the charges through the presence or absence of motive.

The instructional error was particularly prejudicial in this case because motive was such a large part of the prosecution's case against appellant Bryant and therefore against appellant Smith, who was, in the prosecution's theory, Bryant's "hit man." This made it highly probable that the jury improperly applied this instruction to find appellant Smith guilty.

As discussed previously, the trial court's error implicated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. As used in this case, CALJIC No. 2.51 also deprived appellant of his constitutional rights to due process and fundamental fairness. (*In re Winship, supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth and Fourteenth Amendment requirements for reliability in a capital case by allowing appellant to be convicted without the prosecution submitting the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

Motive played a pivotal role in this unusually close case, as reflected by the vast amount of evidence introduced to establish motive and the emphasis it was given by the Deputy District Attorney. Any misdirection caused by the instruction therefore cannot be considered to have been harmless beyond a reasonable doubt, and appellant's convictions and death sentence must be reversed.

XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO LIMIT THE EVIDENCE THAT THE JURY COULD CONSIDER AGAINST HIM TO EVIDENCE PRESENTED IN THE PEOPLE'S CASE IN CHIEF, PRIOR TO THE PEOPLE RESTING

The trial court erred in denying appellant's request to limit the evidence that the jury could consider against him to evidence presented in the People's case in chief, prior to the People resting. This error requires a reversal of the judgment entered below.

A. The Motion Below

At the close of the prosecution's case, appellant rested and requested an instruction that any additional evidence – presented by his co-defendants or by the prosecution in rebuttal – could not be considered against appellant. (RT 13891.)

Mr. Novotney pointed out that had appellant been tried separately, or even had a separate jury, as he had requested, the case would have concluded when appellant rested, and the jury would have determined his guilt or innocence based solely on the prosecution's case in chief. Appellant insisted that he had the right to rest on the People's case. (RT 13891-13892, 13894.)

The court stated that the jury in a multi-defendant case is instructed to consider all evidence against the defendants, except as otherwise instructed, and that there did not appear to be any authority for appellant's request. (RT 13892-13893, 13895.)

Appellant then rested before the jury. (RT 13910-13911.)

Later, appellant was allowed to further clarify his request, explaining that section 1093, which governs the order of evidence, provides for the People's case, the defense case, and any rebuttal. Because appellant was not presenting any evidence, there was nothing to rebut, and appellant was objecting to any evidence that

would thereafter be offered against appellant on the grounds that it was improper rebuttal. The court again denied the request. (RT 14103-14104.)

After appellant rested, several items of evidence were introduced which bolstered the prosecution's case against appellant. This included the following:

1. On rebuttal, the prosecution was allowed to introduce the evidence that Armstrong had given Karen Flowers a phone number that she could use to reach him, a phone number that was the same as appellant's number. This connected appellant and Armstrong, thereby strengthening the prosecution's contention that as Armstrong's friend, appellant "lured" him to the Wheeler Avenue residence.

2. Settle testified, connecting Bryant and Wheeler to cars that may have been involved in the murder. (RT 15539-15540.) Although this did not directly implicate appellant, it corroborated Williams's testimony as to Bryant and Wheeler, thereby giving Williams additional credibility.

3. Settle, Wheeler, and Bryant testified, with at least one, if not all, committing perjury. This also boosted the credibility of Williams and tarnishes the defense.

B. The Relevant Law

When reviewing the denial of a motion to acquit for insufficient evidence made at the close of the prosecution's case, an appellate court considers only the evidence in the record at the time the motion was made. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464; *People v. Trevino* (1985) 39 Cal.3d 667, 695; *People v. Belton*, *supra*, 23 Cal.3d 516, 526-527.) Section 1118 was designed to terminate a prosecution for an offense or offenses at the earliest possible time, when the prosecution's own evidence is insufficient to support a conviction. (*People v. Norris* (2002) 95 Cal.App.4th 475, 479.)

Thus, where the testimony helpful to the prosecution, which came in after denial of defendant's acquittal motion, was given by a codefendant, the Court of Appeal has held that it would review the denial of the defendant's motion on the

basis of the evidence as it existed at the close of the prosecution's case. (*People v. Valerio* (1970) 13 Cal.App.3d 912, at p. 919-920[65].)

The rule that an appellate court reviews a denial of a motion made pursuant to section 1118.1 only considering the evidence admitted at the close of the prosecution's case is compatible with the purposes of the statute. Sections 1118 and 1118.1 were intended to vindicate the presumption of innocence by requiring the prosecution to fulfill its duty "to prove each element of the crime charged," for "[o]ne of the greatest safeguards for the individual under our system of criminal justice is the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense." (*People v. Belton, supra,* at p. 520, quoting *Cephus v. United States* (1963) 324 F.2d 893, 895)

The presumption of innocence and the duty of the prosecution to prove guilt beyond a reasonable doubt, the policies intended to be promoted by section 1118.1 "are two of the most basic premises of our criminal justice system," "the capstone in the protective arch of a citizen's rights when accused of crime." (*People v. Belton, supra,* at p. 520, citation omitted.)

Sections 1118 and 1118.1 ensure that a defendant does not face a Hobson's choice between challenging the sufficiency of the state's prima facie case and presenting a defense with the risk that later evidence would cure the defects in the prosecution's case. (*People v. Belton, supra,* at p. 521-523; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 732.) Relying on evidence the defendant has presented to cure deficiencies in the state's case improperly "lessens the prosecutor's burden to prove each and every element of the case beyond a reasonable doubt," in violation of the Due Process Clause. (*In re Anthony J., supra,* at p. 732). The due process violation is even clearer when the evidence is supplied by a codefendant after the defendant has rested and there is consequently no question of waiver. (*People v. Valerio, supra,* 13 Cal.App.3d at p. 920.)

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[65] In *Valerio*, although the motion was actually made at a later time, it was deemed made and denied at conclusion of prosecution's case.

If it is a basic premise of our system, the "capstone" of procedural protections (*ante*, at p. 284), that the prosecution establish its case beyond a reasonable doubt, there can be no reason why a defendant cannot demand that the state make its case to the jury in its case in chief.

Just as a defendant is entitled to have his motion for judgment of acquittal evaluated solely on the evidence that the state presented in their case in chief, without reference to evidence subsequently introduced, so should he be entitled to have the jury make their determination based solely on the State's evidence against him as presented in the State's case in chief.

Generally, after the State has presented its case in chief, only rebuttal evidence is allowed unless the trial court allows otherwise for good reason. (Pen. Code § 1093, subd. (d); Witkin, *California Evidence, Presentation at Trial 3*, *supra*, § 71, p. 102.) In *People v. Carter* (1957) 48 Cal.2d 737 this Court explained the need for the rule:

> "The purpose of the restriction in that section is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence." (*Id.* at p. 753.)

Here, appellant's defense was the prosecution's failure to prove its case against him, and he therefore rested at the conclusion of the prosecution's case. Then, at the very end of trial, he was confronted with a burst of new evidence that was intended to rebut the co-defendant's evidence but which also incriminated appellant by tying him to the crime itself and to the parties. While sound public policy based on concern for the public purse in many cases argues for joint trials, the economics of that policy may not overcome a defendant's right to hold the state to its burden of proof. Thus, he should not have to defend against another defendant, and he should be entitled to rest on the case presented against him and only him.

To ensure this, the jury should be instructed that it may only consider the evidence presented during the prosecution's case in chief against a defendant who rests without presenting a defense. In fact, the use of limiting instructions has long been regarded as a tool to mitigate the prejudice from joint trials, thereby obviating the need for a severance, as such limiting instructions often will suffice to cure any risk of prejudice. (*People v. Coffman, supra*, 34 Cal.4th at p. 41.) To employ this device here to make sure that appellant is not penalized by the fact of a joint trial is simply another use for this well-established device.

The refusal to give such an instruction in this case allowed the jury to consider evidence against appellant which should not have been admissible against him. It also allowed the jury to factor in evidence of the perjury of the three co-defendants. The consideration of this evidence violated the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases. (*Ante*, at p. 51.)

Furthermore, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Ante*, at p. 52.)

Finally, because appellant was denied the right to rest and rely on whether the prosecution has made its case -- a bedrock right under our system of jurisprudence -- he was denied a state law right of "real substance". (*Ante*, at p. 51.) Therefore, this error had the effect of depriving appellant of due process of law.

Consequently, the trial court erred in denying appellant's motion to instruct the jury that they should only consider that evidence against appellant which had been presented prior to the State resting its case.

C. Prejudice

In this case, the error in not putting the State's case to the test when the state rested was a form of structural error, requiring automatic reversal. Structural errors are those which are so fundamental to a fair trial that they are reversible per se. (6 Witkin, Cal. Crim. Law 3d (2000) Chapter XVII. Reversible Error.)

The reason that this should be viewed as a form of structural error is that appellant was completely deprived of a fundamental right to have the *jury* determine, based on the evidence at the close the prosecution's case in chief, whether the prosecution had proved its case beyond a reasonable doubt.

Alternatively, because the failure to give the requested instruction improperly relieved the state of its burden of proof, violated appellant's liberty interests, and rendered his trial fundamentally unfair in violation of the due process clause, the error should be reversible unless the State can prove it was harmless beyond a reasonable doubt under the standard of *Chapman v. California*, *supra*, 386 U.S. 18.

As the trial judge acknowledged, the case against appellant was weak. If the instruction appellant requested had been given, he could well have been acquitted.

Instead, as discussed above (*ante*, at p. 283), long after the prosecution rested, and after the defenses of Wheeler, Bryant, and Settle, the prosecution was allowed to introduce evidence that the phone number used by Armstrong was appellant's phone number, thereby further connecting appellant to Armstrong.

Appellant objected to this evidence on grounds of improper rebuttal. Mr. Novotney again explained that appellant had rested without presenting a defense. This objection was overruled. (RT 15037, 15997.)

After the court overruled the objections, with the court expressly stating that it would not waive the objection, it was stipulated that in 1981 and 1982, appellant had given his phone number and address as (818) 893-7912 at 9010 Cedros Avenue. It was further stipulated that this was the phone number that Karen Flowers told Detective Tucker that she had for Armstrong. (RT 16001-16002, 16005-16006, 16010-16012.)

There was no reason to allow the prosecution to re-open its case at the eleventh hour so as to allow the People to further connect appellant to Armstrong. Had appellant been tried alone, the prosecution would have rested, and the case

would have gone to the jury. This additional evidence connecting appellant to Armstrong would never have been admitted.

Similarly, while the testimony of Settle did not directly implicate appellant, it did corroborate Williams's testimony as to Wheeler and Bryant, thereby giving added credence to that suspect testimony. To the extent that this was allowed to bolster the prosecution's case, it further prejudiced appellant's defense, which was based solely putting the prosecution's evidence to the test of sufficiency of the evidence.

Furthermore, as discussed above, the questionable tactics and behavior of the other defendants (*ante*, at pp. 110-112, 135-138) could have tainted the jurors' views of appellant. Indeed, by convicting Bryant and Wheeler, the jury implicitly found that they had committed perjury, as did the eleven jurors who voted to convict Settle. The perjury of the other defendants could also taint appellant.

Such an impact would be aggravated by the nature of the case, involving a mass conspiracy, where each of the defendants is involved in the crimes of the others. Indeed, the very "birds-of-a-feather" approach to conspiracy cases has the natural effect of tying the defendants together.

Thus, the jury might have considered the misconduct of Byrant and Wheeler against appellant, even though that misconduct occurred after the prosecution rested.

D. Conclusion

Based on the foregoing, it must be concluded that the trial court erred in denying appellant's request to limit the evidence that the jury could consider against him to evidence presented in the people's case in chief, prior to the people resting. This error requires a reversal of the judgment entered below.

XIV

THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL AND REQUIRES A REVERSAL OF THE JUDGMENT OF CONVICTION

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [cumulative errors may result in an unfair trial in violation of due process]; accord *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; see also *People v. Hill*, *supra*, 17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution]; *Donnelly v. DeChristoforo*, supra, 416 U.S.637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process".)

Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Furthermore, when errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. In *People v. Williams*, *supra*, 22 Cal.App.3d 34, 58-59, the court summarized the multiple errors committed at the trial level and concluded:

> "Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, was not harmless error. [Citations.] (See also *Harrington v. California* (1969) 395 U.S. 250, 255.)

A cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the court. This is because of the recognition that the curative effect of any instruction is uncertain and lingering prejudice can remain even after an admonition. Thus, if there are errors which individually may have been cured by instruction or admonition, the trace of prejudice may remain and be a factor in an analysis of cumulative prejudice. (*United States* v. *Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; *see also United States* v. *Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

In this case, the cumulative effect of these errors requires a reversal. This is especially so because the prejudice is geometrically multiplied because the errors were so inter-related. Therefore, they must be evaluated together and the prejudicial effect of each should not be considered separately from the prejudicial effect of the other.

The evidence regarding the cocaine found when appellant was arrested is an example of how multiple errors in this case are all tied together. Each of the following arguments were related to the introduction of that evidence:

1) The prosecution misrepresented what it intended to prove regarding the cocaine, allowing the court to believe that the evidence would show that the cocaine was found in the distinctive Bryant-shaped wafers, the basis for the court's ruling. 2) As a result of that misconduct, the evidence was wrongly admitted under Evidence Code section 1101. 3) The jury was then wrongly instructed that the evidence, which had been offered to prove the relationship of the parties, could be used to prove motive and intent. 4) This error in instruction resulted from the fact that, because the case was too big to try, there were too many items of "other crimes" evidence for the parties to keep track of, or for the court to list in proper instructions to the jury. 5) Although the cocaine was used to prove motive, the motive instruction was improperly worded, allowing the jury to convict on motive alone. 6) This danger was exacerbated by the fact that the jury was told that it could convict if it found slight corroboration for accomplice testimony. 7) The

error in allowing slight corroboration was, in turn, aggravated by the fact that when the jurors were deliberating they did not know that if they had a reasonable doubt they had to acquit.

As a result, seven separate issues[66] blend into one huge error, in a related flow from the initial prosecutorial misconduct to a lack of reasonable doubt.

The failure to sever the case has a similar stream of consequences:

1) The case was too big to try because no one can keep track of the evidence. 2) As a result, the evidence of the Curry shooting was wrongfully introduced under section 1101, even though its logical predicate was not established as to appellant. 3) The jury was wrongly instructed that the evidence, which had been offered to prove the relationship of the parties, can be used to prove motive and intent.

These three in turn again relate to the issues of the motive and slight corroobration instructions and the jury question regarding reasonable doubt.

Both of these situations are also impacted by the determination as to whether Williams is an accomplice and the level of corroboration that would be required for accomplice testimony. However, even if that issue had been correctly resolved the result is similar. If Williams is not an accomplice, the only thing that would change is factor six, the level of corroboration for accomplice testimony. The motive instruction would still be poorly worded, at best, and, combined with the confusion over reasonable doubt, would allow for an improper conviction.

The failure to sever the case from Settle has a similar interrelation with other errors: 1) When Settle went pro per he make allegations that he was in danger from other defendants. 2) These untested allegations were used as part of the justification for using the stun belt on appellant. 3) Much of the other justification for that measure was the joint trial with the other defendants. 4) The joint trial

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[66] Respectively, Arguments I-C -failure to re-open deliberations, I-E - the slight corroboration instruction, III – severance, IV - Evidence Code section 1101, V - CALJIC No. 2.50, VII - prosecutorial misconduct, XII – motive.

allowed for the wrongful introduction evidence of other bad acts. 5) The jury was given the wrong instructions for that evidence. 5) This was aggravated by confusion over reasonable doubt.

Similarly, motive, for which improper instructions were given, was proven by the Gentry killing. However, the fact of the Gentry killing was improperly shown through the hearsay statements of Armstrong and the others, prohibited under *Crawford*. When the Gentry killing was introduced, because the case was too big for the attorneys to manage, they overlooked the fact that such evidence itself was evidence of other bad acts. The jury was improperly instructed on how to use such evidence, which again tied into the problems of corroboration and reasonable doubt.

Likewise, other aspects of the motive were shown by the hearsay evidence of the pays and owes found at the crack houses. The prosecution used that evidence to show the scope of the organization, building on that argument to develop the appeal to emotion and fear based on the horrific impact of this mini-Mafia on the community.

Other errors relate to each other.

For example, the errors relating to Williams's accomplice status was compounded by the failure to tell the jury that Tannis was also (or may have been) an accomplice. Improper corroboration for Williams should not have been found in her testimony, as the instructions given to the jury would have improperly allowed.

If Williams is an accomplice, corroboration for Williams's testimony may have been found in the Curry shooting, even though the foundation for that incident was never proven as to appellant. Again, that implicates the issues of the improper instructions and reasonable doubt.

All of these scenarios are a vindication of Judge Smith's prediction that the case was just too large to try, a prediction which should have been heeded and the case further severed to make it more manageable.

In a similar manner the introduction of hearsay evidence had an impact o multiple areas of the case: Hearsay was used to prove the motive in the case[67], appellant's connection to Armstrong[68], and to further tie appellant to the crime itself[69].

Prosecutorial misconduct, when the prosecution misrepresented the facts it intended to prove[70], led to the introduction of gruesome and highly prejudicial photographs of the dead bodies.

These webs of interlocking errors are all presented in a case where the evidence is weak, primarily coming from an accomplice or, at the very least, a witness whose credibility is terribly tarnished. (*Ante*, at pp. 48, 61-62, 75-79.)

In such a situation, it is clear that the errors are inter-connected and that the cumulative effect of the errors described above requires a reversal of appellant's conviction.

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[67] Through the statements of Armstrong, Fisher, Gentry, and Ward and the Western Union records and drug ledgers and records.

[68] Through the statement of Flowers.

[69] Through the taped statement of Williams.

[70] That Brown was killed in the car.

PENALTY PHASE ARGUMENTS

XV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR UNDER *WITHERSPOON V. STATE OF ILLINOIS.* (1968) 391 U.S. 10 AND *WAINWRIGHT V. WITT* (1985) 469 U.S. 412, VIOLATING APPELLANT'S RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY EXCUSING TWO PROSPECTIVE JURORS FOR CAUSE DESPITE THEIR WILLINGNESS TO FAIRLY CONSIDER IMPOSING THE DEATH PENALTY

The trial court committed reversible error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, violating appellant's rights to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, by excusing two prospective jurors for cause despite their willingness to fairly consider imposing the death penalty.

A. The Relevant Law

The Sixth Amendment to the federal constitution guarantees the right of a jury trial to criminal defendants in state courts. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) This right is also secured by article I, section 16, of the state constitution. (Cal. Const., art. I, § 16.)

In *Witherspoon*, *supra*, the United States Supreme Court held that a sentence of death could not be carried out where the jury that recommended it was chosen by excluding venire persons for cause simply because they voiced general objections to the death penalty.

At the time, the relevant statute in Illinois allowed for challenges to prospective jurors who had "conscientious scruples against capital punishment." (*Id.*, at p. 512.) The prospective jurors at issue in *Witherspoon* all had made clear that

their reservations about capital punishment would not prevent them from making an impartial decision as to the defendant's guilt. (*Id.*, at p. 513.)

The Supreme Court reasoned in *Witherspoon* that excluding all people with scruples against the death penalty from the jury eliminates a substantial portion of the population and results in a jury that is not representative of the community. (*Id.*, at pp. 519-520.)

Therefore, *Witherspoon* held that it is not permissible to excuse prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," as long as they could obey their oath to follow the law. (*Id.*, at p. 522.) The Court modified the *Witherspoon* standard in *Adams v. Texas* (1980) 448 U.S. 38, a capital case involving the murder of a police officer. The Court explained that *Witherspoon* and its progeny "establish the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Instead, a state could only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*) Prospective jurors could **not** be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." (*Id.* at p. 50.) Rather, a prospective juror who opposed capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (*Id.*, at p. 48.) Moreover, as the Court later made plain in specifically re-affirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 423.)

Witt explained that *Witherspooon* is not based on the Eighth Amendment prohibition on cruel and unusual punishment, but on the Sixth Amendment jury

rights. (*Id.*, at p. 423.) Thus, it is for the party seeking the exclusion to demonstrate through questioning that the potential juror lacks impartiality. (*Ibid.*)

In two recent decisions involving the erroneous dismissal for cause of death-scrupled jurors, this Court has stressed the importance of adhering faithfully to Witt. (*People v. Stewart* (2004) 33 Cal.4th 425; *People v. Heard* (2003) 31 Cal.4th 946). Thus, this Court explained in *Stewart*

> "the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under Witt, supra, 469 U.S. 412, 105 S.Ct. 844...A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Stewart, supra*, at p. 447)

"[T]he burden of demonstrating to the trial court that this standard [is] satisfied as to each of the challenged jurors" is on the prosecution, as the moving party. *Stewart*, *supra*, 33 Cal.4th at p. 445 (citing *Witt*, *supra*, 469 U.S. 412, 423.)

Stewart's death sentence was reversed because the trial judge granted the prosecution's motion to excuse for cause five prospective jurors based solely on the answers on juror questionnaires which expressed reservations about the death penalty. The trial judge declined to question the prospective jurors further.

Similarly, in *Heard,* the trial court erroneously excused a prospective juror for cause who had given answers on the questionnaire that reflected a philosophical opposition to the death penalty. When asked on voir dire, however, the prospective juror had stated that he would do "whatever the law states." (*Id.*, at p. 960.)

This Court explained that that prospective juror's initial responses on the questionnaire, "given without the benefit of the trial court's explanation of the

governing legal principles, does not provide an adequate basis to support H.'s excusal for cause." (*Id.*, at p. 964.)

In summary, while a prospective juror may be excused for cause when the juror indicates that his or her personal and/or religious beliefs would prevent the prospective juror from returning a verdict of death, mere generalized opposition to the death penalty is not a sufficient ground for cause when the prospective juror indicates that he or she would be able to overcome those beliefs and render a verdict according to the law.

B. Application of the Law to the Facts of the Case

Applying the law as described above to the instant case, it is clear that the trial court erred in allowing the challenges for cause made by the District Attorney to Prospective Jurors No. 52 and 56.

In order to determine whether a juror is fit to serve in a capital case, the court should analyze the juror's *voir dire* as a whole rather than simply focus on isolated statements. (*People v. Mason* (1991) 52 Cal.3d 909, 953.)

Initially, No. 52 stated he was "very opposed to death penalty." (RT 7017.) He stated that he had "no quarrel with the law," and could follow the law, although doing so would be against his conscience. (RT 7018.) He repeated that he could be a fair judge. (RT 7019.) He stated that he would not automatically vote for life in prison, and that one has to "go by the evidence." (RT 7021.) He stated that he was sure that he could render a verdict of death or life in prison depending on the evidence. (RT 7021.)

The court then asked whether he "could...in fact be a fair judge of the penalty and vote for death if [he] felt it was appropriate given our facts," to which he replied, "No. I don't think so." (RT 7021.)

The prosecution requested that No. 52 be excused for cause on the grounds that his answers made it clear that his feeling regarding the death penalty were not only personal, but were based on a religious enlightenment. (RT 7023.)

The defense argued that No. 52 that said he could "exercise his duty" if the evidence and facts required it. (RT 7023.) The defense explained that Juror No. 52 was comparable to No. 82 who had indicated on the questionnaire that he believed in "an eye for an eye," and the court had denied a defense challenge for cause to excuse No. 82. (RT 7023.)

The court sustained the challenge based on the one answer No. 52. had given at the end of questioning, when he said he did not think he could be fair. (RT 7024.)

Similarly, in the jury questionnaire, when asked about his feelings on the death penalty, Prospective Juror No. 56 stated that he believed in life without parole because the death penalty would not bring back the victim. (RT 6749.)

In the questionnaire, he also stated that he did not want to serve on a capital case. (RT 6745.) On voir dire, when asked about this statement he initially stated that he would not want to be on a capital jury deciding about the death penalty because religious views would make it "difficult or impossible" to return a death sentence. However he felt that if "required," he could do it. (RT 6745.)

In response to Prospective Juror No. 56 saying that did not "want" to sit on a capital case, the court explained that it could see he did not "want" to sit, but the court needed to know if he meant that he could not be fair because his mind was made up. No 56 replied that he could be fair and that he could return a death penalty. (RT 6746.) He later repeatedly said that he would be able to be fair. (RT 6747.) After further questioning he stated that he would be able to put his feelings aside and return a death verdict, if appropriate, although he would not be "overjoyed" to do so. (RT 6750

He also stated that he could come back with a verdict for the death penalty. (RT 6747.) Furthermore, he expressed a willingness to put aside religious conviction and decide the case on the facts. (RT 6749-6750.)

On the questionnaire he had stated that he would automatically vote for life without parole, but he stated on voir dire that he had changed his view in the last

few days because of the court's comment about weighing good and bad. (RT 7650-7651.) He concluded that he did not believe his feeling would affect the manner in which he judged the case. (RT 6751.)

The prosecution challenged No. 56 for cause on the basis of the answers No. 56 had given in the questionnaire indicating a religious opposition to the death penalty, which the prosecution described as "firm," rather than "muddled." (RT 683.)

The defense argued that the court should look at what No. 56 had said in court, where she was very clear to the court that she could return a death verdict. (RT 6834-6835.)

Examining the responses of these two jurors leads to the conclusion that it was error to grant the prosecution's request to excuse them for cause.

No. 56's statement that it would be "difficult" to impose a death verdict manifestly did not preclude him from serving as a juror. As this Court recently explained in *Stewart*

> "In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it 'very difficult' ever to vote to impose the death penalty. . . [A] prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled--indeed, duty-bound--to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*Stewart, supra,* at p. 446; accord *Smith v. State* (1887) 55 Miss. 413, 415, ("Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.") quoted in *Witherspoon, supra,* at 515.)

No. 56's answers were identical to those of prospective jurors from other cases who were found to have been wrongfully excused for cause. Namely, while No. 56 did express philosophical qualms about the death penalty, No. 56 repeatedly stated that he could return a verdict of death.

Indeed, No. 56 is indistinguishable from the juror in *People v. Heard* who initially expressed anti-death penalty views on the juror questionnaire, but then reconsidered his views based on the trial court's explanation of the law.

Appellant submits that this is exactly the type of juror the state should want on a jury -- willing to follow the law in spite of personal beliefs, able to change his or her mind to follow the instructions of the court, and honest enough to express views that may not be popular in the particular setting.

Prospective Juror No. 52, should, at the least, have been questioned further to clarify his responses, which were conflicting but not disqualifying. In an unfamiliar setting, prospective jurors who may not be familiar with the form of questioning typical to courtrooms cannot be expected to constantly express themselves in the clearest of fashions.

Thus, No. 52 was similar to the juror in *Gray v. Mississippi* (1987) 481 U.S. 648, whose indecisive answers led to her improper exclusion. (*Id.*, at p. 656.) In *Stewart,* this Court similarly stressed the importance of clarifying jurors' responses:

> "Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties (as defined by the court's instructions and the juror's oath)." *Stewart, supra,* at p. 445 (quoting *Witt, supra,* 469 U.S. 412, 424, 105 S.Ct. 844) (other citations omitted); accord *Gray, supra,* at p. 656 "inadequate questioning regarding the venire members' views in effect precludes an appellate court from determining whether the trial judge erred in refusing to remove them for cause.")

Furthermore, although both prospective jurors had answered questions in the questionnaires which could indicate a bias against the death penalty, this is not a sufficient basis for a challenge for cause when both indicated a willingness and ability to impose the death penalty when allowed to expand upon their answers after hearing the court's explanation of the law. (*Ante*, at pp. 299-300.)

In summary, there was insufficient reason to remove Jurors No. 52 and 56 from the pool after a challenge by cause from the prosecution.

C. Prejudice

Because the *Witherspoon-Witt* standard is based on the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the improper exclusion of even one juror under the *Witt-Witherspoon* standard is reversible penalty phase error *per se* even if the prosecutor could have gotten rid of the juror anyway by using one of his or her unexhausted peremptory challenges. (People v. *Stewart*, *supra*, 33 Cal.4th 425; People v. Heard, *supra*, 31 Cal.4th 946; *Davis v. Georgia* (1976) 429 U.S. 122; *Gray v. Mississippi*, *supra*, at p. 668.)

XVI

THE TRIAL COURT IMPROPERLY COERCED A DEATH VERDICT AFTER THE JURY HAD TWICE DECLARED ITSELF DEADLOCKED AND THEN ERRONEOUSLY SUBSTITUTED AN ALTERNATE WHEN THE JURY COULD NOT POSSIBLY BEGIN ITS PENALTY DELIBERATIONS ANEW, THEREBY VIOLATING APPELLANT'S RIGHTS TO A JURY TRIAL, DUE PROCESS OF LAW, AND A RELIABLE SENTENCING DETERMINATION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION AND THE CALIFORNIA CONSTITUTION

Under the unusual facts of this case, the trial court erred in denying appellant's request for a mistrial based on the fact that the jury was deadlocked. The court further erred when it thereafter substituted in an alternate juror when it was no longer practicable for the jury to begin its penalty deliberations anew.

As a result, appellant was denied his right to a jury trial and to due process of law.

A. The Hearings Below

At the beginning of the penalty phase, Juror No. 113 informed the court that he/she had a pre-paid vacation beginning on June 21st. At that time, it was agreed that No. 113 would be excused if a verdict was not reached by that time. (RT 17190.)

On Thursday, July 6th, shortly before receiving instructions for the penalty phase, Juror No. 86 sent the court a note stating that she would be unable to continue with deliberations after July 7th because of an illness in the family for which surgery had been scheduled for July 10th. (RT 18406.) Initially, the court believed that No. 86 should be excused at that time because it would be unlikely for the jury to conclude its work before No. 86 had to leave. (RT 18407.)

Counsel for appellant and Bryant requested that No. 86 be allowed to stay through July 6th and 7th, while counsel for Wheeler agreed with the court that she should be excused at that time. (RT 18408.)

Before reading the penalty phase instructions, the court informed the jury as to No. 86.'s situation, telling them that No. 86 would be excused after the next day's deliberations. The court cautioned the jurors that it was possible that all verdicts may not be reached by then, in which case an alternate could be seated. The court told the jury not to rush with its deliberations[71]. (RT 18416-18417.)

After reading the penalty phase instructions to the jury, and after closing arguments of counsel, the court again informed the jury that No. 86 might be leaving, but they should start deliberating, and he would excuse No. 86 if a verdict was not reached by the time No. 86 had to leave. (RT 18591-18593, 18596.)

On July 10th, Juror No. 113 sent a note to the court, saying that he could not serve for the rest of the deliberations because other jurors could not understand the law. No. 113 believed that the other jurors were deliberately prolonging deliberations for personal reasons, possibly to avoid going back to work. (RT 18602.)

When questioned by the court, No. 113 repeatedly said that he was not willing to continue with deliberations. (RT 18607- 18608.)

The court explained that it was "beneficial" to have the same jurors decide both guilt and penalty phase, if possible, but No. 113 persisted that it would be better if he were released. (RT 18610-18611.)

Counsel for appellant stated that he believed No. 113 should not be excused and that no further admonition be given to the jury, as it appeared that this was just "normal frustration" that was a part of the deliberative process. (RT 18620.)

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[71] Counsel for appellant agreed with the court when the court suggested giving this admonition to the jury. Counsel for Gulartie did not wish the court to give the admonition. (RT 18409-18410.)

The court then asked No. 113 to give it "one more shot" and attempt to stay involved in the deliberations. No. 113 agreed to attempt to do that. (RT 18622-18623.)

Thereafter, the court excused No. 86, replacing her with Juror No. 220. (RT 18624.)

The court refused a request to read the instruction to the jurors telling them not to change their minds simply to reach a verdict. (RT 18630.)

On July 14th, the jury returned death verdicts for Wheeler. (CT 15256.)

Later, the jury sent a note to the court, asking what would happen if they could not reach a verdict. (CT 15785, RT 18633.) The court told the jury not to speculate about what would happen. (RT 18639.)

Shortly thereafter, the day before No. 113 was to be excused, on the eighth day of penalty deliberations, after the penalty verdict had been returned as to Wheeler, but the jury was still deliberating as to appellant and Bryant's penalty, the jury sent a note to the court stating that it was at an impasse as to one defendant and it was not possible for it to reach a verdict. The note had appellant's name on it. At the court's request, the clerk verified with the jury that the note concerned appellant. (RT 18684, 18690.)

Mr. Novotney requested that the court ask the jury if it was deadlocked, and if that was the case, the defense was asking for a mistrial. (RT 18684.)

The prosecution stated that what should be done would depend on "whether there is any movement, whether they think there is anything that might assist them." (RT 18685.)

The defense agreed that the court should ask whether the impasse was "temporary," but if the jury indicated that they were at an impasse, a mistrial should be declared. (RT 18688.)

The court then asked the foreperson if the note referred to appellant and whether there had been formal ballots on appellant. The foreperson informed the court that the note did refer to appellant, and there had been at least eight votes

taken as to appellant, the first one being on the first day of deliberations, about a week earlier. (RT 18690-18691.)

In response to questions from the court, the foreperson explained that the split had first been 6-6 and had then gone to 11-1. (RT 18690.) To the court's comment "There has been some fairly substantial movement then, it would appear. Is that a fair statement?" Foreman answered "Yes." (RT 18691.)

The foreperson explained that they had taken votes on appellant, "reached a point of exasperation," and moved on to a different subject, apparently a reference to Wheeler, for whom they had returned penalty verdicts, before returning to appellant. (RT 18692-18693.) Four more votes had been taken before the jury sent the note announcing that it was deadlocked. (RT 18693.)

The court then asked if there was anything that the court could do to assist the jury, and the foreperson replied that there was not. (RT 18693.) The court asked if there was any clarification of the law that would assist the jury, and the foreperson answered that there were no questions that the jury had as to the law. (RT 18694.)

The court then took a break to handle other matters, during which time the foreperson buzzed the clerk to inform the court that they did not think that there was anything that could be done to assist them, and that they were at the same point. (RT 18696.)

Upon further inquiry, the foreman explained that the jury understood all the legal principles involved, and that further clarification would not help. (RT 18700-18701.)

After the inquiry the court told the jury:

> "All right. The court is going to ask you to do the following.
> "I want you to continue your deliberations on the remaining matters including Mr. Smith
> "You may be quite right and it may be that you do not arrive at a verdict as to Mr. Smith as you seem to feel in your note.

"The court is not convinced that that is the case given the fact that there has been a verdict rendered as to one defendant, *given the fact that there has been a change from six six right up to eleven to one.*

"That may be where it ends or it may go back. *That tells me that there is a potential that the jury may resolve this matter regardless of what you feel now.*

"I may be wrong. I may be right.

"I will ask you to continue your deliberations in any order that you want.

"Again, I am not suggesting who you deliberate on or what count or anything like that. You will have to do that for yourselves. *But the court is not going to at this point declare a mistrial as to the penalty phase as to any defendant based on what we have talked about right here.*

"So you will need to continue your deliberations.

"We are going to see you tomorrow.

"*As you know, we have a juror who will be out of here tomorrow. That will be his last day.*

"I will have everybody present here tomorrow afternoon before you folks leave and we will speak again and *we will handle the matter at that time, it it's still necessary* or of seating an alternate juror and so forth.

"If there are, again, I am not suggesting that you rush. I am suggesting that you don't rush. If there are any verdicts that you arrive at as to any counts or any defendant or anything, we will accept those tomorrow afternoon even if they are not complete verdicts." (RT 18701-18703, italics added.)

One juror then asked if they could "change over" or whether they had to continue deliberating on appellant. The court answered that it was not declaring a mistrial as to appellant, and "[t]here will have to be deliberations by this jury on Mr. Smith's matter." However, the court told the jury that the order of deliberations was up to the jury. (RT 18704-05)

Later, the foreperson of the jury asked what was meant by "mistrial," asking if that meant that "the guilty verdicts won't stand?" (RT 18705.) The court at first refused to answer that question. (RT 18705.) Ms. Gulartie and Mr. Novotney agreed that the jury should know the answer to the question, namely, that a

deadlock as to penalty would not affect the verdicts from the guilt phase. (RT 18706-18707.)

The prosecution stated that it did not believe it was appropriate to tell the jury anything because it could give them an excuse not to decide the case, as having been told that only the penalty phase would affected, the jurors might adopt the attitude that "we can let somebody else deal with it." (RT 18708.)

The court then told the jury that if it could not reach a penalty verdict the guilty verdicts would not be affected, adding "[b]ut I do not want you to take that as a signal by the court that your work is done on this case." (RT 18708.)

Mr. Novotney again objected to further deliberations and requested a mistrial. That request was denied. (RT 18709.)

The next day, appellant asked the court to inquire if further deliberations would be helpful, and if the jury answered in the negative the defense was requesting a mistrial. (RT 18720.) When the jury was present, the following exchange occurred after the jurors told the court they had been voting on Bryant:

> The Court: "That took some of the day.
> "As to Mr. Smith, again, I am not trying to push you folks at all. There are certain things I need to know for the record before we move to the next step here, and that is your estimation as to Mr. Smith, if you can tell me, and perhaps you don't know an answer to this question, and if you don't just tell me that. But insofar as you recall, have things changed as to Smith."
> Foreperson: "I think there has been some change, some dialogue has opened up, yes."
> The Court: "All right. But no further ballots today?"
> Foreperson: "No." (RT 18724.)

The court then excused Juror No. 113, and seated No. 433. (RT 18725-18727.)

The court then told the jury:

> "Okay. I have other news for you. That is the following: the court believes that it is necessary, we have a lot of jurors who obviously need to get on with their business. *This case will take as long as it takes in order for it either to be resolved or for the court to feel that*

> *it cannot be resolved.* All right? But within those parameters, we need to make use of our time wisely. In that regard, the court is going to do two things: I want you to focus, to being your deliberations at 8:30 in the morning. This is not to punish you, but so we can get as much time is as we can on this case while we have you folks here during the day. 8:30.
>
> "We are going to take an hour for lunch and deliberate until 4:30, okay? I know it is tough, but we're going to do it that way, and I believe that it may assist in one way or another getting this thing concluded. At some point in this case, your service will end at some point, either with verdicts or with the court declaring there will not be verdicts as to various matters however that works it's [sic] way out, it works it's [sic] way out; but the end will come sooner, whichever way it is, if we stick to these hours." (RT 18727-18728, italics added.)

After agreeing to end deliberations the next day at 4:00 to accommodate a juror who had a dental appointment, the court stated that on subsequent days the jury would deliberate until 4:30. (RT 18728.)

The court agreed to try to accommodate another juror who had personal matters to take care of. However, the court told the jury to "minimize" that type of thing so "we can keep some presence here and focus on the case." (RT 18729.)

The court then added, "I am not trying to be critical... But I think it is time to maybe expand these hours a little bit and see what happens." (RT 18729.)

The jury deliberated one more day before the weekend. (RT RT 18732-18732-1.)

The next Monday, the jury returned verdicts for Byrant. (RT 18747-18751.)

Thereafter the jury asked the court if it was permissible to place a different value of the lives of different people when weighing the crime, referring to one victim as compared to another victim. (RT 18752.)

After consulting with counsel (RT 18754-18758), the court told the jury that it could assign whatever weight it deemed appropriate to the personal characteristics of the victims. (RT 18759.)

Shortly thereafter, the jury returned the death verdict as to appellant. (RT 18761-18763.)

B. The Relevant Law Regarding Coerced Verdicts

The Sixth Amendment to the federal constitution guarantees the right of a jury trial to criminal defendants in state courts. (*Duncan v. Louisiana*, *supra*, U.S. 145, 149-150.)

Penal Code section 1140 provides:

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

If the jury appears to be deadlocked, in order to determine whether there is a reasonable probability that the jury may yet agree on a verdict, the trial court may make reasonable attempts to obtain the jury's unanimity, including requesting that the jury attempt to reach a verdict, as long as the language used to do so does not contain any sort of encouragement or coercion to reach unanimity. (*People v. Tarantino* (1955) 45 Cal.2d 590.)

In doing so, "[t]he court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Rodriguez*, *supra*, 42 Cal.3d 730, 775, quoting *People v. Carter* (1968) 68 Cal.2d 810, 817.) The goal of reaching a unanimous verdict does not lessen the principle that all parties are entitled to the individual judgment of each juror. (*People v. Gainer*, *supra*, 19 Cal.3d 835, 848.)

Coercive instructions to a divided jury are more than a violation of state law; they are a violation of the due process clause and the right to a fair trial as guaranteed by the United States Constitution. (*Weaver v. Thompson* (9th Cir.

1999) 197 F.3d 359.) An instruction that obligates the jurors to convince one another that one position is superior to another without reminding them not to relinquish their own beliefs is coercive and unconstitutional in that it deprives the defendant of his right to the individual determination of each juror. (*Smalls v. Batiste* (2d Cir. 1999) 191 F.3d 272.) Such individual determination is guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. (*People v. Williams* (1969) 71 Cal.2d 614, 630; *Weaver v. Thompson, supra*, 197 F.3d 359.)

In *Allen* v *United States, supra*, 164 U.S. 492, the United States Supreme Court affirmed a murder conviction based in part upon instructions to an apparently deadlocked jury that they should listen to each other's arguments, and if the majority was for conviction, a dissenting juror should consider whether his doubt was reasonable since it had made no impression on the minds of so many equally honest and equally intelligent men.

In the over 100 years since *Allen*, many decisions questioned whether a similar result would be reached today. Speaking of *Allen*, one court has stated, "there is little wonder that many doubt whether the case would not be decided differently today. [Citation.] But that it should have become the foundation stone of all modern law regarding deadlocked juries is perhaps the greatest anomaly of the *Allen* case." *United States* v. *Bailey* (5th Cir. (1972) 468 F.2d 652, 666.)

Since *Allen* the Supreme Court has clearly held that although an *Allen* charge may be acceptable **in theory**, under the circumstances of any particular case a similar charge may violate the requirement of due process of law. Thus, it has become clear that the due process clause of the Fourteenth Amendment of the United States Constitution is violated when it is "clear from the record" that a flawed *Allen* charge had an impermissibly coercive effect on the jury. (*United States* v. *Wills* (9th Cir. 1996) 88 F.3d 704, 717; *United States* v. *Lorenzo* (9th Cir. 1995) 43 F.3d 1303, 1307; see also *Rodriguez* v. *Marshall* (9th Cir. 1997) 125 F.3d 739.)

The test is whether the comments of the trial court would be likely to coerce certain jurors into relinquishing their views in favor of reaching a verdict. (*Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976, 979.) Whether a particular charge is impermissibly coercive must be evaluated in light of the totality of the circumstances. (*Locks v. Sumner* (9th Cir.1983) 703 F.2d 403, 406; *Jiminez v. Myers*, *supra*, 40 F.3d at 979.)

In *Lowenfield* v. *Phelps* (1988) 484 U.S. 231 at the penalty phase, in response to notes from the jury indicating difficulty in reaching a decision, the court twice polled the jury as to whether further deliberations would be helpful in reaching a verdict, a majority of the jurors answering affirmatively in each instance. After the second poll, the judge reiterated earlier instructions, declaring that he would impose a sentence of life imprisonment without parole if the jurors were unable to reach a unanimous recommendation. The judge admonished the jury to consult and consider each other's views with the objective of reaching a verdict, but not to surrender their own honest beliefs in doing so. The jury then returned a verdict in 30 minutes, sentencing petitioner to death.

Although the Supreme Court affirmed the denial of habeas corpus relief, the Court took pains to make it clear that such an instruction may be violative of due process under different circumstances. Thus, the Court stated "By so holding we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion. Any criminal defendant...being tried by a jury is entitled to the un-coerced verdict of that body. (*Id.*, at p. 241.)

Whether comments of a state trial judge infringed a defendant's due process right to an impartial jury and fair trial depends on whether "the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." (*Locks v. Sumner* (9th Cir.1983) 703 F.2d 403, 406.)

An examination of the circumstances of this case make it clear that the court's response to the jury's impasse was, unlike the situation in *Lowenfield*, improperly coercive in violation of appellant's due process and jury trial rights.

In *Lowenfield*, the judge informed the jury members **three times** not to surrender their individual views merely to reach a verdict. The *Lowenfield* court told the jury "to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment. The court reminded the jurors that they each "must decide the case for yourself," and while they should not hesitate to "reexamine" their own views, they were "not [to] surrender [their] honest belief as to the weight and effect of evidence solely because of the opinion of [their] fellow jurors or for the mere purpose of returning a verdict." (*Id.*, at p. 235.)

Indeed, this instruction comports with the instruction approved in *Allen*, itself, where the jury was instructed that "the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows," and while the minority should consider (with "proper regard") the opinions of the majority, "it was their duty to decide the case *if they could conscientiously do so.*" (*Allen, supra*, at p. 501, italics added.)

Therefore, this crucial aspect of a proper charge not to surrender one's honestly held belief is an essential part of the holding of *Allen* itself.

Other cases have also recognized the coercive effect inherent in this type of charge when it fails to include an admonition not to surrender one's convictions.

In *United States* v. *Rodgers* (4th Cir. 1961) 289 F.2d 433, 453 the trial court instructed the jury regarding its duty to reach a verdict "but without the ameliorating admonition that no juror should yield to his conscientious conviction. (*Id.*, at p. 434.) The court noted that the *Allen* charge "approaches the limits to which the court should go in suggesting to jurors the desirability of agreement..." (*Id.*, at p. 435.) However, the court further explained that

> "[i]f it went much further, or if it were stripped of its complementary reminder that jurors were not to acquiesce in the views of the majority or to surrender their well-founded convictions conscientiously held, it might readily be construed by the minority of jurors as coercive, suggesting to them that they should surrender their views in deference to the majority and concur in what really is a majority, rather than a unanimous, verdict." (*Ibid.*)

The *Rogers* court explained that the fact that *Allen* approaches the ultimate permissible limits is demonstrated by cases that required a reversal simply where the court inquired into the numerical division on the merits prior to giving the *Allen* charge. Likewise, reversal has been required where there were "trifling" modifications of the *Allen* charge. (*Id.*, at p. 435-436, cited in *Jenkins* v *United States*, *supra*, at p. 446.)

In *Jimenez v. Myers*, *supra*, 40 F.3d 977, the court held that the trial judge coerced the jury into convicting by twice requiring that jurors continue deliberations after they declared they were hopelessly deadlocked, inquiring into juror's numerical division, and failing to give a cautionary instruction not to succumb to majority pressure.

Before the *Jimenez* jury was sent to begin deliberations, the judge instructed them that both the people and the defendant are entitled to the individual opinion of each juror, that they should each decide the case, after discussion with other jurors, that they should not hesitate to change an opinion if they are convinced it is erroneous, but they should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

After four and three quarter hours of deliberations, the *Jimenez* jury sent the judge a note stating, "We are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." The court called in the jury and discovered that five or six votes had been taken, that it started out seven to five and had

moved to nine to three. After a three-day weekend, the jury returned to its deliberations. Three hours later, the jury sent another note to the court stating they were at an impasse.

The *Jimenez* court questioned the jurors and discovered that they had taken two more votes, and the latest count was eleven-one. The court asked them to deliberate the rest of the day. The jury returned a guilty verdict after an hour and forty-eight minutes of additional deliberation. The Ninth Circuit concluded from all the circumstances that the defendant was denied a fair trial. In reaching this conclusion, the court did not question the practice of judges asking the jury its numerical division after an impasse, which would require reversal in a federal trial. (*Id.*, at p. 980, fn. 3.) However, the court concluded that that under established due process standards, the comments and conduct of the trial court in that case crossed the line between neutral inquiry and coercive instruction.

In particular, the coerciveness of the *Jimenez* instructions were found in the fact that after inquiries into the numerical division the judge repeatedly praised the movement that had taken place in the deliberations, explaining that the movement of the jury was what was important. (*Id.*, at pp. 980-981.) Thus, the Ninth Circuit concluded that

> "After the first impasse, by eliciting the progression in the voting, determining it was moving in one direction, expressing his approval of that progression, and telling the jury to continue its deliberations, the trial court effectively instructed the jurors to make every effort to reach a unanimous verdict. In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, the court's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity." (*Id.*, at pp. 980-981.)

As a result, whenever the trial court gives any instruction which resembles and *Allen* charge "it is essential in almost all cases to remind jurors of their duty

and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party. (*United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268, see also *People v. Sheldon* (1989) 48 Cal.3d 935, 958-959.)

Jimenez and the other cases discussed above reflect several errors present in this case: First, and most importantly, in this case the court refused a request to read the instruction to the jurors telling them not to change their minds simply to reach a verdict. (RT 18630.) Considering the length of time that the jurors had served on the case, combined with the length of time that they had been deliberating, in light of the apparent deadlock and the court's instruction that they would remain there for as long as the court believed it was necessary, under increased hours, it was crucial to inform jurors that they should not surrender their beliefs simply to resolve the case.

As *Jimenez* shows, even such cautionary instructions are not sufficient. However, as they would be the only thing that could possible lessen the coercive effect of the instruction given, the lack of such a cautionary instruction is even more significant.

Second, the crux of *Jimenez* was the court's praise for progress. This was the exact message that Judge Horan conveyed to the jury. He was looking for progress and movement. It is submitted that with a division of eleven to one, there are not many directions in which movement may progress.

Third, like *Jimenez*, the court here engaged in the disfavored practice of inquiring into the numerical division of the jury.

In fact, the instruction given here, at the very least, could be read as telling the lone minority juror to reconsider his or her views and vote for death. As *Lowenfield* noted, an *Allen* charge is less likely to have a prejudicial effect if it is not addressed specifically to the minority jurors. (*Lowenfield*, *supra*, at pp. 237-238.)

In this case, as noted above, the court told the jury that it believed there was the possibility that it would reach a verdict because there had been movement

from the six-six split to the eleven-one deadlock. By being praised for changing their votes, the jurors might not see the equally important principle of not surrendering their firm convictions.

This proviso is particularly important in the penalty phase of a capital case because jurors cannot be required to agree unanimously on mitigating circumstances. (*Mills v. Maryland* (1988) 486 U.S. 367; *McKoy v. North Carolina* (1990) 494 U.S. 433.) A coerced verdict at the penalty phase therefore also violated appellant's Eighth Amendment right to have jurors decide individually the existence and weight of mitigating circumstances.

In *People* v *Gainer*, *supra*, 19 Cal.3d 835, this Court disapproved an "*Allen* charge" or "dynamite charge" to extract a verdict from a deadlocked jury. In *Gainer*, the court specifically found three flaws in the instructions given to the jury, flaws which are mirrored to some extent in this case: First, the instruction contained a discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views. (*Id*,. at pp. 847-851.) Second the jury was informed that if they failed to agree the case must be retried. Third, the *Gainer* trial court told the jury that a retrial would be expensive.

The tenor of the court's comments in this case, as in *Gainer*, suggested that the holdout juror should change his or her position. This was implicit in the court's praise of the jurors' progress from six to six to eleven to one.

Likewise, the jury in this case was clearly concerned about what would happen if they did not agree on a penalty verdict, asking two times during the penalty phase deliberations what would happen if they were unable to do so. (RT 18685, 18705.) While the court in this case did tell the jury in response to their second question that the guilty verdicts would not be affected, the prospect of a costly retrial of the lengthy penalty phase trial remained.

The third *Gainer* error – telling the jury that a retrial would be expensive – also occurred in this case, as the prosecution's own comments reflect that the penalty phase would be retried.

The *Gainer* court set out a standard for a prejudice determination when any portion of the *Allen* charge is read to the jury:

> "As observed above, the ability of courts to gauge the precise effect on a jury of *Allen*-type instructions is limited, both by the tradition of secrecy of jury deliberations and by the inherent difficulties of estimating the impact of only one factor injected into the subjective processes of each juror...
>
> "The possibility of prejudicial effect, as well as the difficulty of discovering such effect, is magnified by the nature and timing of an admonition to minority jurors when it is used, as is typically the case, to undermine jury division. The instruction skews the deliberative process in a particular direction– toward the result favored by the majority. More significantly, the error is introduced at a crucial stage when the jury looks to the bench for advice on how to solve their dilemma. At that point, all the evidence and arguments already presented to the jury...have failed to produce a verdict. Yet, with defendant's fate poised in the balance, the trial judge tips the scales by use of an erroneous device. It is hard to conceive of circumstances in which error is more capable of producing prejudicial consequences." (*Gainer*, *supra* at 854-855.)

Similarly, in *People* v *Barraza*, *supra*, 23 Cal.3d 675 after more than one day of deliberations, the jury reached a guilty verdict on one count, but was hopelessly deadlocked on another. The judge then gave an *Allen*-type instruction, telling the jury, the case would have to be retried, and that presentation of the case to the jury had involved expense to both sides. The jury returned a guilty verdict several hours later. This Court reversed, holding that it is error for a court to instruct a jury that a case at some time must be decided, since the prosecutor, retains the power to request a dismissal of the action. It was further error to refer to the expense of another trial. The Court held that the fact that the jury continued to deliberate for two or three hours after it heard the *Allen* instruction did not dispel the presumption of prejudice. The Court held that it could not discount the substantial pressure to decide the case caused by the erroneous perception that some jury, sooner or later, must decide this case, and that error was compounded when the

jury heard of the expense of trying the case again as jurors may be reasonably concerned about the spiraling costs of government. (*Barraza, supra,* at 685.)

As noted above, another problem arising from the proceedings below stems from the fact that the court inquired into the numerical division of the jurors, a practice which is strongly disfavored.

In *Lowenfield, supra*, 484 U.S. 231 the Court re-affirmed its prior holding from *Brasfield* v. *United States* (1926) 272 U.S. 448 where after deliberations had stalled, the trial court inquired as to how the jury was divided, and was informed simply that the jury stood nine to three. The United States Supreme Court concluded that the inquiry into the jury's numerical division necessitated reversal because it was generally coercive and almost always brought to bear "in some degree, serious although not measurable, an improper influence upon the jury." (*Id.*, at 450, referred to with approval in *Lowenfield*, at p. 239.)

The *Lowenfield* Court stated that *Brasfield* was "instructive as to the potential dangers of jury polling." (*Lowenfield*, at p. 240.) In this regards, the Court held that reversal was not needed in *Lowenfield*, because the inquiry was to the numerical division of the jury not as to how they stood on the merits of the verdict, "but how they stood on the question of whether further deliberations might assist them in returning a verdict." (*Ibid.*) The Court explained that the two inquiries as the division on the merits did not necessarily correspond to the division on the question of whether future deliberations were likely to produce a verdict. An inquiry into the first area is improper. (*Ibid.*)

The inquiry into how the jury is divided on the issue of guilt has been condemned since *Burton* v. *United States* (1905) 196 U.S. 307, where the Court stated, at p. 370,

> "We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not

> which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain." (*Id.*, at p. 307-308.)

In the instant case, the trial court made an inquiry only into the question of how the jury was divided, the disfavored inquiry under *Brasfield* and *Lowenfield.*

Although this Court has held that inquiries into the numerical division of the jury do not *by themselves* render the instruction coercive (*People v. Rodriguez*, *supra*, 42 Cal.3d 730), it remains one factor in the totality of the circumstance in determining whether, as a whole, the court erred in coercing a verdict.

Furthermore, the instructions given to the jury were coercive because the court threatened to keep the jury for an undetermined amount of time. This factor may be considered as part of the totality of the circumstances surrounding the court's instructions. (*Ante*, at p. 314.)

Jury voir dire had started on January 25, 1995. (RT 6390.) On July 18th the jury was told that their "work is not done on this case until the court concludes that the work is done." (RT 18709.)

On July 19th, the jury is told that the case would take "as long as it takes in order for it either to be resolved or for the court to feel that it cannot be resolved." (RT 18727-18728.)

On July 19th, almost six months later, the jury is being told they may be kept on until the court feels there is no hope for a verdict. Having explained twice to the court that there was no hope for a verdict, and not having been able to impress upon the court their sense of futility, they were sent back with a vague threat

that they would remain, like Charlie on the MTA, in the Criminal Courts Building until the court decided their work was done.

With tempers frayed to the point where bad feelings surfaced over whether someone could have an extra banana (RT 162975-16992), and jurors were reduced to referring to each other with mild obscenities (RT 16370-16374), being told that there was no end in sight would naturally put pressure on one to give way to eleven. After months of service, after giving the best effort possible, the jury said that they could not reach a verdict. To have an open ended "until I am convinced" created an impermissible pressure on the jury to get it over with. If eleven people would not budge, the last angry man must surrender.

Therefore, telling the jury that they would remain until the court was convinced there was no hope had to have had an inherently coercive effect on the jury.

Additionally, the court's frequent reminder that a juror would have to be replaced if a verdict was not reached by a specific point was an additional coercive factor in the totality of circumstances. The jury was told this on two occasions, once when No. 86 was excused and again when No. 113 had to leave. Each time the jury was informed in advance that they would have to continue deliberations if they did not reach a verdict by the time a substitution was required. Both times when the juror was replaced, the jury was told that it had supposed to start deliberations anew. This would create enormous pressure to try to resolve the case before the substitution, because failure to do so would prolong the jurors' ordeal.

This coercive influence may be the reason that on July 18, just one day before No. 113 was to be dismissed, the jury went from a split of 8-8-8 to 11-1 in a series of four votes. (RT 18690-18693.) Further, after being told that the change in votes was an indication that the case may be resolved, a form of implied encouragement for the movement that had occurred, it defies reason to believe that the 11 jurors who were there for the previous 8 or 9 days (the juror who replaced no. 86 was not there the whole time) could wipe the slate clean and start deliberations anew.

In summary, the instructions given to the jury to keep deliberating after they had twice stated that they were hopelessly deadlocked, after the court asked and had been told the numerical split and praised the progress made from a six/six split to 11/1, must be considered coercive in light of the fact that the minority juror was never advised as to the importance of not sacrificing his or her truly held convictions.

C. The Improper Substitution of an Alternate Juror 13 Days into Deliberations Contributed to the Coercive Verdict in Violation of Due Process and the Right to a Jury Trial.

While California generally allows for the substitution of jurors at this stage in the proceeding, it must be recognized that the role of a substituted alternate juror is problematic after deliberations begin. Indeed, the recognition that all jurors must equally participate in rendering the verdict is the reason that several jurisdictions do not permit substitution of alternates after the jury has retired to deliberate.[72]

Under the circumstances of this case, it was error to substitute a juror after nine days of deliberation, when the jury had already reached a verdict as to one defendant and could not possibly start deliberations anew. The court should have declared a mistrial rather than undergo the substitution or keep No. 113.

The defense objected to substituting a juror when the jury had declared that it was deadlocked. (RT 18721.)

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[72] See *People v. Ryan* (New York, 1966) 19 N.Y.2d 100, 278 N.Y.S.2d 199, 224 N.E.2d 710; *Woods v. Commonwealth* (Kentucky, 1941) 287 Ky. 312, 152 S.W.2d 997, 998-999; *People v. Burnette* (Colo.,1989) 775 P.2d 583, 588; *Claudio v. State* (Deleware, 1991) 585 A.2d 1278, 1285; *State v. Bobo* (Tenn.Crim.App 1989) 1989 WL 134712, 13.)

The federal rules also prohibit the substitution of jurors after deliberations had begun although several federal cases had found harmless error when the federal rule was violated. (*United States v. Phillips* (5th Cir. 1981) 664 F.2d 971, cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); accord, *United States v. Kopituk* (11th Cir.1982) 690 F.2d 1289.)

1. The Law Regarding Substitution of Jurors During Deliberations

In *People v. Collins*, *supra*, 17 Cal.3d 687 this Court held that the substitution of an alternate juror, rather than declaring a mistrial, does not offended the double jeopardy rule of the state or federal Constitution, "when good cause has been shown and the jury has been instructed to begin deliberations anew." (*Id.* at p. 691.) However, the court recognized that while such a substitution is desirable in the interests of judicial efficiency, substitution *could* impinge upon a defendant's right to jury trial, therefore it was necessary to examine the nature of that right. (*Id.* at p. 692.)

While the right to trial by jury it may not be abridged by legislation, the Legislature may establish reasonable conditions and regulations so long as the essential elements of the right are preserved. (*Ibid.*) Included in these elements is the requirement that:

> "each juror to have engaged in all of the jury's deliberations.... The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11." (*Id.* at p. 693.)

As a part of this right, this Court recognized the importance of each juror having "the opportunity to review the evidence in light of the perception and memory of each member." Therefore, it was recognized that this balance is upset when one juror enters the process after eleven others have been deliberating. (*Ibid.*)

As a result, Collins held that when an alternate juror is substituted into the jury, the court must instruct the jury to disregard all past deliberations and begin deliberating anew. (*Id.* at p. 694.)

Collins stated that because this requirement was grounded in the state constitution rather the federal constitution, the error is tested by the standard *People*

v. Watson, supra, 46 Cal.2d at p. 836, which holds an error is reversible only if it is probable that the defendant would have achieved a better result but for the error. (*Collins, supra*, at p. 697, fn. 5.)

Collins held that the error was not reversible in that case because of the strength of the evidence of guilt. (*Ibid.*, see also *People v. Odle* (1988) 45 Cal.3d 386, 406 error not reversible due to overwhelming evidence of guilt.)

While *Collins* found the error to be harmless, subsequent cases have found prejudice under the facts of the particular case when the court fails to inform the jury of their obligation to begin deliberations anew. For example, *People v. Martinez* (1984) 159 Cal.App.3d 661, 666 found the failure to properly admonish the jury to begin deliberations anew was reversible in what the court characterized as a close case, even though the jury deliberated a short time before substitution and six days thereafter. In that case the court found that the previous deliberations were sufficient to formulate a conclusion influenced by the views of the discharged juror, and may have done so without the admonition.

Likewise, in *People v. Renteria, supra*, 93 Cal.App.4th 552 during jury deliberations, an alternate juror was substituted in for a juror who had become ill. The Court of Appeal held that the trial court erred in failing to instruct the newly constituted jury that it was required to disregard its previous deliberations and begin new deliberations. Although Penal Code section 1089, defining the role alternate jurors, does not specifically provide for such an instruction, that admonition is constitutionally required under California Constitution Article I, section 16.

In *Renteria* the jury had deliberated some hours before the substitution was made, but reached a verdict some 30 minutes after the substitution. (*Id.*, at p. 560.) The jury had declared that it was deadlocked shortly before the ill juror was discharged for being unable to serve anymore. The case depended on identification and the defendant could have been one of several people present. There were problems with the identification, including a recanting witness, a short opportunity to observe the perpetrator at night, with some discrepancies in the identification.

Taking these circumstances into account, including the very short time that elapsed between substitution of the alternate and the verdict, the *Renteria* Court stated that it could not find the error was harmless, and therefore reversed the conviction. (*Id.*, at p. 561.)

2. Instructing the Jury to Begin Deliberations Anew was not a Viable Option Under the Facts of this Case.

Under the facts of case, even with the instruction to begin deliberations anew, the substitution of the juror at the 11th hour deprived appellant of his right to a jury of twelve persons. This is apparent for several reasons.

First, in this case the jurors' views had already been shaped by each other. Five jurors had changed their votes from life to death by this time. The excused jurors views had also been aired. No. 113 was one of the 11 in the 11 to 1 split. (RT 18731.) From No. 113's comments when he requested to be excused early (*ante*, at p. 303), it does not appear that No. 113 was shy in letting his view be known. Presumably he had input in the prior discussions, and made voiced his opinions. Considering the strength of his views, as shown when he addressed the jury in his request to be excused, No. 113 was clearly forceful in expressing his opinion. While he was on the jury, a verdict was reached as to Wheeler and the deliberations on appellant progressed from a six-six split to 11-1.

Furthermore, this case presents a unique situation in that the eleven original jurors, along with the juror who had to be replaced, had already reached a verdict of death for Wheeler. In capital cases, the actual death verdict is a highly "moral and . . . not factual" determination. (*People v. Brown* (2004) 33 Cal.4th 382, 400; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) The relative culpability of the defendants may be a factor in deciding who gets death and who lives.

On the other hand, once a jury determines that the first defendant should receive the death penalty, an informal "proportionality" mentality may impose it-

self on the jurors in a subtle manner, so that the jury feels inclined, if not compelled, to treat all participants in a similar manner. The jury may well adopt attitudes approaching the view of "birds of a feather" and "in for a penny." This would encourage the jurors to achieve an equality among participants, namely, since Wheeler got death, so should Smith.

Thus, it was likely that a momentum for the death penalty had evolved, a momentum in which the new juror has not played a part. Under the best of circumstances, the new juror would have a hard time resisting the tide. Inherent in the determination to impose the death penalty on Wheeler, a determination into which the new juror had no input, was the fact that some of the aggravating factors involved in this case would have been resolved by the jury at the time that the verdict for Wheeler was decided. Factors in aggravation relating to the circumstances of the offense, the enormity of the crime, and/or the impact of the organization on the community would have been determined as to Wheeler, as part of the instructions in CALJIC Nos. 8.85 and 8.88. (CT 15820-15821, 15846-15847; RT 18426-18428, 18444.) These were also factors argued by the prosecution in urging the jury to return a verdict of death. The jury appears to have reached a consensus on those aspects of aggravation.

This is similar to the situation in *People v. Aikens* (1988) 207 Cal.App.3d 209 where a juror had to be replaced after verdicts on one count had been reached. While the majority affirmed the conviction for the counts decided after the substitution, the dissent argued that where the facts the jury necessarily found in reaching a verdict on one count are essentially the same facts the jury must find on the remaining count, it is error to substitute a new juror after a verdict on the first count. (*Aikens*, *supra*, 207 Cal.App. at p. 215 (dis. opn. of Johnson, J.).)

The *Aikens* dissent stated that the issue of whether it is proper in a criminal case to substitute a juror after a verdict on one count has been returned and allow the reconstituted jury to reach a verdict on the remaining counts was one of first impression in California and noted:

"The closest case on point is *People v. Fields* (1983) 35 Cal.3d 329 in which the court, in dictum, recognized the constitutional problem that would arise if an alternate joins the jury after it has reached a verdict. The defendant, in *Fields*, claimed excluding persons who would automatically vote against the death penalty from the guilt phase of his murder trial denied those persons equal protection of the law. The court rejected the equal protection claim on the ground the interest of the state in maintaining a unitary jury for both phases of the trial is sufficient to justify the exclusion of death penalty foes from the guilt phase. (*Id.* at pp. 352-353.) In explaining why the state had a legitimate interest in maintaining a unitary jury, the court pointed out a new constitutional problem would arise if jurors opposed to the death penalty were allowed to serve during the guilt phase and then replaced by alternates at the commencement of the penalty phase.

"'We held in *People v. Collins* ... that if necessary an alternate juror could join the jury after deliberations had begun, but that the jury must be instructed to disregard all past deliberations and begin anew. The proposal before us, however, envisions an alternate joining the jury after it had deliberated on the issues of guilt and special circumstances and reached a verdict. He would be joining a group which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty. The resulting deliberations between old members who have already considered the evidence and may have arrived at tentative conclusions on some aspects of the case, and new members ignorant of those discussions and conclusions, would depart from the requirement that jurors 'reach their consensus through deliberations which are the common experience of all of them.'" (35 Cal.3d at p. 351, citations omitted.) (*Aikens*, *supra*, 207 Cal.App. at p. 216-217.)

Similar problems are present in this case. The callousness of the plan to lure Armstrong to his death, the level of violence involved in the killings, the manner in which the Bryant organization had acted in the past with impunity, and other factors in aggravation may have played a part in deciding to sentence Wheeler to death.

The court specifically told the jurors he would accept whatever verdicts they had rendered so there was no question of their truly deliberating anew. Obvi-

ously those prior deliberations could not be set aside and would have to color deliberations on Smith.

With 11 people having voted to execute one person based on those facts, they would be hard pressed to truly begin deliberations anew on those very issues with a Johnnie-come-lately, purporting to be an equal partner.

Nevertheless, as to appellant, the 11 jurors should have had to reconsider those issues again.

It is into this culture that the new juror, the new kid on the block, joins the discussion after everyone else has been deliberating from July 7th to July 19th. (RT 18599.) Even during the time that the jurors were not deliberating, they must have spent some time thinking about the arguments that others had made. Arguments and positions the new juror would never hear.

The new kid enters an old debate. Twice the jurors had believed they were deadlocked, with tempers worked up and patience thin. He joins as work hours are increased, with the group being told that respites would be rarer, and the end would maybe be sometime in the future.

Additionally, as noted above (*ante*, at p. 24.), each time a juror was replaced, the remaining jurors were told that they would have to put everything aside and start deliberations again. After all the months spent on the case and the days of deliberation, it defies reason to believe that the jury could have followed this instruction. Indeed, to do so would have required the jurors to go back to their 6-6 split, reflecting their original positions at the first vote in deliberations.

Thus, it is not feasible for the jury to return to square one and pretend none of this "progress" or "movement" has happened.

Further, after being told that the change in votes was an indication that the case may be resolved, a form of implied encouragement for the movement that had occurred, it is not likely that the 11 jurors who were there for the previous 8 or 9 days (the juror who replaced no. 86 was not there the whole time) could wipe the slate clean and start deliberations anew.

In such a situation, the newly-admitted alternate was under profound pressure to go along with the majority, the side praised by the judge as having made progress.

As discussed above (*ante*, at p. 140), it has been recognized that jury instructions are not panaceas, and there are some situations where the presumption that jurors will follow instructions is a naïve assumption. While the judge did give the jury instructions to begin deliberations again, under the facts of this case, it is clear that such a course is not realistically practicable.

Finally, it is important to note that appellant is not suggesting a per se rule that would prohibit substitution of jurors after either guilty verdicts have been reached or even after partial penalty verdicts have been returned. However, under the facts of this case, where there had twice been a declaration of deadlock, after half a year of trial and a long period of deliberations, with an acrimonious, frustrated jury, being forced to continue deliberations under increased hours, appellant submits that it was simply not practicable for the new juror to function as an equal. Nor was it practicable to expect the jury to begin deliberations anew.

Therefore, it was error to substitute the alternate juror at that stage, in those circumstances.

D. Prejudice

The protection of holdout jurors is from coercion is a fundamental part of our system of law. Thus, "[i]f a trial judge inquires into the numerical division of the jury and then gives an *Allen* charge, the charge is per se coercive and requires reversal." (*United States v. Ajiboye* (9th. 1992) 961 F.2d 892, 893-94; *Sanders v. Lamarque* (9th. 2004) 357 F.3d 943, 944.)

Because this error involved the denial of the federal constitutional rights to due process and a jury trial, that the proper standard for judging prejudice is *Chapman v. California*, *supra*, 386 U.S. 18, which holds that for a denial of a fed-

eral constitutional right, reversal is required unless the state can prove the error was harmless beyond a reasonable doubt. The errors in this case were not harmless.

In *Gainer* this Court explained the impossibility of assessing the prejudice caused by an *Allen*-type instruction. The Court noted that both the traditional secrecy of deliberations and "the inherent difficulties of estimating the impact of only one factor injected into the subjective processes of each juror." (*Gainer*, at p. 871.) Furthermore, the *Allen* charge comes at a time when the jury has assessed the evidence and is unable to agree as to whether the case has been proven. The charge represents an "attack on dissenters [which] does more than simply present another isolable factor for the jury's consideration--it distorts the very process by which all the evidence is weighed." This comes at a crucial stage when the jury is seeking the court's guidance after all the argument and evidence have failed to produce a verdict. (*Id.*, at p. 872.)

Likewise, in discussing prejudice, the *Barraza* court explained:

> "The mini-*Allen* instruction erroneously given herein was the central feature of instructions given to a deadlocked jury and thus involves the heightened potential for prejudice we recognized in *Gainer*. Indeed, the judge himself voiced the expectation that the 'blockbuster-type instruction' would 'get them off the dime.' *We must therefore find the error prejudicial unless there are affirmative indications that persuade us this heightened potential was not realized.*" (*Barraza.*, at p. 682 italics added.)

As noted above, this was an incredibly close case, even assuming that there were no errors of any kind, unlike the situation in *Aikens*, where the court noted the strength of the case and its lack of complexity. (*Aikens.*, at pp. 212-213.) Of course, even if no error by itself or in combination with other was prejudicial, trials being human affairs, and it would be impossible to conduct a six-month trial of this complexity without error. Given the weakness of this case alone, the possible pushing the jury over the edge when the case was teetering on a hung jury, it becomes impossible to rebut any presumption of prejudice.

Furthermore, because this is a capital case, there is a heightened scrutiny for potential errors in the oversight of the deliberative process of the jury. "Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." (See *Zant v. Stephens*, *supra*, 462 U.S. 862, 885 .)

Additionally, as discussed above (*ante*, at p. 326), the problems recognized in *People v. Fields*, *supra*, 35 Cal.3d 329 by a situation where the alternate joins the jury after it had deliberated on the issues of guilt come into play. However, in this case, those considerations are even more problematic becuase the juror is not only joining the group that has decided on guilt, but has also rendered death verdicts.

A defendant has a constitutional right to a unanimous verdict. (*See United States v. Ullah* (9th Cir.1992) 976 F.2d 509, 513 n. 13; *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1085.) This includes the right to a jury of 12 members participating in deliberations. (*Parker v. Gladden*, *supra*, 385 U. S. 363, 366.)

To substitute jurors when it is not realistic for the twelfth juror to participate as an equal partner deprived appellant of the constitutional right to a jury trial.

In summary, under the facts of this case it must be concluded that the actions of the trial court were coercive and that the substitution of the juror was error under the combined and unique facts of this case, including the following factors: The substitution of one juror after a death verdict had been reached as to Wheeler, clearly implying that some aggravating factors had been found to be true; The court having impliedly praised the jury for shifting from a six-six split to having twice announced it was deadlocked at 11-1; The inquiry into the division of the jury; The coercive nature of the court's actions in lengthening deliberations and telling the jury that they would remain as long as the court thought it was possible a verdict could be reached; The court refusing an instruction telling the jurors not

to surrender their beliefs in order to reach a verdict. These facts rendered it impossible that the jury would return to the jury room and begin deliberations anew, with the new juror having an equal voice in the deliberation and decision.

In summary, under the totality of the circumstances, the instructions given to the jury to continue deliberations must be regarded as coercive. Therefore, the death verdict imposed below must be reversed.

XVII

THE TRIAL COURT ERRED IN RULING ON THE AUTOMATIC MOTION UNDER SECTION 190.4 TO MODIFY THE SENTENCE

The trial court erred in ruling on the automatic motion under section 190.4 to modify the sentence.

Under Section 190.4, subdivision (e), a defendant sentenced to death is deemed to have automatically applied for a sentence modification. In ruling on such a motion a court is required "to independently reweigh the evidence of aggravating and mitigating circumstances and then determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict." (*People v. Ochoa* (2001) 26 Cal.4th 398, 459; *People v. Burgener* (2003) 29 Cal.4th 833, 891; *People v. Lang* (1989) 49 Cal.3d 991, 1045.)

People v. Crew (1991) 1 Cal.App.4th 1591 held that it was reversible error for the trial court to grant the defendant's motion to modify a death verdict based upon the consideration of evidence that was not before the jury in the case, and therefore should not have been considered by the trial court in the ruling on the motion. From *Crew* it may be extrapolated that in ruling on this type of motion the trail court must also be guided by evidence that is actually in the record.

In this case, the trial court committed two types of errors – the consideration of facts not supported by the evidence and the cursory dismissal of legitimate factors in mitigation, which were supported by the record. The first situation is similar to that in *People v. Crew*, *supra*. The second error represents the converse situation, which logically should have the same effect in terms of error and prejudice. As a result, the ruling reached by the court is an abuse of discretion.

In relevant part, at the hearing on this motion the trial court referred to the following factors in aggravation, among others: Appellant's long standing membership in the organization, the brutal murder of Loretha and Chemise, the bur-

glary where Lubel was injured, and the jail house offenses involving shanks. (RT 18816-18818.)

In contrast, the trial court stated that it did not "buy" the mitigation presented because it was standard in death penalty cases. (RT 18818.)

The aggravating circumstances on which the trial court relied were not, in fact, supported by the record. First, appellant's role in the Bryant organization seems to be rather limited.

As noted previously, there was a failure in the evidence connecting appellant to the Curry shooting. As explained, the trial court believed that the logical underpinning of that evidence would be the fact that Bryant was angry at Curry, but the evidence used to prove this fact was not admissible against appellant. (See Argument IV-C.)

As a result, the only evidence tying appellant to the Curry shooting, and thus the only evidence establishing appellant's "long-standing" membership in the organization was without its logical underpinnings and therefore should not have been considered.

Similarly, if the evidence showing appellant was a long term member of the organization was the cocaine in his presence when he was arrested, again, the necessary foundation for that evidence was never established, namely that the cocaine was cocaine from the Bryant family. (See Argument IV-C-3.)

This leaves the uncorroborated evidence of Williams, the accomplice, that appellant came by the house to pick up money on a couple of occasions. Appellant submits that this hardly qualifies as establishing the fact that he was a long-standing member of the organization.

What is more impressive is the *lack* of evidence tying appellant to the family prior to this occasion: There are no references to appellant in the 1985 arrests involving the Bryant family. Indeed, the fact that appellant's name does not appear on the ninety-minute schedule, or any other of the family documents, tends to

indicate that appellant's involvement in the organization was not as widespread as others.

Appellant's liability for the murders of Loretha and Chemise was vicarious, and that crime appears to have been committed impulsively rather than as part of a plan. While legally guilty of those offenses, according to the jury's verdict, appellant's personal culpability for the murders of Lorethan and Chemise is less than that of the actual shooter.

Likewise, appellant's culpability for the Lubel/Cohen burglary is somewhat mitigated by the fact that appellant was surprised while burglarizing what had been an unoccupied dwelling. When the owner arrived, she was apparently injured when appellant pushed her out of the way in his effort to escape as quickly as possible. No weapon was used, and it appears that appellant did not seek out a physical confrontation. Rather, he used a minimum of force to effect an escape.

Similarly, the possession of shanks in jail, while a serious offense, was not tied to any incident where appellant was known to have used such a weapon. Although appellant was involved in the melee in which another inmate, Holiday, was stabbed with a shank, there was no evidence that he was the person who actually shanked Holiday. (RT 17443-17448.)

This case was therefore not among the most aggravated of murder cases.

The trial judge also violated the Eighth Amendment by rejecting appellant's mitigating evidence out of hand, on the ground that he did not "buy" the evidence because such evidence was "standard" in capital cases.

The trial judge did not say he found the defense witnesses incredible or that the evidence was insufficient to establish that a mitigating circumstance existed. Instead, he simply deemed an entire category of evidence unworthy of consideration because, in his opinion, such evidence was commonly presented in capital cases.

The trial judge's refusal to consider appellant's mitigating evidence was a patent violation of the Eighth Amendment. The modern death penalty is premised

on "the principle that punishment should be directly related to the personal culpability of the criminal defendant." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (*Penry* I).) If the immorality of the crime itself were dispositive, a mandatory death penalty would be permissible. Instead, the Supreme Court has held that

> "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Id.* at 316, quoting *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304); *accord Sumner v. Shuman* (1987) 483 U.S. 66; *Roberts v. Louisiana* (1976) 428 U.S. 325.)

Mitigating evidence about a defendant's abusive childhood or mental impairments is not admitted at sentencing merely to invoke an emotional response from the jury but rather because our system of jurisprudence has long recognized "that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Penry,* 492 U.S. at 319, 327-28 (quoting *California v. Brown* (1987) 479 U.S. 538, 545 (O'Connor, J., concurring).) Consideration of mitigating evidence is essential if the sentencer is to render a reasoned and informed decision and to "ensure reliability in the determination that death is the appropriate punishment in a specific case." (*Penry*, *supra*, 492 U.S. at 327-28, internal citations and quotations omitted.)

The United States Supreme Court recently chastised the Fifth Circuit Court of Appeals for putting "its own restrictive gloss on *Penry I*." (*Tennard v. Dretke* (2004) ___U.S.___, 124 S.Ct. 2562, 2569.) The Fifth Circuit had adopted its own standard of "constitutional relevance" for mitigating evidence, requiring a defendant to show "(1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition.'" Unless this standard was met, the

Fifth Circuit would not find the exclusion of or failure to consider mitigating evidence to be constitutional error.

Holding that the Fifth Circuit standard "has no foundation in the decisions of this Court," the Supreme Court reaffirmed that constitutionally relevant mitigating evidence includes any evidence that has a "tendency to mitigate the defendant's culpability . . . [T]o say that only those features and circumstances that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have such a tendency is incorrect." (*Ibid.*)

The trial judge in this case did precisely what the Supreme Court forbade in *Tennard*. He refused to consider ***any*** of the evidence of appellant's low intelligence or neurological impairments or the evidence of the severe abuse he experienced in childhood because he thought such evidence was "standard" in capital cases – in other words appellant's mitigating evidence was not unique enough or severe enough to be constitutionally relevant. This is contrary to the correct constitutional standard that does not require that the evidence be unique.

Evidence of mental impairment and childhood abuse is, however, at the very core of the Eighth Amendment. (See *Wiggins v. Smith* (2003) 539 U.S. 510; *Penry v. Lynaugh*, *supra*, 492 U.S. 302, 319, 327-28; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-99; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *and Lockett v. Ohio*, *supra*, 438 U.S. 586).

Indeed, in *Lucas* this Court recently reaffirmed that evidence of childhood abuse is powerful mitigating evidence that can properly justify a life sentence. (*In re Lucas* (2004) 16 Cal.Rptr 331, 369-70.)

The trial court's refusal to consider the relevant mitigating evidence appellant presented below prevented him from conducting the review required by Penal Code section 190.4(e) and violated the Eighth and Fourteenth Amendments to the U.S. Constitution. At a minimum, appellant's death sentence must be reversed and remanded to the trial court to allow the court to properly rule on the automatic motion to modify the verdict.

XVIII

THE PROSECUTOR IMPROPERLY DISPARAGED THE MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

In addition to the forms of prosecutorial misconduct discussed above (*ante*, Argument VII), The prosecutor committed another form of misconduct when he referred to the testimony of Dr. Hoagland, the psychologist who testified for the defense in the penalty phase as a "convoluted cockamamie bunch of psycho babble."[73] Appellant's objection was overruled. (RT 18847.)

The prosecutor first set the stage by diminishing the significance of non-statutory mitigation as amounting to nothing more than sympathy:

> "The K factor[74].
>
> "Essentially what happens in a capital case when there is no excuse, no mental disease, no victim participating in the homicidal conduct, no moral justification, no extreme duress is you run into the K factor.
>
> "And I submit to you that basically what that is, and what you will see from each of the boards as we go through them and what I believe the evidence is, is you have been provided in mitigation nothing but the K factor. There is no D, E, F, G, H, I OR J.
>
> "It's all a bunch of zeros.
>
> "So what has been presented is something by way of any other circumstance which extenuates gravity of the crime or any sympathetic or other aspect of defendant's character or record that defendant offers as a basis for a sentence less than death.
>
> "What that is is sympathy." (RT 18470A)

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[73] Dr. Hoagland testified as to appellant's neurocognitive deficits, subnormal intelligence, deficits in his cognitive functions, possible delusions or hallucinations dyslexic, and other impairments which appellant has. (RT 18148-18150.)

[74] In considering the penalty to be imposed, Section 190.3, subdivision (K) allows the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Later, he returned to this theme again, arguing that the mental health evidence in this case was not geared toward impliedly real, statutory mitigation of "mental disease or defect" but only the catch-all factor K. Moreover, the Deputy District Attorney suggested, the defense had used psychologists, rather than psychiatrists "for a reason. Because they can take any set of circumstances, construe it in any fashion that they see fit and then explain away or extenuate conduct even when there is no explanation." (RT 18482)

The prosecution then focused specifically on appellant's expert, Dr. Hoagland:

> "In terms of mitigation, Dr. Hoagland is not interested in providing you anything but deception and misleading testimony. Let's look at his first and third grade records and come up with some excuse and not talk to anybody that has known of him or knows him since third grade. *And let's come up with some convoluted cockamamie theory that is a bunch of psycho babble* as to why Donald Smith committed these acts and don't ask him about that." (RT 18487, italics added.)

Defense counsel's objection was overruled, and the Deputy District Attorney immediately resumed disparaging the mitigating evidence:

> "What you recall Dr. Hoagland said specifically and the stipulation that you received was this evidence was being offered for K factor only. And you can understand why that is significant because it's not being offered for the D factor. It's not being offered for the H factor.
>
> "*Those mitigating factors might have some importance* because if one of these defendants was mentally unstable or he was not culpable or responsible for his conduct, if he was mentally retarded, seriously mentally retarded or had some mental impairment that caused his judgment to be screwed up on a daily basis, not because of moral values but *because of some severe legitimate problem*, you would want to know that." (RT 14887-14888, italics added.)

Such disparagement of defense witnesses is improper. (*Fredrick v. United States* (9th. Cir. 1947) 163 F.2d 536, 548; *State v. Brown* (Idaho App. 1998) 951 P.2d 1288, 1296.) By improperly denigrating constitutionally relevant and miti-

gating evidence the prosecution undermined the reliability of the penalty determination in violation of the Eighth and Fourteenth Amendments to the federal Constitution.

In *Gall v. Parker*, *supra*, 231 F.3d 265, 314, it was explained that courts "frown upon prosecutorial tactics that, in an effort to rebut a defendant's evidentiary showing of insanity, simply make 'know-nothing appeals to ignorance' rather than present testimony countering the defendant's showing in an evidentiary rigorous way." (*Id.*, at p. 314, quoting *United States v. Brawner* (D.C.Cir.1972) 471 F.2d 969, 1004 which criticized as improper prosecutorial comments disparaging an expert witness's tests showing mental disease as "just blots of ink.").

Likewise, it has been held that it is prosecutorial misconduct for a prosecutor to denigrate the defense as a sham. (*United States v. Sanchez* (9th Cir.1999) 176 F.3d 1214, 1224; *United States v. Hermanek* (9th Cir.1999) 289 F.3d 1076, 1098.)

Rather than make fun of the opinion of the defense expert, the prosecution should have rebutted this testimony with its own experts. The use of pejorative rhetoric is not conducive to the reasoned deliberations required in a case of this magnitude.

Additionally, as noted above (*ante*, at p. 335), the Eighth Amendment mandates a consideration of the character the individual defendant. (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 316.)

Consideration of mitigating evidence is essential if the sentencer is to render a reasoned and informed decision and to "ensure reliability in the determination that death is the appropriate punishment in a specific case." (*Penry*, 492 U.S. at 327-328, internal citations and quotations omitted.)

The disparagement of mitigating evidence by labeling it in derogatory terms has the same effect as the additional requirements placed on mitigating evidence that were disapproved of in *Tennard v. Dretke*, *supra*, ___U.S.___, 124 S.Ct. 2562. (*ante*, at p. 335.) Similarly, by disparaging expert psychological tes-

timony as mere "psycho babble" that was offered "only" under factor K" and did not amount to a "severe legitimate problem," cognizable under factor D or H, the prosecution's denigration of the mitigating evidence violated appellant's Eighth and Fourteenth Amendment right to have the jury consider and give effect to mitigating evidence.

Under *Hitchcock v. Dugger*, *supra*, 481 U.S. 393 it is not proper to limit mitigating evidence to statutorily enumerated factors; when a prosecutor disparages the catch-all category it amounts to an end-run around *Hitchcock*. It is also contrary to this Court's position that the existence of restrictive modifiers in the statutory mitigating circumstances does not impermissibly limit the consideration of mitigating evidence because "we have often observed that the catch-all language of section 190.3, factor (k), calls the sentencer's attention to '[a]ny other circumstance which extenuates the gravity of the crime,' and therefore allows consideration of any mental or emotional condition, even if it is not 'extreme.'" (*People v. Arias* (1996) 13 Cal.4th 92, 189.) The arguments here suggested that Factor (K) evidence did not meet the higher standard and was therefore not worthy of consideration. This is directly contrary to the teachings of *Tennard* which hold that a higher standard is not required of "severe" or "extreme" is not required. Indeed, this is one of the values of the catch-all subdivision of Factor K.

Therefore, appellant submits that the comments regarding Dr. Hoagland were disparaging to the defense, a form of prosecutorial misconduct.

A prosecutor's bad faith misstatement of the law is also misconduct. (*Ante*, at p. 231.) In this case, by misstating the relevance of factor K evidence, the prosecution was misstating the correct law regarding the mitigating factors which the jury was allowed to consider in determining whether to put appellant to death. As previously explained (*ante*, at p. 221), a prosecutor's improper arguments may violate due process.

By denigrating this crucial aspect of the penalty defense and the mitigating evidence presented by the defense, the prosecution also violated appellant's right

to an individualized sentencing determination in violation of the Eighth and Fourteenth Amendments. (*Ante*, at p. 149.)

Furthermore, by directing the jury's attention away from constitutionally relevant evidence, this error prevented the jury from considering evidence which it rightly should have considered, thereby violating the Eighth Amendment requirement of heightened reliability in capital cases. (*Ante*, at p. 51),

Because this error deprived appellant of federal constitutional rights, the error is subject to review under the standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24, and reversal is required unless the prosecution can show the error to have been harmless beyond a reasonable doubt.

This was a very close penalty case, as well as a close guilt phase. Indeed, the jury announced twice that it was deadlocked. (*Ante*, Argument XVI.) Likewise, appellant was the least culpable of the three defendants, as shown by the fact that he was convicted of less serious offenses, namely two counts of second degree murder.

In such a situation it is likely that any errors would have an impact on the ultimate decision reached by the jury. Because it cannot be shown that these comments would have not impact of such a close case, the comments of the prosecution must be regarded as prejudicial.

Therefore, the death penalty imposed below must be reversed.

XIX

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUEST FOR AN INSTRUCTION ON LINGERING DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A RELIABLE SENTENCING DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The trial court erred in refusing appellant's request for an instruction on lingering doubt. This error deprived appellant of the rights to due process of law and a reliable jury determination of the case, in violation of Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. The Requested Instruction

Counsel for Bryant submitted a "lingering doubt" instruction that would have told the jurors that an adjudication of guilt was not infallible, and in determining the penalty the jury could consider the possibility of evidence being discovered in the future. (CT 15650.)

An alternate lingering doubt instruction was submitted that would have informed the jury that although a lingering or residual doubt may have been insufficient to raise a reasonable doubt at trial, it could be considered as a mitigating factor at the penalty stage, and the jurors could consider that fact. (CT 15651.)

When the matter was first discussed, the court stated no case had ever held such an instruction was required or suggested it was appropriate. (RT 17970.)

Joining in the request, counsel for appellant argued that unless some type of instruction was given, the jury would not "have a hint" that it could consider this principle, and that counsel would have a hard time arguing a factor to the jury if the jury had not been instructed on that factor. (RT 17971.)

Later, the defense again requested that the trial court instruct the jury on the concept of "lingering doubt" as a factor the jury could consider among the other factors listed in CALJIC No. 8.80. (RT 18298.) The defense explained that it was an appropriate factor to argue, "But the problem is giving it any weight. How do they know it is appropriate for them to consider." (RT 18298.)

The request was denied on the ground that the court believed that lingering doubt was a concept that could be argued by counsel, but no cases had held that a trial court is under a duty to instruct on lingering doubt. Furthermore, the court believed that such an instruction would invite re-litigation of the guilt phase issues which had already been resolved, and which the court was not "big on." (RT 18299.)

Later, when the court and counsel discussed CALJIC No. 1.02 (Statements by Attorneys are not Evidence), the defense explained that this would vitiate the argument that the defense wanted to give regarding lingering doubt, as the jury would then be "in the posture" to disregard the lingering doubt arguments because no instruction on that concept had been given by the court. The court again declined to give the lingering doubt instruction. (RT 18347-18348, 18375-18376.)

B. The Relevant Law

A death sentence violates the Eighth Amendment if the jury is precluded from considering as a mitigating factor any circumstance that a capital defendant proffers as the basis for a sentence less than death. (See *Lockett v. Ohio*, *supra*, 438 U.S. at 604.)

Furthermore, the presentation of mitigating evidence without adequate instructions thereon does not satisfy the Eighth Amendment; the jury must be able to "give effect" to the mitigating evidence. (*Hitchcock v. Dugger*, *supra*, 481 U.S. 393; *Penry v. Johnson* (2002) 532 U.S. 782 (Penry II); *Tennard v. Dretke*, *supra*, 124 S.Ct. at p. 2564.)

The concept of "lingering" or "residual doubt" is considered to be "an extremely effective argument for defendants in capital cases." (*Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 722; *Lockhart v. McCree* (1986) 476 U.S. 162, 181.) As such, it has been recognized as "the most powerful 'mitigating fact'" that a capital defendant may have. (*Williams v. Woodford, supra*, 306 F.3d at p. 722, citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?,* 98 Colum. L. Rev. 1538, 1563 (1998) (footnote omitted) and William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases,* 15 Am. J. Crim. L. 1, 28 (1988)

In *People v. Morris* (1991) 53 Cal.3d 152, this Court characterized a version of a lingering doubt instruction given to the jury as a "straightforward instruction [which] allowed the jury to consider any remaining uncertainty as to defendant's guilt." In *Morris*, this Court stated that other instructions on lingering doubt were not needed. (*Id.*, at p. 219.)

Likewise, in *People v. Snow* (2003) 30 Cal.4th, 43, the trial court gave a requested instruction informing the jury "[a]lthough proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty." The court refused a portion of the requested instruction telling the jury that because an adjudication of guilt is not infallible it could "entertain" any lingering doubt it may have had on the question of guilt in determining the penalty. The court did, however, give an instruction stating that "[e]ach individual juror may consider as a mitigating factor residual or lingering doubt as to whether the defendant killed the victim. Lingering or residual doubt is defined as a state of mind between beyond a reasonable doubt and all possible doubt." (*Id.*, at p. 125.)

This Court held that the omitted section was not necessary, explaining that although the lingering doubt instruction in *Morris* was looked on "favorably," it was never required in every case, and the portion of the instruction as given was sufficient. (*Ibid.*) Likewise, in *People v. Slaughter* (2002) 27 Cal.4th 1187, this

Court held that the court did not err in failing to give a lingering doubt instruction, absent a request from the defense, stating that while it is proper for the jury to consider lingering doubt, there is no requirement that the court must instruct the jury that it may do so. (*Id.*, at p. 1219.)

In *People v. Kaurish* (1990) 52 Cal.3d 648 the trial court instructed on lingering doubt, but refused the additional instruction, "You have concluded that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt. You may still demand a greater degree of certainty of guilt for the imposition of the death penalty." (*Id.*, at p. 706.)

Although this Court stated that California law does not require the additional instruction the defendant proposed, it in no way disparaged the lingering doubt instruction that had been given. This Court noted that in *People v. Terry* (1964) 61 Cal.2d 137, 147 it was held that jurors may consider their doubts concerning defendant's guilt at the penalty phase of the trial. The lingering-doubt instruction given in Kaurish allowed the jury to consider such doubt as a mitigating factor. Therefore, no further instruction was necessary. (*Kaurish*, *supra*, at p. 706.)

Once a state establishes mandatory sentencing procedures, a criminal defendant has a liberty interest, protected by due process in the enforcement of those rights, and the state may not arbitrarily deny that state right to a particular defendant. (*Hewitt v. Helms* (1982) 459 U.S. 460; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343; *Dix v. County of Shasta* (9th Cir. 1992) 963 F.2d 1296, 1299.)

As is evident from the above-cited cases, in the past defendants have received variations of a lingering doubt instruction. Indeed, the issue in prior cases was not whether those defendants were entitled to the instruction, but whether the instruction was sufficient in the form in which it was given to those juries or whether the trial court must give such an instruction sua sponte. In this case, the jury received no instruction whatsoever that they were permitted to consider lingering doubt in mitigation, even though such an instruction was requested.

C. Application of the Law to the Case

In this case, it was imperative that the jury be instructed with the principle relating to lingering doubt.

Initially, it should be noted that the trial court was simply wrong when it stated that no case had ever suggested such an instruction was appropriate. (*Ante*, at p. 342.) As explained above, several cases have held that it is "appropriate." Rather, none have held it is "required." Appellant submits that there is a substantial difference between those two standards.

In fact, as shown above, many cases have spoken favorably about such an instruction. Likewise, the trial court was in error when it denied the request on the ground that arguments of counsel were sufficient. This overlooks the firmly established law that argument of counsel is often a weak second best and not sufficient to overcome a lack of instructions.

Thus, in *Carter v. Kentucky* (1981) 450 U.S. 288, 304, the United States Supreme Court held that "[A]rguments of counsel cannot substitute for instructions by the Court." (see also *People v. Mathews* (1994) 25 Cal.App.4th 89, 99 – "[I]nstruction by the trial court would weigh more than a thousand words from the most eloquent defense counsel."; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 586 Arabian, J., concurring and dissenting: "Counsel's argument was merely that -- argument -- unless and until a ratifying instruction from the trial court dignified it with the force of law.")

Consequently, the defense stated the problem perfectly when it explained to the court that allowing the defense to argue lingering doubt would be meaningless unless it was backed by instructions from the court. (RT 18298.)

Furthermore, although it may be true that courts have not held such an instruction is mandatory in every case, the numerous cases cited above have all recognized that such an instruction may be appropriate and desirable. Indeed, the litigation has focused on whether *further* explanation is required or whether the

duty to give the instruction is sua sponte. In this case, the question is whether such an instruction should be given on request.

Finally, the fact that the trial court was not "big on" inviting re-litigation missed the mark. Such an instruction does not invite "re-litigation." No old witness needed to be recalled. No new testimony on guilt need be presented. It simply focuses the jury's attention on the heightened degree of scrutiny that is appropriate for a capital case and tells the jury that the argument which counsel may present is an argument that is legally relevant.

This is little more than an instruction directing the jury to the defense theory of the case, which is often required by the law. (E.g. *People* v. *Wharton* (1991) 53 Cal.3d 552, 570.)

In this case, such an instruction is particularly important. As discussed above (*ante*, at pp. 75-79), the evidence against appellant was particularly weak. At its best: If Williams was not an accomplice, he was a suspect source, a confessed criminal with an admitted motive to downplay his role in these crimes and blame others. (*Ante*, at pp. 61-62.) As the court noted, there was no other evidence connecting appellant to the offense. (*Ante*, at p. 48.)

Even with the evidence in this case so weak, and the defense improperly ridiculed (*infra*, Argument XVII), the jury was only able to squeak out a verdict. As close as the case may have been at the guilt phase, at the penalty phase it was even closer, with the jury originally split six-six on the issue of punishment and then twice telling the court that it was deadlocked. Only after being improperly urged to engage in further efforts, in light of the movement that had been accomplished, was the jury able to reach an agreement. (*Ante*, Argument XVI.)

Although it involves some degree of speculation, it is impossible to say where the momentum would have led from the split of six-six if the first juror to change his or her mind switched from death to life in prison.

Likewise, had the six jurors in favor of life in prison been reinforced with the concept of lingering doubt, it is possible that one or more may have stayed the course for a life sentence.

In this case, no instruction was ever given regarding the concept of lingering doubt.

The United States Supreme Court held that there is no federal constitutional right to have lingering doubt considered as a mitigating factor which the jury must be allowed to consider. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 174.)

However, California has wisely allowed for a lingering doubt instruction. Such an instruction is important as a last bastion of defense against the wrongful imposition of a death sentence on people who are possibly innocent. To date, at least 117 death-sentenced individuals have been executed[75].

In light of the frequency of death penalty exonerations, it is respectively submitted that *Franklin v. Lynaugh* be reconsidered as a means of imposing a higher standard of proof for the imposition of the death penalty as a means of ensuring the greater indicia of reliability mandated by that penalty. (*Woodson v. North Carolina supra*, 428 U.S. 280, 305.)

D. Conclusion

The trial court erred in refusing appellant's request for an instruction on lingering doubt, depriving appellant of the rights to due process of law and a jury determination of the case, in violation of Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution.

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[75] "Innocence and the Death Penalty"
http://www.deathpenaltyinfo.org/article.php?did=412&scid=6

XX

THE TRIAL COURT'S ERROR IN PERMITTING THE INTRODUCTION OF NON-STATUTORY AGGRAVATION AT APPELLANT'S PENALTY PHASE DEPRIVED APPELLANT OF RIGHTS UNDER FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING SECTIONS OF THE CALIFORNIA CONSTITUTION

Under section 190.3, factor (b), the trial court permitted the introduction in prosecution's penalty phase case-in-chief of evidence of the fact that on two occasions the deputies found shanks in appellant's jail cell. Assuming arguendo that this Court finds the evidence was admissible, appellant submits that the trial court erred by affirmatively instructing the jury that appellant's acts constituted crimes involving violence, effectively depriving appellant of a jury determination on those questions.

A. The Possession of the Shanks is Not a Crime Involving the Use or Attempted Use of Force or Violence or the Express or Implied Threat to Use Force or Violence

During the penalty phase, the prosecution introduced evidence that on two occasions a shank was found in appellant's cell. On one occasion, the shank was made from a broken and sharpened CD, and on the other it was made from a melted plastic cup. (RT 17490-17495, 17527-17529.)

Penal Code section 190.3, factor (b) provides, in part, that, in determining the penalty in a capital case, "the trier of fact shall take into account . . ., if relevant, . . .[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

Although this Court has stated that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible as an implied threat of force or violence under factor (b) (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589),

it should reconsider its previous decisions or distinguish this case from situations that have involved actual threats or the possession of a weapon on a defendant's person.

The prosecution may not introduce aggravating evidence that is not relevant to the statutory factors listed in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) In particular, factor (b) allows the jury to consider only criminal activity that meets a requisite degree of force or violence. (*Id.*, at pp. 776-777 [nonviolent escape attempt not inherently dangerous, inadmissible without evidence that defendant used or threatened violence].) That a shank was found in appellant's cell does not rise to the level of an actual or implied threat of force or violence.

Indeed, nowhere else in the Penal Code is mere possession of a weapon, even possession of a weapon in prison, considered to be a crime of force or violence. For example, section 667.6 which defines "violent felony" does not list any weapon possession offenses as "violent."

It is a firmly established rule of statutory construction that "it must be presumed that the Legislature, in enacting a statute, is aware of existing related laws and intends to maintain a consistent body of rules." (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7.)

Thus, the use of similar language should be given similar meaning, and "violence," as an adjective describing various offenses, should be construed in a like manner under different offenses.

The use of this offense in this case as an aggravating factor is an overbroad application of factor (b). The broad reach of such an aggravating factor would "inject into the individualized sentencing determination the possibility of 'randomness'. . . ." (*People v. Bacigalupo* (1993) 6 Cal.4th at p. 477, [citations omitted].) It would also invite "'the jury to be influenced by a speculative or improper consideration'. . . . [citations]." (*Ibid.*) Indeed, a blanket rule permitting an aggravating factor to be found in any situation involving possession of any weapon while

in jail invites the jury to speculate improperly about situations where it might or might not be used.

In determining that possession of a weapon in jail may be admissible in some cases, this Court has generally decided cases where there have been actual threats or where the weapons have been carried around other prisoners or staff. For instance, in *People v. Harris* (1981) 28 Cal.3d 935, a guard overheard a conversation involving the defendant that referred to a knife. The defendant concealed the knife underneath a table top in a dayroom. The next day, the defendant loudly and repeatedly threatened another prisoner's life after sexually assaulting him. Officers eventually searched the defendant's cell and found a 17-inch wire garrote. (*Id.* at p. 946-947.) This Court found that possession of the knife and garrote constituted an implied threat of force or violence. (*Id.* at p. 963.) Indeed, the conversation about the knife, the defendant's possession of a weapon in a common dayroom area, and his assaults and threats against another prisoner clearly indicated that the weapons involved more than mere possession, but a pattern of violent conduct.

Since *Harris*, this Court has found that "knowing possession of a potentially dangerous weapon in custody is admissible under factor (b)." (*People v. Tuilaepa, supra*, 4 Cal.4th at p. 589.) However in *Tuilaepa*, the defendant actually had razor blades on his person, in addition to other weapons and gang-related items in his cell. (*Id.* at p. 580; see also *People v. Mason, supra,* 52 Cal.3d at pp. 956-957 [murder committed while in prison, defendant repeatedly found with weapons in cell and on person]; *People v. Lucky* (1988) 45 Cal.3d 259, 292 [possession of two shanks while sharing 4-person cell].) In each of these situations, the defendant was found with weapons after engaging in violent behavior or in situations involving direct contact with other prisoners or prison staff. That a shank was found hidden in appellant's cell does not rise to this level.

This Court has also found that concealed possession of a shank while in prison is admissible as an implied threat because the implement is a classic in-

strument of violence normally used for criminal purposes. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187.) Again, this may be true in situations where the weapon is concealed on a defendant's person or in direct proximity to other prisoners, since there is an "immediate atmosphere of danger." (*People v. Grubb* (1965) 63 Cal.2d 614, 621.) However, here there was no evidence that appellant ever concealed the weapon on his person or carried it in situations involving contact with other prisoners or prison staff. Accordingly, the trial court erred in admitting the evidence that a shank was found in appellant's cell as evidence in aggravation at the penalty phase of his capital trial.

B. The Instructions Erroneously Directed the Jury that Appellant's Acts Were Crimes Involving the Express or Implied Use of Force or Violence or the Threat of Force or Violence

Penal Code section 190.3, factor (b), allows a jury to consider as an aggravating factor any criminal activity that involves the "use or attempted use of force or violence or the express or implied threat to use force or violence." Assuming arguendo that the evidence relating to the shank was admissible under factor (b), the ultimate issue of whether the incident rose to the required level of force or violence is one for the jury to decide. Here, the trial court took the issue out of the juror's hands by erroneously instructing them that the evidence was either an express or implied use of force or violence or an actual threat of force or violence.

The jury was instructed with CALJIC 8.87 (1989 revision), that

> "Evidence has been introduced for the purpose of showing that the defendant Donald Smith had committed the following criminal acts:
>
> 4. Possession of weapon in County jail (melted plastic cup)
>
> ...
>
> 6. Possession of weapon in County jail (altered Compact disc...
>
> which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts as an aggravating circumstance in this

case, a juror must first be satisfied beyond a reasonable doubt that the defendant Donald Smith did in fact commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.

It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." (RT 18432-18433, CT 15830.)

This instruction improperly decided against appellant the issue of whether or not his actions constituted a crime of violence within section 190.3, factor (b) and deprived him of a jury determination of whether or not this evidence was properly to be considered as aggravation.

Even if this Court concludes that possession of a shank *may* be a crime of violence, this is different from concluding that it *is* a crime of violence, which is what the jury was told. While this court has held that possession of a shank *is admissible* as a factor b offense, it did so recognizing that there might be "innocent explanations" for such conduct. (*People v. Tuilaepa, supra*, 4 Cal.4th at p. 589.) Likewise, in *People* v. *Roberts* (1992) 2 Cal.4th 271, 332 this Court explained that there "may be doubt" about whether a prisoner possessing a weapon in his cell involved conduct rising to the level of an aggravating factor under subdivision (b).

However, this instruction eliminated any such innocent explanation or doubt from the jury's consideration, informing the jury that if it found the factual allegation true, *it was* a crime of violence. Such an instruction clearly deprived appellant of a jury determination as to the issue of whether factor (b) evidence existed for two of the six factors alleged.

Moreover, the trial court impermissibly increased the weight of the evidence by escalating the defined level of force from an implied threat to an actual threat or implied use of force or violence. Accordingly, it violated appellant's right to due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and

15) and compromised the reliability of the penalty verdict in violation of Eighth Amendment standards.

1. The Instruction Created a Mandatory Presumption

The prosecution must prove beyond a reasonable doubt criminal activity offered as aggravation under Penal Code section 190.3, factor (b). (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) Before this evidence is considered in aggravation, under the plain language of factor (b), the jury must also find that the acts involved force or violence. This is a question of fact rather than law: "[W]hether a particular instance of criminal activity 'involved ... the express or implied threat to use force or violence' (§ 190.3, subd. (b)) can only be determined by looking to the facts of the particular case." (*People v. Mason, supra,* 52 Cal.3d at p. 955.) Accordingly, the jury must determine both that a particular act occurred and that the act involved the requisite force or violence. (See *People v. Figueroa* (1986) 41 Cal.3d 714, 734 [factual determinations are for the jury to decide].)

Appellant had a due process right to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) Here, the instruction violated due process by creating a mandatory presumption that the evidence constituted an actual threat or implied use of force or violence. The second sentence of the instruction focused the jury on deciding whether appellant had committed criminal acts without requiring that they also find beyond a reasonable doubt that the criminal acts involved the use, or the threat, of force or violence. Rather, once the jury found the underlying fact to be true, they were to presume that it constituted an implied use or actual threat of force or violence and apply the aggravating factor against appellant. (See *Francis v. Franklin* (1985) 471 U.S.313, 314 ["mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts"]; *People v. Figueroa, supra*, 41 Cal.3d at p. 724

[instruction effectively directed verdict by removing other relevant considerations if the jury finds one fact to be true].) This foreclosed any independent consideration of the required elements of the aggravating factor. *(Carella v. California* (1989) 492 U.S. 263, 266.)

Therefore, the jury instruction precluded any defense to whether the alleged criminal acts involved a threat or implied use of force or violence. The instruction directed the jury to infer the implied use or the threat of force or violence once the criminal activity was proved. Accordingly, the instruction improperly removed the factual issue of appellant's actual or implied threat of force from the jury's consideration in violation of appellant's statutory and due process rights. (See *People v. Figueroa, supra*, 41 Cal.3d at pp. 725-726.)

2. The Instruction Improperly Escalated the Seriousness of the Incident by Defining the Incident as an Actual, Express Threat or Implied Use of Force or Violence

Even assuming that the factor (b) evidence was admissible as an implied threat of violence, the instruction erroneously told the jury that the evidence was an actual threat, or an implied use, of force or violence, which goes far beyond anything that this Court has sanctioned. The instruction mistakenly defined the criminal acts as involving the "implied use" of force or violence, rather than the "implied threat" of such use. (See Pen. Code, § 190.3, subd. (b), *People v. Tuilaepa, supra,* 4 Cal.4th at p. 589.) By failing to inform the jury about implied threats, the instruction improperly escalated the level of force or violence attached to the evidence of criminal activity presented by the prosecution.[76]

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[76] The instruction's reference to "implied use of force or violence" suggests an odd, if not impossible, occurrence. A person either uses force or violence, or he does not. The forceful or violent conduct either happens or does not happen. Threats can be implied, but actions cannot.

There is an enormous difference between an express or implied threat. An actual threat "must express an intention of being carried out." (*People v. Bolin* (1998) 18 Cal.4th 297, 339.) An implied threat is far less immediate, and far more capable of being rebutted. An implied threat is less dangerous than an express threat. Similarly, an implied threat of force or violence is less aggravating than the use of force or violence. A person may retreat or decide not to follow through on a threat; threats do not necessarily lead to violence.

The jury here was not given the option, provided in section 190.3, subdivision (b), of considering appellant's conduct as simply carrying an implied threat of the use of force or violence. Instead, the trial court's instruction required the jury to consider the alleged criminal acts to be actual threats, or implied use, of force or violence, making them far more serious than the evidence warranted. For example, the instruction increased the aggravating weight of the evidence by telling the jury that having a shank in his cell was an actual threat, or an implied use, of force or violence. The instruction misinformed the jury on the statutory requirements of section 190.3, subdivision (b), to appellant's detriment.

C. The Errors Require Reversal of the Death Judgment

The jury's consideration of non-statutory aggravation violated California law. (*People v. Boyd, supra,* 38 Cal.3d at p. 774.) Its use arbitrarily deprived appellant of his right to have his sentence determined without consideration of such evidence in violation of due process. *(Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Moreover, the jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens, supra,* 462 U.S. at p. 885) undermined the heightened need for reliability in the determination that death is the appropriate penalty. (*Johnson v. Mississippi, supra,* 486 U.S. at p. 585.) Accordingly, the resulting verdict violated appellant's due process rights and was unreliable in violation of Eighth Amendment standards.

(*Beck v. Alabama, supra,* 447 U.S. at p. 637 [8th Amendment requirements of reliability in a capital case].)

Further, the instruction directing the jury to consider it as aggravation was error under California law and violated appellant's right to a reliable penalty determination. Moreover, the mere possibility that an instruction created a mandatory presumption is error. (*Sandstrom v. Montana, supra,* 442 U.S. 510, 519.) Because the error here violated due process and Eighth Amendment standards, it requires reversal unless it can be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) This Court has similarly determined that any substantial error in the penalty phase of a capital trial must be deemed prejudicial. (*People v. Robertson, supra*, 33 Cal.3d at p. 54.) Under these standards, the judgment of death must be reversed.

XXI

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

At the conclusion of the penalty phase, the trial court instructed the jury pursuant to CALJIC No. 8.85. (CT 15820-15821; RT 18426-18428.) As discussed below, this instruction is constitutionally flawed. This Court has previously rejected the basic contentions raised in this argument (see, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 191-192), but has not adequately addressed the underlying reasoning presented by appellant. Furthermore, specific aspects of this case also render the instruction constitutionally flawed.

A. The Trial Court's Failure to Instruct that Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of Capital Punishment

The instructions failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See CT 15820-15821; RT 18426-18428.) This Court has concluded that each of the factors introduced by a prefatory "whether or not"– factors (d), (e), (f), (g), (h), and (j)–are relevant solely as possible mitigators. (See *People v. Hamilton* (1989) 48 Cal.3d 1141, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1995) 11 Cal.4th 1171, 288-289.) The jury, however, was left free to conclude that a negative answer regarding the existence of any of these "whether or not" sentencing factors could actually be considered an aggravating circumstance.

This Court has recognized that "the absence of mitigation would not automatically render the crime more offensive than any other murder of the same

general character." (*People v. Davenport, supra,* 41 Cal.3d at p. 289.) Thus, transforming the absence of mitigating factors into aggravating factors is improper and yields irrational results. Appellant acknowledges that the trial court did not specifically instruct the jury, nor did the prosecution specifically argue, that the absence of mitigating factors constituted aggravating factors. By the same token, the trial court did not instruct the jury that a finding that factors (d), (e), (f), (g), (h), and (j), did not exist could not be considered on the aggravation side of the scale. Simply instructing the jury pursuant to CALJIC No. 8.85, which does not inform the jury that the nonexistence of a mitigating factor cannot be used as an aggravating factor, precludes the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-85; *Zant v. Stephens, supra,* 462 U.S. at p. 879; *Woodson v. North Carolina, supra,* 428 U.S. at p. 304.)

By instructing the jury with the unadorned version of CALJIC No. 8.85, the court ensured that appellant's jury may have aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors; doing so with the belief that the trial court had identified them as potential aggravating factors supporting a death sentence. The fact that the jury may have considered the absence of mitigating factors to be aggravating factors infringed the Eighth Amendment, as well as state law, by making it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of a defendant's failure to present mitigating evidence relating to factors (d), (e), (f), (g), (h), or (j) invariably differs from case to case depending upon how a particular sentencing jury interprets the "law" conveyed by CALJIC No. 8.85. In some cases, the jury may actually construe the pattern instruction in accordance with California law and understand that if evidence of a mitigating circumstance described by factor (d), (e), (f), (g), (h), or (j) is not presented, the factor drops out of the sentencing calculus. In other

cases, the jury may construe the "whether or not" language of CALJIC No. 8.85 as giving aggravating relevance to a "not" answer and accordingly treat each failure to present evidence of an enumerated mitigating factor as establishing an aggravating factor.

The result is that from case to case, even in cases with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of CALJIC No. 8.85. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California* (1994) 512 U.S. 569, 973, quoting *Gregg v. Georgia* (1976) 428 U. S. 153, 189, and help ensure that the death penalty is evenhandedly applied. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 112.) Accordingly, the trial court, by reciting the standard CALJIC No. 8.85 without instructing the jury that the exclusively mitigating factors could not be used as aggravating factors, violated appellant's Eighth and Fourteenth Amendment rights.

B. The Trial Court's Failure to Delete Inapplicable Statutory Mitigating Factors Precluded a Fair and Reliable Capital-Sentencing Determination

1. The Trial Court Should Have Deleted the Factors Enumerated in Penal Code Section 190.3, Subdivisions (d) through (j) from CALJIC No. 8.85 Before Instructing the Jury. In the Alternative, the Trial Court Erred in Refusing a Requested Instruction that the Absence of Those Factors was not Aggravation.

The trial court should have deleted the factors enumerated in penal code section 190.3, subdivisions (d) through (j) from CALJIC No. 8.85 before instructing the jury. In the alternative, the trial court erred in refusing a requested instruction that the absence of those factors was not aggravation.

The defense requested that the court omit from the list of potentially mitigating factors, those factors that were not applicable to the case. (CT 15645.)

CALJIC No. 8.85 is typical of a state or federal pattern jury instruction in that it is designed to cover all of the statutory factors set forth in Penal Code section 190.3 that may apply to any given capital case. The trial court instructed the jury pursuant to CALJIC No. 8.85 without deleting from its terms the statutory mitigating factors for which there was no supporting evidence. (See CT 15820-15821; RT 18426-18428

Included in the instruction are several factors that are not applicable to this case, including the following:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person....
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

The failure to delete the inapplicable mitigating factors rendered the instruction constitutionally deficient.

Interestingly, the use note to the instruction states that if the defendant offers no evidence or there is no sympathetic evidence, the court should delete the bracketed portions of subparagraph (k) dealing with that factor. Logically, the same should apply to other factors for which no evidence has been introduced.

The instruction itself tells the jury that it should "consider, take into account and be guided by the following factors, if applicable . . ." (CT 2120.) There is no issue that the listed factors in (d) through (j) were not applicable to the instant case. However, by not deleting these factors from the jury instruction, the court made circumstances for which there was no evidentiary support a part of the weighing process undertaken by the jury in determining whether appellant lived or

died. Further, since there was no evidentiary support for these factors, they would naturally have been weighed against the defendant.

The result of the failure to delete these factors from the instruction rendered factors that would have been considered mitigating if there had been supporting evidence, e.g., the victim consented to the homicidal act, aggravating by virtue of the fact that they were absent from the case. This is the natural interpretation a jury would draw when a prosecutor takes the time to point out that there is no evidence supporting a factor; such an argument makes what is in essence a nonfactor with which the jury should not be concerned a factor in aggravation because of the lack of evidence to support it.

In fact, in this case the prosecution went through each of the non-applicable factors at some length, taking 6 pages to explain the absence of factors listed on one page the Clerk's Transcript, ending the discussion by explaining, "There is no D, E, F, G, H, I, or J. It's all a bunch of zeros". (RT 18466-18470A.)

This type of argument essentially tells the jury that the legislature considered factors such as these to be mitigating, but "see, they don't exist here and this defendant has fewer mitigating circumstances than other defendants that the legislature thought about when passing this statute." This distorts the legislative intent in passing Penal Code section 190.3 and renders the jury's death sentence unconstitutionally unreliable.

In the alternative, if the court did not err in not deleting these factors the Court erred in refusing a requested instruction that would have informed the jury that all factors may not be applicable, and that the jury should disregard any inapplicable factors. In particular, the defense requested that the jury be instructed as follows:

> Only those factors which are applicable on the evidence adduced at trial are to be taken into account in the penalty determination. All factors may not be relevant and a factor which is not relevant to the evidence in a particular case should be disregarded. The absence of a

statutory mitigating factor does not constitute an aggravating factor. (CT 16544.)

In refusing this instruction, the court explained that it believed it was appropriate to inform the jury of all potential factors and allow the parties to argue which ones were applicable. (RT 17957.) Mr. Gregory argued that the principle that absence of mitigation was not aggravation was an aspect of this requested instruction. (RT 17958.) While the court agreed that this was true, it stated that there was nothing in the instruction that would suggest otherwise.

In response, the defense explained that the problem with the court's reasoning was that the jury would not necessarily understand this principle on its own, and therefore it was necessary that the court explain it to the jury in the instructions. (RT 17960.)

When Mr. Gregory asked the court if it was saying that the prosecution could argue that the absence of mitigation was aggravation, the prosecution replied that it had no intention of making that argument that fact. (RT 17959.) The court agreed that the prosecution could not present that argument, and if that happened the court would "step back in and explain to the jury – to correct that impression." (RT 17959.)

As a result, the court refused the requested instruction.

Appellant submits that if the court was not going to delete the inapplicable factors from the statutory list of mitigation, it should have at least clarified to the jury that not all factors were applicable, and the jury should only consider those that were.

The shift in focus that occurred by leaving inapplicable factors in the jury instruction also diminished the impact on the weighing process of the mitigating evidence that was presented by appellant. By shifting the focus, to the potential mitigating evidence that was not presented, the prosecution was able to dilute the mitigating evidence that appellant did present. The dilution of appellant's

mitigating evidence precluded full consideration of that mitigating evidence. Thus, the trial court's failure to tailor CALJIC No. 8.85 to this case by deleting the inapplicable sentencing factors created a barrier to full consideration of appellant's mitigating evidence and deprived appellant of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. (*Ante*, at p. 351.)

2. Use of the Phrase "if Applicable" in CALJIC No. 8.85 Does Not Cure the Constitutional Defect

Appellant is mindful that CALJIC No. 8.85 directs the jury to consider the enumerated factors only "if applicable." The reason that the phrase "if applicable" does not save the instruction from being unconstitutional is that the instruction was not given in isolation, but was given in conjunction with CALJIC No. 8.88. (CT 15846-15847, RT 18444.) Thus, one must consider both of these instructions together to understand how a jury would interpret the phrase "if applicable" in CALJIC No. 8.85. When one does that, the meaning of the "if applicable" phrase in CALJIC No. 8.85 becomes confusing at best, and the construction that upholds its constitutionality becomes less likely.

There are two places in CALJIC No. 8.88 that relate back to the "if applicable" phrase in CALJIC No. 8.85. The first instance occurs in the second paragraph of the instruction, which directs the jury to "be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." The "applicable factors" upon which the jury has been instructed are all of the factors in Penal Code section 190.3, even though some of them may be inapplicable to the case at bar. The instruction does not direct the jury to be guided by the factors the jurors have determined to be applicable to the case.Rather, it tells the jury to consider "applicable" all of the circumstances upon

which the jury has been instructed, i.e., all of the circumstances contained in Penal Code section 190.3.

The second phrase of import is contained in the fourth paragraph of CALJIC No. 8.88. In that paragraph, the jury is instructed that it should "assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." This instruction refers directly back to CALJIC No. 8.85 since that instruction tells the jury the factors to be considered in determining the appropriate sentence. There can be no saving construction placed on this directive when it is considered in conjunction with CALJIC No. 8.85. This instruction gives the jury free reign to place what is in essence a negative moral value on the fact that some mitigating circumstances do not exist in a particular case.

In short, the phrase "if applicable," does not save the failure to delete inapplicable mitigating circumstances from CALJIC No. 8.85 before giving that instruction to a jury. In this case, since that failure had a negative impact on appellant's penalty phase determination, the death sentence must be reversed.

C. The Trial Court's Failure to Instruct the Jury That it Could Not Consider Aggravating Factors Not Enumerated in the Statute Further Violated Appellant's Right to a Fair and Reliable Capital-Sentencing Determination

The death penalty scheme under which appellant was prosecuted contemplated that the jury would only consider the factors set forth in Penal Code section 190.3 when determining whether appellant was to live or die. This Court recognized this principle when it noted that the purpose of passing Penal Code section 190.3 was to restrict the sentencer to making its decision based solely upon consideration of those factors. (See *People v. Boyd, supra*, 38 Cal.3d 762, 772-776.)

The instructions, however, did not specifically tell the jury that they should only consider as aggravating factors those circumstances enumerated in Penal Code section 190.3. (CT 2120-2122; RT 8129-8131.) Rather, the instructions allowed the jury to consider evidence for any aggravating purpose it wanted, whether enumerated in the statute or not.

The introductory paragraph of CALJIC 8.85 given at appellant's trial stated:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable... (CT 15821, RT 18426.)

One problem with this paragraph is that it allows the jury to consider all evidence received against Bryant and/or Wheeler in the penalty determination against appellant.

Originally huge sections of the evidence had been limited to one defendant or another because those portions of the evidence did not apply to the other defendants.

In the penalty phase, those items of evidence still should have been limited to the original purpose and defendant for which they were introduced. However, at the later stage the jury is told to consider all evidence except as "hereafter" instructed otherwise. Then the jury was never re-instructed with any limiting instructions.

Therefore, the jury could consider the violence of the Bryant organization in terrorizing the community, such as the evidence relating to Francine Smith, against appellant.

This is particularly likely because of the prosecution's theory of the case that the Bryant organization was one huge terrorist group inflicting violence on the community. As part of the organization which beat Francine Smith, to use but one

example, this would be one "circumstance of the crime," and therefore part of the evidence against appellant.

Furthermore, because CALJIC No. 8.88 allows the jury to assign whatever weight it deems appropriate to "each and all" of the relevant factors.

If Bryant's actions Bryant introduced at trial were relevant to the aggravating factors, the jury should have been told to limit those to Bryant.

Because this instruction failed to tell they jury that such evidence still was not relevant to appellant, the instruction was flawed.

Furthermore, the trial court instructed the jury to consider all the evidence and merely be guided by the statutory aggravating and mitigating factors. The trial court gave the jury no indication that the list of statutory factors was exhaustive and that the jury was to consider the evidence only if it could be channeled into one of the statutory factors. To the contrary, the instruction left the door open for the jury to consider the evidence for any purpose, whether it could be channeled into the statutory aggravating factors or not.

The use of evidence by the jury to assess a death sentence based on unspecified factors is the type of evil the *Boyd* Court cautioned trial courts to avoid. The trial court here did not avoid this error, consequently the jury instruction given pursuant to CALJIC 8.85 failed to channel and guide the jury's discretion and permitted the arbitrary and capricious imposition of the death penalty, in violation of the Eighth and Fourteenth Amendments. (See *Harris v. Alabama* (1995) 513 U.S. 504, 511.)

D. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as a Barrier to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth,

and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. 367; *Lockett v. Ohio, supra*, 438 U.S. 586.)

CALJIC No. 8.85 provides, pursuant to Penal Code section 190.3, that a jury may consider certain factors to be mitigating only if it also finds the factors to be "extreme" or "substantial." More specifically, the jury in this case was instructed that it could consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," and "[w]hether or not the defendant acted under extreme duress or under the substantial domination of another person." (CT 15820-15821; RT 18426-18427.)

These modifiers impermissibly raised the threshold for the consideration of mitigating evidence and risked misleading the jury into believing that evidence of emotional disturbance or duress that was not extreme, or evidence of domination that was not substantial, could not be considered in mitigation. Adjectives such as "extreme" and "substantial" in the list of mitigating factors rule out the possibility that lesser degrees of the disturbance, duress, or domination can be mitigating, and thus act as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Tennard v. Dretke, supra*, ___U.S.___, 124 S.Ct. 2562, ____; *Stringer* v. *Black, supra,* 503 U.S. 222; *Mills v. Maryland, supra,* 486 U.S. 367, 374; *Lockett v. Ohio, supra,* 438 U.S. 586.) Such wording also renders these factors unconstitutionally vague, arbitrary, capricious, and incapable of principled application. *(Maynard v. Cartwright* (1988) 486 U.S. 356, 361-64; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) The jury's consideration of these vague factors, in turn, introduces impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

Appellant recognizes that there are cases holding that the word "extreme" need not be deleted from this type of instruction (see, e.g., *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308 [no substantial explanation]; *People v.*

Benson (1990) 52 Cal.3d 754, 803-804), as well as cases holding that the language of factors (d) and (h) is not impermissibly restrictive. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1225.) However, these holdings are based on the assumption that jurors will utilize the "catchall" instruction provided by factor (k) to consider evidence that may not be "extreme" or "substantial."

The "catchall" provision of factor (k) does not, however, cure the defect. First, factor (k) makes no reference whatsoever to mental or emotional disturbance or duress and, in light of the more specific language of factors (d) and (g), factor (k) would not be understood by any reasonable juror as superseding those factors. In addition, by its terms, factor (k) refers only to "any *other* circumstances" not previously listed in CALJIC No. 8.85, and no reasonable juror would therefore understand it to include factors already included in the instruction.

E. Conclusion

The instructions embodied by CALJIC No. 8.85 are constitutionally flawed. The instruction's failure to inform the jurors that they could not consider the absence of mitigating evidence to be an aggravating factor and that they could not consider nonstatutory aggravating factors rendered the decision-making process unreliable. In addition, the inclusion of the terms "extreme" and "substantial" in factors (d) and (g) improperly limited the jury's consideration of mitigating evidence. Because CALJIC No. 8.85 fails to comply with constitutional requirements, appellant's death sentence should be reversed.

XXII

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

At the penalty-phase jury charge, the trial court instructed the jury pursuant to the 1989 revision of CALJIC 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant for each count of first degree murder.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> 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 injuri[ous – sic?]es consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> In this case you must decide separately the question of the penalty as to each of the defendants and each count of first degree murders. If you cannot agree upon the penalty to be inflicted on all defendants or all counts, but do agree on the penalty as to one or

more of them, you must render a verdict to the one or more on which you do agree.

You will soon retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom. (CT 15846-15847; RT 18444.)

This instruction violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and the corresponding sections of the state constitution. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances. Reversal of the death sentence is required.

Appellant recognizes that similar arguments have been rejected by this Court in the past. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered.

A. In Failing to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Impose a Sentence of Life Without Possibility of Parole, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

California Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in

state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code §190.3.[77])

The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California*, *supra*, 494 U.S. 370, 377.)

This mandatory language, however, is not included in CALJIC No. 8.88. Instead, the instruction only addresses directly the imposition of the death penalty, and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violates the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra,* 447 U.S. at pp. 346-347.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which mis-describes the burden of proof, and thus "vitiates *all* the jury's findings," can

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[77] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

never be harmless. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 281 (emphasis in original).).

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-29 (1954); *People v. Costello* (1943) 21 Cal.2d 760; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[78]

People v. Moore, supra, 43 Cal.2d 517 is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

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[78] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas, supra,* 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-77; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-92.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" . . . there "must be a two-way street" as between the prosecution and the defense. (*Wardius, supra,* 412 U.S. at 474.) Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

> It is true that the . . . instructions . . . do not incorrectly state the law . . ., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. (*Id.* at 526-527 (internal quotation marks omitted).)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle to appellant in the instant case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and are as – if not more – entitled as non-capital defendants to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by deny-

ing capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, 573 F.2d 1027, 1028 (8th Cir. 1978); cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under the standard of *Chapman v. California, supra,* 386 U.S. at p. 24, reversal is required.

B. In Failing to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3 and Reversal Is Required

"The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-44, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979; *People v. Brown* (1985) 40 Cal.3d 518, 538-541 [holding jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].)

At the penalty phase, counsel for Bryant requested an instruction that would have informed the jury that, even absent mitigation, they could find that the aggravating evidence was not comparatively substantial enough to warrant death. (CT 15640.) Appellant joined in that request. (RT 17956.) That request was refused by the court. (RT 17956.)

The jurors in this case, therefore, were never informed of this critical fact. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was ipso facto the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation – and even if they found no mitigation whatever. As framed, then, CALJIC No. 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

Since the defect in the instruction deprived appellant of an important procedural protection that California law affords noncapital defendants, it deprived appellant of due process of law (see *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see also *Hewitt v. Helms, supra,* 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments (see *Furman v. Georgia* (1972) 408 U.S. 238).

C. The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Is Unconstitutionally Vague and Improperly Reduced the Prosecution's Burden of Proof Below the Level Required by Penal Code Section 190.3

Under the standard CALJIC instruction given the question of whether to impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the miti-

gating circumstances that it warrants death instead of life without possibility of parole."

The words "so substantial" provide the jurors with no guidance as to what they have to find in order to impose the death penalty. The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites arbitrary application of the death penalty.

The word "substantial" caused constitutional vagueness problems when used as part of the aggravating circumstances in the Georgia death penalty scheme. In *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, the Georgia Supreme Court considered a void-for-vagueness attack on the following aggravating circumstance: "The offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions." The court held that this component of the Georgia death penalty statute did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at 391; see *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.) Of the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance"; "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. [Footnote.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result. We therefore hold that the portion of [the statute] which allows for the death penalty where a 'murder [is] committed by a person who has a substantial history of serious assaultive criminal convictions,' is unconstitutional and, thereby, unenforceable. (*Arnold v. State, supra*, 224 S.E.2d at p. 392 (alternation in original).)[79]

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[79] The United States Supreme Court has specifically praised the portion of the Arnold decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 202.

There is nothing in the words "so substantial . . . that [the aggravating] evidence warrant death" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia*, *supra*, 446 U.S. 420, 429.) These words do not provide meaningful guidance to a sentencing jury attempting to determine whether to impose death or life. The words are too amorphous to constitute a clear standard by which to judge whether the death penalty is appropriate, and their use in this case rendered the resulting death sentence constitutionally indefensible.

D. By Failing to Convey to the Jury That the Central Decision at the Penalty Phase Is the Determination of the Appropriate Punishment, CALJIC No. 8.88 Improperly Reduced the Prosecution's Burden and Reversal Is Required

As noted above, CALJIC No. 8.88 informed the jury that "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

Eighth Amendment capital jurisprudence demands that the central determination at the penalty phase be whether death constitutes the appropriate, and not merely a warranted, punishment. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) CALJIC No. 8.88 does not adequately convey this standard; it thus violates the Eighth and Fourteenth Amendments.

To "warrant" death more accurately describes that state in the statutory sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for imposition of death.[80]

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[80] "Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give (someone) authorization or sanction to do something; (b) to authorize (the doing of something)." (Webster's Unabridged Dictionary (2d ed. 1966) 2062.) In contrast, "appropriate" is defined as, "1. belonging peculiarly; special. 2. Set apart for a particular use or person. [Obs.] 3. Fit or proper; suitable; . . . ." (*Id.* at p. 91.) "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet,

Clearly, just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate.

The instructional deficiency is not cured by passing references in the instructions to a "justified and appropriate" penalty.[81] The instructions did not mention the concept of weighing or in any way inform the jury that aggravation must amount to something more than the mitigation before death became appropriate. Thus, the instructions did not inform the jurors of what circumstances render a death sentence "appropriate."

E. The Instruction Is Unconstitutional Because it Fails to Set Out the Appropriate Burden of Proof

1. The California Death Penalty Statute and Instructions Are Constitutionally Flawed Because They Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor or of Proving Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3; *People v. Cudjo* (1993) 6 Cal.4th 585, 634. However, under the California scheme, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.

In this case, the court explained to the jury that the purpose of the penalty phase was to introduce additional evidence having to do with the offenses and the

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fit, apt" (*ibid.*), while the verb "warrant" is synonymous with broader terms such as "justify, . . . authorize, . . . support." (*Id.* at p. 2062.)

[81] As quoted above, the trial court instructed that "[i]n weighing the various circumstances you determine under the relevant evidence *which penalty is justified and appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (*Ante*, at p. 370. CALJIC No. 8.88 (emphasis added).)

defendants "that fall into the categories known under the law as aggravating and mitigating evidence." (RT 17194.)

The Court further explained that in the penalty phase

> "neither side has a burden of proving which penalty is appropriate. That is, the D.A. does not have to prove beyond a reasonable doubt the death penalty is appropriate; the defense does; not have to prove life without parole is appropriate. There is no burden in that sense. What your duty is here is to make an independent review of all the evidence.... then be guided by the law as to what constitutes aggravating and mitigating evidence and factors, and to weigh those factors, and to determine in your mind if the aggravating factors and the aggravating evidence so outweigh the mitigating as to make death the appropriate penalty. That will be a determination for you each individually to make guided, again, by the law... (RT 17194-17195.)

In a related vein, the court refused the Special Instruction No. 9, requested by the defense, which would have told the jury:

> If you have a doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty at life in prison without the possibility of parole. (CT 15767.)

In refusing this instruction, the court stated that it was an incorrect statement of law. (RT 17984.)

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 124 S.Ct. 2531 [hereinafter *Blakely*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* 536 U.S. at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

This year, in *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an exceptional sentence outside the normal range upon the finding of substantial and compelling reasons. (*Blakely v. Washington*, *supra*, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested deliberate cruelty to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

a. In the Wake of Apprendi, Ring, and Blakely, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[82] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

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[82]See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code §

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, supra*, 4 Cal.4th 43, 79 [penalty phase determinations are moral and . . . not factual, and therefore not susceptible to a burden of proof quantification].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the trier of fact to find that at least one aggravating factor exists and that such aggra-

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19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumtances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

vating factor (or factors) substantially outweigh any and all mitigating factors.[83] As set forth in California's principal sentencing instruction (*People v. Farnam*, *supra*, 28 Cal.4th 107, 177), which was read to appellants jury, "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, CT 15846; RT 18443-18444.)

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 substantially outweigh mitigating factors.[84] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[85]

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[83]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "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*, *supra*, 46 Cal.3d 432, 448.)

[84]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," ... 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 460)

[85]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.)

In *People v. Anderson*, *supra*, 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 section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow*, *supra*, 30 Cal.4th 43, and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not increase the penalty for a crime beyond the prescribed statutory maximum, a United States Supreme Court decision addressing that issue under a different death penalty law imposed no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[86] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circum-

[86] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

stances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole, LWOP, or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez*, *supra*, 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[87] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances

[87] Ariz.Rev.Stat. Ann. section 13-703(E) 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."

substantially outweigh the mitigating circumstances.[88] There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-- no matter how the State labels it--must be found by a jury beyond a reasonable doubt". (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.) The Court has repeatedly sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary

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[88] Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence. In both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death and no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines whether a defendant eligible for the death penalty should in fact receive that sentence. (*Tuilaepa v. California*, *supra*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty. death or life without the possibility of parole, is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present. Otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan*, *supra*, 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation.

Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[89])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own, a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S.Ct. at 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Wash-

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[89] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

ington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[90]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more

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[90] In *People v. Griffin* (2004) 33 Cal.4th 536, this Court=s first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [hereinafter *Leatherman*], for the principles that an "holding that an "award of punitive damages does not constitute a finding of 'fact [ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." .) (*Griffin*, *supra*, 33 Cal.4th at 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"

Leatherman, *supra*, 532 U.S. at 429. This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *Id.*, 532 U.S. at 437, 440. *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) 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.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." [citation]. 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 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, quoting with approval Justice O'onnor's *Apprendi* dissent, 530 U.S. at 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [The death penalty is unique in both its severity and its finality.)[91] As the high court stated in *Ring*, *supra*, 536 U.S. at 608, 609:

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[91] The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof re-

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b.The Requirements of Jury Agreement and Unanimity

The defense requested a special instruction that would have required the jurors to all agree as to the existence of any aggravating factor before any juror could consider it in reaching a decision on the verdict. (CT 15766.)

The court refused this request. (RT 17984.)

Thereafter, after listing the prior criminal acts which could be considered under 190.3, subdivision (b), the last paragraph of CALJIC No. 8.87, given at the end of trail, instructed the jury:

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that

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quirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, ' "the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."' (citations]" (*Monge v. California*, *supra*, 524 U.S. at 732 (italics added).)

> juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose. (RT 18430, CT 15380-15381.)

The court refused to delete this paragraph, as requested by the defense, on the grounds that there was no requirement of jury unanimity or agreement. (CT 15658, RT 17975-17979.)

The effect of this instruction is that each individual juror must be convinced beyond a reasonable doubt that one or more of the six aggravating factors existed. However, the jury need not be unanimous as to which of these aggravating facts existed. The court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted; regarding the reasons for the sentence – a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

This Court has held that "unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin*, *supra*, 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore, including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[92] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

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 final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*; *Blakely*, *supra*.)

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[92] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].[93]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at 732;[94] *accord*, *Johnson v. Mississippi*, surpa, 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

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[93] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[94] The *Monge* court developed this point at some length, explaining as follows: "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." [citation]. Because the death penalty is unique 'in both its severity and its finality,' [citation] we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed");); see also *Strickland v. Washington* (1984) 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) "([W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding)." (*Monge v. California*, *supra*, 524 U.S. at 731-732.)

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 536 U.S. at 609).[95]

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.[96] To apply the requirement to findings carrying 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), would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state 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, 815-816, 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

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[95] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. ' 848, subd. (k).)

[96] 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." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

> 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.* (*Richardson, supra*, 526 U.S. at 819 (emphasis added).)

These reasons are doubly applicable 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.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisites to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Fifth, Eighth and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

The penalty phase instructions not only failed to impose a reasonable doubt standard on the prosecution (see preceding argument), the instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it has also held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes*, *supra*, 52 Cal.3d 577, 643.) Appellant submits that this holding is constitutionally unacceptable under the Fifth, Eighth, and Fourteenth Amendments and urges this Court to reconsider that ruling.

However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors, and the juries on which they sit, respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.) It is unacceptable, "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at 260). the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. 367, 374), that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

The allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) With no standard of proof

articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination will also vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments–"wanton" and "freakish" (*Proffitt v Florida* (1976) 428 U.S. 242, 260 (1976)) and the "height of arbitrariness" (*Mills v. Maryland, supra,* 486 U.S. at p. 374)–that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state, while another assigns it to the accused or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant.

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and at least one special circumstance. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code, §190.3) and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code Section 190.4(e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[97]

A fact could not be established – a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (See Cal. Rules of Court, rule 420, subd. (b) (existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence); Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to non-capital than to capital defendants violates the due process, equal protection and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g. *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Yls* (9th Cir. 1990) 897 F.2d at p. 421.)

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[97] Of course, the Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington*, *supra*, 466 U.S. 668, 686-87; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

3. The Trial Court's Failure to Instruct on the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances Resulted in an Unfair, Unreliable and Constitutionally Inadequate Sentencing Determination

By failing to provide a sua sponte instruction on the standard of proof regarding mitigating circumstances (that is, that the defendant bears no particular burden to prove mitigating factors and that the jury was not required unanimously to agree on the existence of mitigation), the trial court impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) "There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8th Cir. 1992) 957 F.2d 1495, 1501, rev'd on other grounds (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. 433, 442-43.) Thus, had the jury been instructed that unanimity was required before mitigating circumstances could be considered; there would be no question that reversal would be warranted. (*Ibid*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Fourteenth and Eighth Amendments as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

4. Even If Is Constitutionally Acceptable to Have No Burden of Proof, the Trial Court Erred in Failing to So Instruct the Jury

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[98] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

5. The Absence of a Burden of Proof Is Structural Error Requiring That the Penalty Phase Verdict Be Reversed

The burden of proof applicable to a particular case reflects society's estimation of the "consequences of an erroneous factual determination" (*In re Winship*, *supra*, 397 U.S. 358, 370-373 (conc. opn. of Harlan, J.)), and the consequences of

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[98] See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

an erroneous factual determination in a capital penalty phase can be the most severe of all. There can be no explanation why the most important and sensitive fact-finding process in all of the law – a penalty phase jury's choice between life and death – could or should be the only fact-finding process in all of the law completely exempted from a burden of proof. The absence of any burden of proof in the capital sentencing process is the antithesis of due process and of the Eighth Amendment principle that there is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 427 U.S. at p. 305; see also, *Caldwell v. Mississippi* (1980) 472 U.S. 320, 341; *California v. Ramos* (1983) 463 U.S. 992, 998-99.) The notion that a burden of proof is not required at all for proof of the facts at the penalty phase of a capital trial also violates the fundamental premise of appellate intervention in capital sentencing – the need for reliability (see *Ford v. Wainwright* (1986) 477 U.S. 399, 414) and "genuinely narrowed" death eligibility (*Zant v. Stephens*, *supra*, 462 U.S. at p. 877), rather than unbridled discretion. (See *Furman v. Georgia*, *supra*, 408 U.S. at p. 247.)

Even in the administrative arena, "[d]ue process always requires, of course, that substantial evidence support sanctions imposed for alleged misconduct. . . ." (*Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 154, fn. 16; see also, *Simms v. Pope* (1990) 218 Cal.App.3d 472, 477 [trial court may overturn property assessment board's decision only where no substantial evidence supports it, otherwise action is deemed arbitrary and denial of due process]; *In re Estate of Wilson* (1980) 111 Cal.App.3d 242, 247 [determination that decision is supported by substantial evidence is a "procedure reasonably demanded by developing concepts of due process"], citing *Jackson v. Virginia*, *supra*, 443 U.S. 307 and *Bixby v. Pierno* (1971) 4 Cal.3d 130.)

Since any and all factual determinations by any and all entities acting on behalf of the public must be made under some burden of proof to be consistent with due process, even if that is nothing more than "rational basis," as with legisla-

tive decisions (see e.g., *Webster v. Reproductive Health Services* (1989) 492 U.S. 490), it is self-evident that the reliability required of decision-making in capital sentencing also requires some burden of proof. To hold otherwise would ignore this well-established principle of Eighth Amendment jurisprudence.

The absence of the appropriate burden of proof prevented the jury from rendering a reliable determination of penalty. The error was structural and interfered with the jury's function, thus "affecting the framework within which the trial proceeds," and rendered the trial fundamentally unfair. (*Arizona v. Fulminante* (1991) 499 U.S. at p. 310; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.)

Even if the error did not amount to a structural defect, the constitutional harmless error standard should apply. It is reasonably possible that the error adversely affected the penalty determination of at least one juror. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 448-49.) It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment must be reversed.

F. The Instruction Violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution By Failing to Require that the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors CAP

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at 543; *Gregg v. Georgia*, *supra*, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings be-

cause it will otherwise be impossible to reconstruct the findings of the state trier of fact. (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber*, *supra*, 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefore. (*Id.*, 11 Cal.3d at 269.)[99] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded

[99] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra,* 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is normative (*People v. Hayes, supra*, 52 Cal.3d at 643) and moral (*People v. Hawthorne, supra*, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[100]

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[100] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence, including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

G. The Failure to Instruct the Jury on the Presumption of Life Violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution

In noncapital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is a basic component of a fair trial. (See *Estelle v. Williams*, *supra*, 425 U.S. 501, 503.) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. (Note, Brinkham, Beth, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.) Appellant submits that the court's fail-

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Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

ure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that such a presumption of life is not necessary when a person's life is at stake, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" so long as the state's law properly limits death eligibility. (*Id.* at 190.) However, California's capital-sentencing statute fails to narrow adequately the class of murders that are death eligible. (*Infra*, at p. 417-421.) (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283.) Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to require written findings regarding aggravating factors, and fails to require intercase proportionality review. Accordingly, appellant submits that a presumption of life instruction is constitutionally required at the penalty phase, and reversal of the penalty judgment is required.

H. Conclusion

The trial court violated appellant's federal constitutional rights by instructing the jury in accordance with CALJIC No. 8.88. Appellant's death sentence must be reversed

XXIII

THE PENALTY PHASE INSTRUCTIONS WERE DEFECTIVE AND DEATH-ORIENTED IN THAT THEY FAILED TO PROPERLY DESCRIBE OR DEFINE THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE

Neither CALJIC No. 8.88 nor any other instruction given in this case informed the jurors that a sentence of life without possibility of parole meant that appellant would never be considered for parole.

Counsel for Wheeler requested an instruction that would have informed the jury of this fact. (RT 15759.) When the instruction was first discussed, the prosecution objected to that instruction on the grounds that it was a false statement of law. (RT 17978.)

After taking the matter under submission, the court later refused the instruction. In doing so the court stated that the status of the law was that a trial court should not give instructions regarding this principle unless the jury had questions in this area. However, the court did not believe it should be given "up front." (RT 18730.)

Appellant submits that the trial court erred in refusing this instruction. Furthermore, even if there is some flaw in the wording of the instruction that would render it incorrect, the court still had a sua sponte duty to instruct on the true meaning of the sentence.

The trial court is obligated to instruct on its own motion on all principles of law closely or openly connected with the case. (*People v. Wilson* (1967) 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning of the sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination

and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi, supra,* 472 U.S. 320.)[101]

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9.) The *Simmons* opinion has been repeatedly reaffirmed by the United States Supreme Court. In 2001, the Court reversed a second South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52 [citation omitted].) Most recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the Court again reversed a South Carolina death sentence in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obli-

[101] Although this Court has rejected this argument in the past (see, e.g., *People v. Gordon* (1990) 50 Cal.3d 1223, 1277; *People v. Thompson, supra,* 45 Cal.3d 86, 130-131 [proposed instruction on the meaning of life without parole found to be inaccurate and not constitutionally required]), the Court should reconsider its decisions based on recent Supreme Court rulings.

gation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Id.* at p. 256.) [102]

The state in *Simmons* had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow the petitioner to be released into society. (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 166.) In rejecting this argument, the Court stated that, while it is possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading. (*Id.* at pp. 166-168.)

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[102] The Supreme Court opinions make it quite clear that there was an inference of future dangerousness in this case sufficient to warrant an instruction on parole ineligibility. In *Kelly* the Court ruled that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." (*Kelly, supra*, 534 U.S. at p, 254 [footnote omitted].) In that case, the Court found that future dangerousness was a logical inference from the evidence and injected into the case through the state's closing argument. (*Id.* at pp. 250-251; see also *Shafer, supra*, 532 U.S. at pp.54-55; *Simmons, supra*, 512 U.S. at pp. 165, 171 (plur. opn.) [future dangerousness in issue because "State raised the specter of . . . future dangerousness generally" and "advanc[ed] generalized arguments regard the [same]"]); *id.*, at p. 174 (conc. opn. of Ginsburg, J.); *Id.*, at p. 177 (conc. opn. of O'Connor, J.).

As Justice Rehnquist argued in his dissent from the *Kelly* decision, "the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." (534 U.S. at p. 261 (dis. opn. of Rehnquist, J.).) The rule is invoked, "not in reference to any contention made by the State, but only by the existence of evidence from which a jury might infer future dangerousness." (*Ibid.*)

In this case, the evidence raised an implication of future dangerousness, and the prosecution explicitly argued in his penalty phase closing argument that appellant was the type of "reliable comrade" who could be relied on for crimes because he was a "reliable executioner". (RT 18487.) The prosecution also argued appellant's conduct in jail, as demonstrated by the assault on Holiday and the possession of shanks. (RT 18487.)

This Court has erroneously concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (*People* v. *Arias, supra*, 13 Cal.4th at pp. 172-174.) Empirical evidence, however, establishes widespread confusion about the meaning of such a sentence. One study revealed that, among a cross-section of 330 death-qualified Sacramento County potential venirepersons, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45.) In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. (Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45.) The results of a telephone poll commissioned by the *Sacramento Bee* showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." (Sacramento Bee (March 29, 1988) at pp. 1, 13; see also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons, supra*, 512 U.S. at p. 168, fn. 9.) In addition, the information given California jurors is not significantly different from that found wanting by the Supreme Court.

Appellant's jurors were instructed that the sentencing alternative to death is life without possibility of parole, but they were never informed that life without possibility of parole means that defendant will not be released, in spite of the fact that such instructions were requested. (CT 15759.)

In refusing this requested instruction, the court stated that it was not an appropriate instruction, and that it understood if the jury actually asked about this issue, the court would "make some additional decisions how to proceed." (RT 18369-18370.)

In *Kelly*, the Court acknowledged that counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. The Court also recognized that the judge told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly, supra*, 534 U.S. at p. 257.)

Similarly, in *Shafer*, the defense counsel argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer, supra*, 532 U.S. at p.52.) The Court found these statements inadequate to convey a clear understanding of parole ineligibility. *(Id.* at pp. 52-54.) In *Simmons*, the Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines "life imprisonment." (*Simmons, supra*, 512 U.S. at p. 170.) Here, the instruction that the sentencing alternative to death was life without possibility of parole did not adequately inform the jurors that a life sentence for appellant would make him ineligible for parole.

The High Court's rejection of South Carolina's "plain and ordinary meaning" argument in the *Simmons* case should be instructive when applied to California's statutory language of "life without possibility of parole." The principle to be derived from the Court's reliance in *Simmons* on *Gardner v. Florida, supra*, 430 U.S. 349, is that the Constitution will not countenance a false perception, whether brought about as a result of incorrect instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence.

Further, the inadequate instruction violated the principles of *Caldwell v. Mississippi, supra,* 472 U.S. 320, as interpreted in *Darden v. Wainwright, supra*, 477 U.S. at p. 183, n.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without instructional guidance on the meaning of

life without parole, the jurors undoubtedly deliberated under the mistaken, but common misperception, that the choice they were asked to make was between two inherently different alternatives: death and a limited period of incarceration. (See *Simmons*, *supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was simplified.

The prejudicial effect of the instruction's failure to clarify the sentencing options is clear. There is a substantial likelihood that at least one of the jurors[103] concluded that the non-death option offered was neither real nor sufficiently severe and chose a sentence of death not because the juror deemed such punishment warranted, but because he or she feared that appellant would someday be released if they imposed any other sentence.[104]

Given the existence of evidence in this case from which the jurors might infer future dangerousness, the jurors should have been clearly instructed that a sentence of life without the possibility of parole meant that appellant would never be

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[103] See *Mayfield v. Woodford* (2001) 270 F.3d 415, 937 (conc. opn. of Gould, J.) ["in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence'", quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683,. 691-692].)

[104] California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (C. Haney, L. Sontag, & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994), 170-71; accord, Ramos, *et al.*, *Fatal Misconceptions*, *supra*, at p. 45.)

eligible for parole or that to base a sentencing decision on speculation about possible future release would be a violation of the jurors' oaths.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605.) Had the jury been instructed concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith, supra,* 539 U.S. 510; *Chapman v. California, supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

XXIV

CALIFORNIA'S CAPITAL-SENTENCING STATUTE IS UNCONSTITUTIONAL

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to many of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the

imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few defendants for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the state will kill dominates the entire process of applying the penalty of death.

A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia*, *supra*, 446 U.S. 420, 427 [plur. opn.]; *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative

definition: they circumscribe the class of persons eligible for the death penalty. (*Zant v. Stephens*, *supra*, 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo*, *supra*, 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 19 special circumstances[105] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [italics added].)

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[105] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow, and is now twenty – two, although subdivision (17), the felony murder subdivision, contains thirteen felonies which constitute a special circumstance. In 1988, subdivision (b) contained 9 felonies that qualified as special circumstances.

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[106]

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[106] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the

It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, n. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

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victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

B. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(A) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments To The United States Constitution

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[107]

Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence[108], or had a "ha-

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[107] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also, CALJIC No. 8.88 (6th ed. 1996), par. 3.

[108] *People v. Walker* (1988) 47 Cal.3d 605, 639 n.10, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

tred of religion,[109]" or threatened witnesses after his arrest[110], or disposed of the victim's body in a manner that precluded its recovery[111].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California*, *supra*, 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[112] or because the defendant killed with a single execution-style wound[113].

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[109] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[110] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[111] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110 n.35, *cert. den.* 496 U.S. 931 (1990).

[112] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[113] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[114] or because the defendant killed the victim without any motive at all[115].

c. Because the defendant killed the victim in cold blood[116] or because the defendant killed the victim during a savage frenzy[117].

d. Because the defendant engaged in a cover-up to conceal his crime[118] or because the defendant did not engage in a cover-up and so must have been proud of it[119].

e. Because the defendant made the victim endure the terror of anticipating a violent death[120] or because the defendant killed instantly without any warning[121].

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[114] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[115] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[116] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[117] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[118] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[119] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

f. Because the victim had children[122] or because the victim had not yet had a chance to have children[123].

g. Because the victim struggled prior to death[124] or because the victim did not struggle[125].

h. Because the defendant had a prior relationship with the victim[126] or because the victim was a complete stranger to the defendant[127].

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

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[120] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[121] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[122] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[123] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[124] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[125] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[126] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish*, *supra*, 52 Cal.3d 648, 717 (same).

[127] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly[128].

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire[129].

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all[130].

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[128] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips* (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[129] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[130]. See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day[131].

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location[132].

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[133]

2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[131] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[132] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

[133] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in deter-

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia*, *supra*, 446 U.S. 420].)

C. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions."[134] (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 225-229 (conc. and dis. opn. of Harrison, J.).)

The nonuse of the death penalty or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma,* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Indeed, all nations of Western Europe, plus Can-

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mining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

[134] South Africa abandoned the death penalty in 1995, five years after the article was written.

ada, Australia, and the Czech and Slovak Republics, have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)

This is especially important since our Founding Fathers looked to the nations of Western Europe for the "law of nations," as models on which the laws of civilized nations were founded, and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.); *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.) Thus, for example, Congress's power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; what civilized nations of Europe forbade, such as poison weapons or the selling into slavery of wartime prisoners, was constitutionally forbidden here. (See *Miller v. United States, supra,* 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment," as defined in the Constitution, is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency, as perceived by the civilized nations of Europe to which our Framers looked as models, have themselves evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including to-

talitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."].)

Thus, assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept it, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot, supra*; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

Thus, the very broad death scheme in California, and the regular use of death as a punishment, violates the Eighth and Fourteenth Amendments. Consequently, appellant's death sentence should be set aside.

D. Failing to Provide Intercase Proportionality Review Violates Appellant's Eighth and Fourteenth Amendment Rights

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 198; *Profitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris, supra*, 465 U.S. 37, the 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." (*Id.* at p. 51.) Based upon that, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam, supra,* 28 Cal.4th at p. 193.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* 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 jury 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 p. 995 (dis. opn. of Blackmun, J.), quoting *Harris v. Pulley* (9th Cir.) 692 F.2d 1189, 1194.)

The time has come for *Pulley v. Harris* to be reevaluated, because the special circumstances of the California statutory scheme fail to perform the type of narrowing required to sustain the constitutionality of a death penalty scheme in the absence of intercase proportionality review. Comparative case review is the most rational, if not the only, effective means by which to demonstrate that the scheme as a whole is producing arbitrary results. That is why the vast majority of the states that sanction capital punishment require comparative, or intercase, proportionality review.[135]

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[135] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art.

The capital sentencing scheme in effect in this state in 1990 and 1991 was the type of scheme that the *Pulley* Court had in mind when it said "that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) One reason for this is that the scope of the special circumstances that render a first-degree murderer eligible for the death penalty is unduly broad. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, *supra*, 72 N.Y.U. L.Rev. at pp. 1324-26.) Even assuming that California's capital-sentencing statute's narrowing scheme is not so overly broad that it is actually unconstitutional on its face, the narrowing function embodied by the statute barely complies with constitutional standards. Furthermore, the open-ended nature of the aggravating and mitigating factors, especially the circumstances-of-the-offense factor delineated in Penal Code section 190.3, grants the jury tremendous discretion in making the death-sentencing decision. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 [dis. opn. of Blackmun, J.].)

905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

The minimal narrowing of the special circumstances, plus the open-ended nature of the aggravating factors, work synergistically to infuse California's capital-sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few first-degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital-sentencing scheme lacks other safeguards, such as a beyond-the-reasonable-doubt standard and jury unanimity requirement for aggravating factors, the use of an instruction informing the jury which factors are aggravating and which are mitigating, or the use of an instruction informing the jury that it is prohibited from finding nonstatutory aggravating factors. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital-sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital-sentencing scheme does not operate in a manner that enables it to ensure consistency in penalty-phase verdicts; nor does it operate in a manner that assures that it will prevent arbitrariness in capital sentencing. Because of that, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review requires the reversal of appellant's death sentence.

E. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

The United States Supreme Court has repeatedly directed that a greater degree of reliability in sentencing is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra,* 524 U.S. 721, 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a non-

capital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[50] as in *Snow*,[51] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary deci-

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[50] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's tradi-*

sion to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (*Ante*, Argument XXII-E-1.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

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tionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; emphasis added.)

[51] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; emphasis added.)

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court found that argument to be unavailing. However, the reasoning under girding *Allen* was fatally flawed.

The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*Id.* at p. 1286.) Though this may be true, the larger point that is missed by this observation is that the basic requirement for any death penalty scheme is to ensure that capital punishment is not imposed in a random and capricious fashion. It seems somewhat amiss that there is a settled way to assure that this type of randomness does not occur in noncapital cases, but no way to ensure that it does not occur in capital cases. Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is well-situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (See *Ford v. Wainwright, supra,* 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584; *Atkins v. Virginia, supra.*). Juries, like trial courts and counsel, are not immune from error. They may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (See Pen. Code, § 190.4; *People v. Rodriguez*, *supra*, 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capitals cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme

The second reason offered by the *Allen* Court for rejecting the equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first-degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287, italics added.) The idea that the disparity between life and death is a "narrow" one violates constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the state to apply its disparate review procedures to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing, when compared to noncapital sentencing, as supporting the different treatment of persons sentenced to death. (See *People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction drawn by the *Allen* majority between capital and noncapital sentencing regarding "nonquantifiable" aspects is one with very

little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 421 and 423.) One may reasonably presume that it is because "nonquantifiable factors" permeate all sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights, and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause also prevents violations of rights guaranteed to the people by state governments. (See *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

This Court has cited the fact that a death sentence reflects community standards as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of the same type of disparate sentence review that is provided to all other convicted felons in this state; the type of review routinely provided in virtually every state that has enacted death penalty laws, and that is provided by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia, supra)*

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*People v. Allen, supra*, 42 Cal.3d at 1286]) or the acceptance of a verdict that may not be

based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[54]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Yls*, *supra*, 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

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[54] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at 609.)

XIV

BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, BINDING ON THIS COURT, THE DEATH SENTENCE MUST BE VACATED

The California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the death penalty here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky, supra,* 492 U.S. at pp. 389-390 [dis. opn. of Brennan, J.].)

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR. [136]

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[136] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human*

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. This is especially so in this case, where the defendant has been on death row more than 9 years without having a brief filed on his behalf with this Court. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Once again, however, defendant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also 43 Cal.3d at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse*, *supra*, 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

Rights Conformity Act of 1993 (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

Appellant nonetheless requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

XXV

THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL AND REQUIRES A REVERSAL OF THE JUDGMENT OF CONVICTION

As discussed above (*ante*, at p. 289), even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. When the above-described principles are considered in the context of a capital case, it is clear that the verdict of death must be reversed.

In addition, a number of guilt-phase errors also had a considerable impact on the penalty determination, and the impact of these errors must also be assessed in evaluating the prejudice resulting from the penalty phase errors.[137]

The fact that there were multiple homicides is not dispositive. Terry Nichols, convicted of killing 169 people in the bombing of the Alfred P. Murrah Federal Building, received a sentence of life in prison[138]. (see also, Welsh S. White, *Effective Assistance Of Counsel In Capital Cases: The Evolving Standard Of Care* 1993 U. Ill. L. Rev. 323, 365, fn. 290.)

The discussion of each error identifies the way in which the error prejudiced appellant and so requires reversal of the death judgment. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; *see generally* Goodpaster, *The Trial For Life: Effective Assistance Of Counsel In Death Penalty*

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[137] An error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [3 Cal.Rptr.2d 727].) Indeed, the effect of guilt phase errors on the penalty phase must be considered. (Pen. Code, § 190.4, subdivision (d)) and as a matter of federal law (*Magill v. Dugger, supra,* 824 F.2d 879, 888.)

[138] "Terry Nichols Receives 161 Life Sentences," Associated Press/August 9, 2004 http://www.rickross.com/reference/mcveigh/mcveigh37.html

Cases (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses And Their Penalty Phase Effects"].)

The Court must also assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Holt* (1984) 37 Cal.3d 436, 459.) Moreover, "the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright, supra*, 477 U.S. 399, 411 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Zant v. Stephens, supra,* 462 U.S. 862, 885; *Gardner v. Florida, supra,* 430 U.S. 349, 358.)

In considering the cumulative impact of prejudice on penalty phase issues, it must constantly be remembered that the weakness of the case against Smith was not confined to the guilt phase, but also infected the penalty phase, as well.

As discussed above, the guilt phase involved an unusually weak case for a capital trial. Indeed, it is a rare case in capital litigation where the trial court judge comments on the lack of evidence connecting a defendant to the offense. The jury may have accepted the testimony of Williams, believing he was not an accomplice. However, as discussed above (*ante*, at pp. 61-62), even if he is not an accomplice, Williams is incredibly suspect. A confessed felon, implicating his associates as part of a deal where he escapes the death chamber, one may grudgingly accept his word.

With the testimony of Williams as the only evidence connecting appellant to the offense, one is reminded of the Biblical caveat against putting a man to death on the testimony of one witness. (*Ante*, at p. 45.) Combined with the credibility problems inherent in Williams as a witness, even if he is not an accomplice,

the red thread from Deuteronomy, to *Sandstrom,* to *Jackson,* to section 1111, to *Guiuan* presents an inviting trail.

The jury may have had similar qualms about accepting Williams' testimony. However, having grudgingly accepted it for the determination of guilt, they may have reached a different result at to the penalty if told that even though it would be proper to consider such lingering doubt. Thus, the weakness of the guilt phase combines with errors from the penalty phase to require a reversal.

In a similar manner, the penalty phase itself was not overwhelming. Twice declaring itself deadlocked, the court was only able to extract a verdict after inquiring as to how they were split by commenting favorably on the progress the jury had made, and threatening to keep them indefinitely until the court was satisfied that a verdict could not be reached.

In all, there were there were 9 days of deliberations before the verdict was reached. (CT 15778, 15788, 15785, 15786, 15787, 15778, 15798, 15799, 15857.) It has been held that the length of deliberations is one of the indicia of the closeness of the case. (*People v. Woodard, supra,* 23 Cal.3d at p. 341.)

The closeness of the case against appellant is also reflected in the fact that by any standard appellant may be considered the least culpable of the three defendants.

Bryant is culpable as the ringleader and instigator, both in the murders themselves and the general operation of the Bryant family organization. It was for the benefit of his family's business, which he appears to have been running at the time, that the murders were committed. There was evidence that he had hired Armstrong to kill Gentry and then tried to intimidate and/or bribe witnesses in that case. (RT 17587-17588.)

Likewise, Wheeler was the actual killer of Loretha and Chemise, a fact which speaks to a greater degree of culpability. The jury may have found those murders to be more culpable than the murders of Brown and Armstrong. Armstrong was a hit man himself, and both of them were two professional criminals

and drug dealers attempting to shake down Bryant at the time they were killed. In fact, the last question the jury had before reaching a verdict was whether they could consider the value of the lives of different people when weighing the crime, referring to one victim as compared to another victim. (*Ante*, at p. 308, RT 18752.)

Therefore, the jury did appear to be more concerned over the deaths of Loretha and Chemise than the deaths of Armstrong and Brown.

Appellant's liability is as an accomplice to murders of Loretha and Chemise, which were not planned. He is guilty only because of the in-for-a-penny nature of conspiracy cases.

Indeed, the very fact that he was convicted of second degree murders, as opposed to the first degree murder convictions suffered by Bryant and Wheeler, reflect a lesser degree of culpability.

Wheeler also appears to have much closer ties to Bryant and the organization than did appellant[139]. He was actively involved in the business of selling drugs for the family, based out of the Wheeler Avenue residence at the time of the murders.

Likewise, while appellant was found with shanks in his cell, Wheeler was actually involved in a jail house stabbing, stabbing the victim in the chest an inch and a half from his heart and in five other places as well. (RT 17213-17224.)

Thus, while a verdict was eventually reached, it was by no means an open and shut case in the minds of the jurors. Therefore, any errors which may have carried over from the guilt phase or may have occurred in the penalty phase are more likely to be prejudicial than in a case which may be described as overwhelming.

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[139] Williams testified that he had heard that Wheeler was Bryant's nephew. Williams heard Wheeler refer to Bryant as Uncle Stan when Bryant was not around. (RT 12115-12116.)

Furthermore, many of the errors from the guilt phase of the trial also had an impact on the penalty phase. Therefore, if this Court agrees that some of the items discussed in the previous sections were errors, but did not justify a reversal of the conviction because they were harmless, it is possible that these errors would have an independent detrimental effect on the determination of penalty.

For example, even if it was harmless error in the guilt phase to introduce the evidence of either the Curry shooting, the high speed chase, or the cocaine found on appellant when he was arrested or any of the other bad acts of appellant or the other people involved in the Bryant organization, such an error could have had an impact in the penalty phase. Thus, if the Curry shooting was harmless error as to guilt, the penalty jury is considering imposition of the death penalty for a person whom they knew shot an acquaintance for no particular reason, probably at the behest of a drug lord.

The same is true for the other acts of misconduct. A jury would obviously be less sympathetic to a drug dealer who engages in a high speed chase on the freeway to elude the police than they would be to a person with no such record.

Similarly, if the prosecutor's rhetoric in the guilt phase regarding the horrific effect of the Bryant family on the community was harmless as to guilt because it is determined that it was merely argument or an isolated aspect of the case, those remarks remain embedded in the jurors' minds. Later, when the jury is considering the penalty, the jurors are aware of how appellant was part of this organization that terrorized the community with impunity.

If the original six jurors voting for death did so with *any* of these facts in mind, had this evidence or argument not been presented at trial, some of those jurors may have originally been in the camp of the six voting for life. Thus, if the original split had been seven/five or eight/four, there is no telling where the momentum would have led.

Conversely, had this evidence or argument not been presented at trial, appellant would have been a more sympathetic character, and the six voting for life

may have held out longer, or the last remaining juror may have stood his ground. However, being aware of these facts, those jurors would be more willing to change their minds.

Consequently, even if this type of evidence or argument did not impact on the determination of guilt, it is likely that it had an influence in the penalty determination.

The same rational applies to other potential errors from the guilt phase.

Thus, if the antics of Settle, Bryant, or Wheeler at trial were not prejudicial in the determination of guilt, appellant may still be tarnished by those actions so that a juror was influenced by those actions in imposing the penalty. Such a result could have been very subtle. The jury could have been offended by Wheeler's misconduct in court. (*Ante*, at p. 135.) Normally, if a defendant elects to engage in offensive conduct, that defendant is the person who lives, or dies, by those actions. However, if these actions caused a juror to be biased against Wheeler, even if the juror is not biased against appellant, a momentum for death has been created.

Having voted to execute one defendant, for any number of reasons it makes it easier to vote for death of another. Indeed, the desire to treat people equally, may even compel the second verdict.

Thus, the misconduct of Wheeler leads appellant to the death chamber.

Likewise, even if the error in forcing appellant to wear the stun belt is found harmless with respect to the guilt phase, the error was profoundly prejudicial as to the jury's penalty determination.

The use of the stun belt, seen by at least one juror, together with the other enhanced security measures, and the fact that the jurors were forced to live the semi-sequestered life, apart from other juries in the building, could only reinforce the prosecution's efforts to depict the defendants as incredibly dangerous.

If even one juror was having a hard time returning a death verdict, the perception of increased danger could well have been the factor that tipped the scale in the decision to impose the death penalty.

Similarly, jurors tending towards voting to impose life without parole when the division was six to six, and particularly the holdout jurors when the momentum was shifting to death, may have been willing to modify their position when it appeared that a deadlock was likely, and the specter of a new, astronomically expensive trial was on the horizon. Even if this only would require a retrial of the penalty phase, the jury must have been aware of the fact that that portion of the trial was unusually expensive. The willingness to shift one's vote in such a situation would be no more irrational than a voter willing to accept the fact that while he/she does not approve of the death penalty for a particular individual, that person should not receive an expensive transplant on the public dole.[140]

As noted previously, tensions had worn thin in the jury room, and relations were strained. (*Ante*, at p. 320.) In such a situation, the jurors may have been willing to shift votes to finally close out the case and go home.

Likewise, if the juror misconstrued the appropriate evidence regarding appellant's possession of a shank (*ante*, Argument XX), the error in not having more exact jury instructions on how to deal with this evidence would adversely affect the decision to impose the death penalty.

Without repeating arguments, a similar situation is presented by all of the instructional errors discussed above.

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[140] Ethics Newsline, March 10, 2003, Vol. 6, No. 10, reporting that many citizens expressed dismay over the expense related to liver transplants for convicted murderers.
http://www.globalethics.org/newsline/members/issue.tmpl?articleid=03100316345928
See also San Diego Source, March 1, 2002, "The trickiest question in organ transplantation has been on the minds of many Californians this winter, as resentment rose over spending taxpayer dollars and using a healthy heart to save the life of 31-year-old Salinas Valley State Prison inmate serving 14 years for armed robbery.)
http://www.sddt.com/Commentary/article.cfm?Commentary_ID=109&SourceCode=20020301tza

The cumulative effect of the foregoing errors and others detailed in this brief was prejudicial to appellant and requires reversal of the penalty judgment.

As demonstrated, comparison of the length of the jury deliberations at the conclusion of the penalty phase with other capital cases compels the conclusion that this was a very close case. In a close case any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62; *People v. Von* Villas (1992) 11 Cal.4th 175, 249].) In these circumstances *Chapman v. California, supra,* 386 U.S. 18 can not be satisfied. (*People v. Filson* (1994) 22 Cal.4th 1841, 1852.) The state cannot prove beyond a reasonable doubt that the error did not contribute to the jury's sentencing decision and appellant's sentence of death must be reversed.

Thus, in the event that this court does not overturn the guilty verdicts, the judgment of death must be reversed.

XXVI

APPELLANT SMITH JOINS IN ALL ISSUES RAISED BY CO-APPELLANTS WHEELER AND BRYANT WHICH MAY ACCRUE TO APPELLANT SMITH'S BENEFIT

Appellant Smith joins in all issues not raised by himself, but raised by co-appellants, Wheeler and Bryant, which may accrue to Appellant Smith's benefit. (California Rules of Court, Rule 13; *People* v. *Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5; *People* v. *Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the foregoing reasons, the convictions and judgment of death must be reversed.

DATED: December 2004

Respectfully submitted,

David H. Goodwin
Attorney for appellant

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 135,566 not including tables, and exceeds the limits (95,200 words) of California Rules of Court, rule 36, subdivision (b). Concurrently with the filing of this brief, counsel for appellant is filing a request to file an oversized brief.

David H. Goodwin
Attorney for appellant

APPENDIX A

APPENDIX A – CHARGED CRIMES AGAINST SEVERED DEFENDANTS

Arceneaux, Anthory CT 4744-4756, 4799-4816

1. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

2. Conspiracy to commit the crime of sale or transportation of a controlled substance (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

Curry, Tannis CT 4744-4756, 4799-4816

1. Four counts of first degree murder, while lying in wait and multiple murder (Pen. Code §§ 187(a), 190.2(a)3), and 190.2(a)(15))

2. Attempted murder (Pen. Code §§ 664/187, subd. (a))

3. Conspiracy to commit murder murder (Pen. Code §§ 182/187, subd. (a))

4. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

5. Conspiracy of flight to avoid prosecution and concealment and disposal of evidence (Pen. Code § 32)

6. Conspiracy to commit a crime, to wit, preventing or dissuading witnesses (Pen. Code § 136)

7. Conspiracy to commit the crime of sale or transportation of a controlled substance (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

Gillon, Lamont CT 1696-1705, 4772-4779, 4789-4798, 4799-4816

1. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

2. Conspiracy to commit a crime of flight to avoid prosecution and concealment and disposal of evidence (Pen. Code § 182)

3. Accessory after the fact of the crime of murder (Pen. Code § 32)

4. Sale or transportation of a controlled substance (Health & Saf. Code § 11352(a))

5. Conspiracy to commit the crime of sale or transportation of a controlled substance (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

Johnson, Antonio CT 4744-4756, 4772-4779, 4789-4798, 4799-4816, 4983-4995

1. Four counts of first degree murder, while lying in wait and multiple murder (Pen. Code §§ 187(a), 190.2(a)(3), and 190.2(a)(15))

2. Attempted murder (Pen. Code §§ 664/187, subd. (a))

3. Conspiracy to commit murder (Pen. Code §§ 182/187, subd. (a))

4. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

5. Conspiracy of flight to avoid prosecution and concealment and disposal of evidence (Pen. Code § 32)

6. Conspiracy to commit a crime, to wit, preventing or dissuading witnesses (Pen. Code § 136)

7. Sale or transportation of a controlled substance (Health & Saf. Code § 11352(a))

8. Conspiracy to commit the crime of sale or transportation of a controlled substance (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

9. Accessory after the fact of the crime of murder (Pen. Code § 32)

McCloria, Provine CT 4744-4756, 4799-4816

1. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

2. Conspiracy of flight to avoid prosecution and concealment and disposal of evidence (Pen. Code § 32)

3. Accessory after the fact of the crime of murder (Pen. Code § 32)

4. Conspiracy to commit the crime of sale or transportation of a controlled substance (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

Newbill, Nash CT 4744-4756, 4772-4779, 4789-4798, 4799-4816, 4983-4995

1. Four counts of first degree murder, while lying in wait and multiple murder (Pen. Code §§ 187(a), 190.2(a)3), and 190.2(a)(15))

2. Attempted murder (Pen. Code §§ 664/187, subd. (a))

3. Conspiracy to commit murder murder (Pen. Code §§ 182/187, subd. (a))

4. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

5. Conspiracy of flight to avoid prosecution and concealment and disposal of evidence (Pen. Code § 32)

6. Conspiracy to commit a crime, to wit, preventing or dissuading witnesses (Pen. Code § 136)

7. Sale or transportation of a controlled substance (Health & Saf. Code § 11352(a))

8. Conspiracy to commit the crime of sale or transportation of a controlled substance, (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

9. Accessory after the fact of the crime of murder (Pen. Code § 32.)

Settle, Andrew - CT 1696-1705, 4772-4779, 4799-4816

1. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

2. Conspiracy to commit a crime of flight to avoid prosecution and concealment and disposal of evidence (Pen. Code § 182)

3. Possession for sale of a controlled substance (Health & Saf. Code § 11351)

4. Possession for sale of cocaine base (Health & Saf. Code § 11351.5)

5. Sale or transportation of a controlled substance (Health & Saf. Code § 11352(a))

6. Conspiracy to commit the crime of sale or transportation of a controlled substance, (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

Settle, William CT 4744-4756, 4799-4816

1. Conspiracy to operate a major narcotic sales distribution transportation business (Health & Saf. Code § 11352)

2. Conspiracy of flight to avoid prosecution and concealment and disposal of evidence (Pen. Code § 32)

3. Accessory after the fact of the crime of murder (Pen. Code § 32)

4. Conspiracy to commit the crime of sale or transportation of a controlled substance (Pen. Code § 182(1), Health & Saf. Code § 11352(a))

Slack, Levie, III, CT 4968-4973

1. Four counts of first degree murder, while lying in wait and multiple murder (Pen. Code §§ 187(a), 190.2(a)(3), and 190.2(a)(15))

2. Attempted murder (Pen. Code §§ 664/187, subd. (a))

James Williams, CT 4968-4973

1. Four counts of first degree murder, while lying in wait and multiple murder (Pen. Code §§ 187(a), 190.2(a)(3), and 190.2(a)(15))

2. Attempted murder (Pen. Code §§ 664/187, subd. (a))