No. S049596
(Los Angeles Co. Sup. Ct. No. A711739)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STANLEY BRYANT, LEROY WHEELER, AND DONALD FRANKLIN SMITH

Defendants and Appellants.

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgement of Death
Rendered in the State of California, Los Angeles County

(HONORABLE CHARLES E. HORAN, JUDGE, of the Superior Court)

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Pen. Code, § 1239, subd. (b).)

INTRODUCTION

In the six years this case was pending prior to trial, over a half dozen defendants were added to or subtracted from this case; charges of conspiracy to distribute narcotics for sale were added and severed, the entire Los Angeles County District Attorney's office was recused from prosecuting the case and then reinstated when the Court of Appeal reversed the trial court's recusal order. The myriad issues of error argued herein stem in large part from prosecutorial overzealousness. In its efforts to

secure a capital conviction against appellant, the prosecution sought to fabricate evidence that appellant was a shooter, and then, when it became clear that this tainted evidence would not be admitted at trial, the prosecution successfully sought to introduce irrelevant and prejudicial evidence, amounting figuratively to "throwing in everything but the kitchen sink." The trial court not only erroneously acquiesced to the prosecution's demands, but it imposed security measures so severe that appellant was enveloped in an aura of guilt from the start of trial to its conclusion. In the end, appellant was convicted by the testimony of two men who participated in the homicides and who falsely cast blame on appellant in a successful effort to save themselves. Such a conviction and death sentence cannot stand.

STATEMENT OF THE CASE

By amended information dated December 21, 1994, appellant and codefendants Jon Settle, LeRoy Wheeler and Donald Smith were charged with four counts of first degree murder (Pen. Code, §187, subd. (a) [counts 1 through 4]) and one count of attempted murder.[1] (Pen. Code, § 664/187,

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[1] In the six years from the date of the homicides to the filing of this amended information, a plethora of informations were filed against appellant and various other one-time codefendants in this case. (See, e.g., CT 3-13, 1682-1691, 2307-2318, 4744-4756, 4780-4788, 4789-4798, 4799-4816, 4846-4858, 4885-4897, 4911-4923, 4924-4930, 4944-4945, 4946-4954, 5102-5113, 5127-5139.) Since well over 100 witnesses testified in the instant trial, and since the instant record contains transcripts from several different preliminary hearings, appellant believes it would assist the court to list those who were at one time codefendants in this case. The original information charged appellant, coappellant Wheeler, Levi Slack, James Williams, Tannis Bryant Curry (appellant's ex-wife) and Anthony Arceneaux with four counts of murder and one count of attempted

(continued...)

subd. (a) [count 5].) A multiple murder special circumstance was also alleged as to counts 1-4. (Pen. Code, § 192, subd. (a)(3).) It was further alleged that counts 1-4 were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(1).[2] (1 SUPP CT 832-835.)[3] Appellant pled not guilty and denied the charges. (CT 5721, 5734.)

Appellant's Penal Code section 1538.5 motions to suppress were denied by an earlier trial court on August 3, 1992. (CT 10749-10750.)

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[1](...continued)
murder; Antonio Johnson was also named as a defendant and was charged with being an accessory after the fact (Pen. Code, § 32). (CT 3-13.) Eventually, the Settle brothers Andrew, William and Jon were added as defendants in this case, as was coappellant Smith; only codefendant Settle and coappellant Smith were capitally charged. Other one-time non-capital codefendants included Lamont Gillon, Provine McCloria and Nash Newbill. The cases of the non-capital defendants were severed from the capitally charged defendants on August 3, 1992. (CT 10749-10750.)

[2] Appellant was not formally arraigned on this Amended Information. In his first arraignment in the superior court in March, 1989, he pled not guilty to the murder and attempted murder charges, and denied the special circumstance allegation referenced above. As previously noted, in the following years, numerous amended informations were filed, containing additional charges and additional codefendants. On December 21, 1994, the trial court ruled appellant did not have to re-arraigned on the charges in the Amended Information. (*Ibid.*)

[3] "CT" refers to the Clerk's Transcript on Appeal, i.e., the original 59 volumes of CT provided to appellant and "SUPP CT" refers to one of eight Clerk's Supplements, some which contain multiple volumes. For example, the first set of supplemental CT contains 24 volumes, and is designated "1 SUPP CT" herein. The rest of the supplements are designated 2 SUPP CT through 8 SUPP CT respectively.

On November 10, 1994, Settle's request for self-representation was granted. (CT 13756, 13743-13744; RT 6071-6088.)[4] Thereafter appellant's counsel moved to sever appellant's case from that of his codefendants. (CT 14157-14159, 14263.) Several times during trial, appellant's counsel unsuccessfully renewed appellant's motion to sever his case from that of codefendant Settle. (RT 6342-6343, 6379-6382, 7837-7838, 14675-14676, 15471-15472, 15543, 16634-16635.)[5]

On January 24, 1995, the trial court, on its own motion and over appellant's objection, ordered that all defendants wear a stun belt throughout the trial proceedings. (CT 14396-14397; RT 6200-6202, 6344-6377.)

Jury selection began on January 25, 1995; the jury was sworn on February 2, 1995. (CT 14398, 14429.) The jury began deliberations on May 11, 1995. (CT 15206.) On May 17, 1995, over defense objection, the court took a partial verdict from the jury prior to the discharge of a deliberating juror because of a medical condition; the jury found appellant guilty of first degree murder on counts 3 and 4. (CT 15280-15281.) Following the verdict on that same date, the juror was excused over defense objection and replaced by an alternate juror. (*Ibid.*) Another juror was excused, over defense objection, during guilt phase deliberations on May 23, 1995. (CT 15290.)

On June 8, 1995, the jury returned verdicts, dated May 24 and May 25, of guilt as to appellant on counts 1, 2 and 5 and found the multiple

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[4] "RT" refers to the Reporter's Transcript on Appeal. "RCRT" refers to the Record Correction Reporter's Transcript on Appeal, which is paginated separately.

[5] These motions to sever are not reflected in the CT.

murder special circumstance true. (CT 15248-15281, 15409-15437.) Coappellant Wheeler was also found guilty as charged, and the multiple murder special circumstance was found true. (*Ibid.*) Coappellant Smith was found guilty of second degree murder on counts 1 and 2 and with regard to count 5, there was no finding of premeditation; he was otherwise found guilty as charged, and the multiple murder special circumstance finding was found true. (*Ibid.*)

The jury continued deliberations relating to codefendant Settle's guilt until June 14, 1995, when the court found the jury hopelessly deadlocked and declared a mistrial as to all counts relating to codefendant Settle. (CT 15570-15571.)[6]

The penalty phase began on June 21, 1995. (CT 15601-15602.) Jury deliberations began on July 7, 1995. (CT 15778.) On July 14, 1995, the jury returned a verdict of death as to coappellant Wheeler. (CT 15793-15794.) On July 24, 1995, the jury returned a verdict sentencing appellant and coappellant Smith to death. (CT 15857-15659.)

On August 8, 1995, appellant filed a motion for a new trial. (CT 15884-15900.) On October 19, 1995, the trial court considered appellant's motion for a new trial and the automatic motion for modification of sentence and denied both motions. The trial court sentenced appellant to death on counts 1-4, imposed and stayed a life sentence on count 5 and imposed and stayed a restitution fine of $50,000. On the People's motion,

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[6] On January 9, 1996, Jon Settle pled guilty to four counts of voluntary manslaughter and one count of attempted murder. Settle admitted a use allegation under section 12022.5. (CT 16171.) On January 31, 1996, Settle was sentenced to state prison for a term of 21 year, 4 months. (CT 16179, 16233; 1 SUPP CT 7108; 4 SUPP CT 143.)

all remaining severed counts were dismissed in the interests of justice. Coappellants Wheeler and Smith were also sentenced to death on the same date. (CT 16128-16139, 16235-16254.)

STATEMENT OF FACTS

A. Guilt Phase - The Prosecution's Case In Chief

1. Crime Scene Evidence And Coroner's Testimony

After some shots were fired at about 5 p.m. on August 28, 1988, neighbors of 11442 Wheeler Avenue ("the Wheeler house') in Lake View Terrace saw a tall, thin, young Black man with very short hair run from the Wheeler house toward a small red car parked on the street; he was wearing gloves and carrying a shotgun. (RT 8435-8445, 8467, 8475, 8500-8504; 11847-11852.) He started shooting from the sidewalk into the passenger seat of the car. (RT 8438-8439, 8444-8445.) After he stopped shooting, he ran to the driver's door, attempted unsuccessfully to open it, shot out the window, pulled up the lock, got into the car and drove away. (RT 8445.)

Neighbors also saw a white El Camino with a burgundy top parked on the street at about the time of, or shortly after, the shooting. They saw a heavy Black man in his forties get out of the car, go into the house, come out with some packages under his arm, put them in the car, and drive off in the same direction as the red car. (RT 8447-8448, 8507-8508A.)

Neighbors further saw what was alternately described as a an older blue, green or blue-green car coming out of the garage of the Wheeler house. One of the neighbors testified that the car came out of the garage headlights first, and had two people in the front seats and two people seemingly propped up against each other in the rear seats. (RT 8450, 8493, 8508A-8510A, 8512A, 8513, 11852-11855, 11893-11894, 14898.) The

green car drove in the opposite direction of the red car. (RT 8512, 11852-11855, 11893-11894.)

One neighbor reported that, as the red car drove by her house, she got a good look at the driver; in court, this neighbor first identified the driver of the red car from a set of photographs, selecting a photograph of coappellant Wheeler as the driver; however, she then pointed to appellant as that person.[7] (RT 11863, 11865-11867, 11893.) The other neighbors did not identify any of the defendants as being the persons they saw. (RT 8467, 8513.)

None of the neighbors saw anyone else in the yard at the house, nor did they see anyone backing into the driveway or walking from the garage area of the house down the street. (RT 8481-8282, 8528.)

Sometime after 5:00 p.m., residents in the area of 11311 Osborne Street in Lake View Terrace found two children and a woman in the back seat of a red car, covered with shattered glass and blood. (RT 8567-8571.) The boy was seat-belted into the passenger side back seat, and the girl was seat-belted in behind the driver. The woman was on the floor. (RT 8572.) When one of the neighbors screamed, the boy woke up and started crying. The boy was taken from the car alive but bleeding from cuts and scratches, but the females in the car were dead. (RT 8573-8585.)

Los Angeles Police Department ("LAPD") Officer Lynn Blees and his partner were the first police officers to respond to the scene of the shooting at 11442 Wheeler, arriving at about 5:10 p.m. (RT 8532-8533.)

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[7] This same neighbor said that after the homicides, while the neighbors were milling about outside, a boy pointed her out to a man by the name of Provine McCloria. (RT 11871-11874, 11910-11911, 11940-11941.)

He found shattered glass in the street where a neighbor said the red car had been (RT 8535) and a large pool of blood on the walkway going up to the front door of the house. (RT 8537.) He also saw what appeared to be someone's scalp on the metal grating of the front door. (RT 8538.) He walked through the outer steel door and tried to enter the inner front door, but it was locked; Officer Blees and his partner then secured the scene pending the arrival of detectives. (RT 8539, 8542.)

While Officer Blees was waiting at the Wheeler house, he was notified of the crime scene at 11311 Osborne Street. (RT 8542.) His was the first unit there as well, arriving at about 6:00 p.m. He found a red Toyota Camry with the right rear window blown out; a dead Black female adult and a dead child were in the car. (RT 8543.) The injured boy had been taken to the hospital. (RT 8546.) Officer Blees directed a unit that arrived to secure the scene. (RT 8546.)

Later inspection of the Wheeler house by LAPD Detective James Vojtecky revealed bloody shoe prints and drag marks in blood from the front door, through the house and on to the garage floor; a partial shoe print in the garage appeared to reflect the word "Reebok." (RT 8599, 8501-8603, 14901, 14947.) Two 12 gauge double aught buck magnum shotgun shell casings were found in the living room on the carpet near the entryway. (RT 8621-8622.) A live round of the same type of shell was found on the living room floor between the sofa and the couch, and another live round was found on top of the oven in the kitchen. (RT 8622-8623.) An expended 12 gauge casing was found in a trash can in the kitchen, as was a .45 expended shell casing. (RT 8624.) Shot fragments were found in the garage and in the front door area; Detective Vojtecky opined that the shot fragments found in the garage had come from the same shot that caused a hole in one

of the front doors. (RT 8619-8621, 8624-8625.) Double aught buck pellets were also found in a linen closet in the hallway, and Detective Vojtecky opined that a shotgun had been discharged inside the bathroom while someone was sitting on the commode; the pellets then went through the shower door into the linen closet. (RT 8625.) A partial bloody shoe print was found near the entryway of the kitchen. (RT 8659.) A piece of paper with the name "Tommy" and a phone number was found on a work table in the living room. (RT 8750-8753.) An identification card and other personal items in the name of Anthony Arceneaux were found in a desk in one of the bedrooms. (RT 8762-8763.)

All the doors and windows to the Wheeler house were padlocked, with the doors locked from the outside. The only exits were the front door, which consisted of a series of three locked doors, and the garage door. (RT 8613-8614.) No clothing and only a few dishes were found in the house; there was no food in the cabinets, and the refrigerator was fairly empty. (RT 8655.) A safe in one of the bedrooms was open and empty. (RT 8600, 8755.) The only paper currency found in the residence were two counterfeit bills in a desk drawer. (RT 8754-8755.) No narcotics were recovered from the Wheeler house. (RT 8755.)

On September 1, 1988, two bodies, later identified as Andre Armstrong and James Brown, a.k.a. Tommy Hull,[8] were found in Lopez Canyon, about five miles from the Wheeler scene. (RT 8712, 8740-8741.)

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[8] Brown was an escaped convict from Missouri who went by a number of monikers. (RT 11572-11574.) Some witnesses at trial testified regarding their dealings with "Tommy Hull." One witness testified Brown had another alias, "Kenneth Wilbon." (RT 10499-10501.) For the sake of clarity, however, James Brown will be referred to by his true name herein.

Armstrong had his California Department of Correction ("CDC") identification card and an address book containing, inter alia, the address and phone number of the Wheeler house and the names of others later associated with this case, including the name "Stan." (RT 8746.) An address book was also found on Brown's body, and it contained the address and phone number of the Wheeler house as well as appellant's name and home telephone phone number. (RT 8749-8750, 8754.)

Three damaged copper jacketed .38 or .357 caliber rounds were found on the rear floorboard and rear seat of the Camry. (RT 8674.) Fingerprints found on the Camry belonged to Armstrong and Brown. (RT 13310-13311.)

James Ribe, M.D. was the Deputy Medical Examiner ("DME") employed by the Los Angeles County Coroner's Office who conducted the autopsies of the victims in this case. (RT 8278-8282.) Dr. Ribe determined that the child victim, Chemise English, died from a close-range gunshot wound to the neck (RT 8288) from a large caliber handgun (RT 8299) and that her mother, Loretha Anderson died from multiple shotgun wounds, also shot from close range. (RT 8304.) Anderson also had four handgun wounds to her body. (RT 8304.) Andre Armstrong also died from multiple shotgun wounds, one being a contact or near-contact wound to his head. (RT 8340-8341.) James Brown also suffered multiple shotgun wounds, one which blew off a four by five inch part of his scalp. (RT 8351-8356.) Dr. Ribe further opined that Brown's shotguns wounds, though serious, were not immediately fatal, and that Brown was killed by one of two gunshot wounds, of undetermined caliber, to his torso. (RT 8356-8357, 8369-8372.) The scalp specimen found at the scene of the homicides was consistent with the wound in Brown's head, but not a definite match. (RT 8365-8368.)

The bodies of all three adults showed levels of blood alcohol ranging from .03 (Anderson) to .12 (Brown). (RT 8374-8377.)

On cross examination, Dr. Ribe admitted that, after meeting with prosecutors of this case prior to codefendant Settle's grand jury proceedings in 1991, he changed his testimony from that at the preliminary hearing in this case, downwardly revising his estimates of distances from which some shots were fired and revising upwardly the caliber of the bullet evidenced by the wound to Chemise; he further testified that he had discovered two gunshot wounds to Brown that he had not seen did not see earlier.[9] (RT 8378-8387, 8407-8411.) On re-direct examination, Dr. Ribe denied that the district attorneys working on the case told him that he should change his opinions about certain details; he said his opinion changed as the result of reviewing the evidence several times at the request of prosecutors. (RT 8304.) Dr. Ribe added that his lack of experience at the time of the homicides, when he had been a DME for only three months, as opposed to his experience level at the time of this trial, with five years and thousands more autopsies performed, also played a role in his revisions, as did the adverse conditions under which the autopsies were performed in 1988. (RT 8403-8404, 9226.)

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[9] In *In re Salazar* (2003) 3 Cal.Rptr. 262, 264 review granted November 25, 2003, No. S119066, the Court of Appeal granted petitioner's petition based on a violation of *Brady v. Maryland* (1963) 373 U.S. 83, 87 committed by the Los Angeles County District Attorney's office. In that case, the prosecution had "Ribe boxes" containing transcripts and/or autopsy reports from numerous other cases, like Salazar's, in which Dr. Ribe changed his opinion; not all of the materials were disclosed to the defense. (3 Cal.Rptr. at pp. 270-276.) The appellate court found that the materials not disclosed were relevant to Dr. Ribe's credibility, which was material to Salazar's defense. (3 Cal.Rptr. at pp. 277-278.)

2. The 1982 Shootings Of Ken Gentry And Reynard Goldman By Andre Armstrong

The following evidence was admitted for the limited purpose of supporting the prosecution's theory that there was a connection between Armstrong and Ken Gentry and one or more of the defendants, as well for the purpose of establishing motive, premeditation and intent in connection with the crimes charged in this case. (RT 8786-8787.)

a. The Ken Gentry Killing

On May 27, 1982, Ken Gentry was found shot to death in the parking lot of the Pierce Street Apartments in Pacoima. (RT 8785-8804.) Soon after that homicide, two men, Michael Flowers and Winifred Fisher, informed homicide detectives that they and Ken Gentry had purchased bunk cocaine from John Roscoe ("Ross") Bryant and then tried to get their money back from his sibling, Jeff Bryant.[10] When Jeff Bryant refused, the three vandalized Ross's van, but were caught in the act by appellant; the three ran off. Shortly after that event, Ken Gentry was killed. Witness accounts of the Gentry homicide differed with respect to whether appellant and Jeff Bryant were at the scene prior to or after the shooting, and whether appellant nodded or pointed in the direction of Gentry before a man driving a Volkswagen Beetle ("VW") pulled in the parking lot and shot him.[11] (RT

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[10] Both Bryants are appellant's brothers.

[11] At the instant trial, several of the witnesses denied making earlier statements regarding the Ken Gentry homicide; their prior statements, as well as a 1982 statement of a witness who was deceased at the time of the instant trial, were then introduced through the testimony of the law enforcement officers who had taken the statements from the witnesses or by playing a surreptitious recording of the statement to the jury.

8828-8863, 8902-8903, 8958, 8985-8999, 9045-9060, 9009-9034, 9148-9167, 9369-9371; 3 SUPP CT 10581-10600.)

Rhonda Miller, one of the residents in the apartment complex attached to the parking lot where Gentry was shot identified Armstrong as the shooter in a police line-up two days after the homicide. (RT 9073, 9090-9094.) A few days after the line-up, two women Miller did not know personally, Tannis and Rolo, came to her apartment; she thought that Rolo was Jeff Bryant's girlfriend, and she found out later that Tannis was appellant's girlfriend.[12] (RT 9094-9098.) Rolo offered Miller money, saying it was from Jeff, but Miller did not take it. (RT 9099-9102.)

Sometime later, the father of Miller's children, Alvin Brown, who had been in jail, showed up at her apartment; she was afraid of Brown, who had beaten her up in the past; he called her names and told her to take the money that had been offered to her, and she relented. (RT 9100-9103.) When Miller testified at Armstrong's preliminary hearing, she testified that Armstrong was not the man she had seen in the VW. (RT 9104-9105.) The parties stipulated that on June 6, 1982, Florence Bryant, the mother of appellant and Jeff, bailed out Alvin Brown using a property of 13031 Louvre Street in Pacoima to secure his bail, and that she did not know who Alvin Brown was when she did so. (RT 9144-9145.)

Ken Gentry's stepsister, Sofinia Newsome, lived at the Pierce Street apartments. Prior to the shooting, Gentry had told Newsome about the bad dope deal and the subsequent vandalizing of Ross Bryant's van; sometime

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[12] Appellant and Tannis Babineaux eventually married. During their marriage she went by the name Tannis Bryant. After appellant and Tannis divorced, Tannis remarried and was known at the time the homicides as well as the time of the instant trial as Tannis Curry.

after being so informed, but before the shooting, Newsome saw appellant at the Pierce Street apartments. (RT 9167-9170A.)

b. The Reynard Goldman Shooting

The following evidence was admitted for the limited purpose of showing intent and motive of the defendants regarding the instant homicides. (RT 9226.)

Reynard Goldman first became addicted to cocaine when he was about 23 years old. (RT 9244.) After Goldman started using cocaine, his friend and co-worker at Lockheed, John Allen, introduced him to Jeff Bryant, and Goldman started buying cocaine from him at a house on Lourve Street. (RT 9246-9248.) Jeff Bryant sometimes gave cocaine to Goldman on credit, and at one point in the spring of 1982 Goldman owed Jeff about $50. (RT 9250-9251.) Jeff Bryant drove by while Goldman was at a friend's house and asked when Goldman was going to pay; Goldman told Jeff he would bring it by Jeff's house the following Thursday. (RT 9251.) Goldman went to Jeff's house the following Thursday to pay, but no one was home. (RT 9252.) Goldman next saw Jeff a few weeks later. They got into a confrontation about the money and each made threats to the other. (RT 9252-9253.)

On April 23, 1982, about a week after the confrontation, Goldman was walking from his house to his car to go to work at about 6:30 a.m. when he was shot several times by Armstrong, who had been sitting outside of Goldman's house, smoking marijuana. (RT 9253-9259, 9284-9285.)

After the shooting but before the Armstrong's preliminary hearing, Jeff Bryant's girlfriend, Rochelle, also known as Rolo, drove up to Goldman's house. (RT 9261, 9294.) She offered to pay Goldman $5000 not to go to court, but Goldman refused to take the money. (RT 9261-9262,

9299.) Goldman further testified that he knew Rhonda Miller, and she told him in court in July, 1982, that she received a car and money for not testifying about the Gentry shooting. (RT 9262-9263, 9295.)

After he was shot, Goldman bought drugs from the same people he had bought from before. (RT 9266.) He sometimes found out where drugs could be bought from people in Neighborhood Billiards on Van Nuys Boulevard. (RT 9266-9267, 9297.) Goldman saw codefendant Settle in the pool hall a couple of times, and he bought drugs from codefendant Settle at Settle's house a couple of times. (RT 9267-9268, 9279-9280.)

A day prior to his testimony in the instant case, Goldman was visited by Kenny Reaux and Johnny Fisher (the brother of Winifred), whom he knew from growing up in the neighborhood, and who tried to discourage him from testifying. (RT 9263-9265.) Neither told Goldman not to testify, however, and neither offered him money in exchange for his silence. (RT 9307.)

On June 22, 1982, Detective Tucker interviewed John Eric Allen in connection with the Goldman shooting. (RT 9337-9339.) Allen told Tucker that, prior to the Goldman shooting, appellant approached Allen in Fillmore Park and hold him that if Goldman did not pay appellant's brother $50, his brother was going to get violent.[13] (RT 9340.)

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[13] Allen told one of the prosecutors that he would not testify in the instant case because he "liked living." At trial, Allen denied making that statement and denied telling Officer Tucker about the threat in Fillmore Park. (RT 9228-9233, 9337-9339, 9348-9350.)

c. The Prosecution And Conviction Of Andre Armstrong For The Shootings Of Ken Gentry And Reynard Goldman

On June 15, 1982, Armstrong was arrested for the Gentry shooting after leaving the residence of Wilbert Babineaux, Sr.[14] while driving away from that home on a motorcycle that police had previously seen appellant driving. (RT 9324-9330.) Armstrong had $13 on his person at the time of his arrest. (RT 9335.) When he was arrested, Armstrong was living in his 1970 Cadillac parked in a parking lot under a building. (RT 8813-8814.) Live ammunition found in the Cadillac were of the same type, caliber and brand as casings found at the scene of the Gentry homicide. (RT 9358.) A VW that had been reported stolen, and that matched the description of one driven by the man who shot Gentry was found in the same parking lot, with its ignition removed. (RT 9354-9355.)

The Gentry homicide and the Goldman shooting were charged concurrently in the same prosecution. (RT 9337.) Three people were originally charged as defendants: Jeff Bryant, Armstrong and appellant. (RT 9337.) In the instant trial, the parties stipulated that appellant and Jeff Bryant were arrested for the Gentry homicide on June 18, 1982, and that the preliminary hearing of against the three defendants began on July 21, 1982. (RT 9144.) The charges against appellant and Jeff Bryant were dismissed prior to trial. (RT 9344.)

The parties stipulated that on May 20, 1983, Armstrong was convicted of the first degree murder of Gentry and that on May 23, 1983, Armstrong was convicted of assault with a deadly weapon on Goldman. (RT 9386.) It was further stipulated that Armstrong was: sentenced to state

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[14] This is Tannis's father.

prison; his convictions were reversed on appeal; he then pled guilty to the voluntary manslaughter of Ken Gentry and was paroled from Folsom Prison on July 16, 1988[15] into the custody of St. Louis law enforcement; and that he was released from custody in St. Louis on July 21, 1988. (RT 9387-9390.)

3. The 1983 Taped Statement Of Andre Armstrong Regarding His Criminal Activities, Including The Shootings Of Ken Gentry And Reynard Goldman

The jury heard audiotaped recording of a taped statement made by Andre Armstrong on July 6, 1983, to LAPD Detective Kevin Harley, who had been assigned to investigate the homicide of Ken Gentry's father, Charles Gentry, which occurred in North Hollywood on July 3, 1983. (RT 9405-9407.) Detective Harley went to Chino State Prison to interview Armstrong to determine whether the two killings were connected.[16] (RT 9407-9408.) Armstrong did not provide Detective Harley with any information regarding the Charles Gentry homicide, but he did talk about his role, and that of appellant and Jeff Bryant, in the Ken Gentry homicide. (RT 9413.) Part of the interview with Armstrong was surreptitiously tape recorded, and that tape was played to the jury. (RT 9413-9417.)

According to Armstrong's taped statement, in 1982, he left St. Louis for southern California, and he met up with Wilbert Babineaux, Sr., with whom Armstrong had worked transporting drugs from the time that Armstrong was about 12 years old. Babineaux wasn't a big player, but

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[15] The record erroneously reflects Armstrong's release occurred in 1989.

[16] The prosecution represented in the instant trial that the Charles and Ken Gentry killings were unrelated to each other. (RT 9411.)

rather a middle-man for some people in Inglewood. (3 SUPP CT 10474, 10530-10535.) Babineaux's son, Wilbert Babineuax, Jr. ("Booby") introduced Armstrong to the Bryants, who, through Booby, offered Armstrong $45,000 to kill Ken Gentry, Winifred "Foots" Fisher and Michael Flowers. (3 SUPP CT 10478, 10485-10486.) Appellant gave Armstrong $15,000 in cash, that is, 750 twenty dollar bills, immediately following the Ken Gentry shooting. (3 SUPP CT 10528-10529.) The Bryants also paid Armstrong $2,000 to shoot Reynard Goldman, whom they said owed them money from the purchase of cocaine. (3 SUPP CT 10475-10477, 10529.) Armstrong did the shootings because he was desperate, hungry and sleeping in his car. (3 SUPP CT 10475, 10522.)

According to Armstrong's taped statement, the Bryants were too scared to do the shootings themselves, that "that's just not their game." (3 SUPP CT 10477-10478.) Armstrong would have killed Ken Gentry for nothing, as a favor to the Babineaux family, but the Bryants wanted to make it a business deal. (3 SUPP CT 10530.) In retrospect, Armstrong believed he should not have killed Ken Gentry for $15,000 because he probably could have gotten $20,000 from Gentry's father for not killing him. At the time of the Ken Gentry shooting, Armstrong did not know that the Bryants were "lightweights" and that he probably could have gotten $15,000 from them by just threatening them. (RT 3 SUPP CT 10479, 10488, 10511-10512, 10543.) Appellant did not point Ken Gentry out to him on the day he shot Gentry; rather, Armstrong had a photograph of Gentry. (3 SUPP CT 10495-10496.)

Armstrong did not know anything about the Charles Gentry's death. However, he was sure that the Charles and Ken Gentry killings were unrelated and that the Bryants had nothing to do with the former.

Armstrong believed Charles Gentry probably was shot over a woman. (3 SUPP CT 10482, 10506-10509, 10516-10517.) Before the Ken Gentry shooting, all Armstrong knew about the Bryants was that they sold cocaine. (3 SUPP CT 10485.) Armstrong held a grudge against the Bryants for letting him go to trial and get a 28-year sentence when they had told him not to worry about anything because they would take care of the witnesses, that is, pay them off. (3 SUPP CT 10493-10494, 10510, 10519-10520.)

Armstrong admitted to police that he had committed about seven homicides. (3 SUPP CT 10492.) Armstrong believed that his way of thinking was normal to him, because he grew up in an environment where it was "kill or be killed," but that to a psychiatrist he was a mental case. (3 SUPP CT 105000.) Armstrong believed that the Bryants owed it to him to take care of his wife and child and that they would have to do so because he was "holdin' threats on them," that is, any day he could tell on the Bryants and could have any one of them killed. (3 SUPP CT 10505-10506, 10518-10519.) It was Armstrong's intention to bring his people out to California to "squeeze" the Bryants. (3 SUPP CT 10512-10513.) If his appeal was successful, it was "gonna be messy in Pacoima," meaning that Armstrong was going to take care of the people who testified against him concerning the Ken Gentry homicide. (3 SUPP CT 10525.)

4. Evidence Relating To Narcotic Trafficking By "The Family"[17]

Numerous narcotics detectives from the LAPD and the Los Angeles County Sheriff's Office ("LASO"), as well as current or past drug dealers,[18] testified regarding the sale of cocaine in the Pacoima/Lakeview Terrace area in the mid 1980s. The gist of their testimony was that Jeff Bryant ran a narcotics trafficking organization of over 100 members known as "the Family" using well-fortified homes to sell his cocaine. Some of the homes were used as "count houses," that is, where people paid for the drugs they wanted after being electronically buzzed into a sally port created by two metal doors; after payment was received and counted, the buyers were directed to another location where they could pick up the cocaine. In the locations where the cocaine was kept, hot cooking oil was also on hand to enable quick destruction of the drugs if necessary. Reported members of the Family included Jeff Bryant, appellant and their brothers Ross and Eli

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[17] Appellant uses the term "the Family" to refer to the alleged drug sales organization referred to at trial. In so doing, appellant maintains his role in the sale of narcotics and the make-up of "the Family" is as appellant testified to at trial.

[18] Many of the current or former drug dealers had made statements to police at various times prior to the instant trial regarding the sale of cocaine in the San Gabriel Valley in the 1980s, and some of those statements were surreptitiously recorded. When called to testify about those statements in this trial, most denied making some or all of the earlier statements. The content of the earlier statements was then introduced either through the testimony of the officers who took the statements or by playing the tapes for the jury; in many of the prior statements the speakers expressed a reluctance to testify in this case.

Bryant,[19] coappellant Smith (a.k.a. "Duke"), Edie Barber, Antonio Johnson,[20] Nash "Newt" Newbill, codefendant Settle and his brothers William, Frank and Andrew Settle, William "Amp" Johnson, Darrell Blaylock, William "Binky" Blaylock, Ladell Player, Billy Fields, Haywood Kemp, Alonzo Douglas Smith, George Smith, Kenny Reaux, Lawrence Walton, Danny Miles, coappellant Wheeler, Lamont Gillon, Provine "Ben" McCloria, and James "Jay"or "Jay Baby" Williams. Some of the homes used in the sale of narcotics were 11442 Wheeler Avenue, 13031 and 13037 Louvre Street, 10731 and 10743 De Haven,[21] 12719 Judd Street,[22] 13239 Desmond Street, 12707 Dronfield Street, 11236 Adelphia Street, 11649 Fenton Street, 11943 Carl Street, and 11516 Vanport Ave.[23] "Family" drugs were distributed using Neighborhood Billiards, a pool hall owned in part by appellant; public areas such as Hansen Dam and Fillmore Park were also used for drug sales and distribution. (RT 6-7, 9311, 9536-9538, 9539-9555, 9582-9596, 9604-9621, 9628-9706, 9717-9720, 9794, 9811-9812, 9835, 9873, 9882, 9916-9917, 9945-9955, 9983-9986, 9993-10010, 10054-10078, 10219-10220; 10235-10291, 10538-10593, 10681-10684, 10688-

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[19] During the time period in issue, Eli Bryant was employed by LASO as a deputy sheriff, assigned to the Men's Central Jail. (RT 9583, 9599.)

[20] It was reported that Antonio Johnson drove a white El Camino with a burgundy top. (RT 10583.)

[21] These were the homes of Eli and Jeff Bryant, respectively. (RT 9583.)

[22] This was appellant's home at the time of his arrest in 1988. (RT 4158-4159.) This was the only house owned by appellant. (RT 15279.)

[23] Codefendant Settle owned this house. (RT 10661-10662.)

10712, 10792-10841, 10883-10888; 11219-11223; 3 SUPP CT 10468-10472, 10601-10617.)

As a result of a 1985 narcotics investigation, Jeff Bryant pled guilty to operating a house (11442 Wheeler Avenue) where narcotics were dealt and selling or transporting cocaine, and appellant pled guilty to conspiracy to sell or transport cocaine. (RT 9730.) The overt acts admitted during appellant's plea included that he: "recruited Kenny Reaux" to work in the rock house that he and Jeff Bryant were running;" offered Reaux $200 per eight hour shift for selling cocaine at 11442 Wheeler Avenue; Reaux had 137 grams of cocaine in his possession at 11442 Wheeler Avenue on March 22, 1985, while working for appellant; and Reaux attempted to destroy the cocaine by putting it into a crock pot containing hot cooking oil. (RT 9730.)

Evidence of the various defendants' roles in narcotics sales during specific periods of time prior to the homicides was presented. The evidence of coappellant's Smith's role was largely limited to a prior arrest. He was arrested on September 29, 1987, after a high speed car chase through the San Fernando Valley. (RT 10099-10115, 10122-10128.) During the chase, coappellant Smith threw plastic baggies, a white powdery substance and bits of paper from a notebook or address book out the window. (RT 10105, 10124-10125.) A .357 magnum and 18 baggies containing what appeared to be cocaine were found in the passenger compartment of the car; the total weight of the substance in the baggies was 271 grams, or about a quarter of a kilo. (RT 10112-10114, 10126-10128) Coappellant Smith was under the influence of cocaine at the time of his arrest. (RT 10119, 10124.)

With regard to appellant, Alonzo Smith bought cocaine from appellant beginning in 1986, but that he sold the drugs locally as his own

boss. (RT 10884-10889.) In 1987, William Anthony "Amp" Johnson sold narcotics for appellant and Jeff Bryant. (RT 9993.) In 1988, Ladell Player negotiated payment for cocaine in nine-ounce quantities through appellant, and he paid for those drugs at the Wheeler house. (RT 10234-10237, 10239-10243.)

Hayward Kemp distributed cocaine to the Midwest, and he generally obtained the drugs from Ladell Player or Billy Fields; however, in 1988, a kilo of cocaine was delivered to him by codefendant Settle. (RT 10054-10065.)

According to an unrecorded statement by Lawrence Walton to a police detective, the Bryant Family was made up of the Bryant and Settle brothers, and appellant was the boss.[24] (RT 10689, 10691, 10696, 10716-10717.) Walton sold drugs at roving locations at Fillmore Park and Hansen Dam, and when he ran out of drugs Antonio Johnson, Frank Settle or William Settle would replenish his supply. (RT 10584, 10691-10692.)

According to statements by George Smith to a police detective, appellant hired Smith to work for the Family in 1986, and appellant and his brother Ross would circle Fillmore Park to keep the competition away. (RT 11214-11217.) When Smith was arrested in 1987 with a pound of cocaine, appellant got a lawyer for him and Smith had to work to pay appellant back. However, at trial Smith testified that he borrowed the money for a lawyer from Eddie Barber; (RT 10811, 10834, 10865, 10867-10868, 11217-11218.) According to Smith's prior statement, in 1988 appellant ran the

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[24] At trial, Walton denied or did not recall making the prior statements. (RT 10550-10566.)

operations from the street, but the overall head was Jeff Bryant, who was in custody. (RT 11222.)

Regarding codefendant Settle, Smith said that codefendant Settle, whom Smith described as "big time" in the Family, had sold him narcotics on three occasions. (RT 11221, 11255.) While living on the streets, Rhonda Miller sold drugs and met codefendant Settle through a friend. (RT 9106.) She stayed with her friend at a fortified house on Vanport. (RT 9106-9108.) Miller became worried that the people at the Vanport house were stealing drugs, and she did not want to be implicated. She called the number on the kitchen counter for a man named Johnny. (RT 9109-9110.) A man answered the phone and she told him that people were stealing drugs; Johnny, whom she identified as codefendant Settle, later showed up at the house and made everyone leave. (RT 9111-9116.) Miller did not know for certain that drugs were being sold at the Vanport house. She never bought drugs from codefendant Settle, and after codefendant Settle made them leave that house, she heard that drugs were no longer being sold there. (RT 9120-9125, 9137-9141.)

On September 19, 1991, Detective Vojtecky interviewed Una Distad.[25] (RT 9768-9769.) According to Detective Vojtecky, Distad told him that she was a drug user. She was introduced to codefendant Settle by a man named Mickey, who suggested that she have sex with codefendant Settle in exchange for drugs. Distad ended up living with codefendant Settle at the Corcoran Street address for several months. (RT 9770.) She said that Mickey worked at the Vanport house selling drugs. (RT 9770-

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[25] Una Distad testified at trial and disputed she made the statement attributed to her by Detective Vojtecky. (RT 9739-9755.)

9771.) Codefendant Settle supplied Distad with drugs. On about 20 occasions, he gave her either an oil or tennis cans filled with drugs to bring to the Vanport house, and she was paid $1,000-1,500 for each delivery. (RT 9772.) During an interview in the DA's office prior to her testimony, Distad told Detective Vojtecky that she did not want to testify because she had children and that "you can have anybody killed for $600." (RT 9768-9769.) After her testimony, Detective Vojtecky escorted Distad out of the building and she told him that she was sorry she was "an asshole" but they could "prosecute him without me." (RT 9768.)

On February 11, 1988, LAPD Detective David Lambert served a search warrant on a Best Western motel on Sepulveda Boulevard and found codefendant Settle and William Settle in adjoining rooms. (RT 9866-9868.) Evidence seized from William's car included approximately $3000 found in a briefcase, bound in a fashion commonly used by the "Family." (RT 9868-9869.) Evidence seized from Una Distad's car included a small digital scale, two beakers and some ziploc baggies. (RT 9869-9871.) No contraband was found in codefendant Settle's vehicle; codefendant Settle was arrested but released prior to booking. (RT 9871, 9932.) Detective Lambert opined that at the time of the homicides, codefendant Settle ran the Vanport house for the "Family." (RT 9946.)

Walton, Player and George Smith also reported that: coappellant Wheeler started working for the Family in 1988; appellant treated Wheeler like a brother; and coappellant Wheeler drove a white Audi that he used to transport up to 18 ounces of rock cocaine at a time, and was armed with a .357 magnum and an Uzi. (RT 10241, 10253, 10259-10260, 10308, 10588-10589, 10690-10691, 10704, 11219-11220.)

5. Armstrong's Incarceration And His Criminal Activities With James Brown After His Release From Prison In 1988

Francine Smith went to school with the Bryants. (RT 9446-9447.) Jeff Bryant asked her to write to Andre Armstrong while Armstrong was in Folsom State Prison, and she did so; she also visited him in the county jail a few times.[26] (RT 9447-9448, 9463-9464.) Armstrong never told Francine Smith why he was in prison, and he never said that anyone owed him money; he did tell her that Jeff Bryant would take care of him upon he release from prison. (RT 9453-9457, 9463.) While incarcerated in Folsom prison from 1983 through 1985, Andre Armstrong was sent $1,050 from appellant and $55 from Francine Smith.[27] (RT 9475-9489.)

In 1988, Angela Armstrong, the sister of Andre Armstrong, received two Western Union money transfers, one for $2000 and another for $100,

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[26] In 1986, appellant paid her $300 to cover her expenses to visit Armstrong while he was in Folsom; instead, Francine used the money to buy drugs from a house on Louvre Street. (RT 9448-9449.) Later that year she tried to buy drugs at the Louvre Street house with a $10 bill she attempted to alter to look like a $100 bill; she was caught and verbally reprimanded. (RT 9449-9450.) In December, 1986, she was beaten on the head, neck and chest with a billy club with a chain in the middle by someone she didn't know. (RT 9450-9451.) Appellant was standing far away in the parking lot while the beating was occurring. (RT 9451.) After the beating ceased, Francine went to the party and cleaned up. (RT 9452.) She saw appellant about a day or two after that, and he told her that she was lucky to be alive, and that they if they hadn't known her so well, she'd be dead. (RT 9452-9453, 9462.) Francine said that she never saw appellant with any cocaine and that she never bought anything from him. (RT 9463.)

[27] Coincidentally, during this same period of time, coappellant Smith, who was not related to Francine Smith, was approved to correspond with Armstrong. (RT 9588.)

from appellant while her brother was still in the penitentiary in California. (RT 10517-10525.) Before she received the money, her brother told her that appellant was going to send it and that she was to use the money to pay the bills for his collect telephone calls to her from prison. (RT 10528.) She sent $1000 to Armstrong at Folsom prison, and James Brown picked up the rest of the money. (RT 10528-10530.)

Mona Scott Walker met Armstrong in 1988 while he was in prison and she was visiting another inmate. (RT 9492-9493.) Armstrong would write and call her collect. (RT 9493-9495.) At one point the telephone bills became a problem for her, and she asked Armstrong to stop calling. He told her that a friend owed him and that he would make arrangements for her to get money for her phone bill. (RT 9495.) Armstrong then instructed her to call a phone number and ask for appellant; when she did so, she was instructed to go to a house on Judd Street for the pick-up. (RT 9495-9496.) Appellant answered the door, invited her in, and gave her about $400 in small bills, contained in a brown bag. (RT 9497-9499.) Later, Walker also received about $2,500 from appellant for traveling to visit Armstrong in prison. (RT 9500-9502.)

Armstrong told Walker that he had a close personal friend from St. Louise named James Brown. (RT 9504-9505.) At Armstrong's instructions, Walker twice drove Brown from Laurel Canyon to Marina Del Rey. (RT 9506-9507.) Later James Brown called Walker from up north and said he was living up there with his girlfriend Loretha and her kids. (RT 9508.) On August 1, 1988, Armstrong called Walker and told her that he had been released from prison and was up north with Brown and that they would be moving back to the San Fernando Valley. (RT 9508.)

Armstrong arrived at Walker's house around August 27th or 28th. (RT 9509-9510.) He said he was with Brown, Loretha and the kids, and that they were going to find a motel room. (RT 9510.) Walker met the people who were with Armstrong the next day at lunch; they were in a Ryder moving van. (RT 9511.) Armstrong he told Walker that he was in prison for killing a child molester and that it was murder for hire. (RT 9514.)

The last time Walker spoke to Armstrong, he sounded anxious and frustrated, as if there was something he wanted to tell her but did not. (RT 9515.) He told her he was a "fall guy" for appellant. (RT 9516.) He said that appellant owed him and that appellant had only so much time to produce. (RT 9515.) Shortly after that phone call, Walker learned that Armstrong had been killed. (RT 9518.)

In the summer of 1988, Armstrong's mother, Delores Armstrong Brown, was living in St. Louis. She saw her son once or twice that summer after he had been released from custody. (RT 10511-10512.) Armstrong was staying in St. Louis with his sister, Deborah Marshall. (RT 10513.) In a August 15, 1991 interview, Armstrong Brown told Detective Vojtecky that just before the homicides, Armstrong told her that people in Los Angeles owed him a lot of money and that once he collected the money he was going to pay for the family house. (RT 10723-10724.)

Armstrong's sister, Deborah Marshall, saw her brother for the last time in June or July of 1988, after he had been released from custody in St. Louis, Missouri. (RT 10471-10473.) He stayed with her for a few weeks before leaving for California. (RT 10473.) Marshall twice picked up money, totaling $600, wired to him in her name from Antonio Johnson via Western Union. (RT 10465-10467, 10476.)

Valerie Wilbon was an ex-girlfriend of James Brown, and after she and Brown broke up, she remained in telephone contact with him through 1988. (RT 10499-10501, 10502-10503.) On March 5, 1988, she received $500 via Western Union from appellant. (RT 10459-10460, 10504.) She was surprised because Brown had said that he (Brown) was going to send her money, and she did not know appellant. (RT 10505.)

Shirley Owens met Brown and his girlfriend, Janine King, in St. Louis through her son Carmett in March, 1988. (RT 11497-11499.) King asked Owens to pick up some money for her at a Western Union; she said she could not do it herself because she had no identification. (RT 11499.) Owens agreed, and picked up money wired from appellant on several occasions. Owens also identified her son Carmett's signature on a receipt showing that he had picked up $500 wired from appellant.[28] (RT 11504.) Carmett grew up in St. Louis and was friends with Andre Armstrong. (RT 11503.)

In 1988, at appellant's request, Alonzo Douglas Smith (no relation to the other Smiths heretofore mentioned) delivered nine ounces of cocaine, which he received from Andrew Settle, to James Brown's people in St. Louis; some of the drugs were robbed from him upon his arrival. (RT 10889-10895.) Smith called appellant and told him of the robbery. Appellant was understanding, arranged for Smith to be picked up, and wired him several hundred dollars. (RT 10895-10898.) Smith stayed in St. Louis and sold the remainder of the narcotics, sending the proceeds to appellant. (RT 10899-10901.) When Smith returned to Los Angeles at

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[28] Carmett Owens was deceased at the time of the instant trial. (RT 11504.)

James Brown's request, Smith delivered about a half kilo of cocaine, that he received from Andrew Settle, to Brown in Monterey. (RT 10901-10903.) Smith told appellant that he thought that Brown's people might have set Smith up to be robbed in St. Louis. (RT 10904.) After Smith was arrested in March, 1988, on a parole hold, appellant sent money to Smith's ex-wife, Tonia Buckner Smith. (RT 10906-10908.) Smith had met Brown through appellant, who did not introduce Brown as a Family member.[29] (RT 10908-10909.)

Valerie Mitchell met and dated James Brown in March, 1988, while she was living in Marina, California. At the time, Brown was living in the Six Pence Inn motel in the same town, and he later moved to an apartment on Carmel Street. (RT 11366-11369, 11378.) A few weeks after Mitchell met Brown and after he returned from a trip to Los Angeles, she learned that he was dealing narcotics. (RT 11369-11370.) Brown gave her the names of Drew and Stan, along with phone numbers, for her to contact in the event Brown was arrested. (RT 11372-11373.)

Lavonne Cowles Webb, who worked at the Six Pence Inn, was introduced to Brown in March 1988, by co-worker Rodney Wiley. (RT 11379-11381.) She knew that Brown was involved in illegal activities, dealing cocaine. (RT 11382-11383.) She signed a lease for an apartment in Salinas along with Brown, who used Rodney Wiley's name. (RT 11387.)

Rodney Wiley, whoa maintenance man at the Six Pence Inn in February and March, 1988, had met James Brown in St. Louis in February,

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[29] Alonzo Smith also testified that he had a conversation with appellant in the county jail in 1988; the content of this conversation is discussed later in the Statement of Facts; the evidence was admitted solely against appellant.

1988. (RT 11429-11430.) Brown lived at the Six Pence Inn for a few weeks before moving another location. Since Brown did not drive, Wiley occasionally drove Brown around the area, including several trips to a Western Union office, in Webb's car, and Brown paid Wiley in cash or with cocaine. (RT 11430-11432.) Wiley allowed Brown to use Wiley's name when Brown rented an apartment in Salinas with Lavonne Cowles; Brown lived at that apartment before he moved to Los Angeles in August, 1988. (RT 11434-11435.) Shortly before Brown moved, Wiley saw Brown with a man that had just gotten out of prison and who drove a red Toyota; Brown asked Wiley if he wanted to go to Los Angeles with them, but Wiley declined. (RT 11435-11439.)

Albert L. Owens was a soldier in the Army, stationed at Fort Ord in early 1988, and met Brown at a fellow soldier's apartment. (RET 11464-11465.) Owens agreed to drive Brown to Los Angeles; just before they left, Brown made a phone call and said, "Stan, we're on our way now." (RT 11467.) At Brown's direction, Owens drove to an apartment building on Laurel Canyon and Saticoy. After they were let into an apartment by a young woman, Brown made another phone call, saying, "Stan, we're down here now." (RT 11469-11470.) About a half hour later, Andrew Settle delivered nine ounces of cocaine, for which Brown paid him $4500. (RT 11471-11475.) Owens and Brown returned to Marina; Brown paid Owens for the trip in cocaine, gas and food. (RT 11475.)

Owens made three more drug-running trips to Los Angeles with Brown. (RT 11476-479.) Owens then made about four trips to Los Angeles by himself, and two trips with a man named "Drew" whom Brown introduced as his brother. Each time, Owens paged "Stan," and Andrew Settle delivered the drugs. (RT 11479-11483, 11508-11518, 11518-11524.)

Owens met Armstrong in July, 1988, at Brown's apartment in Salinas. (RT 11529.) Armstrong was upset because he thought Brown was supposed to wait until Armstrong got out of prison before setting up operations; Armstrong said that Brown was going about it wrong, dealing on a small level. (RT 11530.) Armstrong thought they should deal in bulk and move back to Los Angeles, but not be under "Stan's" control there. (RT 11531.) Days before Brown was killed, Owens delivered a red Toyota owned by a friend to Brown. (RT 11531-11533.)

Loretha Anderson's brother, Stanley Anderson, testified that Loretha and her children Chemise and Carlos English lived with Brown in an apartment in Salinas. (RT 11451-11454.) Loretha and the children, along with Brown, moved to the San Fernando Valley on a Friday at the end of August, 1988. Stanley Anderson rented a U-haul for them, with money given to him by Brown, and he helped them move all of their belongings out of the apartment and into the truck. (RT 11454-11456.) His sister was killed the Sunday afternoon following the Friday that she moved to Southern California. (RT 11462.)

Andrew Greer, who testified under grant of immunity from prosecution (RT 11649), was in prison in Missouri with both Armstrong and Brown. (RT 11568-11571.) Brown escaped from a prison hospital in late 1987. (RT 11572, 11574.) Greer was released from custody and in April, 1988, he moved to Marina after Brown, who was living there at that time, gave him a bus ticket and then set him up with an apartment. (RT 11574-11578.) Albert Owens picked up Greer at the bus station. (RT 11579.) Greer later made several trips with Owens and another man to Los Angeles, where they delivered money in exchange for powder cocaine, which they in turn brought back to Brown; Brown did business with "Stan"

and Andrew Settle. (RT 11581-11599.) Greer several times picked up money wired by appellant and Antonio Johnson to Brown in northern California. (RT 11600-11602.)

Armstrong was around for a few weeks before he was killed; Tannis came to visit Armstrong in northern California, driving a green Jeep. (RT 11604-11607, 11608.) Armstrong told Greer that appellant owed Armstrong some money for a hit Armstrong did for him, and Armstrong said he was going to get his money. (RT 11607.) Armstrong was not happy with the operation Brown had set up, stating that Brown had "fucked up a lot of money." (RT 11609.) Brown had made arrangements through appellant for an apartment on Laurel Canyon in Los Angeles. (RT 11610.)

Armstrong went to Los Angeles with Tannis. Greer, Elaine Webb (another girlfriend of Armstrong), Brown, Loretha and the children followed in a U-haul and Toyota. (RT 11608-11615.) In the early morning hours they arrived at an apartment where Armstrong was staying, and he instructed them to go to a hotel. (RT 11614-11616.)

The next morning, Greer went with Brown, Loretha and the children to a pool hall. (RT 11616-11617.) Greer waited outside alone while the rest went into the pool hall. (RT 11619.) The apartment they were supposed to move into was dirty, and Armstrong said he wanted money from "Stan" to clean it up. (RT 11619-11620.) While waiting outside, Greer saw a man in a white Audi pull up, get out and talk to Brown, who got some marijuana from him. (RT 11621.) Greer did not go in the pool hall because it was dark and he saw pistols on the bar area. (RT 11622.)

At about 11 a.m. the next day, Armstrong and Brown picked up Greer. After briefly stopping by Mona Scott Walker's place, they went to Tannis's house on Tobias, where they smoked some marijuana. (RT 11623-

11626.) While they were at Tannis's apartment, Armstrong received a phone call in response to a page he had made. (RT 11629-11630.) When Armstrong got off the phone, he said that they were supposed to meet "Stan" at about 4:30 p.m. and pick up some money, about $500, for the cleaning supplies. (RT 11630.) Armstrong also then told Tannis to go back in the room and get the pistol "in case the dude started tripping over it." (RT 11631.) Tannis went in the room, and returned, putting a pistol in her purse. (RT 11631.)

As they were leaving, Armstrong told Greer to ride with Tannis, but Greer would not do it because he was not involved with her, and because he risked violating parole if they were pulled over with a gun in the car. (RT 11631.) Tannis drove her Jeep, and Greer rode with Brown and Armstrong in the Toyota. They all rode over to Tannis's aunt's house, and Tannis and Armstrong got out and talked. (RT 11633.) The three men got back into the Toyota, and Armstrong said Tannis would follow in the Jeep, but she turned around and went back into the house. (RT 11633.) Greer was concerned because Tannis did not follow with the guns. (RT 11634.) Brown and Armstrong told Greer that everything was cool, but Greer insisted they take him back to Laurel Canyon. (RT 11634.) When they dropped off Greer, Loretha said the kids were hungry, and Brown had her and the kids get into the car, saying he'd take them to get something to eat. (RT 11635.) Loretha and the kids got into the back seat of the Toyota, leaving the apartment with Brown at about 4-4:30 p.m. (RT 11636.) Greer did not see them alive again. (RT 11641.)

6. Testimony Of James Williams

James Williams ("Williams"), also known as "Jay" or "Jay Baby," testified under grant of immunity from prosecution.[30] Williams became a member of the Family in about April 1988, when his best friend, Lamont Gillon, introduced him to Nute (Nash Newbill), who hired Williams to work at the pool hall. (RT 12109-12110, 12115-12118.) When Williams joined the organization appellant was the boss. (RT 12110-12111.) Williams had first met coappellant Wheeler, whom he also knew as "Slimm," when they were in seventh grade. (RT 12111-12112.) Coappellant Wheeler was a member of the Family when Williams joined. (RT 12112.) Williams also recognized coappellant Smith, although he did not know appellant's last name in August of 1988; he had seen Smith on two or three occasions. (RT 12113-12114.) He had not met codefendant Settle prior to August 28, although he had heard codefendant Settle's name mentioned. (RT 12114.)

Williams' first job at the pool hall was directing drug buyers to spots where they could pick up drugs. (RT 12120.) Later, Newbill promoted Williams and Williams's friend Lamont Gillon to the count house on Wheeler Avenue, where he worked until August 28, 1988; Anthony "Ant Man" Arceneaux and coappellant Wheeler were also working there at that time. (RT 12115-12118, 12132.) Williams worked the 7:00 a.m. to 3:00 p.m. shift; Gillon worked from 3:00 p.m. to 11 p.m., and coappellant Wheeler worked from 11:00 p.m. to 7:00 a.m. (RT 12131, 12137-12138.) Each worked for three weeks and then had a week off. (RT 12137-12138.) Arceneaux took the shift of the person who was off. (RT 9965-9966,

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[30] At the time of appellant's trial, Williams was in custody in another state on drug trafficking charges. (RT 12109.)

12138-12139.) An older model orange Toyota Corolla "company car" was used by employees of the Wheeler house as transportation between the pool hall and the Wheeler house during shift changes. (RT 12177, 12179.)

The Wheeler house was only used for large-quantity sales of nine ounces of cocaine or more. (RT 12151-12152, 12158-12159.) The customers buying at Wheeler were not directed to another location, as were purchasers of small amounts of drugs who paid at other houses; rather, after the buyers paid at the Wheeler house, drugs would be delivered to them. (RT 12154-12155.) Williams described the procedure for purchasing cocaine as follows: a buyer would go to the count house on Wheeler Avenue; Williams would count the money; Williams would make a telephone call to find out where to direct the buyer; he would then tell the customer where the delivery would occur; Williams would later receive a call saying the buyer had received the goods; and Williams would make a written note of the competed purchase and include his initials in the notation. (RT 12130-12131, 12141, 12149, 12158.)

Tuesdays were the paydays, and Williams would get his money from the safe; other people would come by the house for their money as well. (RT 12228-12230.) On two or three occasions, coappellant Smith came and picked up money. Williams did not know what coappellant Smith did in the organization. (RT 12230.) People who handled in the narcotics made more than the $500 per week that Williams and the other people in the count house made. (RT 12231.) Coappellant Smith made $1,000 per week. (RT 12231.)

Appellant frequented the Wheeler house, usually arriving on Sundays at around 2:00 p.m.; appellant's barber would also come by at that time to cut appellant's hair. (RT 12148.) About a month after Williams

started working at the Wheeler house, the procedure for answering the door was changed. Appellant gave Williams a silver .45, instructing him that he was to be armed when he answered the door. (RT 12235-12236.) About three weeks prior to August 28th, Williams attended a meeting at the pool hall that appellant ran, telling everyone that the following changes were going to be made to avoid police detection: the pool hall was going to be closed, and the locations of the money and drug houses were also to be changed to Fenton and Adelphia, respectively; the money at the Fenton house was not to exceed $1000; the new job for those like Williams employed at the Wheeler house would be to pick up the money from the Fenton house; people also would be required to work ninety-minute shifts at the pool hall in order to keep it open 24-7 for a couple of weeks to make sure that all the customers got news of the new system. (RT 12243-12246.) A schedule of these work shifts was found at the Wheeler Avenue house. (RT 10713, 10758, 12244-12245.)

On Sunday morning, August 28, 1988, coappellant Wheeler picked up Williams at the pool hall in coappellant's Wheeler's white Audi, because something was wrong with the company car, and he dropped off Williams at the Wheeler house. Williams entered through the garage door, which had been opened remotely from Wheeler's car; he then used a key passed on to him from Wheeler to open the steel door between the garage and the kitchen. (RT 12179-12180, 12283, 12422.) Williams walked through the house to see if anyone was there, and finding no one, sat down to watch television. (RT 12284.)

At about 2:00 p.m., appellant called from his blue Hyundai; Williams let appellant into the house by opening the garage door. (RT 12285-12287.) Appellant sat down on the couch and made some small talk with Williams

before taking a portable telephone into one of the bedrooms, while Williams remained in the living room (RT 12287-12288.) The telephone rang while appellant was in the bedroom, but Williams could not recall how many times or if he (Williams) answered it. (RT 12289.) At some point appellant returned to the living room and asked Williams to page Anthony Arceneaux, who was due to arrive at the Wheeler house at 3:00 p.m. to work for a vacationing Lamont Gillon, and tell him not to come to work. (RT 12289-12290.)

Coappellant Wheeler arrived at the Wheeler house sometime after appellant; it was not normal for coappellant Wheeler to be at that house on a Sunday afternoon, but it was not out of the ordinary. (RT 12292.) Coappellant Wheeler was not carrying anything in his hands when he arrived. (RT 12293.) Appellant had picked up the .45 from the table when he arrived. (RT 12293.) Next coappellant Smith, not carrying anything, arrived at the Wheeler house; it was unusual for him to be there on a Sunday afternoon. (RT 12294.) Coappellant Smith also went into a back room of the house. (RT 12300.) Appellant carried the money counting and adding machines into the garage, and returned carrying what appeared to be a heavy green duffel bag, which appellant took into the back of the house; coappellant Wheeler went with appellant. (RT 12294-12295.)

At some point appellant returned to the living room and said, "Where's Johnny, he's late." (RT 12301.) Codefendant Settle, who Williams had never seen at that house before, arrived last and went into the back of the house as well. (RT 12302.) While the four men were in the back of the house, Williams heard a gun go off; appellant came into the living room and asked Williams if he had heard it, and whether he thought the neighbors had heard it. (RT 12304.) Williams said that the house next

door was closer to the back room than the front of the house; appellant then returned to the back room. (RT 12305.) Codefendant Settle came into the living room, knelt on the floor and cocked a shotgun; he did not say anything and then returned to the back of the house. (RT 12305-12307.) Williams, who denied knowing what was going to occur in the Wheeler house that day, said that he did not ask what was happening because it was none of his business. (RT 12290, 12302, 12307.)

Next, coappellants Bryant, Smith and Wheeler came into the living room. (RT 12307.) Coappellant Wheeler asked appellant if he was going to "tell Jay;" Williams saw a pistol in Wheeler's waist. (RT 12308; 12311.) Appellant told Williams that they were expecting company and told Williams that he wanted him to do the following: stand in the kitchen near the buzzer; when the men walked up, yell out that they were there; someone else would let the men in the house; wait for appellant to tell Williams to let appellant out of the house using the buzzer in the kitchen; once Williams could see that appellant was all the way out of the house, Williams was to release the buzzer; after releasing the buzzer, Williams was to exit through the garage, walk to the end of the driveway, where there would be a green car with a key in it; Williams was to back that car into the garage[31]; Williams was then to walk down the driveway, make a left, walk to the bus stop and take a bus to the pool hall; while he was walking to the bus, Williams was to look around to see who was watching. (RT 12309-12312, 12319-12321.)

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[31] Appellant's instructions to Williams about what to do with the green car changed a few times before settling on the plan to back it into the garage; appellant seemed confused about what to do. (RT 12313-12318.)

At that point, Williams knew that something was going to happen, and he wished he was not there. (RT 12321.) Williams believed he was in too deep to get out of the situation. (RT 12322.) Williams heard appellant and coappellant Wheeler talking about going to the 7-11, and he saw coappellant Wheeler and Smith put on workmen's gloves. (RT 12324, 12329.) As Williams looked out the front window, someone else shouted that the people had arrived. (RT 12328.)

Williams first saw the men on the walkway to the front door; one was taller than the other, and one of them had longer hair. (RT 12331-12332.) The two men walked to the front door, and Williams heard someone let them in. (RT 12332.) Williams heard sounds as if someone had entered the house and heard someone say "What's happening, how are you doing." (RT 12333-12334.) Appellant said he was going to get some groceries, although groceries were never kept at that house. (RT 12334.) Appellant told Williams to buzz him out (RT 12334), and Williams pushed the button until he saw the door open and appellant come out of the house. (RT 12335.) Williams then released the buzzer; as he did that, he saw appellant stumble a little and keep walking. (RT 12335.)

Williams then started walking out of the house through the garage; as he was walking, he heard one gunshot, a scream, and then two gunshots. (RT 12336-12337.) The blue Hyundai was in the garage; as Williams was walking out of the garage, he almost ran into Wheeler, who was holding a shotgun, at the point where the gate met the garage. (RT 12338-12339.) At the end of the driveway, Williams made a right to the green car while coappellant Wheeler made a left. (RT 12340.) Williams entered the green car, which had a key in its ignition, and backed the car into the garage. (RT 12341.) While he was in the green car, he heard coappellant Wheeler yell,

"A bitch is in the car. Get out of the car, bitch." (RT 12342.) After that, Williams remembers only glass breaking; he did not recall hearing any shots. (RT 12342.)

After backing the car into the garage, Williams saw appellant standing next to the Hyundai; appellant said "All right, Jay" which Williams took to mean see you later. (RT 12344.) He also saw coappellant Wheeler pull up in front of the driveway in a red car; they looked at each other, and coappellant Wheeler drove off to Williams' right. (RT 12347-12349.) The green car was big and did not look anything like the blue Hyundai. (RT 12345.)

While walking to the bus stop, Williams again saw coappellant Wheeler in the red car at an intersection along the way; coappellant Wheeler pulled over at the corner, looked at Williams again, and drove away. (RT 12352.) At little later, appellant passed by Williams in the blue Hyundai. (RT 12353.) Before he arrived at the bus stop, Williams also saw coappellant Smith and codefendant Settle drive by in the green car. (RT 12355-12356.)

Williams took the bus to the pool hall as instructed. (RT 12364.) Arceneaux was there when Williams arrived, and the two talked, although Williams claimed not to recall what they talked about. (RT 12364-12365.) A short time after Williams arrived at the pool hall, appellant called and asked Williams who he saw looking around, and Williams told appellant who he noticed. (RT 12365.) Appellant then told Williams not to go to the Wheeler house ever again, that Williams' description had been given to police and that Williams was not to send anyone to the Wheeler house or talk about what had happened. (RT 12366.) Williams then went home, and returned to the pool hall either that night or the next night for his 90 minute

shift; no one showed up to relieve him, and he stayed there the entire night. (RT 12366.)

One or two nights after the shootings, William Settle came to Williams' apartment and told Williams that it was "going to be hot," so it was not a good idea for Williams to remain in the neighborhood. (RT 12367.) William Settle also told Williams that Williams had been identified at the scene of the shootings. (RT 12368.) William Settle made arrangements to pay Williams the $2000 owed to him for the month he had just completed; Williams made arrangements to fly to Pennsylvania. (RT 12368-12369.) At William Settle's direction, Williams sent Lamont Gillon to retrieve the money from William Settle at a store at Osborne and Laurel Canyon. (RT 12369.) Williams was told to get in touch with William Settle if Williams needed more money. (RT 12370.) Provine McCloria took Williams to the airport. (RT 12370.)

When Williams ran out of money in Pennsylvania, he called Gillon and got a phone number to call; using that, Williams made arrangements to pick up $500 at a Western Union, using a code word given to him by William Settle. (RT 12371-12372.) At the time of his arrest in Pennsylvania, Williams was in the process of obtaining another $500 in the same fashion. (RT 12373.) Williams agreed to speak with Pennsylvania law enforcement because they told him he was under arrest for six homicides in Los Angeles; Williams knew they had the wrong man because he did not kill anyone. (RT 12373-12374.)

On October 5, 1988, Williams was arrested in Pennsylvania, where he had been dealing crack cocaine. (RT 12373, 12397, 12531-12532, 12775-12776.) After being informed that he was wanted for a multiple homicide in California, he agreed to talk to local law enforcement because

he believed that, because of his resemblance to coappellant Wheeler, it was possible he had been identified as the shooter. (RT 12373, 12397-12398, 12412-12414.) The possibility of Williams facing the death penalty was discussed[32] (RT 12457), and that is why he agreed to speak with police officers; he knew that witnesses are often given leniency. (RT 12373-12374, 12695-12696, 12778.) He also testified that he did not think he would have been given leniency if he had been one of the shooters. (RT 12552.) He then implicated coappellants Bryant, Wheeler, Smith and codefendant Settle. (RT 12374, 12780-12781.)

Williams and his entire family were placed in the witness protection program; Williams denied that he was given money to relocate. (RT 12385-12386.) He got a job while in the program, stole some money on that job and forged his boss's signature. (RT 12386.) He was also convicted on federal charges of possession of narcotics and possession of an offensive firearm, for which he was in custody during his trial testimony. (RT 12387.)

On cross examination, Williams denied receiving word before the shooting that men were coming over to kill the group and take over the organization. (RT 12411-12412.) He also did not recall telling Pennsylvania police that coappellant Wheeler looked like him, so he might have been misidentified as the shooter. (RT 12409, 12415.) Before leaving for Los Angeles, Williams talked to McCloria, Gillon and Williams' girlfriend Julie Potts regarding the homicides. (RT 12416.) Williams did not recall telling Potts that "dumb ass Anthony" left his identification. (RT

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[32] Williams testified in 1988 that he would lie to save himself from the death penalty. (RT 12457-12461.)

12418.) Williams denied telling Potts that he (Williams), Ant Man and two outside hit people were at the Wheeler house that day. (RT 12445.) Williams once testified that he would lie to avoid the gas chamber, but denied that he was lying at trial. (RT 12459-12461.) Williams bought shoes before he went to the airport, but denied that he made the bloody shoe print found at the Wheeler house; he denied being involved in the shooting and believed he was set up to take the blame for the deaths. (RT 12526-12530, 12680-12681, 12705-12708.)

On cross-examination Williams further admitted that he did not know codefendant Settle before the shootings, that he only saw him for a few seconds on the day of the shooting, and that he previously could not distinguish between photographs of codefendant Settle and his brother, Frank Settle. (RT 12463-12478.) All parties but coappellant Smith stipulated that the registered owner of the gray truck parked outside of the Wheeler house was the wife of Frank Settle. (RT 12489.) Williams testified that the initials "FRK" from the beeper list found in the kitchen of the Wheeler house stood for Frank, but Williams did not know Frank Settle. (RT 12492.) When looking at a set of photographs, that contained photographs of both Jon and Frank Settle, for the purpose of identifying the person he saw in the Wheeler house with a shotgun, Williams did not believe he was mistaken in selecting codefendant Settle as opposed to Frank Settle. (RT 12493-12494.) Williams failed to identify William Settle from a set of photographs, even though he knew him, but denied that it was because he was trying to protect him. (RT 12521, 12524.) Williams also denied that Arceneaux was present at the Wheeler house on the 28th and that Williams was lying to protect him. (RT 12561-12562.)

In his October statement to Pennsylvania police Williams said Jeff Bryant was the head of the organization that Williams worked for. (RT 12799, 12810.) In his October statement to Detective Vojtecky, Williams said they were not using the company car anymore because it needed brakes. (RT 15056-15057.)

7. Post-Homicide Events

Appellant visited his brother Jeff Bryant in prison on August 25 and 29, 1988. Appellant attempted to visit his brother again in early September of that year but was denied the visit. (RT 12839.)

On September 2, 1988, Antonio Johnson and appellants Bryant and Wheeler went to an auto dealer and traded a blue 1988 Hyundai in for a 1988 Toyota Corolla. (RT 12845-12850, 12853-12855, 12867.) Johnson executed the sales documents. (RT 12864. The Hyundai was subsequently examined by a criminalist who, applying a chemical in the trunk and on the floorboards, detected a presumptively positive result for blood on the floorboard between the driver's pedals. (RT 12872-12881.) The test did not determine if it was human blood and the chemical used also reacts to plant material. (RT 12878-12879.)

On September 26, 1988, Detective Robert Saurman was assigned to the Foothill Gang Unit; while interviewing a witness, the name Slimm came up and the witness gave Detective Saurman Slimm's pager number; Detective Saurman paged Slimm, and coappellant Wheeler answered the page and went to the police station at Detective Saurman's request. After determining that Slimm was living with Tania Givens, Detective Saurman and Detective Lambert went to Givens' apartment at 13950 Foothill Blvd., #202, where Givens consented to a search of the premises. They found a loaded .357 magnum, ammunition, some notebooks, a photo album,

calendar book with the name "$limm" written on it, newspaper articles about the instant homicides, and $8560 in the apartment. (RT 11012-11039.) Photographs found in the calendar book showed Slimm wearing a paper crown and holding a lot of cash; photographs and phone numbers of other reputed Family members and addresses of Family drug houses were also found in the book. Slimm's beeper number was found on a list in the Wheeler house. (RT 11188-11202, 12008-12011.) At the time of the search, the utility bills to Slimm's apartment were in the name of Vericillia Reese, an employee of Neighborhood Billiards. (RT 11048-11059.) Paperwork relating to a white Audi and a bank statement, both in coappellant Wheeler's name, and cellular phone pamphlets were found in a search of coappellant Wheeler's grandmother's house. (RT 11060-11066.) A search of coappellant Wheeler's Audi produced business cards, beepers and utility bills in the names of Keith Chatters and Vericillia Reese. (RT 11124-11131.) Cellular phone records showed that someone used coappellant Wheeler's phone and placed a one minute phone call to the Wheeler house on August 28, 1988, at 3:05 p.m. (RT 11089-11090, 11138-11140.)

In the early morning hours of September 29, 1988, law enforcement served search warrants on various properties associated with the Family business. Lawrence Walton was found in 11649 Fenton Avenue, along with $1417 in cash and a .38 caliber handgun. (RT 9694-9699.) Thirty six one-gram bags of cocaine were recovered from 11236 Adelphia Street. (RT 9783-9800.) It was believed that drug buyers would go first to the Fenton location and pay money; in return they were given a slip of paper with a number on it that corresponded to the quantity of drugs paid for. (RT 9801-

9802.) The buyer would then go to the Adelphia location, turn in the slip of paper, and receive the drugs. (RT 9802.)

Also on September 29, 1989, appellant's home at 12719 Judd Street was searched and appellant arrested; $719, keys, various kinds of ammunition and a .45 caliber handgun, as well as various papers purportedly relating to the narcotics organization, were seized. (RT 12908-12916; 12925-12928.)

Codefendant Settle's house at 12483 Ralston Street was also searched on that date; a gun safe containing various firearms, walkie talkies and a tap trapper, automotive repair equipment, as well as various paperwork and jewelry, were seized. (RT 12986-12971.) Codefendant Settle never returned to live in his home. He was a fugitive from the date his arrest warrant issued in October, 1988, until he was arrested on August 1991,while living under an assumed name. (RT 13954-13649, 13660-13681.)

Further, Antonio Johnson was home during the search of 13037 Louvre Street when it was searched simultaneously with the others. Included in the items seized were a sales slip and keys for a new Toyota Corolla. (RT 10766-10771.) At the same time, Nash Newbill was at home during the search of 13031 Louvre Street; paperwork including utility bills, Western Union receipts and driver's license were among the items seized. (RT 10774-10780.)

On October 14, 1988, Detective Lambert served a search warrant on a fortified house at 11943 Carl Street. (RT 9806, 9814-9815.) He found an adding machine, money counter and a notebook containing entries from June 1 through August 27 of an unspecified year, which Detective Lambert said was 1988. (RT 9816-9817, 9834.) Detective Lambert also described

how other evidence found at Carl Street, such as beakers and baking soda, were used to make rock cocaine. (RT 9836-9840.) Detective Lambert opined that the notebook contained financial records relating to rock cocaine sales and distribution that had been transported from the Wheeler house to Carl Street after the homicides on August 28, 1988. (RT 9819-9820.) The amount of revenues during those three months as reflected in the notebook was over one million dollars. (RT 9819.) Detective Lambert said that money was retained at sales locations such as Fenton for only a short period of time before being moved to a more secure location, and that at the time of the homicides that more secure location was the "count house" at 11442 Wheeler Avenue. (RT 9823.) Detective Lambert also found vehicle documents relating to a Toyota Corolla and a Hyundai, which were both observed at the Wheeler house. (RT 9840.) Bills and receipts in the names of Eddie Barber, Stan (last name unknown) and William Settle were also located in the Carl Street house. (RT 9841-9842, 9861-9865.)

Detective Lambert further testified that initials found on paperwork seized at Carl Street related to coappellant Wheeler, Antonio Johnson, William and Frank Settle, and various other men he believed to be members of the Bryant organization, as well as various other locations he believed to be associated with the organization. (RT 9825-9831, 9843-9846, 10138-10168.) An entry on one of the documents indicated that appellant withdrew $1000 from the count house. (RT 9830.) The Carl house was owned by James Settle, Junior, who was the father of Jon, William, Andrew and Frank. (RT 9835.) On August 3, 1988, one deed showed that ownership of the Carl house was transferred to Kenneth Bankhead and Jamia Bryant, who is the daughter of Jeff Bryant, but Detective Lambert believed that deed to be fraudulent. (RT 9923-9924, 10183-10185.)

A handwriting expert opined that the handwriting on the note found on Brown's body bearing the Wheeler Avenue address belonged to appellant, and that the handwriting on the piece of paper found at the Wheeler house with the name "Tommy" was Brown's; another expert opined that these two papers were originally one piece of paper. (RT 11815-11820, 13036-13042, 13272-13274.)

The prosecution's ballistics expert examined various shells found at the scene of the Wheeler house and opined that the expended shotgun shell casings found there were expelled from three different shotguns and that another shell was cycled, but not fired through, a fourth shotgun; he also opined that a .45 shell casing found in the trash can in the Wheeler house was fired from the .45 Colt automatic handgun later recovered during the search of appellant's home. (RT 13162-13177.) The bullets found in the Camry, however, were definitely not fired from the handgun found in appellant's home. (RT 13192-13193.) The fingerprints of appellant, coappellant Wheeler, James Williams, Anthony Arceneaux, Nash Newbill, William Settle and Antonio Johnson were found on walls and items in the Wheeler house. (RT 13258-13287.)

It was stipulated that the stationary bicycle found in the Wheeler house had been purchased by appellant on April 2, 1988 (RT 12033-12034) and junk mail addressed to Jeff Bryant was found there.[33] (RT 8696, 8750.) It was also stipulated that the company car was found parked near 11442 Wheeler Avenue on August 28, 1988, after the instant homicides. (RT 14373.)

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[33] The parties stipulated that appellant's brother Jeff Bryant was in Donovan State Prison at the time of the homicides. (RT 8750.)

Telephone records showed a high volume of calls from appellant's home to coappellant Smith's home form January 1988 through September 1988, when both were arrested. (RT 13456-13459, People's Exh. 199.) The last telephone call before the homicides between their residences was on August 27, 1988, and the next call was on September 12, 1988. (RT 13462-13466.) There were no recorded outgoing telephone calls from appellant's home between 10:41 a.m. on August 28, 1988, and September 9, 1988; however, the records did not record local calls. (RT 13462-13466, 13505.)

Telephone records also showed that calls were made between coappellant Smith's home and both the Wheeler house and the Carl Street location. (RT 13469-13474, 13489-13492.) Calls were also made between coappellant Smith's home and locations where Armstrong was staying, as well as between appellant's home and homes of Armstrong's relatives. (RT 13480-13481, 13484-13486, 13486-13489.)

Records further showed cellular telephone calls from coappellant Wheeler's girlfriend's cell phone to appellant's home, Neighborhood Billiards and to the Wheeler house; a call using her phone was made to the Wheeler house at 3:05 p.m. on August 28, 1988. (RT 13474-13480.)

Finally, telephone calls from 11313 Oxnard Street, Apartment 313 were summarized. Detective Lambert testified that this was a "safe house" in the name of Andrew Settle. In the 16 hours following 5:55 p.m. on August 28, 1988, about 90 calls made from that location, including six calls to coappellant Smith's father-in-law's home, six to coappellant Wheeler's apartment, three to Antonio Johnson's home and two each to the homes of codefendant Settle, Eddie Barber and Anthony Arceneaux. (RT 13492-13498.)

The prosecution did not produce the telephone records of Williams, Gillon or McCloria. (RT 13506-13507.)

8. Evidence Limited To Specific Defendants

During the course of the guilt phase, there were several instances when the jury was instructed that certain testimony was admissible against a specific defendant only. In most of these instances, the trial court attempted to restrict the jury's use of such evidence to the applicable defendant as the evidence was presented to the jury, as well as at the end of the guilt phase of the trial.[34]

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[34] Among the jury instructions given at the end of the guilt phase, the jury was told:

> Several times during the trial, evidence was admitted against one or more of the defendants, and not admitted against the others. ¶ At the time this evidence as admitted you were admonished that it could not be considered by you against the other defendants. ¶ Do not consider such evidence against the other defendants.
>
> Evidence has been received of a statement made by a defendant after his arrest. ¶ At the time the evidence of this statement was received you were told that it could not be considered by you against the other defendants. ¶ Do not consider the evidence of such statement against the other defendants.
>
> Certain evidence was admitted for a limited purpose. ¶ At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. ¶ Do not consider such evidence for any purpose except the limited purpose for which it was admitted. (RT 16386-16387; CT 15473-15475.)

a. Evidence Introduced Against Codefendant Settle Only

When Armstrong was released from prison faster than expected, Reynard Goldman recalled people teasing codefendant Settle about Armstrong's release and about Armstrong making demands. Codefendant Settle said that Armstrong wouldn't be around too much longer, or something to that effect.[35] (RT 9269, 9276-9279.) About two weeks after Goldman heard codefendant Settle make that remark, Goldman read that two bodies had been found in Lopez Canyon. (RT 9283.)

San Fernando Police Detective George Hughley testified regarding the arrest of codefendant Settle. (RT 13660, 13682-13683.) In August 1991, Detective Hughley was in a narcotics enforcement task force that encompassed from South Central Los Angeles to Ventura and Kern Counties and that focused on the "Family." (RT 13660-13661.) After arrest, codefendant Settle was informed that a search warrant was going to be executed where he had been staying, and he was asked who else was there. (RT 13667.) Codefendant Settle replied, "I'm the one who did it. I'm the one you want. They didn't do nothing."[36] (RT 13668, 13671, 13676-13677.)

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[35] The jurors received a limiting instruction that the statement by codefendant Settle that Armstrong would not be around much longer was admissible only against codefendant Settle. (RT 9282.)

[36] The trial court limited this testimony to codefendant Settle after the testimony had been completed. (RT 13682-13683.)

b. Evidence Admitted Against Appellant Only

i. Statements Of Ladell Player

Deputy District Attorney ("DDA") Janice Maurizi testified that she was present for interviews of Ladell Player on February 6 and 8, 1991.[37] (RT 10368, 10373.) During that interview, Player said that he and Billy Fields went to court in the San Fernando Valley two or three days after the instant homicides, where Player saw and talked to appellant. Player told appellant that he had gone by the Wheeler house after the homicides, described what he had seen, and asked what had happened. Appellant told him that "we had a little problem, but we took care of it." (RT 10370-103071.) Appellant told Player he was in court because of a problem he was having with his wife, Tannis. (RT 10371.) DDA Maurizi found a minute order indicating that appellant was in court for some sort of domestic violence situation.[38] (RT 10372.)

According to Player, appellant also said that if anyone "messed with" appellant, appellant would "shake their hand, smile at them, let them

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[37] DDA Maurizi further testified that both interview were tape recorded (RT 10369); however, those tapes were not played for the jury nor admitted into evidence. In addition, the record reflects different dates for the interviews; the record alternatively lists February 26 and 28 as the dates of the interviews. (See, e.g., RT 10228, 10376.)

[38] Player's interview as recounted by DDA Maurizi contained other statements that were presumably admissible against all defendants. Player said that in 1988 he had been going to the Wheeler house weekly for five months, where he paid money to Jay Williams, Johnson, codefendant Settle, Gillon and coappellant Wheeler. (RT 10369-10370; 10373.) Player also told her that codefendant Settle and his brothers were high up in the organization and in charge of large shipments involving large amounts of money. (RT 10372.) Player added that codefendant Settle was a "gun nut" and was always armed. (RT 10373, 10382.)

think that everything was OK, and then he would have them killed because he couldn't have people going behind his back."[39] (RT 10375-10376.)

Brent McCleve, an out-of-state law enforcement officer, was present in a monitoring room for a December 28, 1994 videotaped interview of Player by DDA McCormick. (RT 10484-10487.) A videotape of part of the interview was played for the jury, and the jury was provided with a transcript of that portion of the interview.[40] (RT 10486-10492; 3 SUPP CT 10546.) In this interview, Player denied making the above the statements attributed to him in 1991. Player said he had a bad drug habit at that time

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[39] In the instant trial, Ladell Player denied making several of the statements attributed to him during the 1991 interviews. Following these denials, and the defense request for a limiting instruction, the trial court gave the jury the following two instructions:

> [A]t this point the answers of the witness having to do with the last couple of questions indicate no statement was made, but if you do hear any evidence by way of impeachment that would tend to give a contrary answer, you are instructed that the statement of Stanley Bryant or anything along the lines just suggested by the DA is limited to Mr. Bryant only and to be considered only as to Mr. Stanley Bryant and not as to any of the other three defendants in the case.

(RT 10258.)

[40] The record is not entirely clear as to whether the entire tape was played, or if there was an edited portion, or whether the transcription of the interview contained in People's exhibit 216 reflects the portion that was played. The court further noted that something was mixed in on the second portion of the tape that should not have been. The trial court instructed the prosecution to edit tape before it was received into evidence. (RT 10495-10496.) These ambiguities were the subject of settlement requests, which were denied in the trial court, and which is the subject matter of a settlement request pending in this Court. (See appellant Bryant's Motion to Vacate Certification or, in the Alternative, to Correct, Augment and Settle the Record, filed September 13, 2002 in the instant case.)

and probably would have said just about anything to get back out on the streets; he further expressed his reluctance to testify for the prosecution. (3 SUPP CT 10546-10570.)

ii. Alonzo Smith's Conversation With Appellant In The County Jail

At some point after appellant's arrest, Alonzo Smith had a conversation in the county jail with appellant regarding Brown's death. (RT 10911.) Alonzo Smith told appellant that he did not trust Brown and that he believed Brown scammed; appellant said that Brown got killed. (RT 10911, 10914-10915.) Alonzo Smith denied that, in response to his own statement that it was too bad that Brown died, appellant said "he had to go." Rather, Alonzo Smith testified that appellant said "yes" to Smith's expression of regret regarding Brown's death and that appellant did not talk about his case.[41] (RT 10916, 10980-10981.)

iii. Statements Of George Smith

According to Detective Hernandez, George Smith told him that appellant said that if George Smith crossed appellant or the Family, George Smith would be in bad shape.[42] (RT 11216.)

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[41] DDA McCormick informed the court that Alonzo Smith had reported to both he and Detective Vojtecky that appellant's reply had been, "Yeah, Tommy, he had to go." (RT 10914.) Neither DDA McCormick nor Detective Vojtecky testified in that regard, however.

[42] George Smith testified that he had never spoken with appellant and had not told Detective Hernandez otherwise. (RT 10802.)

iv. Evidence Regarding The Attacks On Keith Curry – The Car Bombing[43]

In 1985, Keith Curry was having an affair with appellant's then-estranged wife, Tannis. (RT 11316-11318, 13080-13082.) Upon leaving Tannis' apartment after spending the night with her, Curry was injured when a pipe bomb exploded in his car. (RT 11318-11319, 11786-11790.) A customer at a hair salon heard Tannis tell her hairdresser that her ex-husband admitted to placing the bomb under Curry's car, and that he told her he would do it again until Curry was dead.[44] (RT 13095-13099.) However, appellant's former wife, Tannis Curry, testified and denied that appellant admitted responsibility for the incident or that she talked about it while getting her hair done. (RT 13082-13083.)

c. Evidence Admitted Against Appellant And Coappellant Smith Only

Two years later, Curry, who was then married to Tannis, was shot upon leaving Tannis's mother's house. (RT 11320-11324.)[45] Coappellant Smith had flagged down Curry and pulled up alongside Curry's car; the two were making small talk when two shots were fired from coappellant Smith's car. (RT 11324.) Curry was shot in the neck and paralyzed. (RT 11325.) Curry had been dealing drugs at the time he was shot and had spent

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[43] It was stipulated that coappellant Smith was not in Los Angeles County when Keith Curry's car was bombed. (RT 13656-13657.)

[44] The customer, Gwen Derby, testified that when she went home, she told her husband what she overheard (RT 13104); her husband testified that she told him of the conversation three weeks after it took place. (RT 15107-15108.)

[45] Curry was then coappellant Smith's brother-in-law, since coappellant Smith was married to Tannis' sister, Elaine.

most of the time between 1985 and 1987 in jail on drug charges. (RT 11326-11328.) Curry had never spoken with or met appellant, and did not know who appellant was until Tannis told him that appellant had a brother named Jeff; Curry had heard of Jeff Bryant. (RT 11329-11330.)

Coappellant Smith was arrested for the shooting of Keith Curry; he was bailed out of jail after a number of people put up their houses as collateral, including Smith's father and mother-in-law and codefendant Settle. (RT 11399-11405. 11415-11416.) Appellant's name was listed as a reference on coappellant Smith's bail papers. (RT 11402.) All parties stipulated that: Keith Curry was shot at 9:05 p.m. on September 28, 1987; coappellant Smith was arrested five hours later at 2:00 a.m. on September 29, 1987, by CHP officers; CHP officers recovered a revolver that contained no live rounds, only one expended bullet casing and no others; a revolver does not automatically eject expended bullet casings after a bullet is fired; coappellant Smith was not in Los Angeles county at the time of the Keith Curry car bombing. (RT 13655-13657.) It was also stipulated to by all parties except appellant that coappellant Smith shot Keith Curry on September 28, 1987. (RT 13658-13660.)

Pierre Marshall met with appellant in a Burger King restaurant to work out a problem that was rumored to exist in part because Marshall had dated Jeff Bryant's wife, Rolo, a couple of years prior. (RT 11748-11751, 11753, 11768, 11780, 11784.) Marshall had told Keith Curry that it wasn't smart to publically talk about Curry's relationship with Tannis, and shortly thereafter, Curry was "blown up." (RT 11777-11779.) Marshall denied that appellant had said that he was responsible for the Keith Curry shooting or that appellant had mimicked a paralyzed person in describing what had happened to Keith Curry. (RT 11752-11754.) Marshall testified that he

had lied in his previous statement Detective Vojtecky in an attempt to get consideration in a pending criminal case and that the term "the Family" as used in Pacoima met a group of people who were selling drugs, and not the Black Guerilla Family. (RT 11754-11777, 11781.)

In a 1992 interview, Pierre Marshall told Detective Vojtecky about a the meeting Marshall had with appellant in the Burger King restaurant. Marshall told him that, during that meeting, appellant had laughed while mimicking a paralyzed person and asked Marshall, "Remember how that nigger got paralyzed?" (RT 11791-11793, 11804-11805.) Marshall further told Detective Vojtecky that "the Family" meant the Black Guerrilla Family ("BGF") but that the locals took it to mean the Bryants in Lake View Terrace. (RT 11801.)

d. Evidence Admitted Against Coappellant Wheeler Only

On September 25, 1988, Detective Vojtecky interviewed coappellant Wheeler; the interview was surreptitiously tape-recorded. (RT 8243-8244, 13535-13536.) After the interview, coappellant Wheeler was placed in an interview room with his girlfriend, Tavia Givens; their conversation was also surreptitiously tape-recorded. (RT 11016, 11041, 13536.) Both tape-recordings were played for the jury. (RT 13537-13538; 3 SUPP CT 10621-10660.) Coappellant Wheeler told Detective Vojtecky that: coappellant Wheeler's girlfriend drove a red Jeep; he once had been to the Wheeler house, which was owned by his friend Nash; he did not know an organization called the Family (RT 13551) and did not sell drugs. (3 SUPP CT 10623-10624, 10638, 10654.) During his conversation with Givens, coappellant Wheeler could be heard inquiring of her, in a whisper, whether

the police found $7000 in cash he had hidden the apartment, and counseling her not to talk to the police. (RT 15961, 3 SUPP CT 10656.)

B. The Defense Cases

1. Coappellant Smith

Coappellant Smith rested without presenting any evidence in his defense. (RT 13911.)

2. Coappellant Wheeler

Coappellant Wheeler testified in his own defense. In 1988, he began working for a drug organization run by Jeff Bryant, and he was part of a sub-group of that organization that was run by Eddie Barber. (RT 13918-13919.) Other sub-groups were run by Ted Edmonds, James Williams, Billy Fields, William Settle and Levi Slack. (RT 13919-13920.) When Barber hired him, coappellant Wheeler was given an apartment in Sylmar, and eventually he started working at the Wheeler house, which was run by Williams, at Barber's direction. (RT 13927-13931.) Williams's people included Lamont Gillon, Provine McCloria, Anthony Arceneaux and a few others. (RT 13932.) Williams was also an enforcer for the organization. (RT 13933.) Coappellant Wheeler said he sometimes visited Jeff Bryant in prison and delivered him messages from Barber. (RT 13938.) All coappellant Wheeler knew about appellant was that appellant handled bail. (RT 13939.) The first time coappellant Wheeler saw codefendant Settle was in court on this case, but coappellant Wheeler did know Andrew and William Settle; William Settle had a lot of control over the organization's money. (RT 13939-13940.)

On August 28, 1988, coappellant Wheeler worked at the Wheeler house until 7:00 a.m. At the end of his shift, he drove the company car to the pool hall to pick up Williams, who then dropped coappellant Wheeler

off at Wheeler's apartment. (RT 13941.) Coappellant Wheeler then drove his car, a white Audi, to work at the pool hall until 10:30 a.m. (RT 13942.) After his shift at the pool hall, coappellant Wheeler drove back to his apartment and picked up his girlfriend, and they proceeded to drive to Los Angeles. (RT 13942.) At about 3 p.m. that day, coappellant Wheeler was beeped by the count house, and he returned the call using his cellular phone. (RT 13944.) Codefendant Wheeler talked to Williams, who told him not to come to work. (RT 13945.) That night Williams called again and again told Wheeler not to go to work that night. (RT 13945.)

Codefendant Wheeler heard about the homicides for the first time the next day when he was at Donovan State Penitentiary visiting Jeff Bryant and ran into appellant, who asked coappellant Wheeler what had happened at the count house; coappellant Wheeler told appellant that he didn't know, and appellant told him he had heard on the news that there was a shooting there. (RT 13958-13959.) When coappellant Wheeler returned to Los Angeles, he bought a newspaper to read about the homicides; he kept the article for no reason, but later told Williams that he would send the article to him. (RT 13959.) If coappellant Wheeler had been involved in the homicides, he would never have gone to visit Jeff Bryant because it would have jeopardized Jeff, and coappellant Wheeler probably would not be living at the time of the trial if he had done that. (RT 13960.) Coappellant Wheeler went on a vacation the week of September 29, 1988, and when he returned he began working at the Carl Street location. (RT 13962-13964.)

Upon his return, coappellant Wheeler was beeped by some officers and he agreed to see them. He then called appellant to set up bail. (RT 13966, 13968.) He allowed officers to search his apartment, and when he learned he would be arrested, he contacted his girlfriend, his grandmother,

and Barber. (RT 13968.) Coappellant Wheeler lied to the police about being at the Wheeler house because he was not supposed to be in the area as a condition of parole. (RT 13969.) He denied being the shooter, and said other people in the organization had his height and build. (RT 13972-13974, 14021.) When he first was arrested, coappellant Wheeler thought it was for dealing drugs; coappellant Wheeler knew that Williams and not he had committed the murders. (RT 14064-14065.)

Tavia Givens Wheeler also testified. She had been married to coappellant Wheeler from September, 1989 through June, 1992, and had known him since December, 1987. (RT 14333.) While she did not recall specifically what she and coappellant Wheeler did on Sunday, August 28, 1988, she believes she spent it with him in Los Angeles because they did they same thing every Sunday, that is, they went to Los Angeles to visit their families. (RT 14345-14347.) When coappellant Wheeler was arrested on September 25, 1988, she knew nothing about the homicides; although she had suspected he was a drug dealer, she never questioned him about how he made his living. (RT 14348, 14366-14368.) The only friends of coappellant Wheeler that she knew were men named Michael and Vincent, as well as Eddie Barber. (RT 14340-14344.) She never saw any of the defendants at the apartment she and coappellant Wheeler shared, nor had she ever met Jeff Bryant. (RT 14344, 14348.)

3. Codefendant Settle

Without testifying himself, Settle presented evidence that: he was an auto mechanic by trade, rather than a drug dealer (RT 14527-14543; 14698-14704); his brother, Frank Settle, owned property on Carl Street, which was lived in as opposed to being a rock house (RT 14573-14591); William Settle appeared before the jury for purposes of identification only (RT

14609); codefendant Settle owned the Vanport house and in 1987 rented it to Floyd Renard Tillman and William Settle; both those men sold drugs out of the house without codefendant Settle's knowledge for a couple of months before the operation was shut down (RT 14626-14628); codefendant Settle rented out his Vanport property from June 1988, through September 1989, and there was no drug dealing going on there during that period of time (RT 14611-14624); codefendant Settle worked on repairing cars at his home on the weekends (RT 14631, 14680-14683); codefendant Settle was gone on his honeymoon when his house on Ralston Street was searched and damaged and that they did not return to the house because he wife was afraid for codefendant Settle's safety; he and his wife and daughter stayed at her mother's or in an apartment until codefendant Settle's arrest (RT 14626-14648-14649, 14810-14815); during codefendant Settle's arrest, a police officer was holding a machine gun in one hand and was carrying codefendant Settle's daughter in the other when codefendant Settle said, "I'm the one you want." (RT 14816-14818.)

Frank Settle testified for his brother, codefendant Settle that: Frank had been employed before losing his job because of his addiction to and use of cocaine; after he lost his job, he restored cars and sold them; he once owned a 1960 Impala; his father James Settle owned the Carl Street house; Frank Settle did some upkeep of the Carl Street house and let his nieces swim in the pool; he was arrested at Hansen Dam with less than a half gram of cocaine in his pocket; in 1988 he weighed 110 pounds due to drug use; he never sold drugs but sometimes acted as a go-between; in People's Exhibit Number 117, he was depicted in photograph number 7 and codefendant Settle was depicted in photograph number 8; he knew appellant and knew of coappellant Smith; Frank owned the truck, which was

registered to his wife, that was found parked in front of the Wheeler house; just before the summer of 1988, Frank lent the truck to Nash Newbill, who told Frank that it had broken down, and never returned it; Frank denied that he or any of this brothers sold drugs; Frank knew that appellant had worked for Lockheed and then had started a business, i.e., a pool hall; and appellant tried to discourage Frank from using drugs. (RT 14724-14751.)

4. Appellant Bryant

Karen Flowers testified that she had been Ken Gentry's girlfriend at the time he was killed, but that she had been dating Armstrong as recently as a few months prior to the time that Armstrong killed Gentry in 1982. (RT 15024-15026.) Flowers next saw Armstrong in 1988, when she believed he was following her; concerned for her safety and that of her child, she called LAPD on August 14, 1988 and asked if Armstrong had been released. (RT 15027-15031, 15044-15045.) A police officer conducted a field interview of Andre Armstrong at Hansen Dam on August 14, 1988; Tannis Curry was with Armstrong at that time. (RT 14856-14861, 14864; RT 15066-15070.)

Detective Vojtecky testified that he did nothing to verify whether appellant was in court on the date of his alleged conversation with Ladell Player. (RT 14873.) The defense also presented court documents that reflect that appellant was not present in court on the date in question. (RT 15142-15148.) Detective Vojtecky made contacts in Missouri to assist Andrew Greer with his legal problems there. (RT 14889-14890-14961.)

In addition, Detective Vojtecky knew that George Smith had a pending narcotics case but did not offer him any consideration for his testimony in this case; however, Detective Vojtecky did not know if George Smith worked out a deal with the detective handling George Smith's

narcotics case in return for George Smith's testimony in this case. (RT 14879.) According to George Smith, appellant was known as "Peanut Head." (RT 14882-14885.) George's Smith attorney in 1992, Michael Morse, testified that he represented George Smith on a charge of cocaine sales from a 1991 arrest. (RT 15003-15004.) The case, which set for trial in April 1992, was continued at Morse's request because detective Ray Hernandez informed Morse that George Smith was a witness in a murder case, and Hernandez wanted time to contact the LADA's office regarding the possibility of working out a favorable disposition to George Smith's case. (RT 15005.) Morse does not recall talking to Hernandez after that; George Smith went to trial a week later and was acquitted. (RT 15005-15006.) DDA Eduards Abele, once a prosecutor in the instant case, became the prosecutor on that case a few days before the trial. (RT 15006.) Morse did not know why George Smith would deny having a pending case or why Hernandez would deny trying to help him. (RT 15013.)

Detective Vojtecky could not recall whether the "company car" was parked across from the Wheeler house when he first arrived on the scene, and did not recall that he so testified at the grand jury proceeding; he had that car impounded two weeks after the shootings. (RT 14892-14896.)

According to Detective Vojtecky, at the time of codefendant Settle's grand jury hearing in 1991, Williams said that in 1988, Williams carried a .45 automatic that he borrowed from Gillon's cousin. (RT 14896-14897.) On October 7, 1988, Detective Vojtecky interviewed Williams in Pennsylvania, and Williams said, contrary to his trial testimony, that: on August 28, 1988, Gillon was to take the 3 p.m. shift at the Wheeler house; he did not see the bag appellant brought into the house; he did not see Brown and Armstrong walking up to the front door; he learned about the

homicide case through newspapers and through some of the other people involved; and that he owned a pair of Reebok shoes, but was not wearing them on August 28, 1988. (RT 14949, 15047-15053.) Detective Vojtecky also testified that Provine McCloria lived on Wheeler Place a cul-de-sac off of Wheeler Avenue. (RT 15055-15056.)

William Duncan, Senior Investigator for the Los Angeles County District Attorney's Office, testified that on January 25, 1993, he interviewed Williams along with DDAs McCormick and Bill Seki; Investigator Duncan discussed Williams' immunity status with him and also discussed the events of August 28, 1988. (RT 14906-14908.) According to Investigator Duncan's report, Williams paged Arceneaux that day, and when Arceneaux called the count house, Arceneaux was told to stay at the pool hall. (RT 14908-14912.) Williams also reported that Slimm arrived at the Wheeler house in a burgundy Jeep with personalized license plates that read "TAVIA." (RT 14913.) Based on what Williams had seen and heard, he believed someone was going to die. (RT 14914.) Williams did not walk away because he had planned to cooperate until he could safely get himself out of the house. (RT 14914.) According to Investigator Duncan's report of Williams' statements, appellant slipped before Williams heard the first gunshot; Williams went to the pool hall and told Arceneaux never to go back to the Wheeler house; Williams talked to appellant later that night and later received money from appellant to leave town. (RT 14915.)

Investigator Duncan wrote a report regarding the February 1991 interview of Williams, and in April revised the report at DDA McCormick's instruction. (RT 14916-14918.) After talking to McCormick, Investigator Duncan changed the report to omit the reference to Williams's belief that someone was going to die. (RT 14919.) The revised report also had

Williams attributing ownership of the Wheeler house to appellant. (RT 14922.) Investigator Duncan could not recall if the line in the revised report stating that Williams had no intention to participate in any murder was a change from the first report. (RT 14923.)

Appellant testified in his own defense. He started selling cocaine for his brother Jeff Bryant in February, 1982. Prior to that, appellant had been employed at Lockheed. (RT 15158-15159.) He first met Armstrong in 1981, at the home of his future in-laws, the Babineaux family, and he saw Armstrong there from time to time. (RT 15160-15161.)

Appellant was arrested for the murder of Ken Gentry in June of 1982. (RT 15159.) Appellant did not know Gentry at the time he was arrested for Gentry's killing, and he denied participating in that killing or giving any money to Armstrong to commit that crime. (RT 15162.) On the bus returning from their preliminary hearing on the Gentry murder charges, Armstrong told appellant that Armstrong had shot Gentry in the head one day at the Pierce Street apartments because of crazy looks Gentry had given him at Hansen Dam. (RT 15163.) In the same conversation, Armstrong said that he had been with Karen Flowers and that he thought that Gentry was going to do something to him as a result, so he got to Gentry first. (RT 15163.) Charges against appellant and Jeff Bryant relating to the Gentry homicide were dismissed in March of 1983 and were not refiled. (RT 15159.)

Appellant also denied that he knew that Tannis and Rolo had attempted to bribe Rhonda Miller and Reynard Goldman, denied that he had told Goldman's friend that if Goldman did not pay the $50 he owed it would get violent, and denied that he knew who vandalized his brother John's van. (RT 15257-15259.)

Appellant denied any involvement in the March 1986 car bombing of Keith Curry, and he was never charged with that crime. (RT 15164.) Appellant said that in December of 1985, while he was still married to Tannis, she told him that she and Curry were dating. In January of 1986, Tannis told appellant that she was moving out and that she was planning to continue her relationship with Curry. (RT 15164.) Appellant also denied telling Tannis that he was involved in the car bombing. (RT 15165.) Appellant further denied speaking with Pierre Marshall about Keith Curry; he said that he met with Marshall at the Burger King, but that they had discussed only how to prevent problems between Marshall and Jeff Bryant. (RT 15168.)

Appellant began working for his brother Jeff Bryant's cocaine sales business in February of 1982, because he was not making enough money at Lockheed to support his newborn daughter. (RT 15162, 15165, 15267-15268.) He remained involved in drug sales until his arrest for the instant homicides, but no one worked for him. Appellant denied that he was in any way involved in the killings. (RT 15176, 15263-15264.)

From 1982 through 1985, appellant made $500 a week for his role in narcotics sales, paid to him by Jeff; whatever money appellant sent to people was Jeff's money which was sent at Jeff's request. (RT 15191-15204.) William Settle took over Jeff Bryant's drug organization in 1985, after Jeff's arrest, in large part because appellant did not know how to run the business. (RT 15174-15176.) In 1988, William Settle remained a major drug dealer, and he paid appellant $1500 a month to use the pool hall for his operation. (RT 15170.)

William Settle ran the Wheeler house at the time of the homicides. Although appellant knew James Williams, appellant did not know what

Williams did with William Settle because appellant was never at the Wheeler house at the same time as Williams; appellant only went there in the evenings to count money. (RT 15222-15223, 15333.) Appellant believed that Williams, Gillon, Arceneaux and coappellant Wheeler worked at the Wheeler house. (RT 15331.) Appellant often contacted William Settle at 11313 Oxnard, Apartment 313; William Settle stayed there quite a bit. (RT 15305-15306.) William Settle had appellant buy the exercise bicycle for the Wheeler house. (RT 15350.) William Settle arranged for the meeting regarding the 90 minute schedule, and he directed appellant to report to the Carl Street house after the homicides. (RT 15408-15409.)

It was possible that appellant wrote down the Wheeler house address for James Brown months before August 28, 1988, but appellant did not make arrangement to meet with Armstrong and Brown on the date of the homicides. (RT 15206.) Appellant was at home most of that day and did not recall seeing anyone he knew. (RT 15446-15447.)

Appellant denied that he drove a blue Hyundai, saying that was Antonio Johnson's car; he did not recall taking that car in to a dealership with Johnson. (RT 15223, 15356-15357.) Appellant flew to visit Jeff Bryant in prison after the killings to let Jeff know what was going on; Jeff said that he had warned appellant not to deal with William Settle's business, but appellant did so because he needed the money. (RT 15223-15225.)

A few days after the homicides, appellant had a court date in San Fernando that he did not attend; he denied having a conversation inside a courtroom with Ladell Player. (RT 15167.)

Appellant said that he helped Alonzo Smith obtain cocaine from William Settle to sell in St. Louis. (RT 15381-15382.) Brown sent money from sales in Monterey to appellant to hold for Brown, because Brown

trusted appellant; this was the same money that appellant sent to Alonzo Smith in St. Louis. (RT 15384-15385.) The money appellant sent to Armstrong was money Armstrong negotiated in a deal with Jeff Bryant to sell drugs in the county jail; the money appellant sent to Brown was Armstrong's money sent at Armstrong's request. (RT 15336-15339.) Appellant did not know George Smith. (RT 15263.)

Appellant did not ask Francine Smith to visit Armstrong; rather, she met Armstrong while on another visit in the county jail. Armstrong later had appellant send her money so that she could visit Armstrong in prison. (RT 15358-15359.) Appellant denied arranging for or witnessing the beating of Francine Smith. (RT 15360-15361.)

5. Testimony Of Codefendant Settle

Codefendant Settle was allowed to testify after all parties had rested, over appellant's objection. (RT15472-15473, 15531.) According to codefendant Settle, he was an automobile mechanic by trade, but his brother William Settle paid codefendant Settle $100 a day to sell drugs out of the Vanport house in 1986, after codefendant Settle was injured on the mechanic's job. (RT 15531-15536.) Codefendant Settle quit the business after the search by Detective Lambert and the police at the hotel, and instead rented his house to Clara Marshall, and no drugs were again sold there. (*Ibid.*) A car that he had purchased while he was in the drug business was repossessed on August 15, 1988, because he no longer had income from narcotic sales. (*Ibid.*) Codefendant Settle denied that he ever worked for the Bryants (RT 15620-15622), but that he knew his brother William worked for one of the Bryants and that his brother Frank cooked the cocaine for appellant. (RT 15692.) Codefendant Settle's brother Frank

was involved in drugs, owned expensive houses and drove a Jaguar. (RT 15545.)

According to codefendant Settle, he returned to working on cars at his Ralston residence and was at home on August 28, 1988, when he received a call from appellant at about 3 p.m.. Appellant said he needed some brakes put on a Toyota right away and asked how long it would take to complete the job. (RT 15537-15539, 15553.) After learning that it would take one to two hours, appellant asked codefendant Settle what kind of cars codefendant Settle had. (RT 15539.) Ultimately appellant agreed to buy a green 1970 Bonneville for $900; Frank Settle arrived at codefendant Settle's house in the "company" Toyota at about 3:15 p.m. and left in the Bonneville. (RT 15539, 15553, 15569, 15615-15616.)

Codefendant Settle fixed the brakes on the Toyota in about an hour. (RT 15539.) About an hour and a half later, Frank and coappellant Wheeler later returned in a red Jeep; they gave codefendant Settle the $900 for the Bonneville, and Frank drove off in the Toyota. (RT 15540-15541, 15553, 15556-15558, 15615-15616.) Codefendant Settle had never been to the Wheeler house. (RT 15541.)

After the homicides, codefendant Settle's life did not change. He was still fixing cars, and he got married and went on his honeymoon. (RT 15545.) Upon his return, he found his house boarded up. His brother Ken Settle, a lawyer at that time, told him that the police had been looking for weapons. (RT 15545-15546, 15556, 15575.) Codefendant Settle and his wife and daughter went to live with his mother-in-law and then rented an apartment. (RT 15547.) He kept in touch with his brother Ken about the arrests for the homicides, and checked to see if there was a warrant out for codefendant Settle's arrest, but found none. (RT 15547-15548.)

Codefendant Settle did not go to the authorities because he was afraid of being in jail without bail for years, and his family advised him not to get involved. He said he had never been in jail, but his brothers were involved in drugs. (RT 15548-15550.) His brother Frank said that the Bonneville Frank had picked from codefendant Settle was the same car that was used in the homicides. Codefendant Settle believed that Frank was not involved in the homicides; Frank said he (Frank) had moved the machines out of the Wheeler house prior to the homicides. (RT 15578-15581, 15589-15590.) Codefendant Settle admitted that he owned guns and carried a pistol in his car. (RT 15651-15652.) After his arrest on the instant offenses, codefendant Settle was on suicide watch for several days. (RT 15709.)

C. The Prosecution's Rebuttal

Detective Saurman testified that coappellant's Wheeler's girlfriend told him that Wheeler owned a second handgun in addition to the one found in their apartment, but that it was gone. (RT 15959-15960.)

Detective Vojtecky testified that Williams did not appear to own items of value and never requested protection from William Settle, only from appellant. (RT 15757, 15767-15771.)

Detective Walter Hampton testified that in 1992, Renard Tillman said that he used to live with codefendant Settle and that Settle used to buy his dope from the Bryants. (RT 15806-15807.) Tillman also said that coappellant Wheeler was involved in the Family organization, which was run by Jeff Bryant and that appellant was up in the hierarchy. (RT 15807-15816.)

Los Angeles County Court Commissioner David Stephens testified that, regarding the docket entry he made on appellant's court file on August

30, 1988: the entry reflected only that counsel had the authority to appear without the defendant; however, he never made an inquiry was to whether appellant was present in court on that date; and he did not know whether appellant was there or not. (RT 15476-15486.)

David Harris, a narcotic user, testified that on April 27, 1987, he made a controlled purchase from codefendant Settle at the Vanport house. (RT 16042-16047.)

Detective Lambert testified that he did not assist George Smith in getting Smith's cocaine case dismissed; rather, the case was dismissed to protect the identity of the informer. (RT 15909-15920.) The street value of the cocaine in that case was $60,000 to $80,000. (RT 15915.)

Detective Vojtecky testified that he and DDA Janice Maurizi[46] interviewed codefendant Settle soon after his arrest. (RT 16052-16054, 16110-16111.) An audiotape of a portion of the interview, People's Exhibit 217, was played for the jury. (*Ibid.*) The jury heard codefendant Settle's repeated refusal to provide the address of his residences during the previous 15 years, saying only that he had been "in transit" during those years.[47] (People's Exh. 217.) Detective Vojtecky also testified that, on the day of the homicides, he double-parked next to the "company car" and that it looked as if it had been parked there for weeks because the windshield was dirty and there was trash underneath the car. (RT 15773-15774.)

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[46] DDA Maurizi was removed from prosecuting this case as a result of a successful defense motion to recuse the Los Angeles District Attorney's office (later reversed on appeal). (See Argument I, *post.*)

[47] The trial court further limited the use of codefendant Settle's as it bore on his credibility only, and not for the truth of the matter asserted. (RT 16053-16054.)

D. The Defense Rebuttal

Recalled by the defense, Frank Settle refuted codefendant Settle's account of Frank's activities of August 28, 1988. (RT 15841-15843.) He also denied being involved in the sale of narcotics. (RT 15844-15856.)

The court took judicial notice that on October 5, 1988, a complaint was filed against Williams and others charging him and the other individuals with the four homicides in this case; on November 21, 1988, a formal grant of immunity from those charges was issued and on November 30, 1988, the charges against Williams were dismissed. (RT 16093-16095.)

A tape of the October 7, 1988 interview of Williams by Detective Vojtecky in Pennsylvania was played to the jury.[48] (RT 16086-16092.)

E. The Penalty Phase

1. The Prosecution's Case In Aggravation

a. Against Coappellant Wheeler

The prosecution presented evidence that Wheeler, while in the county jail pending the outcome of the instant case: assaulted an inmate with a shank (RT 17213-17243, 17260-17299); battered two other inmates on two separate occasions (RT 17366-17372; 17404-17433); battered and threatened to sexually assault another (RT 17322-178353); and possessed a shank. (RT 17366-17382.) The prosecution also presented evidence that coappellant Wheeler attacked another ward with a chair while in custody in the California Youth Authority. (RT 17250-17258, 17299-17300, 17306-17371.) The prosecution further presented evidence that, while coappellant

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[48] The jury was not provided transcripts of the tape, but were told that if they wanted to rehear the tape during deliberation a transcript would be ready for them. The tape is Wheeler's Exhibit 8. (RT 16086-16092.) The transcript is Wheeler's Exhibit 8A. (4 SUPP CT 24-142.)

Wheeler was out of custody, he: brandished a gun and held it to a man's head during a confrontation (RT 17384-17403.)

It was stipulated that coappellant Wheeler was in custody in CYA from March 14, 1985, to October 27, 1987 for attempted robbery and that he pled guilty to possession of a shank while in jail pending this case. (RT 17299-17300.)

b. Against Coappellant Smith

The prosecution presented evidence that coappellant Smith, while in the county jail pending the outcome of the instant case, assaulted an inmate with a shank (RT 17452-17484) and, on two separate occasions, possessed a shank. (RT 17490-17499, 17527-17540.) The prosecution also presented evidence that, prior to the instant crimes, coappellant Smith had been convicted of a burglary and an assault with intent to commit great bodily injury. (RT 17500-17510, 17572-17581.)

c. Against Appellant

Walter Compton testified that appellant told him that Ken Gentry was killed over a drug dispute and because he had broken into Ross Bryant's van and stolen a tape; appellant told him who had killed Gentry, but Compton could not recall the name of that person. (RT 17586-17587.) Compton testified that appellant told Compton he wanted Sophinia Newsome, a woman who was speaking to police about the Ken Gentry homicide, killed. Jeff Bryant gave Compton a gun and a getaway car and said he would pay Compton $10,000 if he carried out that plan. (RT 17587-17590.) Compton ultimately backed out of the plan and instead had himself arrested for possessing the handgun. (RT 17591-17593.)

David Hodnett testified that he shot Clarence Johnson in 1985 for personal reasons and denied that appellant paid him to do so. (RT 17619-

17625.) Detective Vojtecky testified that he arrested Hodnett for the Johnson shooting; that Hodnett told him that Jeff Bryant had hired him to shoot Johnson; and that appellant also was involved. (RT 17679-17681.) Hodnett pled guilty shooting Johnson, who survived, and while in prison Hodnett received thousands of dollars from appellant. (RT 17633-17634, 17683.)

Detective Vojtecky further testified that, the day after Alonzo Smith testified in this case, Hodnett contacted Detective Vojtecky and asked Detective Vojtecky to tell Alonzo Smith that Hodnett would not kill him (A Smith) "due to love for his family," but that if he is not locked down in prison, he should carry two knives because he is a dead man. Hodnett also said to tell Alonzo Smith not to ever approach Hodnett on the street because they don't know each other anymore. (RT 17685-17686.)

2. The Defense Cases In Mitigation

The appellants were jointly tried by the same jury. The presentations follow in the same order in which they were presented to the jury on behalf of each appellant.

a. Presentation Regarding Coappellant Wheeler

A counselor who knew coappellant Wheeler while coappellant Wheeler was incarcerated in the CYA testified that: Wheeler's mother became ill with cancer while he was incarcerated, which made coappellant Wheeler sad and discouraged; coappellant Wheeler had no gang affiliation, which caused coappellant Wheeler some problems among gang members; coappellant Wheeler did well in school; and coappellant Wheeler had four minor offenses while in CYA. (RT 17696-17706.)

One of Wheeler's maternal aunts testified that Wheeler's mother was a drug user who died in 1988, and that Wheeler's father abandoned him when coappellant Wheeler was about four years old; she asked the jurors to spare him. (RT 17717-17726.) Another maternal aunt testified that Wheeler, the oldest of four, his mother and his siblings moved around a lot and were often evicted; that Wheeler's mother failed to provide necessities such as shelter and food; that Wheeler's father was not around and there were a lot of other men in and out of Wheeler's life; that coappellant Wheeler was a smart, industrious child who had a paper route and an job at the YMCA cleaning up towels. (RT 17730-17738.)

A paternal aunt of Wheeler's testified that: she knew Wheeler's mother to have taken "reds" and to have smoked marijuana while she was pregnant with Wheeler; there was a dispute as to who was Wheeler's father; the relationship between Wheeler's parents was not good -- his mother "partied" all the time, and his father "would just leave;" she (the aunt) had been arrested for shoplifting and was a recovering narcotics user who found God in jail, and she believed that coappellant Wheeler could do the same. (RT 17769-17778.)

The father of Wheeler's half sisters testified that: he knew coappellant Wheeler from 1977 to 1984, while he was with Wheeler's mother; he had a gambling problem, engaged in illegal activities and beat coappellant Wheeler and Wheeler's brother; and he was a negative role model for Wheeler. (RT 17744-17752.) Wheeler's half sister and his grandmother testified to their love for coappellant Wheeler and asked the jurors to spare his life. (RT 17757-17768.)

Wheeler's brother testified that: he did not know their biological father while growing up; they moved around a lot; their stepfather beat both

of them, but coappellant Wheeler received the majority of the beatings; during the beatings, the stepfather would force them to stand naked in front of him and he would beat with tree branches until he became too tired to continue; during the beatings their mother was in the other room, but did nothing; coappellant Wheeler left home when coappellant Wheeler was 14 years old; he did not know what coappellant Wheeler did for money, but coappellant Wheeler said he would help him and bought him thing; when he asked coappellant Wheeler how he made his money, coappellant Wheeler told him he worked at UCLA; coappellant Wheeler warned his brother not to hang around people involved in drugs; he (the brother) had no felony convictions and was working; coappellant Wheeler did not have an older brother to turn to for protection. (RT 17784-17802.)

Wheeler's father testified that: he was 19 years old when coappellant Wheeler was born; Wheeler's mother was a runaway when they met; he left the home when coappellant Wheeler was two years old because he (the father) was too violent, and he left his son's life altogether when coappellant Wheeler was six years old because Wheeler's mother asked him to stop seeing his son; coappellant Wheeler saw his father severely beat his mother; and he asked the jurors to give coappellant Wheeler a chance because he had never been present for Wheeler. (RT 17803-17814.)

Clinical psychologist Adrienne Davis discussed the risk factors that were present in Wheeler's formative years, including: he had a teenage mother who used drugs; his family was unstable; he was abandoned by his biological father; and his step-father's presence had a very negative affect. (RT 17846-17871.) Dr. Davis opined that when coappellant Wheeler was a teenager, he was looking for male role models to protect him and he found them when he met his codefendants. (RT 17871-17875.)

b. Presentation Regarding Appellant

Roy Player testified that: he was 60 years old and he had known appellant since appellant was a little boy; he got to know appellant because they played golf at the same course; appellant was good with numbers and kept score in his head; when Player[49] was not doing well financially, appellant gave Player's 11-year-old son a birthday present; appellant picked appellant's daughter up every day after school, and appellant communicated very well with her and spent time with her; if someone in the community died and there was not enough money for the burial, appellant would raise money and give of himself; appellant raised money for the local Little League; Player was not afraid of appellant and that other people in the community loved appellant; he believed appellant to be a good person who did not deserve to die, and believed that if appellant went to jail he would help people just like he helped Player. (RT 17992-18000.)

Donald Key testified that he met appellant on the golf course, considered appellant a friend and believed that appellant should get the lesser punishment. (RT 18061-18065.)

Suzanne Bogeberg testified that: she was a teacher and licensed family-child therapist who was contacted by appellant during his divorce because he was concerned about his daughter, Eneeka, who he thought needed counseling; appellant impressed her because he was a caring, loving, warm and a nice person; she worked with appellant and his daughter and gave appellant some support and suggestions for getting through the divorce. (RT 18009-18011.)

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[49] This and all subsequent references are to Roy Player.

Appellant's sister, Wanda Proctor, testified that: she and appellant have four other siblings, Shelia, John Ross, Jeff and Eli; their mother is still living; appellant was very close to his daughter Eneeka and prior to his arrest spent a lot of time with her and was a stabilizing influence in Eneeka's life; Eneeka still takes her problems to appellant and visits him as much as she can; appellant helped Proctor raise her son by encouraging him to stay in school and stay out of trouble; appellant asks her about their relatives and she gives him reports; she talks about the Word of God with appellant and believes that he has made some spiritual progress since his arrest; appellant has always been honest, but not perfect; she does not believe he deserves to die because he has a daughter to raise and brothers and sisters and a mother; she did not believe appellant arranged to have four people killed; she loved appellant and does not want him to die. (RT 18019-18028.)

Appellant's former mother-in-law and Eneeka's grandmother, Dessie Babineaux, also testified about appellant's good relationship with his daughter. (RT 18040-18047.)

Appellant's mother, Florence Bryant, testified that she was 74 years old, and she authenticated one of appellant's school report cards, his elementary school diploma and a photograph of appellant playing baseball when he was a boy. (RT 18264-18265.) She further testified that appellant's father died in 1978. (RT 18265.)

c. Presentation Regarding Coappellant Smith

Clinical psychologist Donald Hoagland testified that: he conducted a neurocognitive assessment of coappellant Smith; coappellant Smith has a below average IQ, is dyslexic, has memory deficits and suffered from attention deficit hyperactivity disorder ("ADHD") as a child; psychological

testing of coappellant Smith indicated that he was vulnerable to psychotic deterioration, is chronically anxious and depressed, is introverted, withdrawn, emotionally detached and feels inadequate; coappellant Smith often used drugs or alcohol to alleviate his emotional pain, which is often converted into back pain and headaches. (RT 18131-18156.)

Coappellant Smith's sister, Donnette, testified that: their father often tortured coappellant Smith with extension cords and belts while coappellant Smith was naked; coappellant Smith often witnessed his father molesting her; their mother did nothing to stop their father's violence; their mother was not affectionate; Donnette had no positive memories of their childhood with their parents. (RT 18312-18332.)

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ARGUMENT

I

THE LADA'S OFFICE ABANDONED ITS ROLE AS A DISINTERESTED PROSECUTOR IN THIS CASE, AS IT SUFFERED FROM A DISQUALIFYING CONFLICT OF INTEREST

A. Introduction

After the lead trial prosecuting attorney declared her belief that the Los Angeles County District Attorney's ("LADA's") office had been infiltrated by members a criminal organization known as the "Family," of which the defendants were alleged to be members, the defense moved to recuse the LADA's office from prosecuting the case at trial. After holding six in camera hearings from which the defense was excluded, on December 17, 1992, the Honorable J.D. Smith, Judge, then assigned to preside over the trial of this case, denied the motion to recuse.

Shortly after that denial, the prosecution disclosed allegations by a trial deputy previously assigned to this case that, in 1991, he had witnessed the lead investigator on the case tamper with a key prosecution witness in the presence of the lead prosecuting attorney. After briefing and testimony relating to the allegations of witness tampering and discovery violations attendant thereto, on January 22, 1993, Judge Smith granted the defense motion to recuse the entire LADA's office. (RT 4816-4820.) That ruling was appealed by the Attorney General's ("AG's") office, and reversed by the Court of Appeal ("CCA") in 1994. (See, e.g., CT 3090-3121.) The CCA adopted the AG's argument that the grant of recusal had been based solely on the discovery violation which came to light after the denial of the "first" recusal motion; it therefore declined to consider any of the proceedings attendant to that "first" recusal motion, and it ruled that the

trial court erroneously recused the entire office because of a minor discovery violation. (CT 3117-3119 and 6 SUPP CT 2-17.)

The record demonstrates that the LADA's office abandoned its role as an impartial prosecutor in this case, and it establishes the existence of a conflict of interest that affected the ability of the prosecutor, including trial deputies through the top levels of the management and the District Attorney ("DA") himself, to act impartially in prosecuting appellant's case, and that the prosecution of appellant by the LADA's office denied him a fair trial, due process of law, and the rights to present a defense, to be present at his capital trial, to confrontation, to the effective assistance of counsel and to a reliable judgment of death. (U.S. Const., Amends. V, VI, VII, VIII and XIV; Cal. Const. art. I, §§ 1, 7, 15 and 17.)

The record relating to this issue is lengthy and complex. A detailed discussion of the proceedings below is a prerequisite to discussion of the merit of appellant's claim.

B. Proceedings Below

On October 5, 1992, the trial court granted the defense motion to sever count VII of the amended information, which charged all four capital defendants with conspiring to sell narcotics. (RT 4250; CT 4817-4835, 11224-11225.)[50] The prosecution filed a writ in the CCA challenging the

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[50] Then-remaining non-capital defendants Tannis Curry, Antonio Johnson, Nash Newbill, Andrew Settle and Lamont Gillon were formally severed from the trial of capital defendants Bryant, Wheeler, Smith and Jon Settle on August 3, 1992. (RT 4105.) Those non-capital cases were set to trail the capital trial; however, the non-capital defendants nonetheless were parties to the recusal motions. (See, e.g., RT 4435.) By the fall of 1992, three one-time co-defendants, Anthony Arceneaux, Provine McCloria and William Settle, had pled to non-capital charges. (CT 11223, fn. 3.)

severance of that count.[51] (CT 11219-11252.) In that filing, verified by the lead prosecutor, DDA Janice Maurizi, it was alleged the defendants "had (and continue to have) people inside most of the major organizations including LAPD, LADA, Franchise Tax Board, Department of Motor Vehicles, Pacific Telephone, etc., allegedly all the way up to congressmen and judges. [. . .] Members of the Bryant Family penetrated key law enforcement agencies to obtain confidential information." (RT 4290; CT 11278.) Days after the writ was filed, as reported in the Los Angeles Times, a spokeswoman for the LADA's office, DDA Sandi Gibbons, confirmed that prosecutors and support staff within the LADA's office were being investigated to determine if information had been supplied to the defendants. (CT 11281.) However, District Attorney ("DA") Ira Reiner was quoted as saying that the LADA's office was not investigating whether there had been leaks of confidential information. (*Ibid.*)

On October 13, 1992, counsel for appellant Wheeler filed a motion for recusal of the LADA's office, which appellant joined. (RT 4281; CT 11263-11281.) The defense argued that, given the facts set forth in the writ and based on the contradictory statements of the LADA's spokesperson and DA Reiner, there existed a conflict of interest that "will prejudice the office of the District Attorney against the defendant[s] and impair the prosecutor's ability to impartially perform his function" and thereby deprive the defendants, inter alia, of their right to a fair trial; in addition, the defense argued that no discovery had been provided regarding any alleged conspiracy between members of the Bryant organization and employees of

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[51] Pursuant to Evidence Code sections 452 and 453, appellant has requested this Court take judicial notice of the contents of the Second Appellate District Court of Appeal case file number B070501.

the LADA's office. (CT 11264, 11268-11275.) At a pretrial hearing on the same date, the trial court found good cause to continue the trial past day 10 in order to investigate the allegations and ordered the prosecution to respond to the defense motion, finding that if some or all of the allegations were true he believed he would grant the defense motion to recuse. The trial court also ordered a representative of the Attorney General's office to be present at the next court date. (RT 4285, 4297.)

On November 2, 1992, the court held a status conference on the recusal motion; a representative from the AG's office, Deputy Attorney General ("DAG") Tricia Bigelow, appeared along with the other parties. (RT 4311-4313, 4324.) The LADA's office that morning had filed a pleading entitled "Status of Discovery Re: Recusal Motion." (CT 11328-11347.) At the status conference DDA Maurizi presented the trial court with a three-inch-thick binder containing discovery previously provided by the prosecution that supported the allegations that the Bryant organization had members inside the police department, the LADA's office, the Department of Motor Vehicles ("DMV"), etc.[52] (RT 4318-4322.) DDA Maurizi stated that the LADA's office of Internal Affairs was investigating whether the organization "had people" in the LADA's office, but that DA Reiner would not know of such "low-level investigations." (RT 4315-

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[52] This binder is not part of the record on appeal. Appellant in record correction requested that the binder be augmented into the record. (5 SUPP CT 74, lines 5-7.) The request to augment was denied by the trial court and remains pending before this Court. (See Motion to Vacate Certification or, in the Alternative, to Correct, Augment and Settle the Record at p. 72, filed September 13, 2002, in this Court by appellant Bryant; see also Argument XXXIV, *post*, incorporated by reference herein.)

4316.) As evidence of the alleged infiltration, DDA Maurizi stated that the outstanding arrest warrant charging codefendant Settle with four counts of murder was removed from a computer and had to be reentered on four separate occasions; she argued, however, that it did not take a high level of infiltration to access that computer. (RT 4216-4317.) She also cited in one of the first batches of discovery provided to the defense a newspaper article that reported Jeff Bryant had an agent in the DMV and an informant in other agencies, including the LADA's office. (RT 4319.) She further argued that discovery from other witnesses referred to the organization's people working in the LADA's Van Nuys office and described the organization's bribing of police officers from the Los Angeles County Police Department's ("LAPD's") Foothill Division. (RT 4320-4321.)

DDA Maurizi informed the court that Lieutenant Al Tomich of the LADA's Bureau of Investigation and Richard Hecht, Director of LADA's Office of Branch and Area Operations, laid out in detail in their declarations attached to prosecution's moving papers the extent of the internal investigations, and argued that the status of ongoing investigations, as well as the status of previous investigations, are not relevant to discovery. (RT 4317.) DDA Maurizi informed the court that that the prosecution would not introduce any of the evidence of the infiltration documented in the binder given to the court, in part in an effort to comply with the court's request to simplify the case. (RT 4323.) She requested the court to take the matter off calendar, conditioned on any in camera hearings the court might wish to conduct, and added that Tomich and Hecht were available that same date. (RT 4323, 4318.)

The defense countered that the prosecution's pleading showed there was information not being disclosed to the defense: Hecht's declaration

reflected that DDA Maurizi had told him that a confidential informant implicated another employee of the LADA's office as being connected to the "Family," that that employee still worked for the LADA's office, and that an ongoing investigation was proceeding. (RT 4328- 4329.) The defense argued that the conflict existed in that the prosecution was withholding evidence which formed the basis of the recusal motion. (RT 4329.) DDA Maurizi argued that evidence of an ongoing investigation and former investigations that resulted in the termination of persons from the LADA's office was privileged and not relevant. As to the informant who led to the ongoing investigation, the DDA Maurizi stated the prosecution had not disclosed that informant, never intended to use the informant, and that nothing in the informant's statement was *Brady* material, so it was not discoverable. (RT 4329-4330.)

DDA Maurizi stated that Hecht and Tomich were ready to go into chambers and inform the court of the outcome of the investigations. DDA Maurizi was informed by the AG's office that two former LADA employees had been prosecuted by the AG's office: one pled guilty to sections 32 and 502, i.e., accessory after the fact and dissemination of confidential information; the second employee was investigated for involvement in the criminal conspiracy and was diverted on drug charges. (RT 4330.) Both had been terminated from the LADA's office for some time. (RT 4330.) DDA Maurizi argued that nothing about those files was in any way relevant to this case, that the defendants were in a far better position to know to what extent their operatives had used the information, and that it was the People who were victimized. (RT 4330.) DDA Maurizi argued that an in camera review would convince the court that there was no legal precedent for turning over the information. (RT 4330.)

DAG Bigelow informed the court that the AG's office was opposed to recusal and desired to file a pleading on the matter, but needed a determination of what information was privileged before that pleading could be filed. (RT 4331.)

The court said it intended to thoroughly review the materials, including the notebook provided by DDA Maurizi, before ruling on the motion. (RT 4332-4333.) The court scheduled in camera hearings on the motion, but said that it believed most of the information would not be privileged. (RT 4337.) Two in camera hearings, from which the defense was excluded, were held prior to the next scheduled court date.[53] (RT 4343; CT 11643.)

On November 6, 1992, the AG's office filed a motion opposing recusal of the LADA's office, arguing: (1) there was insufficient proof of a criminal conspiracy between members of the organization and the LADA's office, or, if such a conspiracy existed, there was insufficient proof that such a tie between the LADA's office and the organization would deprive defendants of a fair trial; and (2) precedent dictated that recusal of the entire LADA's office was inappropriate. (CT 11593-11642.)

On November 9, 1992, the LADA's office filed a Memorandum of Points and Authorities in Opposition to Motion for Recusal of the office of the District Attorney, arguing: (1) the decision by the LADA's office not to present any evidence of infiltration by the organization into state and

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[53] While appellant has requested that the record of all in camera proceedings and documents relating to the recusal motion be unsealed and provided to the defense, the Court has not ruled on appellant's request to date. (See Motion to Vacate Certification or, in the Alternative, to Correct, Augment and Settle the Record at pp. 76-77, filed September 13, 2002 in this Court by appellant Bryant; see also Argument XXXIV, *post.*)

federal agencies at trial rendered the recusal motion moot; (2) no conflict existed because the LADA's internal investigation of the organization's infiltration of its ranks would not cause the DA's office to treat the defendants differently; and (3) the AG's office would prosecute misconduct by LADA employees. (RT 11647-11707.)

On November 10, 1992, counsel for appellant Wheeler filed a response to the opposition to his motion to recuse the LADA's office. He argued that since there existed no evidence of referral to the AG's office for prosecution of LADA employees alleged to be unindicted co-conspirators, the LADA's office was therefore attempting to shield its employees from prosecution. (CT 11712-11726.)

On November 10, 1992, the trial court held a hearing at which the defense and representatives of both the LADA's and AG's offices were present. (RT 4340-4342.) The court expressed concern about the ongoing internal investigations being conducted within the LADA's office, and said that if information came to the court that there was an ongoing investigation involving a person in the LADA's office that affected the Bryant case, the court would have to allow that information to be discovered by the defense or take that into consideration in relation to the recusal motion. (RT 4356.) The court on its own motion conducted an examination of DA Reiner and DDA Gibbons; counsel were not permitted to examine the witnesses, but were permitted to approach and inform the court of questions they would like asked. (RT 4359-4360.)

DA Reiner testified that there was a difference between an internal inquiry into wrongdoing and a formal investigation, and that at the time he was interviewed for the newspaper article there was no formal investigation ongoing, only inquiries relating to the infiltration of the LADA's office by

the Bryant Family; he added that his office opened a formal investigation of the alleged infiltration 10 days after the article appeared. (RT 4363-4373.)

DDA Gibbons testified that she based her belief that an investigation was ongoing on the facts alleged in the prosecution's writ relating to the severance of the drug conspiracy count as well as on her experience of how things worked in her office; she thought it inconceivable, given the allegations, that an investigation would not be ongoing. (RT 4375-4378.)

Detective James Vojtecky, the investigating officer in the instant case, testified that: he interviewed an informant on September 15, 1992; he then conducted an internal LAPD investigation based on information provided by the informant; he next set up a meeting with the LADA's Bureau of Investigation ("BOI") and the informant on October 20, 1992. (RT 4389-4391.) Detective Vojtecky did not know at that point whether the LADA's office had opened an investigation. (RT 4392.)

The trial court said it believed the LADA's investigation was incomplete, and instructed the LADA's office to continue its investigation of the cases it had investigated but did not refer to the AG's office, presumably so that the court could make its final determination of the recusal and related discovery motions.[54] (RT 4405-4406.) The hearing was continued to November 24, 1992. (RT 4410.)

On November 18, 1992, a "Motion for Evidentiary Hearing" was filed on behalf of codefendant Tannis Curry, which argued that an evidentiary hearing was necessary to create a record and establish through

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[54] The court's instruction is somewhat vague; it might make more sense in the context of discussions in the sealed in camera hearings, transcripts of which have not been provided to appellant.

admissible evidence that DDA Maurizi's comments to the press were erroneous; appellant joined this request. (RT 4428; CT 11972-11986.)

On November 19, 1992, appellant filed "Points and Authorities Re: Evidence Code 1040 Motion and Recusal." (CT 11898-11967.) Appellant argued that his federal constitutional rights to a fair trial, to due process of law, to present a defense, to confrontation and to the effective assistance of counsel were violated by the LADA's office misrepresentations regarding the alleged infiltration and by its failure to provide discovery relating to those charges; appellant further argued the "remedy" proposed by the LADA's office of not introducing such evidence at trial was only a cover-up. In support of this claim, he further argued that: the issue facing the court was what remedies were appropriate to correct the LADA's deceit; the information sought by the defense about the alleged infiltration of various agencies by the Family was not privileged, and was relevant both to the recusal motion and to his ability to present a defense; there existed an actual conflict in the LADA's office arising from its ongoing investigation of whether its own employees were associated with the crimes it was prosecuting in appellant's case; and, according to various statements of the DA, as many as five employees had been or were then being investigated about the alleged infiltration. Appellant requested that an evidentiary hearing on the issue be held and that the LADA and law enforcement turn over all documents relevant to this issue to the court. He further argued that, if the allegations of infiltration were untrue, DDA Maurizi had a personal stake in the outcome of the proceeding by virtue of her lie to the CCA and as evidenced by the dissemination of false information designed to taint the jury pool. (*Ibid.*)

Several more in camera hearings were held from which the defense was excluded. At least one, on November 24, 1992, was held at the LADA's request after it represented to the court that new information acquired the prior evening needed to be discussed. (RT 4418-4420.) After that in camera hearing the court said the information revealed was critical to the defense, but had just come to light. (RT 4422.) The court explained that the information applied to all defendants, so the court found good cause to continue the matter as to all defendants; the court said it would rule on what was to be disclosed to the defense, and expected counsel to be ready for trial in the event it did not grant the recusal motion. (RT 4423.) With regard to the defense motion for evidentiary hearing, the court said it would determine if DDA Maurizi's statements to the press were relevant to recusal. (RT 4428.)

Prior to the next hearing on the recusal motion, at least two more in camera proceedings from which the defense was excluded were held.[55] (RT 4434-1 through 4434-58.)

All parties were present at the December 17, 1992, hearing on the motions. (RT 4435-4437.) The court said it believed the investigation was complete and solicited argument from counsel. Counsel for one defendant said it was difficult to argue facts known only to the prosecution and the court, and asked if any additional evidence would be made available to the

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[55] The record seems to reflect that two in camera hearings were held on November 24, 1992. The court stated there were about 115 pages of in camera transcripts from about five hearings. (RT 4437.) Judging from the record available to appellant, there appear to have been six in camera hearings held over the course of the following five days: November 16, 20, 24 (2 hearings), December 14 and 16, 1992. (CT 11643-11646; RT 4413-1 - 4413-10, 4415-1 - 4415-18, 4420-1 - 4420-19, 4434-1 - 4434-58.)

defense. (RT 4439.) Appellant's counsel argued that the court should not reach a decision based on information supplied by the prosecution in camera because the prosecution's credibility was in doubt; counsel then provided the court with specific examples of misrepresentations the prosecution made to both the trial court and the CCA. (RT 4439-4451; see also CT 11258-11262.)

The DDA and the DAG both argued essentially that: there was no evidence Ira Reiner abandoned his role as prosecutor; the issue was moot because Reiner was no longer the LADA[56]; there was no lie to taint the jury pool; and the LADA would not introduce any evidence of infiltration at trial. (RT 4460-4464, 4473.)

The trial court said that in 39 years in the criminal justice field it had never heard of such a case involving the upper echelon of district attorneys. It found that "everyone in the top echelon of the office has been involved." (RT 4475.) In response to questioning from the court, DAG Bigelow argued that recusal of the entire LADA's office was not required; rather, precedent allowed the office to continue to prosecute the case if different DDAs were assigned to the case. (RT 4475-4476.)

The trial court then denied the motion to recuse. (RT 4480.) The court informed appellant's counsel that it did not read all the material relating to the misrepresentations of the LADA's office, but said that it knew the contents of those materials and was leaning toward recusal based on appellant's showing and because, since this was a death penalty case, the defendants were entitled to "as much evidence as they can." (RT 4478-

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[56] Gil Garcetti replaced Ira Reiner as the LADA on December 7, 1992. (RT 4463.)

4479.) However, the court could not find any support in the case law for a ruling "that the failure to give the discovery or the misrepresentations, if there were any, are grounds for recusal." (RT 4479.) The court found nothing in the in camera proceedings to substantiate allegations that the LADA's office was infiltrated by the Bryant organization; it further found that some of the informants were non-exonerating and determined that a privilege attached to some of the informants. (RT 4480-4481.) The trial court then lectured counsel at some length regarding the importance of integrity to the criminal justice system. (RT 4482-4485.)

On December 22, 1992, at the first court hearing following the denial of the defense motion to recuse the LADA's office, Head Deputy District Attorney Harry B. Sondheim appeared and requested an in camera hearing on a discovery issue; he informed the court that a DDA had written notes regarding an interview with a prosecution witness, and he asked the court to determine whether the notes were discoverable or privileged under the work-product doctrine. (RT 4543-4545.) Sondheim said he had additional information to discuss ex parte, but did not believe it would impact on the recusal motion. (RT 4546.) The court replied that if the information related to the recusal motion "the sanctions would be just awesome," and asked if the information was known to members of the office during the recusal hearings. (RT 4547, 4552.) Sondheim answered that he learned of it after the hearings because it takes time for tapes to be transcribed and for meetings to be held. (RT 4553.) The court indicated its discomfort with holding more in camera hearings, and said that it found the decision to deny the recusal motion a "tough one" in light of the discovery issues involved. (RT 4556.) The court then denied the prosecution's request for an in camera hearing. Trial counsel for Wheeler then filed a

subpoena duces tecum ("SDT") for the documents to which Sondheim referred, and the court set a hearing on the SDT for January 5, 1993. (RT 4560-4561.) Without deciding the issue, the court indicated its belief that the documents were discoverable. (RT 4561.)

The prosecution mailed the documents to the defense on December 22, 1992. (1 SUPP CT 756.) The documents were: (1) a transcript of an interview conducted on December 16, 1992, by a LADA investigator of a trial deputy, DDA Eduards Abele, who had been previously assigned to the instant case; and (2) an original, unredacted copy of four pages of notes DDA Abele wrote immediately after an interview on January 28, 1991, of prosecution percipient witness Rosa Hernandez that had not previously been provided to the defense. (1 SUPP CT 756.) Both the transcript and notes reflect, inter alia, DDA Abele's belief that DDA Maurizi and Detective Vojtecky improperly influenced Hernandez, who was 14 years old at the time of the homicides, to change her testimony to support the prosecution's case. (1 SUPP CT 769-803.) The transcript further reflects DDA Abele's beliefs that: DDA Maurizi had become "obsessed" with the case to the extent that it affected her judgment; there was insufficient evidence to prosecute at least one, and possibly as many as three of the defendants; DDA Abele had been discouraged by a supervisor from reporting his concerns to superiors in the LADA's office; he had additional concerns not discussed in the interview notes about the basic fairness of the case. (1 SUPP CT 757-758.)

On December 24, 1992, newly elected DA Gil Garcetti notified defense counsel that DDA Maurizi was being withdrawn from all involvement in the prosecution of the instant case because of her status as a potential witness. (1 SUPP CT 680, 756-757.)

Several defendants, including appellant, then filed recusal motions. (CT 3097-3098; 1 SUPP CT 653-720, 754-803, 805-815.) Appellant's motion was entitled "Motion for Reconsideration of Recusal Motion (New Facts and Changed Circumstances)." (1 SUPP CT 754.) All defendants eventually joined the motions, and the arguments for recusal were addressed jointly.[57] (See, e.g., 1 SUPP CT 234-485.) Those arguments for recusal included: (1) new evidence, improperly withheld from court and counsel, was relevant and material to the court's earlier inquiry regarding the existence of a conflict of interest, and that therefore the court should reconsider its denial of the defense motion to recuse the LADA's office; (2) the evidence established a conflict sufficient to require recusal because two prosecutors would be adversarial witnesses at trial, putting the prosecution in the untenable position of impeaching one prosecutor's credibility while supporting the other's; (3) recusal was required under state statutory and decisional law authorizing such when a reasonable probability exists that the prosecuting agency is not exercising its discretion in an even-handed manner; (4) recusal was necessary in order to ensure appellant's rights under state and federal law to a fair trial and due process of law; (5) the LADA's office suppressed evidence pertinent to the impeachment of a major prosecution witness; (6) the LADA's office suppressed evidence critical to the determination of the recusal motion denied by the trial court on December 17, 1992; (7) members of the LADA's office were guilty of suborning perjury and witness tampering; (8) the criminal conspiracy to suppress material evidence by members of the LADA's office demonstrated

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[57] Co-appellant Smith was granted permission to join in the recusal motions after the motion was granted by the trial court. (RT 4829-4830; CT 12296.)

a personal interest in the outcome of the case; and (9) evidence showed the prosecuting trial deputy harbored personal animus toward the defendants. (1 SUPP CT 234-485, 653-720, 754-803, 805-815 [citations omitted].)

On January 5, 1993, Sondheim informed the court that the subject matter of the SDT had been subsequently provided to the defense. (RT 4600.) The court noted the several recusal motions filed as a result, and it set the matter for hearing on January 12, 1993, stating that it saw "some real problems" with the case. (RT 4600-4601.)

On January 11, 1993, the AG's office, still representing the LADA's Office, filed its opposition to the recusal motions, in which it argued essentially that no wrongdoing occurred, or, in the alternative, that remedies other than the recusal of the entire LADA's office existed, including the recusal of the DDAs and the LAPD investigating officer involved in the allegations of misconduct. (1 SUPP CT 234-281.) In support of the argument that no wrongdoing had occurred, the AG's pleading contained declarations from numerous members of the LADA's office, showing that many members of the office, from deputy district attorneys on up through the ranks of management in two different administrations, had knowledge of and had been involved in determining what to do about DDA Abele's allegations. (*Ibid.*)

The January 12, 1993, hearing on the motions was continued to allow the defense time to review the opposition filing. (RT 4625.) The hearing on the recusal motions was held on January 22, 1993. (RT 4646-4825.) DDA Shellie Samuels testified that: she had known DDA Abele since 1987; she recalled him telling her of some problems he had with an interview of a prosecution witness; that from the Fall of 1990 through January 1991, he repeatedly expressed his dissatisfaction with his role in the

instant case, in that he did not feel he was being given enough responsibility in the case; DDA Abele never told her he was discouraged from pursuing his complaint regarding the witness interview; the investigating officer, Detective Vojtecky, told her he believed DDA Abele was a liar. (RT 4657-4673.)

Over DAG Bigelow's objection, Hecht, then the LADA's Director of Branch and Area Operations, Region 1, was called by the defense. (RT 4674-4675.) Hecht testified that: on February 1, 1991, he met with DDA Maurizi and Detective Vojtecky regarding DDA Abele's concerns regarding the interview of Rosa Hernandez; they discussed both the sanitized and unsanitized version of DDA Abele's notes, along with Detective Vojtecky's written comments on those notes; they did not discuss any discovery issues at that time, except to note that DDA Maurizi told Hecht she was told by a member of the LADA ethics committee to disclose to the defense a copy of the notes sans work product; Detective Vojtecky was very angry and told Hecht that DDA Abele made the allegations because he was either immature or being paid off by someone; Hecht did not investigate Detective Vojtecky's allegations regarding DDA Abele being paid off because he did not believe those allegations; his notes from the meeting with DDA Maurizi and Detective Vojtecky reflect that DDA Maurizi told him that Rosa Hernandez was the only witness who put a gun in appellant's hands; his notes also reflect Detective Vojtecky's concern with security, given that a warrant had been taken out of the computer system several times; Hecht did not turn over his notes regarding his meeting with DDA Maurizi and Detective Vojtecky to the trial court prior to its denial of the recusal motion on December 16, 1992; Hecht never spoke to DDA Abele regarding DDA Abele's concerns about the

Hernandez interview; the decision to remove DDA Abele from the case was made by Chief Deputy DA Greg Thompson without Hecht's input; Hecht was a witness in the in camera hearing held in chambers regarding the allegations of infiltration of the LADA's office by the defendants; Hecht believed DDA Abele would be called by the defense at trial, if defense counsel was in any way competent; and Hecht intentionally did not speak with DDA Abele, whom he did not know very well, because he did not want to be put in a position of being accused of tampering with a defense witness (i.e., DDA Abele). (RT 4674-4723.)

After a lunch break, the court noted that it had received a declaration from Detective Vojtecky; DAG Bigelow said she had not received that declaration and did not file it. (RT 4725, 4732.) DDA Abele was then called by the defense. (RT 4726.) Shortly after his testimony began, the trial court interrupted the examination and determined that none of the parties had received copies of Detective Vojtecky's declaration, whereupon a short recess was taken to allow the parties to review the declaration. (RT 4731-4733.) Upon returning to court DAG Bigelow objected to the admission of the declaration on the ground that it related only to the propriety of the Hernandez interview and not to the issue of recusal. (RT 4733-4734.) The trial court ruled it would consider the declaration as relevant to DDA Abele's testimony. (RT 4734.)

After another short recess to allow DDA Abele to read Detective Vojtecky's declaration, DAG Bigelow moved to recuse Detective Vojtecky from acting as the investigating officer on this case on the grounds that he (1) had demonstrated his inability to work with impartiality, (2) disagreed with the new administration's recent recommendation regarding dismissals, and (3) appeared to be directing the prosecution. (RT 4740.) The trial court

deferred judgment on that request, and expressed uncertainty as to whether it had the authority for such an order.[58] (*Ibid.*)

Detective Vojtecky;s declaration asserted under oath, inter alia, that: he considered DDA Abele's version of the January 28, 1991, Hernandez interview to be a "series of lies;" soon after that interview, Detective Vojtecky, DDA Maurizi and Hecht met with Chief Deputy DA Greg Thompson, who asked Detective Vojtecky if he believed DDA Abele could have been "dirty" or "paid off;" when Detective Vojtecky answered that he did not know, Thompson told him that DDA Abele would be taken off the case; the LADA's office had recently"resurrected" the "DDA Abele incident" by interviewing DDA Abele; Detective Vojtecky listened to the tape of that interview while reviewing its transcript, and "verif[ied] that he [DDA Abele] was more stupid and confused today than he had been almost two years ago;" Detective Vojtecky believed that he and DDA Maurizi should have been formally interviewed as well as DDA Abele; Detective Vojtecky remained aware of "CONNECTIONS" still existing between the criminal organization and the DA's office; Detective Vojtecky disagreed with determinations made by a "group of speed readers" in the new administration that dismissal of murder charges was warranted with regard to two defendants; based on his conversations with one of Tannis Curry's attorneys, Detective Vojtecky was sure that the attorney had knowledge of information contained in a confidential memorandum prepared by a member of the prosecution team; Detective Vojtecky had objected to information contained in the memorandum for security reasons; his objections "fell on deaf ears" and possibly endangered a material witness;

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[58]See Argument II, *post.*

as a result of recent LADA actions, Detective Vojtecky decided to lock down his original files and to preclude access to members of the LADA's office; he received the support of his supervisor in that action; and he suggested to his supervisors on December 18, 1992, that the LAPD separate itself from the LADA's office. (1 SUPP CT 576-580.)

At the hearing, DDA Abele continued his testimony by describing the reasons for his ethical concerns over the way the Hernandez interview were conducted. (RT 4742.) On several occasions Hernandez wanted to review her preliminary hearing testimony, but Detective Vojtecky discouraged her from doing so. (RT 4743-4744.) Hernandez was asked to describe the guns she saw at the time of the shooting. (RT 4745.) Initially, Hernandez said, consistent with her prior testimony, that she saw only two guns, both in the possession of the man she saw come out of the house, run to the red car, and shoot into it. (RT 4745.) At some point during the interview, Hernandez expressed uncertainty as to whether a third gun could have been involved. (RT 4745.) Detective Vojtecky then pulled out a photo display of various types of guns and asked her to identify the big gun she saw in the hands of the person standing next to the red car. (RT 4745-4746.) Detective Vojtecky then covered up that gun, thus eliminating the option of selecting the same gun, and asked her to select a gun she saw in the hands of the person coming out of the house. (RT 4746.) After Hernandez hesitated quite a bit, Detective Vojtecky selected a gun labeled a .45 caliber pistol; Hernandez said that might have been the gun that the person coming out of the house had. (RT 4746-4747.)

At the instruction of the ethics unit, DDA Abele asked DDA Maurizi to meet with Detective Vojtecky to try to agree on and document what occurred in the interview; she refused. (RT 4747-4748.) DDA Abele

sought advice from Assistant Director of Branch and Area Operations Thomas L. Trapp, who was visibly unhappy with DDA Abele's desire to prepare a memorandum regarding what had occurred. (RT 4749-4750.) DDA Abele further testified he would have dismissed the charges pending against some of the defendants in this case for lack of evidence, and that he told his supervisors so at the time. (RT 4751.)

DDA Abele recalled DDA Maurizi became "obsessed" with this case. He based his opinion in that regard on the Newbill murder prosecution, charges which he believed should have been dismissed, and on DDA Maurizi's desire to have DDAs investigated for links to the "Family." (RT 4753, 4756.) DDA Abele denied that he created this incident to get off the case. (RT 4756.)

DDA Abele testified that he believed the objective of the January 28, 1991 interview of Rosa Hernandez was to make Stanley Bryant appear to be a gunman, contrary to any other evidence obtained by the prosecution up to that point in time.[59] (RT 4762-4763.) DDA Abele said that DDA Maurizi continued to question Hernandez when Hernandez expressed no uncertainty regarding seeing only one man leave the house and no uncertainty regarding the number of guns she saw; DDA Maurizi also did not give the witness an opportunity to refresh her recollection when she asked to do so. (RT 4764.)

After argument from counsel, the trial court granted the defense

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[59] After the January 28, 1991, interview, Hernandez's testimony changed in another significant respect: she testified for the first time that she saw James Franklin Williams walking away from the scene of the shooting, thus providing corroborating evidence for Williams' version of events that was otherwise contradicted by all the other percipient witnesses who said they never saw him walking away from the scene. (CT 13823-13824.)

motion to recuse the LADA's office. (RT 4816-4821.) The trial judge, a former prosecutor and police offer, found that "the entire office has failed." (RT 4816.) His findings follow in some detail:

> The conflict is so obvious to this court that I can't even articulate all the things that are wrong with this case. When we first talked about the in-camera hearings, we talked about what was germane to me, what I needed to know to grant or deny the recusal motion.
>
> Everybody put a lot of hours in; and the basic question I asked again was, "Is there anything else? Is there anything else that you could tell me that would have an impact on the outcome of my decision?"
>
> And obviously there was because at the time one of the directors of that organization wanted me to have another in-camera hearing. And I knew with 39 years of experience and instincts that there sure as hell was something else they had.
>
> Little did I know that that would be a conflict between two of their attorneys, either vying for the same position or whatever it was. They both have their impressions of how the interview was handled.
>
> It was so extreme that one district attorney -- and all of you here know, anyone here, anyone who works for anybody else, that to go and talk about another employee is almost fatal. That person felt enough about it to go to Mr. Trapp and other people and talk about it. And he felt it was so important he went to his ethics group and didn't get much help from them either.
>
> Then they sat on it and they looked at it, talked about it; and then two years later again they come up with that information that does have an impact on these defendants for a fair trial. They sat on it four years.
>
> * * *
>
> These people [the defendants], whatever the situation, had been here for a long time. They had a right to a speedy trial. They

had a right to discovery. They had a constitutional and state right, just a do-what's-right philosophy.

* * *

But when you show an intentional, deliberate holding back of evidence, that is the conflict. There is no question that Miss Maurizi, Mr. Hecht and Mr. Trapp, whoever was involved, knew that that was discoverable; and that is the problem. And it must have been a tough decision for them.

* * *

But when the State is asking for the life of some of these defendants -- this is a death penalty case. I said this in the beginning. This is not a burglary or robbery -- this requires the maximum protection of those rights. And they are entitled to it, whether we like it or agree with it, all of us here.

Most of you in this court are officers of this court. They sat on that information when asked repeatedly by this court for that information, "Do they have it all? Would it affect it? Would it have an impact on this case? Would it affect their rights to a just trial, to a speedy trial?"

It did, and it does have another impact now because the court grants recusal. I can rely on all of the materials that the People have presented, and I am not going to refer to it anymore.

* * *

Even the attorney general has asked the investigating officer be removed from the case. I have never heard of anything like that.

Now we have careers of some of these fine people, in the twilight of their careers, challenged. We have the investigating officer recommended to be recused by the attorney general's office. We have an entire new staff of district attorneys, from the high people down. This doesn't affect one or two people.

This isn't like the *Greer* case, one witness. This case involved -- I had Mr. Reiner on the stand. I had his press secretary. We have had the assistants; we have had Mr. Hecht; we have had Mr. Trapp. I have never seen so many district attorneys. I must say 25, 30 people

were involved in this one case. They were out doing work, research work, going through files.

I look out and see every one of these guys almost daily, and they gave me some paperwork. This whole office was involved. It has been in the press, the papers. I sat here and felt like Mr. Reiner was on trial. He sat here and the defendants were over there in the jury box with their counsel. It was almost a backwards situation. I have never seen anything like it in my life.

The case has to be reviewed by somebody different, and I am designating you [DAG Bigelow], you and whatever investigating officer you think is appropriate. It has to be done.

This is four years and you are talking not just about the money and the other problems, but you have a lot of things going on here.

(RT 4816-4821.)

The AG's appealed, and a flurry of briefing, motions and letters were filed in the CCA.[60] The AG asked for the record of the in camera proceedings held relevant to the recusal motion to be transmitted to the CCA. Then, in opposing the defense request to unseal those transcripts, the AG argued the records were not relevant to the issue before the CCA in that the transcripts related to the first recusal motion which was denied by the

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[60] Appellant requested that the CCA be ordered to produce its file for inclusion in the instant record on appeal; the trial court declined to make that order. The court did allow appellants to copy the file for inclusion in the record on appeal. Attorneys for appellant's Smith and Bryant were involved in that process, but appellant believes that the most accurate record remains in the possession of the CCA. (See, e.g., RCRT 1271-1277, 1339-1353, 1407-1413, and 1490-1500.) Pursuant to Evidence Code sections 452, subdivision (d) and 453, appellant has requested that this Court take judicial notice of the content of Second District Court of Appeal case file number B074364.

trial court, rather than to the second motion which was granted on January 22, 1993, and from which the appeal was taken.

As previously mentioned, the in camera transcripts were never unsealed, and have not been provided to the defense to date.

The CCA reversed the grant of recusal. (CT 3090-3121.) In so doing, the CCA declined to review the issues raised attendant to the "first" recusal motion. It ruled that the trial court based his recusal order only on the discovery violation raised attendant to the "second" recusal motion, and that the discovery violation did not warrant recusal of the entire office. (CT 3117-3119.)

The trial court resumed its duties on this case upon its return to the superior court. (RT 4929-4930.) While the defendants' petitions for review were pending, counsel for then-codefendant Andrew Settle asked the trial court to clarify its ruling on the recusal motion, asking whether, contrary to the CCA opinion, the court considered the motions and evidence received, including the evidence taken in the in camera hearings, in granting the defense recusal motions. (RT 4935.) The trial court replied that it thought it was clear that the ruling related back to the prior recusal hearings, that it believed it stated that the denial of recusal based on what it heard in camera was a very close call, and that the decision to recuse the LADA's office was based on all the prior hearings and motions. (RT 4935-4936.)

Respondents' Petitions for Review were denied on June 16, 1994. (CT 13470.)[61]

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[61] On August 18, 1994, Judge Smith recused himself from the case. (CT 13581.) Judge Smith provided a written statement of recusal, which read:

(continued...)

During pre-trial proceedings before the Honorable Charles M. Horan, the judge who presided at appellant's trial, appellant moved to strike the death penalty on the grounds that the prosecution's misconduct which formed the basis of the recusal motion(s) had undermined the Eighth Amendment's reliability requirement in death penalty cases to such an extent that imposing the death penalty in this case would deprive appellant of his rights to a fair trial, procedural and substantive due process, the effective assistance of counsel, and to a reliable judgment of death as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (CT 13780-13788.) The trial court denied appellant's request. (RT 6100-6101.)

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[61](...continued)

> In preparing for pending and upcoming motions, the court has reviewed relevant portions of the file including recently filed materials. This review brought to light information which caused me to reflect on the various investigations of which I was aware during my 25 years as a police officer. In light of this information about which I have just learned, I have determined that my recusal will further the interests of justice and that I am therefore disqualified under the provisions of Code of Civil Procedure section 170.1, subdivision (a)(6)(A).
>
> The reasons for my recusal were first learned after my prior rulings in this matter and, therefore, those rulings should be treated in accordance with Code of Civil Procedure section 170.3, subdivision (b)(4).

(*Ibid.*)

C. The LADA's Office Abandoned Its Role As An Impartial Prosecutor In This Case; It Also Suffered From A Conflict Of Interest Such That Its Prosecution Of Appellant Denied Appellant His Rights To A Fair Trial, Due Process of Law, To Present A Defense, To Be Present At His Capital Trial, To Confrontation, To The Effective Assistance Of Counsel And To A Reliable Death Judgment In Violation Of The Fifth, Sixth, Seventh, Eighth And Fourteenth Amendments To The United States Constitution And Parallel Provisions Of The California Constitution

The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county. (Gov. Code, § 26500; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240.) Therefore, subject to supervision by the Attorney General (Cal. Const., art. V, § 13; Gov. Code, § 12550), the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings. (*People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203; *People v. Municipal Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 199-204.)

The district attorney's discretionary functions extend from the investigation of and gathering of evidence relating to criminal offenses (*Hicks v. Board of Supervisors, supra*, 69 Cal.App.3d at p. 241), through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 452; see also *People v. Superior Court ("Greer")* (1977) 19 Cal.3d 255, 267 [giving as examples the manner of conducting voir dire examination, the granting of immunity, the use of

particular witnesses, the choice of arguments, and the negotiation of plea bargains].)

"The importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised 'with the highest degree of integrity and impartiality, and with the appearance thereof" (*Greer, supra*, 19 Cal.3d at p. 267) cannot easily be overstated." (*People v. Eubanks* (1996) 14 Cal.4th 580, 589 ("*Eubanks*").) The public prosecutor "'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" (*Greer, supra*, 19 Cal.3d at p. 267, quoting *Berger v. United States* (1935) 295 U.S. 78, 88.)

> The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name."

(*Eubanks, supra*, 14 Cal.4th at pp. 589-590, quoting Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Const. L.Q. 537, 538-539.)

That impartially was manifestly absent from the prosecution of appellant's case, in which trial deputies through supervising and managing attorneys displayed their willingness to prosecute appellant for crimes while

covering up crimes of LADA employees. DDA Maurizi declared, in a summary of planned trial evidence attached to a verified pleading, that appellant's alleged organization had "infiltrated" the LADA's office, among various other official agencies. (CT 11258.) Yet, even though the prosecution planned to present that evidence at trial, and despite numerous representations to the trial court and defense counsel that all discovery had been provided to the defense, the defense had not been provided with any discovery related to the alleged infiltration. When the defense argued that a conflict existed in that the prosecution was withholding evidence that was the basis of the recusal motion (RT 4329), the prosecution argued that evidence of an ongoing investigation and former investigations which resulted in the termination of persons from the LADA's office was privileged and not relevant. (RT 4329-4330.) Thus, the prosecution, on the one hand, withheld the documents and witnesses which would have provided appellant with evidence of the prosecution's conflict of interest, and on the other hand asked the trial court to deny appellant's recusal motion because of his inability to prove what the prosecution was withholding. (CT 11947.)

The LADA claimed a privilege for information relating to its investigation of its employees who had been convicted of a crime or crimes relating to the charges pending against appellant, but, at the same time insisted that it would introduce evidence relating to the infiltration of its ranks against appellant. The information sought by the defense as to the alleged infiltration of the LADA's office by the Family was relevant both to the recusal motion and to appellant's ability to present a defense. Yet the prosecution sought to shield, and has to this date succeeded in shielding, its employees from allegations of wrongdoing and possibly from criminal

prosecution. In fact, as referenced above, one DDA who had been investigated for being involved in the alleged criminal conspiracy was prosecuted and convicted by the AG's office for an unrelated crime (i.e., or she was diverted on drug charges). (CT 11964.) Thus, the LADA decided not to pursue any further investigation of that deputy with regard to this case.

The LADA office's inability to exercise its discretionary functions in an even-handed manner was further evidenced by its failure to investigate one of its own until media reports exposed the lack of prosecutorial zeal relating to its own employees. Thus, the same newspaper article that exposed DDA Maurizi's plan to present evidence at appellant's trial of the "Family's" alleged infiltration into the LADA's office, reported that DA Reiner's statement that there was no internal investigation of LADA employees underway. (CT 11281.) When a recusal motion was filed based on charges that the LADA's office was not investigating wrongdoing in its ranks, DA Reiner, forced to testify under penalty of perjury, conducted an exercise in semantic gymnastics, testifying that there was a difference between an internal inquiry into wrongdoing and a formal investigation. (RT 4363-4373.) He said that when he was interviewed for the newspaper article there was no formal investigation ongoing, only inquiries relating to the infiltration of the LADA's office by the "Family," but that a formal investigation of the alleged infiltration was opened 10 days after the article appeared. (*Ibid.*)

The most egregious example of the LADA office's failure to perform its prosecutorial function in an objective manner came days after the trial court's initial denial of the recusal motion, when the LADA's office disclosed what it had withheld for years: in a nutshell, the LADA's

office concealed that one of the former trial deputies assigned to this case, Eduards Abele, witnessed successful and intentional efforts from lead prosecutor DDA Maurizi and the investigating officer, Detective Vojtecky, acting in collusion to tamper with a child percipient witness, generate fabricated evidence of appellant's guilt as a shooter, and fabricate corroborating evidence of James Franklin Williams' version of events. The office further withheld other evidence of the bias against appellant extending from the lead trial deputy through supervising attorneys in the office: DDA Abele was discouraged from reporting his belief in that regard to superiors; his supervisor removed DDA Abele from the prosecution of appellant's case days after he reported the misconduct; and DDA Abele believed that DDA Maurizi had lost her objectivity regarding the prosecution of the case, as evidenced by baseless charges brought against some of the defendants.[62]

In summary, both the public and appellant were denied the right to an impartial prosecutor in this case, as demonstrated by the prosecution's failure to advise the defense of internal investigations relevant to charges pending against the defendants, its failure to tender discovery, its failure to refer to the AG's office for prosecution the cases of alleged informants and witnesses who either provided non-truthful information or who were involved in a criminal conspiracy with the defendants, its failure to try the case on the merits rather than in the press, and its failure to be truthful to the trial court and the Court of Appeal.

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[62] All homicide charges against codefendants Tannis Curry and Nash Newbill were eventually dropped.

Moreover, these facts establish a conflict of interest within the meaning of Penal Code section 1424, requiring recusal of the entire office. Penal Code section 1424 provides that "[t]he motion [to disqualify the district attorney] may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."[63] In *People v. Conner* (1983) 34 Cal.3d 141, 147 ("*Conner*"), this Court held the statute "contemplates both 'actual' and 'apparent' conflict when the presence of either renders it unlikely that defendant will receive a fair trial." The distinction between actual and apparent conflict is not critical under the statute because of the "additional statutory requirement" that the conflict must "render it unlikely that the defendant would receive a fair trial." (*Ibid.*) This Court held that a "conflict," for purposes of section 1424, "exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." (*Id.* at p. 148.) For the reasons stated above, this standard was met.

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[63] Section 1424, enacted in 1980, was the Legislature's response to criminal cases stressing the importance of the appearance of impropriety and other apparent conflicts as bases for prosecutorial disqualification. As noted by this Court:

> "The Legislature's response, however, was not as unequivocal as it might have been: the statute refers simply to a 'conflict of interest'; it does not explicitly require an 'actual' conflict, nor does it explicitly exclude 'apparent' conflicts. On the other hand, the statute allows disqualification only when a conflict 'render[s] it unlikely that the defendant would receive a fair trial,' (§ 1424) whereas [pre-1980 cases] allowed disqualification even when the conflict might merely 'appear to affect' the prosecutor's fairness."

(*Eubanks, supra,* 14 Cal.4th at pp. 690-591 [citations omitted].)

Further, if, as the trial court found after numerous in camera hearings with the prosecution, there was no evidence of infiltration (RT 4480-4481), then the defense contention that DDA Maurizi's allegations of infiltration were designed to taint the jury pool created, at the very least, an apparent conflict of interest within the meaning of section 1424, in that such misconduct evidenced the prosecution's inability to be fair regarding appellant's case. (*Conner, supra*, 34 Cal. 3d at pp. 147-148.)

The conflict was sufficiently grave to warrant recusal of the LADA's office. (*Eubanks, supra*, 14 Cal.4th at p. 594 (citing *Conner, supra*, 34 Cal.3d at pp. 148-149.) The recusal of an entire DA's office due to a conflict of interest is disfavored the courts, absent a substantial reason related to the proper administration of justice. (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680 [citations omitted].) Much of the authority favorable to the concept of a limited grant of recusal involves instances where there was some type of relationship between the prosecutor and defendant, or the prosecutor and the victim, which could have had some impact on his or her exercise of prosecutorial discretion. (See, e.g., *People v. Breaux* (1991) 1 Cal.4th 281 [prosecuting deputy's wife was acquainted with murder victim and both were members of a club having some involvement in the case; *People v. Hernandez, supra*, 235 Cal.App.3d 674 [same office was prosecuting victim in one case as a defendant in another, and deputies could have learned facts concerning an underlying dispute by virtue of witnessing the aftermath of an assault]; *People v. Lopez* (1984) 155 Cal.App.3d 813 [defendant's former lawyer joined district attorney's office just prior to trial of charges prosecuted against defendant by the same office]; *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368 [a deputy district attorney assisted in apprehending a defendant attempting to flee

custody after a murder conviction, and the same office subsequently prosecuted the defendant for the escape attempt.]; *Deukmejian v. Superior Court* (1980) 110 Cal.App.3d 427, 434 [no appearance of possible impropriety arises from the activity of a few deputies who have no supervisory or policy making functions].) In each of these cited instances, the reviewing court concluded that sufficient precautions could be taken within the involved office to ensure that the inferentially tainted prosecutors had no contact with the case and no discussion concerning the matter.

Recusal of an entire district attorney's office has nevertheless been held appropriate when there was substantial evidence that personal animosity, bias or personal emotions had affected the office. (See, e.g., *People v. Vasquez* (2004) 122 Cal.App.4th 1027 [18 Cal.Rptr.3d 848, 851-863 [recusal of LADA's office warranted where defendant was child of DDA and where trial deputy refused to agree to bench trial by a judge who was a former LADA for fear of appearing lenient to the victim's family]; *People v. Eubanks, supra*, 14 Cal.4th 580, 599-600 [fact district attorney requested substantial financial assistance from the private victim created a substantial risk of bias and of being under the influence or control of the victim]; *People v. Choi* (2000) 80 Cal.App.4th 476, 481-482 [district attorney was a close friend of the murder victim and had made public statements regarding the murder of his friend and a connected case]; *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277 [every employee of the district attorney's office was necessarily a victim of and affected by the county's auditor/controller's misconduct resulting in the county's bankruptcy]; *People v. Lepe* (1985) 164 Cal.App.3d 685 [district attorney had previously represented the defendant in the same matter and necessarily had privileged information regarding the case]; *Younger v. Superior Court*,

supra, 77 Cal.App.3d 892 [private attorney with extensive criminal law practice was appointed to the third ranking position in the district attorney's office; because of his policy-making and supervisory position it was likely his decisions would affect his former clients' cases prosecuted in his office]; *People v. Conner, supra*, 34 Cal.3d 141, 148- 149 [defendant tried to escape by shooting and stabbing deputy sheriff and then shot at deputy district attorney who witnessed the scene; deputy district attorney reported the incident to his superiors, discussed the incident with the majority of the prosecutors in his office and gave interviews to the media; recusal regarding the escape charges was upheld as proper because the prosecutor was both a victim of, and a witness to, the incident]; *People v. Greer, supra,* 19 Cal.3d 255, 137 Cal.Rptr. 476 [recusal of entire office upheld as proper where murder victim's mother worked in the same district attorney's office as a clerical employee, and many other employees of the office had an emotional stake in the outcome].

In addition, appellant has found no case in which appellate courts of this state were confronted with a conflict of interest of the type of magnitude that was the catalyst for the trial court's ultimate grant of recusal of the entire LADA's office. With regard to the original infiltration allegations, the prosecution either withheld evidence relevant to the instant proceedings or lied to taint the jury pool with false allegations. The DA himself was forced to testify to explain contradictory statements he and members of his office made regarding the LADA's internal investigations. With regard to the prosecution's decision to withhold DDA Abele's observations of witness tampering from the defense, and to silence his efforts to document valid concerns surrounding the prosecution of the action, numerous high-ranking officials participated in, and thereafter

ratified, the determination to withhold evidence of the extremes to which the prosecution went in order to convict appellant.

In *Younger v. Superior Court*, *supra*, 77 Cal.App.3d 892, the CCA affirmed a grant of recusal of the entire LADA's office where a high level official within the office represented a defendant in a prior matter. The CCA concluded that, despite the LADA's remedial efforts to ensure that the concerned prosecutor had "no contacts with the prosecution of any of his clients or those of his former law firm," the recusal order precluding the office from prosecuting any action in which he or his former law firm had represented a defendant did not constitute an abuse of discretion. In discussing the problem created by allowing the LADA's office to continue prosecution of the actions, the court noted:

> In any event the District Attorney's office would always be "on the spot" in the public's mind as regards its handling of any of the Cochran cases. The problem is a "Caesar's wife" problem. Not only must evil itself be avoided but any significant appearance thereof must likewise be avoided. The presence of a former leading criminal defense attorney, near the top of a public prosecutor's office, suggests to those of a paranoid and conspiratorial turn of mind the presence of a fox in the hen house. We do not think that such abnormal suspicion has any reasonable basis in fact whatsoever, but since a public prosecutor must "perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof" [citation], for appearance's sake, the basis for this suspicion should, under these circumstances, be eliminated.

(77 Cal.App.3d at p. 897.)[64]

The disclosed high-ranking officials involved in the recusal issues in this case included District Attorney Ira Reiner, Chief Deputy District

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[64] While *Younger* is no longer authority for defining a conflict within the meaning of section 1424, it is informative regarding when a conflict, once found, is so grave as to warrant the recusal of an entire prosecuting agency.

Attorney Greg Thompson, Branch and Area Operations Director Richard Hecht, Assistant Branch and Area Operations Director Larry Trapp, and Head Deputy District Attorney Harry Sondheim. These officials were active participants, and their actions were subject to question. As the trial court stated, "Now we have the careers of some of these fine people, in the twilight of their careers, challenged." (RT 4819.) Each thus had a personal stake in the outcome of this trial: convictions would vindicate their conduct, or at least minimize the damage it caused.

Further, any fledgling or seasoned deputy assigned as prosecutor to the case would likely have felt that he or she was under the watchful eye of these personally-involved powers within the office. Their objectivity could have been tainted by the obvious impact the result of the trial could have on their supervisors' future and the reciprocal effects it may have had on his or her own fate within the office. Consider, for instance, that after reporting the witness tampering to his supervisors DDA Abele spent the next five and a half years without a promotion. (RT 4790-4791.)

Further, in *Conner*, this Court found recusal of an entire district attorney's office appropriate where a DDA told 10-25 of his fellow felony prosecutors details of the crime he had witnessed where that office was also prosecuting the alleged perpetrator of that offense. (*Conner, supra*, 34 Cal.3d at p. 145.) In determining whether the conflict was so grave as to render it unlikely that the defendant would receive fair treatment during all portions of the criminal proceeding, this Court considered as relevant factors the size of the office, the communication of what he had witnessed by the DDA to his coworkers, the seriousness of the apparent threat to the DDA's safety, and the impact of the DDA witnessing the serious injuries

actually inflicted on the named victim of the crime for which the defendant was charged. (*Id.* at p. 148.)

This case is analogous to *Conner* in that the subject-matter of the conflict was widely known and discussed in all ranks of the office, from support staff through supervisors and policy makers to the DA himself: at least 18 DDAs and the DA had played a part in some aspect of the case and were potential witnesses. (See 6 SUPP CT 3149.) The trial court found that in 39 years in the criminal justice field he had never heard of such a case involving "everyone in the top echelon of the [LADA's] office [. . .]." (RT 4475.) The trial court erroneously denied the motion to recuse, only later to get it right, finding that the "entire office failed." (RT 4816.) The trial court found that the office failed in its obligation to be objective and impartial to appellant, and that the LADA's office was incapable of guaranteeing appellant his right to a fair trial.

The record reflects that the prosecution was (1) incapable of performing its prosecutorial functions objectively and in an even-handed manner, and (2) suffered from such a conflict of interest that its prosecution of appellant denied him his rights to a fair trial, due process of law, to present a defense, to confrontation, to the effective assistance of counsel and to a reliable judgment of death. (U.S. Const., Amends. V, VI, VII, VIII and XIV; Cal. Const. art. I, §§ 1, 7, 15 and 17.)

Prosecution by a biased prosecutor so infected the trial with unfairness as to make the resulting conviction the result of the denial of due process, and deprived the sentencing determination of the reliability the Eighth Amendment requires. (See *Tumey v. Ohio* (1927) 273 U.S. 510 [trial by unbiased judge denies defendant due process]; *Darden v. Wainwright* (1986) 477 U.S. 168, 181, citing *Donnelly v. DeChristoforo*

(1974) 416 U.S. 637 [improper remarks by prosecutor can so infect trial as to deprive defendant due process].) This error is "structural," and thus subject to automatic reversal. (See, e.g., *Gideon v. Wainwright* (1963) 372 U.S. 335 [complete denial of counsel]; *Tumey v. Ohio, supra*, 273 U.S. 510 [biased trial judge]; *Vasquez v. Hillery* (1986) 474 U.S. 254 [racial discrimination in selection of grand jury]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 [denial of self-representation at trial]; *Waller v. Georgia* (1984) 467 U.S. 39 [denial of public trial]; *Sullivan v. Louisiana* (1993) 508 U.S. 275 [defective reasonable-doubt instruction].) The U.S. Supreme Court explained that these cases contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Such errors "infect the entire trial process," *Brecht v. Abrahamson* (1993) 507 U.S. 619, 630, and "necessarily render a trial fundamentally unfair." (*Rose v. Clark* (1986) 478 U.S. 570, 577.) Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." (*Id.* at pp. 577- 578.)

In the alternative, if this Court finds appellant did not carry his burden of establishing (1) the existence of a conflict of interest and (2) that the conflict was sufficiently grave as to warrant recusal of the DA's office, appellant submits that he was improperly denied an opportunity to do so. Appellant requested an evidentiary hearing on the conflict issue, and argued that any privileged claimed by the LADA's office as to the relevant materials was either waived or could not be legally sustained. (CT 11929-11942.) The trial court declined to allow that evidentiary hearing, opting

for the in camera hearings. The defense requested that the transcripts of the in camera hearings be unsealed prior to final argument on the recusal motion, explaining that a defense could not be properly presented absent access to all the information before the court, and the trial court denied that request. (RT 4439.) Appellant unsuccessfully moved in the Court of Appeal to unseal those transcripts. (6 SUPP CT 2724-2739, 3576.) Appellant's request to unseal those transcripts during record correction in the superior court was also denied (RCRT 1265-1266)), and his request in this Court to unseal the transcripts remains pending (see appellant's Motion to Vacate Certification, or, in the Alternative, to Correct, Augment and Settle the Record on Appeal, at pp. 76-77). Without those transcripts, appellant has been denied his right to an adequate record upon which to argue this claim on appeal. Argument XXXIV, *post*, is incorporated by reference herein.

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II

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY PERMITTED A BIASED AND CONFLICTED INVESTIGATING OFFICER TO SIT AT THE PROSECUTION'S TABLE

A. Proceedings Below

On December 9, 1994, appellant filed a motion to: (1) recuse Investigating Officer Detective James Vojtecky "from further conduct in and contact with this case, except to the extent his presence is required to testify;" (2) for an order compelling Detective Vojtecky to submit to a psychiatric evaluation; and (3) for an order directing Detective Vojtecky to remove all knives and guns from his person prior to entering the courtroom in connection with any proceeding in this case. (CT 13798-14000.) The motion was based on the facts and allegations of witness tampering arising out of Detective Vojtecky's January 28, 1991, interview of Rosa Hernandez, as developed during the defense motion to recuse. (See Argument I, *ante*, incorporated by reference herein.)

Additionally, appellant's counsel filed a declaration adding new facts in support of this motion, including, inter alia, that: (1) during the course of the recusal hearing, counsel witnessed Detective Vojtecky engage in an attempt to intimidate DDA Eduards Abele by an intentional and aggressive display of his holstered handguns to DDA Abele while the latter was testifying; (2) since extensive security existed within the Criminal Court Building due in part to the pending trial of O.J. Simpson, thus there was no need for Detective Vojtecky to be armed in the courtroom; and (3) Detective Vojtecky had on numerous occasions (detailed in the motion) withheld discovery from the defense and misrepresented to the court that all

discovery had been provided to counsel; and 4) Detective Vojtecky had displayed personal animus toward appellant by taking affirmative steps to have appellant's housing in the Los Angeles County Jail changed to a less desirable location. (CT 13790-13797, 13817-13828; RT 6114.)

Appellant argued that Detective Vojtecky's recusal was necessary to avoid further prejudice to appellant's right to a fair trial, due process of law and the effective assistance of counsel. (CT 13802-13804.) As authority for the recusal, appellant cited section 1424 and precedent establishing that public officials engaged in the prosecution of an accused must be fair and impartial in the discharge of their duties. (CT 13806-13807, citing, inter alia, *Greer, supra*, 19 Cal.3d at pp. 265-266; *Berger v. United States, supra*, 295 U.S. at p. 88; *People v. Merritt* (1993) 19 Cal.App.4th 1573 ("*Merritt*").) Appellant's motion is incorporated by reference as if fully set forth herein. (CT 13798-14000.)

The hearing on appellant's motion was held on December 21, 1994. Appellant moved to strike as untimely the prosecution's response to appellant's motion concerning Detective Vojtecky, which was served on appellant that morning. (RT 6113; see CT 14147, 14153.) That request was denied, and appellant's request for a week to review the prosecution's response was also denied. (RT 6113-6114.) Argument went forward over appellant's objection. (RT 6114-6118.) The prosecution argued that section 1424 provided a means for the recusal of employees of the District Attorney's Office only, and that Detective Vojtecky was not so employed. (RT 6119; CT 14153.) Appellant argued that both the AG's office and CCA in this case believed that recusing Detective Vojtecky was an alternative to recusing the entire LADA's Office. (RT 6119-6120.) Appellant further argued that, since the prosecution argued during the

recusal motion in the trial court the prosecution argued that removing Detective Vojtecky from the case was the appropriate remedy, they should be estopped from opposing his recusal now. (*Ibid.*)

The trial court agreed that it had the authority to recuse the investigating officer if it determined that, due to repeated acts of misconduct, a defendant could not get a fair trial, but ruled that there was no evidence of misconduct by Detective Vojtecky that would prejudice the defense; rather the court found it likely that Detective Vojtecky's "unusual" conduct would more likely prejudice the prosecution's case. (RT 6120-6123.) Appellant took exception to the court's ruling, and argued that Detective Vojtecky's presence at the prosecution's table acted as an imprimatur for his behavior and would undercut appellant's ability to impeach Detective Vojtecky's credibility through cross-examination. Appellant also argued that Detective Vojtecky had obtained his own lawyer as a result of the allegations arising out of the Hernandez interview, and therefore had a personal stake in the outcome of the trial. (RT 6124-6126.)

The trial court found that the defense had created Detective Vojtecky's personal stake in the outcome of the trial by litigating the issue, and denied the motion to recuse Detective Vojtecky without addressing the issue of whether his presence at the prosecution table would serve to deny appellant his constitutional rights. (RT 6125.) The court also denied appellant's motions to compel a psychiatric examination of Detective Vojtecky and to preclude him from being armed in the courtroom. (RT 6123, 6126.)

B. The Trial Court's Prejudicial Denial Of The Motion To Recuse Investigating Officer Detective Vojtecky Requires Reversal Of Appellant's Conviction And Death Judgment

The Fifth and Fourteenth Amendments to the United States Constitution provide authority for disqualification of counsel when a defendant's right to a fair trial may be prejudiced. "[T]he Constitution does not deny a trial court authority to disqualify a particular representative when his participation would taint the proceeding." (*Greer, supra*, 19 Cal.3d at p. 265.) A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law. (U.S. Const., Amends. V and XIV; Cal. Const., art. I, § 7, subd. (a); see, e.g., *Tumey v. Ohio* (1927) 273 U.S. 510; *In re Murchison* (1955) 349 U.S. 133, 136; *People v. Lyons* (1956) 47 Cal.2d 311, 319; *In re Winchester* (1960) 53 Cal.2d 528, 531.) It is the obligation of the prosecutor, as well as the court, to respect that mandate. (*Berger v. United States, supra,* 295 U.S. at p. 88; *People v. Lyons, supra*, 47 Cal.2d at p. 318; *People v. Talle* (1952) 111 Cal.App.2d 650, 676--678.) As set forth in Argument I, *ante*, Penal Code section 1424 provides legislative authority for the recusal of a member of a district attorney's office when a conflict of interest exists "such as would render it unlikely that the defendant would receive a fair trial."

Section 1424 has been found applicable to investigators employed by a district attorney's office. In *Merritt, supra,* 19 Cal.App.4th 1573, the appellate court reversed a trial court's order granting the recusal of the LADA's office. The trial court had granted recusal on the grounds that: (1) the investigator had engaged in sexual impropriety towards a material witness; and (2) the investigator was guilty of "gross misconduct," if not the

actual crime of suborning perjury. (*Id.* at p. 1577.) The trial court concluded that recusal of the LADA's Office was warranted because at some point the investigator would be a witness at trial and that there would be a danger that prosecutors would try to protect the office. (*Id.* At p. 1578.)

The appellate court reversed, finding that the recusal of the entire LADA's Office was not appropriate under section 1424 on the following record: the trial deputies had been cleared of wrongdoing; the LADA's office had removed the investigator from all further decisions and investigation in the case; there was no evidence that the investigator had wide influence in the LADA's office nor any evidence that he discussed the case with other investigators or DDAs; and the investigator had no determinative say in the charging decisions and held a position of relative insignificance in the LADA's Office. (*Id.* at pp. 1580-1581.) The appellate court modified the recusal order to "apply only to preclude participation of [the investigator] in any further investigation or decision making with regard to [the] case, and to any other investigators or deputy district attorneys who may be shown to have participated in or approved of the activities of [the investigator] which were the subject matter of the recusal." (*Id.* at pp. 1581-1582.)

In the instant case, while representing the People on appeal of the trial court's grant of recusal, the AG's office relied on *Merritt, supra*, in arguing that removing Detective Vojtecky was the appropriate remedy under section 1424 in this case. (See CT 13807, 13990-13991.) In reversing the grant of recusal, the appellate court recommended the trial court consider motions for other sanctions, such as the recusal of those involved. (CT 13488, 13501.)

But when appellant then moved to recuse Detective Vojtecky, one of the new trial deputies assigned to the case, DDA Paul Sortino,[65] argued that *Merritt* was inapplicable because Detective Vojtecky was not employed by the LADA's office. (RT 6119.) However, Detective Vojtecky testified numerous times during the course of the prosecution of appellant's case that he was on loan from the LAPD to LADA's Office; he was in fact on loan to that office when the motion to recuse him as investigating officer was brought, and when DDA Sortino represented to the court that Detective Vojtecky was not working for the LADA's office. (RT 2896, 4136, 8251-8252.)

Notwithstanding the prosecution's misrepresentation of the facts to the trial court, the trial court prejudicially erred in denying appellant's motion to recuse Detective Vojtecky. It is well-settled that when it appears the State has engaged in misconduct, the burden is on the State to show by a preponderance of the evidence that sanctions are not warranted because the defendant was not prejudiced by the misconduct. (*People v. Zapien* (1993) 4 Cal.4th 929, 967.) Even though the AG's Office, the CCA and a prior trial judge in this case believed that removing Detective Vojtecky was the appropriate sanction, and even though the prosecution utterly failed to meet its burden to show that that sanction was not appropriate, the trial court nonetheless denied appellant's motion to recuse Detective Vojtecky, ruling instead that the prosecution would be harmed by his presence at counsel table once evidence of his misconduct came to light during trial.

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[65] Sortino first began his work on this case as a member of the AG's Office; he was a trial deputy for the LADA's office by the time appellant's case went to trial. (RT 4846, 5026.)

The prosecution circumvented that problem, however, by not calling Rosa Hernandez as a witness; the jurors never heard the crucial evidence undermining Detective Vojtecky's credibility and highlighting the extremes to which the prosecution would go in its zeal to secure a conviction against appellant. Detective Vojtecky was allowed to sit at counsel table and to testify to prior inconsistent statements of numerous witnesses whom he had interviewed, and whose trial testimony did not aid the prosecution's case against appellant, yet his highly questionable ethics not only remained unexamined, his credibility was bolstered by sitting at counsel table with the prosecution, enveloped in the prestige, however undeserved, of that office.

The record clearly reflects that Detective Vojtecky should have been recused from the prosecution of appellant's case. Unlike the investigator in *Merritt*, Detective Vojtecky continued to make decisions of importance in this case – in fact, both the AG and appellant's counsel argued for his recusal on the ground, inter alia, that he was running the prosecution. (RT 4740; CT 13813-13814.) Like the investigator in *Merritt*, Detective Vojtecky appeared, on the basis of the testimony of a deputy district attorney, to have committed a criminal act, witness tampering, along with myriad other "improprieties" previously mentioned (see Argument I, *ante*), in his efforts to secure a conviction against appellant at any cost. The trial court's failure to recuse this clearly conflicted agent of the prosecution denied appellant his right to a fair trial, due process of law, to present a defense, to confrontation, to the effective assistance of counsel and to a reliable judgment of death under the federal and state constitutions. (U.S. Const., Amends. V, VI, VII, VIII and XIV; Cal. Const. art. I, §§ 1, 7, 15 and 17.) His conviction and judgment of death must be reversed.

C. Respondent Must Be Judicially Estopped From Opposing This Claim

As noted in Argument I, *ante*, while Respondent was representing the LADA's Office at the hearing on the defense motion to recuse that office, respondent moved to recuse Detective Vojtecky from acting as the investigating officer on this case on the grounds that he had demonstrated his inability to work with impartiality, disagreed with the new administration's recent recommendation regarding case dismissals, and appeared to be directing the prosecution. (RT 4740.) Under the doctrine of judicial estoppel, respondent should be barred from opposing appellant's argument that, for the same reasons cited by respondent, Detective Vojtecky should have been recused from acting as investigating office at appellant's trial.

This Court has recognized that, as a matter of state law, the doctrine of judicial estoppel precludes a party from taking inconsistent positions in judicial or quasi-judicial proceedings.

> " 'Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.' " (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735, fn. omitted.) The doctrine applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.)

Aguilar v. Lerner (2004) 32 Cal.4th 974, 986-987.)[66]

The Court should apply the doctrine in this case and preclude respondent from opposing the instant claim, because it made a well-informed decision during pre-trial proceedings to recuse Detective Vojtecky due to his impartiality with regard to appellant's case. In opposing appellant's claim, it would necessarily have to take the inconsistent position that recusal was not warranted because Detective Vojtecky was not impartial. Factors (1), (2), (4) and (5) as set forth in Aguilar have clearly been met. (*Ibid.*)

With regard to factor (3), the trial court ultimately adopted respondent's position regarding the recusal of Detective Vojtecky. Initially, the trial court deferred judgment on respondent's motion to recuse Detective Vojtecky, and expressed uncertainty as to whether it had the authority for such an order. (RT 4740.) The trial court's remarks in its

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[66] The doctrine of judicial estoppel is essentially the same in its purpose and in its implementation in federal courts. (See *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 600 [doctrine "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position"]; cf. *Correll v. Stewart* (9th Cir. 1998) 137 F.3d 1404, 1413 ["[s]imply put, the State cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding."]; *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council* (9th Cir. 1988) 851 F.2d 1208, 1210, cert. denied (1991) 501 U.S. 1260 [purpose of doctrine to protect against a litigant playing "fast and loose with the courts"]; *Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037, cert. denied (1991) 501 U.S. 1260 [doctrine is invoked by a court at its discretion]; *Helfand v. Gerson* (9th Cir. 1997) 105 F.3d 530, 535 [doctrine applies to "a party's stated position, whether it is an expression of intention, a statement of fact, or a legal assertion"].)

ruling on the recusal of the LADA's Office showed that it did not rule immediately on the motion to recuse Detective Vojtecky because of the novelty of the issue: "Even the attorney general has asked that the investigating officer be removed from the case. I have never heard of anything like that." (RT 4819.) In ordering the LADA's office recused, however, the trial court said: "The case has to be reviewed by somebody different, and I am designating you [DAG Bigelow], you and whatever investigating officer you think is appropriate." (RT 4820.) Since the trial court adopted respondent's position that Detective Vojtecky had to be recused, factor (3) as set forth in *Aguilar, supra*, 32 Cal.4th at pp. 986-987 has also been met.

For all the foregoing reasons, this Court should rule that respondent is judicially estopped from arguing against appellant's position that the trial court erred in denying the request to recuse Detective Vojtecky as the investigating officer in this case.

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III

THE TRIAL COURT'S FAILURE TO SEVER APPELLANT'S CASE FROM THAT OF HIS CODEFENDANTS REQUIRES REVERSAL

Appellant's confinement and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and parallel provision of the state constitution because the trial court deprived appellant of an unbiased jury determination by: (1) denying appellant's pretrial motions to sever his case from codefendant Settle's case, despite evidence that codefendant Settle's defense would be adversarial to appellant's; (2) failing to grant appellant's motions to sever and for a mistrial after the adversarial defense was presented; and (3) denying appellant's pretrial motion to sever his case from that of coappellants Wheeler and Smith. This Court must reverse because the joinder of appellant's case to that of his three codefendants resulted in gross unfairness to appellant amounting to a denial of due process, the right to a fair trial, the right to counsel and the right to a reliable sentencing determination.

A. The Relevant Law Regarding Severance

Section 1098[67] provides that when two or more defendants are jointly

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[67] Penal Code section 1098 provides:

> When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that

(continued...)

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, a reviewing 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, e.g., *People v. Johnson* (1989) 47 Cal.3d. 1194, 1230.) The statute, however, does not provide any guidelines for the exercise of the court's discretion.

The guidelines for the implementation of section 1098 come from this Court in *People v. Massie* (1967) 66 Cal.2d 899. (*People v. Johnson, supra,* 47 Cal.3d at p. 1230.) There the Court provided that separate trials should be ordered "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie, supra,* at p. 917.) In addition, joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452; *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.) 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.) In *People* v. *Keenan* (1988) 46 Cal.3d 478, this Court observed: "Severance motions in capital cases should receive heightened scrutiny for potential prejudice." (*Id.* at p. 500.) This

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[67](...continued)

> where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial.

principle is consistent with the Eighth Amendment requirement of heightened reliability in capital cases. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

Severance is not required where there is no showing at the time of the hearing why prejudice would result from a joint trial (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1230) or where the prosecution has assured the court that it would not use the evidence upon which the defendant requesting the severance had based his motion (*People v. Turner* (1984) 37 Cal.3d 302, 312.) A court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) If a trial court abuses its discretion in failing to grant severance on the ground of antagonistic defenses, reversal is required upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Keenan, supra*, 46 Cal.3d at p. 503.) This Court recently held that a reasonable probability of a more favorable outcome in a case involving conflicting defenses is not established if there exists sufficient independent evidence against the moving defendant that demonstrates his guilt. (*People v. Coffman* (2004) 34 Cal.4th 1, 42-43.)

Although the standard of review of a trial court's ruling on a motion for severance is whether the trial court abused its discretion based on the showing made at the time of the hearing of the motion (*People v. Johnson, supra,* 47 Cal.3d at p. 590), on appeal reversal will be required where the joinder actually resulted in gross unfairness amounting to a denial of due process even if severance was not initially warranted at the time the motion was made. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127.)

In *Zafiro v. United States* (1993) 506 U.S. 534, the United States Supreme Court held that severance is proper "if there is a serious risk that a joint trial 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. 1081.) As this Court noted in *People v. Massie, supra,* in assessing a claim of improper denial of severance, an appellate court ". . . must weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a separate trial." (*Id.* at p. 923.) Appellant asserts that the State trial court's denial of his motion to sever compromised his constitutional rights, set forth below, rendered his trial fundamentally unfair and deprived him of due process of law. (*Estelle v. McGuire* (1991) 502 U.S. 62, 68; *Jammal v. Van de Kamp* (9th Cir.1991) 926 F.2d 918, 919-20; *Grisby v. Blodgett* (9th Cir. 1997) 130 F.3d 365, 370.) His conviction must be reversed and his judgment of death must be vacated.

B. The Trial Court's Failure To Sever Appellant's Case From That Of Codefendant Settle Requires Reversal

1. Procedural History Of Appellant's Efforts To Sever His Case From That Of Codefendant Settle

On June 24, 1994, codefendant Settle's case was joined with the cases of appellants Bryant, Wheeler and Smith. (RT 4950-4951; CT 13472-13473.) On November 10, 1994, codefendant Settle's request to represent himself was granted. (RT 6071-6088; CT 13744.) On December 12, 1994, appellant filed a motion seeking to sever his case from that of Wheeler and Smith and especially that of codefendant Settle.[68] (RT 6128-

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[68] Appellant's claims regarding the failure to sever his case from that (continued...)

6151; CT 14084-14136.) With regard to codefendant Settle, appellant argued in relevant part that codefendant Settle's defense was antagonistic to appellant's, because would be a second prosecutor during appellant's trial.[69] (CT 14103.)

On December 21, 1994, at a hearing on the matter, it was apparent that all parties were aware that codefendant Settle's defense would be antagonistic to the other defendants. (RT 6140-6141.) Codefendant Settle told the court, "My defense is extremely antagonistic. [. . . .] I didn't do it. It is antagonistic. I intend to assign the proper responsibility to the respective defendants. In doing so, that may deprive them of their right to a fair trial because of the antagonistic nature of my defense." (RT 6143-6144.)

Counsel for appellant complained that codefendant Settle would be another prosecutor at the table and that he would fabricate evidence if he needed to do so in order to escape conviction. (RT 6144-6145.) Counsel further argued that counsel were governed by ethical guidelines that limit what they can do in court, but that codefendant Settle was not so constrained. (RT 6147-6148.) In addition, counsel informed the court that there was a recent newspaper article in which codefendant Settle told the press that "'he was innocent and all the other baby killers were all guilty.'" (RT 6137, 6139.) Counsel was concerned that codefendant Settle would misperceive his codefendants' defenses as "pointing the finger at him" and

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[68](...continued)
of coappellants Wheeler and Smith will be discussed later in this argument.

[69] Appellant also filed a motion to sever his case from that of codefendant Settle, citing the risk of antagonistic defenses. (CT 11074-11078.)

trigger statements from codefendant Settle that would harm the other defendants. (RT 6137-6138.)

The prosecution countered that the suggestion that codefendant Settle would create an inconsistent defense was not well founded, because it is something that could not be known until later. (RT 6145-6146.) Appellant Wheeler joined in the motion to sever his case from codefendant Settle. (RT 6144.) The court denied appellant's motion to sever from Wheeler and Smith and took under submission appellants' motion to sever from codefendant Settle. (RT 6151.)

On January 18, 1995, at the commencement of appellants' trial and prior to jury selection, the court returned to appellants' motion to sever their case from codefendant Settle and codefendant Settle's motion to sever his case from theirs. (RT 6192.) Among the considerations proffered by appellants in support of the motion was that codefendant Settle would likely choose a course of action detrimental to his codefendants. (RT 6195-6196.) The trial court found that was an allegation not borne out by any concrete evidence presented to the court. (RT 6196.) The court expressed the view that it had not seen any proof that codefendant Settle would somehow hurt his codefendants and the court was not convinced that it was "tremendously likely that that will happen." As a palliative, the court offered that if its estimate turned out to be overly optimistic, the court could remedy the situation at any time, even after the case had gone to the jury. (RT 6196.) The court denied the motion, reasoning that joint trials were judicially efficient, and avoided the burden on the prosecution and witnesses of multiple proceedings, especially in large conspiracy cases. (RT 6192-6193, 6196.) The court also noted that joint trials have been viewed as serving the

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

On January 24, 1995, still prior to jury selection, codefendant Settle informed the court that he had the right to testify and that his testimony was not going to be favorable to his codefendants. (RT 6342.) In addition, he advised the court that he had been threatened. (RT 6342-6343.) Defense counsel renewed their motion to sever codefendant Settle's case, arguing that, in his pro per status, he could not be controlled by the court or counsel and was free to make such allegations without cross-examination. Counsel argued that if the allegations were true, they were entitled to cross-examine him to learn who the witnesses were. If the allegations were not true, they were also entitled to know because it would support their position that codefendant Settle would do anything, including fabricating evidence, to convict appellants. The court responded that it could prevent codefendant Settle from engaging in misconduct by taking away his pro per status if he violated the court's orders, and once again denied the motion. (RT 6342-6343, 6379-6382.)

On February 9, 1995, the date the alternate jurors were impaneled, codefendant Settle renewed his motion for severance from his codefendants' case and asked for federal protection because of his fear for his safety. (RT 7834-7837.) Codefendant Settle advised the court that he would testify and that "it may be damaging to ... the co-defendants." (RT 7834-7835.) Counsel for appellant joined the motion to sever, but the court denied the motion. (RT 7837-7838.)

On April 17, 1995, during cross-examination by the prosecution of a witness codefendant Settle had called and examined, counsel for appellant objected that the cross-examination was eliciting information damaging to

appellant that would never have been before the jury if appellant's case had been severed from codefendant Settle's; appellant's motion for a mistrial based on the failure to sever his case from codefendant Settle was denied. (RT 14675-14676.)

On April 25, 1995, counsel for appellant and coappellant Wheeler again sought to sever their cases from codefendant Settle's case, citing the damage codefendant Settle did to appellant's case during his cross-examination of appellant on the preceding day. (RT 15471-15472.) The motion was denied. (RT 15472.) Later in the day, when codefendant Settle was permitted to reopen his case and testify after all of the appellants had rested,[70] counsel for appellants once again sought to sever their case from that of codefendant Settle, but their request was denied. (RT 15543.)

On May 9, 1995, after codefendant Settle's closing guilt phase argument, defense counsel renewed their motion to sever codefendant Settle's case from theirs and moved for a mistrial based on his conduct in the case, particularly his testifying after appellants had rested. (RT 16634-16635.) Both motions were denied. (RT 16635.)

2. Appellant Was Denied A Fair Trial And Due Process Of Law By The Trial Court's Failure To Sever The Case Of Pro Per Codefendant Settle From Appellant's Capital Trial

Time and again the trial court was explicitly informed, from pro per codefendant Settle himself, of the antagonistic nature of codefendant Settle's defense, yet the trial court denied appellant's repeated motions to sever. Codefendant Settle delivered the antagonistic defense he promised.

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[70] This deviation from the orderly presentation of the case is the topic of Argument IV, *post*.

The joinder of codefendant's case to appellant's resulted in a trial so unfair to appellant that he was denied due process of law and deprived him of the heightened reliability required in capital cases. (U.S. Const., Amends. V, VII, VIII and XIV.) Reversal is required.

a. The Trial Court Abused Its Discretion In Denying Appellant's Severance Motions

i. Evidence Before The Trial Court Showed That Codefendant Settle's Defense Was Antagonistic To Appellant's Defense

"[M]utual antagonism' exists where the acceptance of one party's defense will preclude the acquittal of the other." (*People v. Hardy, supra,* 2 Cal.4th at p. 169 [citations and quotation marks omitted].) Severance on the ground of antagonistic defenses is warranted if a defendant's statements implicate another defendant. (*People v. Massie, supra*, 66 Cal.2d at p. 919 [one defendant's confession implicated second defendant and failure to sever trials ruled prejudicial]; *People v. Wheeler* (1973) 32 Cal.App.3d 455 [one defendant claimed second defendant forced him to participate in crime and erroneous failure to sever cases held harmless].)

Prior to the start of the prosecution's case, the evidence before the trial court at the time of appellant's motions to sever his case from codefendant Settle's established that codefendant Settle intended to testify and that his testimony would exculpate himself and inculpate appellant. During the hearing on the first motion, codefendant Settle informed the trial court, "I intend to assign the proper responsibility to the respective defendants. In doing so, that may deprive them of their right to a fair trial because of the antagonistic nature of my defense." (RT 6143-6144.) The trial court indicated that codefendant Settle's defense was that he was not

present during the crime, and it expressed doubt about codefendant Settle's ability incriminate the other defendants. (RT 6139, 6140.) Counsel for appellant replied that all codefendant Settle had to do was "stand up and say it." (RT 6139-6140.) The trial court countered it did not see how he could do that short of "standing up and yelling in court," and that if codefendant Settle did so it would only happen once and that the court would then take measures to protect appellant's rights. (RT 6140.) If such an event transpired, counsel argued that a mistrial would be required. (RT 6140.) Nonetheless, the court denied appellant's severance motion, ruling that no "concrete evidence" had been presented to it indicating that codefendant Settle's defense "might somehow hurt the other defendants." (RT 6195-6196.)

The trial court's remarks indicate it believed the only way codefendant Settle could harm the other defendants' cases was by an outburst in court, which the trial court believed it could remedy by instructing the jurors to disregard codefendant Settle's comments. However, during a later argument surrounding appellant's motion to sever, codefendant Settle informed the trial court that he intended to testify at trial and that his testimony was not going to be favorable to the other defendants. (RT 6342.) Nonetheless, even with an offer of proof about codefendant Settle's adversarial defense, the trial court again denied appellant's motion to sever, ruling that it could control the proceedings so as to avoid harm to Settle's codefendants. (RT 6342-6343, 6379-6382.) At a subsequent hearing, codefendant Settle again informed the trial court that he intended to testify against the codefendants, and the trial court again denied, without discussion or explanation, appellant's motion to sever. (RT 7837-7838.)

Codefendant Settle explicitly informed the trial court that he would testify that he was innocent and appellant was guilty. Thus, there existed more than "adequate grounds" before the trial court warranting severance on the ground of antagonistic defenses. The trial court knew: (1) codefendant Settle's testimony would implicate appellant (*People v. Massie, supra*, 66 Cal.2d at p. 919); and (2) the acceptance of codefendant Settle's defense would preclude the acquittal of appellant. (*People v. Hardy, supra*, 2 Cal.4th at p. 169.) The trial court at first failed to understand the nature of codefendant Settle's defense, believing that codefendant Settle would make an outburst incriminating appellant, a problem the court believed it could correct by instructing the jury to disregard codefendant Settle's unsworn comments. Later, the trial court was informed that codefendant Settle planned to testify against appellant, but the trial court did nothing, believing it could fix any problem created by the joinder of codefendant Settle's case to appellant's; in so doing, it failed to consider the fact that no instruction could cure the harm caused by sworn testimony of a codefendant that inculpated appellant. (See *Bruton v. United States* (1968) 391 U.S. 123, 135-136 [the admission of a nontestifying defendant's confession, facially implicating his codefendant in the crime, was so inherently prejudicial that it violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment, despite a limiting instruction to the jury to consider the statement against the declarant defendant only]; see also *People v. Aranda* (1965) 63 Cal.2d 518 [same].) Under these circumstances, the trial court abused its discretion in dismissing appellant's requests to sever made prior to the start of the prosecution's case. (*People v. Ervin* (2000) 22 Cal.4th 48, 68.)

The trial court further abused its discretion when it denied appellant's motions to sever during the presentation of evidence. Appellant again renewed his motion to sever and requested a mistrial after the prosecution's cross-examination of Floyd Tillman, a witness codefendant Settle called, elicited testimony damaging to appellant. (RT 14670-14675.) Counsel argued that the witness would not have been called if appellant had been tried separately, and thus the damaging testimony would not have been before appellant's jury. (RT 14675-14676.) The trial court denied the motion without comment on the merits of appellant's motion, ruling only that the scope of the prosecution's cross examination was proper due to a prior inconsistent statement made by the witness. (RT 14676.) The trial court abused its discretion in failing to address the merits of appellant's motion.

Codefendant Settle's cross-examination of appellant left little doubt but that he was a second prosecutor in this case. Codefendant Settle undercut appellant's defense when he asked appellant how William Settle moved from "stacking beer in the 7-11s" for Budweiser to leading a narcotic organization. (RT 15457.) He further asked appellant if the Toyota, also known as the "company car," needed brakes on the date of the homicides in this case, whether appellant called codefendant Settle on that date and whether Frank Settle acted as a go-between for appellant with regard to car transactions. (RT 15457-15458, 15460-15642.) The next morning counsel argued that "the 10 minutes by Mr. Settle yesterday I think did more than anything that I have ever seen in 28 years to destroy on nonissues. . . . I think that it was grounds for severance when we started. . . . Each day there are questions and tactical and strategic decisions being made by Mr. Settle in pro per that could corroborate or support the severance that

should have been granted in this case, and should be granted at this point." (RT 15471.) Given the evidence of antagonistic defenses before it, the trial court abused its discretion when it denied the motion without comment on the merits of whether a severance was warranted based on antagonistic defenses. (RT 15473.)

The trial court then permitted codefendant Settle to testify, over appellant's objection. (RT 15472.) In relevant part, codefendant Settle testified that: at about 3 p.m. on the day of the homicides, appellant telephoned codefendant Settle and inquired how long a brake repair job on a Toyota would take; when told by codefendant Settle that it would be about an hour if he did not need parts or two if he did, appellant asked codefendant Settle if he had any cars for sale; codefendant Settle read a list of cars and appellant chose a green 1970 Bonneville for $900, and told codefendant Settle that Frank Settle would be over to pick it up; Frank came over in the red Toyota "company car" and drove away in the Bonneville; codefendant Settle fixed the brakes on the Toyota in an hour. (RT 15539, 15553, 15579, 15600.) About an hour and a half after dropping off the Toyota, coappellant Wheeler and Frank Settle returned to codefendant Settle's place driving in what had been identified at trial as the red Jeep belonging to Wheeler's girlfriend; they paid codefendant Settle the $900 and picked up the Toyota. (RT 15539-15541, 15561.) Codefendant Settle denied ever being to the house on Wheeler Avenue. (RT 15541.) He said that his brothers Frank and William were both involved in drug sales, but that he was mostly gainfully employed as an auto mechanic. (RT 15531-15534.) He testified that after a work-related accident, he briefly allowed William to pay him to use his house on Vanport to sell drugs, but codefendant Settle cancelled the arrangement when contacted by Detective

Lambert regarding activities at the house. (RT 15533-15534.) Codefendant Settle denied making the statements that Reynard Goldman said he heard codefendant Settle make at the Vanport house, i.e. that Armstrong "would not be around much longer" (RT 9278), stating the Vanport house had been rented out and that he had not been on the property. (RT 15536-15537.)

At this point in codefendant Settle's narrative, counsel for appellant renewed the motion to sever and incorporated all prior arguments made by appellant for severance of his case from that of codefendant Settle; the court denied the motion, but stated, "Let's hear the testimony and the examination and then make whatever motions you have." (RT 15543.)

The trial court abused its discretion in failing to grant appellant's motion to sever when it knew, in no uncertain terms, that codefendant Settle's defense was extremely antagonistic to appellant's. A discussion of the evidence before the trial court prior to codefendant Settle's testimony is illustrative of this point.

The prosecution's case against appellant was, in summary: (1) appellant was a high-ranking member of a multi-million dollar narcotics organization known as "The Family," run by appellant's brother Jeff Bryant, since about 1982; (2) appellant and his brother paid Andre Armstrong to kill Ken Gentry in 1982 because of a dispute arising out of a drug sale; (3) after Armstrong was convicted of the Ken Gentry killing, he was interviewed by homicide investigators while in prison and said that he intended to collect from the Family for money owed him for the Gentry hit; (4) upon his release from prison in 1988, Armstrong and James Brown sold Family drugs in northern California before moving to southern California, where Armstrong intended to "squeeze" the Family for money or part of its business; (5) appellant arranged for the killings of the victims in this case in

order to protect the Family's business; (6) appellant had arranged for other violent acts against people over drug disputes; (7) appellant had arranged for violent acts against Keith Curry, the second husband of appellant's former wife Tannis; (8) at the time of the homicides, Armstrong and Tannis were romantically involved; (9) appellant was present at and facilitated the instant homicides; and (10) appellant made admissions regarding the homicides after they occurred. (See Statement of Facts, *ante*.)

Appellant testified in his own defense that: (1) he had long been working for people who sold narcotics, at first for his brother Jeff Bryant; (2) appellant sold the Family to William Settle after Jeff was incarcerated because appellant did not know how to run it; (3) he denied knowing anything about the homicides before they occurred, denied arranging for the homicides, denied being present at the Wheeler Avenue house on the date of the homicides and denied making any admissions regarding the homicides; (4) he denied paying Armstrong to kill Ken Gentry and testified that Armstrong told appellant he killed Gentry for personal reasons; and (5) denied ever arranging for violent attacks on anyone. Appellant presented additional evidence that Armstrong killed Gentry because Gentry was dating Armstrong's love interest, Karen Flowers, and that Armstrong stalked Karen Flowers upon his release from prison in 1988. Appellant's defense also undermined the credibility of the prosecution's witnesses and undercut key aspects of the prosecution's case in chief; the defenses of Smith and Wheeler did not contradict appellant's defense. (See Statement of Facts, *ante*.)

In short, appellant testified that, although he was involved in drug sales, he was not in a leadership position and did not order violent acts to further the interests of the organization. Appellant's defense challenged the

existence of the alleged admissions by appellant, and also called into question the proffered motive for and existence of various bad acts allegedly committed by appellant. No one but James Williams, an original defendant in this case, gave direct testimony inculpating appellant in the homicides, and his testimony was subject to extensive impeachment. Given the contradictory state of the evidence at this point, it was reasonably probable that one juror would have found that the prosecution had not carried its burden of establishing appellant's guilt beyond a reasonable doubt. Then came codefendant Settle's testimony, which secured appellant's conviction for the prosecution. The trial court abused its discretion in failing to grant appellant's motion to sever given the prejudice caused to appellant from joinder with codefendant Settle's case.

Finally, the trial court abused its discretion when it failed to grant appellant's motions to sever and for a mistrial after codefendant Settle's closing argument. Codefendant Settle began by arguing "This case is not a murder mystery. It's clear that the Bryant organization strikes again, and it's Stanley Bryant calling the shots on August 28, 1988." (RT 16592.) He argued that when Wheeler yelled that there was a woman in the red car, he was shouting to appellant, who did not tell Wheeler not to shoot into the car. (RT 16599-16000.) Then codefendant Settle argued that appellant used his .45 caliber handgun to kill James Brown. (RT 16610.) Codefendant Settle further argued facts not in evidence when he said that Tannis Curry was known in the community as the "Black Widow" because men who had an affair with her were killed by appellant. (RT 16611-16612.) Codefendant Settle argued, again not based on the facts in evidence, that his brother Frank, who looked like codefendant Settle, had a lot of money, was being paid by appellant. (RT 16619-16620.)

Appellant's counsel objected to these comments and asked the trial court to instruct the jury that closing arguments are not evidence, and the court agreed. (RT 16625-16626.) When codefendant Settle continued with his argument, appellant's counsel objected that codefendant Settle argued facts not in evidence when he argued that Frank told him that Frank would not testify about the green car; the court overruled the objection. (RT 16628.) Codefendant Settle then again argued that appellant shot James Brown. (RT 16630.)

Immediately following codefendant Settle's closing argument, counsel for appellant renewed appellant's motion to sever and moved for a mistrial based on: (1) codefendant Settle's argument, which was "new and different from everything heretofore;" (2) codefendant Settle's testimony; and (3) on codefendant Settle's prior conduct throughout the trial, including his failure to abide by the court's admonition not to argue facts not in evidence. (RT 16634.) The trial court found the "second portion" of codefendant Settle's argument to be "unobjectionable" and denied counsel's motion for severance and a mistrial without further comment or elucidation. (RT 16635.)

Given all the foregoing, there can be no debate about the antagonistic nature of codefendant Settle and appellant's defenses. Consequently, the trial court clearly abused its discretion in denying appellant's motions to sever and for a mistrial.

ii. It Is Reasonably Probable That Appellant Would Have Received A More Favorable Result In A Trial Separate From That Of Codefendant Settle

Codefendant Settle wove a tale not only consistent with the prosecution's facts, but one that filled gaps in the prosecution's evidence, directly contradicted the testimony both of appellants Bryant and Wheeler and provided additional circumstantial evidence of their guilt. As set forth above, prior to codefendant Settle's testimony, there was a reasonable probability that the prosecution could not carry its burden of proving appellant's guilt beyond a reasonable doubt; therefore, it cannot be said that there existed sufficient independent evidence against appellant, absent codefendant Settle's antagonistic testimony, demonstrating appellant's guilt. (See *People v. Coffman, supra,* 34 Cal.4th at pp. 42-43.) Codefendant Settle's testimony, in appellant's counsel's words, was an "ambush" that secured appellant's conviction for the prosecution. (RT 16703.) Certainly, the jury attributed weight to codefendant Settle's testimony, since they did not convict him of the instant crimes. If appellant's case had been severed from that of codefendant Settle, appellant's jury would have been instructed that codefendant Settle was an accomplice as a matter of law and that his testimony must be viewed with distrust. Compounding the harm to appellant was the prosecution's improper argument that codefendant's Settle's testimony did in fact corroborate James Williams with regard to the State's case against appellant in that his testimony showed that appellant set up the killing. (RT 16526-16527.) Had severance been granted, the jury would not have been able use his testimony to tip the scale in favor appellant's guilt.

Given these facts, there is a reasonable probability appellant would have received a more favorable result in a trial separate from codefendant Settle's; reversal is required. (*People v. Keenan, supra*, 46 Cal.3d at p. 503.)

b. If this Court Determines That Severance Was Not Warranted At the Time Appellant's Pretrial Motions Were made, Reversal Is Nonetheless Required Because The Joinder Of Codefendant Settle's Case To Appellant's Case Resulted In A Gross Unfairness To Appellant Such That He Was Denied Due Process Of Law

For the reasons stated in the immediately preceding section, incorporated by reference herein, the antagonistic testimony of codefendant Settle resulted in a gross unfairness to appellant such that appellant was denied due process of law. (*People v. Mendoza, supra,* 24 Cal.4th at p. 162; *People v. Arias, supra,* 13 Cal.4th at p. 127.) Codefendant Settle made good on his representations to the trial court: he secured appellant's conviction for the prosecution while attaining a hung jury for himself. Codefendant Settle later pled guilty four counts of voluntary manslaughter and received a determinate term of 21 year, 4 months. (CT 16171-16179, 16233, 1 SUPP CT 7108, 4 SUPP CT 143.) During his sentencing, in pleading for leniency, codefendant Settle's advisory counsel even referred to codefendant Settle as a "fourth prosecutor" of appellant. (1 SUPP CT 7085.) At trial, codefendant Settle lied to save himself, at the expense of appellant. Today, codefendant Settle is a free man, while appellant sits on death row. It is difficult to ponder a result that is more "grossly unfair" than that.

For all the foregoing reasons, the joinder of codefendant Settle to appellant's case resulted in a trial so unfair to appellant that he was denied due process of law and deprived him of the heightened reliability required in capital cases. (U.S. Const., Amends. V, VII, VIII and XIV; *People v. Mendoza, supra,* 24 Cal.4th at p. 162; *People v. Arias, supra,* 13 Cal.4th at p. 127; *People v. Keenan, supra*, 46 Cal.3d at p. 500; see *Zafiro v. United States, supra,* 506 U.S. 534; *Mills v. Maryland, supra,* 486 U.S. at p. 376.) Reversal is required.

C. The Trial Court's Failure To Sever Appellant's Case From That Of Coappellants Wheeler And Smith Requires Reversal

Appellant also moved prior to trial to sever his case from that of coappellants Wheeler and Smith. (CT 14084-14136.) With regard to coappellant Wheeler, he argued that, given the prosecution's theory that appellant was not the actual shooter of any victim, he would be prejudiced by the joinder of his case with that of the actual shooter of the two female victims in this case, one being a two-year-old. (RT 14115-14116.) With regard to appellant Smith, appellant argued, inter alia, that coappellant Smith's counsel had demonstrated an intent to become a second prosecutor in this case. (CT 14110-14115.) The trial court denied appellant's motions as to coappellants Wheeler and Smith without comment or elucidation. (RT 6151.)

On appeal reversal will be required where the joinder of defendants actually resulted in gross unfairness amounting to a denial of due process even if severance was not initially warranted at the time the motion was made. (*People v. Mendoza, supra,* 24 Cal.4th at p. 162; *People v. Arias, supra,* 13 Cal.4th at p. 127.) Appellant submits that the joinder of

coappellants Wheeler and Smith denied him due process under this standard, both at the guilt and penalty phases of trial.

At the guilt phase, coappellant Wheeler testified that he had been hired by a man named Eddie Barber to sell narcotics, and that Barber had assigned coappellant Wheeler to work at the Wheeler Avenue house, which James Williams ran, and that Williams was responsible for the killings. (RT 13931-13932, 14070.) This contradicted and thus undermined appellant's testimony that William Settle was in charge of both the drug operation and the Wheeler Avenue house, and thus likely responsible for the killings. (RT 15222-15223, 15333.) Had severance been granted, appellant's jury would never had heard the contradictory testimony. Without coappellant Wheeler's testimony, there is at least a reasonable probability that the jury would have believed appellant's testimony as opposed to that of Williams and codefendant Settle, and that, consequently, appellant would have received a more favorable result in a separate trial. (*People v. Keenan, supra*, 46 Cal.3d at p. 503.) Even if severance was not initially warranted at the time the motion was made, the joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Mendoza, supra,* 24 Cal.4th at p. 162; *People v. Arias, supra,* 13 Cal.4th at p. 127.)

In addition, appellant was denied due process by the joinder of his case with that of coappellant Smith because he was denied his right to mount an adequate defense to the charges that he had coappellant Smith shoot Curry because Curry was sleeping with appellant's ex-wife. Appellant's counsel argued that, had coappellant Smith's case been severed from appellant's, Smith's independent motive to shoot Curry would have been available, that is, that Smith shot Curry because Curry was taking

Smith's children with him to sell drugs in order to throw off the police. (RT 10951, 11160.)

At the penalty phase, the prejudice to appellant of the joinder of defendants in this case is even more apparent. Coappellant Wheeler presented evidence that his childhood was chaotic, that he was abandoned by his father and beaten by his stepfather, that his mother was a drug addict who died at a critical time in coappellant Wheeler's life, and that he began selling drugs to provide for his younger brother. (See Statement of Facts, *ante*.) Coappellant Smith presented evidence that he had a below average IQ, suffered from a variety of mental disorders and that he was tortured as a child by his father. (See Statement of Facts, *ante*.) Appellant presented evidence that his friends and family cared for him and wanted him to live, and that appellant cared for his young daughter. (See Statement of Facts, *ante*.) In light of the evidence presented at the penalty phase, there is a grave risk that the jury's verdict was not based solely on appellant's character, background and participation in the capital offense, but rather it was based on evidence relating to his codefendants that would not have been admissible had appellant been given a separate penalty trial.

The joinder of the coappellant's mitigation cases, both of which were more compelling than appellant's, violated appellant's due process and Eighth Amendment rights to a fair, reliable, individualized and non-arbitrary sentencing determination. Beginning with *Woodson v. North Carolina* (1976) 428 U.S. 280, the United States Supreme Court has stressed the principle that "the fundamental respect for humanity underlying the Eighth Amendment" requires an "individualized" sentencing determination in which the jury considers "the character and record of the individual offender and the circumstances of the particular offense . . . ."

(*Id.* at p. 304; see also *Zant v. Stephens* (1983) 462 U.S. 862, 879 ["What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.").

In *Lockett v. Ohio* (1978) 438 U.S. 586, the Court further recognized that "an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases." (*Id.* at p. 605.) Again, in *Penry v. Lynaugh* (1989) 492 U.S. 302, the Supreme Court reaffirmed the principle "that punishment should be directly related to the personal culpability of the criminal defendant." (*Id.* at p. 319.) It is critical that the sentencer treat the defendant "as a 'uniquely individual human bein[g],' and has made a reliable determination that death is the appropriate sentence." *(Ibid.* (quoting *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304- 305). "'Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character and crime.'" (*Ibid.* [quoting *California v. Brown* (1987) 479 U.S. 538, 545 (con. opn. of O'Connor, J. (emphasis in original)].)

The jury's consideration of appellant's mitigation was undoubtedly minimized because of its proximity to the codefendants' more powerful penalty phase presentations. This prevented the jury from determining the appropriate sentence based on the defendant's background, character and crime. Because an individualized sentencing determination must be based on the "character of the individual and the circumstances of the crime" *(Zant v. Stephens, supra*, 462 U.S. at 879), the background and culpability of codefendants have no place in the jury's decision. The codefendants'

tragic upbringing and various mental impairments are not relevant to whether appellant should receive a death sentence. Nor is it appropriate to weigh appellant's culpability for the crime against the codefendants in determining which of the four deserve death. Such a process that encourages the jury to compare and contrast defendants to determine which one should receive the death penalty cannot withstand constitutional scrutiny.

Appellant's death sentence was the direct result of joinder. Evidence of the codefendants' background and comparisons between appellant and his codefendants would never have been permitted if appellant were tried separately. Under California law, only evidence pertaining to the statutory factors is admissible in aggravation. (See *People v. Boyd* (1985) 38 Cal.3d 762, 771-776; Cal. Penal Code § 190.3.) Moreover, evidence of a codefendant's lesser sentence has repeatedly been found inadmissible and irrelevant to a defendant's capital sentencing. (See *People v. Morris* (1991) 53 Cal.3d 152, 225 [citing *People v. Carrera* (1989) 49 Cal.3d 291, 343 ["The punishment meted out to a codefendant is irrelevant to the decision the jury must make at the penalty phase: whether the defendant before the jury should be sentenced to death."].) "Clearly, the fact that a different jury under different evidence, found that a different defendant should not be put to death" is irrelevant. (*People v. Dyer* (1988) 45 Cal.3d 26, 70.)

Moreover, under California law, intercase proportionality review, "whether the comparison involves sentences for other, similar crimes or sentences of codefendants" is not permissible. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1182.) Thus, while all of the codefendants compared appellant's mitigating and aggravating factors with their own, and argued that appellant was worse, appellant was precluded from arguing there were

numerous other capital crimes far more heinous and capital defendants whose backgrounds and characters were less mitigating.

Here, in a joint penalty trial in which the jury was confronted with four defendants with different levels of culpability and mitigating evidence, the jury was urged to compare the three in determining the appropriate sentence. Joinder was particularly prejudicial where the mitigating evidence presented on the codefendants' behalf was more compelling than that presented in appellant's case, even though viewed on its own appellant's mitigating evidence may have been sufficient to move the jury to a life without possibility of parole sentence. The Ninth Circuit has recognized the primary danger of a joint penalty phase of codefendants: "A single jury . . . may well assess relative blame, with the resultant imposition of a non-capital sentence on the less blameworthy of the two defendants." (*Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1304, fn.1 [criticizing use of dual juries in capital trials].) Such a calculus certainly occurred here when the jury reached a verdict of death for appellant and a verdict of life without possibility of parole for his three codefendants. Having one jury decide the appropriate penalty for all four defendants in this case deprived appellant of his due process and Eighth Amendment rights to a fair, reliable, individualized and non-arbitrary sentencing determination.[71]

D. Conclusion

A basic principle underlying the concept of a fundamentally fair trial is that the culpability of every criminal defendant on each charge will be

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[71] Appellant is not arguing that a joint penalty trial is unconstitutional per se, but only that in this case it rendered the trial fundamentally unfair and deprived appellant of a fair, reliable and individualized sentencing determination.

determined solely on the basis of evidence regarding him individually. (See, e.g., *People v. Mitchell* (1969) 1 Cal.App.3d 35, 39.) The denial of separate trial prejudicially denied appellant a fair determination of his guilt.

Similarly, the failure to sever the guilt phase trial prejudiced appellant in the penalty phase of his trial. The Eighth Amendment of the U.S. Constitution requires that in determining whether a death sentence is appropriate the jury must make an "individualized determination" based on the character of the defendant and the circumstances of the crime. (See, e.g., *Zant v. Stephens, supra*, 462 U.S. at p. 879.) When carrying out this task, the jury must focus on the defendant as a "uniquely individual human being." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Also, considerations not relevant to defendant's personal responsibility and moral guilt should not play any part in the jury's determination of whether defendant should receive the death penalty. (*Ibid.*)

For all of the foregoing reasons, appellant's Fifth, Sixth, Eighth and Fourteenth Amendments rights to fundamental fairness, a fair and reliable guilt determination and a reliable, fair and individualized sentence as well as his corresponding rights under California law were violated as a result of the trial court's erroneous denial of appellant's severance motion. Appellant's convictions must be reversed and his judgment of death vacated.

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IV

THE TRIAL COURT'S FAILURE TO CONTROL THE CONDUCT OF THE TRIAL DENIED APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW

After codefendant Settle exercised his right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, the defense made several motions for a severance. (RT 6071-6088, 6129, 6144; CT 13756.) When the request for a severance was made, the defense predicted that codefendant Settle would not abide by rules which govern the conduct of attorneys. As will be detailed below, appellant argued before trial that he would be deprived of a fair trial and due process of law if forced to trial with codefendant Settle as a pro per defendant; appellant's counsel, based on conversations with codefendant Settle as well as codefendant Settle's in-court representations, warned the court that codefendant Settle would fabricate evidence to exonerate himself and inculpate appellant. The trial court assured appellant that it would be able to control the conduct of the trial so as to assure appellant's constitutional rights. Throughout appellant's trial, codefendant Settle engaged in repeated acts of misconduct that violated appellant's constitutional rights, but the trial court failed to admonish codefendant Settle or attempt to alleviate the prejudice to appellant.

The result denied appellant a fair trial and due process of law. As a result, his confinement and sentence are illegal and unconstitutional under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

A. Pretrial Proceedings

As part of appellant's motion to sever his case from codefendant Settle's, appellant specifically argued that the trial court needed to weigh

codefendant Settle's right to self-representation against appellant's right to a fair trial and due process of law. (RT 6146-6147; CT 14084-14136.) The trial court said it did not "see it that way" and ruled that it could not rule to sever codefendant Settle's case on the basis of codefendant Settle exercising his right to represent himself. (RT 6147.)

Mr. Gregory, counsel for appellant Smith, 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 cases is not under that type of constraint. In a rhetorical question, Mr. Gregory asked whether the court would fine codefendant Settle if codefendant 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; he argued that in determining severance, the rights of those defendants to a fair trial needed to be weighed against codefendant Settle's right to represent himself. (RT 6147-6149.) The trial court disagreed, ruling that:

> You don't balance pro per rights against anything. I disagree with you. He is pro per. That's a fact of life. . . . The analysis as to whether there is a joint or separate trial cannot turn on his status of self [representation] because it assumes the following. If he had a lawyer, the lawyer would muzzle him. A lawyer would do things in a particular way. That's more to your advantage. That's not necessarily the case. I won't assume that is the case.

(RT 6149-6150.)

Subsequently, this issue was raised again, after codefendant Settle made a motion for protective custody based on his accusations that he was in danger from the other defendants. Appellant's counsel expressed concern because of the possibility that codefendant Settle might fabricate

evidence if it was in his interest; counsel for appellant explained that the defense had the right to know who made those threats, arguing that if the information was true, the defense needed to know it for trial, or, if the information was not true, the defense needed to know it because it would show that codefendant Settle had no compunction about fabricating evidence if he believed it advantageous to his defense. (RT 6378-6379.)

At this time, Ms. Harris, counsel for appellant Wheeler, informed the court that she believed the court was "sadly mistaken" if the court believed it could prevent codefendant Settle from engaging in misconduct. The court informed Ms. Harris that *she* was sadly mistaken if she believed that the court could not prevent codefendant Settle from engaging in prejudicial misconduct. (RT 6381.) Ms. Harris explained that, with codefendant 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 codefendant Settle had to comply with court's orders or he would lose his pro per status. (RT 6381.)

While counsel for the defendants provided reasons to the trial court as to why the represented defendants should not be forced to trial with a pro per defendant, that pro per defendant provided the clearest basis for severance: codefendant Settle stated, in no uncertain terms, that his defense was "extremely antagonistic" in that he planned to implicate his codefendants. (RT 6143-6144.) Appellant's counsel argued that, in light of codefendant Settle's representations to the court, there was no doubt his defense was antagonistic to appellant's, that he would be a "second prosecutor" in this case and that he would fabricate a defense in order to save himself. (RT 6144.) The trial court indicated that codefendant Settle's

defense was that he was not present during the crime, and it expressed doubt about codefendant Settle's ability to incriminate the other defendants. (RT 6139, 6140.) Counsel for appellant replied that all codefendant Settle had to do was "stand up and say it." (RT 6139-6140.) The trial court countered it did not see how he could do that short of "standing up and yelling in court," and that if codefendant Settle did so it would only happen once and that it would then take measures to protect appellant's rights. (RT 6140.)

As will be shown below, the trial court failed miserably. Codefendant Settle engaged in gamesmanship with the court and his codefendants that the trial court failed to control. The court permitted codefendant Settle to violate the law, the rules of evidence and ethics and to manipulate the order of the trial to ultimately testify after all of the defendants, including himself, had rested their cases. As a result of the trial court's failures, appellant was denied a fair trial and due process of law.

B. The Relevant Law

The trial judge must preserve order in the courtroom. (*People v. Hill* (1992) 3 Cal.4th 959, 999.) This includes the responsibility to guard against "any conduct calculated to obstruct justice." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 883.) The statutory authority is in Penal Code section 1044 which provides:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

Penal Code section 1093 sets forth the normal order of trial.[72]

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[72]Section 1093 provides:

The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court:

(a) If the accusatory pleading be for a felony, the clerk shall read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction.

In all other cases this formality may be dispensed with.

(b) The district attorney, or other counsel for the people, may make an opening statement in support of the charge. Whether or not the district attorney, or other counsel for the people, makes an opening statement, the defendant or his or her counsel may then make an opening statement, or may reserve the making of an opening statement until after introduction of the evidence in support of the charge.

(c) The district attorney, or other counsel for the people shall then offer the evidence in support of the charge. The defendant or his or her counsel may then offer his or her evidence in support of the defense.

(d) The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

(e) When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.

(f) The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury retiring for deliberation, the court shall advise the jury of the availability of

(continued...)

However, section 1094 permits the court in its discretion to depart from that order.[73] Nonetheless, the judge has the duty to stop introduction of highly prejudicial matter. (*People v. Arends* (1957) 155 Cal.App.2d 496, 508.)

There are other limitations on the court's discretion. After the parties have presented their cases 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 (4th ed. 2000), § 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.)

Evidence code section 778 provides:

> After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion.

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[72](...continued)
a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

[73] Section 1094 provides:
When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in the last section may be departed from.

This rule is particularly true after each party has presented its entire case in chief. (Witkin, *California Evidence, Presentation at Trial 3, supra,* § 78, p. 112; see *People v. Thomas* (1992) 2 Cal.4th 489, 542; *People v. Cooks* (1983) 141 Cal.App.3d 224, 327.)

C. The Trial Court Failed To Protect Appellant's Constitutional Rights In Failing To Give Appropriate Admonishments To The Jury After Codefendant Settle Committed Misconduct Prejudicial To Appellant's Case

In his first appearance before the jury, codefendant 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 said that although a defendant had a right to remain silent, he was going to give up that right because he was innocent. (RT 8157-8158.) At the start of his closing argument, codefendant Settle stated that the other three defendants and Williams were the ones who were involved in the killings. (RT 16592.) Almost immediately thereafter, codefendant 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.)

Codefendant Settle's remarks effectively communicated to the jury that innocent people do not allow themselves to be represented by counsel, and thus deprived appellant of his constitutional rights to be presumed innocent, to be represented by counsel, to a fair trial and to due process of law. (U.S. Const., Amends. VI and XIV; *Gideon v. Wainwright, supra,* 372 U.S. at p. 344 ["lawyers in criminal cases are necessities not luxuries"]; *In re Winship* (1970) 397 U.S. 358, 363, quoting *Coffin v. United States* (1985) 156 U.S. 432, 453 [principle of presumption of innocence in favor of the accused is axiomatic and its enforcement lies at the foundation of the

administration of criminal law].) Certainly in no situation in a criminal trial is the fact that one is represented by counsel probative of one's guilt or innocence. (See *Bruno v. Rushen* (9th Cir. 1983) 721 F.2d 1193, 1194 [mere act of hiring an attorney not probative in the least of the guilt or innocence of defendant].) To say that codefendant Settle was representing himself because he believed the best way to get to the truth was through self-representation asks the jury to make a positive inference on his self-representation, which, by necessary implication, creates a negative inference towards those who elect to have an attorney. Codefendant Settle's comments were calculated to impute guilt to appellant and "str[uck] at the jugular" of the appellant's defense. (*Id.* at p. 1195.)

The remarks in codefendant Settle's closing argument occurred within minutes of the defense asking for a preview of codefendant Settle's argument to make sure that no misconduct would occur. The court simply denied this request, saying that it could admonish codefendant Settle if the engaged in misconduct. (RT 16588-16589.) Codefendant Settle also argued facts not in evidence during his closing that were extremely prejudicial to appellant, as discussed in Argument III, *ante*, incorporated by reference herein. Despite its promise to protect appellant's rights, the court made no admonishments to the jury regarding any of the misconduct by codefendant Settle discussed herein.

D. The Trial Court Failed To Protect Appellant's Constitutional Rights When It Allowed Codefendant Settle To Manipulate The Order Of Evidence To Appellant's Detriment

The jury had a five day break after the People rested before the commencement of the defense cases. (CT 14948-14949.) Upon their return, the court told them that the parties had agreed that the defense cases

would be presented in the following order: appellant Smith, appellant Wheeler, codefendant Settle, and appellant Bryant. (RT 13910.) Thereafter, appellant Smith immediately rested without calling any witnesses. (RT 13910-13911.) Appellant Wheeler, from April 10th through April 12th, put on his defense. (RT 13911-14377.) His defense is detailed above in the Statement of the Facts, incorporated herein. His defense did not inculpate codefendant Settle.

Codefendant Settle then put on his defense, calling nine witnesses from April 13th through April 18th. (RT 14526-14847.) His defense is detailed above in the Statement of the Facts, incorporated herein. On April 17th, codefendant Settle told the court that he intended to testify. (RT 14774-14775.) The court advised him that he had the absolute right not to testify and that his testimony might help, but could also devastate, his case. (RT 14774-14775.) Codefendant Settle said that he would like to see what Mr. Leonard, his assisting counsel, thought. (RT 14775.) Later in the day, codefendant Settle told the court that he had decided not to testify. (RT14786-14788.) The court again cautioned him about his decision and asked whether he had any questions. (RT 14787.) Codefendant Settle replied:

> Should the codefendant testify and raise issues that after I have rested that would make me want to testify?
>
> The Court: I would let you.
>
> Defendant Jon Settle: All right.
>
> The Court: I think it would be error for a court to refuse a defendant's request to testify, basically at any point in the case. I don't think I could do that.

Defendant Jon Settle: Okay.

The Court: Unless the case had been argued to the jury. You know what I am saying? While we are still taking testimony, if you change your mind and decided you had to get up there, yeah I would.

Defendant Jon Settle: Okay. In that case, –

The Court: But I'd kind of like you to do this—again, I have told you the truth, but what I would like you to do is if you know for sure that you are going to, let's do it now.

Defendant Jon Settle: At this point, I'm not. And I just have one more witness, my wife.

(RT 14787-14788.) At the end of the day appellant's counsel expressed his concern to the court that codefendant Settle said he might testify:

We had agreed upon a rotation, so to speak, and the only concern I have was that we not go in front of codefendant Settle.

The Court: Well, there is only so much I can do, and I gave him an honest answer to this question, and I think he is being honest with me. Has been throughout most of the trial. He has indicated that his intention is not to testify in the case. Am I correct on that?

Defendant Jon Settle: Yes.

The Court: And he was inquiring if somebody got up and dumped on him or said something about him that he disagreed with would he be allowed to rebut that, and I gave him, again, the honest answer, the only answer I could, that I would allow. I cannot prevent, no more than I could if Mr. Wheeler changed his mind and decided now he—or Mr. Smith changed his mind. It was an agreement, but if he does change his mind, I have to let him testify.

(RT 14805.) The following day, codefendant Settle rested without testifying. (RT 14847.)

Appellant then put on his defense, beginning on April 18th and concluding on April 25th. (RT 14856-15523.) His defense is detailed above in the Statement of the Facts, incorporated herein. His defense did not inculpate codefendant Settle. At the end of the court day on April 24th, the court asked appellant Wheeler's counsel if they would have any additional evidence and was informed that they would not. Counsel for appellant Smith reminded the court that they had rested. (RT 15463.) The court asked codefendant Settle if he had decided if he was going to testify. Codefendant Settle responded, "Yes, I am." (RT 15463.)

The following morning, counsel for appellant objected to codefendant Settle testifying. (RT 15472.) He argued that codefendant Settle was violating the original agreement on the order of the defenses and that he had maneuvered the situation so that he could present his account last. (RT 15472.) The Court affirmed from codefendant Settle that he wanted to testify. (RT15473.) The court mused:

> I don't believe, as I indicated, trying to be honest with the defendant. I don't believe the court has the authority to preclude a defendant from testifying in the guilt phase, notwithstanding he made that decision after he has passed the first time around and rested. And later he was waiting in the wing to see what Mr. Bryant did and what he testified to. Perhaps, that is what was going on. Perhaps, he made the decision to testify whether Mr. Bryant did or not. I don't know. But for sure he has the constitutional right to testify as all defendants do, and I am not going to preclude him from testifying in this case.

(RT 15473.)

Codefendant Settle's testimony, imparted though his narrative and cross-examination by counsel for appellants Wheeler and Bryant and the People, consumed a substantial part of the court day on April 25th and April 26th. (RT 15487-15782.) The substance of that testimony is detailed in the

Statement of the Facts, and is incorporated herein. In short, codefendant Settle contradicted appellant's testimony that he was not involved in the instant homicides by testifying that appellant arranged for the purchase of the large green car (described by Williams as the vehicle he was asked to back into the garage at the Wheeler Avenue house) on the afternoon of homicides, and that that Frank Settle told him that that car was used in the murders. (RT 15572-15582.) Codefendant Settle wove appellant Wheeler into his tale and placed him with Frank Settle an hour after Frank Settle had taken possession of the green car.

Defense counsel argued that codefendant Settle's vacillation about whether he would testify was a subterfuge. The court agreed. (RT 15800-15801.) Counsel for appellants Wheeler and Bryant informed the court that a defense investigator as well as counsel for appellant Bryant spoke with Frank Settle, on the evening after codefendant Settle testified, and Frank said that he did not know appellant Wheeler, he had not been with him on August 28th, he had not picked up a car at codefendant Settle's residence on that date, he did not take codefendant Settle a car for repair on that date, and he had never been to the Wheeler Avenue house. The court appointed counsel for Frank Settle, who shortly thereafter advised that Frank would assert his constitutional right not to testify if asked about the green car transaction. (RT 15784-15785, 15793-15794, 15798-15799.) Counsel complained that this was the first time they had heard these purported facts in the seven years that they had been on the case. (RT 15792-15793.)

Frank Settle was ordered to return on the following morning. (RT 15803-15804.) He ultimately testified and confirmed the facts alleged by counsel above. (RT 15841-15870.) After codefendant Settle's closing guilt

phase argument, defense counsel renewed their motion to sever codefendant Settle's case from theirs and moved for a mistrial based on his conduct in the case, particularly his testifying after appellants had rested. (RT 16634-16635.) Both motions were denied. (RT 16635.)

The trial court erred in allowing codefendant Settle to testify in this case. Certainly, an accused's right to testify in his defense is a "constitutional right of fundamental dimension." (*United States v. Joelson* (9th Cir. 1993) 7 F.3d 174, 177; *Rock v. Arkansas* (1987) 483 U.S. 44, 51.)

> The right stems from several provisions of the Constitution, including the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's privilege against self-incrimination. (*Rock, supra*, 483 U.S. at pp. 51-52.) . . . The right is personal, and "may only be relinquished by the defendant, and the defendant's relinquishment of the right must be knowing and intentional." (*Joelson, supra*, 7 F.3d at p. 177.)

(*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3d 1089, 1094; accord *People v. Robles* (1970) 2 Cal.3d 205, 214.)

However, a defendant's right to testify is circumscribed by procedural and evidentiary rules, when the rules are neither arbitrary nor disproportionate to the purposes they are designed to serve. (*Rock v. Arkansas, supra*, 483 U.S. at pp. 55-56.) The right "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" (*Ibid.*, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.)

For example, a defendant's demand to testify must be timely made. (*United States v. Pino-Noriega, supra*, 189 F.3d at p. 1095 [too late after verdict has been reached, even though verdict had not been announced].) "Hence, a defendant does not have an unrestricted right to testify at any

point during trial. Generally, if he wishes to testify, he must do so before he rests his case; otherwise, he can move the trial court to reopen the evidence, but the choice whether to reopen is left to the court's sound discretion." *(United States v. Peterson* (1st Cir. 2000) 233 F.3d 101, 106, citing *United States v. Santana* (1st Cir. 1999) 175 F.3d 57, 64.) "Such a rule serves to ensure that the trial proceeds in a fair and orderly manner, with the defendant's testimony occurring when the judge, jury, and prosecution reasonably expect it. (*Peterson, supra*, citing *United States v. Jones* (8th Cir. 1989) 880 F.2d 55, 59- 60.)

The Fifth Circuit in *United States v. Thetford* (5th Cir. 1982) 676 F.2d 170 enumerated the factors a district court must consider in deciding whether to reopen the evidence to allow a defendant to testify:

> In exercising its discretion, the court must consider the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused. The belated receipt of such testimony should not "imbue the evidence with distorted importance, prejudice the opposing party's case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered."

(*Thetford, supra*, at p. 1177, quoting *United States v. Larson* (8th Cir. 1979) 596 F.2d 759, 778; accord *United States v. Walker* (5th Cir. 1985) 772 F.2d 1172, 1177; *United States v. Peterson, supra*, 233 F.3d at p. 106.)[74]

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[74] In *United States v. Peterson, supra*, the court upheld the refusal to permit the defendant to reopen and testify where he had given the court little indication as to what he wished to testify about, where there was the

(continued...)

There is abundant authority illustrating that the right to testify is not absolute. (*State v. Chapple* (Wash. 2001) 36 P.3d 1025 [defendant properly prohibited from testifying by his expulsion from the courtroom for disruptive conduct]; *United States v. Gallagher* (9th Cir. 1996) 99 F.3d 329, 332 [defendant properly prohibited from testifying in a narrative form after his counsel indicated that he had no further questions]; *State v. Mitchell* (S.D. 1992) 491 N.W.2d 438, 446-447 [defendant's testimony properly limited in surrebuttal to issues raised in rebuttal where he had not testified in the defense case-in-chief]; *United States v. Blum* (8th Cir. 1995) 65 F.3d 1436, 1444 [defendant's testimony properly refused where she chose not to testify but then after the close of the evidence and then she sent a message to the court that she had changed her mind]; *United States v. Stewart* (1994) 20 F.3d 911 [defendant's testimony properly refused where he unequivocally stated his desire not to introduce evidence after the government rested and requested to testify only after the court informed the jury that they would hear closing statements]; *People v. Collier* (Ill. App. 2002) 738 N.E.2d 267, 271-274 [same, because the justification for the defendant's repeated "change of heart" appeared to be a manipulation of the trial process]; *Comm. v. Moore* (Mass.App.Ct. 2001) 751 N.E.2d 901, 903-906 [same, where did not request to testify until both he and his codefendant had rested their cases]; *State v. Barnett* (Wash.App. Div. 2001) 16 P.3d 74, 78-79 [same, defendant's change of mind after he rested was too late]; *Smith v. Campbell* (M.D. Tenn. 1991) 781 F.Supp. 521, 532-533

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[74](...continued)
strong possibility that he planned to commit perjury, and where he had offered no excuse for not testifying during his case-in-chief although he had had ample time to offer testimony. (233 F.3d at p. 107.)

[defendant's testimony properly refused where request to testify made after the prosecution's rebuttal evidence and where the defendant knew of the importance of his testimony during his case-in-chief, chose to remain silent for strategic reasons, and his proffered testimony was not offered as rebuttal].)

In this case, as in *People v. Collier, supra*, 738 N.E.2d at pp. 271-274 and *Comm. v. Moore, supra*, 751 N.E.2d at pp. 903-906, that trial court commented that codefendant Settle "was waiting in the wing to see what [appellant] did and what he testified to." (RT 15473.) The trial court acknowledged that codefendant Settle engaged in a pattern of "gamesmanship" during the trial. (RT 15818.)

In this case, "gamesmanship" as used by the trial court is a euphemism for what occurred: codefendant Settle waited until all the evidence against him was in, with that knowledge concocted a story of his innocence and presented fabricated evidence of appellant's guilt in order to save himself. The subterfuge codefendant Settle employed was calculated to obstruct justice in his case while tipping the scales of justice against his codefendants.

In the context of capital litigation, prejudice arising from a similar situation was found *State v. Carruthers* (Tenn. 2000) 35 S.W.3d 516. In *Carruthers,* the Tennessee Supreme Court reversed the conviction and death sentence of a defendant who had been tried along with a pro per co-defendant. That Court explained that protective measures which the trial court attempted to employ did not prevent the possibility of prejudice from ripening into actual prejudice. The Court found prejudice where it appeared that the pro per defendant had engaged in offensive mannerisms in front of the jury and had engaged in questioning of witnesses that elicited

incriminating evidence, including calling a witness who testified as to the non-pro per defendant's admissions regarding the offense. (35 S.W.3d at p. 553-555.)

In this case, the trial court not only failed to take actions that might have protected appellant's rights, but it failed to realize that it could have prevented codefendant Settle from testifying. This issue does not present merely a review for abuse of discretion, however, because the trial court did not know that it had the power, let alone the obligation, to exercise discretion and prevent codefendant Settle from manipulating the proceedings by testifying after he had rested, to his advantage at the expense of his codefendants. (RT 15473,15800-15801; *People v. Slocum, supra*, 52 Cal.App.3d at p. 883 [trial judge has the responsibility to guard against "any conduct calculated to obstruct justice"]; *People v. Carter, supra*, 48 Cal.2d at p. 753 [trial judge has the obligation "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"]; *United States v. Peterson, supra*, 233 F.3d at p. 106 [generally a defendant must testify before he rests his case]; *United States v. Thetford, supra*, 676 F.2d at p. 1177 ["[t]he belated receipt of such testimony should not 'imbue the evidence with distorted importance, prejudice the opposing party's case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered."].)

The trial court's acquiescence to codefendant Settle's late testimony produced a trial that was fundamentally unfair, and the prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt.

(Arizona v. Fulminante, supra, 499 U.S. at pp. 306-307 [the Chapman standard applies to "ordinary trial errors" implicating the federal constitution].) For, as one of the prosecutors observed during jury argument, with codefendant Settle's testimony, the jury did not need Williams' testimony. (RT16501.) The prosecutor repeatedly pointed out the value of codefendant Settle's testimony to the prosecution's case against appellants Bryant and Wheeler. (RT 16526-16527,16531, 16542.) The result produced a gross unfairness amounting to a denial of due process and a fair trial in violation of appellant's rights under the Fifth, Eighth, and Fourteenth Amendments and requiring reversal of his convictions and judgment of death. (*Chapman v. California* (1967) 386 U.S. 18.)

Appellant further asserts that the trial court's error in failing to sever appellant's case from that of codefendant Settle's (see Argument III, ante, incorporated by reference herein), coupled with the trial failure to make good on its promises to control the conduct of trial so as to protect appellant's constitutional rights, considered together, violated appellant's rights to a fair trial and due process of law. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].) Reversal is required.

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V

THE IMPROPER USE OF A REACT BELT RESTRAINT ON APPELLANT DURING THE COURSE OF HIS CAPITAL TRIAL REQUIRES REVERSAL OF HIS CONVICTION AND DEATH JUDGMENT

A. Proceedings Below

Appellant made his first appearance in court proceedings relating to this case in October, 1988. (CT 5329.) Thereafter, for almost six years, he made numerous appearances in various courts before the case was finally assigned to trial before the Honorable Charles M. Horan in September, 1994. (RT 5006.) At no point was appellant in any way disruptive of proceedings, nor was he a disciplinary problem in the county jail. (CT 14284.) Nevertheless, during pretrial proceedings on January 18, 1995, the court announced it intended to order each defendant to wear either a "leg brace or some form of shackle" during trial, or if he chose, each defendant would be afforded the opportunity to wear "what they call a REACT belt." (RT 6200.) The court explained the belt was a relatively new device, and although it did not know what the belt was made of, it consisted of electrodes worn underneath one's clothing that provided the deputies with the ability to shock, and thus immobilize, a defendant. (RT 6201.) The court represented the REACT belt would "not in any way restrict the ability of the defense to move" and that it would not be "at all visible to the jury unless somebody does something that requires its use. Then it becomes quite obvious." (RT 6201.) One of the court's deputies, apparently the only person in the courtroom who had seen one of the restraints, explained the device consists of a square box that can be positioned on either one's front or back, but the front position was preferred from the deputy's standpoint. (RT 6202.)

The court stated the restraint was necessary "because a case like this, this many defendants and these kinds of [unspecified] allegations floating around, we will have a lot of security here."[75] (RT 6202.) After the court then said it would hear argument from the parties, the prosecution declined to be heard first. (RT 6202.) All defendants objected to the court's plan. (RT 6202-6207.) Specifically, appellant argued his conduct did not warrant the use of restraints, and asked whether the same button controlled all four defendants. (RT 6203-6204.) After being informed that it did not, appellant asked for more time to consult with someone regarding how the belt worked, including how much voltage was used. (RT 6204.) The court provided the defense time to research the issue and gave them until January 24 to decide which kind of restraint they would wear. (RT 6206.)

On January 24, 1995, appellant filed a written objection to shackling or to the use of the REACT belt. (CT 14280-14285.) In that pleading appellant argued such restraint was contrary to state law that prohibited use of physical restraints during trial absent a showing of manifest need, and that the use of restraints during trial violated his state and federal

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[75] The record does not reflect the specific allegations to which the court referred. At the time the court made this remark, the case had been before it for a very short period of time; it had not taken any testimony and had heard little argument from counsel. (RT 5006-6202.) The prosecution had not moved for an order to restrain the defendants, and there was no record of any misconduct by the defendants other than the charges contained in the information. In fact, many of the substantive issues argued to the court up to that point involved the propriety of continued participation in the prosecution of this case by Detective Vojtecky and Deputy District Attorney Janice Maurizi based on charges of witness intimidation leveled against them. (RT 6022-6031, 6113-6126; see also Argument I, *ante*.)

constitutional rights to due process and a fair trial as well as state statutory and common law.[76] (*Ibid.*)

In that pleading appellant's counsel declared that, since his arrest in 1988, appellant had no criminal record of violence except as to the unproven allegations in this case, had not attempted escape nor been involved in incidents of violence in the county jail, and had never disrupted a courtroom proceeding in the six and some-odd years his case had been pending. (CT 14284.)

In pretrial proceedings held that same date, January 24, 1995, the court restated its decision to impose physical restraints on the defendants during trial, and asked if anyone wished to make further argument. (RT 6344.) Appellant's counsel stated she spoke with a representative of the Los Angeles County Sheriff's office and was informed the REACT belt

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[76] Specifically, appellant argued the use of such restraints: (1) violated Penal Code section 688, which provides that no person charged with a public offense may be subjected before conviction to any more restraint than is necessary for his detention to answer the charge; (2) was contrary to *People v. Ceniceros* (1994) 26 Cal.App. 4th 266, which required a showing of "manifest need" before such restraints were used in the presence of the jury; (3) was contrary to *People v. Duran* (1976) 16 Cal.3d 282, which required a showing of necessity before restraints were used, and which held that the imposition of physical restraints in the absence of a record of violence or a threat of violence, or other such nonconforming conduct, would be deemed an abuse of discretion; (4) violated the common law privilege of a prisoner to be tried free of restraints absent a showing of necessity, e.g., where there was a danger of escape, under *People v. Harrington* (1871) 42 Cal. 165; (5) violated the requirement of *People v. Condley* (1977) 69 Cal.App. 3d 999, that restraints be out of view; and (6) violated the federal constitutional rights of a defendant to appear before a jury free of restraint and the prohibition of the use of such restraint except as a "last resort" under *Illinois v. Allen* (1970) 397 U.S. 337 and *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712. (CT 14281-14282.)

"pumps about 50,000 volts of energy into the kidneys" and that she so informed appellant. (RT 6344-6345.) Without conceding the justification for shackling, she informed the court that, given the choice between a leg brace and the electronic restraint, appellant believed the leg brace was preferable. (RT 6345.) The court then informed appellant "the leg brace wouldn't do it," that it would require him to wear shackles. (RT 6345.) Appellant's counsel reiterated that, if given a choice between an electronic restraint and a nonelectrical device, appellant would choose the nonelectrical. (RT 6345.) The court then said that "was a bad choice," but it would not make anyone wear the electronic device. (RT 6345.) Codefendants Wheeler and Smith also objected to the use of restraints for lack of a showing of need, and also selected shackles versus the REACT belt. (RT 6346.)

Codefendant Settle objected to restraints, but chose the REACT belt; he asked for the criteria for its activation, and he expressed concern the belt might be activated if he "itched or scratched." (RT 6347.) The court attempted to assure codefendant Settle the belt would not be activated "just simply for the heck of it" but only if there were sudden or hostile movement toward other individuals involved in the case" or failure to comply with repeated demands or requests made by the court." (RT 6347.) At the same time, it told codefendant Settle, "You will be in good shape, nothing is going to happen. . . . And no one is going to set this thing off, and I don't expect it during the entire course of the trial." (RT 6347.)

The court then asked for the prosecution's reasons it believed restraints were necessary. (RT 6347.) The prosecution informed the court the only acts it was aware of other than the circumstances of the crime was codefendant Wheeler's attack on an inmate and a deputy while in custody.

(RT 6347-6348.) The prosecution said the nature of the case "is somewhat unusual" in that each of the defendants are alleged to be a member of a "sophisticated criminal organization" in the county jail known as the "BGF" and that they had ties to the Crips and Bloods because of their narcotic activity. (RT 6348.) The prosecution conceded appellant himself did not have any acts of aggression, but argued since jail records showed appellant possessed too many toiletries, cookies and candy bars in his cell, that was evidence appellant was still engaged in illegal activities of the type he was alleged to have engaged in before he was incarcerated. (RT 6348-6349.)

After a break and discussion of other issues, the court asked the parties if anyone had further thoughts about the issue of "REACT belt versus shackles." (RT6372.) Appellant's counsel informed the court appellant had been "enduring a great deal of physical pain" while wearing the shackles that day, and that he did not believe that he could tolerate it for eight hours a day. (RT 6372.) While stating his continued objection to restraints, appellant then chose the REACT belt over the shackles. (RT 6372.) The court addressed appellant directly and appellant said "leg chains for eight hours are ridiculous." (RT 6373.) The court acknowledged the chains were heavy and that they chafed. (RT 6373.) Appellant said if he was "forced to wear the belt," he would wear it. (RT 6373.) Codefendants Smith and Wheeler followed suit. (RT 6373-6375.)

Then the court once again stated its decision to order each defendant to wear a REACT belt over the objection of all defendants. (RT 6375.) The court stated its belief that: the belts would have no effect on any defendants' right to a fair trial; the belts would not be seen by jurors; the belts were necessary based on the facts of the case as it knew them; and the belts were necessary because of the "the very high pressure situation that all

the defendants find themselves in" due to the fact that the death penalty was being sought for each and because of acts of violence by certain defendants and "ill will between some of the defendants here and others." (RT 6376.) Counsel for Wheeler then requested the court to acknowledge there was "no evidence that he did anything in custody," there were only allegations that had resulted in two pending cases. (RT 6376-6377.) The court assumed that since the cases were in superior court "some finding has been made by somebody that the allegations are not woven out of cloth." (RT 6377.)

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, and wondered if he was wearing a life vest. (AUG CT 1032.) After consultation with counsel, the court did not address this issue with the juror, but appellant's counsel was forced to exercise a peremptory challenge to remove this juror. (RT 7052-7053, 7060.) The court later noted the REACT belts were the size of a fanny pack, and when a defendant stood up, "there [was] a big lump that show[ed] in the lower back area." (RT 18789.) The court recognized jurors may have seen the belt when a defendant walked forward to take the witness stand, but the court did not perceive the problem to have been "serious." (RT 18789-18790.)

Appellant testified in his own defense at the guilt phase of trial; the record reflects that on several occasions appellant was required to walk between the defense table and the witness stand in front of the jurors. (RT 15157, 15486, 15501.) The record further reflects that appellant was uncomfortable sitting in the witness chair while wearing the stun belt, and that counsel attempted to help appellant find a comfortable sitting position in the witness chair by advising him he would be more comfortable if he leaned back in the chair and pulled the microphone closer to him; appellant

thanked counsel but stated he was leaning back as far as he could. (RT 15158.)

B. The Trial Court Erred In Ordering Appellant To Wear A REACT Belt During Appellant's Trial, Including During Appellant's Testimony Before The Jury, In The Absence Of Any Record Showing Of A "Manifest Need" For The Use Of Physical Restraints

Limitations on the use of physical restraints on criminal defendants during trial date from the early English common law.[77] (*People v. Duran* (1976) 16 Cal.3d 282, 288 (*Duran*).) In *People v. Harrington* (1871) 42 Cal. 165, 168 (*Harrington*), the Court recognized:

> [A]ny order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional right of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying on his own behalf.

In *Duran*, this Court reaffirmed the *Harrington* rule:

> We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the *Harrington* rule. We reaffirm the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of manifest need for such restraints.

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[77] This prohibition has been codified as Penal Code, section 688, which reads, "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

(16 Cal.3d 290-291.)

As discussed more fully below, federal courts have recognized that the use of restraints infringes myriad federal constitutional rights, including the right: to be presumed innocent; to be present at trial; to testify in one's own defense; to participate in, communicate with and assist counsel in one's own defense; to be tried by an impartial jury; to a fair trial; to due process of law; and, in a capital trial, to a reliable determination of penalty. (U.S. Const., Amends. V, VI, VII, VIII and XIV; *Illinois v. Allen*, *supra,* 397 U.S. 337; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Lockett v. Ohio*, *supra*, 438 U.S. 586 (plur. opn.); *Gardner v. Florida* (1977) 430 U.S. 349 (plur. opn.); *Woodson v. North Carolina, supra,* 428 U.S. 280 (plur. opn.); *Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586, 588; *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748; *Spain v. Rushen* (1989) 883 F.2d 713, 720-72; see *Riggins v. Nevada* (1992) 504 U.S. 127; *Rock v. Arkansas, supra*, 483 U.S. at pp. 51-53, 62; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Faretta v. California, supra,* 422 U.S. at pp. 834; *Parker v. Gladden* (1966) 385 U.S. 363. "Generally, a criminal defendant has a constitutional right to appear before a jury free of shackles." (*Spain v. Rushen, supra,* 883 F.2d at p. 716 [citation omitted].) The Supreme Court noted in *Illinois v. Allen, supra,* to avoid unnecessary implication of such constitutional concerns, "no person should be tried while shackled and gagged except as a last resort." (397 U.S. at p. 344.)

Stun belts are a method of prisoner restraint, used as an alternative to shackles. (*Gonzalez v. Pliler* (9th Cir. 2003) 341 F.3d 897, 899.) Also known as a "REACT belt," an acronym for "remote electronically activated

control technology,"[78] it is an electronic device that is secured around a prisoner's waist. (*People v. Mar* (2002) 28 Cal.4th 1201, 1214.) Powered by nine-volt batteries, the belt is connected to prongs attached to the wearer's left kidney region. (*Ibid.*) When activated remotely, "the belt delivers a 50,000-volt, three to four milliampere shock lasting eight seconds." (*Hawkins v. Comparet-Cassani* (9th Cir.2001) 251 F.3d 1230, 1234; see also *People v. Mar, supra*, 28 Cal.4th at p. 1215 [citations omitted.]) Upon activation of the belt, an electrical current enters the body near the wearer's kidneys and travels along blood channels and nerve pathways; the shock administered from the activated belt "causes incapacitation in the first few seconds and severe pain during the entire period." (*Hawkins v. Comparet-Cassani, supra*, 251 F.3d at p. 1234.) "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." (*People v. Mar, supra*, 28 Cal.4th at p. 1215 [internal citation and quotation marks omitted].) Activation of a stun belt can cause muscular weakness for approximately 30-45 minutes and heartbeat irregularities or seizures. (*Ibid.*) Accidental activations are not unknown. (See, e.g., *United States v. Durham* (N.D. Fla. 2002) 219 F.Supp.2d 1234, 1239 [reporting a survey that showed 11 out of 45 total activations (24.4%) were accidental, but noting the low percentage of accidental activations on general usage].)

The use of stun belts raises all of the traditional constitutional concerns described above about the imposition of physical restraints.

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[78] A REACT belt is also commonly known as a stun belt, and the terms will be used interchangeably herein.

(*Gonzalez v. Pliler, supra*, 341 F.3d at p. 900.) The use of stun belts, moreover, risks "disrupt[ing] a different set of a defendant's constitutionally guaranteed rights." (*Ibid.*, citing *United States v. Durham* (11th Cir.2002) 287 F.3d 1297, 1305 ("*Durham*").) Given "the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences." (*People v. Mar, supra*, 28 Cal.4th at p. 1205.)

These "psychological consequences" cannot be understated. *(Gonzalez v. Pliler, supra,* 341 F.3d at p. 900, [quoting Mar].) Stun belts, for example, may "pose[...] a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles." (*Ibid*, quoting *Durham, supra*, 287 F.3d at p. 1305.) Federal courts have long noted that "one of the defendant's primary advantages of being present at the trial[...] [is] his ability to communicate with his counsel." (*Spain v. Rushen, supra*, 883 F.2d at p. 720; see also *Kennedy v. Cardwell* (6th Cir.1973) 487 F.2d 101, 106 [asserting restraints confuse mental faculties and thus abridge a defendant's constitutional rights].) Stun belts may directly derogate this "primary advantage[...]" (*Spain v. Rushen, supra*, 883 F.2d at p. 720), impacting a defendant's right to be present at trial and to participate in his or her defense. As the Eleventh Circuit recently observed, "[w]earing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case." (*Durham, supra*, 287 F.3d at p. 1306.) "The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely" hinders a defendant's participation in defense of the case, "chill[ing] [that] defendant's inclination to make any

movements during trial--including those movements necessary for effective communication with counsel." (*Id.* at p. 1305.)

For like reasons, a stun belt may "materially impair and prejudicially affect" a defendant's "privilege of becoming a competent witness and testifying in his own behalf." (*People v. Mar, supra*, 28 Cal.4th at p. 1216 [citation omitted] .) In the course of litigation, it is "not unusual for a defendant, or any witness, to be nervous while testifying." (*Id.* at p. 1224.) "[I]n view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict," however, "it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial." (*Ibid.*) This "increase in anxiety" may impact a defendant's demeanor on the stand; this demeanor, in turn, impacts a jury's perception of the defendant, thus risking material impairment of and prejudicial affect on the defendant's "privilege of becoming a competent witness and testifying in his own behalf." (*Id.* at p. 1216 [citation omitted].)

For these reasons, "a decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints." *(Mar, supra*, 28 Cal.4th at p. 1219; *Gonzalez v. Pliler, supra*, 341 F.3d at p. 901 [citation omitted].) And for these reasons, before a court may order the use of physical restraints on a defendant at trial, "the court must be persuaded by compelling circumstances that some measure is needed to maintain security of the courtroom," and "the court must pursue less restrictive alternatives before imposing physical restraints." (*Duckett v. Godinez, supra*, 67 F.3d at p. 748 [internal citations and quotation marks omitted]; see also *Morgan v. Bunnell* (9th Cir.1994) 24 F.3d 49, 51.) California's and the Ninth Circuit's respective physical restraint doctrines

are, despite some linguistic distinctions, largely coextensive: Under California law, a court directing the use of stun belts must determine that a "manifest need" justifies the use. *(Gonzalez v. Pliler, supra*, 341 F.3d at p. 901, quoting *Mar, supra*, 28 Cal.4th at p. 1216.)

This Court explicitly held in *Duran* and reaffirmed in *Mar* that a showing of "manifest need" must be a matter of record:

> The showing of *nonconforming behavior* in support of the court's determination to impose physical 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. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.

(*Mar, supra*, 28 Cal.4th at p. 1217, quoting *Duran, supra*, 16 Cal.3d at pp. 291-292 [emphasis added].) While no formal hearing is necessary to fulfill the mandate of *Duran*, 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* (1991) 53 Cal.3d 618, 651-652 [emphasis added in *Mar*].)

"Nonconforming conduct" has been deemed actual violent conduct, escape attempts, or the threat of escape or threat of acting violently in the courtroom. (*Duran, supra*, 16 Cal.3d at pp. 292-293.) "In all [ ] cases in which shackling has been approved," the Ninth Circuit noted, there has been "evidence of disruptive *courtroom* behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a *pattern* of defiant behavior toward corrections officials and judicial authorities." (*Duckett v. Godinez, supra*, 67 F.3d at p. 749 [emphasis added].)

In *Duran*, the fact the defendant was a state prison inmate who had been convicted of robbery and was charged with a violent crime did not, without more, justify the use of physical restraints. (*Duran, supra,* 16 Cal.3d at pp. 292-293.) Numerous state cases indicate what circumstances will demonstrate a "manifest need" for restraints, and all require more than the fact that a defendant has been charged with a violent crime. (*Mar, supra*, 28 Cal.4th at pp. 1216-1217, citing *People v. Kimball* (1936) 5 Cal.2d 608, 611 [defendant expressed intent to escape, threatened to kill witnesses, secreted lead pipe in courtroom]; *People v. Burwell* (1955) 44 Cal.2d 16, 33 [defendant had written letters stating he intended to procure a weapon and escape from the courtroom with the aid of friends]; *People v. Hillery* (1967) 65 Cal.2d 795, 806 [defendant had resisted being brought to court, refused to dress for court, and had to be taken bodily from prison to court]; *People v. Burnett* (1967) 251 Cal.App.2d 651, 655 [evidence of escape attempt]; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-863 [defendant attempted to escape from county jail while awaiting trial on other escape charges]; *People v. Loomis* (1938) 27 Cal.App.2d 236, 239 [defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers, and threw himself on the floor].)

Mar and *Pliler* leave no doubt that a showing of "manifest need" was required before the trial court could order appellant to wear a stun belt during his trial. (*People v. Mar, supra*, 28 Cal.4th at p.1219; *Gonzalez v. Pliler, supra*, 341 F.3d at p. 901 ["compelling circumstances" that some measure is needed to maintain the security of the courtroom].) The record in this case clearly demonstrates the trial court failed to adhere to the relevant constitutional standards in forcing appellant to wear the restraint. The trial court took no testimony on why such a debilitating restraint was

necessary. In fact, the court indicated its decision, ipse dixit, to order appellant and his codefendants be held in restraint before it took any argument from counsel on the matter. (RT6200.) The argument the court eventually heard did not provide any evidence of "manifest need" for the use of restraint against appellant: the court was informed by appellant's counsel that appellant had not caused any courtroom disruptions in the more than six years his case had been pending, he had no escape attempts and no disciplinary record in the county jail.[79] (CT 14284.) The prosecution did not contradict any of those facts. The only "reason" the prosecution could manufacture for the use of restraints against appellant was the specious speculation that, since appellant had too many cookies, candy bars and toiletries in his cell, he still must have been involved in drug sales and therefore a security risk. (RT6348-6349.)[80]

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[79] In fact, the record reflects appellant was a trustee in the mainline section of the Los Angeles County jail for many years. (RT 6101-6103; CT 13790-13798.)

[80] The opinion in *Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at pp. 1234-1235, contains the following policy of the Los Angeles County Sheriff's Office regarding the circumstances under which the belt could be used:

> The R.E.A.C.T. Belt may be placed around the waist of any prisoner whose actions pose a physical threat to the safety of deputies, a Judge or courtroom staff. The belt may only be placed on a prisoner under the following circumstances:
> i. An attempted escape while in custody or in a courtroom
> ii. Violent or assaultive behavior while in custody or in a courtroom
> iii. Documented past incidents of violent or assaultive behavior while in custody or in a courtroom.
> iv. Documented past incidents of escapes or attempted escape from custody or from a courtroom.

(continued...)

The articulated bases for the trial court's decision to force appellant to don the belt was based on the "facts of the case" as it knew them, "the very high pressure situation that all the defendants find themselves in" due to the fact the death penalty was being sought for each, because of acts of violence by certain defendants and "ill will between some of the defendants here and others." (RT 6376.) None of the articulated reasons provides an adequate basis for depriving a defendant of myriad constitutional rights by forcing him to be physically restrained during his capital trial.

First, as discussed at length above, it is well-established under both state and federal law that the fact that appellant had been charged with a violent crime and risked a serious penalty if convicted, without more, did not justify the use of restraints. (See, e.g. *Illinois v. Allen, supra*, 397 U.S. 337; *Duckett v. Godinez, supra*, 67 F.3d at p. 749; *Duran, supra*, 16 Cal.3d at pp. 292-293.)

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[80](...continued)

v. Documented incidents in which the person has threatened to escape or attempt to escape from custody; or has threatened violent or assaultive behavior while in custody.

vi. Documented or objectively observable evidence that the prisoner poses a threat because he/she is suffering from a mental disorder or disease.

vii. Overt acts or attempt [sic] to remove restraints or the R.E.A.C.T. Belt itself.

viii. The R.E.A.C.T. Belt may also be used pursuant to a facially valid court order communicated to Sheriff's personnel by the Judge.

Although it is unclear from the opinion when the policy was enacted, one thing is clear: appellant committed none of the requisite acts warranting the belt's use.

Second, although there were allegations codefendant Wheeler had committed acts of violence in the county jail, there were no such allegations nor evidence appellant had committed any acts of violence against anyone while in custody. Nor was there any evidence he attempted or threatened escape. In fact, the record reflects appellant was a trustee in the mainline section of the Los Angeles County jail for many years. (RT 6101-6103; CT 13790-13798.) Nor were there any allegations or evidence that, during the six years this case had been pending, appellant had acted inappropriately in any way while in a courtroom.

Third, there was no showing of ill will on the part of appellant toward any of his codefendants. Just prior to its final ruling requiring appellant to wear a stun belt, the trial court considered pro per codefendant Settle's motion to be placed in federal custody because of threats he allegedly received. (RT 6336-6344; CT 14252-14262.)[81] The upshot of codefendant Settle's allegations was that, because his testimony in this case would be adverse to the penal interests of other defendants, the lives of he and his family had been threatened by "sympathizers and/or members of the alleged Bryant Crime Family and their associated gang member [sic], the Crips, the Bloods and the Black Guerrilla Family." (*Ibid.*) He did not specify who communicated these threats to him, nor did codefendant Settle specify which defendant or defendants would suffer from codefendant Settle's testimony. (*Ibid.*) The allegations of threats amounted to no more than the kind of rumor and innuendo deemed to be an insufficient basis for

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[81] This exact motion does not appear to be contained in the CT provided to appellant. However, the CT section cited above contains a declaration and documents filed by codefendant Settle regarding threats he says he and his family received.

the use of physical restraint. (*Mar, supra*, 28 Cal.4th at p. 1218; *People v. Cox, supra,* 53 Cal.3d at pp. 651-652 [error to shackle defendant at trial where defense counsel informed the court there was a possibility of an escape attempt; while the record was rife with an undercurrent of tension and charged emotion on all sides, it did not contain a single substantiation of violence or the threat of violence on the part of the accused].)

Fourth, the court itself acknowledged, at least impliedly, the restraints were not necessary. The court stated it did not "expect it [the REACT belt] to be used during the entire course of the trial." (RT 6347.) If it did not expect to need to activate the REACT belt, then, ipso facto, there was no "manifest need" for the restraint in the first place.[82]

In this case, the trial court's decision to compel the use of a stun belt was illegal and unconstitutional. As will be shown below, the trial court's error in compelling appellant to wear a stun belt from jury selection through sentencing, including during appellant's testimony in his own defense, was prejudicial.

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[82] The court's facility with ordering the use of the stun belt without a sufficient showing of need, as well as its comments that the belt was preferable to other methods of restraint, are strongly suggestive of the belief, now repudiated by this Court, that a stun belt is a less restrictive and presumptively less prejudicial security tool than traditional shackles or chains because the belt was worn under clothing and interfered less with a defendant's freedom of movement than did other restraints. (See *Mar, supra,* 28 Cal.4th at pp. 1225-1230.)

C. Under Any Standard, Appellant Was Prejudiced By Being Forced To Wear A REACT Belt Restraint During Trial In The Absence Of A "Manifest Need" For Such Restraint

Historically, pursuant to California state law the issue of whether a defendant was prejudiced by the erroneous imposition of physical restraints was deemed an abuse of discretion and evaluated under the standard applicable to ordinary state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836-837 (*Watson*). (*Duran, supra*, 16 Cal.3d at pp. 288-289 [citations omitted].) In *Mar*, this Court found the improper use of a REACT belt in that case to be prejudicial under the *Watson* standard, but specifically left open the question whether the "error in requiring a defendant to testify while wearing a stun belt, without an adequate showing of danger, constituted federal constitutional error that is subject to a more rigorous prejudicial error test." (*Mar, supra*, 28 Cal.4th at p. 1225, fn. 7; see also *Duran, supra*, 16 Cal.3d at p. 296, fn. 15 [Court did not express an opinion whether the erroneous imposition of physical restraints, alone or in combination with other trial court errors, resulted in the deprivation of a federal constitutional right of sufficient stature to require reversal based the rule of *Chapman v. California, supra,* 386 U.S. at p. 24].)

However, as noted above, federal courts have long recognized the erroneous imposition of physical restraints to be of federal constitutional dimension. Appellant therefore urges this Court to, at minimum, apply the *Chapman* standard. Appellant further argues below that recent precedent establishes that the error is not only of federal constitutional stature, but is also structural in nature, and therefore not subject to harmless error analysis. *(Arizona v. Fulminante, supra,* 499 U.S. at pp. 307-309.)

Under any standard of review, the prejudice from the trial court's improper ruling requiring appellant to wear a stun belt during trial, including during his testimony in his own defense, is demonstrated.

1. Reversal Is Required Under *Arizona v. Fulminante* And *Riggins v. Nevada*

The United States Supreme Court has developed distinct methodologies to determine whether an error of federal constitutional magnitude is subject to or defies harmless error analysis. In *Arizona v. Fulminante, supra,* 499 U.S. at pp. 307-309, the Court differentiated "structural error," which defies harmless error analysis, from "trial error," which is subject to such analysis. "'[S]tructural'" errors require automatic reversal and include: racial discrimination in the grand jury selection (*Vasquez v. Hillery, supra,* 474 U.S. 254); denial of self-representation at trial (*McKaskle v. Wiggins, supra*, 465 U.S. at pp. 177-178, fn. 8); complete denial of counsel (*Gideon v. Wainwright, supra*, 372 U.S. 510); biased adjudicator (*Tumey v. Ohio* (1927) 273 U.S. 510); defective reasonable-doubt instruction (*Sullivan v. Louisiana, supra,* 508 U.S. 275). (*Arizona v. Fulminante, supra*, 499 U.S. at pp. 309-310; *Neder v. United States* (1999) 527 U.S. 1, 8.) Trial error, which occurs during the prosecution of the case to the jury, may be quantitatively assessed in the context of other presented evidence to determine whether its admission was harmless beyond a reasonable doubt under the standard of *Chapman, supra*, 386 U.S. at p. 24. (*Arizona v. Fulminante, supra*, 499 U.S. at pp. 307-308.)

The error in this case is similar in kind to the error the United States Supreme Court has found cannot be subject to harmless error analysis. In 1992, the high Court decided *Riggins v. Nevada, supra*, 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 forced administration of the drug, 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. . . . Like the consequences of compelling a defendant to wear prison clothing," *(Estelle v. Williams, supra*, 425 U.S. at pp. 504-505) "or of binding and gagging an accused during trial," (*Illinois v. Allen, supra*, 397 U.S. at p. 344), the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(*Ibid.*) 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.*) The High Court held that, even if the Nevada Supreme Court was correct in holding that expert testimony allowed jurors to assess Riggins' demeanor fairly, "an unacceptable risk of prejudice remained." (*Id.* at p. 138.) The Nevada Supreme Court's judgment was reversed. (*Ibid.*)

In *Mar*, this Court recognized that the concerns raised in *Riggins* by the involuntary administration of antipsychotic medication, are the same as those raised by the compelled use of a stun belt insofar as both involve the circumstance that the State's intervention may result in the impairment, mental or psychological, of a criminal defendant's ability to conduct a defense at trial. (*Mar, supra*, 28 Cal.4th at pp. 1227-1228.)

Riggins governs this case and requires, without an actual prejudice assessment, reversal of appellant's conviction and death judgment. The precise consequences of forcing the stun belt restraint upon appellant cannot be shown from a trial transcript. There is a strong possibility appellant's defense was impaired due to the involuntary stun belt restraint. An unacceptable risk of prejudice remains that, because of the stun belt restraint, jurors were not allowed to assess appellant's demeanor fairly during the two days of testimony in his own defense. Reversal is required. (*Id.* at pp. 129, 137-138; *Illinois v. Allen, supra*, 397 U.S. 333; *Arizona v. Fulminante, supra*, 499 U.S. 279; see also *State v. Damon* (N.J. Super. A.D. 1996) 669 A.2d 860, 863-864 [rejecting restraint harmless error doctrine].) Appellant's conviction and death judgment must be reversed.

2. Reversal is Required under the *Chapman* Standard

As implied in *Mar* and as discussed above, improperly forcing appellant to wear a stun belt during his trial violated appellant's federal constitutional rights, as enumerated above. Appellant urges this Court to explicitly hold the *Chapman* standard applies in determining prejudice resulting from the improper use of a stun belt.

Under *Chapman*, the State has the burden to prove beyond a reasonable doubt the error did not contribute to the verdict obtained. (*Chapman, supra*, 386 U.S. at p. 24.) "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. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

Applying the *Chapman* standard, appellant was indeed prejudiced by being forced to wear a stun belt during his capital trial, including during his

testimony in his own defense during the guilt phase. The prosecution's case against appellant for the instant homicides turned upon whether the jury believed James Williams, or whether they believed appellant. Williams said appellant was present at the scene of the homicides and conspired to kill Armstrong and Brown. Appellant testified that, while he had been involved in the business of distributing narcotics with his brother Jeff, appellant had sold the business to William Settle when Jeff went to prison in 1985; appellant further testified that he was an employee of William Settle at the time of the homicides; he denied playing any role in the killings. (RT 15157-15169.) Appellant's testimony, objectively speaking, was not absurd or inherently implausible. The jury obviously did not believe appellant, because if they had, they would not have convicted him. The record reflects the stun belt had at least some negative effect on appellant's demeanor while testifying: appellant knew that the belt, if activated, would pump 50,000 volts of electricity into his kidneys (RT 6344-6345); he heard fears expressed by codefendant Settle that the belt would be activated if he "itched or scratched" (RT 6347); appellant was not informed of any specific standards for the activation, only that it would be used if "somebody did something that required its use" (RT 6201); appellant was so resistant to wearing the belt he initially chose the only other option offered to him – shackles – until he could no longer bear the pain of wearing them (RT 6200, 6345); and, like Mar, he was uncomfortable the entire time he testified because the belt preventing him from being able to lean back in the witness chair for the two full days he testified. (RT 15158; *Mar, supra*, 28 Cal.4th at p. 1210.) As this Court stated in *Mar*:

> 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 – especially while on the witness stand.

(*Id.* at p. 1219.) And, as emphasized in *Pliler* and *Durham*, fear of the REACT belt not only negatively affected appellant during his testimony, but it interfered with his Sixth Amendment right to confer with counsel throughout the entire trial. (*Pliler*, *supra*, 341 F.3d at p. 900, quoting *Durham, supra*, 287 F.3d at p. 1305.)

In this case, appellant was further prejudiced because the REACT belt was visible to the jurors. When a defendant is charged with a violent crime, his appearance before the jury in visible restraints is likely to lead the jurors improperly to infer that he is a violent person disposed to commit crimes of the type alleged, and thus violate a defendant's right to be presumed innocent (*Duran, supra*, 16 Cal.3d at p. 290 [citations omitted]) and to his right to be tried by 12 unbiased jurors. (*Dyas v. Poole, supra*, 309 F.3d at p. 588 [reversal required if one juror saw shackles imposed without sufficient showing of need].) Once seen, a stun belt may be more prejudicial than handcuff or leg iron because it implies that unique force is necessary to control the defendant. (*Durham, supra*, 287 F.3d at p. 1297.)

The record clearly reflects the jurors could see appellant was wearing the belt: one of the prospective jurors noted it on his/her juror questionnaire (AUG CT 1032); the trial court acknowledged the belt was visible if a defendant leaned forward or walked in front of the jury (RT 18789); and appellant several times walked before the jurors to and from the witness stand (RT 15157, 15486, 15501); and, as noted above, appellant had to lean forward during his entire testimony. (RT 15158.)

Given these circumstances, the State cannot carry its burden of showing the guilty verdict was "surely unattributable to the error." ((*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Reversal of appellant's conviction and death judgment is required.

3. Reversal Is Required Under The *Watson* Standard

Under the Watson "reasonable probability" standard, reversal is required when there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result." (*Watson, supra*, 46 Cal.2d at pp. 836-837.)

Given the above circumstances – the importance of appellant's credibility to his defense, the likelihood the stun belt had a negative effect on his demeanor while testifying, and that fact the belt was visible to the jurors – there is a reasonable probability the error affected the outcome of appellant's trial. Appellant's conviction and sentence of death must be reversed.

D. In The Alternative, Should This Court Hold The Trial Court Properly Determined The Existence Of A "Manifest Need" For The Use Of Restraints, Appellant Was Deprived Of His Constitutional Right To The Use Of The Least Restrictive Alternative

Due process requires that, in determining what physical restraint to use, a court must consider and impose the least restrictive alternative. (*Illinois v. Allen, supra*, 397 U.S. 337; *Morgan, supra*, 24 F.3d at p. 51; *Spain v. Rushen, supra*, 883 F.2d 713; *Mar, supra*, 28 Cal.4th 1201; *Duran, supra*, 16 Cal.3d 282.) As this Court acknowledged, in view of the potentially significant psychological effects of the use of a stun belt, any presumption that the use of the belt is less onerous or less restrictive than the use of more traditional security measures is unwarranted. (*Mar, supra,*

28 Cal.4th at p. 1228.) This Court has set forth several factors that must be considered before the use of such a debilitating device: the defendant's perspective on whether leg chains or leg braces constitute a less intrusive or restrictive alternative; the risk of accidental activation should be brought to the attention of a defendant who is asked to express a preference regarding the use of stun belt over more traditional restraints; whether a defendant is medically cleared to wear a dangerous device; and whether the current design of the belt – which delivers a 50,000-volt shock lasting 8 to 10 seconds – is necessary to achieve the court's legitimate security objectives, or whether lower voltage at a shorter duration would be more appropriate. (*Id.* at pp. 1228-1230.)

In this case, assuming arguendo this Court finds no error in the trial court's decision to order appellant to wear a physical restraint, the trial court nonetheless fatally erred in making no effort to pursue a less restrictive alternative (*Illinois v. Allen, supra*, 397 U.S. 337; *Morgan, supra*, 24 F.3d at p. 51; *Spain v. Rushen, supra*, 883 F.2d 713; *Duran, supra*, 16 Cal.3d 282) and in making no attempt to determine whether the use of the stun belt on appellant was safe and appropriate. (*Mar, supra*, 28 Cal.4th at p. 1230.) At the outset of the discussion of this issue, appellant made it clear he preferred physical restraints over the stun belt. He wore the stun belt only after his request to wear a leg brace, an alternate form of restraint initially offered by the court, was denied by the court (RT 6200, 6345) and after he was incapacitated by the pain he suffered wearing the chains in court. (RT 6373.) When codefendant Settle voiced concerns about accidental activation, the court simply told him and the other defendants that that would not happen (RT 6347), yet at the same time offered little in the way of standards for its use: the court said it would be used only if "somebody

does something that requires its use." (RT 6201.) The court thus did nothing to allay fears attendant to wearing the stun belt.

Further, the court made no inquiry into whether appellant had an existing medical condition that would put him at risk of serious injury or death if the belt was used. The court failed to consider the psychological consequences the belt would have upon defendant, even when faced with appellant's demonstrated fear of the belt. Appellant testified in his own defense for two days, most of that encompassing cross examination, all while wearing the belt he feared. (RT 15157-15501.) The trial court, while acknowledging the stun belt was visible to jurors if a defendant walked before them or if he leaned forward (RT 18789-18790), did not take the standard precaution of bringing jurors into the courtroom after appellant had taken his seat on the witness stand – instead, appellant was required to walk to the witness stand on several occasions (RT 15157, 15486, 15501); such a simple precaution may have protected appellant's right to be presumed innocent. (*Morgan, supra*, 24 F.3d at p. 52.)

In light of the complete lack of any record appellant himself had ever committed a violent act by his own hands, or any evidence appellant ever planned to escape, there was simply no reason the court could not have ordered appellant to wear a leg brace rather than a debilitating device such as the REACT belt, or why other less restrictive measures to ensure security already being employed at appellant's trial, such as the use of additional security personnel (RT 6194-6195; see *Holbrook v. Flynn* (1985) 475 U.S. 560, 568-569, 571; *People v. Miller* (1990) 50 Cal.3d 954, 1004 [trial court exercised its discretion wisely by not utilizing physical restraints and reducing the number of bailiffs as the threat of disruption appeared to

diminish]), would not have been sufficient. Appellant's conviction and judgment of death must be reversed.

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VI

EXTENSIVE SECURITY PRECAUTIONS EMPLOYED THROUGHOUT THE TRIAL IMPROPERLY PREJUDICED APPELLANT

Upon the trial court's own motion, extensive security precautions were taken throughout the instant trial.[83] They suggested to the jury that these defendants were dangerous and violent people and that only extraordinary security measures could ensure public safety as well as the safety of all trial participants, including jurors. The affect of these precautions undercut appellant's presumption of innocence, deprived him of his right to an impartial jury, a fair trial, due process of law and a reliable death judgment. As a result, his confinement and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.[84]

A. Proceedings Below

On the first day of appellants' trial, the court told the parties that the case would require additional bailiffs and other security support personnel throughout the trial. (RT 6194-6195.) Seven to eight deputies were in the courtroom at all times and nine were present at the commencement of jury deliberations. (CT 15888, RT 6194-6195, 6202, 6298, 16865, 18596, 18782, 18787-18788.) Some wore uniforms; many were out of uniform. (RT 18787-18788.) Over the course of the trial, the jury became aware of these additional deputies. (RT 18788)

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[83] None of the previous judges assigned to this case, including those who presided over appellant's preliminary hearing found the need to institute such security precautions.

[84] This was a key issue in appellant's motion for a new trial. (CT 15884-15900.)

Structural changes were made to modify the courtroom that included installation of twice the normal number of tables to accommodate the four defendants and six counsel representing appellants. (RT 16867.) 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, and spectators, witnesses, and counsel had to pass through both. (RT 6442, 6567, 6651, 7468-7469.) In addition, the court informed the parties at the commencement of the trial that it was considering the likely installation of yet another metal detector at the entrance to the courtroom, although it is unclear from the record on appeal whether that was done. (RT 6296-6299.)

One of the themes that ran through the court's voir dire of prospective jurors was whether they would remain impartial if they learned that a witness or witnesses would be testifying only because they had been given a grant of immunity for their testimony. (RT 6662-6663, 6688-6689, 6722, 6738, 6743, 6764, 6799, 6810-6811, 6825-6826, 6908-6909, 6921, 7013, 7058, 7081, 7089, 7131, 7267, 7503, 7566, 7597-7598, 7605-7606, 7614, 7622, 7646-7467, 7721, 7737, 7911, 7929.) During one such exchange with a prospective juror in the presence of all the jurors being examined that morning, the court prefaced its inquiry:

> How about if there was somebody that was—I am not talking about this case but hypothetically. What if there was somebody who was so bad and so dangerous that nobody could testify against him unless they got something in return for it? [¶] Do you think that might be an appropriate time to give somebody immunity to get them into court?

(RT 7596-7597.) The defense motions to excuse that juror and the panel that heard this exchange was denied. (RT 7605-7607; see also Argument XX, *post*, incorporated by reference herein.) Thereafter, during the course

of the guilt phase of the trial, the jury learned that at least four prosecution witnesses had been given grants of immunity.[85]

Among the security precautions taken, the jury itself was given unique status and treatment. Over appellants' objections, the court ordered that all the jurors' names would be withheld. (RT 6194, 6203, 6207-6215, 6358-6366, 7980-7981.) And although the jury was permitted to go home at night, during the court day from the moment they parked their cars until they left the parking lot in the evening, they were not free to roam in or leave the courthouse or be outside the company of the bailiffs. They had to take their breaks in a special room inside the courthouse and 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 for lunch, but were fed in the building at the court's substantial expense. (RT 6194-6196, 6365, 6651-6653, 7980-7988, 8057-8072, 9567-9577.)

On February 14, 1995, after the jury had been impaneled and shortly before the prosecution's opening statement, the court spoke with the jury out of the presence of counsel and the defendants. (See also Argument XXX, *post*, incorporated by reference herein.) In that session, the court attempted to ameliorate the natural concerns the jury would have over the implicit reasons for the special and unique provisions that were being taken on their behalf. Although the court cast the explanation as a need to safeguard them from media and witness contact, the court asked the jury not

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[85] Those witnesses were Andrew Greer (RT 11649-11650), George Smith (RT 11230, 14875-14876), James Williams (RT 12278, 12387-12388, 12587-12588, 12651-12653, 14907-14908, 16093-4 - 16093-5), and Tannis Curry (RT 13050-13054.)

to "speculate as to any reasons that [they] might imagine exists and utilize that sort of speculation as evidence in this case...." (RT 8057-8072.) The court continued, "We are having security arrangements, but that is appropriate. That does not mean you should now start imagining abut what was going on in my mind." (RT 8064.)

Two weeks later, on March 1, 1995, the court had another session with the jurors out of the presence of counsel and the defendants. They were told that the arrangements that had been made to get them into the court in the morning, to keep them together, and provide them lunches was "done for their benefit and at considerable expense." (RT 9567.) The court asked them not to speculate why the court was doing this. The court offered as explanation, "Let me indicate to you that based on my 20 years in the system, it is necessary for the reasons that I stated earlier that this take place." (RT 9568.) "This is being done because the court thinks it is appropriate. That is about all I will say at this point in time." (RT 9569.) The court continued:

> I understand this is a long case. It is uncomfortable to be here in the criminal courts building. But believe me when I tell you that it would be a lot worse if we were not doing this. [¶] Okay? It would be a lot harder on you in terms of getting here and all that you would have to do to fight the public elevators and things of that nature.

(RT 9569.) The court affirmed a juror's question whether they were restricted to the room provided even during their lunch break. (RT 9570.) Another juror expressed concern that they were no longer being searched. The juror said a bailiff explained that the court "didn't want it that way." The court replied that it was convinced there was no need to search them. (RT 9571.) The court again asked them not to speculate "about what is

going on and why." (RT 9572.) Another juror asked whether there would be more "little talks like this" every couple of weeks. The court replied:

> [T]he answer is probably no unless something comes up because all the parties and the prosecution and defense have a right to be present for matters like that. Matters that deal with the security of the jury and the comfort of the jury the court feels they are not entitled to be present although they would all disagree with me.

(RT 9572.)

The court told the jurors that the deputies attending them had been "hand picked" over the course of a number of weeks. (RT 9573.)

The defense was told about these security precautions as *faits accomplis* without requiring the prosecution or anyone else to make any particular showing on the need for such provisions and without holding an evidentiary hearing to explore the bases and their sources for these precautions. (See *People v. Duran, supra*, 16 Cal.3d at p. 291, fn. 8 [if armed guards present in unreasonable numbers, need for such security should be justified by the court or the prosecutor].)

In addition to these precautions, the court advised the parties that it wished their input on the court's proposal to employ one of two options: Each defendant would either wear a leg brace with waist and leg shackles during the trial or they would wear a "REACT" belt." (RT 6200, 6205, 6297.) For the reasons set forth in Argument V, *ante*, incorporated by reference herein, the trial court's ruling regarding the imposition of restraints during trial was without legal basis, and, standing alone, constitutes grounds for reversal of appellant's conviction and judgment of death.

B. Security Precautions Taken Created The Same Aura Of Guilt And Violence Over The Trial As Would Displaying Appellant To The Jury Shackled

Adoption of security measures requires due process safeguards, because the measures create a courtroom environment that distinguishes the defendant's trial from those of others, that suggests to the jurors that these defendants are dangerous and violent people requiring extraordinary measures, and possibly deters some persons from attending. (*Gibson v. Superior Court* (1982) 135 Cal.App.3d 774, 779.) Security at the scale employed in appellants' trial created the same negative impact on the presumption of innocence and impartiality of the jury as would the requirement that appellants wear shackles visible to the jury. (Cf., *Gibson v. Superior Court, supra*, at pp. 779-780.) Displaying a defendant shackled at his trial is inherently prejudicial and, hence, requires close scrutiny and a showing that it is justified by an essential state interest. (*Illinois v. Allen, supra,* 397 U.S. at p. 343; *Spain v. Rushen, supra*, 883 F.2d at pp. 721-722.)

The resulting aura of guilt resulting from such use of shackles is indistinguishable from that that arose from the extensive security precautions taken in appellants' case. It provided "'the constant reminder of the accused's condition implicit in such distinctive'" circumstances and "'may [have affected] a juror's judgment.'" (*Rhoden, supra*, quoting *Estelle v. Williams, supra*, 425 U.S. 501, 504-505.) Such an aura "is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy. (*Rhoden, supra*, citing *Holbrook v. Flynn*, 475 U.S. at pp. 568-569; accord *Dyas v. Poole, supra*, 309 F.3d at p. 588.)

As discussed above, the court had told the jury that the special and unique provisions taken in their behalf were necessitated by the court's concern for them to avoid media and witness contact and to make it easier for the jurors to get in and out of the courthouse. Security was not highlighted as a reason for any of the precautions (RT 8057-8072, 9567-9573), although the court twice mentioned security in his private sessions with the jurors (RT 8064, 9572), and repeatedly asked them not to speculate on the reasons for the precautions taken. However, the very act of asking them not to speculate only called attention to the security being employed in this case. Certainly the juror who inquired why they were no longer being searched (RT 9571) was concerned about security and not media or witness contact.

In addition, at least those jurors present in the morning session of the February 7, 1995 jury voir dire hearing had been programmed to assume that a motivation for immunizing prosecution witnesses was because the defendants were "so bad and so dangerous that nobody could testify against [them] unless they got something in return for it." If all the jurors had not immediately after being advised of the precautions being taken or soon thereafter understood that security was the prime reason for all of the precautions being taken, it would have been clear by the midpoint of the guilt phase when Detective Vojtecky was permitted to testify over defense objection that during a portion of the period pretrial, he took varying routes between the courthouse and the police station because of security concerns that "had arisen in connection with this case." (RT 10755-10757.)

Moreover, the prosecution used a series of witnesses[86] to ostensibly testify about the drug organization, but their testimony provided a much more damaging theme that their lives were in danger by their alleged role in the prosecution's case against the "Family." This was a predominant theme of the prosecution's opening (RT 16448-16449, 16458-16459, 16474-16480, 6483-16487, 16490-16491) and closing arguments (RT 16474-16489, 16804, 16807-16809, 16824.) If there remained any doubt about why the security precautions were taken, it was made abundantly clear in the court's instructions to the jury that they were not to consider or discuss the security measures employed in determining any issue in the case. (RT 16381.) Further, during the jury's deliberations at the end of the guilt phase, it became necessary for the court to interview one of the jurors when the concern arose about 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.) Immediately after that interview, the court again referred to the "security" arrangements that the jury had to endure. (RT 17005-17006.) The jurors in appellant's case essentially spent five months

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[86] 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).

in which they were in the custody of the Los Angeles County Sheriff's Department, five months in which to identify with their guardians, the people who fed them, five months to observe the extensive security precautions, including the equipment used to retrain the defendants.

In short, the jury was constantly reminded from the beginning of the trial until its end, by evidence improperly admitted at trial (see, e.g., Arguments VII, VIII, IX, X, and XII, *post*) and by extraneous security measures that had not been shown necessary, that this was a very bad organization made up of very bad men doing very bad things. Appellant was entitled not to be so marked with the concomitant suggestion "that the fact of his guilt [was] a foregone conclusion." (*Rhoden, supra*, 172 F.3d 633, 636, quoting *Stewart v. Corbin* (9th Cir. 1988)f 850 F.2d 492, 497.) Due process only permits such an aura as a last resort. *(Rhoden, supra*, citing *Stewart v. Corbin, supra*, at pp. 497-498; see also *Illinois v. Allen, supra*, 397 U.S. 337; *Spain v. Rushen, supra*, 883 F.2d 712.) The cumulative impact of the extensive security precautions, including the decision to force appellant to wear a stun belt without legal cause (see Argument V, *ante*, incorporated by reference herein), denied appellant his rights to be presumed innocent, to a fair trial by an impartial jury, to a reliable judgment of death, and so infected the trial with unfairness as to make his resulting convictions a denial of due process. As a result, the confinement and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

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VII

THE TRIAL COURT PERMITTED THE PROSECUTION TO INFLAME THE JURY BY PRESENTING IRRELEVANT AND PREJUDICIAL EVIDENCE OF BAD CHARACTER AND CRIMINAL PROPENSITY

The trial court erroneously admitted literally weeks of irrelevant, unreliable, misleading, and inflammatory evidence that portrayed appellant as a callous, violent drug dealer who terrorized his community and who attempted to murder a man who was sleeping with appellant's estranged wife. With little credible evidence to connect appellant with the murders, the prosecution relied instead on this evidence for the impermissible purpose of showing appellant was a bad person with a propensity to kill his rivals and any man that slept with his wife.

There was unquestionably some evidence of appellant's role in the sale of narcotics in the Pacoima/Lake View Terrace area that, based on the prosecution's proffers, was relevant to this case. Appellant did not move to exclude evidence relating to the shootings of Ken Gentry and Reynard Goldman,[87] which was admitted as relevant to the prosecution's theory of

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[87] With regard to the evidence concerning the Ken Gentry killing, appellant moved that an instruction be given prior to the introduction of this evidence limiting its purpose to show a connection between Armstrong and one or more of the defendants. (CT 11093-11099.) The trial court ruled that a limiting instruction prior to the admission of the evidence was proper, but expanded the limiting instruction to say the evidence could also be considered as to issues of motive, premeditation and intent with regard to the charged homicides in this case; a key factor in the court's ruling was the prosecution's proffer that further evidence would establish that Armstrong's threats were in fact communicated to appellant (RT 8724-8730, 8786-8787.) Appellant made the same objection to the evidence relating to the Goldman shooting, and the court ruled and instructed in the same

(continued...)

motive, intent and premeditation with regard to the instant homicides, i.e.: Armstrong had been hired in 1982 by appellant and his brother Jeff Bryant to kill Gentry and Goldman over drug disputes; after Armstrong was convicted of killing Gentry and shooting Goldman, he threatened to force appellant to pay for the hit; that appellant knew of this threat; and that upon Armstrong's release from prison appellant arranged to have him killed in order to protect appellant's business interests. Nor did appellant move to exclude all testimony from other former or current drug dealers regarding narcotic sales in the Pacoima/Lake View Terrace area. However, the fact that some evidence relating to appellant's role in narcotics sales may have been appropriately introduced did not immunize the jury from the emotional impact of evidence detailing alleged criminal and violent propensities of appellant and his fellow drug dealers. Indeed, the evidence of threats, murders, and violence which had nothing to do with the case surely overshadowed the evidence that was actually relevant to the jury's determination of guilt. Likewise, evidence that purported to establish that appellant arranged attacks on the lover of his estranged wife was irrelevant to the prosecution's proffered motive, that is, that Armstrong and the others were shot to prevent Armstrong from collecting for the 1982 shootings.

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[87](...continued)
manner. (RT 9218-9220, 9226.) The trial court there allowed Goldman to testify regarding implied threats he received prior to his testimony in his case; however, the court ruled that unless the threats were linked to appellant, that evidence would be limited to the credibility of the witness. (RT 9219.) No evidence was introduced showing either that (1) Armstrong's threats to collect from appellant were communicated to appellant or (2) that appellant directed people to threaten Goldman prior to his testimony.

The emotionally-charged bad character evidence described herein was irrelevant, unreliable, inflammatory, cumulative, remote, and far more prejudicial than probative. Its admission violated state law as well as appellant's state and federal constitutional rights. In view of the weakness of the case against appellant as to the instant homicides and the inflammatory nature of the other crimes evidence, alone and when combined with the other erroneously admitted evidence described in Arguments VIII and IX, *post*, incorporated by reference herein, its admission was prejudicial.

A. Legal Standards

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Relevant evidence may be excluded under Evidence Code section 352, however, if a trial court determines that the probative value of the evidence is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the

reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14).

Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101, subdivision (b) provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Under section 1101, subdivision (b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent ...) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.)

The rule excluding evidence of criminal propensity derives from early English law and is currently in force in all American jurisdictions. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 392; *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.) Such evidence is impermissible to "establish a probability of guilt." As the United States Supreme Court stated in *Michelson v. United States* (1948) 335 U.S. 469:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Id.* at pp. 475-476, fns. omitted.)

When evidence of other acts is offered to prove a material fact, the court must employ a case-by-case balancing test of the probative value of the evidence compared with its prejudicial effect in order to determine the admissibility of the evidence. (*People v. Stanley* (1967) 67 Cal.2d 812.) There must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such evidence. (See *People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Evidence of other acts "should be scrutinized with great care ... in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived." (*People v. Elder* (1969) 274 Cal.App.2d 381, 393-394, quoting *People v. Durham* (1969) 70 Cal.2d 171, 186.) The exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Murphy* (1963) 59 Cal.2d 818, 829.) "[U]ncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson* (1980) 27 Cal.3d 303, 318, original emphasis, fn. omitted.)

A defendant's uncharged offense is admissible under Evidence Code section 1101 on the issue of identity only if the offense is "highly similar" to the charged crimes. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common

features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation omitted.] 'The pattern and characteristics of the crimes must be *so unusual and distinctive as to be like a signature.*'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403 [citing 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803 (italics added)].) Thus, to prove identity, the uncharged misconduct and the charged offense must be "mirror images."[88] "The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." (*People v. Thornton* (1974) 11 Cal.3d 738, 756 [italics in original].)[89] On the other hand, courts will find no signature if the crimes

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[88] See, e.g., *People v. Huber* (1986) 181 Cal.App.3d 601, 622; *People v. Balcom* (1994) 7 Cal.4th 414, 425 ["The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense"]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1066 ["highly distinctive marks of similarity" between the prior offense and the charged crime are required for admissibility to prove the defendant's identity]; *People v. Wein* (1977) 69 Cal.App.3d 79, 90 [prior offense was "unique and peculiar" to the extent that it constituted defendant's "trademark"]; *People v. Rodriguez* (1977) 68 Cal.App.3d 874, 883-884 [uncharged and charged offenses must have "highly distinctive marks of similarity"].

[89] See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 333 [the existence of stolen credit cards in Crown Royal bags in both the charged and uncharged offenses is sufficiently distinctive "signature" characteristic to support an inference that the same person committed both the charged and the uncharged acts]; *People v. Catlin, supra,* 26 Cal.4th at p. 120 ["the charged and uncharged crimes bore a number of highly distinctive common marks" – each victim was a close female relative of the defendant (wife or mother); the defendant stood to gain financially from each victim's death; and the victims had died from paraquat poisoning, which is "rare"]; *People*

(continued...)

are not uniquely similar.[90] Moreover, "the presence of marked

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[89](...continued)
v. Kipp, *supra*, 18 Cal.4th at pp. 370-371 [the charged and uncharged offenses displayed common features that revealed a "highly distinctive" pattern: in *both* rape-murders, the perpetrator strangled a 19-year-old woman in one location, carried the victim's body to an enclosed area belonging to the victim, and covered the body with bedding; the bodies of both victims were found with a garment on the upper body, while the breasts and genital area were unclothed; in neither instance had the victim's clothing been torn, and the bodies of both victims had been bruised on the legs]; *People v. Medina* (1995) 11 Cal.4th 694, 748 [admission of uncharged murders was justified in murder prosecution; both charged and uncharged offenses involved robbery and murder of convenience store employee, each victim was shot in the head execution-style, and ballistics reports indicated use of the *same handgun*, later traced to the defendant]; *People v. Sully* (1991) 53 Cal.3d 1195, 1223-1225 [illicit sex, cocaine and the abuse of prostitutes were common to all crimes, and each crime occurred in defendant's warehouse, where he lived, worked, and controlled "what came in and out"].)

[90] See, e.g., *People v. Bean* (1988) 46 Cal. 3d 919, 937 [finding no unique signature where the murders occurred three days apart in the same neighborhood, both victims died as a result of brutal blows to the head area, both victims were elderly women who were robbed and their homes burglarized, and in each instance an automobile belonging to the victim was taken and abandoned in the same vicinity]; *People v. Rivera* (1985) 41 Cal. 3d 388, 393 [finding the following characteristics not sufficiently distinctive so as to demonstrate a signature: "(1) both crimes occurred on a Friday night; (2) both occurred at approximately 11:30 p.m.; (3) both involved convenience markets; (4) both markets were in Rialto; (5) both markets were located on street corners; (6) both crimes involved three perpetrators; (7) both involved getaway vehicles; (8) prior to both crimes, two or three people were observed standing outside the store; (9) defendant used an alibi defense in both cases: when accused of the prior offense, he claimed to have been with his brother all night; in the current case he claims he spent the evening with his sister"]; *People v. Antick* (1975) 15 Cal.3d 79, 94 [fact that charged and uncharged offenses involved removal of personal property from private residence during owner's absence "cannot seriously
(continued...)

dissimilarities between the charged and uncharged offenses is a factor to be considered by the trial court" in determining whether to admit the other crimes evidence. (*People v. Haston* (1968) 69 Cal.2d 233, 249, fn. 18 [italics added].)[91]

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[90](...continued)
be asserted as a distinctive and signature-like feature"]; *People v. Nottingham* (1985) 172 Cal.App.3d 484, 500 [finding no logical inference of identity where (1) both victims were young women who were casual acquaintances of defendant; (2) both victims resided in the same neighborhood as defendant; (3) both attacks occurred in remote locations; (4) each victim had force applied to her neck and her clothing ripped; the first victim had hands placed around her neck that startled her and apparently left no permanent physical injuries, while the second victim was strangled to death]; *People v. Alvarez* (1975) 44 Cal.App.3d 375, 385 [similarities between earlier statutory rape of 13-year-old and later forced rape of 14-year-old were simply "necessary concomitants" of the crime, rather than distinctive marks tying defendant to both crimes]; *State v. Dewey* (1998) 93 Wash. App. 50, 55-58, 966 P.2d 414, 417-418 [evidence was neither unique nor sufficiently uncommon where (1) defendant used friendly conversation to develop a level of trust with both female victims; (2) he invited each woman to accompany him on a date to a restaurant or lounge to enjoy music; (3) on both occasions, after they left the public establishment, defendant suggested they go to his home; (4) in both cases, after initially playing the sociable host, defendant forcibly had sexual intercourse with the women; (5) afterward, defendant was friendly toward the women – allowing them to dress, driving them home, and acting as if they had been on "a regular date" culminating in consensual sex].)

[91] See, e.g., *People v. Alcala*, *supra*, 36 Cal.3d at p. 633 [defendant's pattern of sexual conduct was not consistent or distinctive and "[m]ost importantly, [the last victim] was killed, while the earlier victims were not"]; *People v. Guerrero* (1976) 16 Cal. 3d 719, 729 [reversing murder conviction for admitting evidence of other crime where other crime victim was raped, not murdered, and murder victim was not raped].)

B. Evidence Of Other Alleged Crimes Was Inadmissible Under Evidence Code Sections 350, 352 And 1101

1. The Bribe Of Rhonda Miller

a. Proceedings Below

Appellant moved to exclude the following statements of Rhonda Miller, who identified Andre Armstrong as the shooter of Ken Gentry in a line-up, that: the day after the line-up she was visited by Rollo and Tannis (who at the time were the girlfriends of Jeff Bryant and appellant, respectively) during which visit Rochelle offered Miller money from Jeff not to inculpate Armstrong in the Ken Gentry shooting; after Miller refused the money, she was visited by her abusive husband Alvin Brown, who told Miller to take the money; Brown took the money and, at the preliminary hearing, at which Jeff Bryant, appellant and Armstrong were defendants, recanted her identification of Armstrong; Alvin Brown had been bailed out by Jeff and appellant's mother, Florence Bryant, using a house on Louvre Street as collateral. (RT 9075-9081.)

Appellant argued, in relevant part, that the admission of such evidence was more prejudicial than probative under Evidence Code section 352 and to the extent the prosecution relied on a conspiracy theory for the evidence's admission, no foundation had been laid. (RT 9078-9079.)

The prosecution argued the evidence was relevant to Miller's recantation at the preliminary hearing that Armstrong was the shooter. (RT 9081.) The defense countered Armstrong's guilt of the Gentry shooting was uncontested and that the defense maintained that he did it as a solo venture. (RT 9083.) The trial court ruled that there existed a reasonable inference that the bribe money came from the "Family," thus evidencing an interest in the outcome of the prosecution, that that interest suggested the

possible involvement of others in the Ken Gentry homicide; the court also ruled the bribe evidence admissible to belie the inference that Armstrong was an independent actor and in turn "buttress the credibility" of the taped statement of Armstrong. (RT 9082, 9084.)

b. The Evidence Relating To The Bribe Of Rhonda Miller Was Inadmissible

It must be first noted that the trial court's ruling was incorrect insofar it held the evidence admissible to "bolster the credibility" of Andre Armstrong in his taped statement to police in 1983, because that taped statement was inadmissible testimonial hearsay. (See Argument IX, *post.*) Since the taped statement was inadmissible, testimony concerning the bribe of Miller was also inadmissible.

To the extent that the evidence objected to was relevant to belie the inference that Armstrong was a solo actor in the Gentry homicide, it was clearly more prejudicial than probative under Evidence Code Section 352; the court found there was a reasonable inference that the money used to bribe Miller came from the "Family." (RT 9082.) However, there was no evidence that appellant, as opposed to his brother Jeff, was involved in the bribe of Miller or in the release of Alvin Brown. Numerous law enforcement personnel as well as former employees stated unequivocally that Jeff Bryant was in charge of the organization, and it was Jeff Bryant's girlfriend Rollo who offered Miller the bribe. That appellant was dating the woman who went with Rollo to perform that task has little or no probative value as to the issue of whether appellant directed the bribe to occur, and thus was inadmissible under Evidence Code section 352. (*Ibid*; *People v. Lavergne, supra,* 4 Cal.3d at p. 744 [if in doubt, the exercise of discretion should weigh in favor of the defendant].

In any event, given the statements of other witnesses putting appellant near the scene either before or after the Gentry shooting, and given the statements of Ken Gentry that came in through other witness that implicated appellant, the probative value of the evidence regarding the Miller bribe as to appellant's role in the Gentry shooting was so slight as to be far outweighed by the prejudicial effect of the evidence that whomever was behind the bribe of Miller would bail out a wife-beater to ensure compliance with the offer. (*People v. Crew* (2003) 31 Cal.4th 822, 840 [evidence with very little effect on the issues that tends to evoke an emotional bias against the defendant should be excluded under Evidence Code section 352].)

2. The Attack On Francine Smith

a. Proceedings Below

Appellant moved to exclude the statement of Francine Smith regarding a beating she received in 1986, after she tried to buy drugs at Jeff Bryant's Louvre Street house with a $10 bill she attempted to alter to look like a $100 bill; she was caught and verbally reprimanded by the person working at the house at that time. (RT 9449-9450.) In December of the same year, she was beaten on the head, neck and chest with a billy club with a chain in the middle by someone she did not know. (RT 9450-9451.) Appellant was standing far away in the parking lot while the beating was occurring. (RT 9451.) Francine denied that she told prosecutors that appellant was ten feet away while she was being beaten. (RT 9452.) After the beating ceased, Francine went to a party and cleaned up. (RT 9452.) She saw appellant about a day or two after that, and he told her that she was lucky to be alive, and that they if they had not known her so well, she would be dead. (RT 9452-9453, 9462.)

Appellant moved to exclude this portion of her testimony, arguing that the evidence was irrelevant to any issue in this case and that it was more prejudicial than probative under Evidence Code section 352. (RT 9421-9424.) The trial court denied the motion, finding the evidence showed appellant's "involvement and interest in the financing of these various narcotic houses and, perhaps, his willingness to use violence to make sure those things are run as they were supposed to run and that people don't rip them off and things of that nature, all of which are issues in the case." (RT 9424.)

b. The Evidence Relating To The Attack On Francine Smith Was Inadmissible

Similarly, the beating of Francine Smith in appellant's presence over a minor drug debt in 1986 was irrelevant to the issue of who killed Armstrong and the others in 1988. It clearly lacks any of the "high distinctive marks of similarity" with the instant homicides required for admission to prove identity under Evidence Code section 1101. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403; see also cases cited in section A of this Argument, *ante*.) Moreover, evidence regarding motive for the instant crimes had already been introduced at length, and the beating of Smith added nothing to the prosecution's case on any material fact in the instant case, i.e.,it did not relate to motive or intent to kill Armstrong and the others. Rather, this evidence was admitted to show appellant's "involvement and interest in the financing of these various narcotic houses and, perhaps, his willingness to use violence to make sure those things are run as they were supposed to run and that people don't rip them off and things of that nature . . ." (RT 9424.) Thus, the court clearly admitted the evidence for the inadmissible purpose of showing appellant's character in

the form of a specific instance of uncharged misconduct to prove his conduct on the specified occasion charged: that is, that appellant was someone who did, as was the case with Francine Smith, act with violence in the instant case in order to protect his business interests. The evidence impermissibly established a "probability of guilt" as to appellant's guilt of the instant crimes and it posed an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (Evid. Code, § 1101; *People v. Alvarez, supra,* 14 Cal.4th at p. 204, fn. 14; see also *Michelson v. United States, supra,* 335 U.S. at pp. 475-476.)

3. Evidence Relating To Narcotic Sales in 1985 And To Appellant's 1986 Conviction For Conspiracy To Distribute Narcotics

a. Proceedings Below

Prior to the introduction of evidence regarding evidence of the activities of the "dope operation," all defendants objected to the presentation of evidence through the testimony of detectives relating to drug sales by the Family in "1984 or 1985" as irrelevant and more prejudicial than probative under Evidence Code section 352; the defense argued that the evidence had a tenuous link to the motive for the instant homicides, and that the evidence related to a drug conspiracy count that was severed from the case years prior.[92] (RT 9533-9535.) The trial court denied the motion

[92] The Honorable J.D. Smith, Judge of the Superior Court, severed count 7, which charged the defendants conspired "to operate a major narcotics sales distribution/transportation business"from the instant case in 1992. (RT 366, 4247.) In so doing, the court found that the entire conspiracy to sell narcotics was not motive for the instant homicides. (RT 4231-4232.)

without comment.[93] (RT 9533.) The prosecution then presented the following:

LASO Deputy Sheriff Gheral Taylor was assigned to the narcotic bureau on June 27, 1984, when he executed several search warrants. (RT 9582-9588.) Taylor first stopped and searched a vehicle driven by Jeff Bryant and seized his keys. (RT 9588, 9590.) He next went to 13031 Louvre Street, which was owned by Jeff and Florence Bryant, and used one of the keys seized from Jeff to open one of the steel doors to the house; all the doors and the windows to the house were barred. (RT 9590-9591, 9597.) Danny Miles was arrested in the house; an eighth of an ounce of cocaine was recovered from a pot of hot oil, and a shotgun and police scanner were also found there. (RT 9591-9593.) Taylor also searched Jeff Bryant's residence at 10743 De Haven; he recovered a plate that contained a small amount of a substance that appeared to be cocaine and $6,500 in cash. (RT 9594-9594.) Taylor also searched Eli Bryant's house, which was next door to Jeff's at 10731 De Haven and seized $20,000 found in a safe in the bedroom. (RT 9583, 9595-9596.) Eli was employed by LASO as a deputy sheriff, assigned to the Men's Central Jail. (RT 9583, 9599.)

Detective Charles G. Uribe of the LAPD testified that in the first four months of 1985 he was assigned to the narcotics division of the Valley bureau unit, partnered with Detective James Dumelle. (RT 9536.) He and Detective Dumelle focused on "rock houses" in the Lakeview Terrace/Pacoima area that he opined were unique to the Bryant family

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[93] At one point during the presentation of this evidence when all counsel renewed their Evidence Code section 352 objection, the court ruled this category of evidence admissible because one counsel disputed the existence of the Family in opening statements. (RT 10536.)

organization. (RT 9536-9538.) One unique characteristic were that the houses were very well fortified; the front doors were electronically controlled; buyers were buzzed in and then locked between two metal doors when making a transaction. (RT 9537.) In two of the Bryant rock houses a hot crock pot filled with oil was kept in the kitchen to enable the quick destruction of cocaine. (RT 9538.)

On January 22, 1985, LAPD Detective Ernest Guzman served a search warrant on 11442 Wheeler. (RT 9983.) He recovered 46 bindles of cocaine from the toilet bowl; a carton labeled "acid" was found next to the toilet bowl. (RT 9985.) Terry Evans, who was in the house when the warrant was served, was arrested. A 12 gauge sawed-off shotgun was found in the living room, and $300 was found in a pot in the kitchen. (RT 9985, 9988.) It did not appear that anyone was living in the house. (RT 9986.)

On February 6, 1985, Detective Dumelle served a search warrant on 13037 Louvre Street, a "fortified rock house." (RT 9641.) The SWAT team entered the house using a battering ram, putting a hole in the front bedroom of the house. (RT 9642.) Detective Dumelle found equipment commonly used to "rock" powder cocaine, what he believed to be recordations of narcotic transactions and a grant deed to the home in the name of Jeff Bryant. (RT 9645-9646.) Antonio Johnson arrived during the search and identified himself as a resident of the house. (RT 9647.)

On March 5, 1985, after an undercover purchase of narcotics at 13031 Louvre Street, Detective Uribe served a search warrant and arrested the home's sole occupant, Kenny Reaux; a pound and a half of narcotics were seized, as were several one gallon Wesson Oil containers, a calendar and paperwork Detective Uribe said were "pay and owes in the narcotic

industry." (RT 9541-9543, 9550-9555.) This house was also owned by Jeff Bryant. (RT 9638, 9668-9669.) A week after the search, Detective Dumelle went to the location and saw the house was being repaired. (RT 9658.) Three repair men testified that they worked to repair the Louvre Street and Wheeler Avenue houses; one recalled that appellant paid him for the work; paperwork from the repairs the other two completed was found in appellant's home. (RT 9676-9693.)

On March 18, 1985, Detective Dumelle went to Neighborhood Billiards because the business's police commission license to run a pool hall had not been paid. (RT 9661.) Detective Dumelle had previously surveilled the pool hall and testified that it didn't appear to him that many people played pool there. (RT 9660-9661.) He found appellant behind the counter and cited him for not having the proper permits. (RT 9661.) Two days later, when appellant was interviewed by LAPD homicide detective Manford Brown, appellant told Brown that appellant was part owner of the pool hall. (RT 9895-9896.)

On March 22, 1985, Detective Dumelle executed a search warrant at 11442 Wheeler Avenue. (RT 9648-9650.) A battering ram was again used by a SWAT team to enter the house. (RT 9651-9652.) Inside Detective Dumelle found crock pots tipped over, some spilling a white greasy oil, and a notebook with "pays and owes;" Kenny Reaux was arrested in the house. (RT 9652-9653.)

Detective Dumelle interviewed Kenny Reaux on March 25, 1985, three days after Detective Dumelle had arrested Reaux at the Wheeler house. (RT 9628-9631.) Detective Dumelle testified that Reaux told him that he needed some extra money and had been recruited by appellant at the pool hall to work an eight hour shift inside the Wheeler house for $200. (RT

9632.) Reaux said that appellant had driven him to the house at about 2:30 p.m. that day in appellant's white Audi, that appellant told him there was no cocaine in the house and that he instructed Reaux to watch the house. (RT 9632.) Reaux then said he didn't want to talk about it any more because Jeff Bryant would have him killed. (RT 9632, 9706.)

LAPD detective William Thurston testified that he interviewed Reaux in prison regarding the Charles Gentry homicide. (RT 9717-9718.) He testified that Reaux told him that he was working a rock house for Jeff and appellant and that he was in custody on narcotics-related charges. (RT 9719.) Reaux told him that his bills and family were being taken care of by the Bryants and that he was receiving money from the Bryants through his wife. (RT 9720.) In response to questions about the Charles Gentry homicide, Reaux said that the Bryants were family and that he would not rat on them. (RT 9720.)

Kenny Reaux testified and disputed the testimony of Detective Dumelle and Thurston regarding his prior statements. Reaux said that he was working for himself along with a partner named Alfonso when he was arrested both on March 5, 1985 at Louvre Street and on March 22, 1985 at Wheeler Avenue. (RT 9604-9606, 9610-9612.) He denied he told Detective Dumelle that the Bryants had any involvement in drugs sales at those locations and that he said he would not testify against them. (RT 9614-9616.) Reaux said that he worked as an attendant, handing out racks and balls, at Neighborhood Billiards before his arrests in 1985; he testified that it was a legitimate business and that he was paid by John Bryant. (RT 9606-9608.) Reaux also denied that Thurston asked him any questions about the Charles Gentry homicide and he denied making any of the statements that Thurston attributed to him. (RT 9616-9621.)

On April 18, 1985, Detective Uribe led a team that served a search warrant on appellant's house on Judd Street. (RT 9539.) Detective Uribe found a calendar similar to the one seized at Louvre Street the previous month, a piece of paper with the booking number of Kenny Reaux with a citation to an Heath and Safety Code section, as well as some one gallon Wesson Oil containers. (RT 9540-9544.) He also found paperwork related to repair work and utility bills from 11442 Wheeler Ave, as well as a Health and Safety Code violation in the name of Tony Johnson that contained the Wheeler Avenue address. (RT 9545-9549.) Detective Uribe also recovered personal belongings of appellant which indicated that he lived at the Judd Street address. (RT 9550.)

At the same date and time that Detective Uribe was serving the warrant on appellant's house, Detective Dumelle led a search team at Jeff Bryant's house at 10743 De Haven. (RT 9635-9638.) A half kilo of a white powder commonly used as a cutting agent was found in his garage. (RT 9639-9640.) Detective Dumelle testified that he believed that Jeff Bryant ran the narcotics operation, and that Jeff Bryant would continue to do so whether he was in prison or not. (RT 9703.) Detective Dumelle also testified that in the Pacoima/Lake View Terrace area, the term "the Family" referred to the Bryant family or the Jeff Bryant family, and that the Bryant family organization was completely separate from a prison gang known as the "BGF." (RT 9705-9708.)

Detective Lambert opined that the Bryant family's narcotics operations operated continuously from 1985 through 1988, and that the houses on Wheeler, Carl, Adelphia, Fenton and Vanport were all part of the Bryant organization. (RT 9794, 9811.) He also said the organization distributed cocaine at the Hansen Dam and at a rented home at 12707

Dronefield. (RT 9812.) He said it was a common characteristic of the Bryant organization to have their properties in the names of its members or relatives or friends; the Adelphia and Fenton houses were in Eddie Barber's name, who Lambert said was a high-ranking member. (RT 9835.) At the time of the homicides, the Wheeler house had been quit-claimed to Nash Newbill by Jeff Bryant. (RT 9916-9917.) Lambert believed that it was highly likely that Jeff Bryant continued to run the organization while he was in prison; he also testified that he believed that appellant ran the organization while Jeff was in prison.[94] (RT 9873, 9882, 9945.) Lambert opined that, at the time of the homicides, the people running the Bryant family organization were appellant, John Roscoe and Eli Bryant, and that Jon, William, Frank and Andrew Settle were also involved. (RT 9946.) He also opined that William "Amp" Johnson, Ladell Player, Lawrence Walton, Larry Bradley, William "Binky" Blaylock and Darrell Blaylock were all Family members. (RT 9952-9955.)

As a result of the 1985 narcotics investigation, Jeff Bryant pled guilty to two counts: operating a house (11442 Wheeler Avenue) where narcotics were dealt and selling or transporting cocaine. (RT 9730.) Appellant pled guilty in 1986 to conspiracy to distribute narcotics; the prosecution moved to introduce both the fact of appellant's 1986 guilty plea to conspiracy to sell or transport narcotics as well as appellant's plea allocution. (RT 9721-9722.) The overt acts admitted during appellant's plea included: "recruiting Kenny Reaux to work in the rock house that he and Jeff Bryant were running;" offering Reaux $200 per eight hour shift for

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[94] The erroneous admission of Detective Lambert's opinion testimony in this regard is the subject of Argument X, *post*.

selling cocaine at 11442 Wheeler Avenue; Reaux had 137 grams of cocaine in his possession at 11442 Wheeler Avenue on March 22, 1985, while working for appellant; and that Reaux attempted to destroy the cocaine by putting in into a crock pot containing hot cooking oil. (RT 9730.) The prosecution argued in part that the overt acts admitted were relevant to impeach the testimony of Kenny Reaux. (RT 9722.)

Appellant objected, arguing that evidence of appellant's prior conviction was inadmissible unless and until appellant testified, but conceded that the overt acts admitted during the plea were admissible as an admission. (RT 9722.) Appellant argued that the fact of the conviction itself was irrelevant in that it did not add to the prosecution's case, that Reaux would be adequately impeached with the admissions, and that evidence regarding the fact of conviction was more prejudicial than probative under Evidence Code section 352. (RT RT 9721-9722.)

The trial court overruled appellant's objection, ruling that admissions have more of an indicia of reliability when they come before a plea, and found no prejudice under Evidence Code section 352. (RT 9726-9727.) At appellant's request, the court gave the following limiting instruction after reading the fact of appellant's conviction and his admission to the overt acts as follows: the evidence was not offered to show bad character or propensity, but whether (1) there existed an organization of the type alleged by the prosecution, and, if so, its membership and scope of activities; and (2) as to the credibility of Kenny Reaux. (RT 9727-9733.)

b. The Evidence Relating To Narcotic Sales In 1985 And To Appellant's 1986 Conviction For Conspiracy To Distribute Narcotics Was Inadmissible

The extraneous evidence regarding the drug operations set forth above had no relevance to the instant homicides. The motives proffered by the prosecution were (1) that appellant owed Armstrong money for Armstrong's shooting Ken Gentry and Reynard Goldman and/or (2) that appellant wanted Armstrong dead because Armstrong was sleeping with appellant's ex-wife. That appellant and his brother were involved in narcotic sales while Armstrong was in prison is irrelevant to these motives as the alleged debt owed Armstrong and Armstrong's affair with Tannis were not connected in any way to the drug operations described in detail over weeks of testimony. To the extent that the prosecution argued that appellant had Armstrong killed because Armstrong threatened appellant and demanded part of appellant's drug business in payment for his services, the prosecution failed to introduce any evidence that appellant knew of Armstrong's threats and demands.

At the very least, the evidence relating to drug operations prior to and including appellant's arrest in 1985 and conviction in 1986 were irrelevant to the proceedings since appellant admitted selling drugs for his brother Jeff during this period of time. (RT 15158-15159, 15174-15176, 15191-15192.) The evidence was prejudicial in no small part because it allowed the prosecution to introduce a comment Kenny Reaux made to detectives regarding the Charles Gentry homicide, i.e., that the Bryants were family and he would not rat on them. (RT 9720.) The implication was clear: appellant was responsible for the uncharged homicide of Ken Gentry's father and, therefore, was likely the kind of person to be guilty of

the instant crimes. The introduction of Reaux's statement was particularly harmful in light of the fact that the prosecution stipulated that the Ken Gentry and Charles Gentry homicides were unrelated. (RT 9411.)

Numerous other irrelevant and prejudicial statements were introduced during the prosecution's presentation of evidence regarding the "drug operations." The out-of-court statement by William "Amp" Johnson contained references to the uncharged homicide of Tank Hennegan, which the prosecution conceded was inadmissible in their case in chief. (RT 10059; 3 SUPP CT 10603.) The Johnson statement also contained other inadmissible references to the bad character of the drug dealers in Pacoima: he said that young men in Pacoima were corrupted by the drug dealers whom they looked up to because of their material possessions (3 SUPP CT 10607-10609), that there were people in Pacoima who "for $500 they come burn your whole house down, kill your mama, kill everyone else and then brag about it because they know they ain't going to jail, because its been demonstrated" (3 SUPP CT 10604, 10609, 10616-10617), that "they" still had "their threat on" and that a lot of people were going to be dying (3 SUPP CT 10609-10610), and that "they" can reach out and touch him at Pelican Bay and other prisons. (3 SUPP CT 10614-10615.)

This type of evidence similar to gang-related evidence, which, like other bad character evidence, is not admissible if it is introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) Such evidence is only admissible if it is relevant to issues in the case, is not more prejudicial than probative, and is not cumulative. (See *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.) In addition, this Court has cautioned that even if

gang evidence is relevant, it may have a highly inflammatory impact on the jury, and therefore, "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997)16 Cal.4th 153, 193; *People v. Gurule* (2002) 28 Cal.4th 557, 653, quoting *People v. Champion* (1995) 9 Cal.4th 879, 922.)

What was in dispute was the not the bad character of those who deal drugs, but specifically, whether or not appellant ordered the killing of Armstrong and his cohorts in the instant case. The prosecution's evidence in this regard was based primarily on an accomplice who turned state's evidence to save himself from multiple murder charges. As a result, the prosecutor sought to bolster its case by introducing the above-described evidence which demonstrated that appellant was a bad person who was part of a bad organization with a propensity to murder those who threatened its existence. Such damning propensity evidence is precisely what Evidence Code 1101 forbids. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 392-393.)

4. Testimony And Statements Of William "Amp" Johnson, Lawrence Walton And Ladell Player

a. Proceedings Below

i. Taped Statement And Testimony Of William "Amp" Johnson

At trial, William "Amp" Johnson testified that in 1987 through 1988 he sold narcotics and sometimes bought from the Family organization, which included appellant as a member; he did not know if appellant or Jeff Bryant ran the organization. (RT 9993-9996.) He was arrested in 1987 in a rock house on Dronfield where he and his cousin sold narcotics for the "Family." (RT 10010.) He further denied that all drugs sold in Pacoima from 1985 through 1988 were Family drugs or that there was pressure on

him to not testify in this case. (RT 9996-9997.) He testified that he did not want to testify, but denied that being forced to do so was putting him in a bad position; he admitted being afraid for his family if he testified and admitted telling the prosecutor that he would rather go to jail than testify in this case. (RT 1003-1004.)

Throughout the course of Johnson's testimony, there were defense objections under Evidence Code section 352 to various out-of-court statements made by Johnson, discussed more fully below, that relate to his perceptions of the effect the narcotic sales operations run by the Family had on the community in Pacoima. (RT 10006-10009.) The trial court allowed the prosecution to examine Johnson regarding the full content of his prior statement, subject to "revisiting" the issue at a later time; the court also directed counsel not to make objections during a witnesses's testimony regarding alleged threats – rather, the court instructed counsel to listen to the prosecution's case and then explain to the jury to what use they may put it to later. (*Ibid.*) The prosecution was allowed to essentially read portions of Johnson's prior statements to him; Johnson denied making some statement relating to the fear caused by and the effect the Family organization had on the people of Pacoima. (RT 10000-10013.)

When the prosecution sought to introduce the entirety of Johnson's tape-recorded statement to police as a prior inconsistent statement, all of the defendants objected. The defense argued that the taped statement contained "vague ramblings" and frequent references to "they" being bad guys and that the statement was more prejudicial than probative under under Evidence Code section 352. (RT 10188-10195.) The defense also objected to damaging and prejudicial statement of the interviewers contained on the tape that were hearsay and not admissible as a prior inconsistent statement

of Johnson. (*Ibid.*) In addition, the defense specifically objected to the portion of the tape in which Johnson tells the police that they have the correct people in custody, but that there are people involved other than the defendants who are out on the streets. (RT 10202-10206.) The prosecution argued that the entire statement was relevant to the witnesses's state of mind, that is, he was fearful because of what was going on in the streets and thus might not testify truthfully. The prosecution conceded that much of the statement was not admissible for the truth of the matter asserted. (RT 10206-10207.)

The court ruled the tape would be played in its entirety to the jury with the instruction that the statements could only be considered as it bears on the state of the mind and credibility of the witness. (RT 10211.) When the court instructed the jury before the playing of Johnson's taped statement, however, it gave the standard instruction regarding prior inconsistent statements, which included the provision that the jury could consider the prior statement for the truth of the matter therein if they did not believe a witness's testimony. (RT 10214-10218.)

Detective Lambert testified that he, DDA Kevin McCormick and Detective Walter Hampton surreptitiously tape recorded their interview of William "Amp" Johnson on November 28, 1994; an edited version of that tape recorded statement was played to the jury. (RT 10219-1022.) According to Johnson, a house on Desmond was sometimes a Family location for drug sales, but sometimes Johnson sold drugs there independently, when the Family wasn't operating from the location. (3 SUPP CT 10601-10602.) At this time, there was one dope man in Pacoima, and that man would not get involved in sales by individuals until he saw material indicia that the person was profiting from the sales; then

"something might happen" to the person who was profiting. (3 SUPP CT 10603.) Nothing had changed in Pacoima since the homicides in 1988, and there was pressure on the streets keep one's mouth shut. (3 SUPP CT 10604-10605.) Johnson used to do freelance drug sales, and he hung out at the carwash, at the pool hall and at Hansen Dam; the organization was not a gang, but a business. (3 SUPP CT 10605-10607.) Johnson bought from them because it was the only safe way to do business in Pacoima, but the was never a salaried employee. (3 SUPP CT 10611-10613.) Johnson is younger than the Bryant brothers and did not hang out with them. (3 SUPP CT 10607.) When Johnson was released from prison, he was asked if he needed some work, and he declined. (3 SUPP CT 10607.)

According to Johnson, the police had missed a lot, but Johnson could not tell them what. The police were dealing with people who had basically run Pacoima all of his life and whom he looked up to because of the cars they drove and the jewelry they wore. (3 SUPP CT 10607-10608.) Sooner or later they would offer to "show you game," that is, show you how things work and how to make sure things did not get back to them. (3 SUPP CT 10608-10609.) Johnson planned to contact his parole officer and get locked up for the instant trial as a way of protecting himself and his family; if he was in jail, they know he is not telling on them. Johnson explained that there were people in Pacoima who, "for $500 they come burn your whole house down, kill your mama, kill everyone else and then brag about it because they know they ain't going to jail, because its been demonstrated." (3 SUPP CT 10604, 10609, 10616-10617.)

At the time of Johnson's taped interview, things were pretty shaken up in Pacoima, and he thought there was going to be a lot of people dying. (3 SUPP CT 10609.) Johnson said he told his parole officer that when the

police get to the list of people they want to talk to about this case, some people would not be around and that those people would not care if there were caught and put in jail, because they would rather do that than testify because "they still got their threat on.". (3 SUP CT 10609-10610.) The first time Johnson went to prison "was because of them motherfuckers" and that he "ain't never had a dollar after that." (3 SUPP CT 10610.) Now that the case is back, "everybody want to be friendly and everybody want to be close to everybody because everybody want to know who's telling on each other." (3 SUPP CT 10610.) If he was made to testify, he would not say anything that will damage them in any way because "you can't get no police protection, ain't enough fundage [sic]." (3 SUPP CT 10613-10614.) Johnson said that "they can reach out and touch" him at Pelican Bay or in other prisons. (3 SUPP CT 10614-10615.)

During the interview, DDA McCormick told Johnson that he would "do absolutely everything that needs to be done to make sure that they don't get away with killing a two-year old baby." (3 SUPP CT 10611.) Johnson agreed that the killing was "cold-hearted" and "didn't have nothing to do with what was going on," that he couldn't "see anybody killing a child for no reason." (3 SUPP CT 10611.)

ii. Testimony And Statements Of Lawrence Walton

Prior to the testimony of Lawrence Walton, the defense objected to the "series of witnesses that the prosecution is putting on," i.e., former employees of the alleged organization have said they are afraid to testify. (RT 10535.) Specifically, counsel argued Walton's testimony was repetitive, cumulative and more prejudicial than probative under Evidence Code section 352 in that it created an unacceptable risk the jury would

convict the defendants not on the evidence but because "they were bad guys and had a very bad organization and they were out doing bad things." (RT 10535-10537.) The defense also argued that evidence relating to narcotics sales was irrelevant to any count charged in the instant case. (*Ibid.*) The court ruled the evidence admissible since one defendant disputed the existence of a drug organization in his opening statement, and Walton will identify all defendants as participants in the drug operations. (RT 10536.)

Lawrence Walton testified that he did not want to be in court because this was all part of his past. (RT 10538-10539, 10545.) He identified photographs of various alleged Family members, including all four defendants. (RT 10541-10544.) According to Walton, when he worked at the Fenton location, people came to the house and received a slip of paper with a number on it in exchange for money; the people would take those slips to another location to receive narcotics. (RT 10547-10550.) Walton denied that there was an organization known as the Family, that appellant was the boss of it, or that appellant would bail Walton out of jail. (RT 10550-10552.) Walton denied working for the Family, testifying that he worked for himself and that he once worked for Nash Newbill at the pool hall. (RT 10558.) Walton sold drugs at the Hansen Dam, Filmore Park and the dead end of Adelphia, among other places. (RT 10560.) Walton did not recall many other statements attributed to him by Lambert. (RT 10561-10572, 10604.) Walton used to make large deliveries of narcotics to people, and he once delivered a quarter kilo to Billy Fields. (RT 10584.) According to Walton, Wheeler was dressed nice all the time when he was on the street and wore a thick gold chain around his neck. (RT 10582.) In 1988, James Franklin Williams was known as "Jay Baby", worked at the pool hall and at the Wheeler house, told jokes all the time, and was tall and

fat. (RT 10586., 10591.) Walton knew Smith only as "Duke." (RT 10593.)

Prior to the testimony of Los Angeles County District Attorney Investigator Steven Johnson about his interview of Walton, the defense again objected under Evidence Code section 352. Counsel argued that a taped statement of Walton to be introduced through Investigator Johnson did not contain statements that were inconsistent with his testimony and that Walton's fear of testifying was conveyed while he was on the stand. (RT 10675.) Counsel argued that the tape was repetitive regarding the witnesses being frightened:

> I think it has the effect of having the jurors to convict [sic] these guys because they're bad guys and not on the evidence. [¶] That is really the purpose of the DA introducing this type of evidence. He does not have a case as to the homicides so he is trying to make them the worst guys in the world.

(RT 10675.)

The prosecution argued the tape was "important" because in it Walton said his prior statements to police were truthful, but that he was not going to tell the jury the truth. (RT 10676.) Defense counsel replied that Walton testified that his prior statement was true. (RT 10676.) The trial court ruled the entire statement was admissible on the issue of the witness's credibility in that Walton testified he did not recall if he said he was fearful about testifying. (RT 10677-10679.) At the same time, the trial court cautioned the prosecution to be mindful that its opinions about this case stated during these surreptitious recording will be played to the jury. (RT 10678-10679.) The trial court also instructed the prosecution not to go through the entire interview of Walton by Detective Lambert, finding most of it cumulative. (RT 10679-10680.)

Investigator Johnson testified that he was present for an interview by DDA McCormick of Lawrence Walton at 8:50 p.m. on the morning that Walton testified; the entire conversation was tape recorded without Walton's knowledge, and that tape was played for the jury. (RT 10681-10684.) Walton said that he did not want to testify because he was through with the drug life, that he had not been arrested for drugs since 1988, that he did not associate with any of those people anymore, that he would not tell the truth if called to the stand because that life was behind him, that he had a job and a little boy, and that if he testified he would have to look over his shoulder for years to come. (3 SUPP CT 10468-10472.)

Detective Lambert testified that he interviewed Lawrence Walton on June 17 and June 23, 1992, but these interviews were not tape recorded. (RT 10688.) According to Walton's interview statements, he was part of the organization known as the Family, which included both the Bryant and the Settle brothers, and appellant was the boss. (RT 10689, 10691, 10697.) Members he had seen at the Wheeler house included appellant, William Settle, Darrell Blaylock, Newt Newbill, Tony Johnson, Ben and Slimm. (RT 10691.) The purpose of the meeting at the pool hall regarding the institution of the 90 minute schedule was to get the maximum amount of sales and to introduce people to the new system regarding selling at the Fenton and Adelphia locations. (RT 10689-10690.) Walton operated one of the roving sales locations, and he would call the pool hall when he moved to tell them his new location. (RT 10691-10692.) Either Tony Johnson or Frank Settle gave Walton more drugs when needed, and the narcotics were fronted to him and the money obtained through sales was turned over to other people. (RT 10692.)

Lambert was present during a tape recorded interview of Walton on October 28, 1994. According to this interview, Walton never took orders from appellant and was not hired by appellant; everyone out buying and selling drugs was part of one big family. (RT 10699-10703.) Walton did not know anything about coappellant Smith, and codefendant Settle was a loner with whom Walton never dealt. (RT 10706, 10712.)

iii. Testimony And Statements Of Ladell Player

Prior to the testimony of Ladell Player, defense counsel objected under Evidence Code section 352 to the admission of portions of his out-of-court statements in which he: stated that out of fear he bought drugs from the Family and no one else; referred to a number of violent incidents unrelated to the instant crimes; referred to threats perceived or received; and told police what the word on the street was about the homicides. (RT 10226-10227.) The prosecution said it had no intention of eliciting what Player had heard on the streets, but it planned to get into other parts of his statement if Player went "backwards." (RT 10227.) The court deferred ruling pending the testimony of Player. (RT 10228-10229.)

Ladell Player testified that he started selling drugs when he was 20 years old and sold for about six years, until 1990. (RT 10235-10236, 10268.) He had an arrangement to purchase regularly nine ounces of cocaine from appellant. (RT 10236-10243.) Player would pay at the Wheeler house, and afterward Amp Johnson or Darrell Blaylock would deliver the drugs to Player's apartment. (RT 10241-10242.) He negotiated the price of the nine ounces with appellant; the price varied from $4,200 to $4,500. (RT 10247.) The term "the Family" was used to refer to people who dealt with appellant in those days. (RT 10248.) After the homicides,

Player continued to purchase from the same group of people, only then through Nash Newbill. (RT 10248-10249.) Player testified that he met Leroy Wheeler in 1986, when Wheeler sold drugs around the Terra Bella apartments. (RT 10253.) Player also knew Lamont Gillon as someone who delivered drugs, and Jay, a big kid, from the Wheeler house. (RT 10258-10259.)

Player did not come to court voluntarily, but rather was arrested and brought to court. (RT 10264.) He believed that testifying in this case would help him get a sentence of less than 30 years to life in his federal narcotics distribution case. (RT 10270.) He also told the prosecutor that he would probably say just about anything so he could get back on the street and get high again. (RT 10291.) Player further testified that he was currently in a half-way house and admitted he told police that he would rather testify against John Gotti than this organization. (RT 10345-10347.) Player otherwise denied the statements attributed to him by DDA Maurizi and those contained in a videotape. (RT 10251-10267.)

DDA Janice Maurizi[95] testified that she was present for a February 6, 1991 interview of Ladell Player. (RT 10368.) According to that interview, in 1988, Player had been going to the Wheeler house weekly for five months, where he paid money to Jay Williams, Antonio Johnson, codefendant Settle, Lamont Gillon and coappellant Wheeler. (RT 10369-10370; 10373.) On the day after the homicides, Player walked up to the front porch of the house, saw the blood and the police tape, and left immediately. (RT 10369-10370.) He and Billy Fields went to court in the

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[95] DDA Maurizi was removed from prosecuting this case as a result of a successful defense motion to recuse the Los Angeles District Attorney's office (later reversed on appeal). (See Argument I, *ante*.)

San Fernando Valley two or three days after that, where Player saw and talked to appellant. (RT 10370-10371.) Player told appellant that he had gone to the Wheeler house, described what he had seen, and asked what had happened. Appellant told him that "we had a little problem, but we took care of it." (RT 103071.)

According to DDA Maurizi, appellant told Player he was in court because of a problem he was having with his wife, Tannis. (RT 10371.) DDA Maurizi found a minute order indicating that appellant was in court for some sort of domestic violence situation. (RT 10372.) According to Player, codefendant Settle and his brothers were high up in the organization and in charge of large shipments involving large amounts of money. (RT 10372.) Codefendant Settle was a "gun nut" and was always armed. (RT 10373, 10382.) Appellant told Player that if anyone messed with him (appellant), appellant would shake their hand, smile at them, let them think that everything was OK, and then would have them killed because he could not have people going behind his back. (RT 10375-10376.)

Prior to the playing of the videotaped statement of Player, defense objected under Evidence Code section 352 to portions of the tape in which: (1) Player said appellant told him that Tank Hennegan was mistakenly killed and (2) Player expressed displeasure upon learning that appellant received a copy of Player's statements in discovery. (RT 10420-10427.) The court ordered the prosecution to excise the former but permitted the latter portion of the tape to be Player, ruling it relevant to Player's reluctance to testify. (RT 10427.) Defense counsel also objected on hearsay grounds to portions of the tape in which the prosecutor said that a lot of people who deal with the Bryants end up getting killed; the court believed that the jury would take that comment only as hyperbole, but

agreed to instruct the jury that the interview questions were not evidence. (RT 10428-10431.)

The court gave this instruction and also instructed the jury only that the statements Player attributed to appellant could be used against appellant only. (RT 10487-10488.) However, the court did not instruct regarding the proper use of prior inconsistent statements. (*Ibid.*)

Brent McCleve, an out-of-state law enforcement officer, was present in a monitoring room for a December 28, 1994 videotaped interview of Ladell Player by DDA McCormick. (RT 10484-10487.) The videotape was played to the jury.[96] In that interview, Player recalled some of of the 1991 interview, but he had a bad drug habit at the time and probably would have said just about anything to get back out on the streets. (3 SUPP CT 10546-10547.) Player could not get involved in this case; he had given up Tommy Chavez, and he was not going to testify against anyone anymore. (3 SUPP CT 10548-10549.) Player would rather go to the electric chair than testify against appellant. (3 SUPP CT 10549.) Player could not recall any dealing with appellant, and he lied when he said he met appellant at the Wheeler house. Player had never been inside the Wheeler house, and he never worked for the Bryants. (3 SUPP CT 10550-10551.) Player denied that he ran into appellant at the courthouse; it might have been Billy Fields that had gone to the courthouse or who had heard somebody talking about

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[96] The record is not entirely clear as to whether the entire tape was played, whether there was an edited portion, or whether the transcription in the SUPP CT reflects the portion that was played. In addition, the court stated that something was "mixed in" on the second portion of the tape that should not have been. Court told the prosecutor to edit tape before it was received into evidence. (RT 10495-10496.) These ambiguities were the subject of settlement requests, which were denied.

that. (3 SUPP CT 10552-10553.) Player would testify that he did not know appellant because "what Stan's got going on right now is none of my business." (3 SUPP CT 10554.) If called to testify, Player would say he did not know anything about the family drug organization and that he just went to jail for selling drugs in Minnesota. (3 SUPP CT 10556-10560.) Player would not voluntarily testify in court in this case. (3 SUPP CT 10561-10570.) He would not testify because he wanted to go home for Christmas, and putting his parents in the witness protection program would not make any difference. (3 SUPP CT 10564-10565.) Player ended the interview in dismay after learning that appellant had been provided discovery relating to Player's statements. (3 SUPP CT 10569.)

b. The Testimony And Statements Of Johnson, Walton Were Inadmissible

This evidence should not have been admitted under California Evidence Code sections 352 and 1101. Admission of the Johnson statements was extremely prejudicial to appellant, while its probative value was slight. In fact, the only evidence relevant the issue of appellant guilt came in through Johnson's testimony at trial: he testified that in 1987 he sold narcotics for appellant and Jeff Bryant. (RT 9993.) Johnson's prior statement was not inconsistent in this regard, but rather contained references to the bad character of drug dealers in Pacoima; there was no connection between these vague and ambiguous statements and the circumstances leading to the killing of Armstrong and the others. Johnson's statements were minimally probative of appellant's individual culpability in the instant crimes, and highly prejudicial and inflammatory in that appellant was categorized part of a very bad organization that threatened and killed people to preserve its interests. The error in admitting this evidence was

compounded when the trial court erroneously instructed, contrary to its prior ruling, that Johnson's statements could be considered for the truth of the matter asserted, rather then only as it bore on Johnson's state of mind and credibility. (RT 10211, 10214-10218.)

Similarly, while parts of the testimony and out-of-court statements of Lawrence Walton and Ladell Player relevant to the instant case and arguably more probative than prejudicial (as described in relevant part in the Statement of Facts, *ante*), much of what was adduced was irrelevant and/or cumulative to the issues in the instant case and highly prejudicial. The out-of-court statements of these men conveyed to the jury the witnesses's reluctance to testify in this case and allowed the prosecution to argue that appellant was the West Coast equivalent of John Gotti. Player's concern that the prosecution had discovery obligations to the defense was simply not relevant to any material fact in issue, was not inconsistent to any of his testimony and, even if deemed relevant, was more prejudicial that probative given the fact that the reasons for the witnesses's reluctance to testify had already been explained.

The cumulative impact of the "drug operations" and the testimony and statements of its former employees shifted the focus from the properly admitted testimony and turned the trial into what was essentially a character assassination. In light of its misleading nature and minimal probative value, the bad character evidence should not have been admitted.

5. The Attacks On Keith Curry

a. Proceedings Below

The prosecution sought to introduce evidence that: (1) in 1986 Keith Curry suffered injury after a pipe bomb exploded as he left the apartment of Tannis Bryant, the estranged wife of appellant; and (2) in 1987 coappellant

Smith shot Keith Curry, who was then married to Tannis, after appellant put a contract out on Curry.[97] (RT 10936-10937.)

Appellant objected to the admission of the car bombing as irrelevant and more prejudicial than probative under Evidence Code section 352.[98] (RT 10939-10941, 10948, 11285-11286.)

With regard to the shooting of Keith Curry, appellant joined in coappellant's Smith's objection, in which he argued that evidence was irrelevant and also inadmissible under Evidence Code sections 1101, subdivision (a) and 352, in that the incident was domestic in nature and not relevant to the motive for the instant crime, i.e., that Armstrong and the others were killed to protect the interests of the drug operations. (RT 10939-10941.) Appellant's counsel also argued the additional prejudice from the evidence in that Keith Curry would testify from a wheelchair, as he was subsequently paralyzed in an unrelated shooting.[99] (RT 10948.)

The trial court ruled the evidence of the shooting was relevant and more prejudicial than probative to show the relationship between appellant and coappellant Smith and was admissible under Evidence Code 1101 to show that coappellant Smith would shoot someone at the request of appellant. (RT 10950.) However, the court precluded the prosecution from

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[97] Coappellant Smith pled guilty to the shooting of Keith Curry. (RT 10949.)

[98] The erroneous admission of evidence regarding the Keith Curry car bombing over appellant's claim of marital privilege is addressed in Argument, VIII, *post.*)

[99] Mr. Curry's paralysis was not a result of the shooting by coappellant Smith. (RT 11274.) The trial court excluded evidence relating to the shooting of Mr. Curry that resulted in his paralysis. (RT 10949, 11292-11293.)

eliciting from Keith Curry his belief that appellant hired coappellant Smith to commit the shooting. (RT 10942-10943, 11299.)

The next court day, coappellant Smith was permitted to continue his objection to the admission of this evidence. He argued that the real purpose of the evidence was to establish coappellant Smith's identity as a shooter in the instant case. (RT 11150-11154.) He further argued that there existed insufficient similarities in that: the shooting of Keith Curry was over a domestic issue, while the prosecution's motive for the instant crimes was that the killings occurred in order to protect the interests of a narcotic organization; the prosecution would not be able to connect the Curry shooting to appellant; and the crimes bore no common signature, since the Curry shooting occurred in the street and the instant shooting was an ambush in a house. (RT 11154-11155.)

The prosecution countered that the evidence was offered not to establish identity but rather to show a common scheme or plan, i.e.,, that at appellant's request coappellant Smith shoots men who sleep with Tannis; the prosecution proffered they would show through testimony of Andrew Greer that Tannis and Armstrong were involved in a sexual relationship at the time Armstrong was killed and that appellant was aware of that relationship. (RT 11157, 11160.) The prosecution further proffered that Pierre Marshall would testify that in 1988, appellant admitted being involved in the Keith Curry shooting while mimicking a paralyzed person. (RT 11259-11260.)

The court indicated that, based on *Ewoldt*, it was considering reversing its ruling on the admissibility of the evidence regarding the shooting of Curry, finding dispositive the issue of whether appellant knew of the relationship between Tannis and Keith Curry and harbored some

animus because of their relationship. (RT 11158.) Coappellant Smith disclosed that it was his position that coappellant Smith shot Keith Curry because the latter took coappellant's children out with him on drug deals to distract the police. (RT 11160.) The court deferred ruling in favor of a Evidence Code section 402 hearing regarding Keith Curry's testimony. (RT 11161-11162.)

In response to the court's examination, Keith Curry testified that when he started his relationship with Tannis, he was dealing drugs in Pacoima; he did not know appellant, and he did not attempt to hide his relationship with Tannis. (RT 11262-11264, 11266.) Several months after they were dating, a bomb exploded in his Porsche as Curry left Tannis's apartment. (RT 11264-11265, 11270.) He did not receive threats prior to this injury, nor did he or Tannis know why he was targeted. (RT 11267.) He maintained his relationship with Tannis after the incident. (RT 11268.) Keith Curry knew coappellant Smith; the latter was married to a sister of Tannis. (RT 11272-11273.) Keith Curry was shot in the face by coappellant Smith while the two talked; he had no idea why coappellant Smith shot him. (RT 11271.)

Coappellant Smith argued there existed no competent evidence linking the incident to the "Bryant organization," no similarities of common plan or scheme and the evidence was being introduced for the inadmissible purpose of showing that someone of Smith's stature in the organization would commit the Wheeler house homicides. (RT 11280-11283.) Appellant joined in this objection and argued the evidence should be excluded under Evidence Code section 352 because the relationship between Keith Curry and Tannis was open, there was no evidence of any

threats by appellant and no evidence anyone but Tannis appellant knew of Keith Curry's location. (RT 11285-11286.)

The prosecution replied that the Keith Curry shooting was similar to the instant homicides in that Tannis pretended to be close to both Curry and Armstrong before they were shot; however, in responding to appellant's argument that there was no evidence that Tannis played any role in the instant homicides, the prosecution stated that while there was evidence of a common plan or scheme as to the relationship between Tannis and the two men, that was not the purpose for which the evidence was being offered. (RT 11286.) The prosecution argued that the evidence relating to the timing of Curry's injuries was circumstantial evidence of what appellant knew and thought about the relationship between Curry and Tannis. Regarding the car bomb incident, the prosecution proffered that Gwendolyn Derby would testify that she heard Tannis say that appellant admitted that he was responsible for the car bombing incident. (RT 11287.)

In response to the court's inquiry, the prosecution said Andrew Greer would testify that: Tannis and Armstrong were involved in a sexual relationship of which everyone was aware; on the day of the homicides Armstrong wanted Tannis to take guns in her purse in case "Dude" tripped; Armstrong left for the Wheeler house after dropping off Tannis at her relative's apartment; Greer refused to go to the Wheeler house after seeing this; while dropping Greer off, Loretha Anderson and her two kids got in the car and went to the Wheeler house with Armstrong and Brown. (RT 11288-11289.)

All defense counsel objected to the admission of the evidence regarding the Keith Curry assaults under section 352, arguing that it was a "mini case" that, after two months of testimony that the motive for the

killings was drug-related, to introduce evidence relating to a different theory for the instant homicides. (RT 11285, 11290-11292.)

The trial court ruled both incidents admissible. (RT 11293.) The court found the evidence that coappellant Smith shot Keith Curry, a man he had no apparent "beef" with, "strongly suggestive" that he did it at the request of appellant because of Tannis's affair with Curry, and that such evidence was probative of appellant's and coappellant Smith's guilt of the instant crimes insofar as it tends to show that appellant uses coappellant Smith to commit violent acts for him. (RT 11294-11297.) The court found the evidence of the Curry shooting admissible to show coappellant's Smith's identity as the shooter in the instant case, finding that the common marks shared were Tannis Curry's "central involvement" in both incidents and coappellant Smith's friendship with and ability to lure the victims to locations where they are shot.[100] (RT 11297-11299.) The court further noted its ruling was dependent upon the prosecution proving up its proffers regarding the testimony of Andrew Greer, Tannis Curry, Pierre Marshall and Gwendolyn Derby. (RT 11300-11301.)

Prior to the testimony of Keith Curry, the court instructed the jury that the evidence was admissible only as to appellant and coappellant Smith as to the issues of intent and motive for the charged crimes, the identity of the person who committed the charged crimes, and "as it may tend to prove the relationship between Mr. Bryant and Mr. Smith in this case." (RT 11314.)

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[100] There was evidence that Armstrong and coappellant Smith once shared a common address, and Smith was Keith Curry's brother-in-law. (RT 11297.)

b. The Evidence Relating To The Attacks On Keith Curry Was Inadmissible

The evidence regarding the attacks on Keith Curry were irrelevant to the prosecution's proffered motive, i.e., that Armstrong was killed because of threats he posed to appellant and appellant's alleged business. Indeed, the trial court found the evidence admissible only as to the secondary motive: the theory that appellant would kill anyone who slept with his ex-wife. However, the court's decision, which it clearly considered a close one, turned on whether appellant knew of the affair between Curry and Tannis and whether there existed evidence that he was angry about the affair. As is argued *post*, evidence regarding these predicate facts was erroneously admitted in violation of appellant's marital privilege. (See Argument VIII, *post.*) Without that erroneously admitted evidence, the predicate facts that appellant knew Tannis was having an affair with Keith Curry and that appellant was angry about that affair were not established. Thus, the evidence of the car bombing as well as the shooting of Keith Curry by coappellant Smith were improperly admitted against appellant, since there existed no admissible evidence of a motive for appellant to want Keith Curry harmed. In addition, there was no evidence adduced at trial that appellant knew of the affair between Tannis and Armstrong, so the theory that the affair was the motive for the instant homicides fails as well.

Most egregiously, however, the trial court's decision to instruct the jury that they could consider coappellant Smith's shooting of Keith Curry as evidence of appellant's identity as the perpetrator of the instant crimes was without basis in law, contrary to the prosecution's purpose for offering the evidence and contrary to the court's own ruling regarding the permissible use of the evidence. The prosecution specifically stated the evidence was

not being offered to establish identity as to appellant, but rather to show a common plan or scheme, that is, at appellant's request, coappellant Smith shoots men who sleep with appellant's ex-wife. (RT 11160.) The trial court specifically found that the shooting of Curry by coappellant Smith was relevant on the issue of identity only as to coappellant Smith. (RT 11297-11299.)

This ruling was erroneous, as the shooting of Mr. Curry with a handgun by his brother-in-law while each was sitting in his car on a public street was hardly a mirror image of the shooting of Armstrong and Brown in a private home by multiple shooters using multiple shotguns and certainly did not eliminate the possibility that anyone other than appellant was behind the charged offense. (*People v. Huber, supra,* 181 Cal.App.3d at p. 622; *People v. Balcom, supra,* 7 Cal.4th at p. 425.) In any event, as stated by this Court in *Ewoldt*, "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." (*People v. Ewoldt, supra*, 7 Cal. 4th at p. 406.) In this case, the trial court specifically determined that, as to appellant, the probative value of the evidence as it related to a common plan or scheme was outweighed by the prejudice. It erred in failing to instruct the jury that it could consider the shooting of Keith Curry as it relates to coappellant Smith's identity only.

6. In This Case, Other Crimes Evidence Was Inadmissible On The Issue Of Intent

The court erred in admitting all other crimes evidence on the issue of intent, because evidence of intent was irrelevant. Evidence is only relevant if it has a tendency to prove or disprove a "disputed fact." (Evid. Code, § 210; see 1 Witkin, Cal. Evid. 4th (2000) Circum Evid, § 88, p. 428

[evidence of other offenses is admissible to show intent or motive, where they are *disputed* by defenses such as mistake, accident, or insanity].) The defense did not dispute the killings in this case were premeditated. (RT 8728.) As counsel pointed out, "shooting people inside a cage is going to show ample evidence of premeditation;" in the alternative, counsel argued the evidence was cumulative as to the issue of intent. (*Ibid.*) The circumstances of the crime as established by the physical evidence left no doubt about the intent of the shooters in this case. The disputed issue was their identity. Even if this Court determines that intent was a disputed issued, the minimal probative value of the evidence as it relates to the issue of premeditation was far outweighed by the prejudicial effect of evidence of other crimes evidence upon the jury. The trial court erred each time it instructed the jury it could consider the evidence as to the issue of intent and/or premeditation.

D. The Admission Of Bad Character Evidence Violated Appellant's Constitutional Rights

The admission of this evidence violated appellant's right to due process under the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra*, 397 U.S. at p. 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (*See e.g., Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) The introduction of such evidence so infected the trial as to render appellant's

convictions fundamentally unfair. (*Estelle v. McGuire, supra,* 502 U.S. at p. 67; *see also McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code section 1101 not to have his guilt determined by propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) By ignoring well-established state law that prevents the State from using evidence admitted for a limited purpose as general propensity evidence and excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived appellant of a state-created liberty interest.

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (*See Lockett v. Ohio, supra,* 438 U.S. at pp. 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Penry v. Lynaugh, supra,* 492 U.S. at p. 328, *abrogated on other grounds Atkins v. Virginia* (2002) 536 U.S. 304.)

E. The Use Of Bad Character Evidence Was Prejudicial

The prosecution's case against appellant as to the instant crimes was far from overwhelming, and relied on witnesses of dubious credibility to establish the key facts that connected appellant to the shootings. To persuade the jury that appellant was guilty, the prosecutor sought to significantly bolster its case through innuendo and character assassination by introducing extremely inflammatory evidence that portrayed appellant as a person of bad character and as a member of an organization that kills. None of this evidence had any relevance to the murders, but was likely to inflame the jury and mislead it with regard to appellant's guilt. The prominence of the other crimes evidence in the prosecution's case cannot be overstated. The sheer volume of the testimony of uncharged offenses is

staggering – it literally went on for months and involved dozens of witnesses.

The prosecution's closing argument is replete with references urging the jury to convict appellant because he was a member of a group of with a propensity for violence such that the entire community was threatened. The prosecution personified this organization as a beast that expands and grows, one that does not break stride with police raids or the killing of innocent people. (RT 16430P.)

> The People told you [in opening statements] you were going to hear about an organization, the biggest most violent drug organization that anyone could imagine and that you would wish did not exist. ¶ I do believe that is what you've heard about in this case. ¶ It hasn't changed. It adapts.

(RT 16430S.)

> They are an organization that has existed for a long, long time in this county getting by on selling dope, poisoning their fellow citizens, intimidation, threats, paying off witnesses, killing people, blowing people up, beating people. ¶ The worst you can imagine, folks. And they have been getting away with it for years. ¶ This is an organized crime case . . . because this is the way these people are. . . .[¶] The reason the law treats an organized crime case differently than one individual who goes out and does the robbery, when you are dealing with groups of criminals the threat to the public is much greater. The ability of law enforcement to apprehend them and do anything about them is much, much harder. ¶ It is just like dealing with the Mafia, when they have a huge organization of thugs and killers out there in the streets.

(RT 16430T.)

> You are dealing with an organization that has perpetuated itself by intimidation, threats, by paying off witnesses, by beating up people, by blowing up people, and by killing people. And, you know, everybody in the community knows what these people are, and everybody's attitude is the same. They all want to see them prosecuted, but when it comes time to be a witness, they all have just

> that attitude, you can do it without me. . . . "The truth about what these people are . . . and the truth about the harm to society that is done by an organization like that . . ."

(RT 16490-16491.)

The prosecution called it a "very powerful, violent, wealthy organization run by Stan Bryant, that has hundred and fifty to two hundred employees, an organization you all wish never existed, and an organization responsible for killing a baby, innocent woman and two other men on August 28th." (RT 16494.) The prosecution continued its theme of referencing uncharged offenses throughout its closing argument to the jury. The prosecution argued the William Johnson taped gave jurors "insight on these people" and showed the effect of the organization on the people in Los Angeles. (RT 16475-16476.) With regard to the bribe of Rhonda Miller, the prosecution argued she cried while testifying in this case about the incident because "her life went down the toilet after taking this money and she was living on the street for years." (RT 16550-16451.) Likewise Francine Smith was categorized as "Bryant's victims, victims of the organization" and it argued that appellant did not have her killed because he thought he could make money off of her: "This case is about greed, money and power. It is about protecting an empire they have built that has lasted all these years." (RT 16471-16472.)

The prosecution repeatedly exploited the irrelevant and highly inflammatory portions of the taped statement of Player that he would "rather go to the electric chair than testify against John Gotti" (RT 16483, 16494) and Player's belief that appellant would present a friendly face to someone before having them killed. (RT 16484.)

In rebuttal argument, the prosecution argued "And I can get up here and yell and scream and talk about what a horrible, greedy person that Stan Bryant is, I can talk about all the people he's murdered and beaten." (RT 16783.) It further argued that appellant is head of an organization that thrives on teaching young kids that violence is the better way. (RT 16785, 16787.)

Appellant was further prejudiced by the erroneous admission of voluminous other crimes evidence in this case by the trial court's failure to properly limit the jury's consideration of this type of evidence. Argument XV, *post*, is incorporated by reference herein.

Given the weakness in the prosecution's case, which essentially relied on James Williams, who admitted being present at and assisting in the killings, and codefendant Settle, who made up the best story he could in order to save himself, its reliance on this inflammatory evidence was extremely prejudicial especially in the absence of an adequate limiting instruction. Reversal is required because the error was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

F. Conclusion

The admission of wholly irrelevant and highly inflammatory evidence of uncharged misconduct rendered appellant's trial fundamentally unfair and requires reversal of the conviction, special circumstance finding and death judgment.

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VIII

THE TRIAL COURT'S ERRONEOUS OVERRULING OF APPELLANT'S CLAIM OF MARITAL PRIVILEGE RESULTED IN THE ADMISSION OF EXTREMELY PREJUDICIAL EVIDENCE REGARDING ATTACKS ON KEITH CURRY

The prosecution's ability to establish the factual predicate for the admissibility of all of the evidence relating to the attacks on Keith Curry turned on the trial court's erroneous ruling that appellant did not have a marital communications privilege to prevent testimony about an alleged conversation between appellant and his then-estranged wife in which he was said to have admitted responsibility for harming Keith Curry. The trial court's error resulted in the erroneous admission of irrelevant and highly inflammatory evidence that was far more prejudicial than probative on the issues in this case, and amounted to nothing more than bad character evidence. Its admission violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights and requires reversal.

A. Proceedings Below

Keith Curry ("Curry") was injured on March 15, 1986, when a pipe bomb exploded as he drove his car out of the parking garage of the apartment building where appellant's then estranged wife, Tannis, was living. (RT 11823.) The prosecution sought to examine Tannis Curry (as she was known at the time of trial and referred to as "Tannis" herein) regarding statements appellant purportedly made to her in a telephone conversation concerning the pipe bombing and which she repeated to a woman at a beauty parlor on April 6 or 7, 1986 . (RT 11821-11826.) Appellant objected to Tannis being called as a witness, and requested both counsel for Tannis and a hearing to determine the status of the marital

relationship at the time the statement was made. (RT 11822-11823.) The prosecution argued that even if a valid marriage existed at the time the statement was made, it was not privileged under Evidence Code section 980 since: (1) she was separated from appellant and in a relationship with Curry; (2) she was not asserting the marital privilege; and (3) she waived the privilege by conveying the communication to a third party. (RT 11824-11825.)

The trial court conducted a brief examination of Tannis outside the presence of the jury in an attempt to determine the dates of her marriage to appellant, but the witness refused to answer any questions posed by the court. (RT 11827-11829.) The court then ruled that the prosecution could question her in front of the jury, but after being sworn, Tannis asked to be represented by counsel. (RT 11830-11840.) The court interrupted the prosecution's examination of Tannis in order to permit her to consult with counsel. (RT 11841-11842.) The court later told Tannis's counsel that if a valid marriage was in place at the of the statement, *People v. Johnson* (1991) 233 Cal.App.3d 425 was relevant to privilege issues in this case. (RT 11903.)

Another hearing was conducted wherein Tannis was represented by counsel, who informed the court that, in addition to any marital privilege that may have existed, Tannis's Fifth Amendment rights were implicated; the court deferred ruling on the matter so court documents could be obtained establishing the date the marriage ended. (RT 11961-11999.)

At a subsequent hearing, court records were introduced that showed that appellant and Tannis's marriage was dissolved on May 13, 1986 and that the final judgment was entered in September 2, 1986. (RT 12972, 13062.) Counsel for Tannis and appellant argued that the issue of marital

privilege should be decided prior to any determination of whether Tannis could claim a Fifth Amendment privilege not to testify; appellant formally asserted his marital privilege to the alleged communication; the trial court indicated that Tannis may have waived her privilege, and ruled it would require her to testify regarding the circumstances in which the statement was made so it could determine if the parties reasonably expected the communication to be confidential. (RT 12972-13006.)

Prior to her testimony, the prosecution granted Tannis transactional immunity, and she agreed to testify regarding the pipe bombing. The court ruled her testimony was necessary prior to its ruling on appellant's claim of privilege under section 980. (RT 13051-13057.) Out of the presence of the jury, Tannis testified regarding the attack and Curry's injuries, but denied that she called appellant to confront him about the incident and denied that appellant said he was responsible and that he would do it again until Curry was dead. (RT 13057-13061.)

Appellant argued he had a right to assert the marital communication privilege as to the statement since he and Tannis were legally married when the communication occurred. (RT 13062.) The prosecution argued that the statement was not the kind the privilege was designed to protect because when it ws made appellant and Tannis were no longer living together and she was in a relationship with someone else. (RT 13062-13063.) Appellant replied that the prosecution's position was contrary to the law, and noted that if having an affair terminates the marital relationship "then many of us will be in trouble." (RT 13063.)

The court overruled appellant's claim of marital privilege, ruling that: (1) given that appellant had been served with the divorce papers in 1983, and given the circumstances of their living arrangements and intimate

relationships with other, there was "no real marriage here" of the kind that the law seeks to protect through the marital communications privilege; and (2) assuming there was a marriage, there was no reasonable expectation by either party that the communication would be a privileged one. (RT 13067-13072.) The court found the situation similar to the *Johnson* case in that both involved "crimes against the boyfriend" by ex-husbands in the general proximity of the ex-wife, and found that the differences between this case and the circumstances in the *Johnson* case to be "a distinction without much of a difference." (RT 13072.)

When appellant pointed out that that the attack was not done in Tannis's presence nor did it involve her car, the court found that although appellant did not commit a crime against Tannis, he nonetheless committed a "wrong against her" of the type the statute does not intent to protect. (RT 13073-13074.) The court found that appellant's admission to the bombing to Tannis would, standing alone, likely be privileged, but the added statement that appellant would do it again until Curry was dead made it a statement that no one would expect to remain private, and that such a statement was statutorily exempted from the privilege. (RT 13075.) In response to counsel's continued argument that appellant and Tannis were living together until shortly before the pipe bombing, the court said the law does not protect threats to kill someone, and noted mandatory reporting requirements in the context of other privileged relationships such as lawyer/client and psychotherapist/patient. (RT 13075-13076.)

The court also ruled that, for the same reasons, the privilege was not available to Tannis to assert, or, in the alternative, if she did possess the privilege, she waived it when she repeated the communication at the beauty parlor. (RT 13072.)

Tannis then testified before the jury and denied appellant made any admissions to her and denied that she repeated his alleged statements to others in a beauty parlor. (RT 13080-13085.) Gwendolyn Derby then testified that she heard Tannis say that appellant admitted he was responsible for the pipe bomb and that he would do it again until Curry was dead. (RT 13095-13098.)

B. Legal Standards

In California, all privileges are statutory. (See Evid. Code, § 911, subd. (a) ["Except as otherwise provided by statute: [¶] (a) No person has a privilege to refuse to be a witness"].) California recognizes a marital communications privilege, which provides that a spouse may refuse to disclose or may prevent the other spouse from disclosing confidential communications between them during their marriage. (Evid. Code, § 980.)

The marital communications privilege is defined in Evidence Code section 980:

> Subject to Section 912 and except as otherwise provided in this article, a spouse [. . .], whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

Evidence Code section 912, subdivision (b) provides that the waiver of the marital privilege provided by section 980 by one spouse does not affect the right of the other spouse to claim the privilege. The marital privilege attaches to communications made between spouses until the marriage is legally dissolved; whether the marriage is otherwise viable or intact is irrelevant. (See *Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886,

894-895 [spousal testimonial privilege as provided by Evidence Code section 970 et seq. is retained even though wife had not lived with husband for 17 years and husband had lived with another woman] .)

The Legislature created certain exceptions to rule of marital privilege. For example, there is no privilege if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud. (Evid. Code, § 981.) Section 981 authorizes a limited exception to section 980, however. With reference to section 981, the Law Revision Commission Comment reads in part:

> It is important to note that the exception provided by Section 981 is quite limited. It does not permit disclosure of communications that merely reveal a plan to commit a crime or fraud; it permits disclosure only of communications made to enable or aid anyone to commit or plan to commit a crime or fraud. Thus, unless the communication is for the purpose of obtaining assistance in the commission of the crime or fraud or in furtherance thereof, it is not made admissible by the exception provided in this section. . . .

Thus, statements made by one spouse before the alleged commission of an offense as to what he intended to do, why he intended to do it or how he intended to do it, or, after the alleged commission of a crime, as to what he had done, why he had done it or how he had done it, are communications within the privilege of Evidence Code section 980. (*People v. Dorsey* (1975) 46 Cal.App.3d 706, 719.) Upon timely objection and claim of privilege, such testimony must be excluded. (*Ibid.*)

Evidence Code section 985 codifies other exceptions to the marital communications privilege. It provides in relevant part:

> There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

(a) A crime committed at any time against the person or property of the other spouse or of a child of either.

(b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.

Privileges and their exceptions are statutory creations which cannot be altered by judicial interpretation. "[T]he Legislature has determined that evidentiary privileges shall be available only as defined by statute. ([ ] § 911.) Courts may not add to the statutory privileges except as required by state or federal constitutional law [citations], nor may courts imply unwritten exceptions to existing statutory privileges. [Citations.]" (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, emphasis added.) This Court reaffirmed this rule: "The privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions. [Citing *Roberts*.]" *(Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206, emphasis added.)

The Legislature has addressed marriage in other statutes. "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division...." (Fam. Code, § 300.) Moreover, the Legislature has also defined how marriages can be dissolved: "Marriage is dissolved only by one of the following: [¶] (a) The death of one of the parties. [¶] (b) *A judgment of dissolution of marriage.* [¶] (c) A judgment of nullity of marriage." (Fam. Code, § 310 (emphasis added).)

As shown below, appellant's marital communications privilege remained intact at the time the alleged conversation between appellant and his then-estranged wife Tannis took place, and the trial court erroneously permitted testimony regarding that privileged conversation.

C. Appellant Had A Right To Assert His Marital Communications Privilege To Preclude The Testimony Of Tannis Curry Relating To The Alleged Admission of Appellant

There was no dispute that appellant and Tannis were legally still married when the communication in issue allegedly took place, nor could there have been. The pipe bombing took place on March 15, 1986 and it was claimed that Tannis repeated the content of her conversation with appellant on April 6 or 7, 1986. The marriage was dissolved on May 13, 1986, and final judgment in the divorce was entered on September 2, 1986. Unquestionably, the appellant and Tannis were legally married when the alleged communication took place. Based on those facts, appellant had a right under Evidence Code section 980, given his timely assertion of the marital communications privilege, to prevent disclosure of any statements he may have made to Tannis concerning the attack on Keith Curry. Thus, the trial court erred in permitting the testimony of Tannis in this regard.

The trial court mistakenly relied on *People v. Johnson, supra*, 233 Cal.App.3d 425 to support its ruling that the law did not extend the privilege to legally married people who were not longer living together. In *People v. Johnson, supra*, 233 Cal.App.3d 425, a wife testified against her husband, a defendant in a preliminary hearing, without any assertion of privilege by the defendant that, while inflicting a beating on her, he told her that what happened to the victim in the criminal case could happen to her. At the time of the wife's testimony, the defendant was also charged in

another criminal proceeding with attempting to murder her. The latter charges were later dismissed. At trial, the defendant attempted to assert his marital communications privilege, but the trial court found it waived when his wife testified at the preliminary hearing.

On appeal, the defendant argued that because that charge was dismissed before trial, the statements he made to his wife should have been afforded the protection of the privilege at trial. The Court of Appeal found the waiver valid under Evidence Code section 912, subdivision (a), which provides in relevant part that the privilege is waived when a holder of the privilege consents to the disclosure of a significant portion of the communication. In response to the defendant's additional claim on appeal that his counsel was ineffective for failing to assert the marital communications privilege to prevent the wife's testimony at the time of the preliminary hearing, the Court of Appeal ruled counsel was not ineffective because there existed no marital communications privilege under Evidence Code section 985, subdivision (a), which provides there is no such privilege in a criminal proceeding when a defendant is charged with a crime against the spouse. (233 Cal.App.3d at pp. 437-438.)

The *Johnson* court commented:

> We doubt, too, whether the statements assumed the mantle of confidentiality when they were first made, inasmuch as defendant, in abusing Lenora, abused the relationship on which the privilege is predicated. In *People v. Carter* (1973) 34 Cal.App.3d 748, the court held a marital communication, made while the husband was assaulting his wife, not confidential. The court observed that "[t]he privilege afforded to a confidential marital communication is based on considerations of public policy which seek to preserve the confidence and tranquility of the marital relationship. The essence of a confidential communication between spouses is

> that it springs from the confidence which exists between them because of the marital relationship. [¶] These public policy considerations would not be served by shielding as confidential and privileged threats against third persons made by one spouse in the course of criminally victimizing the other spouse." (*Id.* at pp. 752-753.)

(233 Cal.App.3d at p. 438.) The trial court here seized on this language to support its ruling that appellant possessed no marital privilege to assert.

The trial court's reliance on this language was error for several reasons. First, this portion of the opinion was dicta. Second, Tannis was not criminally victimized by appellant – it was undisputed that Tannis was not harmed by appellant and that she was not present when Curry was harmed (RT 13082) – so the exception to the privilege under Evidence Code section 985 did not apply. Third, contrary to the trial court's belief, the marital privilege attaches to communications made between spouses until the marriage is legally dissolved; whether the marriage is otherwise viable or intact is irrelevant. (See *Jurcoane v. Superior Court, supra,* 93 Cal.App.4th at pp. 894-895.)

Fourth, the communication was privileged even if appellant did admit to committing the pipe bomb attack on Curry and even if he said he would do it again until Curry was dead. Evidence Code section 981 provides that there is no privilege if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud, *unless the communication was for the purpose of obtaining assistance in the commission of the crime or fraud or in furtherance thereof.* So, the statement to Tannis was not made admissible by the exception provided in section 981. (Cal. Law Revision Com. com., West's Ann. Cal. Evid. Code (2004 ed.) foll. § 981.) The prosecution argued that

Tannis called and confronted appellant after Curry was injured in his car, and appellant admitted to her what he had done and said he would do it again. (RT 13058.) There is no evidence that appellant sought to obtain assistance from Tannis in committing a crime against Curry; in fact, the trial court interpreted the comments to be a threat or "wrong" against Tannis.[101] (RT 13072-13073.) Thus, statements purportedly made by appellant as to what he did or intended to do are communications within the privilege of Evidence Code section 980 and are not within any statutory exception to that rule. (*People v. Dorsey* (1975) 46 Cal.App.3d 706, 719.)

Assuming arguendo that Tannis waived her marital privilege, appellant's right to assert the privilege remained intact (Evid. Code, §§ 912, subd. (b) and 980), and the trial court erred in rejecting appellant's claim of marital privilege.

D. The Erroneous Admission Of The Testimony Of Tannis Curry Requires Reversal Of Appellant's Conviction And Death Judgment

The prosecution argued that evidence of the Curry attacks was admissible under Evidence Code section 1101, subdivision (b) to establish motive for the instant crimes, i.e., appellant has men who were sleeping with his ex-wife killed. (RT 11157.) The prosecution proffered that it would show that Tannis was sleeping with both Curry and Armstrong before they were harmed and that appellant knew and was angry about each affair. (RT 11157.) With regard to the Curry attacks, the prosecution represented to the court that it would establish that: (1) appellant admitted

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[101] The fact that after the pipe bomb incident Tannis divorced appellant and married Curry (11826-11827) also belies the prosecution's oft-stated theory that Tannis was somehow involved in setting both Curry and Armstrong up to be injured by appellant or his agents.

to Tannis the pipe bombing of Curry and told her that he would do it again until Curry was dead; and (2) appellant admitted to Pierre Marshall responsibility for shooting and paralyzing Curry. (RT 11259-11260.)

In admitting the evidence of the attacks on Keith Curry, the trial court stated it was relying on the prosecution's proffer that it would prove two essential factual predicates to the admissibility of that evidence under Evidence Code section 1101, subdivision (b): (1) appellant knew of the affair between Tannis and Curry; and (2) appellant possessed some animus about that relationship. (RT 11158.) The trial court ruled, "Without that, you [the prosecution] really don't have a whole lot other than that otherwise unexplained shooting by Mr. Smith. In other words, for this to make any sense at all, it has got to come back to Mr. Bryant's relationship with this young woman [Tannis] and some demonstrable proof that he was angry about this, and that Mr. Curry's problems began at or near the time he took up with her." (RT 11158-11159.)

The prosecution's proffer that Pierre Marshall's testimony would supply a factual underpinning for the admissibility of this evidence never materialized. After Marshall's denial that appellant made such an admission (RT 11752-11756), Detective Vojtecky testified that Marshall had told him that the meeting between Marshall and appellant took place for two reasons: (1) because a cousin of Marshall, Derrick Johnson, owed the Family the cost of a half kilo of cocaine; and (2) Marshall had slept with Jeff Bryant's wife a couple of years prior and the word was on the street that there was a hit out on him. According to Marshall's statement, as he sat down to talk with appellant, appellant began holding his hands in a deformed fashion around his head while laughing, and said, "Remember how that nigger got paralyzed?" Marshall knew appellant was referring to

Curry. (RT 11791-11793.) Appellant's comments and gestures hardly constitute an admission that he was responsible for shooting Curry. In fact, the trial court deemed another shooting of Curry, which resulted in Curry's paralysis, inadmissible in the instant case. (RT 10949, 11274, 11292-11293.)

If the trial court had properly upheld the application of the marital communications privilege to the alleged conversation between appellant and Tannis, Tannis would not have been compelled to testify about the communication. Therefore Derby's testimony regarding Tannis's statements in the beauty parlor would have been inadmissible hearsay. (See RT 11288, 11303-11304.) Derby's testimony was that only evidence that showed the factual predicates, as determined by the trial court, to the admissibility of the Curry attacks under Evidence Code section 1101, subdivision (b). Therefore, had appellant been afforded his right to assert his marital communications privilege, the prosecution would not have met its burden of establishing the factual predicates for the admissibility of any of the evidence regarding the attacks on Keith Curry.

Given the weakness of the case against appellant and the inflammatory nature of this evidence, its admission, particularly in combination with the other bad character evidence discussed in Argument VII, *ante*, was prejudicial. The erroneously admitted evidence regarding the attacks on Keith Curry was extremely damaging and prejudicial to appellant's case. Appellant's trial counsel noted the pathos and sympathy for the prosecution's case evoked by the testimony of a quadriplegic. The error is even more egregious considering that Curry was paralyzed from a shooting the court ruled unrelated to this case. The testimony of Pierre Marshall did nothing but communicate to the jury that appellant was not a

nice man, but rather was one who would laugh at the fact that Curry had been paralyzed and who would use a word very derogatory to African Americans. Since the trial court's erroneous ruling on appellant's marital privilege led to the admission of highly prejudicial evidence relating to the attacks on Keith Curry; such error was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Further, the emotional impact of this evidence unfairly prejudiced and inflamed the jurors against appellant, and its admission infected the trial with unfairness and lightened the prosecution's burden of proof in violation of appellant's rights to due process, a fair trial and impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and analogous provisions of the California Constitution. (*In re Winship, supra,* 397 U.S. at p. 364; *Estelle v. McGuire, supra,* 502 U.S. at p. 67; see e.g., *Sandstrom v. Montana, supra,* 442 U.S. at pp. 520-524; *McKinney v. Rees, supra,* 993 F.2d 1378.)

In addition, the trial court's failure to apply the California Evidence Code in a non-arbitrary manner violated appellant's liberty interest in violation of due process by arbitrarily depriving him of a liberty interest created by Evidence Code sections 912, 980 and 1101 not to have his guilt determined inadmissible evidence or by propensity evidence. (*Hicks v. Oklahoma, supra*, 447 U.S. at pp. 346-347.) By ignoring well-established state law that prevents the State from using evidence admitted for a limited purpose as general propensity evidence and excludes the use of unduly prejudicial evidence as well as privileged marital communications, the state court arbitrarily deprived appellant of a state-created liberty interest.

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (*See Lockett v. Ohio, supra,* 438 U.S. at

pp. 603-605; *Beck v. Alabama, supra,* 447 U.S. at p. 638; *Penry v. Lynaugh, supra,* 492 U.S. at p. 328, *abrogated on other grounds Atkins v. Virginia, supra,* 536 U.S. 304.)

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IX

THE ERRONEOUS ADMISSION OF PREJUDICIAL HEARSAY EVIDENCE REQUIRES REVERSAL

The trial court erred in admitting numerous hearsay statements, including testimonial statements that had never been subject to cross-examination, as well as hearsay statements not properly within any exception to the hearsay rule. The improperly admitted evidence included: the tape-recorded police interrogation of Andre Armstrong; statements of Winifred Fisher during police interrogation relevant to the Ken Gentry shooting; the out-of-court statements by Ken Gentry to Benny Ward; and a portion of the tape-recorded statement of William "Amp" Johnson. In addition to violating state evidentiary rules, the erroneous admission of each statement deprived appellant of his right to confront witnesses under Sixth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution. Each error and its attendant prejudice to appellant's case will be discussed individually below, followed by a discussion of the prejudice resulting from the aggregate errors.

A. General Principles Of Relevant Law

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.) "Hearsay" is defined in Evidence Code section 1200 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." Read literally, the Sixth Amendment would exclude all hearsay.

However, as discussed below, the United States Supreme Court has interpreted the Sixth Amendment as allowing the admission of nontestimonial hearsay provided sufficient indicia of reliability can be demonstrated. It prohibits the admission of testimonial hearsay unless the declarant is unavailable and there has been a prior opportunity for cross-examination.

The U.S. Supreme Court recently 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 High 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 nontestimonial hearsay is at issue, *Crawford* held that the Sixth Amendment, consistent with *Ohio v. Roberts* (1980) 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 wished to use against a defendant and where the hearsay bore certain "indicia of reliability." (*Roberts, supra*, at p. 65; *Snyder v. Massachusetts* (1934) 291 U.S. 97,107.) In assessing whether a particular hearsay statement bears sufficient "indicia

of reliability" to satisfy the Confrontation Clause, courts "essentially determine whether the historical reasons for believing that a particular type of statement is inherently reliable have withstood the test of time." (*People v. Farmer* (1989) 47 Cal.3d 888, 905.) This test may be satisfied if the statement falls within a long-recognized hearsay exception, such as the exception for spontaneous utterances. (*Ibid.*)

Thus, nontestimonial hearsay is inadmissible unless it qualifies under an exception, and the proponent of the evidence has the burden of proof that a statement comes within an exception to the hearsay rule. (*People v. Ramos, supra,* 15 Cal.4th at p. 1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.) Each hearsay exception has its own foundational requirements that must be met before the admission of any statement. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57, citing *Chambers v. Mississippi, supra,* 410 U.S. at p. 302.)

As explained below in the subdivisions dealing with specific forms of nontestimonial hearsay introduced at trial, the specific hearsay items introduced by the prosecution did not possess the foundational requirements for any hearsay exceptions. Furthermore, for none of these statements was there a showing of trustworthiness or reliability.

Because confrontation ensures the reliability of the fact finding process (*Crawford, supra*, 124 S.Ct. at pp. 1373-1374; *Roberts*, *supra*, 448 U.S. at pp. 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. Furthermore, to the extent that the introduction of some of these hearsay statements violated only state evidentiary law, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable

death judgment were violated by the State arbitrarily withholding a nonconstitutional right provided by its laws. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 1, 7, 15, 16; Woodson v. North Carolina, supra, 428 U.S. 280; *Gardner* v. *Florida, supra,* 430 U.S. 349; *Ross v. Oklahoma* (1988) 487 U.S. at pp. 88- 89; see *Hicks v. Oklahoma, supra,* 447 U.S. 343.)

B. Erroneously Admitted Testimonial Hearsay

1. The Tape-Recorded Police Interrogation Of Andre Armstrong

As previously stated, one of the victims in this case, Andre Armstrong, was convicted of the 1982 killing of Ken Gentry. (RT 9386.) While Armstrong was in prison, on July 23, 1983, as part of an investigation into the murder of Ken Gentry's father, Charles Gentry, police interrogated Armstrong and tape-recorded much of that interview. (RT 9405-9417.) During that interview, Armstrong said, inter alia, that: the Bryants contracted with Armstrong to shoot Ken Gentry and Reynard Goldman; appellant paid Armstrong $15,000 after Ken Gentry was killed; the Bryants were supposed to take care of witnesses after Armstrong's arrest for the Ken Gentry homicide, but they failed to do so; Armstrong was convicted and sentenced to 28 years to life for that crime; Armstrong believed the Bryants owed him and that they were "lightweights;" Armstrong said it was going to be "messy in Pacoima" if and when he was released from prison; the Bryants owed him and he intended to "squeeze" the Bryants; he had killed about seven people but would not kill children if offered millions of dollars. (3 SUPP CT 10473-10545.) The prosecution moved in limine to admit the tape recording of the Armstrong interrogation; the State contended that the tape was admissible under the following

hearsay exceptions: (1) declaration against penal interest as defined by Evidence Code section 1230; (2) statement of a then-existing mental state as set forth in Evidence Code section 1250, subdivision (a)(1) and (a)(2); (3) statement of a present intent to prove a future act by an unavailable declarant, admissible under Evidence Code section 1250 and *People v. Alcalde* (1944) 24 Cal.2d 177; and (4) hearsay statement of an available declarant admissible under Evidence Code section 1350. (CT 14296-14395.)

Appellant argued that none of these hearsay exceptions was properly applied to the taped interrogation, that the statements of Armstrong were inherently untrustworthy, and that the admission of the tape would violate appellant's "Sixth Amendment and analogous state constitutional rights to confrontation and cross examination," as well as his constitutional rights to due process and to a fair trial. (CT 14505-14534.) Appellant also joined in codefendant Wheeler's opposition to the admission of the interrogation. (See RT 7971-7980; CT 14496-14504.)

The court initially attempted to defer judgment regarding the admissibility of the tape as a whole by deciding only what portions of the tape it would allow the prosecution to refer to in its opening statement. (RT 7978.) The court ruled that the prosecution could refer to what Armstrong said regarding the Ken Gentry murder and Goldman assault in order to show "the genesis" of the instant offenses, the fact that Armstrong believed that he was owed money or other consideration for the Ken Gentry homicide, and that Armstrong intended to make good on that obligation later. (RT 7979.) Appellant objected to the deferred ruling and argued that if the court permitted the prosecution to address portions of the tape, then the defense would need to address other portions of the tape in its opening

statements. (RT 7979-7980.) There was no further discussion of this issue on the record other than the court indicating it previously ruled the tape admissible. (RT 9084.)

The tape of the Armstrong's interview, Exhibit 74, was admitted into evidence over defense objection and was played for the jury. (RT 9414-9418, 13819; 3 SUP CT 10473-10545.) A short passage containing a discussion of codefendant Smith's relationship by marriage to a member of the Bryant family was excised. (*Ibid.*) In addition, there was a stipulation that Armstrong's reference to a "Johnny" did not refer to codefendant Settle and that Armstrong's reference to Lisa Settle did not refer to a relative of the codefendant Settle. (*Ibid.*)

The admission of the taped interrogation of decedent Andre Armstrong clearly violated appellant's Sixth Amendment right to confrontation. The *Crawford* Court held that, with regard to testimonial hearsay, the Confrontation Clause demands that the declarant be both unavailable **and** that the defendant had a prior opportunity to cross-examine the declarant. (*Crawford, supra*, 124 S.Ct. 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. (*Crawford, supra*, 124 S.Ct. at pp. 1364-1365, 1374.) Thus, 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 admission (*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.

Under *Chapman*, the State has the burden to prove beyond a reasonable doubt the error did not contribute to the verdict obtained. (*Chapman*, *supra* 386 U.S. at p. 24.) "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." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Applying the *Chapman* standard, appellant was indeed prejudiced by the admission of the taped-recorded police interrogation of Andre Armstrong. The taped-interrogation provided the only direct "evidence" of appellant's alleged involvement in the shootings of Gentry and Goldman: Armstrong said that appellant paid Armstrong $15,000 after the Ken Gentry killing. (3 SUPP CT 10528-10529) The evidence of appellant's involvement in the Gentry homicide was otherwise hotly contested. (See, e.g., testimony of Michael Flowers, G.T. Fisher, Benny and Barron Ward, denying appellant's alleged involvement. (RT 8837-8838, 8883-8899, 8925-8930, 8939, 9022-9026.) Additional evidence established that the charges brought against appellant in those cases were dismissed. (RT 9344.) Thus, the other evidence adduced at trial did not implicate appellant and did not contradict defense evidence that Armstrong acted alone in killing Ken Gentry and that Armstrong shot Gentry because of jealousy over a mutual love interest. (RT 8217, 8940, 9029, 15162-15163, 15022-15031.)

The erroneous admission of the taped interrogation led to the erroneous admission of other evidence prejudicial to appellant's case. Appellant objected to the admission of the following proffered by the

prosecution: after Armstrong's arrest, Rhonda Miller, a potential eyewitness against him, was visited by Rochelle and Tannis (who at the time were the girlfriends of Jeff and Stanley Bryant, respectively) during which visit Rochelle offered Miller money from Jeff not to inculpate Armstrong in the Ken Gentry shooting. (RT 9075-9076); after Miller refused the money, she was visited by her abusive husband Alvin Brown, who told Miller to take the money (RT 9076-9077); Brown had been bailed out by Jeff and appellant's mother, Florence Bryant, using a house on Louvre Street as collateral. (RT 9080.)

Appellant argued that the admission of such evidence: (1) impinged on appellant's First Amendment right to freedom of association, that it tended to inculpate appellant based on his blood relationship to Jeff Bryant; (2) was more prejudicial than probative under Evidence Code section 352; and (3) to the extent the prosecution relied on a conspiracy theory for the evidence's admission, no foundation had been laid. (RT 9078-9079.) The defense further argued that they did not contest Armstrong's guilt of the Gentry shooting, but maintained that he did it as a solo venture. (RT 9083.) The trial court ruled the evidence admissible to belie the inference that Armstrong was an independent actor and to buttress the credibility of Armstrong during the taped interrogation in which he states he was paid by the Bryants to do the shooting. (RT 9084.) Under the court's ruling, none of this evidence would have been admissible had it not been for the erroneous admission of the taped interrogation of Andre Armstrong.

The prosecution emphasized the importance of the tape-recorded interrogation to its case at the start of its closing argument by informing the jurors of their good fortune: "It isn't often that a jury hears the voice from the grave of one of the victims explaining the motive and why what

happened here happened." (RT 16430L.) The prosecution then argued Armstrong's statements should be considered for the truth of the matter asserted in them (his statements), that is, that Armstrong shot both Gentry and Goldman for the Bryants. The prosecution also argued that the tape showed Armstrong felt the Bryants owed him for those shootings and that he was killed because he was a threat. (RT 16430L-16430M.)

The prosecution further used the taped interrogation of Armstrong to inflame the passions of the jurors by arguing that, even though Armstrong was a man who admitted to the cold-blooded murder of at least seven people, he had standards because he said he would not kill children for a million dollars: "But killing children, folks. Even among hit men and killers there are some standards. And there is nothing lower than what happened in this case. All to protect – to put money in their pockets. That's the sad part." (RT 16430-O.)

The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials: confrontation. (*Crawford, supra*, 124 S.Ct. at pp. 1373-1374.) In this case, the prosecution was permitted to use testimonial statements of a dead man, which had never been subject to cross-examination, to convict appellant of capital murder. Given the circumstances set forth above, the State cannot carry its burden of proving that the guilty verdict actually rendered in this trial was surely unattributable to the erroneous and unconstitutional admission of the tape-recorded police interrogation of Andre Armstrong. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Appellant's conviction and judgment of death must be reversed.

2. Statements Of Winifred Fisher During Police Interrogation Relating To The Investigation Of The Ken Gentry Homicide

During the investigation of the Ken Gentry homicide, Detective David M. Stachowiski interrogated Winifred Fisher in a room in the Foothill Police Station. (RT 8640-8641.) Winifred Fisher was deceased at the time of appellant's trial. (RT 8642.) The defense objected to the admission of the content of that interrogation of Fisher on hearsay grounds. (RT 8641.) The court overruled the objection, implicitly ruling that the statements of Fisher were admissible because Fisher was dead. (RT 8642.) Thereafter, the detective testified that Fisher told him that: he, Ken Gentry and Michael Flowers bought "bunk" dope from a man named Bryant; they attempted to get their money back from that Bryant, but were refused; in retaliation, the three stole and vandalized Roscoe Bryant's van; the three were seen doing this, and Bryant and his friends were upset over it. (RT 8643-8648.) Appellant was not named in the report. (RT 8647.)

The trial court clearly violated appellant's Sixth Amendment right to confront witnesses against him when it ruled that Fisher's statements made during police interrogation were admissible simply because he was deceased. Fisher's statements were testimonial hearsay, admissible only if appellant also had had a prior opportunity to cross-examine Fisher regarding the content of the statements. (*Crawford, supra*, 124 S.Ct. at p. 1374.)

The state cannot sustain its burden of proving beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman, supra,* 386 U.S. at p. 24; *Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

Fisher's statement established a motive for the shooting of Gentry, which appellant was not able to dispute through cross-examination. The evidence of appellant's involvement in the Gentry homicide was otherwise hotly contested. (See, e.g., testimony of Michael Flowers, G.T. Fisher, Benny and Barron Ward, denying appellant's alleged involvement. (RT 8837-8838, 8883-8899, 8925-8930, 8939, 9022-9026.) During closing argument, the prosecution argued that Fisher's statement should be considered for its truth and used the reference to Fisher to imply that appellant was responsible for Fisher's death: "You know . . . [the reason Ken Gentry was killed] from Winifred Fisher. He's dead too." (RT 16447.) The erroneously admitted evidence was therefore patently prejudicial, requiring reversal of appellant's conviction and judgment of death.

3. Statements Admitted Pursuant To *California v. Green* When The Witness Denies Making All Or Part Of The Statement At Trial

In this case, numerous prior statements of testifying witnesses were introduced pursuant to *California v. Green* (1970) 399 U.S. 149, 165-168, which permits the introduction of prior statements made by testifying witnesses to law enforcement that are inconsistent with the witnesses's trial testimony. In *Crawford*, the Supreme Court held the Confrontation Clause does not bar admission of a prior statement to law enforcement so long as the declarant is present at trial to defend or explain the statement. (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1369.) To the extent that testifying witnesses in this case denied in whole or in part prior statements to law enforcement, appellant submits that since the declarants did not defend nor explain the prior statements, the Confrontation Clause was not satisfied; the prior statements introduced through the testimony of law

enforcement officers therefore violated appellant's rights under the Sixth Amendment. (*Ibid.*)

C. Other Erroneous Rulings On Hearsay Evidence

1. Prior Statements Of Benny Ward Were Not Inconsistent With His Trial Testimony

Benny Ward was with Ken Gentry prior to and at the time of the Gentry shooting. (RT 8923-8924.) He was called by the prosecution in this case and testified to the circumstances surrounding the homicide. (RT 8925-8939.) After his testimony, the prosecution sought to introduce the statements Ward made about the shooting to a detective in 1982 and to the prosecution in 1992. (RT 8973-8978, 8983, 9002-9007.) Over defense objection, the court found Ward's testimony to be evasive and his statements admissible under the prior inconsistent statement exception to the hearsay rule. (RT 8977.)

Benny Ward's prior statement to law enforcement was improperly admitted as a prior inconsistent statement under Evidence Code section 1235. A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.[102] The "fundamental requirement" of section 1235 is that the

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[102] Evidence Code section 1235 provides as follows: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides that: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to

(continued...)

statement, in fact, be inconsistent with the witness's trial testimony. (*People v. Sam* (1969) 71 Cal.2d 194, 210.) Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. (*People v. Green* (1971) 3 Cal.3d 981, 988.) However, courts do not apply this rule mechanically. "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness." (*Ibid.*) When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. (*Id.* at pp. 988- 989.) As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220 [citation omitted].)

Examination of the record discloses no reasonable basis for a belief that the testimony Benny Ward gave at trial was materially inconsistent with his statement to law enforcement some 13 years prior. The record reflects, as trial counsel argued, that Ward answered questions regarding the shooting and had genuinely attempted to recall what had happened some 13 years prior. (RT 8973-8975.) Ward testified that he was shocked and upset when the shooting occurred, and that that affected his memory of the events. (RT 8926, 8930, 8975.) Admission of Ward's prior statements to law enforcement was, therefore, erroneous. (*People v. Johnson*, *supra,* 3 Cal.4th at pp. 1219-1220; see *People v. Arias, supra,* 13 C.4th at p. 153

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[102](...continued)
deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

[testimony of defendant's mother, a prosecution witness, was not sufficiently inconsistent with her prior statements to detective].)

2. Statements Of Ken Gentry Contained In Benny Ward's Prior Statements Were Inadmissible Hearsay

Further, the trial court erred in admitting hearsay statements of Ken Gentry contained in Ward's prior statements to police. Within Ward's 1982 statement, Ward said that while he was sitting in the car with Gentry prior to the shooting, Gentry said, "There goes the niggers I got a beef with. I ain't got my shit but I'd get down with them." (RT 8979.) Ward then looked up and saw a brown Cadillac driving by, and Gentry said, "It is a nigger named Stanley." (*Ibid.*) In a 1992 interview, Ward was asked about his earlier police statement and seemed to recall Gentry's reference to "Stanley." (RT 9002-9007; 3 SUPP CT 10618-10620.)

The court asked for a separate basis for the admissibility of those statements. (RT 8978.) The prosecution argued that they were spontaneous statements and therefore admissible as a hearsay exception under Evidence Code section 1240. (RT 8978-8979.) The defense argued: (1) the statement was ambiguous in that Ward reported that there were two Cadillacs that had driven by, and the statement was not clearly in response to the first sighting; and (2) it did not qualify as a spontaneous statement. (RT 8980.) The court overruled the objection. (RT 8980.) The court said it understood "I don't have my shit" to mean that Gentry did not have his gun, and that since Gentry expressed a desire to arm himself moments after seeing the person or persons drive by, it was "the type of event described in 1240(a), an act, condition or event perceived by the declarant which might cause a bit of a fright." (RT 8980-8981.) The statement was subsequently introduced

through the testimony of the detective who interviewed Ward after Gentry's murder. (RT 8983-8995.)

> Evidence code section 1240 provides:
>
> Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

As interpreted by this Court, to render statements admissible under the spontaneous declaration exception, it is required that:

> (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.

(*Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468; accord, *People v. Poggi* (1988) 45 Cal.3d 306, 318.)

The crucial element in determining whether a declaration is sufficiently reliable to be admissible under excited utterance exception to the hearsay rule is not the nature of statement, but the mental state of speaker. (*People v. Roybal* (1998) 19 Cal.4th 481, 516.) It is clear that the statements of Gentry do not qualify under this exception because there was no showing and no basis to conclude that seeing appellant was necessarily a startling event to Gentry or that Gentry was upset when he made the statements. 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 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 [victim, who was crying and had abrasions, was screaming for help as the police arrived shortly after assault].)

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 people who drove by, but Ward did not describe anything that would indicate that Gentry possessed a mental state remotely similar to those described by the cases interpreting Evidence Code section 1240. Gentry did not appear fearful or startled: he remained in the parking lot, did not attempt to flee, and he did not attempt to find a weapon with which to arm himself. Rather, he continued working on his car. Given Gentry's actions at and after the time the statements were made, the statements can only be interpreted as those of a man communicating to his friend that he believed he could handle the person or persons with whom he had a "beef" without a weapon. Contrary to the court's ruling, there is no evidence that the sighting of "Stanley" or anyone else gave Gentry even a "bit of a fright." Therefore, this did not qualify under any exception to the hearsay rule and should not have been admitted into evidence. (See *People v. Pearch* (1991) 229 Cal.App.3d

1282, 1291 [statement inadmissible where evidence unclear that speaker was excited or under the influence of the event].)

The hearsay statement attributed to Gentry by Benny Ward's statement established a motive for the shooting of Gentry, which appellant was not able to dispute through cross-examination. As referenced above, the evidence of appellant's involvement in the Gentry homicide was otherwise hotly contested. (See, e.g., testimony of Michael Flowers, G.T. Fisher, Benny and Barron Ward, denying appellant's alleged involvement (RT 8837-8838, 8883-8899, 8925-8930, 8939, 9022-9026.) The erroneously admitted evidence was therefore patently prejudicial, requiring reversal of appellant's conviction and judgment of death.

3. The Prior Statement Of William "Amp" Johnson Regarding His Belief In Appellant's Guilt Was Inadmissible Hearsay

After William "Amp" Johnson testified at trial, the prosecution moved to play an edited portion of a law enforcement interview of Johnson that took place in November, 1994. Appellant objected to the portion of the tape in which Johnson stated that the prosecution did not have the "wrong people" in custody on the instant homicides as hearsay without foundation and speculation. (RT 10202-10212.) The prosecution conceded the statement would normally have been inadmissible hearsay, but argued that it should be admitted because appellant's counsel questioned Johnson on the subject. (RT 10206.) The court agreed that the statement probably reflected an "opinion...without foundation" but ruled that that part of Johnson's statement was admissible because appellant's counsel had questioned Johnson about whether he had said that the wrong people were in custody. (RT 10205-10206.) Appellant's counsel then argued that he

never asked Johnson about Johnson's opinion as to whether the defendants were correctly arrested on the instant crimes; rather, counsel had asked Johnson about whether had had told law enforcement a person who was involved had been arrested and released, and that Johnson then corrected counsel's misunderstanding of Johnson's statement on that subject. (RT 10209.) The court ruled the tape, including Johnson's opinion that the right people were being prosecuted for the instant crimes, was admissible as a prior inconsistent statement that could be considered for the purposes of determining the witness's credibility as well as for the truth of the matter asserted. (RT 10216-10220; 3 SUPP CT 10604.)

The portion of the Johnson statement appellant objected to was hearsay not within any exception. It was not a prior inconsistent statement under Evidence Code section 1235 because, contrary to the court's ruling, counsel had not questioned the witness on that part of his statement, and therefore the witness made no statement, inconsistent or otherwise, regarding his opinion of whether the right or wrong people were in custody for the Wheeler Avenue homicides. (Compare *People v. Dominguez* (2004)___ Cal.4th ___, ___ [police officer's opinion of guilt improper testimony; no error because elicited by defense].)

In addition, it is well established that a witness's opinion regarding the guilt or innocence of the defendant is inadmissible. (*People v. Torres* (1995) 33 Cal.App.4th 37, 47 [citations omitted].) Further, standing alone, as both the court and the prosecution conceded, that portion of Johnson's statement was inadmissible under Evidence Code section 702, which requires that a person have personal knowledge as to any matter to which he testifies, and that such "must be shown before the witness may testify concerning the matter." In other words, for hearsay evidence to be

admissible under any exception it must be trustworthy and the witness must be have personal knowledge of the events. (*People v. Tatum* (2003) 108 Cal.App.4th 288, 289.) The statement was, as the court noted, opinion without foundation or personal knowledge. (RT 10205-10206.)

The prosecution emphasized Johnson's taped statement during closing argument, quoted the portion objected to by the defense, and argued that the jurors needed to listen to the Johnson tape "to get some insight on these people." (RT 16475-16476.) In the tape, Johnson directly implicated appellant in the instant crimes. In summary, the portion of the Johnson statement objected to by appellant was hearsay for which no exception existed, and was patently prejudicial. The trial court erred in admitting that evidence.

D. Prejudice

The cumulative effect of the erroneous admission of hearsay evidence at appellant's trial was prejudicial to appellant's case. Because the introduction of this evidence violated appellant's federal constitutional right to confront witnesses, it must be judged under the standard established by *Chapman v. California, supra*, 386 U.S. 18, requiring reversal unless the error was harmless beyond a reasonable doubt. Much of the evidence went a long way to establishing the motive for the underlying crime, namely, the desire of Armstrong to collect for a debt owed to him for killing Ken Gentry. More damaging to appellant, the erroneously admitted statements tied him *personally* to that motive, a link that was otherwise a hotly contested issue and denied by most prosecution witnesses. The prejudice from the erroneously admitted statements was exacerbated by the prosecution's exploitation of the evidence in closing argument, as discussed above. Given the foregoing circumstances, the State cannot carry its burden

of proving that the guilty verdict actually rendered in this trial was surely unattributable to the error. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Appellant's conviction and judgment of death must be reversed.

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THE TRIAL COURT ERRONEOUSLY ADMITTED OPINION TESTIMONY THAT INVADED THE PROVINCE OF THE JURY

A. Proceedings Below

Detective James Dumelle testified regarding investigations he conducted into drug sales in the Pacoima area in 1985. His testimony included describing the execution of search warrants at 13037 Louvre Street and 11442 Wheeler Ave, citing appellant at Neighborhood Billiards for failing to have proper permits, and interviewing Kenny Reaux after his arrest at the Wheeler house. Detective Dumelle testified that Reaux told him that appellant had recruited him to work at the Wheeler house and that he did not want to talk because Jeff Bryant would kill him. (RT 9628-9653, 9706.)

While appellant objected to the relevancy and admissibility of evidence of drug operations from this time period (see Argument VII, *ante*), appellant additionally objected when the prosecution sought to elicit from Detective Dumelle his opinion, given his "understanding of the people running this organization," as to whom Jeff Bryant would leave in charge of narcotic sales operations while he served his prison term. (RT 9707.) Appellant objected to the question, arguing it sought to elicit improper opinion testimony and lacked of foundation. (*Ibid.*) Detective Dumelle then testified he believed Jeff Bryant would leave appellant in charge. (*Ibid.*)

B. Detective Dumelle's Opinion As To Who Was In Charge Of Narcotic Operations While Jeff Bryant Was Incarcerated Was Improper And Prejudicial

Generally, a witness may testify only about matters of which he or she has personal knowledge. (Evid. Code, § 702, subd. (a).) A lay witness may provide opinion testimony if such opinion is rationally based on the perception of the witness and is helpful to a clear understanding of his or her testimony. (*Id.*, § 800.) "[A] lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording." (*People v. Miron* (1989) 210 Cal.App.3d 580, 583.) "Where the witness can adequately describe his observations, his opinion or conclusion is inadmissible because it is not helpful to a clear understanding of his testimony." (*Ibid.*; in accord, see *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)

In this case, Detective Dumelle was not qualified as an expert witness in any regard. He more than adequately testified regarding his observations during the execution of search warrants and other activities conducted during the investigation into narcotic sales in the Pacoima area in 1985. Arguably, his lay opinion that Jeff Bryant was in charge of the Family business was reasonably based on his observations given that the homes in which indicia of drug sales were found belonged to Jeff Bryant and given Reaux's statement to him. However, his opinion of whom Jeff Bryant would leave in charge of his business while in prison was inadmissible because it was not based on his perceptions and it was not helpful to the jury's understanding of his testimony.

Assuming arguendo this Court finds Detective Dumelle qualified as an expert on drug operations in the Pacoima area in 1985, his opinion

testimony that Jeff Bryant would have put appellant in charge of operations while he was incarcerated was nonetheless improper opinion testimony.

An expert witness is one who has special knowledge, skill, experience, training, or education sufficient to qualify as an expert on the subject to which his or her testimony relates. (Evid. Code, § 720.) An expert may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (*Id.* at § 801.) The opinion must be based on matter perceived by, or personally known, or made known to the witness at or before the hearing that is of the type that reasonably may be relied on in forming an opinion on the subject to which the expert's testimony relates. (*Ibid.*) On direct examination, an expert may state the reasons for his or her opinion and the matter upon which the opinion is based. (*Id.* at § 802.) Additionally, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (*Id.* at § 805.) This rule, however, "does not permit the expert to express any opinion he or she may have." (*People v. Killebrew* (2003) 103 Cal.App.4th 644, 651 ("*Killebrew*").)

An examination of cases exploring the proper use of expert opinion testimony on gangs is instructive. In *People v. Gardeley* (1996)14 Cal.4th 605, 617 ("*Gardeley*"), this Court concluded that "the subject matter of the culture and habits of criminal street gangs" can be the appropriate subject of expert testimony pursuant to Evidence Code section 801. The admission of such testimony may be admissible when the testimony is used to educate the trier of fact "concerning territory, retaliation, graffiti, hand signals, and dress." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506; see also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) In *Gardeley*, the expert

permissibly testified on the primary purpose of the gang in question, and that the actions for which the defendants were being prosecuted were gang related. (*Id.* at pp. 612-613.)

Gardeley, however, is not authority for allowing officers who testify as gang experts to state any opinions they may have about gangs and gang activities. (See *Killebrew, supra*, 103 Cal.App.4th at p. 654.) While it may be appropriate to admit evidence regarding gang culture and habits to provide the jury with some understanding of gang actions and to put the crimes in context, this does not "bestow upon an expert carte blanche to express any opinion he or she wishes." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) Indeed, "testimony that a specific individual had specific knowledge or possessed a specific intent" is not the proper area of gang expert testimony. (*Killebrew, supra*, 103 Cal.App.4th at pp. 656-658, and cases cited therein.)

In *Killebrew*, the defendant was convicted of felony conspiracy to possess a handgun after members of his gang were involved in a drive-by shooting. The prosecution's theory was that the shooting would generate retaliation, which would have compelled the occupants of three vehicles to conspire to possess the gun that was recovered. The prosecution relied heavily on the expert's testimony, which went far beyond a general discussion of gangs and gang psychology. The expert testified, for example, on the subjective knowledge and intent of the occupants of the car, opining that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id.* at p. 652.)

The Court of Appeal found this testimony to be improper and inadmissible. The court noted that testimony regarding the "knowledge and

intent" of each occupant was much different from "expectations" of gang members in general when confronted with a specific action. (*Id.* at p. 658.) The court recognized that the expert testimony was "the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided." (*Ibid.*) The court noted:

> Testimony that a gang would expect retaliation as a result of a shooting such as occurred at Casa Loma Park, that gangs would travel in large groups if expecting trouble, that in a confrontation more than one gang member may share a gun in some identified circumstances, and that oftentimes gang members traveling together may know if one of their group is armed, would have been admissible. Beyond that, [the gang expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

(*Id.* at p. 658.)

Similarly, in appellant's case, assuming arguendo Detective Dumelle was an expert in the narcotic activities of the "Family," it was nonetheless impermissible for him to testify about the subjective beliefs of the witnesses – that is, that Jeff Bryant believed appellant was the person to whom he believed most qualified to run the business while Jeff was in prison. As in *Killebrew*, this type of testimony regarding the specific state of mind of individuals was irrelevant and improper. In essence, the prosecution presented a police officer who vouched for the credibility of its other witnesses who testified or claimed in out-of-court statements that they believed appellant was in charge of operations while Jeff was in prison. It is impermissible, however, for the State to place the prestige of the government behind a witness. (See *People v. Sergill, supra*, 138 Cal.App.3d 34 [police officer not qualified to testify regarding truthfulness

of one who claimed to be victim of crime]; cf. *People v. Fierro* (1991) 1 Cal.4th 173, 211 ["Impermissible 'vouching' may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony"]; United States v. Roberts (9th Cir. 1980) 618 F.2d 530, 533 ["the government may not vouch for the credibility of its witnesses, either by putting its own prestige behind the witness, or by indicating that extrinsic information not presented in court supports the witness's testimony"].)

The issue of who was running narcotic sales operations in the Pacoima area on August 28, 1988 was central to the prosecution's case. The prosecution's theory of the case was that whomever was in charge arranged to have Armstrong and the others killed because Armstrong posed a threat to the business. Testimony that Jeff Bryant would have put appellant in charge while Jeff was in prison unfairly skewed the evidence in the prosecution's favor and supplanted the jury's factfinding role.

The admission of Detective Dumelle's opinion that appellant ran the operations while Jeff Bryant was in prison usurped the jury's role as fact finder, rendered the trial fundamentally unfair, lightened the prosecution's burden of proof, unduly inflamed the jury, deprived appellant of his right to confront and cross-examine witnesses, undermined the need for heightened reliability at all stages of a capital case, and constituted an arbitrary deprivation of appellant's liberty interest in the application of state evidentiary rules, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

XI

THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING IRRELEVANT, 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, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and parallel provisions of the state constitution by admitting irrelevant, inflammatory, gruesome, and cumulative photographs of the victim's body.

A. Proceedings Below

The defense objected to showing the jury photographs of Loretha and Chemise 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.)

In response, the prosecution stated that this had been the first time that it had heard the defense was willing to stipulate that the scalp came

from Brown, as it had previously understood that the defense was claiming 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 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. (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 defense renewed these objections when the exhibits were admitted at the end of trial. The defense objected to the x-ray and another set of photographs of Chemise on the grounds of relevance. 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.)

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 from Lopez Canyon in People's Exhibit Nos. 46 and 47, arguing that they 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 ("*Marsh*").) 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." (*Marsh, supra*, 175 Cal.App.3d, at p. 998; quoting *People v. Burns* (1952) 109 Cal.App.2d 524, 541.) In *Marsh, supra*, the prosecutor argued that the autopsy photographs were relevant to show the amount of force used to inflict the fatal blows. (*Id.* at p. 997.) The Court of Appeal 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, 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.*)

Other 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 have 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. (*People v. Staten, supra,* 24 Cal.4th at pp. 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 they helped explain the mental state of the two witnesses who found the victims. That mental state, when the first witness made statements to the police, had been the subject of some litigation. (*Id.* at p. 16.)

On the other hand, admission of irrelevant and lurid photographs may render a trial fundamentally unfair. (See, e.g., *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548.) When a trial court's ruling admitting prejudicial evidence renders a trial fundamentally unfair, regardless of whether the ruling complies with or violates state evidentiary law, the ruling runs afoul of the Due Process Clause. (*Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 919.) The wrongful admission of this type of evidence also violates the Eighth Amendment prohibition on cruel and unusual punishments, extended to the states through the Fourteenth Amendment, which encompasses the right to a fair and reliable guilt and

penalty determination. (*Gardner v. Florida, supra,* 430 U.S. at pp. 357-358; *Lockett v. Ohio, supra,* 438 U.S. at p. 605.)

C. Application Of The Law To The Facts Of This Case

Applying these principles, it is clear that the trial court erred in admitting the photographs objected to by the defense. The most important lesson from the foregoing cases is 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. The instant case presents precisely such a situation.

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 and Armstrong's body rendered the photographs of questionable value for that use. Furthermore, it is important to note that many of the purported reasons for this evidence which the prosecution presented are of dubious relevance. For example, the prosecution argued for the admission of the photographs depicting Brown's scalp because the prosecution had previously understood that the defense was claiming that the scalp came from the actual killer, and therefore this was relevant to a self-defense claim. However, at the time that this issue was raised, it was clear that such a claim was not being made by the defense. The prosecution should not be allowed introduce evidence simply to disprove something which the defense has no intention of arguing. Thus, the focus of the inquiry should have been on what issues were in dispute when the issue was raised.

Likewise, the prosecution noted that the position of the wounds was important. The specific position of the wounds was not relevant to any disputed issue in this case. The difference in the inference to be proven is

negligible whether someone is shot with a shotgun from one foot away or from a contact wound. Accompanied by a second fatal wound, any desired inferences - such as the intentional nature of the shooting - fades even further. Therefore, the specific nature of the wounds was irrelevant.

Even if the positioning of the wounds could be considered relevant, there is no additional relevance to photographs of the maggot-infested remains. 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, 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 also important to show how she was positioned to show the deliberateness of shooting. (RT 8271.) Again, it is respectfully submitted that shooting a toddler in any position from close-up range is almost conclusive evidence that the shooting was deliberate.

In this case it is clear that the photographs had little or no probative value relating to any disputed issue in this case. The fact of the murders, the manner in which they were committed, the identity of the victims, and other facts that these photographs might have had bearing on were not actually in dispute. Truly, in this case there was nothing particularly informative about these pictures, apart from their generic use of showing how the murder was committed. It has been noted that " 'murder is seldom pretty, and pictures, testimony and physical evidence in such a case are

always unpleasant ....' ." *(People v. Carpenter* (1997) 15 Cal.4th 312, 385, quoting *People v. Pierce* (1979) 24 Cal.3d 199, 211.) However, if all that is necessary to make this type of evidence relevant is a mantra of "need-to-show-how-the-crime-happened," the boilerplate reason for the admission of evidence would de facto overrule all cases which held this type of evidence was improperly admitted, and would negate the trial court's discretion and an appellate court's oversight of that discretion.

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 at p. 592 and *People v. Staten, supra,* 24 Cal.4th at pp. 462-464.) The fact that the wounds portrayed in the pictures were described to the jury negated the need to actually show the pictures. In such a case, the photographs become, at best cumulative.

Contrary to the adage that a picture is worth a thousand words, in many cases the picture adds little actual knowledge to a lay person who must rely on an expert for its interpretation. The real value may be in the testimony explaining what happened, rather than a picture, which a juror may not understand. Thus, the photographs only add to the emotional aspect of the case, rather than to the analytical aspect.

D. Prejudice

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. Because the photographs in this case did not tend to prove anything that was of consequence to any disputed fact in the case, the evidence was not relevant. (Evid. Code § 210.) Having failed the test of relevance, this leaves only the gruesome nature of the photographs which clearly was prejudicial.

An important consideration in determining prejudice is the weakness of the case against appellant. This is particularly true here in light of the lack of evidence connecting appellant to the offense and the suspect nature of the testimony of James Williams, as discussed *ante*. While it has been held that any error in admitting gruesome photographs was harmless due to the strength of the prosecution's case (*People v. Hines* (1997) 15 Cal.4th 997, 1046), the same rationale may not be employed here. In a weak case like this one the nature of these pictures, decomposed bodies and bloody photographs of a dead baby and her mother, had an undue detrimental influence on the jury. Because the injuries had already been described to the jury, any information the pictures might have contained had already been conveyed to the jury, thereby lessening any probative value in relation to prejudice. All this was done in the most gruesome way regarding the bodies of the otherwise unsympathetic hit man and his right hand man, by displaying close-up photographs of Armstrong and Brown's decomposed, maggot-infested bodies. 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, supra,* 45 Cal.3d 323.)

In summary, the trial court's decision to allow for introduction of irrelevant, inflammatory, gruesome photographs depicting the bodies of the victims was an abuse of discretion, depriving appellant of an impartial jury,

a fair trial, due process of law, and a reliable penalty determination in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provision of the state constitution. Appellant's conviction and death sentence must be reversed.

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XII

APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL BY THE TRIAL COURT'S SUA SPONTE CROSS-EXAMINATION OF APPELLANT WHICH UNDERMINED APPELLANT'S CREDIBILITY

A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of life or liberty without due process of law. (U.S. Const., Amends. V, VI, and XIV; Cal. Const., art. I, § 7, subd. (a); see e.g., *Tumey v. Ohio* (1927) 273 U.S. 510, 523; *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266.) There are many components to a fair and impartial trial, one of which is a defendant's right to a trial by a detached, fair and impartial judge who is not biased against him. (*Ibid.*) It is fully recognized that the judiciary must not only be impartial but should always appear impartial. (*In re Richard W.* (1979) 91 Cal.App.3d 960, 967.) Appellant asserts that his right to a fair and impartial trial was violated when the trial court indicated it disbelieved appellant during appellant's cross-examination.

During the prosecution's cross-examination of appellant, the prosecution attempted to undermine appellant's credibility in the following exchange:

BY MR. MCCORMICK:

Q: A number of times when I asked you questions, you said that happened seven or eight years ago, and you just couldn't remember the answer, correct?

A: The answer to what?

Q: A lot of my questions, you can't remember because so much time had passed that you just had no idea?

A: If I couldn't remember certain things, I said that.

Q: Is there some particular reason you remember that you purchased a car on January of 1983, that you had an accident in January of 1987, that you remember the date that you bought a house, you remember the date John bought a house, you remember the date Eli bought a house, you remember the date that Jeff bought a house, you remember the date a pool hall was purchased, yet when I asked you questions you can't remember any of the details?

MR. JONES: Your Honor, I –

THE WITNESS: Did you ask me –

MR. JONES: I object as compound.

THE COURT: Overruled. Go ahead.

THE WITNESS: Did you me [sic] any of those questions?

BY MR. MCCORMICK:

Q: Are you having selective memory problems?

A: Absolutely not.

(RT 15491-15492.)

The trial court then interjected its own question:

THE COURT: And you aren't selectively answering questions you choose to answer because you figure they're safe to answer?

A: I'm answering the questions to the best of my ability when you ask me and the other attorneys.

(RT 15492.)

In exercising the trial judge's broad power to control the trial proceedings, the judge has a duty to be impartial, courteous, and patient.

This duty is recognized in the Canons of Judicial Ethics (see 2 Witkin, Cal. Procedure (4th ed. 1997), Courts, §50 et seq., pp. 77 et seq.]), and its violation may be so serious as to constitute reversible error. (See 7 Witkin, Cal. Procedure (4th ed. 1997), Trial, §254 et seq., pp. 300 et seq.) "A trial judge may examine witnesses to elicit or clarify testimony ... [but he or she] must not become an advocate for either party or under the gui[s]e of examining witnesses[,] comment on the evidence or cast aspersions or ridicule on a witness." (*People v. Rigney* (1961) 55 Cal.2d 236, 241.)

Appellant submits that the trial court in this case lost its neutrality and communicated to the jury its disbelief in appellant's credibility when it cross-examined appellant as set forth above.[103] As previously stated, appellant testified on his own behalf and denied any complicity in the instant crimes. Thus, appellant's credibility was critical to his defense, and the trial court's question improperly and prejudicially communicated to the jury that the court disbelieved appellant's testimony. (*People v. Perkins, supra,* 109 Cal.App.4th at p. 1567 [trial judge committed prejudicial

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[103] The fact that trial counsel did not object to any of these comments does not bar appellate review of this issue. Issues relating to the biases exhibited by a trial judge have been found cognizable on appeal despite the lack of an objection in the trial court. (See *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244.) Further, as commentators have observed, the rule that an appellate court will not consider points not raised at trial does not apply to "[a] matter involving the public interest or the due administration of justice." (9 Witkin, Cal.Procedure (3d ed. 1985), Appeal, § 315, p. 326.) This is an issue involving the due administration of justice. Further, a defendant's failure to object does not preclude review "when an objection and an admonition could not cure the prejudice caused by" such misconduct. (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567 [citations omitted].) Such is the case here.

misconduct by intemperate examination of defendant in manner indicating that he sided with prosecution].)

The trial court's question undermined appellant's credibility and deprived appellant of the type of fair and impartial trial that is required in a capital case, violating appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution, as well as his rights to a fair trial under the state constitution. Reversal of his conviction and judgment of death is required. (*Ibid.*; see also *Hall v. Harker* (1999) 69 Cal.App.4th 836 [in malicious prosecution action against attorney, trial judge's frequent negative comments about attorneys generally created appearance of judicial bias, providing basis for reversal of judgment]; *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 455 [in medical malpractice action by injured worker who may have been in United States illegally, trial judge's conduct required reversal even absent showing of prejudice; his remarks gave appearance that he had preconceived ideas based on stereotypes of undocumented aliens, raising doubts about fairness and impartiality of proceeding and casting judicial system in bad light].

In anticipation of respondent's argument in reply, appellant asserts that, given that the trial court ruled in favor of respondent and denied all of appellant's requests to correct and settle the record on appeal, the State must be estopped from asserting the statement attributed to the court as set forth above is the due to the court reporter's error.

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XIII

THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTION TO PRODUCE JAMES WILLIAMS AS A DEFENSE WITNESS AT APPELLANT'S SUPPRESSION HEARING AND ITS FAILURE TO SUPPRESS THE EVIDENCE SEIZED DURING UNCONSTITUTIONAL SEARCHES OF THE WHEELER AVENUE AND JUDD STREET RESIDENCES REQUIRES REVERSAL OF APPELLANT'S CONVICTION AND DEATH SENTENCE

Appellant was denied his rights, under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution, to be free from unreasonable searches and seizures and to due process of law when the trial court denied appellant's motions to suppress the evidence seized as a result of the warrantless search of the house at 11442 Wheeler Avenue, where the prosecution maintained appellant conducted business, as well as that seized one month after the instant homicides from his home on Judd Street. Appellant was also denied his rights, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution, to due process and compulsory process when the trial court denied appellant's motion to compel the production of James Williams in order to establish appellant's reasonable expectation of privacy regarding the Wheeler house. Appellant's conviction and judgment of death must be reversed.

A. Proceedings Below

The search and seizure of evidence from the Wheeler location was conducted without a warrant. (RT 4125.)

One full month after the homicides, Detective James Vojtecky supplied the affidavit that was the basis for a search warrant authorizing the

search of appellant's home at 12719 Judd Street, as well as a search of 23 other residences, for a 12 gauge shotgun, a .38 or .357 caliber revolver and ammunition, clothing described in the initial crime scene report and "[a]ny articles or personal property tending to establish the identity of person who have dominion and control over the premises, automobiles, or items to be seized, including but not limited to: rent receipts, utility bills, telephone bills, miscellaneous addressed mail, personal letters, personal identification, keys, purchase receipts, sales receipts, tax statements, photographs, vehicle pink slips and vehicle registration." (CT 10480-10485.)

Prior to trial appellant filed motions: (1) to suppress evidence seized from Wheeler house on the grounds that the search was warrantless and not within any exception to the warrant requirement; and (2) to suppress evidence seized from appellant's Judd Street home on the grounds that the affidavit supporting the search warrant lacked probable cause to search the premises for indicia of appellant's involvement the instant homicides, as opposed to indicia of appellant's involvement in drug sales, and that it was based on stale information. (CT 10441-10521.) Appellant also filed a motion to compel production of James Williams, who was in the prosecution's witness protection program, to testify concerning appellant's reasonable expectation of privacy with regard to both addresses. (CT 10437-10440; RT 4116.) All three motions are incorporated by reference as if set forth in full herein. (CT 10437-10440, 10441-10540.)

The prosecution opposed all three motions. With regard to the Wheeler house, it argued that the testimony of James Williams would not

establish standing[104] as to appellant, because Williams had testified that: no one lived at the Wheeler Avenue location; appellant had to call ahead of time to be let into the house, and Williams worked at the house at the direction of appellant and others in the drug operation. (CT 10558.) The prosecution offered to stipulate that appellant operated a narcotics business out of the house, but at the same time argued that no "competent court would find a legitimate expectation of privacy in an illicit" business location. (CT 10559.) The prosecution further argued that the search was conducted under the emergency exception to the warrant requirement, as well as the plain view doctrine. (CT 10560-10564.)

With regard to the search of appellant's home, the prosecution: (1) refused to concede that appellant had standing to challenge the issuance of the warrant; (2) argued that the warrant contained sufficient evidence that appellant was involved in the homicides and thus contained probable cause for issuing the search warrant of appellant's home for the items listed. (CT 10692-10707.)

The motions were heard on August 3, 1992, before the Honorable J.D. Smith, Judge. (RT 4055, 4110-4186.) The prosecution stipulated that the search at the Wheeler location was warrantless, but refused to stipulate that Williams's prior testimony at the various preliminary hearings associated with this case established appellant's standing as to either location. (RT 4120-4122, 4125.) The trial court denied appellant's motion

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[104] The term "standing" in the Fourth Amendment search and seizure context has been largely replaced by other nomenclature, which will be discussed later in this argument. However, that term was used by the parties and the trial court, and appellant will use the term in summarizing the proceedings below for the sake of accurate reporting of events at trial.

to compel the attendance of Williams so that he could testify in that regard. (RT 4124.) After appellant then testified that he lived at the Judd Street location, the court found standing had been established as to that location, but rejected appellant's arguments about the insufficiency of the warrant, which included the additional in-court challenge that the warrant provision to search for "any items of personal property . . . ." was unconstitutionally overbroad. (RT 4175-4186.) The court found appellant had not established standing to challenge the search and seizure at the Wheeler house. (RT 4186.)

B. Trial Testimony Regarding The Search And Seizure Of The Wheeler House

Los Angeles Police Department ("LAPD") Officer Lynn Blees and his partner Carol Posner were the first police officers to respond to the scene of the shooting at 11442 Wheeler, a private residence, arriving at about 5:10 p.m. (RT 8532-8533.) Blees found shattered glass in the street where a neighbor said the red car had been (RT 8535) and a large pool of blood on the walkway going up to the front door of the house. (RT 8537.) He also saw what appeared to be someone's scalp on the metal grating of the front door. (RT 8538.) He walked through the outer steel door and tried to enter the inner front door, but it was locked. (RT 8539.) Blees and his partner secured the scene with yellow tape pending the arrival of detectives. (RT 8542.)

While Blees was at the Wheeler house, he was notified of a crime scene at 11311 Osborne Street. (RT 8542.) His was the first unit there as well, arriving at about 6:00 p.m. He found a red Toyota Camry with the right rear window blown out; a dead Black female adult and child were in the car. (RT 8543.) Blees returned to the Wheeler house with his

supervisor and members of the Los Angeles Fire Department ("LAFD"). (RT 8546-8547.) Blees entered the Wheeler house after the LAFD forced open the garage door. Blees checked for victims, and, finding none, left the house. (RT 8547.)

When LAPD homicide detective James Vojtecky arrived at the Wheeler house, he spoke with Officer Blees who informed Vojtecky of what he had done at the two crimes scenes, including his return to the Wheeler house to search for additional victims. (RT 8596-8597.) Vojtecky then proceeded to walk through the entire Wheeler crime scene, including the inside of the house, with Officer Blees and Vojtecky's partner, taking pains not to further contaminate the crime scene. (RT 8597-8606.) At this point, Vojtecky had not yet been to the Osborne crime scene; his stated purpose for the walk-through was to see if there was anyone else injured in the house and to get an idea of the physical layout of the scene. (RT 8598, 8606.) After his initial walk through, Vojtecky and his partner went to and examined the Osborne crime scene, determined that there were one or two more victims, and returned to the Wheeler house. (RT 8607-8611.) Vojtecky testified that the purpose of his search of the Wheeler house was to identify the additional victim or victims. (RT 8611.) Vojtecky began his investigation by directing officers to conduct field interviews and by establishing telephone communications with the police station. (RT 8612.) He then conducted an exterior survey of the premises, and then began marking and collecting all the evidence at the Wheeler crime scene; he also directed photographs to be taken and latent fingerprint lifts to be made. (RT 8613-8625, 8649-8712; CT 10490-10491.)

C. The Trial Court Erred In Denying Appellant's Motion To Compel The Production Of James Williams For The Suppression Hearing And In Denying Appellant's Motions Suppress Evidence Seized At The Wheeler Avenue And Judd Street Houses

1. The Prosecution Conceded Appellant's Standing As To The Wheeler House; In The Alternative, The Prosecution Should Have Been Estopped From Contesting Standing As To that Location

The Fourth Amendment provides that the people are entitled "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Although this Amendment restricts only the federal government, the "right of privacy" thus guaranteed is one of the fundamental rights protected against state action by the Due Process Clause of the Fourteenth Amendment. (*Mapp v. Ohio* (1961) 367 U.S. 643.) The guarantee extends to any person, including a corporation (*Silverthorne Lumber Co. v. United States* (1920) 251 U.S. 385) and the guarantee applies to commercial property as well as to private residences. (*New York v. Burger* (1987) 482 U.S. 691; *People v. Paulson* (1990) 216 Cal.App.3d 1480, 1483; *People v. Roman* (1991) 227 Cal.App.3d 674, 680.) Pursuant to California Constitution, article 1, section 28, subdivision (a), courts in this state must be guided by the federal Constitution as interpreted by controlling federal decisions as the sole basis for exclusion. (See *In re Lance W.* (1985) 37 C.3d 873, 888.)

The Fourth Amendment protects a person's privacy in both the home and office setting. As the high court explained:

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental

> intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure.

(*Hoffa v. United States* (1966) 385 U.S. 293, 301.)

Since *Rakas v. Illinois* (1978) 439 U.S. 128, the United States Supreme Court has largely abandoned the use of the term "standing" in Fourth Amendment analysis, but without changing the basic inquiry: "whether the defendant, rather than someone else, had a reasonable expectation of privacy in the place searched or the items seized." Put another way, the capacity to claim the protection of the Fourth Amendment depends on whether the claimant has a legitimate expectation of privacy in the invaded place. (*Id.* at p. 143.) The high court has stated that the defendant has the burden of proving he or she has a legitimate expectation of privacy in the area or item searched. (*Rawlings v. Kentucky* (1979) 448 U.S. 98, 104.) Under substantive Fourth Amendment principles "a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction" because *Simmons v. United States* (1968) 390 U.S. 377, eliminated the self-incrimination problem by ruling that a defendant's testimony in support of a motion to suppress cannot be admitted as evidence of guilt at trial. (*United States v. Salvucci* (1980) 448 U.S. 83, 88, 90.) However, *Salvucci* does not stand for the proposition that the government can always avoid "the vice of self-contradiction." (*People v. Dees* (1990) 221 Cal.App.3d 588, 596.) As explained in *United States v. Issacs* (9th Cir.1983) 708 F.2d 1365, 1367-1368, *Salvucci* simply rejected automatic standing based on possession alone, where there was no expectation of privacy in the area searched. But where circumstances of a

particular case make possession and denial of an expectation of privacy inconsistent, the court in *Issacs* concluded the government cannot have it both ways. (*Ibid.*; accord, *People v. Dees, supra*, 221 Cal.App.3d at pp. 597-598.)

In its opposition to appellant's suppression motion in this case, the prosecution presented evidence from many witnesses over the course of a half dozen preliminary hearings and a grand jury proceeding that appellant operated a narcotics trafficking business out of several locations, including the Wheeler house. The prosecution offered to stipulate to those facts in its opposition papers, and thus conceded appellant's standing to challenge the warrantless search and seizure of evidence from the Wheeler house. (CT 10559.) Since the prosecution conceded "standing" in their moving papers, the trial court erred in precluding appellant from challenging the legality of the warrantless search and seizure of evidence from the Wheeler house.

If this Court rules there was no such concession, then given the circumstances of this case, the prosecution must be estopped from arguing that appellant did not carry his burden to prove standing. (*United States v. Issacs, supra,* 708 F.2d at pp. 1367-1368; *People v. Dees, supra*, 221 Cal.App.3d at p. 598.) Moreover, the trial court, by holding appellant to answer on the basis of the prosecution's evidence, thereby rejecting appellant's attempt to disassociate himself from Wheeler house, cannot turn the tables to deny his assertion of privacy based on the exact same showing. (*People v. Dees, supra,* 221 Cal.App.3d at p. 598.)

2. Even If Standing Was Not Conceded And The Prosecution Not Estopped From Contesting Standing, The Trial Court Unconstitutionally Precluded Appellant From Carrying His Burden of Proof Regarding His Reasonable Expectation Of Privacy In The That House

Appellant attempted to establish his reasonable expectation of privacy in the Wheeler house in several different ways: (1) through his motion for the production of prosecution witness James Williams, whose whereabouts were in the control of and was known only to the prosecution; (2) through the testimony of investigating officer James Vojtecky; and (3) through the testimony of one of the prosecutors in this case, DDA Michael Yglecias.

The trial court: (1) denied the motion to produce Williams, ruling simply that it was not required to order him to appear because appellant had other witnesses available to him who could establish his standing; (2) ruled that Vojtecky's testimony regarding the information contained in his affidavit supporting the warrant was based on hearsay and thus inadmissible; (3) ruled that it would not accept Vojtecky's expert opinion as competent evidence in support of appellant's claim of standing, even if it was based on business records, that appellant conducted business out of the Wheeler house and he lived at the Judd Street house; and (4) would not permit the DDA to be examined as to whether they intended to present evidence that appellant conducted business out of the Wheeler house. (RT 4126-4157.) Appellant then testified that he lived at the Judd Street house during the time in question, but he did not testify regarding the Wheeler house. (RT 4158-4159.)

The Sixth Amendment provides in part: "In all criminal

prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor...." (U.S. Const., Amend. VI.) The right to present witnesses has long been recognized as essential to due process. (*Chambers v. Mississippi, supra,* 410 U.S. at p. 294 ("*Chambers*").) *Chambers* and *Washington v. Texas* (1967) 388 U.S. 14 stand for the general proposition that a defendant's right to present a defense includes the right to offer testimony by witnesses and to compel their attendance. "While the Sixth Amendment does not literally guarantee the right to present witnesses; it gives the right to compulsory process to obtain them. However, it is pellucid that the latter includes the former." (*U.S. v. Mack* (9th Cir. 2004) 362 F.3d 597, 601 [citing to *Taylor v. Illinois* (1988) 484 U.S. 400, 409.) In fact, "few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Taylor v. Illinois, supra*, 484 U.S. at p. 408 [citation omitted].) As the Supreme Court put it at an earlier time:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

(*Washington v. Texas, supra*, 388 U.S. at p. 19.) The Court has recognized that the Sixth Amendment right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." (*Rock v. Arkansas, supra,* 483 U.S. 44 [citations omitted].) The Court has emphasized, however, that restrictions on a criminal defendant's right to confront witnesses and to present relevant

evidence " 'may not be arbitrary or disproportionate to the purposes they are designed to serve.' " (*Id.* at p. 56; see also *United States v. Scheffer* (1998) 523 U.S. 303, 308.)

A state court may violate a defendant's right to present a defense and witnesses by applying evidentiary standards in an arbitrary or uneven way. In *Washington v. Texas, supra*, for example, the Court held that a Texas rule that prevented an accomplice from testifying on a defendant's behalf arbitrarily denied the defendant his right to offer the testimony of a witness. (388 U.S. at p. 23.) Similarly, in *Rock v. Arkansas, supra*, the Court held that Arkansas's per se rule excluding all hypnotically refreshed testimony was an arbitrary infringement of the defendant's right to present testimony. The Court stated that a state's restrictions on testimony may not be arbitrary, (483 U.S. at pp. 55-56); that a state "may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand;" and that a state "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." (*Id.* at p. 55.)

In addition to ruling that a state may not arbitrarily apply evidentiary standards, the Court has also focused its criticism on a particular variety of arbitrariness: the unjustified and uneven application of evidentiary standards in a way that favors the prosecution over defendants. In *Green v. Georgia* (1979) 442 U.S. 95, 97 [per curiam], the Supreme Court reversed a death penalty sentence because the trial court had excluded testimony offered by the defense under Georgia's hearsay rules. While Georgia's hearsay rules did not allow the admission of evidence that would have been exculpatory in Green's sentencing hearing, the state's rules did allow the government to introduce the same evidence in his co-defendant's trial. The

Court held the exclusion of the evidence at sentencing to be reversible error, listing several reasons why the trial court should have admitted the hearsay testimony. The Court concluded: "Perhaps most important the State considered the testimony sufficiently reliable to use it against [Green's co-defendant], and to base a sentence of death upon it." (*Ibid.*)

Other cases confirm and apply the principle that a state rule or ruling that imposes a greater evidentiary burden on a defendant without justification violates due process. For example, in *Webb v. Texas* (1972) 409 U.S. 95, the trial judge admonished the defendant's witness at length to testify truthfully, but did not give similar warnings to the State's witnesses. As a result of the trial judge's lecture, the defendant's witness refused to testify. The Court ruled that the "trial judge gratuitously singled out this one witness," and held that the witness' subsequent refusal to testify deprived the defendant of due process. (409 U.S. at pp. 97-98.)

Moreover, various types of governmental and judicial interference have been found to deprive the criminal defendant of the right to present his own witnesses to establish a defense. (See *United States v. Smith* (D.C.Cir.1973) 478 F.2d 976 [defense witness told by prosecutor that if he testified as indicated by other testimony he could or would be prosecuted for carrying a concealed weapon, obstructing justice, and as an accessory to murder]; *United States v. MacCloskey* (4th Cir. 1982) 682 F.2d 468 [U.S. Attorney telephoned defendant's girlfriend's attorney to advise him to remind his client that if she testified at trial she could be reindicted on dropped charges]; *United States v. Goodwin* (5th Cir. 1980) 625 F.2d 693 [defense witnesses intimidated by threats of prison officials conditioned upon whether the witnesses testified at trial]; *United States v. Hammond* (5th Cir. 1979) 598 F.2d 1008 [defense witness threatened by FBI agent

with retaliation in other cases pending against him]; *United States v. Henricksen* (5th Cir. 1977) 564 F.2d 197 (per curiam) [defense witness intimidated by terms of his plea bargain in another case]; *United States v. Thomas* (6th Cir. 1973) 488 F.2d 334 (per curiam) [defense witness told by secret service agent during recess of trial that he would be prosecuted for a felony if he testified]; *Berg v. Morris* (E.D.Cal. 1980) 483 F.Supp. 179 [trial court coerced witness into giving inculpatory evidence by twice warning him that his probation would be revoked and perjury charges filed if the truth were not told].)

Nothing could be a more literal example of governmental and judicial interference with a defendant's right to present witnesses in his defense than what happened in this case. The prosecution maintained exclusive access to Williams and refused to bring him to court for purposes of appellant's hearing. The trial court articulated no reason, let alone a rational one, for denying appellant's motion to compel the production of Williams. The trial court simply said that it did not have to make the order, and that it believed appellant had "other witnesses" who could testify as to his standing to challenge the search warrant. Given the context of the suppression hearing, the trial court essentially required appellant to take the stand and testify in that regard: the only witness present for the defense was Vojtecky, and the court refused to consider his testimony, expert or otherwise, on the issue of standing, and the trial court also refused to allow the defense to question the prosecutor in this regard. Appellant was left with no witness but himself. The law simply does allow a trial court to control the presentation of defense evidence in this manner. Appellant had a constitutional right to compel Williams' relevant testimony in this regard. As will be discussed below, Williams' testimony would have supplied

sufficient competent evidence of appellant's expectation of privacy in the Wheeler house. The trial court's arbitrary denial of appellant's request to compel Williams' production and the other limitations it posed on testimony at the suppression hearing denied appellant his federal constitutional rights to compulsory process, to present a defense and to due process of law.

3. Appellant Had An Actual, Subjective Expectation Of Privacy At The Wheeler House, And The Warrantless Search Of That House Was Not Within Any Exception To The Fourth Amendment's Warrant Requirement; All Evidence Seized Therein Should Have Been Suppressed

a. Appellant's Expectation Of Privacy In The Wheeler House

The prosecution argued that: (1) appellant had no legitimate expectation of privacy in the Wheeler house because he operated an illegal business out of that property; and (2) the search was within the emergency and plain view exceptions to the warrant requirement. These contentions were meritless.

In *Katz v. United States* (1967) 389 U.S. 347, as articulated in Justice Harlan's concurring opinion, the test for whether a person may invoke the Fourth Amendment purposes has two prongs: (1) a person must demonstrate an actual, subjective expectation of privacy in that which is searched; and (2) that actual expectation must be one society recognizes to be reasonable. (*Id.* at p. 361 (conc. opn. of Harlan, J.).) The reasonableness of a claimed expectation of privacy depends on the totality of circumstances presented in each case. (*In re Baraka H.* (1992) 6 Cal.App.4th 1044.) Factors to be considered in determining whether a defendant has a legitimate expectation of privacy in a particular place include whether the defendant has a property interest in the place, whether he or she has a right

to exclude others from the place, whether he or she has exhibited a subjective expectation that it would remain free from governmental intrusion, whether he or she took normal precautions to maintain his or her privacy, and whether he or she was legitimately on the premises. (*People v. Roybal, supra,* 19 Cal.4th at p. 507; *People v. Ybarra* (1991) 233 Cal.App.3d 1353, 1360.) A person does not forfeit his or her Fourth Amendment rights by using property in which her her she has a legitimate expectation of privacy for illegal purposes. (*United States v. Vega* (5th Cir. 2000) 221 F.3d 789, 797; see also *Minnesota v Carter* (1998) 525 U.S. 83, 110 (dis. opn. of Ginsberg, J.) ["[i]f the illegality of the activity made constitutional an otherwise unconstitutional search, such Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty"].)

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. (*Payton v. New York* (1980) 445 U.S. 573, 586.) As the United States Supreme Court has stated in *Coolidge v. New Hampshire* (1971) 403 U.S., at 474-475, 477-478 :

> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property – his home or office – and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances."
>
> * * *
>
> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is

> in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined "exigent circumstances."

(See also *United States v. Shaibu* (9th Cir.1990) 920 F.2d 1423, 1425 [warrantless search of a house is per se unreasonable and absent exigency or consent, warrantless entry into the home is impermissible under the Fourth Amendment].) The Wheeler house was clearly a private residence, used regularly by appellant, and thus by definition appellant had a reasonable expectation of privacy in the premises. (*Ibid.*; see also *Hoffa v. United States, supra,* 385 U.S. 293.) And, as explained below, no exigent circumstance justified the warrantless search of that house.

In the alternative, it is clear that, if appellant's request to compel the testimony of Williams had been granted, appellant would have carried his burden of showing that a totality of the circumstances supported his claim of standing as to the Wheeler house. As an offer of proof at his suppression hearing, appellant argued that Williams would testify consistent with his prior testimony in six preliminary hearings and one grand jury proceeding relating to the instant charges. In testimony prior to trial Williams said, inter alia, that: he was employed at the Wheeler house, a secured location in which people came to pay for drugs and to which people working for the drug organization came to be paid; that appellant was his boss and directed Williams to pay money to people; appellant entered the house whenever he wanted by calling ahead to the premises; appellant parked his car in the garage; appellant frequented the house most Sundays when Williams worked there and always brought a briefcase into the house; appellant made calls from the room in the house where the safe was located; appellant directed Williams to use force if necessary to keep out unauthorized

intruders; appellant had access to the combination safe and put money in and took it out of that safe; appellant showed Williams how to operate a money counting machine on the premises; and appellant regularly got his hair cut at the house. (See, e.g., CT 834-850, 860-862, 1030, 3474, 3747; 3 SUPP CT 9691-9743.)[105] Thus, it was clear that appellant had a subjective expectation of privacy in the Wheeler house: he was legitimately on the premises; he took precautions to maintain the privacy and security of the premises; he determined who was permitted on the premises; he employed people at the house; and he operated the payroll out of that house. All of these factors demonstrate appellant's subjective expectation of privacy there. Before this house could be searched, a warrant was required.

b. The Search Was Not Within The Emergency Exception To The Warrant Requirement

Contrary to the prosecution's contention, the warrantless search of the Wheeler house was not permitted under the emergency exception to the warrant requirement. The emergency exception was recognized by the United States Supreme Court in *Mincey v. Arizona* (1978) 437 U.S. 385, 392 ("*Mincey*"). The Court reasoned that an entry or search that would

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[105] Appellant was provided only with the preliminary hearing transcripts of appellant and coappellant Smith, as well as testimony from codefendant Settle's grand jury proceedings. Appellant requested and was denied transcripts from the other preliminary hearings held in this case, and has moved this Court to augment the record with those transcripts. (See Motion to Vacate Certification or, in the Alternative, to Correct, Augment and Settle the Record at pp. 63-71, filed September 13, 2002, in this Court by appellant Bryant.) To the extent this Court finds appellant has not supplied facts sufficient to establish that Williams would have testified regarding appellant's expectation of privacy in the Wheeler house, appellant has been denied an adequate record on appeal. (See Argument, XXXIV, *post.*)

otherwise be barred by the Fourth Amendment may be justified by the need to protect life or avoid serious injury. (*Ibid.*; see also *People v. Ramey* (1976) 16 Cal.3d 263, 276; *People v. Duncan* (1986) 42 Cal.3d 91, 104.) The Ninth Circuit recognized the emergency exception to the Fourth Amendment's warrant requirement in *United States v. Cervantes* (9th Cir. 2000) 219 F.3d 882, 889. In *Cervantes*, the court set forth the three requirement of the emergency exception doctrine: (1) the police must have reasonable grounds to believe that there was an emergency at hand and that there was an immediate need for their assistance; (2) the search was not primarily motivated by an intent to arrest and seize evidence; and (3) the police had a reasonable basis, approximating probable cause, to associate the emergency with the area to be searched. (*Id.* at pp. 888-91.) If any of these three requirements is not satisfied, the emergency exception to the Fourth Amendment is not applicable and the search is unconstitutional. (*Id.* at p. 890 [holding that this three-part test is a "clear and soundly-crafted formulation of the emergency doctrine's requirements"].) The emergency exception requires that the persons responding to the emergency have a good-faith belief in the existence of what reasonably appears to be an emergency; exigency is determined on the basis of facts and inferences available to the officer in light of his or her training and particular experience; this belief must be objectively reasonable. (*People v. Smith* (1977) 67 Cal.App.3d 638, 629.) After the emergency has passed, a re-entry to investigate or seize evidence is unlawful in the absence of a search warrant or consent. (*People v. Keener* (1983) 148 Cal.App.3d 73, 77; *People v. Bradley* (1989) 132 Cal.App. 737, 744.)

Mere speculation is not sufficient to show exigent circumstances. (See *United States v. Tarazon* (9th Cir.1993) 989 F.2d 1045, 1049.) Rather,

"[t]he government bears the burden of showing the existence of exigent circumstances by particularized evidence." (*Ibid.*) This is a heavy burden and can be satisfied "only by demonstrating specific and articulable facts to justify the finding of exigent circumstances." *(LaLonde v. County of Riverside* (9th Cir.2000) 204 F.3d 947, 954 [internal quotation marks omitted].) Furthermore, "the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time." (*United States v. Tarazon, supra*, 989 F.2d at p. 1049.)

Here, the search of the Wheeler house was not within the emergency exception to the warrant requirement in that Officer Blees testified that, after examining both the Wheeler and Osbourne crime scenes, he gained entry to the house with the assistance of the LAFD, searched the house for other victims, and, finding none, secured the house for the detectives; thus, officers determined an emergency no longer existed and in his trial testimony, which took place years after the suppression motions, Vojtecky affirmed that, after his initial visits to the Wheeler and Osborne crime scenes, he returned to the Wheeler house and was informed by Officer Blees that Blees had searched the house for additional victims and found none. (RT 8596-8600.) Rather than obtain a warrant to search the premises, Vojtecky proceeded to enter the home for the explicit purpose of gathering evidence. (*Ibid.*) At the time of the suppression motions the prosecution claimed that Vojtecky had determined that a continuing emergency existed in the Wheeler house. (CT 10562-10563.) However, Vojtecky's trial testimony belies any "good faith" belief that an emergency still existed and demonstrates both that Vojtecky knew from Officer Blees's searches of the Wheeler house that there were no additional victims in that

house and that the purpose of Vojtecky's entry into the premises was to gather evidence. (RT 8596-8600.)

The facts of this case mirror closely in key aspects that of *Mincey, supra*, where the Court determined that Arizona's "murder scene exception" to the Fourth's Amendments warrant requirement was unconstitutional. In *Mincey*, officers conducted a narcotics raid on the defendant's apartment by plainclothes and undercover officers, during which one of the undercover officers was killed. The first officers to the scene looked through the crime scene for victims of the shooting, made arrangements for medical assistance, and then, pursuant to department policy prohibiting them from investigating incidents in which they were involved, took no further investigative action. Shortly thereafter, homicide detectives arrived at the scene and conducted a warrantless search and seized many items. The Court held that the search could not be justified on the ground that a possible homicide inevitably presents an emergency situation, especially in light of the fact that officers determined that the emergency had ceased. The seriousness of the offense under investigation did not itself create exigent circumstances of the kind that under the Fourth Amendment justifies a warrantless search, where there was no indication evidence would be lost, destroyed or removed during the time required to obtain a warrant. (*Id.* at pp. 392-395.) Similarly, in this case, the Wheeler house had been cleared of victims, the premises secured, and officers posted at the doors. There was no suggestion that a warrant could not have been obtained.

c. The "Plain View" Doctrine Does Not Apply Because Law Enforcement Were Illegally In The Wheeler House At The Time The Search And Seizure Was Conducted

Nor was the search and seizure of evidence from the Wheeler house admissible under the plain view doctrine. Under the plain view doctrine, once lawfully present in the home due to exigent circumstances, police may seize incriminating evidence found in plain view within the officer's lawful right of access. (*Coolidge v. New Hampshire, supra,* 403 U.S. at p. 465.) In this case, while the plain view doctrine might have justified seizure while Officer Blees conducted his search for other victims in the house, no evidence was seized by Officer Blees. Vojtecky had no legal right to enter the premises after the emergency had ended, and since he was in premises unlawfully, the plain view exception does not apply. (*Ibid.*; see also *Thompson v. Louisiana* (1984) 469 U.S. 17, 21-22.)

The warrantless search of the Wheeler house violated the Fourth Amendment's prohibition against unreasonable searches and seizures and was not within any exception to its warrant requirement. As a general rule, evidence obtained and observations made in violation of the Fourth Amendment must be excluded from a subsequent criminal prosecution. (*Mapp v. Ohio, supra*, 367 U.S. at p. 655; *Silverman v. United States* (1961) 365 U.S. 505.) This general rule is applicable to a situation such as the one presented in appellant's case, where the conduct of the detectives involved the flagrant disregard of both the letter and spirit of the law. Since law enforcement's warrantless search of the Wheeler residence was illegal, the evidence initially seized therein should have been suppressed because it "'ha[d] been come at by exploitation of that illegality.'" (*Wong Sun v. United States* (1963) 371 U.S. 471, 488, [citation omitted].) Because the

affidavit in support of the search warrant derived from that illegally obtained evidence (see CT 10486-10497), the evidence seized at appellant's home should also have been suppressed as further "fruit of the poisonous tree." (*Ibid.*) The search and seizure of evidence from appellant's Judd Street home was illegal on other grounds as well, as argued in the following subsection.

4. The Search Warrant Issued For Appellant's Home Was Issued Without Probable Cause, Was Based On Stale Information And Was Unconstitutionally Overbroad; The Evidence Illegally Seized From Appellant's Home Should Have Been Suppressed

a. The Search Warrant Lacked Probable Cause

In order for an affidavit to establish probable cause to search a specific location, the affidavit must demonstrate a reasonable probability that specific property subject to seizure is located at that place. *(People v. Cook* (1978) 22 Cal.3d 67, 84, fn. 6, superceded on other grounds in *Franks v. Delaware* (1978) 438 U.S. 154, but approved on this point by *People v. Frank* (1985) 38 Cal.3d 711, 727.) It is a well-accepted tenet of Fourth Amendment law that the sufficiency of an affidavit is determined by utilizing a commonsense, practical, approach that looks at the totality of the circumstances alleged in the affidavit. (*Illinois v. Gates* (1983) 462 U.S. 213, 230; *People v. Bradford* (1997) 15 Cal.4th 1229, 1297.) Thus, the question becomes whether, after reviewing the information in the affidavit, the totality of this information leads to a reasonable belief that evidence of the homicides at the Wheeler house would be found at appellant's home. The answer to that question is "no."

In making this assessment, the affidavit first should be examined for any information that links appellant's home itself to any evidence relating to

the homicides. Upon such an examination, the only conclusion to be drawn is that there is, in fact, no such information. For example, this is not a case where anyone has provided information that fruits or instrumentalities of a crime actually were seen at appellant's home. (See, e.g., *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 151-154 [informant had seen stolen items at locale to be searched].) Without this type of information, the only way the affidavit can be found to set forth the necessary probable cause is to determine that it provides enough facts to infer that appellant committed the homicides and that there is a reasonable probability that the instrumentalities or fruits of those homicides would be found in his home.

In this case, the affidavit that supported the warrant as to appellant's home reflected a paucity of facts relating to the issue of specific property alleged to have been located there, although some conclusions were alleged. It is a well-settled principle that an affidavit in support of a search warrant must contain statements of fact and that mere conclusions or suspicions are an inadequate basis upon which to establish probable cause. (*People v. Smith* (1976) 17 Cal.3d 845, 850.) There were no facts alleged in the affidavit that gave rise to the inference that the evidence sought was probably located in appellant's home. (*Illinois v. Gates, supra*, 462 U.S. at p. 238; *People v. Frank, supra*, 38 Cal.3d at p. 727.) While the affidavit in the instant case recites a lot of criminal activity, it is wholly devoid of concrete information about the location of any fruits of the instant crimes. The search warrant therefore issued without probable cause.

b. The Information In The Affidavit Is Too "Stale" To Provide The Requisite Probable Cause

The information in the affidavit was too stale to provide the requisite probable cause. Information in an affidavit is worthy of weight in the probable cause determination only when the facts set forth are so closely related in time to the issuance of the warrant as to justify a finding of probable cause at the time of issuance. (*Sgro v. United States* (1932) 287 U.S. 206, 210.) There is no clear-cut rule as to the time period that would be too attenuated. (*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393.) Under the circumstances existing in this case, however the one month gap between the homicides and the issuance of the warrant rendered the information too "stale" to supply the requisite probable cause.

The issue here relates to whether the information was too "stale" to support a probable cause finding that the search warrant should be issued, not that it was too "stale" to support a belief that appellant had committed homicides. As this Court has long recognized, "an affidavit in support of a search warrant must provide probable cause to believe the material to be seized is still on the premises to be searched when the warrant is sought." (*People v. Mesa* (1975) 14 Cal.3d 466, 470 [information timely where informant observed material on premises in preceding six days].)

While the question of whether information is too "stale" to support a search of premises is one that depends on the facts of each case (see *People v. Hernandez* (1974) 43 Cal.App.3d 581, 586), there are general guidelines that can be gleaned from the cases which have considered this issue. For example, in *Sgro v. United States*, a 20-day delay between the observation of a sale of contraband on the premises and the issuance of a search warrant

for those premises was too lengthy a delay to support a finding of probable cause to believe that contraband was still on the premises. (See *Sgro v. United States, supra*, 287 U.S. at pp. 211-212.)

As a more general proposition, it has been observed that in the absence of other indications, delays exceeding four weeks are uniformly considered too lengthy to permit a finding of present probable cause to search premises. (See *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 434.) The types of indications that could warrant probable cause despite such a delay are factors like extended observations of criminal activity at the premises or a physical setting strongly indicative of continuing illegal activity. (*Ibid.*) The affidavit lacked any evidence of such observations relating to appellant's home, and was thus too stale to support a finding of probable cause.

c. The Search Warrant Was Unconstitutionally Overbroad

The general principles governing a person's right to be free from unwarranted intrusion are well-understood. (See U.S. Const., Amend. IV; *Mapp v. Ohio, supra,* 367 U.S. at pp. 654-655 [Fourth Amendment made applicable to the states through the Fourteenth Amendment's Due Process Clause]; Cal. Const., art. I, § 13; see Pen. Code, § 1525.) The Fourth Amendment also serves to protect persons against all general searches, and requires that a search of a person's home be restricted to searching for particular items. (*Go-Bart Importing Co. v. U.S.* (1931) 282 U.S. 344, 357; *Marron v. United States* (1927) 275 U.S. 192, 196 [particularity requirement "makes general searches under [warrants] impossible"].)

The Supreme Court felt that guarding against general searches was critical because historically "such searches have been deemed obnoxious to

fundamental principles of liberty." (*Go-Bart Importing Co. v. U.S., supra*, 282 U.S. at p. 357; *Coolidge v. New Hampshire, supra,* 403 U.S. at p. 467 (plur. opinion of Stewart, J.) ["the problem [with the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings"; particularity requirement prevents "the specific evil [of] the 'general warrant' abhorred by the colonists"].) The Court also held that "[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. [Citations]." (*Go-Bart Importing Co. v. U.S., supra*, 282 U.S. at p. 357.)

In *People v. Frank, supra,* 38 Cal.3d 711, this Court addressed the issue of overbreadth in search warrants. The warrant in *Frank* contained 16 separate clauses permitting the seizure of a wide array of items. The existence of some of these items could properly be inferred from the information in the affidavit, but the *Frank* court identified three clauses permitting the examination and seizure of virtually any document in Frank's residence. (See *id.* at pp. 722- 723.) At the suppression hearing, it was established by the testimony of law enforcement personnel present at the warrant's execution that virtually every document in the residence was indiscriminately seized without regard to the warrant. The lead opinion in *Frank* indicates the warrant suffered from two species of overbreadth: (1) it did not place a meaningful restriction on the things to be seized, and (2) it permitted the seizure of items for which no probable cause was demonstrated in the affidavit.

Without a doubt, the warrant in this case failed to place a meaningful restriction on the things to be seized. The phrase "[a]ny articles or personal property tending to establish the identity of person who have dominion and

control over the premises" could permit the seizure of virtually any document. (See also *Aday v. Superior Court* (1961) 55 Cal.2d 789, disapproved on another ground in *Hicks v. Miranda* (1975) 422 U.S. 332, 346, fn. 15.) For example, there was no indication in the warrant showing why "miscellaneous addressed mail," which presumably encompasses mail addressed to "resident" as well as mail mistakenly delivered to that location, would be relevant to the instant homicides. In fact, mail and papers addressed to third parties at locations other than Judd Street, were seized from appellant's home and used against him at trial which showed his involvement in narcotic sales. (RT 13365-13408.) There simply existed no probable cause in the affidavit or supporting documents to believe that such documents were related to the instant homicide. The warrant was unconstitutionally overbroad, and should have been suppressed.

D. As A Result Of The Fourth Amendment Violations In This Case, Considered Singularly Or Cumulatively, Appellant's Conviction And Judgment Of Death Must Be Reversed

The erroneous admission of evidence seized in violation of a defendant's Fourth Amendment rights requires reversal unless the government can prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The state cannot meet that burden in this case.

The illegally seized evidence at the Wheeler Avenue and Judd Street houses constituted virtually all of the evidence offered to corroborate the testimony of accomplice James Williams. Most of the physical evidence relating to the crime was recovered from inside of the Wheeler house, and all of the evidence that linked appellant to the scene of the instant homicides and to the narcotics business, was recovered either from inside

the Wheeler Avenue or Judd Street houses: (1) appellant's fingerprints were found in the Wheeler house (RT 13258-13287); (2) documents containing what was opined to be appellant's handwriting were recovered from the Wheeler house (RT 11815-11820, 13036-13042, 13272-13274); (3) an exercise bicycle that was purchased by appellant was recovered in the Wheeler house (RT 12033-12034); (4) a .45 caliber handgun which Williams testified was taken by appellant from the Wheeler house on the day of the homicides was found in the Judd Street house (RT 12293; CT 10461); and (5) virtually all of the documents connecting appellant to the narcotics sales business were found in a briefcase recovered from the Judd Street house. (RT 12908-12916; 12925-12928; CT 10458-10462.) Without that evidence recovered from those two houses, Williams's uncorroborated testimony of appellant's alleged guilt would not have been admissible. Without that evidence, the state cannot carry its burden of showing that, in the absence of the error, appellant would have been convicted of the instant crimes. (*Chapman, supra,* 386 U.S. at p. 24.) The trial court's error in failing to exclude all of the illegally obtained evidence seized from appellant's home and from the Wheeler house clearly was not harmless beyond a reasonable doubt. Reversal is required.

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XIV

JAMES WILLIAMS WAS AN ACCOMPLICE AS A MATTER OF LAW AND THE FAILURE OF THE TRIAL COURT TO SO INSTRUCT REQUIRES REVERSAL; FURTHER, THE TRIAL COURT ERRED PREJUDICIALLY WHEN IT REFUSED TO ORDER THE JURY TO RECONSIDER THEIR VERDICTS AGAINST APPELLANT WHEN IT BECAME CLEAR THAT THEY HAD NOT UNDERSTOOD THE INSTRUCTIONS RELATING TO ACCOMPLICE TESTIMONY

Appellant's confinement and sentence are illegal and unconstitutional under state statute and constitutional law and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution because his conviction is based solely on the uncorroborated testimony of James Williams, an accomplice as a matter of law. This outcome was the result of the trial court's improper refusal of the defense request to instruct the jury that Williams was an accomplice as a matter of law and that his testimony had to be corroborated. This outcome was also the result of the trial court's improper refusal to order the jury to reconsider their verdicts when it became apparent that they had not understood their task in several fundamental and critical ways.

A. The Facts And Procedural History

As detailed in the Statement of the Facts, and incorporated herein, the prosecution had only one witness who placed appellant at the place and time of the homicides, and that was James Williams, a participant in the offenses. None of the three neighbors to the Wheeler Avenue house who testified was able to identify any of the participants, with the exception of Ms. Daniel, who for the first time and nearly seven years after the offenses, identified both appellant and coappellant Wheeler as the driver of the red

car that carried the victims, Loretha Anderson and her children.[106] No one, including the prosecution, credited Ms. Daniel's identification of appellant as the driver of the red car. The prosecution argued in both its guilt and penalty phase closing arguments that coappellant Wheeler shot into that red car, killing Loretha Anderson and Chemise English. (RT 16441, 16469, 16525-16526, 16529-16530, 16785, 16838, 16849, 18451, 18461-18462. 18483.)

On the afternoon of the homicides, by the point at which Williams had allegedly received instructions on his role in the upcoming confrontation, there are three accounts from Williams in the record on appeal of his own state of mind. Williams first provided an account during his interview with Detective Vojtecky and two Harrisburg, Pennsylvania police officers on October 7, 1988, nine and one-half weeks after the homicides. (RT 16086-16092, 16561-16562; Wheeler's exh. 8A, 4 SUPP 24.) In the interview, Detective Vojtecky asked Williams:

> Did you know what was going down?
>
> W: I had an idea.
>
> V: How?
>
> W: When, uh, first thing, they put gloves on and went in that backroom and I heard all the guns, people cocking the guns.

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[106] In 1988, at the preliminary hearing, she testified that she had not gotten a good look at the driver and was unable to identify him. (RT 11891-11892.) However, in 1995, apparently for the first time at trial, she identified a photograph of appellant Wheeler (People's exh. 113, photograph 2) as depicting the driver of the car, but when asked if she saw him in the courtroom, she identified appellant as the driver. (RT 10539-10544, 11862-11865, 11875-11876, 11892-11893, 11922, 11939-11943, 11951-11953, 11959, 13711-13712.)

4 SUPP CT 45.) Williams told them that he assumed that the reason he was instructed to back the green car into the garage was so that the bodies could be put in the trunk. (RT 15766-15767.)

The second account Williams provided during his interview by two DDAs Kevin McCormick and Bill Seki, and DA Investigator William Duncan on January 25, 1993. (RT 14905, 14907.) The stated purpose of the interview was to review William's prior statements. (People's exh. 207, p. 1.) At the conclusion of the interview, Investigator Duncan summarized what was learned in a five page report. (People's Exh. 207; RT 14915.) Duncan had 20 years of experience as a police officer and investigator. (RT 14924.) Williams told them that: appellant removed the money counting machine from the house; appellant took the handgun that was normally kept in the living room; Williams heard the sound of a gunshot from a bedroom in the house; appellant asked Williams whether the neighbors could have heard the shot; appellant brought a heavily laden duffle bag into the house; Williams heard the sound of codefendant Settle racking a shotgun; Williams eventually saw coappellants Wheeler and Smith alongside codefendant Settle; coappellant Wheeler had a handgun in his waistband; and Williams was told that that "some people were coming to the house." (People's exh. 207, pp. 3-4.) Investigator Duncan continued:

> Williams said that at approximately 4:30 p.m., he looked through the kitchen window and saw a group of people park a red car in front of the count house. Williams saw "Slim" and Don Smith put gloves on their hands. Bryant asked "Slim, Smith and Wheeler if they were ready." Everyone nodded yes. Williams said that it was at this time, he believed someone was going to die. Williams did not believe Bryant would kill anyone in the house. Williams was asked why he did not walk away, if he had a strong belief that Bryant was planning to kill someone. Williams explained that he believed that if he did not go along with the group, they would eliminate him as a potential

witness. Williams said that he planned to cooperate with Bryant so he could safely get himself out of the house.

(People's exh. 207, p.4; RT 14914-14915.)

Investigator Duncan testified that in mid February 1993, DDA McCormick talked with Duncan and told him "to write another report to clear up the problems in the first report." (RT 14916-14918.) McCormick convinced Duncan that the former's notes were more accurate than the latter's notes. (RT 14919-14920.) Duncan's supplemental report is dated April 22, 1993 and begins with a"synopsis of facts" that states, "Last report February 16, 1993. DDA Kevin McCormick reviewed the report of the James Williams interview and determined certain statements made by Williams were omitted." (People's exh. 208, p. 1.) The report then added two paragraphs of facts among which are the following:

> Leroy Wheeler, Don Smith, John Settles arrived at the count house after Bryant and Williams became suspicious. Bryant's employees were not permitted at the count house if they were not working. It was Williams understanding that Bryant owned the House on Wheeler Ave. It was Williams belief Bryant would never have permitted anyone to be killed at the count house because it would have connected the event to Bryant. Bryant told Williams that he was expecting people at the house later that afternoon. Bryant gave Williams instructions to push the buzzer that opened the front door when the people arrived and he, Bryant, would exit the house. Bryant was the boss and Williams had to follow orders. Williams had no idea Bryant and the others were going to kill anyone. Williams had no intention of participating in the murders. Williams gave the same explanation for moving the car from the street into the garage.

(People's exh. 208.)

Williams provided the third account of his state of mind at appellant's trial. Williams testified that he did not want to be there (at the house). (RT 12321-12322.) He planned to cooperate only until he could

safely get himself out of the house. (RT 14914.) Of course by that point the plan would be substantially executed. And, that, assuming one credits Williams's account, is what he did – he cooperated. Williams watched for and saw Armstrong and Brown arrive (RT 12330-12336), he heard them buzzed in through the first set of doors (RT 12332-12333), and then he listened for and acted upon appellant's request to let him out of the house by activating the electronic lock. (RT 12334-12336, 12627-12628.) As Williams was walking towards the kitchen door, he heard one shot, a scream, and then two shots. (RT 12336-12337, 12433.) Williams went into the garage. (RT 12337-12338.) The blue Hyundai was in the garage. (RT 12338.) He continued outside and turned right to a big, old green car. (RT 12340-12341,12345) The key was in the ignition. (RT 12340-12341, 12434.) Williams backed the car into the garage. (RT 12342.) As Williams got out of the car, he saw appellant standing next to the Hyundai. (RT 12343-12344.) Appellant said, "All right, Jay." (RT 12344.) Williams then left as he had been told (RT 12346) and walked to the bus stop, while looking about for witnesses to the shooting. (RT 12321.)

On October 3, 1988, a complaint for four counts of murder and one count of attempted murder were filed against Williams as well as Anthony Arceneaux, appellants Wheeler and Bryant, Levi Slack, Antonio Johnson, and Tannis Bryant Curry. (RT 15064; CT 4836-4845.) Four days later the complaint was amended to add John [sic] Settle, Nash Newbill, and William Settle as defendants. (CT 4968-4972.) Four days later, Provine McCloria was added as a defendant. (CT 5013-5023.)

On November 21, 1988, Williams's preliminary hearing began, joined with that of appellants Wheeler and Bryant, Antonio Johnson, Tannis Curry, and Nash Newbill. (RT 14447, CT 3380, 3397.) Williams was

given a formal grant of immunity from those charges on that date by the Los Angeles Superior Court. The charges against Williams were dismissed on November 30, 1988. (RT 16083,16093-4-5.)

The prosecution argued that, according to Williams' testimony, he did not have sufficient knowledge of what the four defendants were going to do to be an accomplice and that at the most, Williams was an accessory after the fact. (RT 14452.) Alternatively, and in regard to appellant Smith, the prosecution argued that there would be sufficient corroboration through the telephone records and appellant Smith's relationship with appellant in that he would attempt a homicide for appellant. (RT 14453.) The court expressed the view that an accomplice is somebody who is guilty for the same offense, not somebody who merely might be guilty. (RT 14448.) The court found no nexus to the issue just because criminal charges had been filed. (RT 14448-14449.) The court concluded that it could not be said that as a matter of law Williams was an accomplice. (RT 14455.) As the court put it:

> [T]here is circumstantial evidence from which the jury could find him to be an accomplice, or they could find him to be an innocent dupe who does not quite know what's going on. He—according to him, he knows that there are guns, he does not know the people that are coming over, or what is going to happen, but he knows it could be dangerous. He knows Mr. Bryant is to leave and his job is to buzz him out and then get on back to the pool hall after he brings the car in. Does that add up to he must have known there would be a murder and, therefore, must have aided and abetted in one or more murders and shared that intent to kill and so forth? No, that does not necessarily dictate that result.[107]

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[107] Three court days later (RT 14331, 14808), came the testimony of District Attorney's Investigator Duncan with his two 1993 reports of the (continued...)

> The jury may well find that he is not to be believed and that the knew from the beginning what was going to happen in this situation, and he was part and parcel of planning to kill some people that were coming in. They could very well find that. Why would you let a guy listen to murders that are going to happen unless you knew quite well this guy was not going to tell anybody because he was part of the deal. And I don't know if the jury will find that or not. But they may believe him; he was up on the stand for a couple of days. If they believe everything he said, I would submit he is not an accomplice, at least as a matter of law.

(RT 14455-14456.) At a later point, the court stated that the substance of Williams' testimony that his actions were without the specific intent to kill was "certainly very disputable." (RT 15953.) At the close of the prosecution's case appellant's motion to dismiss under section 1118.1 for lack of corroboration of the testimony of Williams was denied. (RT 16154-16157; CT 15146-15147.) Ultimately, the court refused the defense request to instruct the jury that Williams was an accomplice as a matter of law. (RT 16207-16209.)

At the close of the guilt phase, the jury was instructed on the use that maybe made of the testimony of a single witness. Using CALJIC No. 2.27 (1991 rev.) the jury was instructed:

> You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient

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[107](...continued)
interview he participated in with Williams, recounted above. In that interview Williams admitted that by 4:30 in the afternoon of the homicides, Williams believed by what he had seen and heard in the Wheeler Avenue house that somebody was going to die. (RT 14914, 14919, 14923, 14928-14929.)

for the proof of that fact. You should carefully review all the evidence upon which the proof of such fact depends.

(RT 16393; CT 15487.) Williams said that he only planned to cooperate until he could safely get himself out of the house. (RT 14914.)

In regard to accomplice testimony, the jury was provided a definition of an accomplice using the language of CALJIC Nos. 3.10 and 3.14:

> An accomplice is a person who is or was subject to prosecution for the identical offense charged against the defendant on trial by reason of aiding and abetting.

(RT 16406; CT 15510.)

> Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging or facilitating the commission of the crime is not criminal. Thus a person who assents to, or aids, or assists in, the commission of a crime without such knowledge and without such intent or purpose is not an accomplice in the commission of such crime.

(RT 16408-16409, CT 15515.)

In regard to the meaning of "aiding and abetting," the jury was instructed using the language of CALJIC Nos. 3.00 and 3.01.[108] Thereafter

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[108] The jury was instructed as follows:

> The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:
>
> 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission or attempted commission of the crime.
>
> 3. A person aids and abets the commission or attempted

(continued...)

the jury was instructed that an aider and abettor was liable for the natural and probable consequences of the crime committed by a principal.[109]

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[108](...continued)
commission of a crime when he or she,

(1) with knowledge of the unlawful purpose of the perpetrator and

(2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

A person who aids and abets the commission or attempted commission of a crime need not be personally present at the scene of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not itself assist the commission of the crime does not amount to aiding and abetting,

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (RT16404-16405, CT 15507-15508.)

[109] The jury was instructed using the language of CALJIC No. 3.02:

One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, or those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime or crimes originally aided and abetted.

In order to find a defendant guilty of a crime under this theory, you must be satisfied beyond a reasonable doubt that:

1. The crime of murder was committed,
2. The defendant aided and abetted such murder,
3. Thereafter, a co-principal in such crime committed additional charged murders, and
4. Those additional murders were a natural and probable consequence of the commission of the murder or murders which the defendant initially aided and abetted.

Taken together, these instructions mean that a defendant maybe found guilty of a charged offense if the evidence shows beyond a

(continued...)

In regard to the limitations placed on the use of an accomplice's testimony the jury was instructed using the language of CALJIC Nos. 3.11, 3.12, 3.13, 3.18, and 3.19:

> A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.
>
> Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated was true.
>
> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.

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[109](...continued)
reasonable doubt that said defendant:

1. Actively and directly committed such offense, or
2. Was an aider and abetter of such offense, as those terms are defined in the previous two instructions, or
3. Was an aider and abetter in another charged crime or crimes, and the offense under consideration was a natural and probable consequence of the commission of that other crime or crimes. (RT 16405-16406; CT 15509.)

If there is not such independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence.

Evidence to corroborate an accomplice may be direct or circumstantial. It is sufficient if it tends to connect the defendant with the crime even though it is slight and entitled, when standing alone, to little consideration.

Corroborative evidence does not need to establish the precise facts testified to by the accomplice. It is sufficient if it tends to connect the defendant with the commission of the offense.

A defendant's own testimony and inferences therefrom maybe sufficient corroboration of an accomplice as to that defendant only.

Likewise, false or misleading statements to authorities regarding the charged offenses may constitute corroborative evidence or as part of the circumstances supporting a finding of corroboration as to the defendant making the false or misleading statement. ... ¶ ...

The testimony of an accomplice insofar as it tends to incriminate any defendant ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.

You must determine whether any witness was an accomplice as I have defined that term.

> The defendant has the burden of proving by a preponderance of the evidence that such witness was an accomplice in the crimes charged against the defendant.
>
> You should consider all of the evidence bearing upon this issue, regardless of who produced it.

(RT 16406-16410; CT 15511-15514, 15516-15517; CALJIC Nos. 3.11, 3.12, 3.13, 3.18, 3.19.)

During DDA Davidson's opening argument, he pressed that Williams was not an accomplice. Davidson explained to the jury, "and the reason he is not an accomplice in this case, and the reason he is not an accomplice is he has to be subject to prosecution for exactly the same crimes, meaning he has to be guilty of these crimes." (RT 16505.) This prompted a defense objection that he was misstating the law. The court responded, "Well, he has to be shown to be an accomplice by the evidence, I think within, the confines of the court." (RT 16505.) Davidson resumed:

> I tried to explain aiding and abetting. But to be an aider and abettor, you have to have knowledge of the unlawful purpose of perpetrators and know what is going to happen. Know that somebody in the house is going to be murdered. You have to have the intent, the intent to encourage, instigate, to aid those murders. You have to intend to aid those murders, and you have to do so. You have to aid them. And the problem with Jay Williams while he is technically, legally not an accomplice here, even though he was there, he was not privy to the planning of killings in the back of the house.

(RT 16505-16506.) As an illustration of Williams lack of knowledge, Davidson argued that Williams believed that he was backing the green garage into the car so that the bodies could be put in the trunk, whereas in fact the bodies were placed in the back seat. (RT 16506-16507.)

Davidson asked the jury to consider in corroboration of Williams's testimony: appellant's alleged admissions to Ladell Player and Alonzo Douglas Smith; the blood found in the blue Hyundai; appellant's refusal to give a handwriting exemplar as evidence of consciousness of guilt of the instant homicides; the half a piece of paper from a telephone book containing what might be appellant's handwriting found on James Brown's body; the other half of that paper found on a work table at the Wheeler Avenue house; a shell casing from the .45 caliber handgun seized from appellant's house found in the trash at the Wheeler Avenue house; appellant's use of Western Union to send money to the male victims; unspecified telephone records; the "character and quality" of appellant's own testimony; and codefendant Settle's testimony. (RT 16493-16501.)

The jury began their guilt phase deliberations on May 11, 1995. (CT 15206.) Jurors were excused and alternates substituted on May 17 and May 23, 1995. (CT2 837, CT 15289-15290; RT 16950, 16956-16957.) Each time, the jury was instructed to begin their deliberations anew. (2 SUPP CT2 839, CT 15290; RT 16958,16970.) By June 8, 1995 at 5:05 p.m., after 12 days of deliberation (May 23 through June 8, 1995), the jury had reached verdicts on all counts charged against appellant and coappellants Wheeler and Smith,[110] but had not reached agreement on codefendant Settle. (CT 15291, 15295-15296, 15309,15316-15317, 15376-15377, 15381, 15385, 15394, 15403-15406, 16090.)

On June 12, 1995, the jury asked the following seven questions:

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[110] On May 17, 1995, the jury had returned guilty verdicts on counts three and four against appellant Bryant. (RT 16952-16956.)

[1.] Please clarify page 23 of jurors [sic] instructions [CALJIC No. 2.13], in regards to inconsistent or consistent of a [sic] testimony. (CT 15438; RT 17100-17101.)
[2.] If more than one witness has made inconsistent statements, how do we weigh their "credibility" and "truth of facts"between them? (CT 15439; RT 17101.)
[3.] If one is charged with the same crime but not brought to trial is he automatically an accomplice?
[4.] Can there be aiding and abetting after the crime was committed? (CT 15440; RT 17101.)
[5.] We would like to have some clarification as to doubt. ¶Reasonable—Possible—Imagined ... maybe an example of each??? (CT 15442; RT 17101.)
[6.] ... Page 56 of the instructions states "A defendant cannot be found guilty based upon the testimony of an accomplice unless corroborated by other evidence." Doesn't this constitute reasonable doubt if there is no corroboration of same in your mind?
[7.] ... If you have reasonable doubt, you are required to vote not guilty. Is that the law?

(CT 15441; RT 17102.)

In discussing the appropriate responses to questions 3 and 4, the court stated:

> It is a fact that if you are charged with a crime it does not make you an accomplice. I believe the law is that one must be properly chargeable with a crime to be an accomplice, which means there has to be some proof of a person's criminal culpability, certainly not proof beyond a reasonable doubt, but if you are properly chargeable with the crime, then you are an accomplice.
>
> As to the [question 4], you can't aid and abet a crime after it was committed and be guilty of the underlying crime. ... We have to be careful here because as to No. 3, they may be asking whether Mr. Williams—in effect, could Mr. Williams for example, would be an accomplice simply by driving the green car back into the driveway. That is one way to look at it.
>
> The other is, I'm trying to see if they could be trying to apply that to Mr. Settle in some way. Is there any evidence of an

accomplice, well, I guess so. It could be this: There is some testimony that Mr. Settle was in one of the vehicles seen leaving the scene, I think the vehicle with two victims in it. There was some testimony that the jury could find that to be the case, though. They may be wondering, for example, well, would that act in and of itself make one guilty even though they are not a hundred percent sure that the guy was there firing the shots, let's say. . . .

(RT 17105-17105a.)

The court adjourned and continued the discussion the following morning. (RT 17105b-c.) When the court asked for the input from counsel for appellants, Mr. Novotney moved pursuant to section 1161[111] that the deliberations be reopened because the jury's questions demonstrated that they misunderstood the law and the instructions they had been provided. (RT 17105e.) The Court immediately denied the motion.[112] (RT 17105e.)

Returning to the appropriate response to question number 4, the court pondered:

In terms of Mr. Williams, ... they may be asking again in a roundabout way, we want to know if Mr. Williams is a accomplice, and the reason we are asking about aiding and abetting is we think he

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[111] Section 1161 provides in pertinent part:

When there is a verdict of conviction, in which it appears to the Court that the jury may have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered..... If the jury render a verdict which is neither general nor special, the Court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the Court.

[112] This denial discussed in Argument XIV, *post.*

> is an aider, Mr. Williams, and therefore, we have worked out in this circumstance it is possible that simply by driving the green car in, which is after the homicide, at least after a couple of homicides, and arguable even after all four, ... ¶¶ [d]oes that fact make one an aider even though something arguably occurred after the murder. The answer is technically, "NO." But the answer is "certainly" if he agreed to do it beforehand and that facilitated and encouraged to get this ball rolling.

(RT 17105j.)

In the court's responses to the jury, in regard to question number 4, the court provided two hypothetical sets of facts. In one a defendant agreed before a murder to permit a body to be buried in his yard to facilitate the commission of a murder. In the second, the defendant agreed after the murder. The court instructed the jury that in the first scenario, the defendant, "in all likelihood, [is] an aider and abettor in the crime of murder." In the second scenario he would not be. (RT 17105s-u.) Whereupon, juror 247 inquired, "In that second scenario, would he be an accomplice?" (RT 17105u.) The court clarified that the juror meant an accomplice to murder. (RT 17105u-v.) The court reminded the juror that an accomplice "is a person who is a principal or aider and abettor shown by the preponderance of the evidence in the commission of a crime." (RT 17105v.)

Shortly thereafter, Juror 113 inquired, "Now, you still are saying, no, that the juror has the – the final decision as to whether or not they consider someone to be an accomplice or an accessory? (RT 17105y.) The court replied that "accessory" is not a word that the court had used. (RT 17105z.) Juror 113 replied, "I think that was part of the problem we were having." (RT 17105z.) The juror then asked, "What if someone has decided that someone is an accomplice? (RT 17105z.) The court then clarified that the

juror's question was whether it was up to them to determine whether somebody is or is not an accomplice. (RT17105z.)

Immediately thereafter, juror 412 asked, "I also said I wanted to clarify in my mind, if you find a person is an accomplice and his testimony is not corroborated that goes beyond a reasonable doubt, the law says you cannot find him guilty." (RT 17105aa.) Juror 261 then asked, "what if the jurors don't agree whether or not someone is an accomplice or not? (RT 17105aa.)

At the conclusion of this exchange, Mr. Novotney argued that it was painfully clear that at the time the jury rendered its verdicts, it did not understand the law of accomplice liability, and again moved pursuant to section 1161 that the deliberations be reopened. (RT 17105bb-cc.) The court denied the motion. (RT17105cc.) The court explained:

> I don't see a misunderstanding. What I see is the fact as to Mr. Settle, one defendant, one juror is apparently having problems with the issue of whether there is sufficient corroboration, assuming Mr. Settle is an accomplice. And that in no way exists with any verdict re [sic] your client's case, and does not evidence a confusion as to the law regarding accomplices whatever as to render a verdict against your client mildly suspect.

(RT 17105cc-dd.)

B. Accomplice Testimony Must Be Viewed With Distrust

Distrust of accomplice testimony is as an important component of a defendant's right to a fair trial and to a reliable jury verdict. *(People v. Guiuan* (1998) 18 Cal.4th 558, 564-569.) Thus, Penal Code section 1111 proscribes basing a conviction upon the uncorroborated testimony of an accomplice. The section provides in relevant part:

> 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.

(§ 1111.) The due process roots for safeguards in the use of accomplice testimony are deep and well documented. (*People v. Guiuan, supra*, 18 Cal.4th at pp. 565-567.) As Justice Kennard explained in her concurring opinion:

> "A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From 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."

(*People v. Guiuan, supra*, 18 Cal.4th 558, 570, conc. opn. of Kennard, J., quoting *Phelps v. United States* (5th Cir. 1958) 252 F.2d 49, 52.)

There are good reasons for such skepticism. First, accomplices, because they are liable for prosecution for the same offense, have a powerful built-in 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.) "A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation." (*Williamson v. United States* (1994) 512 U.S. 594, 607-608, conc. opn. of Ginsburg, J.) "There is solid historical justification for an accomplice's expectation that, even in the absence of an explicit agreement, the prosecution will reward testimony that results in a conviction by

granting the testifying accomplice immunity from prosecution or at least leniency in charging or sentencing." (*People v. Guiuan, supra*, 18 Cal.4th at p. 572, conc. opn. Kennard, J.) Accomplices are rarely persons of integrity whose veracity is above suspicion. An accomplice's participation in the charged offense is itself evidence of bad moral character. (*Id.* at p. 574.) As the Ninth Circuit put it in *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243F.3d 1109:

> [B]ecause 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.) The danger of relying on testimony from people who are receiving a deal for that testimony was brought to light by a study of the Actual Innocence Project which illustrated the high incidence of reliance on informants in cases where the defendant was later exonerated as innocent by DNA tests. (*Id.* at p. 1124, fn. 6.)

A second reason for such skepticism is the accomplice's obvious interest in minimizing his own role in the charged offense. Quite apart from any hope that the prosecution will grant the accomplice immunity or leniency as a reward for testimony that results in the defendant's conviction, it is in the accomplice's interest to persuade the prosecution that the offense is less serious than the charge indicates or that the accomplice's own role in its commission is relatively insignificant. (See Alarcon, *supra*, 25 Loyola L.A.L.Rev. 953, 960.) For this reason, accomplice testimony may falsely minimize the seriousness of the crime or the accomplice's culpability for it. Testimony portraying the offense as less serious than charged necessarily

would favor the defense, but testimony minimizing the accomplice's role could favor either the prosecution (by shifting primary blame to the defendant) or the defense (by shifting primary blame to other individuals).

> Finally, special caution is warranted because an accomplice's firsthand knowledge of the details of the criminal conduct allows for the construction of plausible falsehoods not easily disproved. This court has previously described the problem in these words: "[A]ccomplice testimony is frequently cloaked with a plausibility which may interfere with the jury's ability to evaluate its credibility. '"[A]n accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth."' (Heydon, *The Corroboration of Accomplices* (Eng. ed. 1973) Crim.L.Rev. 264,266; see also Note, 54 Colum.L.Rev. 219, 234.)" (*People v. Tewksbury* [1976] 15 Cal.3d 953, 967 [127 Cal.Rptr. 135]; also Note, *Accomplices in Federal Court: A Case For Increased Evidentiary Standards* (1990) 100 Yale L.J. 785, 787 ["Since the accomplice alone knows about the pattern of criminal events, he can manipulate the details of those events without blatant discrepancies."]; Hughes, *[Agreements for Cooperation in Criminal Cases* (1992) 45 Vand. L.Rev. 1, 33 ["Courts should instruct juries to consider how easily suspects with inside knowledge can fabricate testimony and the strong incentive for suspects to do so when their liberty may depend on it."].)

(*People v. Guiuan, supra*, 18 Cal.4th at p. 575, conc. opn. of Kennard, J.)

In *People v. Tewksbury* (1976) 15 Cal.3d 953, 967, this Court affirmed the Legislature's mandated skepticism for accomplice testimony:

> Juries are now compelled rather than cautioned to view an accomplice's testimony with distrust, for while his testimony is always admissible and in some respects competent to establish certain facts (see *People v. McRae* [(1947)] 31 Cal.2d 184, 157 [187P.2 SUPP CT 741] [probable cause to hold defendant to answer at preliminary hearing]), such testimony has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated.

Thus, whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies, the jury must be instructed, sua sponte, that the accomplice's testimony should be viewed with caution. (*People v. Guiuan, supra*, 18 Cal.4th at p. 569.) Where a witness is an accomplice as a matter of law, the trial court must in addition instruct the jury that the accomplice's testimony must be corroborated. (*People v. Robinson* (1964) 61 Cal.2d 373; *People v. Dailey* (1960) 179 Cal.App.2d 482, 485-486.)

C. James Williams Was An Accomplice As A Matter of Law

An accomplice is "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 give." (Pen. Code, § 1111; accord Witkin, California Evidence, Presentation at Trial 3, supra, § 97, pp. 132-133.) "In order to be chargeable with the identical offense, the witness must be considered a principal under section 31." (*People v. Fauber* (1992) 2 Cal.4th 792, 833.) Section 31 defines who principals are. It provides in pertinent part:

> All persons concerned in the commission of a crime...whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission... are principals in any crime so committed.

Thus, an accomplice is a principal (§ 1111) and a principal includes an aider and abettor (§ 31; *People v. Beeman* (1984) 35 Cal.3d 547, 554.)

An explication for the latter was provided by this Court in *Beeman, supra*:

> [T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of

> encouraging or facilitating commission of, the offense. [Emphasis in orig.]

(*People v. Beeman, supra,* at p. 560, citing *People v. Terry, supra*, at p. 402; *People v. Yarber* (1979) 90 Cal.App.3d 895, 915-916; *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87.)

A defendant need not himself commit the acts requisite to the crime to be an aider and abettor; his peripheral assistance may be sufficient to make him an accomplice as a matter of law. (See, e.g., *People v. Dailey, supra*, 179 Cal.App.2d at p. 486.) In addition one does not necessarily have to have the intention of enjoying the fruits of the crime to be an aider and abettor. (*People v. Beeman, supra*, at pp. 557 & 560, quoting *People v. Terry* (1970) 2 Cal.3d 362, 401; e.g., *People v. Lewis* (1952) 113 Cal.App.2d 468 [encouraging statutory rape].)

Furthermore, and aider and abettor is not only guilty of the offense he intends to assist, but also of any offense that is a natural, foreseeable, and probable consequence of that offense. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260.) Thus, in *People v. Solis* (1993) 20 Cal.App.4th 264, the defendant, a gang member, after a confrontation with some rival youths, 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 three shots, killing one person. The court found Solis was properly convicted of second degree murder based on a theory of aiding and abetting, where he admitted knowing that the shooter had a gun, even though Solis denied knowing or expecting 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.)

Where there is no dispute as to either the facts or the inferences to be drawn therefrom that the witness was an accomplice, the witness is an accomplice as a matter of law and the jury must be instructed that the witness's testimony must be viewed with distrust and corroborated by other evidence that tends to connect the defendant with the commission of the offense. *(People v. Robinson, supra*, 61 Cal.2d at p. 394; *People v. Valerio* (1970) 13 Cal.App.3d 912, 924; *People v. Fauber, supra*, 2 Cal.4th 792, 833-834; *People v. Zapien* (1993) 4 Cal.4th 929, 982.) Thus, a witness's extrajudicial confession to the charged crime makes the witness an accomplice as a matter of law. (*People v. Robinson, supra*, 61 Cal.2d at p. 394.) So too, a witness who "was the person with whom appellant was charged with conspiring" was "obviously an accomplice" to the crime of conspiracy. *(People v. Tatman* (1993) 20 Cal.App.4th 1, 12.)

In the instant case, as detailed above, James Williams was an accomplice as a matter of law. Irrefutably, Williams was a principal in the target offense of drugs sales from a fortified house, stocked with firearms, and during the course of an upcoming armed confrontation.[113] Although fully aware of all of these factors, he did nothing to extricate himself from the looming events. In fact, he agreed to assume the role in those events assigned to him. This alone made him liable for murder as a principal to murder under the natural, foreseeable, and probable consequences of the target offense he aided and abetted, narcotic sales. (*People v. Solis, supra.*)

Moreover and irrefutably, Williams was aiding and abetting the target offense of murder. By Williams own account, from the preparations

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[113] Appellants had been jointly charged for conspiracy (§ 182, subd. (1)) to operate a major narcotic sales distribution organization. (CT 4764, 4784, 4865,4879, 4892, 4918, 4928, 4947, 4962, 4965, 4821, 7623.)

being made, he knew that someone was going to be killed. He may not of known who or why, but the imminent nature of the criminal purpose was clear. Nevertheless, he facilitated the murders by playing his role as he was instructed. He understood that he was going to back the green car into the garage so that the bodies could be put into the trunk. The prosecution made this very point in their opening argument. (RT 16506-16507.) Williams watched for the arrival of the victims. After they had entered the outermost steel door, Williams electronically reopened the door and let appellant out of the front door. Even if by that point he had had any doubt in what he was aiding and abetting, that doubt was removed by the first shots and screams he heard as he walked through the kitchen. Yet, he continued to provide his assistance to the venture and went out to the street and backed the green car into the garage as the victims in the car at the curb were shot. Thereafter, he walked to the bus stop, looking about for witnesses to the homicides.

The prosecution believed that he was a principal in the homicides and charged him just as they had appellants and several others. But, that is not the dispositive fact. The dispositive fact is that Williams admitted sufficient facts that collectively confessed his role as a principal to murder under both of the aiding and abetting theories detailed above. There is no dispute as to either these facts or the inferences to be drawn therefrom. That is what made him an accomplice as a matter of law. (*People v. Robinson, supra*, 61 Cal.2d at p. 394; *People v. Valerio, supra*, 13 Cal.App.3d 912, 924; *People v. Fauber, supra*, 2 Cal.4th 792, 833-834; *People v. Zapien, supra*, 4 Cal.4th 929, 982.)

Williams's proffer that he was assisting only because he believed that it was too late for him to back out did not relieve him of criminal liability for the multiple murders. Not even the threat of future danger of

loss of life is a defense (*People v. Otis* (1959) 174 Cal.App.2d 119, 125-126; *People v. Lewis* (1963)222 Cal.App.2d 136, 141), and the defense of coercion is not available at all when the charged offense is punishable by death. (*People v. Petro* (1936) 13 Cal.App.2d 245, 248.) The authority for excluding wrongdoers from accomplice liability in the context of a "feigned accomplice" theory is limited to those acting under the direction of an officer of the law where the accomplice's feigned complicity in the commission of the crime is merely for the purpose of detecting or prosecuting the perpetrator. (*People v. Griffin* (1950) 98 Cal.App.2d 1, 22; *People v. Hensling* (1962) 205 Cal.App.2d 34,39-40; *People v. Hoover* (1974) 12 Cal.3d 875, 881; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191-193; Witkin, California Evidence 3, supra, § 101, p. 137.)

As set forth above, the trial court refused appellant's request that the jury be instructed that Williams was an accomplice as a matter of law and that his testimony had to be corroborated by other evidence, exclusive of other accomplice testimony. Appellant's jury was instructed that they could not find appellant guilty based on the testimony of an accomplice unless that testimony was corroborated by other evidence that tended to connect him with the commission of the offense. However, the instructions left it to the jury to resolve whether Williams was an accomplice. Moreover, the jury was told that the burden was on appellant to prove by a preponderance of the evidence that Williams was an accomplice.

As a result, the jury was permitted to speculate upon whether Williams was an accomplice and thereby impliedly and erroneously authorized to find that he was not an accomplice and to convict appellant on Williams's uncorroborated testimony. In fact, the prosecution argued to the jury that Williams was not an accomplice because "he was not privy to the

planning of killings in the back of the house." (RT 16505-16506.) That was not a determinative factor. As detailed in Part A, above, Williams heard codefendant Settle racking the shotgun. Coappellants Wheeler and Smith were alongside Settle, putting on gloves. Coappellant Wheeler had a handgun in his waistband. And Williams was instructed that these preparations were for "some people [who] were coming to the house." He believed that people were going to be killed and their bodies were going to be put in the trunk of the green car that he was going to back into the garage. The failure to instruct that Williams was an accomplice as a matter of law let the jury make a determination it should not have made, i.e., whether Williams was an accomplice, and did not require it to make the essential finding of corroboration. The failure to properly instruct the jury to make a factual determination necessary for guilt violated appellant's Sixth Amendment right to a jury trial. (*In re Winship, supra,* 397 U.S. at p. 361.)

The failure to instruct on accomplice testimony is only harmless if there is sufficient corroborating evidence in the record. (*People v. Tatman, supra*, 20 Cal.App.4th at p. 12; *People v. Miranda* (1987) 44 Cal.3d 57, 100.) However, as will be demonstrated, below, there was insufficient corroborating evidence that appellant participated in the charged offenses.

D. There Was Insufficient Corroborating Evidence That Appellant Was Involved In The Homicides

1. General Principles Of Appellate Review

The constitutionally mandated test to determine a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578;

Jackson v. Virginia (1979) 433 U.S. 307, 318-319.) In making this determination the appellate court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment of conviction the existence of every fact the trier of fact could reasonably deduce from the evidence. However, the appellate court must resolve the issue of sufficiency of the evidence in light of the whole record. Furthermore, the reviewing court must judge whether the evidence of each of the essential elements of the offense of which the defendant stands convicted is substantial and of solid value. (*People v. Johnson, supra*; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Hernandez* (1988) 47 Cal.3d 315, 345-346; *People v. Ochoa* (1994) 6 Cal.4th 1199, 1206.) That is, the evidence must reasonably inspire confidence and be of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

A finding based on conjecture or surmise cannot be affirmed. (*People v. Memro* (1985) 38 Cal.3d 658, 695.) This is because suspicion is not evidence; it only raises a possibility, which will not support an inference of fact. Even a strong suspicion is insufficient to support a conviction. (*People v. Thompson, supra,* 27 Cal.3d at p. 324.)

Furthermore, the evidence must be capable of supporting a finding as to every fact required for conviction beyond a reasonable doubt. "[T]he trier of fact must be reasonably persuaded to a near certainty" (*People v. Hall* (1964) 62Cal.2d 104, 112) or "evidentiary certainty." (*Cage v. Louisiana* (1990) 498 U.S. 39, 41.) It is therefore not enough that there is some evidence based upon which a trier of fact might speculate that the defendant is in fact guilty. (*People v. Thomas, supra,* 2 Cal.4th489, 545, dis. opn. of Mosk, J.)

These same standards apply to accomplice testimony. (*People v. Malone* (1947) 82 Cal.App.2d 54, 60; Witkin, California Evidence, Presentation at Trial 3, supra, § 103, pp. 141.) The reviewing court determines whether there is any substantial corroborative evidence, and whether, when error is found, the error committed has led to the verdict reached. (*People v. Malone, supra*, at p. 60; *People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012; Witkin, California Evidence, Presentation at Trial 3, § 103, p. 141.)

In this process, the Eighth Amendment requires a greater degree of accuracy and fact-finding than in noncapital cases. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334.)

2. The Testimony Of An Accomplice Must Be Corroborated

To prevent convictions from being based solely upon evidence from the inherently untrustworthy source of an accomplice, the legislature enacted section 1111 to require corroboration whenever an accomplice provided the evidence upon which a conviction is sought. (*People v. Belton* (1979) 23 Cal.3d 516, 525.) It places upon the prosecution the burden of producing independent evidence to corroborate the testimony of an accomplice. (*People v. Cooks, supra*, 141 Cal.App.3d at p. 258.) The section provides:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such proper 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.

(Pen. Code, § 1111.)

To corroborate the testimony of an accomplice, the prosecution must produce independent evidence that, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206.) In this regard, the evidence must connect the defendant with the crime, not simply with its perpetrators. (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543; *People v. Robinson, supra*, 61 Cal.2d at p. 400; *In re Ricky B.* (1978) 82 Cal.App.3d 106, 111.) If the corroboration merely raises a suspicion of guilt, however grave, it is insufficient. (*People v. Robinson, supra*, 61 Cal.2d 373, 399; *People v. Szeto* (1981) 29 Cal.3d 20, 27; Witkin, California Evidence, Presentation at Trial 3, § 103, p. 140.) Likewise, it is insufficient to show mere suspicious circumstances. (*People v. Robbins* (1915) 171 Cal. 466, 476.)

An accomplice cannot corroborate himself (*People v. Andrews* (1989) 49 Cal.3d 200, 214), nor can the testimony of one accomplice corroborate another accomplice (CALJIC No. 3.13; *People v. Clapp* (1944) 24 Cal.2d 835, 837; *People v. Dailey, supra*, 179 Cal.App.2d at p. 486.)

To determine if sufficient corroboration exists, the accomplice's testimony should be eliminated from the case. The evidence of other witnesses must then be examined to determine if there is any inculpatory evidence tending to connect appellant with the offense. (*People v. Shaw* (1941) 17 Cal.2d 778, 803-804; *People v. Falconer, supra*, 201 Cal.App.3d at p. 1543.)

3. The Evidence That Appellant Participated In The Homicides Was Insufficient As A Matter Of Law

In the instant case, once James Williams's testimony is eliminated from the case, there is no evidence that appellant was at or in the Wheeler Avenue house during the homicides or that he aided or abetted their commission. The prosecution essentially argued to the jury to disbelieve the testimony of appellant and to consider that disbelief as "evidence" in corroboration of Williams' testimony. Disbelief does not equate to evidence, however. In addition, the substance found in the blue Hyundai was presumptively positive for blood, but it could have been nonhuman blood or plant material. (RT 12878-12879.) The statements attributed to appellant by Player and A. Smith show knowledge of the homicides after the fact, and an agreement that the drug organization appellant was a part of was better off without Armstrong and Brown, but the statements do not show that appellant planned, authorized aided or committed the killings. Similarly, phone records do not show anything other than the fact that appellant called others involved in the drug trade. The piece of paper found on Brown's body allegedly containing appellant's handwriting and money appellant allegedly sent to Armstrong and Brown were of no significance to the homicides, since appellant admitted working in the drug business. Likewise, since appellant admitted to frequenting the Wheeler Avenue house, the fact that a shell casing from his gun was found at the scene is simply not dispositive of involvement in the homicides. And finally, Settle's testimony could not legally constitute corroboration of Williams' testimony, since the testimony of one accomplice cannot corroborate that of another accomplice. (CALJIC No. 3.13; *People v.*

Clapp, supra, 24 Cal.2d at p. 837; *People v. Dailey, supra*, 179 Cal.App.2d at p.486.)

The evidence must connect the defendant with the crime itself, not simply with its perpetrators. (*People v. Falconer, supra*, 201 Cal.App.3d at p. 1543; see also *People v. Robinson, supra*, 61 Cal.2d at p. 400; *In re Ricky B.*, supra, 82 Cal.App.3d at p. 111.) *Falconer, supra*, illustrates the application of this rule. There an accomplice testified that the defendant was among four or five intruders who planned and participated in a burglary of a residence to steal marijuana. All the intruders wore stockings, masks and bandanas, and the victim was unable to identify any of the intruders. The accomplice testified that not only did the defendant participate, but that the defendant had planned the raid, purchased the stockings ahead of time, and had cased the place the morning before the burglary. (*Id.* at p. 1542.) The Court of Appeal found there was insufficient corroboration of accomplice testimony. The court emphasized:

> Excluding [the accomplice's] testimony we are left with these pertinent facts established by the evidence: [the defendant] is the father of one of the intruders; that he visited the [victim's] residence eight or nine months before the incident and knew [the victim] was a marijuana grower. This evidence is not enough to corroborate [the accomplice's] testimony. Although corroborating evidence need only be slight and may be entitled to little consideration when standing alone [citations], it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime.

(*Id.* at p. 1543.) Similarly, in *People v. Martinez* (1982) 132 Cal.App.3d 119, 126-127, an accomplice was the sole witness linking the defendant to an armed robbery. In reversing the defendant's conviction, the court observed:

> Although certain testimony by [two police officers] corroborated [the accomplice's] testimony, it did nothing more than show "the commission of the offense or the circumstances thereof."

(*Id.* at p. 133, citations omitted.)

All of appellant's actions after the homicides were equally consistent with his role as an employee of the organization in its drug distribution business. Thus, once William's testimony is eliminated from the case, there is no evidence, let alone substantial evidence, corroborating his testimony regarding appellant's involvement in the homicides.

Moreover, from the jury note detailed above, it is certainly clear that the jury was confused about whether Williams was an accomplice as a matter of law and whether appellant could be convicted without substantial evidence corroborating Williams's testimony. After the jury had returned their verdicts against all capital appellant herein, they continued their deliberations on codefendant Settle's case. In the process, they submitted seven questions to the court (detailed above.) From their content, it is clear that one or more of the jurors had yet to resolve whether Williams was an accomplice, despite the fact that it had been part of their charged duty. (RT 17101; CT 15440.) In addition, one or more had not understood their role once they concluded that Williams was an accomplice. (RT 17102; CT 15441.) And, even more troubling, one or more jurors had not understood their role once they had arrived at a reasonable doubt of the defendant's guilt. (RT 17102, RT 17105aa; CT 15441.)

4. Appellant's Convictions Must Be Reversed

From a review of the entire record and with Williams's testimony removed, a rational trier of fact could not have found appellant guilty beyond a reasonable doubt, and, as a result, appellant's convictions must be

reversed. (*People v. Johnson, supra*, 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra*, 433 U.S. at pp. 318-319.) Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1), the trial court should be directed to dismiss these offenses from the accusatory pleading with prejudice.

The result here effectively lightened the State's burden of proof and violated appellant's constitutional right to federal due process. (*Carella v. California* (1989) 491 U.S. 263.) Furthermore, misapplication of a state law that leads to a deprivation of a liberty interest, here that no conviction shall be had on uncorroborated accomplice testimony (§ 1111), violated the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.; *Vitek v. Jones* (1980) 445 U.S. 480; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *People v. Marshall* (1996) 13 Cal.4th 799, 850-851.) This too was reversible error. (*People v. Robinson, supra* (1964) 61 Cal.2d 373, 394; *People v. Zapien, supra*, 4 Cal.4th 929, 982.)

For all the foregoing reasons, appellant's conviction and death judgment must be reversed.

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XV

THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S REQUEST FOR A PRETRIAL HEARING ON THE ADMISSIBILITY OF OTHER CRIMES EVIDENCE; IN ADDITION, THE INSTRUCTIONS PREJUDICIALLY FAILED TO PROPERLY LIMIT THE JURY'S CONSIDERATION OF OTHER CRIMES EVIDENCE

The trial court erred in failing: (1) to afford appellant a full and fair hearing on the admissibility of other crimes evidence; (2) upon appellant's request, to instruct the jury to find true preliminary facts prior to considering the other crimes evidence; (3) upon appellant's request, to instruct the jury regarding the proper use of evidence relating to the uncharged crimes that was introduced during the guilt phase of appellant's trial; (4) to instruct the jury that the preliminary facts and other crimes evidence had to be found true beyond a reasonable doubt prior to the consideration of other crimes evidence by the jury. These errors deprived appellant of the right to a jury trial, to a fair trial, to due process of law, to a reliable determination of penalty, and also lighted the prosecution's burden of proof, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution. As a result, appellant's conviction must be reversed and his death sentence vacated.

A. The Trial Court Erred In Denying Appellant's Motion For An Evidentiary Hearing On The Admissibility Of Other Crimes Evidence

Prior to trial, appellant filed a motion for evidentiary hearing on each uncharged crime the prosecution intended to introduce at the guilt phase of

trial under Evidence Code, section 1101, subdivision (b). (CT 11079-11092.) The trial court denied appellant's request.[114] (RT 18339.)

Appellant was improperly denied his right to a hearing on the admissibility of other crimes evidence in the prosecution's case in chief. (Evid. Code, § 403.) By its express terms, Evidence Code section 403, subdivision (a) provides that "proffered evidence is inadmissible" unless the court makes preliminary findings of sufficient foundational facts in the following areas: (1) relevancy; (2) personal knowledge of the witness; (3) the authenticity of a writing; and (4) whether or not a hearsay statement is authentic (i.e., actually made by the person alleged to have made it.) Thus, under the statute, the trial court was required, upon appellant's request, to determine the admissibility of the evidence in a hearing outside the presence of the jury. (Evid. Code, § 402, subd. (b).) Using this procedure, the jury is not tainted by evidence which should be excluded for lack of foundation.

Where issues of relevancy and personal knowledge are in issue, the trial court should grant defendant a hearing upon request to determine the existence of the requisite factual predicate to the admissibility of evidence. In *Holt v. Virginia* (1965) 381 US 131, 136, the high court concluded that "[t]he right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues." In *Reece v. Georgia* (1955) 350 U.S. 85, 89, the United States Supreme Court held that "the right to object to a grand jury presupposed an opportunity to exercise

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[114] Trial counsel mentions a denial of this motion that appellant's counsel cannot locate in the record provided to appellant. To the extent the relevant record might have been produced had the trial court and the instant court granted appellant's requests to augment and settle the record on appeal, appellant submits he has been denied the right to an adequate record on appeal. (See Argument XXXIV, *post*, incorporated by reference herein.)

that right." Implicit within these decisions is the right to an evidentiary hearing to resolve disputed material issues of fact. The right to object and the right to file motions would be useless if the accused is arbitrarily precluded from introducing evidence in support of those motions.

Due process guarantees the accused the right to access to the courts and the right to a meaningful opportunity to be heard. (See e.g., *In re William F.* (1974) 11 Cal.3d 249, 255 [due process requires fundamental fairness in the fact finding process]; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914; see also *People v. Braxton* (2002) 103 Cal.App.4th 471 ["justice" requires remand where defendant was improperly denied an opportunity to make motion for new trial].)

Thus, due process principles are violated if the jury is permitted to consider other crimes evidence without affording the defense a full and fair hearing on the admissibility of the other crimes evidence. (See *People v. Armstead* (2002) 102 Cal.App.4th 784, 793-794; *People v. Martin* (1954) 128 Cal.App. 2d 724 [court first admitted evidence and then, after the case was argued, instructed the jury not to consider it].) Moreover, the federal constitution (6th and 14th Amendments) gives the defense the right to compel the attendance of witnesses and confront the prosecution witnesses. (See *Chambers v. Mississippi, supra,* 410 U.S. at p. 294; *Webb v. Texas* (1972) 409 U.S. 95; *Washington v. Texas, supra,* 388 U.S. at pp. 17-19.) The right to call witnesses is expressly guaranteed under the California Constitution. (See *People v. Chavez* (1980) 26 Cal.3d 334, 353.) These fundamental constitutional rights to be heard and to call witnesses apply to motion hearings as well as to the jury trial itself. (See *Holt v. Virginia, supra*, 381 U.S. at p. 136; *Bell v. Burson* (1971) 402 U.S. 535, 541-42.)

In short, both the California Constitution and federal Constitution guarantee the defendant a right to his day in court (*In re Oliver* (1948) 333 U.S. 257, 273), free from arbitrary adjudicative procedures. *(Truax v. Corrigan* (1921) 257 U.S. 312, 332 [due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry]; *Powell v. Alabama* (1932) 287 U.S. 45 [the opportunity to be heard is one of the immutable principles of justice which inhere in the very idea of free government and is a central component of procedural due process]; see also *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [California Due Process Clause protects against arbitrary adjudications].)

The trial court's failure to afford appellant his requested evidentiary hearing denied him the aforementioned rights to his prejudice. Throughout trial, the prosecution sought to introduce evidence of other crimes evidence over appellant's objections. (See Argument VII, *ante*, incorporated by reference herein.) Time and again the defense heard proffers regarding the relevancy and admissibility of this evidence for the first time in court, which the trial court, with one or two exceptions, accepted without taking evidence. The court's action denied appellant his right to examine witnesses and challenge the prosecution's theory and factual support for the admissibility of the other crimes evidence and resulted in the admission of evidence for which the factual predicate for its admissibility was absent.

For example, with regard to the admissibility of evidence concerning the shootings of Ken Gentry and Renard Goldman, a key factor in the court's ruling was the prosecution's proffer that further evidence would establish that Armstrong's threats to collect from appellant for those

shootings were, in fact, communicated to appellant. (RT 8724-8730, 8786-8787.) Appellant also objected to the admission of evidence regarding threats received by Goldman prior to his testimony in this case; The court accepted the prosecution's proffer that it would produce evidence that those threats were done at the behest of appellant. (RT 9218-9220, 9226.) Subsequently, no evidence was introduced at trial showing either that: (1) Armstrong's threats to collect from appellant were communicated to appellant; or (2) that appellant directed people to threaten Goldman prior to his testimony. If appellant's request for an evidentiary hearing on these preliminary facts had been granted, the inadmissibility of the evidence would have been established pretrial and the jury never would have heard the prejudicial and inflammatory evidence.

Likewise, the prosecution proffered a theory as to a secondary motive for appellant to have committed the instant homicides: he killed or attempted to kill men who slept with his ex-wife. Regarding that theory of admissibility, the trial court ruled that evidence regarding the Keith Curry attacks were relevant and admissible if the prosecution established that: (1) appellant knew of his ex-wife's relationship with Curry and was unhappy about it, and (2) appellant knew of his ex-wife's relationship with Armstrong and was unhappy about it. (RT 11288-11289, 11300-11301.) The prosecution represented that they would prove up the latter point, but never did. Again, if appellant had been granted a hearing, none of the extremely prejudicial Curry evidence would have been admissible at appellant's trial.

In sum, the trial court prejudicially failed to grant appellant's request for an evidentiary hearing to establish the sufficiency of the evidence of predicate facts as required by Evidence Code section 403, subdivision (a).

For all the foregoing reasons, appellant was denied his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution; reversal of his conviction and sentence is required. *(Chapman v. California, supra*, 386 U.S. at p. 24.)

B. The Trial Court Erred In Denying Appellant's Request For A Modified CALJIC No. 2.50 Instruction Requiring The Jury To Find Preliminary Facts Prior To Consideration Of Other Crimes Evidence

Appellant requested, inter alia, the jury be instructed that it was required to find the existence of the various preliminary facts upon which the admissibility of other crimes evidence concerning the Gentry and Goldman shootings, the Keith Curry attacks, the beating of Francine Smith and the bribe of Rhonda Miller depended, citing to Evidence Code section 403, subdivision (c)(1), *People v. Simon* (1986) 184 Cal.App.3d 125, 129; appellant also claimed that a denial of this instruction would lessen the prosecution's burden of proof in violation of the Sixth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution. (RT 16325, 16332-16334; CT 14995-14997; see also CT 14993-14994.) The trial court denied appellant's request, and instead gave an edited version of CALJIC No. 2.50 (1994 rev.). (RT 16393-16395; CT 15488-15489.) Appellant also requested the court to modify CALJIC No. 2.50 to instruct the jury that it had to find that appellant caused a witness's fear before considering that against appellant. (CT 15016-15017.)

Evidence Code section 403, subdivision (c) requires the trial court, upon request, to instruct the jury regarding the necessity of finding preliminary facts where relevancy, personal knowledge or authenticity is disputed. The statutory language is as follows:

> (c) If the court admits the proffered evidence under this section, the court:
>
> (1) may, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.
>
> (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines a jury could not reasonably find that the preliminary fact exists.

The statutory mandate is clear: whenever the relevance of evidence is dependent upon a preliminary fact, the foregoing instruction must be given when requested.[115] The trial court's failure to grant appellant's requested instruction was clear error, and that error was prejudicial. The delivery of CALJIC No. 2.50, which purported to limit the use of other crimes evidence, could only have confused the jury because it failed to acknowledge the disputed factual issues underlying the admission of the other crimes evidence in this case, thereby suggesting that evidence of the other crimes evidence was admissible against appellant regardless of whether the prosecution established the predicate facts upon which the admissibility of the evidence depended. (*People v. Simon, supra*, 184 Cal.App.3d at p. 131.) And as discussed above, the prosecution failed to prove up its proffers regarding the admissibility of much of the other crimes evidence admitted against appellant. (See also Argument VII, *ante*, incorporated by reference herein.) Considering these circumstances, and

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[115] This Court has consistently held the trial court has no sua sponte duty to submit an instruction about finding a preliminary fact. (*People v. Lewis* (2001) 26 Cal.4th 334, 362; *People v. Marshall* (1996) 13 Cal.4th 799, 833.)

given the critical impact of the other crimes evidence on this trial, appellant's conviction must be reversed.

C. The Trial Court Erred In Giving CALJIC No. 2.50 Because It Allowed The Jury To Consider Other Crimes Evidence For Improper Purposes

The jury was instructed with a slightly modified version of CALJIC No. 2.50 (1994 rev.), as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused;
>
> The existence of the intent which is a necessary element of the crime charged;
>
> The identity of the person who committed the crime, if any, of which the defendant is accused;
>
> A motive for the commission of the crime charged;
>
> The defendant had knowledge of the nature of things found in his possession;

> The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;
>
> The crime charged is part of a larger or continuing plan or scheme.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.
>
> However, prior criminal conduct resulting in a felony conviction may also be considered on the issue of the credibility of the person suffering the conviction.

(RT 16393-16395; CT 15488-15489.)

It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [citations omitted].) 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* (1997)130 F.3d 833, 836.) Thus, it is imperative that a 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. As Justice Jefferson has explained, "it is error for a trial judge to give CALJIC 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. Similarly, it is improper to instruct on motive when the proffered evidence is not relevant to that fact. (*Id.* at p. 848.) 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, supra,* 102 Cal.App.4th at p. 792, quoting *People v. Saddler* (1979) 24 Cal.3d 671, 681 [internal quotation marks omitted].) Furthermore, 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 is "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 use other than that for which the evidence was admitted violates the right to due process of law under the Fourteenth Amendment. (*Id.* at p. 788.) 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 delivery of CALJIC No. 2.50 in this case allowed the jury the unfettered discretion to use the evidence of other bad acts against appellant in any of the enumerated purposes stated in that instruction, even if the evidence was not admitted for such a purpose. For example, the evidence that coappellant Smith shot Keith Curry was admitted to show his identity, but not properly admitted to show appellant's identity as the perpetrator of the instant crimes; rather, the evidence was determined to be admissible against appellant only to as it tended to prove the relationship between appellant and coappellant Smith in this case. (RT 11297-11301, 11314.) The court not only misinstructed the jury in this regard at the time the evidence was introduced (see Argument VII, *ante*, incorporated by reference herein), but that error was exacerbated to appellant's detriment by CALJIC No. 2.50 as given, which allowed the jury to use improperly that evidence to establish appellant's identity as a perpetrator in this case.

Appellant submits that, after *People v. Ewoldt, supra*, 7 Cal.4th 380 and *People v. Balcom, supra*, 7 Cal.4th 414, which set forth the parameters for limited admission of other crimes evidence, the trial court was required

to match the prior act evidence with each issue to be proven. (Contra *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614-1615.)

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 his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution.

D. As Given, CALJIC Nos. 2.50 And 2.50.1 Unconstitutionally Lessened The Prosecution's Burden of Proof

Due process "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." [Emphasis added.] (*In re Winship, supra,* 397 U.S. at p. 364.) It requires the State to prove "'every ingredient of the offense beyond a reasonable doubt ....'" (*Sandstrom v. Montana, supra,* 442 U.S. at p. 524, quoting *Patterson v. New York* (1977) 432 U.S. 197, 215.) Not only does this requirement apply to the evidence as a whole, but also to each fact from which the defendant's guilt is inferred. This Court explained this principle in *People v. Watson, supra,* 46 Cal.2d at p. 831: "properly interpreted, [the instruction] applies the doctrine of reasonable doubt not to proof of miscellaneous collateral or incidental facts, but only to proof of 'each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt.'" Accordingly, the *Watson* court held that in any case which rests essentially on circumstantial evidence, it would be error to refuse to instruct the jury on this basic principle. Further, in any such case, it would be error for the trial court in any way to mislead

the jury into thinking that it was not necessary that each fact essential to complete a chain of circumstances establishing guilt be proved beyond a reasonable doubt. (*People v. Carter, supra,* 48 Cal.2d at pp. 758-759, 760-761.) A conviction violates due process if it is based upon an amalgamation of facts none of which have been proven beyond a reasonable doubt. (See *People v. Deletto* (1983) 147 Cal.App.3d 458, 472; *People v. Hefner* (1981) 127 Cal.App.3d 88, 96-97.)

It is true, of course, that neither the defendant's guilt of the uncharged offense nor the relevance of prior uncharged offenses needs be proven beyond a reasonable doubt as a prerequisite to the admissibility of the uncharged offense. (See *People v. Simon, supra,* 184 Cal.App.3d at p. 134, fn. 6 [admissibility of other crimes evidence governed by preponderance standard]; see also *People v. Albertson* (1944) 23 Cal.2d 550, 557.) However, this rule does not permit the jury to utilize the evidence to convict the defendant without finding that the other crime has been proven unanimously beyond a reasonable doubt. Such a result would violate due process by allowing an "ingredient of the offense" to be proven under a lesser standard. "An essential element of any crime is, of course, that the defendant is the person who committed the offense. Identity as the perpetrator must be proved beyond a reasonable doubt." (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505.)

Hence, the jury is actually faced with a two-step process regarding other crimes evidence. First, before the evidence may even be considered, it must be proven under the preponderance standard. (See Evid. Code, § 403.) Second, before the other crime may be utilized to convict, it must be proven beyond a reasonable doubt. Appellant incorporates by reference herein Argument XVI, *post.*

Accordingly, to avoid unconstitutional use of prior uncharged offenses, the standard CALJIC instruction regarding the standard of proof as to uncharged offenses should have been be modified to make it clear to the jury that: (1) the evidence may not even be considered unless its relevance and the defendant's commission of the uncharged offense is established by a preponderance of the evidence (Evid. Code, § 403); and (2) the evidence may not be utilized to convict the defendant unless its relevance, and the defendant's commission of the offense is proven unanimously and beyond a reasonable doubt. Without such an instruction, appellant's constitutional rights to trial by jury and due process (6th and 14th Amendments) were violated by allowing the jury to convict according to a standard that is less than the Constitution requires. (Contra *People v. Carpenter, supra,* 15 Cal.4th at pp. 380-382.)

E. The Multiple Failures Of The Instructions To Properly Limit The Jury's Consideration Of Other Crimes Evidence Prejudiced Appellant And Requires Reversal Of Appellant's Conviction

Given the recognized, necessary fiction that proper instructions can cure errors that occur at trial, it is imperative that the jurors *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 misdirected as to the use of evidence, the likelihood becomes overwhelming that the evidence will be misused. 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. at p. 72; *Boyde v. California* (1990) 494 U.S. 370, 381-381.) As stated

above, there was at least a reasonable likelihood that the jurors misapplied the instructions in this case.

In so far as these incorrect instructions violated appellant's right to due process of law the only proper standard for judging prejudice is that standard established by *Chapman v. California*, *supra*, 386 U.S. 18, which provides that reversal is required unless the error was harmless beyond a reasonable doubt. That cannot be shown in this case. Instructions "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) The errors set forth above allowed the jury (1) to consider other crimes evidence as relevant to the purposes enumerated in CALJIC No. 2.50 without any finding regarding whether the predicate facts essential to the admissibility of those crimes were proven by any standard, be it by a preponderance of the evidence or beyond a reasonable doubt; (2) the unfettered discretion to use the other crimes evidence for any of the enumerated purposes in CALJIC No. 2.50; and (3) to convict appellant on constitutionally insufficient proof.

In short, the misdirection of the jury through the faulty instructions must be regarded as prejudicial, thereby requiring a reversal of the conviction and judgment entered below.

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XVI

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "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. at p. 364; accord, *Cage v. Louisiana, supra,* 498 U.S. at pp. 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 317 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.90, 2.01, and 2.02)

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (RT 16401; CT 15502.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(RT 16401; CT 15502.)

The jury was given two interrelated instructions – CALJIC Nos. 2.01 and 2.02 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence.[116] Except for the fact that they were directed at different evidentiary points, these advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (RT 16382-16384; CT 15466-15467.) These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they

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[116] CALJIC No. 2.01 [circumstantial evidence re: guilt of crimes (RT 16382-16383; CT 15466); CALJIC No. 2.02 [specific intent or mental state re: crimes] (RT 16383-16384; CT 15467).)

entertained a reasonable doubt as to guilt. This twice-repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and, therefore, to find multiple murder special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty" [italics added].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference

when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [italics added, fn. omitted].) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana, supra,* 442 U.S. at p. 524.)

Here, the instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (RT 16383.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. All the more, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of reversing the burden of proof, since it required the jury to find appellant guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. Further, the instructions were prejudicial given the context of this case. The prosecution's theory of guilt was that appellant operated a

multi-million dollar drug organization and that he had Armstrong and the others killed to protect that business. Appellant testified that, while he was involved in the sale of narcotics, he was not a major player and denied that he had the motive for or that he was responsible for the killings. The erroneous instructions were prejudicial with regard to guilt in that they required the jury to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict appellant because he was a likely suspect, rather than because they believed him guilty beyond a reasonable doubt. In addition, the constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations in this case since there was no direct evidence other than the highly suspect testimony of James Williams.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.50, 2.50.1, 2.51 and 8.20)

The trial court gave nine other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (RT 16377-16378; CT 15456-15457.); CALJIC No. 2.21.1, regarding discrepancies in testimony (RT 16391; CT 15482); CALJIC No. 2.21.2, regarding willfully false witnesses (RT 16391; CT 15483); CALJIC No. 2.22, regarding weighing conflicting testimony (RT 16391-16392; CT 15484); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (RT 16393; CT 15487); CALJIC No. 2.50, regarding evidence of other crimes (RT 16393-16395; CT 15488-15489), CALJIC No. 2.50.1, regarding proving other crimes by a preponderance of the evidence (RT 16395; CT 15490), CALJIC No. 2.51, regarding motive (RT 16396; CT 15492) and CALJIC No. 8.20, defining premeditation and deliberation (RT 16412-16413; CT 15524-15525). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated appellant's constitutional rights as enumerated in section A of this argument by misinforming the jurors that their duty was to decide whether appellant was

guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (RT 16377-16378.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (RT 16382-16383.)

In addition, the jury was instructed with former CALJIC No. 2.51 (5th ed.):

> 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 allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction was in stark contrast to another standard evidentiary instruction, CALJIC No. 2.03, which expressly admonished the jury that a wilfully false or deliberating misleading statement was "not sufficient by itself to prove guilt." (RT 16384; CT 15469.) The instruction appeared to include an intentional omission allowing the jury to determine guilt based on motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.] [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

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, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. This instruction conflicted with other instructions regarding criminal intent for finding premeditated murder by suggesting to the jurors that they need not find that

premeditation in order to convict appellant of first degree murder or, in turn, to find true a multiple murder special circumstance. Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all 12, of the jurors so concluded. (See, e.g., *Francis v. Franklin, supra,* 471 U.S. at p. 322.)

With respect to the instant homicides, the jury was instructed that "all murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder in the first degree," and, in relevant part, that "willful" means "intentional" and that intent to kill was an element of premeditated murder. (RT 16412-16413.) By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proving that element of the prosecutor's case, that is, that appellant had the intent to kill. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana, supra,* 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

Further, CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of his

federal 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 Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

Similarly, CALJIC Nos. 2.21.1 and 2.21.2[117] lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (RT 16391 [italics added].) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[118] The essential mandate of *Winship* and its progeny – that each

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[117] Appellant's requested modification to CALJIC No. 2.21.2 to correct the unconstitutional burden shifting discussed herein was rejected. (RT 16263; CT 14989-14990.)

[118] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt. (But see *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822-825 [CALJIC No. 2.50.01 contrary to *Winship* and (continued...)

specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(RT 16391-16392.) This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in

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[118](...continued)
Sullivan and, under *Boyde v. California, supra,* 494 U.S. at pp. 384-385, error not cured by correct reasonable doubt and presumption of innocence instructions].)

the convincing force of the evidence." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (RT 16393), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Since the prosecution's case against appellant was centered on uncharged offenses, perhaps most harmful in the context of this case, were CALJIC Nos. 2.50 and 2.50.1. The jury was instructed as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. [¶] Such

> evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:... [¶] The identity of the person who committed the crime, if any, of which the defendant is accused... [¶] Or the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.
>
> Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by the defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the defendant committed such other crime or crimes. [¶] The prosecution has the burden of proving these facts by a preponderance of the evidence.

(RT 16393-16395.) These instructions told the jury that the appellant's guilt of the uncharged offenses need only be proven by a preponderance of evidence and that once proven such evidence could be utilized to prove identity. Thus, under these instruction the first prosecution premise—that appellant committed the uncharged offenses – could be satisfied by a preponderance of the evidence, and, that once satisfied, the jury could then find appellant guilty of the charged offenses. These instructions clearly violated *In re Winship*, *supra* at p. 363 and *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275-278. (See *Gibson v. Ortiz, supra,* 387 F.3d 812 [CALJIC No. 2.50.01 contrary to *Winship* and *Sullivan*].)

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation ...." (RT 16412-16413 [italics added].) The use of the word "precluding" could be interpreted to require the

defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction on a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing

CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].)[119] While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire, supra,* 502 U.S. at p.72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An

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[119] Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC No. 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC No. 2.90]; *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739 [citing *People v. Wilson* (1992) 3 Cal.4th 926, 943] [CALJIC No. 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC No. 2.90].)

instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [citing *People v. Westlake* (1899) 124 Cal. 452, 457] [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[120] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard nine

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[120] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: Penal Code Section 1096 as set out in CALJIC No. 2.90. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

Most recently, the Ninth Circuit Court of Appeals agreed with the foregoing analysis. In *Gibson v. Ortiz, supra*, the Court found that CALJIC No. 2.50.01 violated *Winship* and *Sullivan*, and further held that under *Boyde v. California, supra,* 494 U.S. at pp. 379-380, the error was not cured by CALJIC No. 2.90, because "[w]hen a court gives the jury instructions that allow it to convict a defendant on an impermissible legal theory, as well as a theory that meets constitutional requirements, 'the unconstitutionality of any of the theories requires that the convictions be set aside.'" (*Gibson v. Ortiz, supra* [citation].)

D. Reversal Is Required.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error that is reversible per se. (*Sullivan v.*

Louisiana, *supra*, 508 U.S. at pp. 280-282; *Gibson v. Ortiz, supra*, 387 F.3d 812.)

If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, as set forth above, that showing cannot be made. Further, under CALJIC No. 2.51, the prosecutor was relieved of proving an element of first degree premeditated murder – rather, the instructions permitted the prosecution to only establish motive for the jury to conclude that appellant was guilty. The instructional error was particularly prejudicial in this case given literally most of the prosecution's case was devoted to testimony relating to the alleged motives for the homicides, i.e., (1) that appellant and his brother were drug dealers who had paid Armstrong to shoot Ken Gentry and Reynard Goldman, and that when Armstrong was released from prison appellant had him killed to protect a multi-million dollar drug organization and (2) that appellant had his ex-wife's lovers shot. Exclusive of motive evidence, the prosecution's evidence against appellant was very weak: there was no eyewitness identification of appellant and no physical evidence linked him to the scene. A very weak circumstantial evidence case against appellant was otherwise propped up by the testimony of a man who had been charged with the homicides and who admitted he had the strongest motive in the world to lie: to save himself from the death penalty. However, the instruction allowed the jury to convict appellant on the motive evidence alone and this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's conviction.

The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.) The instructions also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) Accordingly, appellant's conviction and death sentence must be reversed.

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XVII

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

The trial court delivered four related instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading, unsupported by the evidence, and constituted improper pinpoint instructions.[121]

The trial court also gave CALJIC No. 2.05 (Efforts By Other Than Defendant To Suppress Evidence), which stated as follows:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized such effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(RT 16385; CT 15470.)

The court also gave a modified version of CALJIC No. 2.06 (Efforts To Suppress Evidence), which stated as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by intimidation of a witness, by an offer to compensate a witness, by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is

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[121] A fifth related instruction, CALJIC No. 2.03 (Consciousness of Guilt – Falsehood), was given at appellant's request in modified version and presumably did not apply to appellant, since he gave no statement to police. (See RT 16250-16251, 16384; CT 14979-14980, 15469.)

not sufficient by itself to prove guilt, and its weight and significance, if any, are for your consideration.

If you find that such attempt was not made by the defendant, but by someone for the defendant's benefit, you may not consider such effort as tending to show the defendant's consciousness of guilt unless you find also that the defendant authorized such effort.

(RT 16385-16386; CT 15471.)

The trial court further instructed the jury with the following special instruction:

If you find that before this trial any defendant wilfully failed and refused to proved handwriting exemplars, then as to that defendant you may consider such failure as a circumstance tending to prove his consciousness of guilt as to the fact that his handwriting appears on some or all of the documents admitted into evidence.

(RT 16386; CT 15472.)[122]

And finally in this regard, the trial court instructed the jury with a modified version of CALJIC No. 2.52 (Flight After Crime) as follows:

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination.

(RT16396; CT 15493.)[123]

Evidence of the defendant's attempts to avoid or obstruct prosecution is said to constitute circumstantial evidence of guilt on the theory that the inference of consciousness of guilt supports a second

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[122] Upon advice of counsel, appellant refused to provide a handwriting exemplar. (RT 13013-13022.)

[123] The prosecution argued that appellant fled to a "safe house"after the instant homicide. (RT 16430P-16430Q, 16530, 16883-16838.)

inference of guilt in fact. (*People v. James* (1976) 56 Cal.App.3d 876, 890; see McCormick on Evidence (4th ed. 1992) § 263 at p. 181 [evidence of defendant's evasive conduct after the crime is received "as circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself"].)

In appellant's case, these instructions permitted the jury to infer appellant's guilt from unreliable and ambiguous evidence purportedly showing that appellant sought to procure false testimony as well as from alleged acts of intimidation unrelated to the charged offenses. Where, as here, the question of appellant's guilt was close and based in large part on the credibility of witnesses who implicated appellant, delivery of these instructions was prejudicial error. The instructions unfairly highlighted evidence favorable to the prosecution and invited the jury to draw critical but irrational inferences against appellant related directly to the question of guilt.

The instructional errors, especially when considered in combination, deprived appellant of due process, equal protection, a fair jury trial, and a fair and reliable jury determination of guilt, special circumstances, and penalty. (U.S. Const. Amends. V, VI, VIII, XIV; Cal. Const. art. I, §§ 7, 15, 16, & 17.)[124]

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[124] The jury was also instructed at the penalty phase with CALJIC Nos. 2.03 (Consciousness of Guilt – Falsehood); 2.04 (Efforts by Defendant to Fabricate Evidence); 2.05 (Efforts Other Than By Defendant To Fabricate Evidence); and 2.06 (Efforts to Suppress Evidence). For the same reasons described herein, the delivery of these instructions at the penalty phase pertaining to the finding of aggravating factors undermined the fairness and reliability of the jury's sentencing determination in violation of appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights, and require that the death judgment be vacated.

A. The Consciousness Of Guilt Instructions Improperly Duplicated The Circumstantial Evidence Instruction

The instructions under CALJIC Nos. 2.05, 2.06, 2.52 and the special instruction were unnecessary. This Court has held that specific instructions relating to the consideration of evidence which simply reiterate a general principle upon which the jury has already been instructed should not be given. (See *People v. Lewis, supra*, 26 Cal.4th at pp. 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) Here, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (RT 16381-16384; CT 15465-15468.) These instructions amply informed the jury that it could draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479; *Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

B. The Consciousness Of Guilt Instructions Were Unfairly Partisan And Argumentative

The trial court must refuse to deliver any instructions which are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions

unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted].) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, the consciousness of guilt instructions given in this case are impermissibly argumentative. Structurally, they are almost identical to the defense "pinpoint" instruction which this Court found to be argumentative in *People v. Mincey, supra*, 2 Cal.4th at p. 437. All five instructions tell the jurors that if they find certain preliminary facts, they may rely on those facts to find additional facts favorable to one party or the other. Since the instruction in *Mincey* was held to be argumentative, the four instructions at issue here should be held argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions based on an analogy to *People v. Mincey, supra*, 2 Cal.4th 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense. [Citation omitted].'") This holding, however, does not explain

why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions...." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895)157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.)

The unfairness to appellant in giving the instructions complained of in this argument was exacerbated by the refusal of the trial court to give numerous defense request "pinpoint" instructions. For example, the trial court denied appellant's request that the jury be instructed that efforts of law enforcement to fabricate evidence against a defendant permitted the jury to draw "an inference adverse to the prosecution." (RT 16251-16252; CT 14981-14982.) The trial court also denied appellant's request to instruct the jury to view the testimony of immunized witnesses with distrust and to consider a witnesses's belief as to future benefit or gain in return for testifying against appellant as relevant to that witnesses's credibility. (RT 16267-16269; CT 15005-15006, 15011-15012.) The trial court further denied appellant's requests to instruct the jury, pursuant to Evidence Code section 403, to first find the preliminary, foundational facts for the

admission of other crimes evidence prior to considering that evidence. (See Argument XV, *ante*, incorporated by reference herein.) None of these instructions contained incorrect statements of law, but the trial court ruled refused to so direct the jury's attention. This was neither impartial nor fair to appellant.

To insure fairness and equal treatment, this Court should reconsider those cases that have found California's consciousness of guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra,* 30 Cal.4th at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright, supra,* 45 Cal.3d at p. 1137.)

The argumentative consciousness of guilt instructions given in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution and placing the trial court's imprimatur on the prosecution's theory of the case. They therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., Amends. V and XIV; Cal. Const. art. I, §§ 7 & 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., Amends. VI, XIV; Cal. Const. art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., Amends. VIII, XIV; Cal. Const. art. I, § 17.)

C. CALJIC Nos. 2.05, 2.06 2.52 And The Special Instruction On Consciousness Of Guilt Each Embody An Irrational Permissive Inference

In this case, the giving of the four instructions referred to above improperly allowed appellant's jury to make a permissive inference. (See *People v. Ashmus, supra*, 54 Cal.3d at p. 977.) It permitted the jury to infer one fact, consciousness of guilt, from other facts, i.e., appellant's alleged efforts at witness intimidation to suppress evidence, etc.. Because these inferences lacked a rational basis, however, the giving of this instruction violated the due process guarantees of the state and federal Constitutions. (U.S. Const., Amends. V and XIV; Cal. Const. art. I, §§ 7 & 15; *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *People v. Castro* (1985) 38 Cal.3d 301, 313.)

The rational connection required between a fact and permissive inference is not merely a connection that is logical or reasonable; it is rather a connection that is more likely than not. Permissive inferences must satisfy the test stated in *Leary v. United States* (1969) 395 U.S. 6:

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to follow from the proved fact on which it is made to depend.

(*Id.* at p. 36; see also *Ulster County Court v. Allen, supra*, 442 U.S. at pp. 165-167, and fn. 28.)

The only "consciousness of guilt" evidence that could be probative in any given case is evidence of "consciousness of guilt" of the particular offense for which a defendant is being charged and tried. Obviously, if a defendant acts in a manner that demonstrates a guilty mind concerning a

particular crime, that does not make it any more likely that he has reason to feel guilty about a different crime. The complained-of instructions, however, do not make this distinction, and indeed suggest to a jury that if it finds a factor supposedly showing some "consciousness of guilt" of some unstated crime, this is evidence of guilt of the crime for which the defendant is on trial. However, as in this case, that is not a logical inference, because a defendant may have "consciousness of guilt" of an uncharged offense just as easily as he might have "consciousness of guilt" of a charged offense, and it may be impossible to tell which is true because the record shows more than one offense of which the defendant might be feeling guilty.

In such circumstances, there is no logical connection between the evidence and the defendant's guilt of the offense for which he is being charged and tried. The instructions permitted the jury to infer a given mental state from the defendant's acts, when it was impossible to tell whether those acts showed that particular mental state or a different mental state. Any conclusion as to which inference to draw would be speculation, not rational inference. A conviction based on speculation lightens the prosecution's burden of proving each element of a crime beyond a reasonable doubt, and thereby violates a defendant's right to due process. (See *In re Winship, supra*, 397 U.S. at p. 364.)

Furthermore, since this presents a situation where there is no rational – as opposed to speculative or conjectural – connection between the underlying facts and the sought-after inference, instructing the jury that it may draw the desired inference from the underlying facts is a violation of a defendant's right to due process of law. (*Ulster County Court v. Allen, supra,* 442 U.S. at pp. 157, 165.)

Because the consciousness of guilt instructions permitted the jury to draw irrational inferences of guilt against appellant, the delivery of those instructions undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law (U.S. Const., Amends. V and XIV; Cal. Const. art. I, §§ 7 & 15). It also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., Amends. V, VI, and XIV; Cal. Const. art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, it violated his right to a fair and reliable capital trial. (U.S. Const., Amends. V, VIII, and XIV; Cal. Const. art. I, § 17.)

D. The Giving Of The Pinpoint Instructions On Consciousness Of Guilt Was Not Harmless Beyond A Reasonable Doubt

Because the erroneous delivery of the consciousness of guilt instructions violated several provisions of the federal Constitution, the judgment must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) It was not.

The jury was given not one, but four unconstitutional instructions, which magnified the argumentative nature of the instructions as well as their impermissible inferences. The prosecutor repeatedly elicited evidence of the intimidation and fear purportedly felt by the witnesses, ostensibly to bolster their credibility, as discussed above. However, these instructions permitted the jury to rely on this evidence not merely in assessing credibility, but also as substantive evidence of guilt.

The centerpiece of the prosecution's case was a portrayal of appellant as a violent leader of a vast narcotics sales operation who ordered others to do his bidding and resorted to threats and violence at every opportunity. Instructions which told the jury, inter alia, to especially consider appellant's intimidation of witnesses to either suppress or fabricate evidence thus endorsed the prosecution's theory of the case, and made it more likely that the jury would believe appellant was capable of ordering the murders in this case, an issue that was strongly contested.

In addition, in the context of the weak case against appellant, where there was no physical or eye witness evidence that tied him to the killings and which turned on the suspect testimony of James Williams and codefendant Settle, these instructions were extremely prejudicial to appellant's case. CALJIC No. 2.52 allowed the jury to infer appellant's guilt of the charged homicides from his alleged flight to the "Family safe house" after the killings, a point the prosecution emphasized in its closing argument. The prosecution emphatically argued to the jury that it was appellant who made the telephone calls from that "safe house" after the homicides, and that he would not have been there if he had not been guilty of the charged offenses. (RT 16835-16838, 18463.)

For all the foregoing reasons, appellant's conviction must be reversed and his judgment of death vacated.

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XVIII

THE TRIAL COURT COMMITTED AN INSTRUCTIONAL ERROR WHICH UNFAIRLY, UNCONSTITUTIONALLY, AND PREJUDICIALLY BOLSTERED THE CREDIBILITY OF NUMEROUS PROSECUTION WITNESSES WHO TESTIFIED AGAINST APPELLANT

A. Introduction

No fewer than a dozen prior statements of witnesses were introduced in the prosecution's case in chief against appellant.[125] Many of these witnesses had a motive to lie when making those statements: all were involved in the drug trade and therefore had a vested interest in being helpful to police in the hope of avoiding prosecution and/or leniency in sentencing. The delivery of CALJIC No. 2.13 (Prior Consistent or Inconsistent Statements as Evidence), at both the guilt and penalty phases of trial, which directed the jury to consider prior inconsistent or consistent statements of witnesses as evidence of "the truth," but not of "the falsity" of such "facts," unfairly skewed the jury's credibility determination in favor of the prosecution. The error unfairly affected the jury's evaluation of the prosecution witnesses' credibility, unfairly strengthened the prosecution's case against appellant, and requires reversal of his convictions and the special-circumstance finding.

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[125] See, e.g., RT 8857-8863 [Michael Flowers]; 8954-8958 [G.T. Fisher]; 8983-8991 and 9003-9006 [Benny Ward]; 9039-9044 and 9045-9049 [Barron Ward]; 9336-9343 [John Allen]; 9628-9632 and 9717-9720 [Kenny Reaux]; 10219-10222 [William Johnson];10367-10376 and 10484-10493 [Ladell Player]; 10681-10684 and 10688-10703 [Laurence Walton];11214-11223 [George Smith]; 11787-11790 [Pierre Marshall]; 13095-13099 [Tannis Curry].

B. CALJIC No. 2.13

In *Wardius v. Oregon, supra*, 412 U.S. 470, the United States Supreme Court found a violation of due process in a state procedure which unfairly skewed discovery obligations in favor of the prosecution. The high court warned that "[t]his Court has . . . been particularly suspicious of 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." (*Id.* at p. 475, fn. 6, citing, inter alia, *Washington v. Texas*, *supra*, 388 U.S. at p. 22, and *Gideon v. Wainwright, supra,* 372 U.S. at p. 344.) The Supreme Court explained the constitutional underpinnings of its decision as follows: "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and the accuser." (412 U.S. at p. 474, citation omitted.) Finally, with respect to the particular issue before it, the Court held "that in the absence of a strong showing of state interests to the contrary, discovery must be *a two-way street*." (*Id.* at p. 475, emphasis added.)

California law specifically applies such principles to the giving of one-sided jury instructions. (See, e.g., *People v. Moore, supra,* 43 Cal.2d at pp. 526-529; *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions must "avoid misleading the jury or in any way overemphasizing either party's theory"]; *People v. Mata* (1955) 133 Cal.App.2d 18, 21 [instructions must not "strongly present the theory of the prosecution and minimize that of the defense"].) In *People v. Moore, supra*, this Court, in reversing a manslaughter conviction because of one-sided self-defense instructions, used reasoning apropos of the instructions challenged by appellant herein:

> It is true that the four 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. . . . 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.

(43 Cal.2d at pp. 526-527, internal quotation marks omitted, emphasis added.)

Here, the delivery of CALJIC No. 2.13 similarly violated the Due Process Clause of the Fourteenth Amendment and California case law by impermissibly tilting the balance in favor of the prosecution with respect to the jury's evaluation of the credibility--or lack thereof--of many of its witnesses. The written instruction given to the jurors at appellant's trial read as follows:

> Evidence that on some former occasion, a witness made a statement or statements that were inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as *evidence of the truth of the facts as stated by the witness on such former occasion.*
>
> If you disbelieve a witness' testimony that he or she no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him or her describing that event.

(RT 16388, 18421-18422; CT 15478, 15810 [emphasis added].)

This instruction, though a standard one, obviously applied to many prosecution witnesses, including Ladell Player, who gave statements to the police indicating that appellant admitted involvement in the homicides, but during his testimony denied any such admission by appellant. The

prosecutor vigorously impeached Player with his prior inconsistent statements on its direct examination as a "hostile" witness and impeached Player with the testimony of an assistant district attorney who was present for the interview. (RT 10252-10267, 10367-10376.) With regard to many of the other witnesses, the prosecution played audio or video tapes, and introduced into evidence the tapes and transcripts, of the witness's statements to the police. (See, e.g., People's Exhibits 57 [G.T. Fisher], 59A [Benny Ward], 106 [William Johnson], 110 [Ladell Player], 120 [Laurence Walton].)[126] Later, in its guilt phase rebuttal argument, the prosecution emphasized the importance of the prior statements, and argued to the jury that such prior statements could and should be considered truthful. (RT 16783-16783 [expressly referencing CALJIC No. 2.13 and emphasizing the "evidence of the truth of the facts" language of that instruction]; see also RT 16792.) These were critical witnesses relied upon by the prosecution to convince the jury that appellant was guilty of capital murder. Many of these witnesses supplied evidence critical to the prosecution's ability to establish a motive with regard to appellant. With regard to the prosecution's theory that appellant had Armstrong killed because Armstrong threatened to collect for his prior services as a hit man for appellant, five of the witnesses testified regarding appellant's alleged complicity in the shooting of Ken

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[126] The prosecution asserted once that, contrary to Alonzo Smith's testimony, Detective Vojtecky would testify that Smith told him that appellant responded to Smith's comment about the death of Brown by saying, "Tommy, yeah, he had to go." (RT 10914.) However, no such prior inconsistent statement was presented by the prosecution. Therefore, the only testimony in the record regarding appellant's conversation with Smith regarding the death of Brown is that appellant agreed with Smith that it was "too bad about Tommy" but did not discuss it further because appellant was charged with Tommy's death. (RT (RT 10916, 10980-10981.)

Gentry and Renard Goldman (see, e.g., Michael Flowers, G.T. Fisher, Benny Ward, Barron Ward, and John Allen [page citations referenced in the first footnote of this argument]).

With regard to the prosecution's theory that appellant had Armstrong killed because appellant hurt men who slept with his ex-wife, two of the witnesses supplied the factual predicate for the admission of all of the evidence relating to this secondary motive theory (see., e.g., Pierre Marshall and Tannis Curry [page citations in the first footnote of this argument]; see also Arguments VII and VIII, *ante*, incorporated by reference herein). In addition, four of those witnesses supplied evidence that directly contradicted appellant's testimony in his own defense, i.e., that he did not own or control the drug organization after 1985 (see, e.g., William Johnson, Ladell Player, Laurence Walton and George Smith [page citations in the first footnote of this argument].)

Further, at the penalty phase, the testimony of David Hodnett, who testified that he shot Clarence Johnson in 1985 for personal reasons, was impeached through Det. Vojtecky, who testified that Hodnett told him that Jeff Bryant had paid Hodnett to shoot Johnson for leaving a rock house unlocked, and that appellant was involved in the hiring of Hodnett. (RT 17619-17625, 17679-17681.)

The version of CALJIC No. 2.13 given to the jury strongly and unfairly buttressed the prosecution's contentions and undermined appellant's case in at least two ways: (1) by telling the jurors only that they could consider those prior inconsistent statements for their "truth," but not telling them that they could also consider those statements for their "falsity," it unfairly skewed those credibility determinations in the prosecution's favor; and (2) by telling the jurors to consider the prior

statements as evidence of the truth of "the facts" as stated by the witnesses on those former occasions, by definition it strongly implied to them that the prior statements were *factual*. Thus, the use of the two terms "the truth" and "the facts" in the instruction effectively, and prejudicially, constituted the kind of "one-way street" deemed by the Supreme Court in *Wardius* to be violative of due process, and by this Court to be improperly stated "from the viewpoint solely of the prosecution." (*Moore, supra*, 43 Cal.2d at p. 526.)

C. The Errors In Instruction Were Prejudicial

The instructional error discussed above skewed "the balance of forces between the accused and the accuser" (*Wardius, supra*, 412 U.S. at p. 474) in favor of the accuser--the prosecution--and against the accused--appellant. All of the witnesses who were impeached with prior inconsistent statements had serious credibility problems in a number of significant respects, including the incentive of a reward, their present and past criminality, and their dislike for appellant and his family. The above-discussed instructional error improperly assisted the prosecution in establishing the credibility of all of these prosecution witnesses, damaged appellant's vigorous efforts to undermine their credibility in the jurors' eyes, and prejudicially denied appellant his right to a fair jury trial as well as his right to due process. (U.S. Const., Amends VI and XIV.) The prejudice to appellant was further compounded when the prosecution argued in its guilt-phase summation that all of these witnesses were reluctant to go to the police or tell their stories because they were afraid of appellant and afraid for their safety or the safety of their families. (RT 16459, 16476, 16783-16785.) At penalty, CALJIC No. 2.13 essentially directed the jury to believe as true the prior statement of David Hodnett, an

accomplice as a matter of law to the Johnson shooting, and thus find true the aggravating factor that appellant hired Hodnett to shoot Johnson, even though the jury should not have considered Hodnett's statement true unless they also found it corroborated. (RT 18421-18422, 18436-18437.)

Since the People cannot establish that, as to the guilt and penalty determinations, these federal constitutional errors in unfairly buttressing the credibility of so many critical prosecution witnesses were harmless beyond a reasonable doubt (see *Chapman v. California, supra,* 386 U.S. at p. 24), the entire judgment must be reversed. (See also *Wardius v. Oregon, supra*, 412 U.S. at p. 479 [conviction reversed because of "a substantial possibility" that the error "may have infected the verdict"]; *People v. Moore, supra*, 43 Cal.2d at pp. 530-531; *People v. Mata, supra*, 133 Cal.App.2d at pp. 21-24.)

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XIX

THE TRIAL COURT'S ERRONEOUS RULINGS DURING GUILT PHASE DELIBERATIONS RELATING TO THE DISCHARGE OF A JUROR AND THE TAKING OF A PARTIAL VERDICT REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS AND SENTENCE

The trial court erroneously allowed a juror it knew was suffering a disabling medical condition to deliberate and reach a partial verdict against appellant. The court also erred when it then recorded the partial verdict taken from the jury before the deliberative process was complete and thereafter substituted the disabled juror with an alternate juror. The court further erred when it failed to instruct the newly constituted panel to begin deliberations anew as to all counts. In so doing, appellant's rights to a jury trial, to a unanimous verdict by 12 jurors, to due process of law and to a reliable judgment of death guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as parallel provisions to the California Constitution, were violated. (Cal. Const., art. 1, § 16; Pen. Code § 1089.) Reversal of his convictions and death sentence is required.

A. Proceedings Below

On May 17, 1995, after four days of guilt phase deliberations, the jury resumed their deliberations at 9 a.m. (CT 15280.) At 9:15 a.m., the trial court and counsel discussed a note juror number 77 had sent to the trial court upon his arrival at court that morning, indicating he had been advised by his doctor to take a few days off due to health problems. (RT 16895.) After discussing the note as well as a read back request, the trial court called juror number 77 into the courtroom. (RT 16906-16906.) The trial court did not instruct to remaining jurors to stop deliberations. After

questioning juror number 77, the trial court told the juror that it would have to give his request some "serious thought." The court explained that when a juror is replaced during deliberations, a "problem" arises in that the jury has to be instructed to "start all over again" with the new juror on the panel. The trial court then instructed juror number 77 to return to the jury room and continue deliberations while the court spoke with counsel. (RT 16906-16910.)

In the ensuing discussion, the prosecution requested that, should the juror be excused, the court seal any verdicts reached. (RT 16910.) Appellant's counsel, Mr. Jones, objected to the excusal if any partial verdicts were to be taken. (RT 16911.) The trial court found good cause for the excusal. (RT 16911-16913.) The court indicated that it intended also to inquire about whether any verdicts had been reached, and that, if so, it would take further argument on the matter. (RT 16914-16915.) Mr. Jones objected to the inquiry. (RT 16915.) Mr. Jones argued that no verdicts are final until rendered in court, and that the jury should be instructed to begin deliberations anew with the replacement juror. (*Ibid.*) Mr. Jones also argued that if a partial verdict was rendered, it would "conflict with the instructions to the jury that they should start deliberations anew" and argued it was unclear legally as to whether the jury should start deliberations anew as to the verdicts already rendered against a particular defendant. (*Ibid.*)

The court overruled counsel's objection to its inquiry into whether any verdicts had been reached. (RT 16916.) Mr. Jones then clarified that he objected to the excusal of the juror because the inquiry into the verdict status "imparts information to the prosecution that they are not entitled to have." (*Ibid.*)

In the presence of the 12 impaneled jurors, the court informed them that number 77 would be excused because of his medical problems. (RT 16917.) In response to the court's inquiry, the foreman informed the court that verdicts had been reached on one or more counts as to one defendant, but that they had not yet decided on the degree of the crime, and that verdict forms had been filled out reflecting those decisions. (RT 16917-16918.) The court then informed number 77 that he was not excused and sent all jurors back into the jury room, instructing them to "stand by." (RT 16918.)

Both the prosecution and Mr. Jones agreed that there could be no verdict if the jurors had not yet determined degree. (RT 16919-16920.) The court, however, believed it necessary to look at the verdict forms to ensure that, in the event there were verdicts of not guilty, those verdicts be rendered, and ruled it would make the inquiry over Mr. Jones's objection. (RT 16920-16924.)

At the trial court's request, the clerk instructed the jury to return to the courtroom and to bring the verdict forms with them.[127] (RT 16923-16925.) Upon review, the court informed counsel that two verdict forms had been filled out completely, with degree, and that the verdicts forms were dated that date (May 17, 1995). (RT 16926.) In response to the court's inquiry, the foreman said those forms had been filled out prior to the court's first inquiry of the foreman that morning, but that the foreman had forgotten about those verdicts because the jury was deliberating on others.

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[127] The record does not reflect the times at which the jury was brought into the courtroom in the morning of May 17, 1995. (CT 15280.) However, as will be explained *post*, it had to have been before a readback began at 10:35 a.m. (*Ibid.*)

(RT 16927-16927.) The jurors were again instructed to return to the jury room and to "stand by." (RT 16927.)

The prosecution urged the court to record the partial verdicts, replace number 77, and instruct the reconstituted panel to deliberate anew on the remaining verdicts. (RT 16928.) All defense counsel objected to rendering a partial verdict, and instead requested number 77 be replaced and the jury instructed to begin deliberations anew as to all counts. (RT 16928-16929.)

The court indicated that the defendants had to be brought into court to discuss matters with their counsel and for the rendering of the verdict, and the court further instructed that "the main inquiry" should be between appellant and Mr. Jones. (RT 16929-16930.) Mr. Jones expressed confusion, and the court explained that it believed that Mr. Jones was entitled to know what was on the verdict forms prior to the court's ruling on his objection to rendering partial verdicts, and he then informed Mr. Jones that appellant had been found guilty of the first degree murders of Armstrong and Brown (counts 3 and 4). (RT 16930-16931.) The court then ordered all counsel not to discuss the verdict with anyone outside of the legal teams, and expressed an intent to send all of the verdict forms, including those that had been signed, back into the jury room and allow them to deliberate during the time it took to bring the defendants to court. (RT 16931-16932.) Mr. Jones requested that juror number 77 not be excused, and the court overruled the objection. (RT 16933.) Mr. Jones then argued that deliberations should not continue because number 77 was in pain and did not want to be present; however, the court overruled that objection as well and instructed the court reporter to begin the readback of the testimony of James Williams that had been previously requested and

agreed upon. (RT 16934-16936.) The readback began at 10:35 a.m. (CT 15280.)

When the defendants arrived in court, the jurors were listening to the continuing readback in the jury room. (RT 16938.) Mr. Jones again objected to the taking of any partial verdicts, arguing that such would deny appellant due process. (RT 16938-16939.) The court agreed with coappellant Smith's argument that the court was not required to render the verdicts. (RT 16940.) However, the court ruled it would accept the guilty verdicts against appellant as to counts 3 and 4 because: (1) it still believed juror number 77 needed to be excused; (2) it believed the verdicts were filled out that morning prior to the jury being brought into the courtroom the first time that morning; (3) it could not "imagine any colloquy involving 77 or his impending possible dismissal could have contributed" to the verdict; and (4) it did not know if there existed a "case or statute" that required "a defendant in a multiple count case . . . to have all verdicts on all counts rendered by the same 12 jurors." (RT 16490-16492.)

Mr. Jones then argued that, since juror number 77's medical problems began the previous evening, appellant was deprived of that juror's "full attention" as to the verdicts rendered. (RT 16943.) When the court asked counsel how the court might instruct the jury after the partial verdict, Mr. Jones requested that they be instructed to "set aside the verdicts" and the court denied that request. (RT 16946-16947.) With regard to CALJIC No. 17.51, the court did not believe it could instruct the jury to disregard any verdict, and instead modified CALJIC No. 17.51, as set forth below. (RT 16947-16949.)

The readback was completed at 12:40 p.m. (CT 15280.) The trial court then called the jurors into the courtroom, obtained the verdict forms

and received an affirmative response from the jury foreman to its question regarding whether the verdicts were final. (RT 16951-16953.) The court then read the verdicts finding appellant guilty of first degree murder of Armstrong and Brown and polled the jury. (RT 16953-16955.) Both verdicts were dated May 17, 1995, and signed by the jury foreman. (*Ibid.*)

The court found good cause to excuse juror number 77 based on the information stated in his note, and replaced him with alternate juror number 247. (RT 16956-16958.) The court then instructed the newly constituted jury with CALJIC No. 17.51 modified to instruct the jury to "set aside all past deliberations *and tentative conclusions* and begin deliberating anew *as to the remaining charges*." (RT 16958 [modifications reflected in italics]; CT 15548.)

B. The Trial Court Erred In Taking The Verdicts From The Jury Before The Deliberative Process Was Complete

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.) This right means more than merely empaneling 12 persons and having them listen to evidence. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." (*United States v. Gaudin* (1995) 515 U.S. 506, 514.) When a judge rather than a jury reaches the ultimate verdict of guilty, "the wrong entity judge[s] the defendant guilty." (*Sullivan v. Louisiana. supra,* 508 U.S. at p. 281.)

Obviously, appellant was accorded the right to a trial by jury, in that 12 persons were convened to determine his guilt or innocence. However, it

is appellant's contention that the trial court's decision to take verdicts from the jury prior to the jury notifying the court that it had unanimously reached its own conclusion regarding the finality of the verdicts constitutes an interference with the deliberative process and defendant's right to have the jury render an ultimate finding of guilt.

As a manner of effecting the constitutional right to trial by jury, there are several state statutes which pertain to the type of situation presented by this case. Penal Code sections 1160 through 1164 deal with the issues of verdicts in multi-count and multi-defendant cases, as well as the procedures for returning a complete verdict and the process of a jury's reconsideration of a verdict. Appellant contends that the trial court's actions here also violated one of these statutes.

Penal Code section 1164, subdivision (a) provides in relevant part that "[wh]en the verdict given *is receivable by the court*, the clerk shall record it in full upon the minutes [. . . .]" (Emphasis added.) The question in this case is whether the verdicts against appellant as to counts 3 and 4 were receivable within the meaning of the statute if the jury foreman never informed the court that the jurors had unanimously reached a final verdict on those counts. The trial court solicited the verdicts from the jury in this case, and then asked the jury foreman if the verdicts reached against appellant were final. The foreman answered in the affirmative, but that answer did not necessarily reflect: (1) that the foreman knew what the word "final" connoted, that is, that the jury had, as a whole, completed their deliberations as to those counts, as opposed to simply casting a preliminary vote that was open to more discussion; or (2) the understanding of the rest of the jurors regarding the "finality" of those verdicts. To be sure, when polled, all jurors answered in the affirmative to the question of whether

those were their verdicts; however, they were not asked if those verdicts were "final" as opposed to preliminary verdicts, and the difference between those two concepts was never explained to them. (RT 16955.) Therefore, the affirmative responses did not necessarily mean that any of the jurors considered their verdicts "final" as to those counts.

A juror note sent out later in the deliberations reflects a lack of understanding on the part of the jurors about the legal concept of when a verdict is "final." On June 7, 1995, the jury queried in a note whether a juror could change his or her "vote regarding a decision prior to a verdict being read." (CT 15393.) The ensuing colloquy between the juror who wrote that note and the trial court reflected that the juror did not know whether he could change his vote on a count on which the jury had completed a verdict form but had not yet submitted that form to the court. (RT 17042-17043.) Therefore, the record reflects that the jurors' answers to the inquiry at the time verdicts 3 and 4 were recorded against appellant were not informed by law or reflective of the fact that all jurors knew they could answer "no" to the question of whether his or her verdict was "final" in that sense the individual juror had come to a final determination, as opposed to a preliminary vote, regarding appellant's guilt.

Appellant submits the trial court erred in taking the verdicts from the jury before the jury informed the court that final verdicts had been reached, and that the error denied appellant his right to a jury trial, infringed upon the jury's fact-finding role, and undermined the jury's deliberative process, and denied appellant a reliable judgment of death, in violation of the Sixth, Eighth and Fourteenth Amendment to the United States Constitution and parallel provisions of the state constitution. (See *Zant v. Stephens, supra,* 462 U.S. at p. 885 [although not every imperfection in the deliberative

process during capital sentencing proceeding is sufficient to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error].)

C. Appellant Was Deprived Of His Right To A Unanimous Verdict By 12 Jurors On Counts 3 And 4 Because One Of The Jurors Who Rendered That Verdict Suffered From A Disabling Medical Condition For Which The Trial Court Found Good Cause For Excusal

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict by 12 jurors in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama, supra,* 447 U.S. at p. 638). Therefore, jury unanimity is required in capital cases.

After court in the evening of May 23, 1995, juror number 77 was examined by his doctor, who then told him he had very high blood pressure and severe arthritis, that he needed to keep his feet elevated all the time and

that he needed to take a few days off from jury duty. (RT 16895.) After speaking with juror number 77 early in the morning on May 24, 1995 (RT 16905-16910), the trial court expressly found, based on his examination of the juror and the medical evaluation and recommendation the juror had received the previous evening, there existed good cause to excuse the juror for medical reasons, saying "[t]he fella is in pain. He has a physical problem he needs to attend to." (RT 16911-16913.) After making this finding, the trial court nonetheless required juror number 77 to continue with deliberations while the court and counsel discussed the propriety of inquiring into verdicts prior to the juror's excusal. (RT 16906-16910.) The jury, including juror number 77, found appellant guilty of counts 3 and 4 sometime that very date. (RT 16923.)

Penal Code section 1089 provides, in relevant part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror request discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box [. . . .]

There is no statutory procedure for determining the existence of a ground of juror discharge. (*People v. Dell* (1991) 232 Cal.App.3d 232, 256.) In the absence of a stipulation by counsel, "the judge must act on his own motion, expeditiously. His summary determination on the basis of any evidence . . . will seldom be successfully challenged." (*Ibid.*, quoting 6 Witkin & Epstein, Cal. Crim. Law (2d ed. 1989) Trial, § 2875, p. 3507.) A juror's disqualification is discretionary with the court and if there is any substantial evidence supporting the decision it will generally be upheld on appeal. (*People v. Farris* (1977) 66 Cal.App.3d 376, 386.) However, this

Court has recognized that since the substitution of a juror after the jury has retired to deliberate may trench upon a defendant's right to trial by jury (U.S. Const., Amend. VI; Cal. Const., art. I, § 16; *People v. Collins, supra*, 17 Cal.3d at p. 692, fn. omitted), the discharge of a juror during deliberations will be affirmed on appeal if "[the] juror's inability to perform as a juror . . . 'appear[s] in the record as a demonstrable reality.'" (*People v. Johnson* (1993) 6 Cal.4th 1, 21, italics added, quoting *People v. Compton* (1971) 6 Cal.3d 55, 60; *People v. Marshall, supra,* 13 Cal.4th at p. 843; see also *People v. Cleveland* (2001) 25 Cal.4th 466, 488 (conc. opn. of Werdegar, J.)

In this case, the trial court found good cause to excuse juror number 77 under section 1089. Logically then, the court found that juror number 77 was too ill to continue deliberations. (See *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1855 [jurors cannot be excused if they are not ill or otherwise unable to perform their duties].) Substantial evidence supported the trial court's ruling, and the juror's impairment appears in the record to be a demonstrable reality. As the trial court noted, the juror was in much pain and suffered from potentially deadly high blood pressure. The juror should have been excused immediately. Yet, instead of excusing the juror when it determined the juror was too ill to fulfill his obligations, the trial ordered the juror to continue deliberating, and essentially warned him his excusal during deliberations was problematic because the jury would have to begin deliberating anew upon the substitution of a new juror. (RT 16906-16910.) Illness can affect a juror's ability to concentrate on and weigh the evidence in a case. An unwell juror may also feel pressured to acquiesce in the conclusions of fellow jurors in order to escape more readily from the discomforts of the jury room. The trial court abused its discretion

by forcing juror number 77 to continue to deliberate despite his request to be discharged due to a disqualifying medical condition and by informing the juror that his excusal would be a "problem" unless there were verdicts. (Cf. *People v. Beeler* (1995) [trial court did not abuse its discretion in requiring juror whose father had died to continue deliberating where juror did not request discharge].) The trial court then compounded the error by accepting verdicts finding appellant guilty of counts 3 and 4 when it knew that a juror whom it had expressly determined was unable to perform his duties had participated in those verdicts while so impaired.

Since juror number 77 participated in deliberations despite his express desire to be relieved of jury service on that date due to severe pain and life-threatening illness, a condition which rendered him legally unable to perform his duties, appellant's conviction on counts 3 and 4 must be reversed because he was deprived of his right to a jury trial, to a unanimous verdict by 12 jurors, to a fair trial, to due process of law and to a reliable judgment of death. (U.S. Const., Amends. VI, VIII and XIV; Cal. Const., art. I, § 1.)

In the alternative, if the Court finds juror number 77 was capable of deliberating, then appellant submits that the trial court necessarily erred in excusing that juror during guilt phase deliberations, thus violating appellant's right to trial by jury. (*People v. Delamora, supra,* 48 Cal.App.4th at p. 1855; U.S. Const., Amend. VI; Cal. Const., art. I, § 16; *People v. Collins, supra*, 17 Cal.3d at p. 692, fn. omitted.)

Juror number 77 was either incapable of deliberating and therefore should have been immediately excused from his duties as a juror, or he was not subject to discharge and the trial court erred in so doing. Either way, reversal of appellant's convictions is required.

D. The Recording Of Partial Verdicts On Counts 3 And 4 Prior To The Substitution Of A Deliberating Juror Requires Reversal Of Appellant's Convictions On Counts 1, 2 And 5, As Well As The Jury's Special Circumstance Finding And Death Sentence

In *People v. Collins, supra,* 17 Cal.3d 687, this Court held that, as a matter of state statutory and constitutional law, the right to a trial by 12 jurors whose verdict must be unanimous includes the right to have each juror engage in all jury deliberations. (17 Cal.3d at pp. 692, fn. 3 [interpreting Pen. Code, § 1089; Cal. Const., art. 1, § 16].) As this Court explained:

> 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 deliberation of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interaction as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean 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.

(*Id.* at p. 693.) Therefore, 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. (*Id.* at p. 694.)

CALJIC No. 17.51 (5th ed.) embodies the *Collins* rule, and provides, in relevant part, that in a panel reconstituted after substitution of an alternate, all jurors "must therefore set aside and disregard all past

deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place."

The issue of the propriety of rendering a partial verdict during guilt deliberations followed by the substitution of a juror has not been frequently addressed, and appellant can find no California published case on point that addresses the issue in a capital case.[128] However, this issue was addressed in the context of two non-capital cases, *People v. Aikens* (1988) 207 Cal.App.3d 209, review denied March 29, 1989, and *People v. Thomas* (1990) 218 Cal.App.3d 1477, review denied June 27, 1990.

In *Aikens*, the trial court recorded a verdict on one count of two charged counts prior to the substitution of a juror during guilty deliberations; after replacing the juror, the trial court issued the instruction mandated by the *Collins* and informed the jury to begin deliberations on the second count from the beginning. (*Id.* at p. 211.) On appeal, Aikens maintained that once a juror arrives at a verdict the court may not excuse a juror, insert an alternate, and allow the reconstituted jury to deliberate regarding other verdicts.[129] (*Ibid.*) The *Aikens* court found that "[t]he logical extension of this position would be to require an automatic mistrial even if a juror should die or become incapacitated and even if ten fully qualified alternate jurors were available for substitution. However, this

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[128] The argument appellant presents herein was considered by this Court in *People v. Fudge* (1994) 7 Cal.4th 1075. However, this Court did not address the merits of the issue because it found the claim had been waived for failing to object to the substitution at trial. (*Id.* at pp. 1100-1101.)

[129] The opinion does not reflect the legal basis for Aiken's claim.

'mechanistic approach appears not to be consonant with Penal Code section 1089 [. . .].'" (*Ibid.* [citation omitted.].) The Court of Appeal affirmed the conviction based on an interplay of factors:

> First, the *Aikens* court noted that the trial court judge issued the proper instructions. These instructions, reasoned the court, preserved the defendant's right to a verdict reached after the full participation in deliberations of the twelve jurors who ultimately issue the verdict. Next, the court cited the one-sided nature of the case making the possibility of prejudice minimal. Both victims and one independent witness positively identified the defendant, thus negating the only defense asserted--mis-identification. Finally, the court determined that a policy denying trial courts the ability to replace jurors with alternates in post-verdict situations would have negative consequences. For instance, the *Aikens* court explained that trial courts would likely refuse to discharge jurors in these situations, creating the potential for a hurried and dispassionate consideration of the evidence and a rushed judgment. The *Aikens* court concluded that trial courts should balance the constitutional rights of the accused against the state interest in judicial economy. Recognizing the conflicting interests involved, the court struck the balance in favor of the state interest and affirmed the post-verdict substitution.

(McDermott, *Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial* (1994) 35 B.C. L. Rev. 847, 866-867.) The Court of Appeal in *People v. Thomas, supra*, 218 Cal.App.3d at pp. 1485-1488, likewise ruled that, in a non-capital case, it was not error under state law to record a partial verdict after the trial court had decided good cause existed to substitute a juror during guilt deliberations. However, the heightened need for reliability in capital cases tips the balance in favor of a defendant's constitutional rights versus those of judicial economy.

In addition, the rigorous dissenting opinion in *Aikens* 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. (207 Cal.App. at p. 215 (dis. opn. of Johnson, J.).) The dissent noted 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 (207 Cal.App.3d at p. 215) and stated:

> 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.
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> "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.)

(207 Cal.App.3d at pp. 216-217.) The dissent continued that *Fields*, which involved the substitution of an alternate juror at the penalty phase of trial, did not address the issue of the propriety of substituting a juror during guilt deliberations after a partial verdict had been recorded (*Id.* at p. 217), but that *Collins* should be interpreted and applied in this situation to bar the substitution of jurors after a guilt verdict has been recorded:

> The New Jersey Supreme Court has addressed the identical issue presented in the case before us and, relying in part on *Collins*, held it was error to substitute a juror after the return of verdicts on some counts in order to reach verdicts on the remaining counts when there is a factual overlap between the counts. (*State v. Corsaro* (1987) 107 N.J. 339.) I believe the reasoning in *Corsaro* is consistent with the reasoning in *People v. Collins* and that it should be followed in California.
>
> Defendants in *State v. Corsaro* were tried on various gambling charges. Before the juror substitution, the original jury convicted two of the defendants of maintaining a gambling resort, one defendant of promoting gambling and defendant Corsaro of possession of gambling records. The remaining counts charged defendant Corsaro with promoting gambling and all defendants with conspiracy to promote gambling. (526 A.2d at pp. 1047-1048.) The verdicts of the original jury bore on the remaining counts because those convictions could have established the overt act requirement for the conspiracy count and the conviction of Corsaro for possession of gambling equipment was a "'strong, perhaps irresistible pull' toward her conviction for 'promoting gambling.'" (526 A.2d at p. 1054.)
>
> The New Jersey statute on substitution of jurors is similar to Penal Code section 1089. It provides in relevant part, "[I]f at any time after submission of the case to the jury, the juror dies or a juror is discharged by the court because he is ill or otherwise unable to continue, the court may direct the clerk to draw the name of an

alternate juror to take the place of the juror who is deceased or discharged. When such a substitution of an alternate juror is made, the court shall instruct the jury to recommence deliberations and shall give the jury such other supplemental instructions as may be appropriate." (Quoted in *State v. Corsaro, supra*, 526 A.2d at p. 1052.) The New Jersey high court, like California's, has imposed a construction on the statute requiring "'the jury must be instructed in clear and unequivocal terms that it is to begin its deliberations anew'" not simply pick up from where they left off before the substitution. (*Ibid.*) The trial court in *Corsaro*, like the trial court in the case before us, gave the reconstituted jury an instruction which arguably at least complied with state decisional law. It instructed the jury, "you are to begin your deliberations anew with respect to the open charges that you are considering ....." (*Id.* at p. 1050.)

The problem in *Corsaro* was not in the wording of the instruction. (526 A.2d at p. 1053.) The problem in *Corsaro*, as in the case at bar, was that the original jurors had gone beyond deliberations and actually announced verdicts. (*Id.* at pp. 1053-1054.) The court concluded it would be unreasonable and untenable to presume the original 11 jurors would follow an instruction to disregard the findings of fact reflected in their existing verdicts and start from scratch with the new juror. (Cf. *People v. Fields, supra*, 35 Cal.3d at p. 351.)

In reaching this conclusion the *Corsaro* court interpreted *People v. Collins* to mean a "verdict does not satisfy the constitutional requirement of unanimity if the new juror does not have the benefit of the deliberations of the original 11, is pressured to conform to the views of the original 11 and has no meaningful chance to persuade the others to accept his or her viewpoint." *(State v. Corsaro, supra*, 526 A.2d at pp. 1052-1053, citing *People v. Collins, supra*, 17 Cal.3d at p. 693.) The *Corsaro* court then explained why a verdict by a reconstituted jury, after the original jury had reached a related verdict, cannot meet the requirement of unanimity.

"[W]here the deliberative process has progressed for such a length of time or to such a degree that it is strongly inferable that the jury has made actual fact-findings or reached determinations of guilt

or innocence, the new juror is likely to be confronted with closed or closing minds. In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated." (526 A.2d at p. 1054.)

(207 Cal.App.3d at pp. 217-219 (dis. opn. of Johnson, J.).)

As the dissent in *Aikens* further noted, the majority in that case:

[...] apparently believes no prejudice to the defendant arises if the reconstituted jury finds him guilty on a related count because it is probable the original jury would have reached the same result. (See, supra, p. 213.) This argument entirely misses the point. What the original jury would have done is irrelevant. Defendant was not convicted on count II by the original jury. He was convicted by a different jury and as to that jury he had the constitutional right "not to be convicted except by 12 jurors ... who together have deliberated to unanimity." (*People v. Collins, supra*, 17 Cal.3d at p. 693.) Surely the majority does not mean to say it would have been harmless error not to impanel an alternate juror at all on the ground the verdict of the remaining 11 jurors is probably the same verdict the original 12 would have reached. Yet, this would appear to be the logical extension of the majority's argument. Regardless of the court's view about the probability of the outcome, a felony defendant cannot be compelled to accept a verdict by less than 12 jurors. (*People v. Ames* (1975) 52 Cal.App.3d 389, 392; cf. *People v. Superior Court* (1967) 67 Cal.2d 929, 932.)

I recognize dicta in *People v. Collins* and *Griesel v. Dart Industries* express our Supreme Court's view an instruction to the reconstituted jury to disregard all past deliberations and begin anew is sufficient to guarantee the defendant a unanimous verdict. (See *Collins, supra*, 17 Cal.3d at p. 694; *Griesel, supra*, 23 Cal.3d at p. 583, fn. 2.) But, in those cases the court was speaking about setting aside deliberations not determinations. As the *Corsaro* court correctly observed,

> "The requirement that juries begin deliberations anew after a juror has been substituted would be rendered nugatory if the reconstituted jury is likely to accept, as conclusively established, facts that could underlie, if not necessarily establish, its verdict on the open charges. ... While the jury was not technically required to accept the facts underlying the partial verdict, the likelihood that deliberations would truly 'begin anew' was so remote, in our opinion, as to foreclose juror substitution." (*State v. Corsaro, supra*, 526 A.2d at p. 1055.)

(207 Cal.App.3d at p. 220 (dis. opn. of Johnson, J.).)

In the instant case, the jury necessarily made findings with regard to Counts 3 and 4 that were inextricably intertwined with the remaining counts. For example, the jury found that appellant was either present at the scene while the killings occurred and/or that he directed the killings be carried out. Given the trial court's instruction that the jury was to begin deliberations anew *as to the remaining counts*, it is entirely unreasonable to presume that having finalized those findings of fact in the form of a guilty verdict as to counts 3 and 4, the remaining 11 members of the original jury put those findings aside and considered the facts underlying all the counts anew, including in their deliberations the perceptions, memory and viewpoint of the new juror. (See *People v. Collins, supra*, 17 Cal.3d at p. 693; *State v. Corsaro, supra*, 526 A.2d at p. 1054.) Given the trial court's instruction and the circumstances of the crimes in this case, the findings of fact underlying the first-degree murder guilty verdicts on count 3 and 4 necessarily compelled a guilty verdict as to counts 1, 2 and 5, and compelled the jury's verdict as to the multiple murder special circumstance in this case.

In addition, the trial court twice erred in failing to instruct the newly constituted jury to begin deliberations anew. Instead, after both the discharge of juror number 77 on May 17, 1995, as well as after the

discharge of juror number 327 on May 23, 1995, the jury was instructed to begin deliberations *as to the remaining counts*. (RT 16958, 16970.) This instruction failed to meet the requirement set forth in *Collins* and CALJIC NO. 17.51 that the jurors "disregard the earlier deliberations as if they had not taken place, " since they were explicitly instructed to deliberate anew on only the remaining counts. Appellant was therefore denied his right to a unanimous verdict by 12 jurors as to those remaining counts. (*People v. Collins, supra*, 17 Cal.3d at p. 692, fn. 3; Cal. Const., art. 1, § 16.)

The recording of the partial guilt verdict against appellant and the erroneous *Collins* instruction violated both state and federal law, as set forth herein, and requires that appellant's conviction on counts 1, 2 and 5, and the multiple murder special circumstance finding, be reversed.

E. Conclusion

The right to a unanimous jury verdict by 12 jurors in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins, supra,* 17 Cal.3d at p. 693); all state-created constitutional and statutory rights are protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Vitek v. Jones*, *supra,* 445 U.S. at p. 488.) The denial of appellant's right to a unanimous verdict by 12 jurors thus denied appellant due process of law.

In addition, because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana*, *supra*, 447 U.S. at pp. 331-334; *People v. Feagley*, *supra*, 14

Cal.3d at p. 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense (Murray v. Giarratano, supra, 492 U.S. at pp. 8-9; *Beck v. Alabama, supra,* 447 U.S. at p. 638).

Further, the denial of a unanimous verdict by 12 jurors constituted structural error requiring reversal without a determination of whether the error affected the verdict. Some errors, involving "'structural defects in the constitution of the trial mechanism . . . defy analysis by "harmless-error" standards,'" because they are "necessarily unquantifiable and indeterminate." (*Arizona v. Fulminante, supra,* 499 U.S. at p. 309.)[130] Such errors always require invalidation of a judgment. (*Id.* at p. 279.)

For the foregoing reasons, the trial court's multiple errors during guilt phase deliberations violated appellant's state statutory rights as well as his state and federal constitutional rights. Reversal of appellant's conviction and sentence is required.

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[130] However, regardless of whether the error is deemed violative of the federal Constitution, the error here is structural and requires reversal without analysis of harmless error. As noted by the Court of Appeals in *United States v. Curbelo* (2003) 343 F.3d. 273, the United States Supreme Court has clearly held that structural errors need not be of constitutional dimension. (*Id.* at p. 280, citing *Nguyen v. United States* (2003) 539 U.S. 69.) In *Nguyen*, the Supreme Court recognized that when an error "involves a violation of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business' courts may vacate the judgment without assessing prejudice." (*Nguyen v. United States*, *supra*, 539 U.S. at p. 81.) Certainly the statutory provisions which govern the number of jurors required to convict a criminal defendant, especially in a capital case, must be deemed to embody such policy considerations.

XX

THE TRIAL COURT'S FAILURE TO CONDUCT INDIVIDUAL SEQUESTERED DEATH QUALIFICATION VOIR DIRE, AND ITS UNREASONABLE AND UNEQUAL APPLICATION OF CALIFORNIA LAW GOVERNING JUROR VOIR DIRE, VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND HIS STATUTORY RIGHT UNDER CODE OF CIVIL PROCEDURE SECTION 223 TO INDIVIDUAL VOIR DIRE WHERE GROUP VOIR DIRE IS NOT PRACTICABLE

> Given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death.

(*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 81.)

Appellant joined in coappellant Smith's request for sequestered individual voir dire of the prospective jurors, citing inter alia appellant's federal constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution; appellant also argued that "good cause" within the meaning of Code of Civil Procedure section 223 (as enacted by section 7 of Proposition 115) existed for such examination. (RT 6294; CT 2799-2813.) The trial court summarily denied the request and conducted non-sequestered voir dire. (RT 6626-6627.)

As described below, the trial court's failure to conduct individual sequestered death qualification voir dire, and its unreasonable and unequal application of state law governing such voir dire, violated appellant's federal constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel, and a reliable death verdict,

and his right under California law to individual juror voir dire where group voir dire is not practicable.

A. A Voir Dire Procedure That Does Not Allow Individual Sequestered Voir Dire On Death-Qualifying Issues Violates A Capital Defendant's Constitutional Rights To Due Process, Trial By An Impartial Jury, Effective Assistance Of Counsel, And A Reliable Sentencing Determination

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. (U.S. Const., Amends. VI and XIV; *Morgan v. Illinois* (1992) 504 U.S. 719, 726; Cal. Const, art. I, §§ 7, 15 & 16.) Whether prospective capital jurors are impartial within the meaning of these rights is determined in part by their opinions regarding the death penalty. Prospective jurors whose views on the death penalty prevent or impair their ability to judge in accordance with the court's instructions are not impartial and cannot constitutionally remain on a capital jury. (See generally, *Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510; see also *Morgan v. Illinois, supra,* 504 U.S. at pp. 733-734; *People v. Cummings, supra,* 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois, supra,* 504 U.S. at p. 729.) To that extent, the right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at pp. 735-736, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37.) A trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors necessarily creates such an unreasonable risk.

This Court has long recognized that exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v. Superior Court, supra,* 28 Cal.3d 1, 74-75.) When jurors state their unequivocal opposition to the death penalty and are subsequently dismissed, the remaining jurors may be less inclined to rely upon their own impartial attitudes about the death penalty when choosing between life and death. (*Id.* at p. 74.) By the same token, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey, supra,* at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.)

Given the substantial risks created by exposure to the death qualification process, any restriction on individual and sequestered voir dire on death-qualifying issues – including that imposed by Code of Civil Procedure section 223, which allows death qualification in the presence of other prospective jurors and abrogates this Court's mandate that such voir dire be done individually and in sequestration (*Hovey v. Superior Court, supra*, 28 Cal.3d at p. 80; *People v. Waidla* (2000) 22 Cal.4th 690, 713) – cannot withstand constitutional principles of jury impartiality. (See, e.g., *Morgan v. Illinois, supra,* 504 U.S. at pp. 736, citing *Turner v. Murray, supra,* 476 U.S. at p. 36 ["The risk that . . . jurors [who were not impartial]

may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.'"].) Nor can such restriction withstand Eighth Amendment principles mandating a need for the heightened reliability of death sentences. (See, e.g., *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Zant v. Stephens, supra,* 462 U.S. 862, 884-885; *Gardner v. Florida, supra,* 430 U.S. 349, 357-358; *Woodson v. North Carolina, supra,* 428 U.S. 280, 305.) Likewise, because the right to an impartial jury guarantees adequate voir dire to identify unqualified jurors and provide sufficient information to enable the defense to raise peremptory challenges (*Morgan v. Illinois, supra,* 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the Sixth Amendment's guarantee of effective assistance of counsel.

Put simply, juror exposure to death qualification in the presence of other jurors leads to doubt that a convicted capital defendant was sentenced to death by a jury empaneled in compliance with constitutionally compelled impartiality principles. Such doubt requires reversal of appellant's death sentence. (See, e.g., *Morgan v. Illinois, supra,* 504 U.S. at p.739; *Turner v. Murray, supra,* 476 U.S. at p. 37.)

B. The Superior Court Erred In Denying Appellant's Request For Individual Sequestered Voir

Even assuming individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case the trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors still violated appellant's constitutional rights to an impartial jury and due process of law.

The court's conduct also violated appellant's constitutional right to equal protection of the law, and his federal due process protected statutory right to individual voir dire where group voir dire is impracticable. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Code of Civil Procedure section 223 vests trial courts with discretion to determine the feasibility of conducting voir dire in the presence of other jurors. (*People v. Box* (2000) 23 Cal.4th 1153, 1180; *People v. Waidla, supra,* 22 Cal.4th at p. 713; *Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1184.) Under that code section, "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223.) However, as this Court recognizes, individual sequestered voir dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 80, 81.) The proper exercise of a trial court's discretion under section 223 therefore must balance competing practicalities. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977["[E]xercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue."].)

The trial court's summary denial of appellant's request simply does not reflect a sound exercise of discretion about whether, in the particular circumstances of this case, group voir dire was practicable. (RT 6626-6627.) The record fails to show that the court in making its decision "engaged in a careful consideration of the practicability of . . . group voir dire as applied to [appellant's] case." (*Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1183.) The court's bald denial of appellant's

request does not equate with the kind of "reasoned judgment" this Court ascribes to judicial discretion. (See *People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 977.) Nor does it equate with a "a careful consideration" (*Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1183) of the practicability of small group voir over individualized sequestered voir dire, "[t]he most practical and effective procedure available to minimize the untoward effects of death-qualification[.]" (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 80.)

The record reflects that prospective jurors were in fact influenced by the responses elicited during voir dire. Prospective jurors who admitted in their questionnaires that they would automatically impose the death penalty in certain circumstances after exposure to other jurors' views during the voir dire process changed their responses, and appellant was then forced to exercise peremptory challenges in order to remove those prospective jurors from the petit jury. (See. e.g., 1 SUPP CT 3237 and RT 6826-6826, 6990 [prospective juror number 92]; 1 SUPP CT 1574 and RT 7120-7121 [prospective juror number 180]; 1 SUPP CT 1540 and RT 7270-7274 [prospective juror number 179].)

Additionally, two prospective jurors were unsuccessfully challenged by the defense for cause, even though they expressed strong automatic death penalty views in their juror questionnaires, because they modified their answers during voir dire; the defense was forced to exercise peremptory challenges to ensure they did not remain on the jury. (1 SUPP CT 3065-3067 and RT 6852-6855, 6918 [prospective juror no. 82]; 1 SUPP CT 3031-3033 and RT 6870-6872, 6954 [prospective juror no. 80]; see also Argument XXII, *post*, incorporated by reference herein.)

Further, two sitting jurors in this case, numbers 59 and 73, who declared in their questionnaires they strongly agreed that anyone who intentionally kills more than one person without legal justification and not in self defense should automatically receive the death penalty (1 SUPP CT 6804 and 2897, respectively), after hearing the "correct" responses in voir dire, said they would not impose the death penalty automatically. (RT 6969-6971 and 6919-6925, respectively.)

Moreover, the record shows that, as a result of the trial court's denial of sequestered voir dire, a portion of the venire that included at least three of the petit jurors heard the trial court ask prospective juror number 217, if, in a hypothetical case, "What if there was somebody who was so bad and so dangerous that nobody could testify against him unless they got something in return for it? Do you think that might be an appropriate time to give somebody immunity to get them into court?" (RT 7596-7597.) Appellant later challenged for cause not only prospective juror number 217, but the entire venire who was present for the court's questions, arguing that appellant was prejudiced because the questions led all the jurors who heard them to believe that appellant was the type of person suggested by the questions. (RT 7605-7606.) The court denied appellant's challenge. (RT 7606.) The question to which appellant objected was made in front of prospective jurors from whom the alternate jurors were selected. Although the original twelve jurors were selected from among the first 200 prospective jurors; due to the dismissal of numerous sitting jurors during the course of the trial, three of the alternates who were biased by the court's improper question took part in deciding appellant's fate. (RT 7230-7231, 7245, 7313, 7327, 7420, 7608, 7655, 7670, 7735, 7743, 7747 [Juror Nos. 247, 220, 261].) The presence of three biased jurors denied appellant his

right to a verdict by an impartial jury. (*Irwin v. Dowd* (1961) 366 U.S. 717, 722; *Tumey v. Ohio* (1927) U.S. 273 U.S. 510, 532; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 [bias or prejudice of even a single juror violates a defendant's right to a fair trial].)

Under these circumstances, the trial court clearly committed error of federal constitutional magnitude in denying appellant's request for individual sequestered voir dire as well as appellant's cause challenge to the venirepersons who heard the court's prejudicial question. (U.S. Const., Amends. V, VI, VIII and XIV.)

C. The Trial Court's Unreasonable And Unequal Application Of The Law Governing Juror Voir Dire Requires Reversal Of Appellant's Death Sentence

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in a "a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." However, section 223 must be viewed as providing appellant an important procedural protection and liberty interest (namely, the right to individual juror voir dire on death penalty issues where group voir dire is impracticable) that is protected under the federal due process clause. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Accordingly, the trial court's unreasonable application of section 223 in appellant's case must be assessed under the *Chapman* standard of federal constitutional error. In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that contributed to appellant's death verdict (*Chapman v. California, supra,* 386 U.S. at p. 24), the trial court's

failure to conduct individual, sequestered juror voir dire on death penalty issues requires reversal of appellant's death sentence.

The group voir dire procedure employed by the trial court created a substantial risk that appellant was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 80, fn. 134), and who had become "desensitized to the intimidating duty" of determining whether appellant would live or die (*Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1173) because of their "repeated exposure to the idea of taking a life." (*Hovey, supra,* at p. 75.) Accordingly, the trial court's failure to carefully consider the practicability of group voir dire as applied to appellant's case led to a voir dire procedure that denied appellant the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that appellant was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process. (See *Hovey v. Superior Court, supra,* 28 Cal.3d at pp. 74-75.) These hazards infringed upon appellant's rights to due process and an impartial jury (see *Morgan v. Illinois, supra,* 504 U.S. at p. 729), and cast doubt on whether the Eighth Amendment principles mandating a need for the heightened reliability of death sentences is satisfied in this case. By their very nature, these are rights that are so important as to constitute an "essential part of justice" (*People v. O'Bryan* (1913) 165 Cal. 55, 65) for which the risks of deprivation must be regarded as a miscarriage of justice. Indeed, errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required

'orderly legal procedure' (or, in other words, a fair trial)[.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 501; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 699 ["The denial of the right of trial by a fair and impartial jury is, in itself, a miscarriage of justice."].)

Moreover, because the voir dire procedure employed by the trial court was inadequate to identify those jurors whose views on the death penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or impaired their ability to judge appellant in accordance with the court's instructions. The trial court's use of this procedure cannot, therefore, be dismissed as harmless. (*People v. Cash* (2002) 28 Cal.4th 703, 723.) Stated simply, the jurors' exposure to death qualification of other jurors leads to doubt that appellant was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles, and that doubt requires reversal of appellant's death sentence. (*Morgan v. Illinois, supra,* 504 U.S. at p. 739; *People v. Cash, supra,* 28 Cal.4th at p. 723.)

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XXI

THE TRIAL COURT'S UNLAWFUL EXCLUSION OF THREE PROSPECTIVE JURORS FOR CAUSE REQUIRES REVERSAL OF APPELLANT'S CONVICTION AND DEATH SENTENCE

Over appellant's objection, the trial court granted the prosecution's challenge for cause and excused three prospective jurors who stated that, despite their general opposition to the death penalty, they would follow the law and would be able to impose a death sentence, if warranted, in this case. Because the record does not show these prospective jurors feelings about the death penalty substantially impaired their ability to sit as impartial jurors, their dismissal violated appellant's rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. Reversal of appellant's conviction and death judgment is required.

A. The Trial Court Erroneously Sustained The Prosecution's Cause Challenge To Prospective Juror Number 56, Despite Her Unequivocal Promise To Follow The Law In Determining Sentence In This Case

The trial court conducted all voir dire in this case; attorneys were not permitted to directly question prospective jurors.[131] (RT 6293-6294; CT 2770-2781, 2799-2813, 2877-2888.) Among the potential jurors called in the case was prospective juror number 56. Although she said she was

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[131] At the time of trial in this case, Code of Civil Procedure section 223 provided for court-conducted voir dire, with participation from the parties only upon showing of "good cause." As amended in 2001, section 223 now provides for counsel to have the right to question prospective jurors after the court's voir dire.

opposed to the death penalty and would not want to impose a death sentence, she repeatedly said she could and would do what the law required in this case. Nevertheless, the prosecutor moved to discharge her for cause, and the trial court sustained the challenge. As more fully discussed below, the trial court erred. Reversal of appellant's death sentence is required.

1. The Voir Dire Of Prospective Juror Number 56

Prospective juror number 56 was a 50-year-old grandmother (1 SUPP CT 6718-6722) who said during voir dire that she did not think she could be fair in this case because one of the victims was a baby who was about her grandchild's age. (RT 6746.) When she informed the court that she had already been a juror on a murder trial and did not want to do so again, the court informed her that she could be dismissed only if she said her mind was made up about penalty or if she said she could not be fair because there was a child involved. (RT 6747.) She thereafter repeatedly said that she could be fair to both the prosecution and the defendants, and that she would follow the court's instructions. (RT 6747-6748.) When specifically asked if, since she indicated in her questionnaire that a basis for her opposition to the death penalty was religious in nature, whether those beliefs would preclude her from imposing a death sentence, she said she could put her personal views aside and make a decision based on the facts because it was her civic duty to do so, although she said it was "not something I would be overjoyed in doing." (RT 6749-6750.) In response to the court's questions, she stated that she had changed her view from the questionnaire, in which she stated she would vote for life without the possibility of parole no matter what the evidence, because of the court's "little speech this morning about weighing the good and the bad and the evidence that comes in before that." (RT 6750-6751.) Lastly, she said she

honestly did not believe her feelings would influence the manner in which she judged this case (RT 6751), that she preferred life in prison as a penalty but could apply the evidence to the law and decide for either penalty. (RT 6819-6820.)

The prosecution challenged her for cause, arguing that the answers on her questionnaire to questions 65, 87, 88C, 88d, 88E, 89, 94 and 98[132]

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[132] Since the court's ruling was based on the content portions of number 56's questionnaire, both the questions and her answers that were cited by the prosecution and the court as the basis for the challenge are set forth herein:

> Question 65. Would your religious preference or beliefs make it difficult or impossible to sit in judgment of another person? (If yes, please explain)
> Answer: If death pen [sic] was involved.
>
> Question 87. What are your general feelings about the death penalty?
> Answer: I believe in life in prison without parole.
>
> Question 88C. Are your views on the death penalty based on religious conviction? (If yes, please indicate what those views are)
> Answer: Yes. No one has the right to take a life.
>
> Question 88D. Do you feel California should have the death penalty? (Please explain)
> Answer: No.
>
> Question 88E. Regardless of your views on the death penalty, would you as a juror, be able to vote for the death penalty on another person if you believed, after hearing all the evidence, that the penalty was appropriate?
> Answer: No.

(continued...)

reflected that she was incapable of imposing the death penalty and that she had been influenced to change her opinion by the voir dire process. (RT 6933-6934.) The defense argued that under United States Supreme Court precedent, a prospective juror could not be removed for cause because they opposed the death penalty, and that number 56 said she would temporarily set aside her own beliefs in deference to the rule of law. (RT 6934-6935.) The court ruled the issue as follows:

> Given the totality of her answer, is there really a reasonable likelihood she could choose conscientiously between the penalties based on the evidence and so forth. The answer is clearly no, in the court's opinion.
>
> I don't believe it is a close credibility call at all. I don't believe the woman is trying to mislead the court, but when you look at the terms in which she answered, and in the questionnaire she said she could never impose that penalty. She is dead set on religious grounds and that nobody has got a right to that power, over and over and over, eight or nine or ten times in the questionnaire. For some reason yesterday she had this awakening that the court is not convinced is reflective of her true feelings, frankly. So, yes, the court feels that her ability would be substantially impaired to be a juror, not on the guilt phase, but the penalty phase of the trial the [sic] reasons stated in her questionnaire. That challenge will be allowed.

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[132](...continued)

> Question 94: If the trial reached the penalty phase would you automatically, in very case, regardless of the evidence, vote for life in prison without the possibility of parole?
> Answer: Yes.
>
> Question 98. Do you believe you would consider the costs of imprisoning a defendant for life without the possibility of parole in deciding what the punishment of a defendant should be?
> Answer: No.
> Please explain: I don't believe in the death penalty.

(RT 6837.) As appellant will show below, the trial court was wrong.

2. Because The Voir Dire Of Prospective Juror Number 56 Established That Her Position On The Death Penalty Would Neither Prevent Nor Substantially Impair Her Ability To Follow The Court's Instructions, Apply The Law To The Facts, Or Impose A Sentence Of Death, The Trial Court Committed Reversible Error Discharging Her For Cause

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. (*Duncan v. Louisiana, supra,* 391 U.S. at pp. 149-150; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) In capital cases, this right applies to the determinations of both guilt and penalty. (*Morgan v. Illinois, supra,* 504 U.S. at p. 727; *Turner v. Murray, supra,* 476 U.S. at p. 36, fn. 9.) This right also is protected by the California State Constitution. (See Cal. Const., art. I, § 16.)

The United States Supreme Court has enacted a process of "death qualification" for capital cases. (See *Witherspoon v. Illinois, supra,* 391 U.S. at p. 522); *Wainwright v. Witt, supra,* 469 U.S. at p. 421.) Appellant maintains that this process produces "juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused" in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. (*Witt v. Wainwright,* (1985) 470 U.S. 1039 (Marshall, J., dissenting from denial of certiorari); *Grigsby v. Mabry* (8th Cir. 1985) 758 F.2d 226, revd. sub nom, *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) The reasons supporting this claim are set forth in Justice Marshall's dissenting opinions in *Witt, supra,* at pp. 1040-1042, and in *McCree, supra,* at pp. 184-206, which are incorporated herein to preserve the issue for federal habeas corpus review, if necessary.

Even with a death qualification process, the Supreme Court has held that prospective jurors do not lack impartiality, and thus may not be excused for cause, "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-523, fns. omitted.) Such an exclusion violates the defendant's rights to due process and an impartial jury "and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) Rather, under the federal Constitution, "[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 oath." (*Wainwright v. Witt*, *supra,* 469 U.S. at 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) The focus on a prospective juror's ability to honor his or her oath as a juror is important:

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree*, *supra,* 476 U.S. at p. 176; see also *Witherspoon*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State."].) Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra* at p. 45.) The same standard is applicable under the California

Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d, 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

In applying the *Adams-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962); see also, *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole].) As this Court has explained:

> On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

(*People v. Heard* (2003) 31 Cal.4th 946, 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975, citations omitted.) The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Witt*, *supra*, 469 U.S. at p. 424; accord, *Morgan v. Illinois, supra,* 504 U.S. at p. 733.) The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray v. Mississippi* (1987) 481 U.S. 648, 668.).

Moreover, given the per se standard of reversal for *Witherspoon-Witt* errors, the trial court bears a special responsibility to conduct adequate death qualification voir dire. As this Court recently emphasized, when a prospective juror's views appear uncertain, the trial court must conduct

careful and thorough questioning, including follow-up questions, to determine whether his "views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror." (*People v. Heard*, *supra*, 31 Cal.4th at p. 965.) In short, the trial courts must "proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases." (*Id.* at p. 968.)

Most recently in *People v. Stewart* (2004) 33 Cal.4th 425, 440-455, this Court held that the trial court had committed reversible error by excusing five prospective jurors for cause based solely upon their written answers on a jury questionnaire. In answering the questionnaire, the five jurors had expressed general objections to the death penalty. However, this Court held that their answers to the questionnaire did not establish that they would be unable to set aside their own beliefs and apply the instructions given to them by the court. This Court reiterated the United States Supreme Court's holding that personal objection to the death penalty is not a sufficient basis for excluding a person from jury service in a capital case:

> Not all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, quoting *Lockhart v. McCree, supra*, 476 U.S. at p. 176.) Relying also on its own opinion in *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court held that particularly in California, those who are opposed to the death penalty are legally qualified to serve as jurors:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own

> values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, 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, . . . 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.

(*People* v. *Stewart*, *supra*, 15 Cal.Rptr.3d at p. 675. [emphasis in original].) And as this Court reaffirmed in *People v. Heard, supra,* 31 Cal.4th 946, 958, "'The real question is whether the juror's views about capital punishment would prevent or [substantially] impair the juror's ability to return a verdict of death *in the case before the juror.*'" (Citations and internal quotation marks omitted, emphasis added.)

Application of these standards to the voir dire of number 56 shows that the trial court plainly erred in discharging her for cause. To be sure, the questionnaire supports a conclusion that number 56 was opposed to capital punishment. (See 1 SUPP CT 6729-6730, 6734-6737.) But as the cases cited above held, mere opposition to capital punishment is an insufficient basis on which to discharge a prospective juror for cause. (*Adams v. Texas, supra*, 448 U.S. at p. 45; see also *People v. Stewart, supra*, 33 Cal.4th at p. 449 ["Disagreement with the current state of the law is not disqualifying by itself [. . .]."] Instead, the State must go further and carry its burden of proving that the juror's views on capital punishment would "prevent or substantially impair" the juror's ability to perform his duties as a juror and

follow the law in the case at hand. (*Adams v. Texas, supra,* 448 U.S. at pp 45, 48; *People v. Stewart, supra,* 33 Cal.4th at p. 445.)

Here, the State did not come close to satisfying this burden. The prosecution did not and could not rely on number 56's in-court answers as a basis for the challenge, because she said she could follow the law and impose death if it was warranted in this case. The prosecution's basis for the challenge was instead the answers she provided in her questionnaire. An examination of the seven questions objected to in her questions show that five reflected only that she was opposed to the death penalty, which, as set forth above, is not a legal basis for sustaining a cause challenge. Two of her answers did reflect her then-held view that: (1) she did not believe she would be able to vote for the death penalty "on another person if [she] believed, after hearing all the evidence, that the penalty was appropriate" (see answer to question 88E); and (2) that she would "automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole" (see answer to question 94).[133] However, after being instructed as to *the law* requiring her to weigh the aggravating and mitigating factors, and after being informed of *the facts of this case*, she unequivocally and repeatedly said she would consider death as an option. In fact, the record reflects a case-based reason for her willingness to consider the death penalty: this case involved the death of a baby about her grandchild's age, and number 56 went so far as to say that she was

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[133] These two questions fail to determine accurately whether a prospective juror's views on the death penalty would prevent or substantially impair his or her ability to follow the law, since neither posits the question of whether the juror could follow the law as applied to this case. (See *People v. Stewart, supra*, 676, fn. 12.)

uncertain if she could be fair *to the defendants* because of that fact. (RT 6290-6291, 6746-6747.) In view of number 56's clarification of her views during voir dire, her earlier juror questionnaire responses, given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support her excusal for cause. (*People v. Heard, supra*, 31 Cal.4th a p. 964.)

In sustaining the prosecution's challenge for cause, the trial court ruled that number 56's answers in her questionnaire provided the bases for sustaining the challenge, and that the court was not convinced by her in-court answers that she would follow the law and could impose the death penalty in this case if the facts so warranted. The trial court incorrectly framed the issue when it ruled the question was whether there was " really a reasonable likelihood she could choose conscientiously between the penalties based on the evidence and so forth." (RT 6837.) As discussed above, the question is whether her opposition to the death penalty 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.) Applying the correct standard, the record simply does not contain substantial evidence that number 56 was "substantially impaired." Despite her general opposition to the death penalty, and her inability to envision herself voting for death in the abstract, she stated *unequivocally* in voir dire that, now that she understood the law and given the facts of this case, that is, where one of the victims was a baby, she would consider imposing the death penalty in this case. Number 56 recognized what the trial court did not: that, despite her views on the death penalty and her unwillingness to serve again as a juror on a murder case, she was obliged to do her "civic duty."

This Court expressly recognized the ability of jurors like number 56 to serve on capital juries in *People v. Stewart, supra*, 33 Cal.4th at pp. 674-675:

> 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 [. . . .] [H]owever, 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.

The record in this case suggests the trial court "erroneously equated (1) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with (2) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty" (*People v. Stewart, supra*, 33 Cal.4th at p. 676) and failed to recognize that a prospective juror's opposition to the death penalty, religious or otherwise, does not, standing alone, constitute a disqualifying bias under the law.[134]

Number 56 is precisely the type of juror which the Sixth and Fourteenth Amendments do not allow to be excused from a capital case for cause: a juror that has promised to set aside her views and render a judgment based on the facts of a particular case and the law presented to her. The erroneous granting of even a single challenge for cause requires reversal of appellant's judgment of death. (*Gray v. Mississippi, supra*, 481 U.S. at p. 660 [improper exclusion of a single juror warrants reversal; error

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[134] The trial court's use of the term "substantially impaired" does not salvage its ruling (RT 6837) because the trial court explicitly relied on an incorrect standard.

not subject to harmless error analysis]; accord *People v. Heard, supra*, 31 Cal.4th at p. 966.)

B. The Trial Court Erroneously Excused Prospective Juror Number 52, Who Was Equivocal About Whether His Attitudes About The Death Penalty Would Effect His Penalty Phase Deliberations

After being subjected to repeated questioning by the trial court, prospective juror number 52, who otherwise said he would follow the law, expressed a doubt as to whether his views on the death penalty would impair his ability to impose a death sentence in this case. However, he did not state with anything approaching the requisite degree of certitude that he would not consider death as an option in this case under proper instructions from the trial court. Reversal of appellant's death judgment is required.

1. Voir Dire Of Prospective Juror Number 52

Prospective juror number 52 was a 52-year-old palletizer, Army veteran, father of six and long-time resident of Crenshaw. (1 SUPP CT 6650-6654.) Answers in his questionnaire reflect no particular opposition to the death penalty; rather, his lack of responses to many questions indicate that he had not formulated an opinion regarding the death penalty. (1 SUPP CT 6650-6683.) On the one hand, he "agreed somewhat" with the statement that anyone who intentionally kills more than one person without legal justification and not in self defense should automatically get the death penalty; he said that he "didn't know" if he would automatically find a special circumstance true in order to be able to consider the death penalty or if he would automatically vote for the death penalty. (1 SUPP CT 6668.) On the other hand, he also "didn't know" if he would automatically vote for life in prison without the possibility of parole and that he did not know if he had any conscientious objections to the death penalty which would impair

his ability to be fair and impartial in seeking the death penalty. (1 SUPP CT 6668-6669.)

During voir dire he said he was "very opposed" to the death penalty, that he had been studying "that" recently and that the death penalty "bother[ed] his conscious." (RT 7017-7018.) But, in response to the court's question about whether his views would prevent him from imposing one of the sentences provided by the law in this case, he replied, "Like I say, your honor, I have no quarrel with the law. I could follow the law. But I could not say that it would not – it – I couldn't say it would not be against my conscious." (RT 7017-7018.) He further stated that he would not automatically vote for either sentence and that he was sure he could vote for either sentence in this case, depending on the evidence. (RT 7020-7021.) Despite his clear response that he could follow the law, the trial court continued to question number 52 regarding his conscientious objections to the death penalty, until number 52 agreed that he did not think he could be "a fair judge of the penalty and vote for death if he felt it was appropriate" given the facts of this case. (RT 7021.) When specifically asked if he had religious beliefs that would "make it difficult to sit in judgment on a case like this," number 52 replied: "As I say, I have been studying about it lately and from what I learn, this is where it comes into play. Now 10 years ago I would have no quarrel with that, but since what I have learned in the past few years, I can't honestly say that." (RT 7022.)

The prosecution challenged number 52 for cause, arguing that number 52's answers were based on "some sort of religious enlightenment" and that his ability render a death verdict was substantially impaired by those beliefs. (RT 7022-7023.) Appellant argued that number 52's conscientious objection likely made him a "walking peremptory" for the

prosecution, but since he consistently indicated his willingness to follow the law, a cause challenge should not be allowed. (RT 7024.) The trial court sustained the challenge "based on the total of his answers including the quite clear one the gave about two minutes ago." (RT 7024.)

2. A Prospective Juror In A Capital Case May Not Be Excused For Cause Based On Opposition To The Death Penalty Unless The Voir Dire Affirmatively Establishes The Juror Will Not Follow The Law Or Consider Death As An Option

As noted above, this Court has held that reviewing courts must apply the *Adams/Witt* standard in evaluating a trial court's decision to discharge jurors because of opposition to the death penalty. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 650.) As also noted above, under *Adams* a prospective juror who opposes capital punishment may be discharged for cause only where the record shows the juror is unable to follow the law as set forth by the court. (*Adams v. Texas, supra*, 448 U.S. at p. 48.) *Witt* establishes that 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. at p. 423.)

With all due respect, this Court has taken a wrong turn. In applying these cases, the Court has held that where the record shows a prospective juror is equivocal about his or her ability to vote for death, (1) a trial court may decide to discharge the juror and (2) that decision is binding on the reviewing court. (See, e.g., *People v. Mincey, supra,* 2 Cal.4th at p. 456; *People v. Breaux, supra,* 1 Cal.4th at pp. 309-310; *People v. Frierson* (1991) 53 Cal.3d 730, 742; *People v. Cox, supra,* 53 Cal.3d at p. 646.) Ultimately, these cases all rely for this proposition on *People v. Ghent, supra,* 43 Cal.3d at p. 768. In turn, *Ghent* relied on *People v. Fields* (1984)

35 Cal.3d 329 at 355-356 for this proposition, which itself relied on this Court's 1970 decision in *People v. Floyd* (1970) 1 Cal.3d 694 at 724.

What this history shows is that the current rule which the Court applies – holding that a trial court may rely on a prospective juror's equivocal responses to discharge that juror in a capital case -- is based on a 1970 precedent which pre-dates the *Adams* case by nearly a decade. In fact, an analysis of the actual voir dire in *Adams*, as well as in cases the Supreme Court has decided since *Adams*, shows that the United States Supreme Court embraces precisely the opposite rule.

In this regard, in addition to modifying the *Witherspoon* standard, *Adams* went on to apply the modified standard to several prospective jurors. Ultimately, *Adams* held that a number of these jurors had been improperly excused for cause in that case, precisely because the State had not carried its burden of proving that the jurors' views "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." *(Adams v. Texas, supra*, 448 U.S. at p. 45.) An analysis of the voir dire of several of these jurors shows that this Court's rule deferring to a trial court's treatment of jurors who give equivocal responses is fundamentally contrary to *Adams*.

The voir dire in *Adams* involved several jurors who were equivocal about whether their penalty phase deliberations would be affected by the fact that death was an option. For example, prospective juror Francis Mahon was unable to state that her feelings about the death penalty would not impact her deliberations. Instead, she admitted that these feelings "could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no." (*Adams v. Texas*, No. 79-5175, Brief for Petitioner,

Appendix ("*Adams* App.") at p. 3, 8.)[135] Prospective juror Nelda Coyle expressed the same concern. She too was equivocal when asked if her feelings about imposing the death penalty would affect her deliberations. (*Adams* App. at p. 23-24.) She too admitted she was unable to say her deliberations "would not be influenced by the punishment . . . ." (*Adams* App. at p. 24.)

Similarly, prospective juror Mrs. Lloyd White was not entirely sure, but believed her aversion to imposing death would "probably" affect her deliberations. (*Adams* App. at pp. 27, 28.) She "didn't think" she could vote for death. (*Adams* App. at pp. 27-28.) Prospective juror George Ferguson admitted that opposition to capital punishment "might" impact his deliberations, while prospective juror Forrest Jenson admitted that his views on the death penalty would "probably" affect his deliberations. (*Adams* App. at p. 12, 17.)

In connection with each of these five jurors expressing equivocal comments, the trial court resolved the ambiguity in the State's favor, discharging them all for cause. Significantly, the Supreme Court did *not* defer to any of these five conclusions; instead, the Court ruled that the record contained insufficient evidence to justify striking any of these jurors for cause. (448 U.S. at pp. 49-50.) The Supreme Court held that jurors could *not* be discharged "because they were unable positively to state whether or not their deliberations would in any way be affected." (448 U.S. at pp. 49, 50.) In other words, when a juror gives conflicting or equivocal responses -- as did jurors Mahon, Coyle, White, Ferguson and Jenson in

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[135] The Appendix to Brief of Petitioner in Adams is a transcript of the voir dire examination of prospective jurors.

Adams -- the trial court is not free to simply assume the worst and discharge the jurors for cause. The reason is simple; when a prospective juror gives equivocal responses, the State has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas, supra*, 448 U.S. at p. 45.)

Seven years after *Adams* the Supreme Court addressed this same issue, again holding unconstitutional a trial court's exclusion of a juror who had been equivocal about her ability to serve. (See *Gray v. Mississippi, supra*, 481 U.S. 648.) There, defendant was charged with capital murder. During voir dire, prospective juror H.C. Bounds was questioned. According to the state supreme court, this voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds which were "equivocal." (*Gray v. State* (Miss. 1985) 472 So.2d 409, 422.) As the actual voir dire shows, the state supreme court's characterization was entirely correct.

When asked if she had any "conscientious scruples" against the death penalty, Ms. Bounds replied "I don't know." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I would." (*Id.* at p. 17, 18.) When pressed by the trial court to commit to a position, she agreed that she did not have scruples against the death penalty where it was "authorized by law." (*Id.* at p. 18.) But when directly asked by the prosecutor whether she could vote for death, she said "I don't think I could." (*Id.* at p. 19.)

The prosecutor moved to strike Ms. Bounds for cause. The trial court noted that "I don't know whether she could or couldn't [vote for

death]. She told me she could, a while ago." (*Id.* at p. 20.) Seeking to resolve this, the court asked Ms. Bounds whether she could vote for the death penalty and she responded "I think I could." (*Id.* at p. 22.) When the prosecutor again challenged Ms. Bounds, the trial court found that "she can't make up her mind." (*Id.* at p. 26.) The trial court then resolved the ambiguity by discharging Ms. Bounds for cause.

Before the United States Supreme Court, the State "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." *(Gray v. Mississippi, supra*, 481 U.S. at p. 661, n.10.) In fact, the State explicitly made the very argument this Court has repeatedly embraced, arguing that a conclusion Ms. Bounds was improperly excused for cause "refuse[s] to pay the deference due the trial court's finding that juror Bounds was not qualified to sit as a juror." (*Gray v. Mississippi*, No. 85-5454, Respondent's Brief at 15-16.) Noting that the trial court found Ms. Bounds to have given equivocal responses, and that "the trial judge was left with the definite impression that juror Bounds would be unable to faithfully and impartially apply the law," the State urged the Supreme Court to give the trial judge's conclusion "the deference that it was due . . . ." (*Id.* at pp. 22, 23.) In his reply, petitioner conceded that Ms. Bounds had "equivocated" in her responses, but argued that under this circumstance "the prosecutor, the party that requested Mrs. Bounds's excusal, had not carried its burden." (*Gray v. Mississippi*, No. 85-5454, Petitioner's Reply Brief at 22.)

Of course, the State's position in *Gray* represents the precise view this Court adopted in 1970. (*People v. Floyd, supra*, 1 Cal.3d at p. 724.) As noted above, it is a view this Court has continued to follow since *Floyd.* (*People v. Mincey, supra*, 2 Cal.4th at p. 456; *People v. Breaux, supra*, 1

Cal.4th at pp. 309-310; *People v. Frierson, supra*, 53 Cal.3d at p. 742; *People v. Cox, supra*, 53 Cal.3d at p. 646; *People v. Ghent, supra*, 43 Cal.3d at p. 768; *People v. Fields, supra*, 35 Cal.3d at pp. 355-356.)

Significantly, however, it is also the same position the Supreme Court rejected, not only in *Adams*, but in *Gray* as well. Just as *Adams* did, *Gray* rejected the State's arguments that (1) the trial court was free to discharge equivocal jurors for cause and (2) a reviewing court was required to pay deference to such a discharge. In fact, not only did the Supreme Court refuse to afford *any* deference to the trial court's finding in *Gray*, but it concluded that the discharge of prospective juror Bounds violated the federal constitution. (*Gray v. Mississippi, supra*, 481 U.S. at p. 661, n.10.) As the Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause." (*Ibid.*)

The treatment of equivocal jurors in both *Adams* and *Gray* was compelled by developments in the high court's capital case jurisprudence. In the years between the Court's landmark decision in *Furman v. Georgia* (1972) 408 U.S. 238 and its later decisions in *Adams* and *Gray*, the Court repeatedly recognized that death was a unique punishment, qualitatively different from all others. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Beck v. Alabama, supra,* 447 U.S. at p. 638.) Relying on this fundamental premise, the Court held there was a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (See, e.g., *Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra*, 430 U.S. at p. 357.)

As the Court later recognized, the rule set forth in *Adams* "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to . . . great[] concern over the possible effects of an 'imbalanced' jury." (*Lockhart v. McCree, supra*, 476 U.S. at p. 182.) The rule in *Adams* -- designed to minimize the risk of an "imbalanced jury" -- was appropriate precisely because of "the discretionary nature of the [sentencing] jury's task [in a capital case]." (*Id.* at p. 183.) In fact, the Court specifically noted that the *Adams* rule would not apply "outside the special context of capital sentencing." (*Ibid.*)

In other words, however the standard of proof for a cause challenge is properly applied in non-capital cases (where the jury is simply making a binary determination of fact), the standard applied in capital cases is different. In the "special context of capital sentencing" -- where the jury is making a largely discretionary decision as to whether a defendant should live or die -- there is a greater concern over the impact of an "imbalanced jury" on the reliability of the judgment, as well as with ensuring that the State not seat juries predisposed to a death verdict. Accordingly, in both *Adams* and *Gray*, the Supreme Court made clear that when a prospective capital-case juror gives equivocal responses, the State has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." (*Adams v. Texas, supra*, 448 U.S. at p. 45.)

In light of the actual voir dire in both *Gray* and *Adams*, this Court must reconsider the 1970 precedent which forms the basis for the rule currently applied in all California capital cases. The current California rule – which permits the State to satisfy its burden of proof by eliciting equivocal answers from prospective jurors – cannot be squared with the rule

applied in either *Adams* or *Gray*, or the Eighth Amendment developments on which they were based.

The difference between the two rules is important in this case. Applying the actual *Adams* standard (in light of its application) to the voir dire of number 52 compels a finding that the trial court in this case erred. Prospective juror number 52 expressed some level of concern that his views on the death penalty would affect his deliberations. As discussed above, however, the teaching of *Adams* and *Gray* is that a prospective juror's equivocal or contradictory responses do *not* satisfy the State's burden of proving impairment. Absent an affirmative showing that a juror's views would either preclude death as an option, or otherwise prevent him from following the law, the juror may not be excluded for cause. Indeed, a comparison of the responses of prospective juror number 52 with the jurors held to have been improperly excluded in *Adams* removes any doubt that his exclusion in this case was improper.

3. Prospective Juror Number 52 Was Not Substantially Impaired under *Adams/Witt*

Number 52's responses during voir dire reflected in large part nondisqualifying opposition to the death penalty and a willingness to follow the law. However, he did say he did not think he would impose the death penalty in this case; to that extent, his views mirrored those of prospective juror White in the *Adams* case. Just like White, number 52 did not think he could consider death as an option. (Compare RT 7021 with *Adams* App. at pp. 27-28.) Like White, number 52 should not have been excluded. Once again, the Sixth Amendment does not permit for-cause exclusion of jurors because they are "unable positively to state whether or not their

deliberations would in any way be affected." (*Adams v. Texas, supra*, 448 U.S. at p. 50.)

A comparison between prospective juror McDonald from *Adams* and number 52 further establishes that trial court erred. Prospective juror McDonald said that although she could consider death in a "very, very aggravated case," she would not vote for death in a case involving murder of a police officer -- the exact crime for which defendant was on trial in that case. (*Adams* App. at p. 42.) She was unable to guarantee that she could set aside her feelings in deliberations. (App. at p. 48.) In this situation too the Court held discharge was improper because McDonald was "unable positively to state whether or not their deliberations would in any way be affected." (*Adams v. Texas, supra*, 448 U.S. at p. 50.) If the McDonald voir dire in *Adams* was insufficient to uphold a discharge, the same result is compelled with respect to number 52 in this case.

In short, the voir dire responses of number 52 evidenced no disqualifying bias under the law. Number 52 affirmatively stated he could follow the law in this case despite his reservations about the death penalty. (RT 7017-7022.) Because this juror merely gave, after very suggestive questioning by the trial court, one equivocal response about his ability to serve, the State did not carry its burden justifying its cause challenge, and the exclusion of number 52 thus violated the Sixth, Eighth and Fourteenth Amendments. As noted above, the erroneous granting of even a single challenge for cause requires reversal. (*Gray v. Mississippi, supra*, 481 U.S. at p. 660; *People v. Heard, supra*, 31 Cal.4th at p. 966.) Appellant's judgment of death must be reversed. Further, the unlawful exclusion of a prospective juror who is opposed to capital punishment constitutes structural error resulting in automatic reversal of the guilt phase as well,

because the error infects the entire trial process. (*Brecht v. Abrahamson, supra,* 507 U.S. at pp. 629-630; *Arizona v. Fulminante, supra,* 499 U.S. at p. 310.)

C. Because The Voir Dire Of Prospective Juror Number 204 Established That Her Position On The Death Penalty Would Neither Prevent Nor Substantially Impair Her Ability To Follow The Court's Instructions, Apply The Law To The Facts, Or Impose A Sentence Of Death, The Trial Court Committed Reversible Error Discharging Her For Cause

1. The Voir Dire of Prospective Juror Number 204

Prospective juror number 204 was a 66-year-old retired secretary from Santa Monica. (RT 1 SUPP CT 4272.) In her questionnaire she said she was against the death penalty in part because she felt it had little deterrent effect and because she did not like violence; she further stated that she could impose the death penalty if she found it appropriate after hearing all of the evidence, and indicated that she would not automatically vote either for or against the death penalty if the defendants were convicted of a capital crime. (1 SUPP CT 4288-4292.) During voir dire she repeated her opposition to the death penalty, and repeated that she could render a death verdict in a case "if she had to [. . . .] If the facts were there." (RT 7388-7389.) She said that she could not really see herself voting for death in a case, but said she would try to be fair in this case, and believed that she could succeed in being fair in this case, and that she could render a death verdict, although she believed that "would be very difficult" to do. (RT 7391.) When specifically asked if she could vote for the death penalty in this case, as opposed to some hypothetical case, she said that she could do so. (RT 7392.) The trial court asked her to explain how "difficult" she would find it to impose the death penalty and asked her if it would be "as if

you were literally pulling the trigger on somebody?" (RT 7393.) She agreed, and also agreed that she could never pull a trigger on someone, and agreed to the leading question of whether she would equate serving on a penalty case with that situation. (*Ibid.*) However, she also agreed that her guilt phase vote would not be influenced by the fact that her vote would determine whether there was a penalty phase, and she said she understood the evidence she would have to consider in order to determine penalty. (RT 7395.)

The trial court remained unsatisfied, and categorized her answers as "tentative" and if she could look someone in the eye and tell them that she had sentenced them to death; she replied in the negative. (RT 7395-7396.) The court then invited a stipulation from counsel. (RT 7396.) Instead, counsel for Wheeler argued the court's questioning had determined only that number 204 would not want to look a defendant in the eye and sentence them to death, and noted that the court's question in that regard seemed to overwhelm the prospective juror. (RT 7396-7397.) Counsel argued the questioning showed that number 204 was opposed to the death penalty, but could impose that sentence if the law so required. (RT 7397.) The prosecution challenged the juror for cause, appellant joined in the objection, and the trial court sustained the challenge without further questioning or comment. (RT 7397-7398.)

2. Prospective Juror Number 204 Was Not Substantially Impaired under *Adams/Witt*

Prospective juror number 204 stated that: she was philosophically opposed to the death penalty; she believed it would be difficult to impose a death sentence, but that she could do so; despite her opposition to the death penalty, she would consider imposing it "if the facts were there." (RT

7388-7389.) While she said she could "not really" envision herself deciding to vote for death generally (RT 7391), when asked if she could vote for death in this case and not some hypothetical case, she said she could do so. (RT 7392.) Again, facts of this case suggest the reason for the discrepancy: one of the victims was an infant. In response to very leading and provocative questioning from the trial court, prospective juror number 204 agreed that she could not imagine herself pulling a trigger on an other human being (RT 7393) and that she did not want to look the defendants in the eye when sentencing them to death. (RT 7395.) However, the inability to do either of those things is not legal grounds excluding a juror based on substantial impairment under *Adams* and *Witt*. And her stated inability to do either of those things simply does not subtract from her stated ability to follow the law in this case and impose the death penalty if the evidence so warranted. Because a prospective juror in a capital case may not be excused for cause based on opposition to the death penalty unless the voir dire affirmatively establishes that juror will not follow the law or consider death as on option, the trial court erred discharging prospective juror number 204 for cause and thus violated the Sixth, Eighth and Fourteenth Amendments. As noted above, the erroneous granting of even a single challenge for cause requires reversal. (*Gray v. Mississippi, supra*, 481 U.S. at p. 660; *People v. Heard, supra*, 31 Cal.4th at p. 966.) Appellant's judgment of death must be reversed.

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XXII

THE TRIAL COURT VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AND COMMITTED REVERSIBLE ERROR, BY APPLYING A MORE LENIENT DEATH-QUALIFICATION STANDARD TO PROSECUTION THAN DEFENSE CHALLENGES TO PROSPECTIVE JURORS

A. Introduction

In *Wainwright v. Witt, supra*, 469 U.S. 412, the United States Supreme Court made clear that a prospective juror in a capital trial may be excluded for cause when his or her views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424.) In essence, the *Witt* court held that challenges for cause based upon a juror's views regarding capital punishment were to be governed by the same standard as any challenge for cause of a juror in a criminal case. (*Id.* at pp. 423-424.)

Logic and fundamental fairness dictate that this standard must apply as well to defense challenges for cause of any juror whose views in favor of the death penalty "prevent or substantially impair the performance of his duties" as well as to prosecution challenges to jurors whose views against the death penalty likewise prevent or substantially impair the performance of their duties. (Cf. *Ross v. Oklahoma*, *supra,* 487 U.S. 81, 85.) Application of a lesser standard to pro-death jurors would produce "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 520-521), in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In *People v. Coleman* (1988) 46 Cal.3d 749, this Court essentially held that the standard for deciding challenges for cause on death-qualification applies equally to the prosecution and defense:

> Although neither *Witherspoon, supra*, 391 U.S. 510, nor *Witt, supra*, 469 U.S. 412, on its face concerns exclusion of a prospective juror for cause due to his or her view favoring the death penalty, we think *Witt* makes clear that a challenge on the basis of bias meeting the *Witherspoon* standard is no different from any other challenge for cause, where the trial court is asked to determine whether the juror lacks impartiality on an issue relevant to the case. (See *Witt, supra*, at p. 423.) When the adversary seeking exclusion is the People, and the basis for exclusion is an inability to conscientiously consider all of the sentencing alternatives, *Witt* offers particular guidance as to when the People have shown that partiality. *We conclude that the same standard of partiality would also have to be shown when the defendant asks the state to exclude a prospective juror for cause, based on a view of the death penalty.* A defendant seeking to exclude a prospective juror for cause, based on the person's views of the death penalty, must therefore demonstrate that those views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. . . ." (*Witt, supra*, 469 U.S. at p. 424; see also *Ross v. Oklahoma* [, *supra*] [applying *Witt* in such a case].)'"

(46 Cal.3d at p. 765 [emphasis added].)

Application of the same standard to both "pro-death" and "pro-life" jurors should produce a similarity in result where jurors with equal difficulties vis-a-vis particular penalties are challenged. Evidence that the court below treated pro-death jurors more leniently than pro-life jurors – i.e., excusing pro-life jurors who exhibited no more bias than did pro-death jurors whom the court retained – would compel the conclusion that the trial court's rulings employed an unacceptable double standard, requiring appellant to be tried by a jury "uncommonly willing to condemn [him] to die." (*Witherspoon, supra*, 391 U.S. at p. 521.)

A review of the voir dire of the relevant jurors clearly reveals just such a double standard in the instant case and compels the conclusion that appellant's jury was selected by procedures which violate the Sixth, Eighth and Fourteenth Amendments.

B. The Excusal Of "Pro-Life" Jurors

The voir dire of three of the "pro-life" jurors excused by the court upon prosecution challenge – i.e., numbers 52, 56 and 204 – is reviewed in Argument XXI, *ante*, and is incorporated by reference at this point.

C. The Refusal to Excuse "Pro-Death" Jurors

A review of the voir dire of the relevant "pro-death" jurors follows:

1. Prospective Juror Number 82

In his questionnaire, number 82 indicated that he "strongly agreed" that anyone who intentionally kills more than one person should automatically get the death penalty; and that he would automatically vote for the death penalty "if the circumstances are multiple murders." (1 SUPP CT 3067.) Additional answers in his questionnaire reflect his strong support for the death penalty. (1 SUPP CT 3065-3068.)

In voir dire, both the prospective juror and the trial court took great pains to articulate a reason other than prejudgment for the juror's expressed intent to sentence all multiple murders to death, regardless of the evidence. (RT 6733-6736.) In the end, number 82 said he would follow the court's instructions and that he could vote for either penalty. (RT 6736, 6820.)

After the prosecution's challenge to prospective juror number 56 was sustained (see Argument XXI, *ante*), the defense reopened their challenge for cause as to prospective juror number 82. Counsel argued that the trial court sustained the challenge as to number 56, despite her in-court answers that she would in this case follow the law and be open to either penalty,

because the court determined that her answers in her questionnaire indicated otherwise. (RT 6852.) Counsel argued that if the court sustained the prosecution's challenge because a juror's in-court answers were contradicted by answers in his or her questionnaire, then the court must sustain the defense challenge to prospective juror number 82. (RT 6853-6854.) The court disallowed the defense challenge, relying on "the sum total of responses, demeanor, appearance, et cetera, of the juror while answering questions." (RT 6854-6855.) The court found number 82's answers "quite rational," unlike juror number 56's answers. (RT 6855.) The defense used a peremptory challenge to remove number 82 from the jury. (RT 6918.)

2. Prospective Juror Number 80

In her questionnaire, prospective juror number 80 said that "If someone kills someone kills someone, I think he ought to get the death penalty." (1 SUPP CT 3031.) She thought the death penalty was not used enough, that it was warranted "if you have been proven [sic] without a doubt that they killed someone," and that if "they took a life, their life should be taken." (1 SUPP CT 3032-3033.) She reiterated her belief in an "eye for an eye" when she wrote in that phrase on the lines provided for explaining why she "strongly agreed" that "anyone who intentionally kills more than one person without legal justification and not in self-defense should automatically get the death penalty. (*Ibid.*)

In voir dire, and after listening to the court's questions of numerous prospective jurors, juror number 80 changed her answers from those in her questionnaire, stating that the changes were in part due to the fact she was in a hurry to finish it and in part because she did not understand the questions. (RT 6863-6864.)

The defense challenged her for cause, arguing that, the reasoning used by the trial court to excusing prospective juror number 56 applied to number 80, in that her answers in her questionnaire contradicted her in-court answers, given after being educated as to the "correct" answers through the voir dire process. (RT 6870-6872.) Counsel argued that her in-court answers belied her beliefs as stated in the questionnaire: she clearly indicated several times in her questionnaire that she believed anyone who kills someone ought to receive the death penalty, regardless of the evidence, and that those responses indicated "a deep-seeded impairment on her part to impose the death penalty across the board in all murder cases." (RT 6871.)

The trial court disallowed the challenged, ruling:

> She is what I would call a supporter of the death penalty law, no question about that. And she is a juror that probably the defense would wish to utilize a peremptory challenge on.
>
> But in terms of cause, she is not indicating, even in the answers that you point out, that she would automatically vote a certain way or that she is strongly favoring a particular route in this case.
>
> It is different asking somebody if they think what purpose does a death penalty serve and we have one and why and then ask them let's talk about this case and what you are going to do.
>
> Insofar as her answers on this behavior on this particular case, both her questions and her answers in court are not lending credence to the idea that she will *automatically* proceed in a particular way.

(RT 6873-6874 [emphasis added].) The defense used a peremptory challenge to remove number 80 from the jury. (RT 6954.)

D. The Court Treated "Pro-Life" And "Pro-Death" Jurors Disparately In Ruling On Challenges For Cause

A careful and objective review of the voir dire of all of the above-cited prospective jurors plainly reveals the court's unfairly disparate treatment of those jurors challenged by the defense vis-a-vis those challenged by the prosecution. At the outset, two general conclusions are readily apparent and highly significant.

First, while the trial court *nominally* applied the standard of *Wainwright v. Witt*, the court *in fact* applied two different standards: (1) with regard to two jurors who demonstrated a strong bias against the lesser sentence of life imprisonment without the possibility of parole, the court found them acceptable unless they said that they would "automatically" vote for the death penalty; (2) with regard to the three jurors who demonstrated a strong bias against imposition of the death penalty, but who said they would not automatically vote for the lesser sentence, the trial court nonetheless found them unfit. Clearly, pro-life jurors who were "relatively marginal," gave "contradictory" answers, may not have fully understood the questioning, or would likely be subject to other challenges later on, did not pass this trial court's peculiar and uneven application of the *Witt* standard, while pro-death jurors with identical or substantially similar qualities did pass muster. Appellant submits that the trial court's erroneous use of a double standard in evaluating and ruling upon defense and prosecution challenges for cause, whether it acted to improperly exclude qualified pro-life jurors or to improperly include unqualified pro-death jurors, intolerably distorted the entire death-qualification process and thereby prejudicially violated appellant's Sixth, Eighth and Fourteenth Amendment rights. (See

Gray v. Mississippi, supra, 481 U.S. 648, 664-668; *compare Ross v. Oklahoma, supra,* 487 U.S. at p. 91, fn. 5.) The exercise of peremptory challenges was insufficient to adequately counter the effect of the trial court's error.

As in *Gray, supra*, where qualified jurors were erroneously stricken from the jury, "the relevant inquiry is 'whether the composition of *the jury panel as a whole* could possibly have been affected by the trial court's error.'" (481 U.S. at p. 665 [citation omitted]; original emphasis.) In the instant case, the trial court's fundamentally inconsistent and unfair treatment of defense and prosecution challenges so adulterated the jury selection process as to completely distort the composition of the jury panel (see *Morgan v. Illinois, supra*, 504 U.S. at pp. 735-736), depriving appellant of any reasonable confidence that the jury was truly a fair cross-section of the community rather than a jury "organized to return a verdict of death." (*Witherspoon, supra*, 391 U.S. at pp. 521-522.)

Reversal of the death judgment is therefore compelled. *(Gray v. Mississippi, supra*, 481 U.S. at p. 668; see *Morgan v. Illinois, supra*, 504 U.S. at p. 739, citing *Turner v. Murray, supra*, 476 U.S. at p. 37.) Further, the denial of appellant's constitutional rights as set forth above constitutes structural error resulting in automatic reversal of the guilt phase as well, because the error infects the entire trial process. (*Brecht v. Abrahamson, supra,* 507 U.S. at p. 629-630; *Arizona v. Fulminante, supra,* 499 U.S. at p. 310.)

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XXIII

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER IMPROPER AGGRAVATING CIRCUMSTANCES

The trial court committed several statutory and constitutional errors in admitting and instructing upon evidence in aggravation at the penalty phase. First, the court erroneously admitted evidence that appellant allegedly solicited two prior attempted homicides as factor (b) evidence despite the prosecution's failure to corroborate accomplice testimony that appellant was involved in each act, and then failed to instruct correctly on the need for corroboration of accomplice testimony prior to the jury's consideration of such testimony. Second, the court delivered an instruction to the jurors that essentially directed them to find that such evidence constituted a crime. Third, the court delivered an instruction to the jurors that erroneously allowed them to consider the facts and circumstances underlying appellant's prior non-violent felony conviction as factor (b) evidence. These evidentiary and instructional errors regarding the consideration of aggravating evidence violated appellant's Sixth, Eighth and Fourteenth Amendment rights and, whether considered individually or in combination, require reversal of the death judgment.

A. The Trial Court Erred In Refusing To Strike The Evidence Presented In Aggravation Against Appellant

As set forth in the Statement of Facts, *ante*, at the penalty phase the prosecution presented evidence that attempted to show that: (1) appellant took part in hiring Walter Compton to kill Sofinia Newsome, who was a witness to the Ken Gentry shooting; and (2) David Hodnett was hired by appellant to shoot Clarence Johnson.

With regard to the Newsome incident, Walter Compton testified that appellant told Compton he wanted Sophinia Newsome, a woman who was speaking to police about the Ken Gentry homicide, killed. He testified that Jeff Bryant gave Compton a gun and a getaway car and said he would pay Compton $10,000 if he carried out that plan. (RT 17587-17590.) Compton ultimately backed out of the plan and instead was himself arrested for possessing the handgun. (RT 17591-17593.)

With regard to the Johnson shooting, the prosecution called David Hodnett, who admitted that he shot Johnson, but said he did so for personal reasons. (RT 17619-17625.) Detective Vojtecky testified that he arrested Hodnett for the Johnson shooting; that Hodnett told him that Jeff Bryant had hired him to shoot Johnson; and that appellant also was involved. (RT 17679-17681.) Hodnett pled guilty shooting Johnson, who survived, and while in prison Hodnett received thousands of dollars from appellant. (RT 17633-17634, 17683.)

Appellant moved to strike both incidents from the jury's consideration, arguing that the prosecution failed to corroborate the testimony of the accomplice witnesses to both incidents. (RT 18402.)

The prosecution conceded that Compton and Hodnett were accomplices as a matter of law (RT 18107), but argued that Compton was corroborated by: (1) the taped statement of Andre Armstrong, in which he claimed appellant told Armstrong appellant would "take care" of witnesses to the Ken Gentry shooting; (2) similar attempts to silence witnesses to the Gentry shooting by bribing them; and (3) Ladell Player's statement, introduced through DDA Maurizi, that if appellant had a problem with someone, he would smile, shake their hand, and then have them killed. (RT 18106-18107.) With regard to the Johnson shooting, the prosecution argued

appellant's payments to Hodnett while Hodnett was in prison corroborated appellant's involvement in the Johnson shooting. (RT 18403.)

The trial court ruled that there was sufficient corroboration as to the Johnson shooting, but found it a close case as to the Newsome incident. (RT 18404.) The court had stated several times during the penalty phase that it did not see evidence of corroboration as to the solicitation to kill or the attempted murder of Newsome. (RT 17937-17941, 18109-18111.) The trial court nonetheless denied appellant's motion to strike, ruling that the following evidence established appellant's involvement in the hiring of Compton: the obtaining of the firearm, the fact that Compton went to the location, and the lack of evidence that appellant called off the crime. (RT 18403-18404.)

The trial court was incorrect with regard to both aggravators: neither was admissible because there was no evidence, independent of the testimony of an accomplice, that tended to connect appellant with the commission of the offense. (See, e.g., CALJIC No. 3.11.) With regard to the Newsome incident, the trial court seemed to be focused on whether there was independent evidence that the crime occurred, rather then that appellant took part in that crime. There was none. The only evidence proffered by the prosecution of appellant's alleged involvement in the solicitation to kill Newsome was the taped statement of Armstrong, which appellant has shown was inadmissible at trial (see Argument IX, *ante*, incorporated by reference herein), and the statement of Player described above. The latter statement attributed to appellant, which appellant also argues was inadmissible at trial (see Argument VII, *ante*, incorporated by reference herein) was clearly insufficient to prove any "crime" other than nefarious boastfulness.

With regard to the Johnson shooting, evidence that appellant sent Hodnett money while Hodnett was serving his prison sentence for the shooting may very well evidence that appellant was involved in paying off Hodnett after the fact, but it does not establish that it was appellant who solicited the crime. There simply was evidence, absent Hodnett's statement, that appellant was that person.

At the penalty phase of a capital case, the jury is directed to consider evidence "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." (§ 190.3, factor (b).) This Court has consistently held "that evidence of other criminal activity" under factor (b) "must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips* (1985) 41 Cal.3d 29, 72; accord, e.g., *People v. Wright* (1990) 52 Cal.3d 367, 426.) Because of the requirement of reasonable-doubt instructions for proof of uncharged charges at the penalty phase (see *People v. Robertson* (1982) 33 Cal.3d 21, 53-55), the trial court may "not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a """rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."""" (*People v. Boyd* (1985) 38 Cal.3d 762, 778, quoting *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319, and *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Under these standards, the trial court erroneously denied appellant's motion to strike evidence relating to the Newsome or Johnson incidents due to the prosecution's complete failure to corroborate the testimony of the accomplice witnesses who implicated appellant.

The trial court's error was compounded by its failure to instruct correctly on the need for corroboration of an accomplice's testimony. The trial court instructed the jury as follows:

> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime, the testimony of the accomplice is not corroborated. If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

(RT 18436-18437.) The instruction should have read:

> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime *alleged. If there is not such independent evidence tending to connect defendant with the commission of the crime,* the testimony of the accomplice is not corroborated. If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

(CT 15834 [omitted words emphasized].) The erroneous instruction essentially guaranteed that the jury did not understand its obligation to find the testimony of an accomplice corroborated by independent evidence prior to considering the alleged act as a factor in aggravation. The failure to correctly instruct on the requirement of corroboration denied appellant due process and a reliable judgment of death. (U.S. Const., Amends. V, VIII and XIV.)

Absent aggravating evidence complained of herein, the prosecution would have had no additional aggravating evidence against appellant other than the facts of the crime and alleged other crimes evidence introduced at the guilt phase. Appellant was not the actual shooter in this case. Given

that the jury clearly struggled with the sentence of coappellant Smith, whom the jury clearly believed pulled the trigger on Armstrong and Brown and who had a considerable history of committing violent acts, or there was a reasonable probability that, absent the additional aggravating evidence improperly admitted against appellant, at least one juror would have decided that death was not the appropriate penalty for him. (*Wiggins v. Smith* (2003) 539 U.S.510, 537.) Appellant's death judgment must be vacated.

B. The Trial Court's Instructions Erroneously Directed The Jury That Appellant Committed Prior Criminal Acts

The jury was instructed with CALJIC No. 8.87 (1989 revision), in relevant part, as follows:

> Evidence has been introduced for the purpose of showing that the defendant Stanley Bryant has committed the following criminal acts: [seven acts enumerated, omitted here] 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, Stanley Bryant, 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 18429-18430; CT 15826.)

This instruction improperly decided against appellant the issue of whether or not his threats violated a penal statute under factor (b), and thereby deprived him of a jury determination of whether the threat evidence was properly to be considered as aggravation. Before prosecution evidence

may be considered in aggravation under factor (b), the jurors must find beyond a reasonable doubt that the defendant's conduct constituted commission of an actual crime. (*People v. Phillips, supra*, 41 Cal.3d at pp. 65-72; *People v. Robertson, supra*, 33 Cal.3d at pp. 53-55.) Thus, the jury must find not only that the defendant committed a particular act and that it involved the express or implied threat to use force or violence (§ 190.3, factor (b)), but also that the conduct "*violate[d] a penal statute.*" (*People v. Wright, supra*, 52 Cal.3d at p. 425, original emphasis.)

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. (U.S. Const., Amend. XIV; see *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) The instruction here violated that constitutional mandate, as well as appellant's Sixth and Fourteenth Amendment due process and jury trial rights (see *In re Winship, supra,* 317 U.S. at p. 364 [due process "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"]), and his Eighth and Fourteenth Amendment right to a reliable penalty determination, by effectively creating a mandatory presumption that the threat evidence was in fact criminal activity. By thrice using the term "such criminal acts" (or "activity"), the instruction plainly implied that the enumerated acts were in fact crimes and that the jurors did not have to decide that question. This implication was especially strong because the immediately-preceding special instruction regarding factor (c)

evidence by stark contrast used the language "alleged crimes" (RT 18429; CT 15825) – even though factor (c) applies to actual convictions.[136]

The *only* question the jurors were told to decide, beyond a reasonable doubt, was whether "the defendant, Stanley, did in fact *commit* such criminal acts." (CT 15826.) Thus, the second sentence of the instruction focused the jurors on deciding whether appellant had "committed" the acts in question without also requiring that they find beyond a reasonable doubt that those acts were in fact criminal ones. Rather, once the jury found that appellant had committed those acts, they were to presume that they were "criminal acts" or "criminal activity" and apply the aggravating factor against appellant. (See *Francis v. Franklin, supra,* 471 U.S. at p. 314 ["A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts."]; *People v. Figueroa* (1986) 41 Cal.3d 714, 734 [instruction that promissory notes were "securities" under the relevant law was tantamount to a directed verdict on that offense]; *People v. Vanegas* (2004) 115 Cal.App.4th 592, 598-602 [instruction requiring the jury to find "dangerousness to human life" upon proof of violation of basic speed law is unconstitutional].).) This "foreclosed independent jury consideration" of all of the required elements of the aggravating factor. (*Carella v. California, supra,* 491 U.S. at p. 266.)

"The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of doing so by eliminating other relevant considerations if the jury finds one fact to be true.'" (*People*

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[136] After appellant's trial, CALJIC No. 8.87 was revised to entirely eliminate use of the word "such" as a modifier to "criminal acts" or "criminal activity." (See CALJIC No. 8.87 (6th ed. 1996).)

v. Figueroa, supra, 41 Cal.3d at p. 724, quoting *United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144.) That was the precise situation here.

As shown above, this Court has repeatedly found evidence of non-criminal threats inadmissible under factor (b). However, the faulty jury instruction precluded any defense to the allegation that appellant's threats – which he never disputed having "committed"– were in fact "criminal acts" or "criminal activity," and directed the jury to infer that those allegations were true once it was inevitably proved that appellant had committed them. The instruction therefore improperly removed the factual issue of "criminal activity" from the jury's consideration in violation of appellant's statutory and constitutional due process and jury-trial rights. (See *Figueroa, supra*, 41 Cal.3d at pp. 725-726.) The resultant improper finding and consideration of a statutory aggravating factor denied appellant his constitutional right to a reliable penalty determination and requires reversal of the death judgment. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 590; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)

Moreover, the mere *possibility* that an instruction created a mandatory presumption is federal constitutional error. (*Sandstrom v. Montana, supra,* 442 U.S. at p. 519.) Because the instructional error violated due process and the Eighth Amendment, at a minimum 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; see *People v. Brown* (1988) 46 Cal.3d 432, 448.) The prosecution cannot meet this burden with respect to either the constitutionally-erroneous instruction or the constitutionally-improper consideration by the jury of appellant's juvenile threats in the first instance. The death judgment must therefore be reversed.

C. The Trial Court's Erroneous Instruction Allowed The Jury To Consider Improperly The Circumstances Underlying Appellant's Prior Conviction

At the guilt phase of appellant's trial, the prosecution introduced evidence that appellant had been convicted of the conspiracy to possess cocaine for the purpose of sale. (RT 9730.) The overt acts admitted during appellant's plea included: "recruiting Kenny Reaux to work in the rock house that he and Jeff Bryant were running;" offering Reaux $200 per eight hour shift for selling cocaine at 11442 Wheeler Avenue; Reaux having 137 grams of cocaine in his possession at 11442 Wheeler Avenue on March 22, 1985, while working for appellant; and that Reaux attempting to destroy the cocaine by putting it into a crock pot containing hot cooking oil. (RT 9730.)

In the penalty phase of appellant's trial, the evidence of the fact of appellant's conviction was admissible under Penal Code section 190.3, factor (c), which provided that the jury could consider in determining penalty the presence or absence of any prior felony convictions if satisfied beyond a reasonable doubt that such conviction(s) occurred. (CT 15820, 15825.)

In its penalty phase instructions to the jury, the trial court instructed the jury that it could consider the following factors, in relevant part, in determining which sentence to impose:

> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of *criminal activity [sic]* by the defendant, other than the crimes for which the defendant has been trial in the present proceedings.

(RT 18426 [emphasis added].) The jurors should have been instructed that they could consider "[t]he presence or absence of any prior felony conviction [. . . .]" (Pen. Code, § 190.3, factor (c).)

Appellant submits that the trial court's erroneous instruction to the jury failed to limit the jury's consideration to the fact of appellant's prior conviction itself, and instead allowed the jury to consider improperly the facts and circumstance of a non-violent drug crime as aggravating factors. The jury's consideration of such non-statutory aggravation violated California law. (*People v. Boyd, supra*, 38 Cal.3d at p. 777; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 590.) Its use arbitrarily deprived appellant of his right to have his sentence determined without consideration of such evidence in violation of due process. (U.S. Const., Amends. V and XIV; see, e.g., *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 (U.S. Const., Amends. V, VIII and XIV.) and requires reversal of the death judgment. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at p. 585.)

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XXIV

THE TRIAL COURT ERRED BY REFUSING SEVERAL DEFENSE PENALTY PHASE INSTRUCTIONS AND BY GIVING ITS OWN INCORRECT ANTI-SYMPATHY INSTRUCTIONS

The trial court refused several specially-tailored instructions appellant requested that would have helped to alleviate confusion engendered by the instructions that were given, and would have informed the jury about how to evaluate mitigation in this case. None of these instructions was argumentative, or contained incorrect statements of law, and they were not properly refused on either of those grounds. (*See People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Mickey* (1991) 54 Cal.3d 612, 697 (1991).) Moreover, the instructions were offered to pinpoint appellant's theory of the case, rather than specific evidence, and were thus proper. (*See People v. Kraft* (2000) 23 Cal.4th 978, 1068 (2000); *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) Refusing to deliver the requested instructions was reversible error.

A criminal defendant is entitled upon request to instructions that either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190); *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 865; *see Penry v. Lynaugh, supra*, 492 U.S. 302.) Accordingly, "in considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of ... CALJIC ...." (Cal. Stds. Jud. Admin., § 5.) It is equally well-established that the right to request specially-tailored instructions applies at the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

The trial court's refusal to give the instructions at issue here deprived appellant of the right recognized in the above-cited cases, as well as his rights to a fair and reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the applicable sections of the California Constitution.

A. The Trial Court Erred By Rejecting Appellant's Requests To Instruct The Jury That The Absence Of A Mitigating Factor Could Not Be Considered To Be An Aggravating Factor And That The Aggravating Factors Are Limited To Those Specified In The Instructions

Appellant objected to the inclusion of inapplicable factors (d), (e), (f), (g), (h), (i) and (j) in CALJIC No. 8.85. (CT 15645; see CT 15820-15821.) Appellant requested that, should the trial court overrule appellant's objection and include those factors in CALJIC No. 8.85, that the following paragraph be added to that instruction:

> 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 15644-15645.) In refusing the defense requested instruction, the trial court acknowledged that the request was supported by case law, but ruled it was not required to give the instruction, that it believed the instruction was not needed because the issues were addressed in CALJIC No. 8.85, and that it would give the entire list of factors "absent a stipulation from all parties that a certain factor does not apply." (RT 17957-17964.)

Appellant also requested that the jurors be instructed that factors in aggravation are limited to those enumerated in the CALJIC No. 8.85:

> The factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider. You are not allowed to consider the other facts or circumstances as a basis for deciding that the death penalty would be an appropriate punishment in this case.

(RT 15646-15647.) The court took ruled that the inclusion of "facts or circumstances" in the instruction rendered it an incorrect statement of law, but that it was a correct statement of law to instruct the jury that aggravating factors were limited to those set forth in CALJIC No. 8.85. (RT 17964-17965.) The trial court nonetheless did not give this instruction.

The instructions were proper to inform the jury regarding the applicable law. It is improper for the State to argue to the jury that the lack of evidence in support of one of the statutory mitigating factors converts it into an aggravating factor. (*People v. Davenport, supra,* 41 Cal.3d at pp. 288-290; see *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 [improper for state to imply that each enumerated factor is either aggravating or mitigating and that if not shown to be mitigating it must be considered aggravating].) Therefore, the only basis for declining to provide the instruction would be if the court was correct that an instruction pursuant to CALJIC No. 8.85 rendered the requested instruction duplicative. It did not.

The trial court did instruct the jury pursuant to CALJIC No. 8.85. The jury was instructed as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any criminal activity (sic), other than the crimes for which the defendant has been tried in the present proceedings.

(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.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the

> defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(CT 15820-15821.)

This instruction does not convey the same information as the instruction requested by appellant. It may appear that this instruction conveys the same information because of its language that the jury should be guided by "the following factors, if applicable" and lists the aggravating and mitigating factors. This might suggest that a jury would not be guided by factors that were absent, and thus not applicable. However, this misleading approach examines the instruction in isolation and apart from the overall penalty determination that the jury must make.

The harm in not explicitly instructing the jurors that they cannot consider the absence of a mitigating factor to be aggravating comes when they engage in the weighing process to determine the appropriateness of the death penalty. At that point, there is a strong likelihood that the absence of a mitigating factor will be turned into a de facto aggravating factor. CALJIC No. 8.85 does not address this concern, but appellant's requested instruction, by explicitly pointing out to the jury this danger, would have created a safeguard against this improper method of engaging in the weighing process. Appellant sought to emphasize for the jury that there were only specific factors, if proven, that could be considered aggravating enough to be used to warrant consideration of the death penalty. This point was made by pointing out that no other factors than those listed could be considered in aggravation, and that the defendant's failure to adduce evidence on mitigating factors could not be used against him.

The failure to give the requested instruction left the jury without the guidance necessary for it to properly make its penalty assessment. As a result, appellant was denied a reliable penalty determination, the right to be free from the arbitrary and capricious imposition of the death penalty, and the right to the heightened protections of due process that are required in the penalty phase of a capital case. (See *Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Beck v. Alabama, supra,* 447 U.S. at p. 637-638.)

B. The Trial Court Erred In Refusing Appellant's Special Instruction Regarding The Scope and Proof Of Mitigation

Appellant requested the following special instruction at the penalty phase:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in ths case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstance to these specific factors.
>
> A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.
>
> A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.
>
> Any mitigating circumstance may outweigh all the aggravating factors.
>
> A juror is permitted to use mercy, sympathy or sentiment in deciding what weight to give each mitigating factor.

(CT 15636-15637.) The trial court denied appellant's request, ruling that the requested instruction was: (1) argumentative in the sense that it did not also instruct the jury that it could vote for death if it found any one aggravating factor substantially outweighed the mitigating factors; and (2) an incorrect statement of law in that it "invited the jury to go forward without any guidance as to the criteria they ought to employ." (RT 17952-17954.) The trial court was wrong in both respects.

This instruction should have been given because it contained proper statements of law. Rejecting it denied appellant his Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable sentencing determination, to have the jury consider all mitigating circumstances (see e.g., *Skipper v. South Carolina* (1989) 476 U.S. 1, 4; *Lockett v. Ohio*, *supra,* 438 U.S. at p. 604), and make an individualized determination whether he should be executed, under all the circumstances. (See *Zant v. Stephens, supra,* 462 U.S. at p. 879.)

The trial court erred in refusing appellant's proposed instruction in that it would have informed the jury that each member may assign whatever weight to the factors in aggravation and mitigation each deems appropriate. This instruction was an accurate statement of law which pinpointed a crucial fact in mitigation, and should have been given. (*People v. Sears*, *supra*, 2 Cal.3d at p.190.) "The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540.) The jury must be given that freedom, because the penalty determination is a "moral assessment of [the] facts as they reflect on whether defendant should be put to death." (*People v. Easley*, *supra*, 34 Cal.3d at p. 889; *People v. Haskett* (1982) 30 Cal.3d 841, 863.) Since that

assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the circumstances." (*People v. Edelbacher, supra,* 47 Cal.3d at p. 1035.) The proposed instruction would have clarified for the jury the nature of the process of moral weighing in which they were to engage by demonstrating that any single factor in mitigation might provide a sufficient reason for imposing a sentence other than death.

People v. Sanders, *supra* 11 Cal.4th at 557, noted with approval an instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that *a single factor could outweigh all other factors*." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 557, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 845, emphasis added.) This Court indicated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process ...." (*Id.* at p. 557; *see also People v. Anderson, supra,* 25 Cal.4th at pp. 599-600 [approving an instruction that "any one mitigating factor, standing alone,"can suffice as a basis for rejecting death].)

In addition, all non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. (*Tennard v. Dretke* (2004) __ U.S. __ [124 S. Ct. 2562, 2571].) The requested instruction would have clarified for the jury that they were not limited in their consideration of mitigating factors to those enumerated by the trial court.

Without proper guidance as to the broad scope of available mitigating factors and how to weigh aggravating and mitigating circumstances, it is unlikely the jurors realized that just one mitigating factor could outweigh all the aggravating factors. This was a real danger in appellant's case where little mitigating evidence was presented and therefore, the jury had few options to consider. Consequently, the court's refusal to give the proposed instruction violated appellant's rights to a fair trial and a reliable, non-arbitrary and individualized penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

C. The Trial Court Erred By Refusing Appellant's Special Requested Instruction That Sympathy Alone Is Sufficient To Reject Death As A Penalty

Appellant also requested the following special instruction at the penalty phase:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.

(CT 15638-15639.)

A verdict based upon the jury's decision to exercise sympathy or mercy is an appropriate verdict. The law contemplates that in a capital case the jury will return a verdict that reflects its "personal view as to the appropriate sentence." (*People v. Allen* (1986) 42 Cal.3d 1222, 1277.) The instructions given to the jury by the court did not fully inform the jury of its ability to do this, but the instruction requested by appellant would have done so.

CALJIC No. 8.85 advises the jury that it may consider any sympathetic aspect of the defendant's character or record as a mitigating circumstance. (CALJIC No. 8.85, factor (k).) Therefore, that instruction does advise the jurors that sympathy is a legitimate factor to consider. However, it advises the jury only that sympathy may be considered a circumstance in mitigation. Other instructions then advise the jury that when arriving at a penalty verdict they should balance the mitigating factors against the aggravating factors in arriving at its verdict. Consequently, the jury is effectively being told that they may only consider sympathy for the defendant as one of the factors to balance in arriving at the appropriate punishment.

Appellant's requested instruction would have explicitly advised the jury that it was appropriate to return a verdict of life without the possibility of parole based on feelings of sympathy and compassion the mitigating evidence evoked. This instruction directly deals with the situation where the jury has found that aggravation outweighs mitigation, but because of sympathy or compassion for the defendant, the jury wishes to impose a sentence of life without the possibility of parole. The general instructions provided by the court did not address that situation and relegated the concept of sympathy or compassion to a single factor in the overall penalty determination. This is workable as along as the jury finds the circumstances in mitigation outweigh the circumstances in aggravation, because then the jury need not act out of sympathy or compassion. However, when the converse is true, then this instruction is needed for the jurors to be able to exercise the full range of factors open to them.

This Court has made clear that a jury's determination of penalty is not a "mere mechanical counting of factors on each side of the imaginary

scale." (*People v. Brown, supra*, 40 Cal.3d at p. 541.) "[O]ur statute and instruction give the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) Thus, a jury may select life over death even if the aggravating factors outweigh the mitigating factors. Sympathy or compassion for the defendant is the most likely reason a jury would do this. The way to effectuate these principles is to provide the instruction requested by appellant and it was error to fail to do so.

Enabling the jury to accord the consideration of the sentence in a capital case individualized consideration goes to the heart of the role the Eighth Amendment plays in capital sentencing. The Eighth Amendment requires an individualized capital sentencing determination. (*Zant v. Stephens, supra*, 462 U.S. at p. 879.) That is assured by the instruction requested by appellant, but is not assured by the generalized instructions given by the trial court. Thus, the failure to give appellant's requested instruction violates appellant's right to a fair and reliable penalty determination under the federal constitution.

D. The Trial Court Erred By Failing To Instruct The Jury That It Could Return A Verdict Of Life Imprisonment Without The Possibility Of Parole Even If It Failed To Specifically Find The Presence Of Any Mitigating Factors

Appellant requested that the court instruct the jury as follows:

> A jury may decide, even in the absence of mitigation evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(CT 15640-15641.) The trial court denied the request, stating that the requested instruction was confusing and that the jurors were adequately instructed by the standard CALJIC instructions that they do not need to find the existence of mitigating circumstance in order to choose the lesser sentence. (RT 17954-17956.)

Appellant acknowledges that this Court has found that appellant's requested instruction is implicit in what is now CALJIC No. 8.88.[137] This Court has held that in reading what is now CALJIC No. 8.88, "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances merely because no mitigating circumstances were found to exist." (*People v. Johnson, supra,* 6 Cal.4th at p. 52.) This finding begs the real question, which is whether a reasonable juror would believe that his or her options were restricted in some fashion when considering the appropriate punishment. If so, then appellant has been denied his right to an individualized sentencing determination.

The proper question is not whether a juror would assume that death had to be imposed even if there were insubstantial aggravating circumstances, but whether a juror would feel free to return a verdict of life imprisonment without parole in the face of substantial aggravating circumstances and no mitigating circumstances. (*People v. Duncan, supra,* 53 Cal.3d at p. 979.) That is what is implicit in appellant's requested instruction, and what a juror has a right to do. However, this concept is not properly conveyed in the instruction given by the court. The failure to give

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[137] CALJIC No. 8.88 was provided to appellant's jury. (RT 18433-18438.)

appellant's special instruction arbitrarily deprived him of a liberty interest created by state law – i.e., the right to a penalty phase instruction that either relates the particular facts of his case to any legal issue or pinpoint the crux of his defense (*People v. Sears, supra*, 2 Cal.3d at p. 190; *People v. Duncan, supra*, 53 Cal.3d at p. 979) and deprived appellant of due process of law under the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Further, without the aid of appellant's special requested instruction, the jurors were not able to fully engage in the type of individualized consideration the Eighth Amendment requires in a capital case. (See *Zant v. Stephens, supra,* 462 U.S. at p. 879.) Thus, the failure to give appellant's requested instruction requires reversal of appellant's death judgment.

E. The Trial Court Erred By Refusing To Instruct On Lingering Doubt

Appellant requested two instructions on lingering doubt. The first instruction follows:

> The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that some time in the future, facts may come to light that have not yet been discovered.
>
> It may be considered by you as a factor in mitigation if you have a lingering doubt as to the guilt of the defendant.

(CT 15650.) The second instruction was specific to appellant:

> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to either Defendant Bryant's precise role in the crimes of which he has been convicted or as to the truth of the "other crimes" evidence which was adduced both at guilty and at penalty.

> Lingering or residual doubt, although not sufficient to raise a reasonable doubt a the guilt phase, may still be considered as a mitigating factor at the penalty phase.
>
> Each individual juror may determine whether any lingering or residual doubt is a mitigating factor any may assign it whatever weight the juror feels is appropriate.

(CT 15651.)

The trial court refused to give this instruction on the basis that there was no case that required the court to give the instruction, and that it doubted the need for it. (RT 17970-17974; see also RT 18298-18299 [trial court refused appellant's request to modify CALJIC No. 8.80 to include instruction that lingering doubt may be considered a mitigating factor].) Appellant was entitled to an instruction that the jurors may consider lingering doubt as to appellant's guilt as a factor in mitigation, and the trial court committed prejudicial error by refusing to grant appellant's requests in this regard.

A capital defendant has the right to have the penalty phase jurors consider any residual or lingering doubt as to his guilt. (See, e.g., *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Terry* (1964) 61 Cal.2d 137, 145-147.) A jury that determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving the defendant's guilt beyond a reasonable doubt, but may still demand a greater degree of certainty of guilt for the imposition of the death penalty. (See *People v. Terry*, *supra*, 61 Cal.2d at pp. 145-146.)

Clearly, this Court has recognized the principle that lingering doubt can play a part in the penalty determination and that defense counsel has a right to argue lingering doubt to the jury as a consideration in determining

punishment. (See *People v. Cox, supra,* 53 Cal.3d at pp. 677-678.) However, the Court has also found that a lingering doubt instruction is not required by either the state or federal constitutions. (*People v. Berryman* (1994) 6 Cal.4th 1048, 1104.) Nonetheless, this Court has recognized that a lingering doubt instruction may be called for by the evidence in any particular case. (See *People v. Fauber, supra,* 2 Cal.4th at pp. 863-865; *People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20.) Appellant submits that this Court is incorrect in holding that a lingering doubt instruction is not constitutionally required, and that in any event the instruction was required in this case.

This Court's rejection of a constitutional right to an instruction on lingering doubt has essentially been based upon the conclusion that CALJIC No. 8.85 includes factors that adequately alert the jury that it can consider lingering doubt in reaching its penalty determination. (*People v. Osband* (1996) 13 Cal.4th 622, 716.) Specifically, this Court has held that factors (a) and (k) are adequate enough for a jury to give effect to lingering doubt. (*Ibid.*) Notwithstanding the Court's ruling, the wording of factors (a) and (k) would not lead a reasonable juror to understand that any residual doubt the juror has as to guilt can be given effect through factors (a) and (k).

This question should be analyzed through the prism of *Boyde v. California, supra,* 494 U.S. 370. In *Boyde*, the Supreme Court held that an instruction is unconstitutional if there was a reasonable likelihood that the jury applied the instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Id.* at p. 380.) Although appellant is not challenging the constitutionality of an instruction, by analogy *Boyde* would seem to be saying that for an instruction to fulfill its purpose, a reasonable juror should be likely to interpret it in a manner that would

enable that juror to utilize constitutionally relevant evidence. That is where factors (a) and (k) fail in this situation.

Factor (a) directs itself to circumstances of the crime. A reasonable juror would believe that this relates to the manner in which the crime itself was effectuated, and not necessarily the defendant's involvement in the crime. Factor (a) encourages a juror to focus on the crime itself and not the relative culpability or guilt of the persons who may have committed the crime. This does not lend itself to consideration of a lingering doubt of guilt.

Factor (k) directs the jury to consider any circumstance which may extenuate the gravity of the crime. Once again, this focuses on the nature of the crime and not any lingering doubt that the jury may have about a defendant's participation in the crime. This factor also directs the jury to consider any aspect of the defendant's character or record, but this relates not at all to residual doubt of guilt. In fact, it steers the jury in exactly the opposite direction, since an aspect of the defendant's character or record, by its own terms, has nothing to do with the crime.

Factors (a) and (k) do not readily give the jury a way to address residual doubts regarding the defendant's guilt of the offense. While the Court may be able to envision that some juror might view these factors and decide it to be appropriate to utilize them as a way to consider residual doubt of guilt, it cannot be said there is a reasonable likelihood that a juror would have used these factors to give effect to such doubt. Because of this, appellant's requested instruction, which provided a method for the jury to give effect to such residual doubt, should have been given by the trial court.

The thought that the standard instruction does not provide a framework for jurors to give effect to residual doubt of a defendant's guilt

has been recognized by trial courts across the state. It is not unusual for this Court to see records where trial judges have found the evidence warranted providing the jury with this type of instruction. (See, e.g., *People v. Cain* (1995) 10 Cal.4th 1, 66, fn. 23 [jury instructed on lingering doubt as mitigating circumstance]; *People v. Morris* (1991) 53 Cal.3d 152, 218-219 [jury given instruction similar to that requested by appellant]; *People v. Kaurish, supra,* 52 Cal.3d at pp. 705-706 [jury given lingering doubt instruction].) Giving this type of instruction is also in accord with Penal Code sections 1093, subdivision (f), and 1127, which both dictate that a trial court charge the jury on points of law that are both correct and pertinent to the issues before the jury.

California law recognizes that a lingering doubt instruction should be given when pertinent to the case. All appellant was seeking in this instance was an instruction "intended to supplement or amplify more general instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 257; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."].) California law authorizes this type of instruction and other capitally charged defendants across the state have received this type of instruction. Appellant should have been accorded the same protection.

The trial court's refusal to give the instruction not only was error under state law, it also violated appellant's federal constitutional rights to due process, equal protection, a fair trial by jury and a reliable and non-arbitrary penalty determination. (U.S. Const., Amends. VI, VIII and XIV.) By refusing to specifically instruct on lingering doubt, the trial court failed to give guidance to the jury with respect to all potential mitigating

factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S.at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

The trial court's refusal to instruct appellant's jury concerning the concept of lingering doubt also violated the Due Process Clause of the Fourteenth Amendment by arbitrarily depriving him of his state-created liberty interest not to be sentenced to death by a jury that did not consider lingering doubt under appropriate instructions as a basis for a lesser sentence. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterley v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) California law mandates that lingering doubt be considered as mitigation when warranted by the evidence. (*People v. Terry, supra*, 61 Cal.3d at pp. 145-147; see also *People v. Cox, supra*, 53 Cal.3d at pp. 677-678; *People v. Thompson* (1988) 45 Cal.3d 86, 134.) The denial to appellant of a state-created right granted to other capital defendants further violated the Equal Protection Clause of the Fourteenth Amendment. (Cf. *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 425.)

Appellant was prejudiced by the failure to provide this instruction. The highly-suspect testimony of James Williams played a significant role in appellant's conviction in this case. There was no physical evidence linking appellant to the homicides, nor was there any eyewitness identification that placed appellant at the scene of the homicides. The jury could have harbored a lingering doubt as to whether appellant was involved in the instant homicides. The trial court's refusal to instruct appellant's jury on the concept of lingering doubt cannot be deemed harmless under any appropriate standard of review. Accordingly, the death judgment must be reversed. (See *People v. Brown, supra*, 46 Cal.3d at pp. 446-448.)

F. The Trial Court Erred In Failing To Grant Appellant's Request To Strike The Non-Unanimity Provision Of CALJIC No. 8.87; In The Absence Of A Separate Instruction Highlighting The Non-Unanimity Requirement For Finding Mitigating Circumstances, The Inclusion Of That Paragraph Rendered The Instruction Partisan And Deprived Appellant Of His Constitutional Rights

CALJIC No. 8.87 (1989 rev.) provides in part that before a juror can consider aggravating evidence under Penal Code section 190.3, factor (b), the juror must be satisfied beyond a reasonable doubt that the defendant committed the alleged criminal acts. (CT 15827.) The last paragraph of CALJIC No. 8.87 further provides that the jurors need not unanimously agree on whether the defendant committed the alleged criminal act:

> 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.

(CT 15826.) Appellant requested that this provision be stricken, arguing that because *People v. Breaux*, *supra*, 1 Cal.4th at p. 314, precluded a defendant from obtaining a specific non-unanimity instruction as to mitigation, the prosecution should not be permitted to obtain such an instruction in the context of other crimes aggravation.[138] (CT 15659.) The trial court denied appellant's request, ruling that the standard CALJIC instruction was a correct statement of law which it would not modify

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[138] In *People v. Breaux, supra*, 1 Cal.4th at pp. 314-315, this Court approved the rejection at trial of a defense proposed instruction that unanimity was not a requisite to consideration of mitigating evidence on grounds the instruction was confusing and adequately covered in other instructions.

without explicit authority for the modification. (RT 17975-17977.) Later, during discussion of coappellant Wheeler's requests for special instructions, the trial court modified the defense request for a non-unanimity instruction as to mitigating factors:

> No decision regarding the existence or nonexistence of any aggravating or mitigating circumstance in this case, or the weight to be assigned to such circumstance, need be reached unanimously. Only the final penalty decision must be unanimous in order to arrive at a verdict.

(RT 18428; CT 15822.) Appellant maintains that, given the context of the penalty phase instructions, the inclusion of the last paragraph of CALJIC No. 8.87 rendered the instruction partisan and argumentative, and the trial court's refusal to strike that paragraph denied appellant his deprived appellant of due process, equal protection, and a fair and reliable jury determination of penalty. (U.S. Const. amends. V, VI, VIII, XIV; Cal. Const. art. I, §§ 7, 15, 16, & 17.)

As set forth in Argument XVII, *ante*, this Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury has already been instructed should not be given. (See *People v. Lewis, supra,* 26 Cal.4th at pp. 362-363*; People v. Ochoa, supra,* 26 Cal.4th at pp. 444-445.) Further, the trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders, supra*, 11 Cal.4th at p. 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright, supra,* 45 Cal.3d at pp. 1135-1137.) "There should be absolute impartiality as between the People and defendant in the matter of instructions...."

(*People v. Moore, supra,* 43 Cal.2d at pp. 526-527 [citation omitted]; accord *Reagan v. United States, supra,* 157 U.S. at p. 310.)

Here, the trial court instructed the jury of the non-unanimity requirement with regard to aggravating and mitigating factors. (RT 18428.) There was no need to repeat this general principle as applied to factor (b) evidence, particularly since the trial court refused the defense request to separately instruct the jury regarding the non-unanimity requirement with regard to mitigating factors. The standard instruction in this case amounted to an unfair "pinpoint" instruction for the prosecution with regard to aggravating factors. Aside from the other constitutional defects inherent in factor (b), discussed at length, *post*, the instructions distinguished between parties to the appellant's detriment, depriving him of his due process right to a fair trial (*Green v. Bock Laundry Machine Co., supra,* 490 U.S. at p. 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474); in addition, the arbitrary distinction between litigants also deprived appellant of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.)

G. The Trial Court Erred In Refusing To Instruct That Aggravating Factors Are Limited To Those Enumerated And That Appellant's Background May Be Considered Only In Mitigation

Appellant requested the following instruction:

> The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence.

(CT 15656.) The trial court refused appellant's request, ruling that the instruction would have the effect of directing the jury to find appellant's

drug dealing mitigating because it was non-violent, and that it was "nonsense." (RT 17975.)

As this Court affirmed in *People v. Hardy, supra*, 2 Cal.4th at p. 207, evidence of a capital defendant's "background can be only a mitigating factor because the permissible aggravating factors are limited to those listed in section 190.3. [citations omitted].) In that case, defendant Reilly complained that the trial court should have instructed the jury that evidence of his background could be considered as mitigating evidence only, and that the court's failure to do so prejudiced him because there was much evidence presented at the guilt phase that he was frequently unemployed, often abused alcohol and illegal drugs, and in general led a dissolute and aimless life. (*Ibid.*) The Court found error in the failure to so instruct, but found the error harmless where the prosecution did not urge the jury to find the case was aggravated by Reilly's unemployment, drug use, or aimless life-style.

The prosecution in this case presented extensive evidence regarding the sale of narcotics. Appellant admitted that he was involved in selling drugs for a living for years. In the penalty phase, the prosecution urged the jury to judge appellant on his "lifelong commitment to destroying society" (RT 18450) and urged the jury to question whether appellant deserved mercy given his lifestyle choice (RT 18494) and his "life of crime." (RT 18495.) The jury instructions failed to adequately direct the jury that they could not consider such illegal non-violent activity as aggravation. In the context of this case, then, the trial court's error was not harmless.

H. The Trial Court Erred In Refusing Appellant's Requested Sympathy Instructions And In Instructing, Over Defense Objection, That Sympathy For Appellant's Family Could Not Be Considered A Factor In Mitigation

Midway through the penalty phase of the trial, the trial court expressed its intention to instruct the jury that they could not consider their sympathy for the defendant's family members or friends in weighing the sentence alternatives. (RT 17941-17942.) Appellant had requested that the court instruct the jury that they could consider such sympathy and had proposed the following special instruction:

> In arriving at your verdict, you may consider, take into account, and be guided by sympathy for family members or friends of the defendant or by the effect your verdict may have on any such person.

(CT 15850.) The court asked the parties to ponder its contrary proposal. (RT 17944.) A week later, the court returned to the issue. (RT 18293.) The court stated that as of the date of this point in the trial, July 1995, the California Supreme Court had not ruled on whether sympathy for a family member was an appropriate mitigating factor.[139] (RT 18293-18296, 18379, 18386-18387.) The court postulated that since the prosecution was permitted to introduce victim impact evidence, there may come a time when the federal courts would find that the defendant is similarly entitled to introduce evidence about how his family and friends would be impacted by the outcome of the jury's penalty selection. (RT 18296, 18299-18301, 18387-18390.) Yet, the court concluded that although the defendant's

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[139] Three months earlier, this Court in *People v. Beeler* (1995) 9 Cal.4th 953, 991-992 recognized, but did not decide, the question of whether the impact of the death penalty upon the defendant's family would be "constitutionally pertinent mitigation."

character was appropriate for the jury's consideration, the character of his family and friends was not. (RT 17944, 18378-18381, 18386-18389.) The defense objected to the court's proposal. (RT 17941-17942, 17952-17953, 18380-18381, 18385, 18390, 18404-18405.)

Nevertheless, the trial court instructed the jury:

> You may not consider mere sympathy for a family member or friend of a defendant, or the opposite feelings, or the effect that your verdict may have on anyone other than the defendant, except to the extent that such matters may bear upon your determination of any sympathetic or other aspect of the character and background of the defendant himself.

(RT 18428; CT 15823.)[140]

During the prosecution's argument to the jury, the jury was repeatedly implored that any sympathy they felt should be limited to the victims and their families. (RT 18455-18456, 18469-18470, 18494-18495.)

Appellant moved for a new trial based, in part, on the trial court's error in giving the anti-sympathy instructions. (CT 15884-15900.) The trial court denied that motion. (RT 18780.)

The Eighth and Fourteenth Amendments provide that a sentencing authority in a capital case may not be precluded from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at pp. 604-605 (plur. opn. of

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[140] The instruction was promulgated by the trial court on its own motion, and only subsequently requested by the prosecution. (CT 15895.)

Burger, C.J.); *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110.) It includes both "mitigating aspects of the crime" (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 245) and mitigation that is unrelated to the crime. (*Lockett, supra*, 438 U.S. at p. 605.) The Constitution prohibits limiting the scope of mitigating evidence to only that evidence which relates specifically to the defendant's culpability for the crime he or she has committed. It requires that a defendant be allowed to present any relevant mitigating evidence, and that a sentencer be allowed to listen and consider that evidence. (*Sumner v. Shuman* (1987) 483 U.S. 66, 76.) "Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so," (*South Carolina v. Gathers* (1989) 490 U.S. 805, 817 [dis. Opn. of O'Connor, J.][141]), in that Eighth and Fourteenth Amendment jurisprudence requires that a defendant be given the opportunity to present any reason why the death penalty should not be imposed.

California Penal Code section 190.3 also commands a jury to consider all relevant mitigating evidence. Section 190.3, subdivision (k), requires consideration of "any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In compliance with *Lockett* and its progeny, this Court has interpreted this statutory provision to allow a jury to consider, as a mitigating factor, any aspect of the defendant's character, or record, and any of the circumstances of the offense that a defendant proffers, as a basis for a sentence less than death. (*People v. Easley* (1983) 34 Cal.3d 858, 878; see CALJIC No. 8.85 (5th ed. 1988).) And this Court has ruled that a capital defendant's family

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[141] Overruled on other grounds in *Payne v. Tennessee* (1991) 501 U.S. 808, 830.

members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character. (*People v. Ochoa* (1998) 19 Cal.4th 353, 456; *People v. Smithey, supra,* 20 Cal.4th at p. 1000.) Appellant argues that rule should be extended as suggested herein for the following reasons.

In *Payne v. Tennessee* (1991) 501 U.S. 808, the prosecutor introduced to the jury, during sentencing, testimony from the murder victim's mother about the impact the murder of her daughter and granddaughter had upon her surviving grandson. (*Id.* at pp. 814-815.)

In affirming the Tennessee Supreme Court's decision to permit the introduction of victim impact evidence for aggravating purposes, the Supreme Court found that "the sentencing authority has always been free to consider a wide range of relevant material" (*Payne v. Tennessee, supra*, at pp. 820-821), and that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (*Id.* at p. 827.) The Court went on to say that "a State may legitimately conclude that evidence about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Ibid.*)

California courts have permitted the introduction of victim impact evidence for aggravating purposes. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) In *Edwards* this Court held that victim impact evidence is evidence of the circumstances of the crime and is admissible under California Penal Code section 190.3, subdivision (a). A year later *in People v. Pinholster* (1992) 1 Cal.4th 865, 959, this Court held that no error was committed by the trial court by permitting the victim's mother, who wept openly in front of the jury, to identify her deceased son through photographs

which had been taken of him. This Court held that such testimony was properly admitted evidence of the impact on the family of the victim. (*Ibid.*)

Payne and *Edwards* establish that sympathy for a victim's family is relevant evidence, and may be considered by the jury for aggravating purposes. As the Court observed in *Payne*, "There is no reason to treat such evidence differently than other relevant evidence is treated." (*Payne*, at p. 827.) Such inquiry does not even require that the victim's family's sympathy be rationally based. *(People v. Boyette* (2002) 29 Cal.4th 381, 444-445.) Sympathy is the byproduct of the empathy a jury develops for the impact that the offense had on the lives of the families involved. Telling the jury to ignore mere sympathy for appellant's family members would be interpreted as an admonition to ignore the emotional responses that are rooted in the aggravating and mitigating evidence introduced during the penalty phase. (*California v. Brown, supra,* 479 U.S. at p. 542.) Given the fact that sympathy for a victim's family is relevant and may be used by a prosecutor for aggravating purposes, a point the prosecutor here made to the court (RT 17980), so too should sympathy for a defendant's family be considered relevant and weighed by the jury as mitigating evidence. Due process requires a balance of forces between the accused and his accuser. (*Wardius v. Oregon, supra,* 412 U.S. at p. 473, fn 6.)[142]

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[142] Here, the trial court rejected appellant's request that the jury be instructed that they could not base their decision upon sympathy for the victims' families. (CT 15762, RT 17941-17944, 17980-17981.)

Appellant Bryant's penalty phase encompassed little else other than the testimony of friends and family members that they loved and cared for appellant. The trial court's instruction had the effect of striking appellant's entire penalty phase from the jury's consideration. This was error. The jury should have been allowed to weigh the affection family members and friends had for appellant as an individual whom they knew, perhaps better than anyone else. Their testimony regarding the effect appellant has had upon their lives comments upon his character and background, and this evidence is what the jury was instructed to disregard. The *Payne* and *Edwards* line of cases demonstrates that the relationship of a victim with his or her family is compelling; it generates a strong emotional response from a jury and is a powerfully persuasive tool. Because such evidence is so compelling, the Eighth and Fourteenth Amendments dictate that a defendant be permitted to present to the jury and to have the jury consider, the relationship that a defendant has with his family and friends and the impact that his death would have upon them. A contrary rule would result in the jury imposing the death penalty without considering all relevant mitigating evidence proffered as a basis for a sentence less than death, in violation of a defendant's right to a fair trial, to a reliable determination of sentence, due process, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Lockett v. Ohio, supra*, and *Eddings v. Oklahoma, supra.*) The constitutional mandate requires that a jury may consider sympathy for a victim's family when it is introduced for mitigating purposes. Sympathy for appellant's family was a substantial reason why the death penalty should not have been imposed in this case. Had the jury not been instructed to ignore such

sympathy, it is reasonably probable that they would have reached a verdict of less than death. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence must be reversed.[143]

I. The Denial Of All Of The Above Requested Instructions Combined To Deny Appellant A Fair And Reliable Penalty Determination

Appellant believes that each of the requested instructions should have been given, and the failure to give any one of the instructions discussed above constitutes reversible error. However, even if the denial of each instruction individually would not be considered to be reversible error, the cumulative effect of the trial court's failure to give all of the instructions denied appellant a fair penalty determination.

Each of the instructions above was designed to address all of the considerations that the jurors could bring to bear in making the determination between life and death. None of the instructions is an incorrect statement of the law or improper in its manner of presentation. All of the principles embraced by the instructions have been endorsed by this Court. In short, all of these instructions presented to the jurors information that is an accepted part of death penalty jurisprudence in this state. Yet, the trial court refused to give any of these instructions.

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[143] This Court has rejected claims similar to that raised herein. (*People v. Ochoa* (1998) 19 Cal.5th 353, 456; *People v. Smithey, supra*, 20 Cal.4th at p. 1000; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856.) Appellant asserts these claims to give this Court an opportunity to reconsider its prior rulings in light of the facts of appellant's case and to permit him to preserve the claims for federal review.

The basic reasons that the trial court refused all of appellant's special requested instructions were that they were either duplicative of instructions already being given or that this Court had found they did not need to be given. However, the almost uniform reason given by this Court as to why these instructions were unnecessary was that the standard instructions implicitly provided the same information. Although this Court continually finds that explicit instructions need not be given because a juror may find the same information to be implicitly stated in a differently-phrased instruction, when the decision is between life and death, the instructions should be explicit.

This Court's continued practice of finding that instructions which are supposed to provide guidance for jurors as they attempt to determine the appropriateness of a death sentence are sufficient because a reasonable juror may be able to divine what the instructions really mean, regardless of how inaptly they may be phrased, is a constitutionally unacceptable practice. The Eighth Amendment to the federal constitution demands a practice that will guarantee more regularity in death decisions, and the combined failure to give all of these instructions–which would have provided this certainty–resulted in a penalty trial that did not have sufficient indicia of trustworthiness to guarantee a constitutionally acceptable result. Appellant's death judgment must be vacated.

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XXV

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original) (quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 [opinion of Stewart, Powell, and Stevens, JJ.]).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality 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; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing 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* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (*See People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion 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" 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,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). 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* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris*, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia, supra,* 408 U.S. at p. 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[144]

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[144] *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. 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, 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,* 283 So.2d 1, 10 (Fla. 1973); *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *People v. Brownell*, 404 N.E.2d 181, 197 (Ill. 1980); *Brewer v. State*, 417 NE.2d 889, 899 (Ind. 1980); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants*, 250 N.W.2d 881, 890 (Neb.

(continued...)

The capital sentencing scheme in effect at the time of appellant's trial 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.) Penal Code section 190.2 immunizes few kinds of 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 as discussed in the arguments following this one. 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 ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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[144](...continued)
1977)(comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State*, 548 S.W.2d 106, 121 (Ark. 1977).

XXVI

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument XXV, *ante*.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Cal. Penal Code § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown, supra,* 40 Cal.3d at p. 541, rev'd on other grounds, *California v. Brown*, *supra,* 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, 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.[145]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held 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 ...." (*People v. Fairbank* (1997)

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[145] There are two exceptions to this lack of a burden of proof. The special circumstances (Cal. Penal Code § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Cal. Penal Code § 190.3(b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3(b), post.

16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, *supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) ___ U.S. ___ [124 S. Ct. 2531].

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior

conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[146] The Court observed: "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. We hold that the Sixth Amendment applies to both." (*Id.*)

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[146] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

In *Blakely*, the 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 p. 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 p. 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." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, original italics.)

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.[147] Only

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[147] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); 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); Neb. Rev.

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

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*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne, supra,* 4 Cal.4th at p. 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

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[147](...continued)
Stat., § 29-2520(4)(f) (2002) ; 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 circumstances 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.)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[148] As set forth in California's "principal sentencing instruction" (*People v. Farnam, supra,* 28 Cal.4th at p. 177), which was read to appellant's 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." (RT 18444; CT 15846; CALJIC No. 8.88.)

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. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the

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[148] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[149]

In *People v. Anderson, supra,* 25 Cal.4th at p. 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Penal Code 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "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 v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also

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[149] 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*, *supra*, 42 Cal.3d at pp. 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

(all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2551, (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Cal. Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.)].) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494).) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*,

supra, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

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.[150] 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." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 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 decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 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

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[150] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. 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. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 263 (italics is 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 at pp. 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, 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 at p. 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; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[151]

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 p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment

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[151] 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).

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.[152]

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[152] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle 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." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 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 p. 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.* at pp. 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.

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 aggravating circumstances as defined in CALJIC No. 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, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 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 v. Arizona*, *supra*, 536 U.S. at p. 606 (quoting with approval *Apprendi v. New Jersey*, *supra,* 530 U.S. at 539 (dis. opn. of O'Connor, J.)).)

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 its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . . 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.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

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 Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Requires That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are

determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of

the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley, supra,* 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755 (quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427).)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I*]n *a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [emphasis added].) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See e.g., *People v. Griffin, supra,* 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt.

This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the

sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase 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 also has 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* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, 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 also will 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 proof beyond a 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 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. (See *Proffitt v Florida*, *supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion 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 has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Cal. Penal 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, subdivision (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 to "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."[153]

A fact could not be established – i.e., 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, in noncapital cases, 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. (See Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Cal. Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

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[153] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421.)

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. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 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.

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*, 508 U.S. 275.) 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. This raises the constitutionally unacceptable possibility that 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 Fifth, 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, as the case may be, is not – is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial 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. As to the reason for imposing death, 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.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[154]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin*

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[154] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

v. Florida (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[155]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana, surpa,* 447 U.S. at p. 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California,* 524 U.S. at p. 732; *accord Johnson v. Mississippi, surpa,* 486 U.S. at p. 584;

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[155] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

Gardner v. Florida, supra, 430 U.S. at p. 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial 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 also *People v. Wheeler*, *supra*, 22 Cal.3d at p. 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[156] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Cal. Penal Code § 1158(a).) Since capital

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[156] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k). In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); 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 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).

defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could 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 United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will

> cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

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*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 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 prerequisite 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.

E. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof (see Argument XXIV, *ante*) was the trial court's rejection of the defense's requested instructions. This 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. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed 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 Sixth, Eighth, and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. XIV; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. VIII & XIV; Cal. Const. art. I, § 17),

and his right to the equal protection of the laws. (U.S. Const. Amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, 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 state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other subsections of this argument demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XXVII

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88 [Penalty Trial – Concluding Instruction] (1989 rev.), read 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 injurious 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. 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 murder. 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 as 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.

(RT 18443-18445; CT 15846-15847.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. The flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., Amend. XIV), to a fair trial by jury (U.S. Const., Amends. VI and XIV), and to a reliable penalty determination (U.S. Const., Amends. VI, VIII and XIV) and require reversal of his sentence. (See e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.)

A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death

instead of life without parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) 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 the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*See Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

In analyzing 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. 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 the death penalty compels a different result.(224 S.E.2d at p. 392, fn. omitted.)[157]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux, supra,* 1 Cal.4th at p. 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

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[157] The United States Supreme Court has specifically recognized 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.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII and XIV), the death judgment must be reversed.

B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether The Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty, For Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion, supra,* 9 Cal.4th at p. 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir.

2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to

the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (RT 18444.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

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.)[158] 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. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 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 permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

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[158] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (*See Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.)

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 [the] 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 *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts 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, supra,* 43 Cal.2d at pp. 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata, supra,* 133 Cal.App.2d 18, 21; see also *People v. Rice, supra,* 59 Cal.App.3d at p. 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States, supra,* 157 U.S. at p. 310.)[159]

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[159] There are due process underpinnings to these holdings. In *Wardius v. Oregon, supra*, 412 U.S. at p. 473, fn. 6, the United States

(continued...)

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:

> 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 pp. 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 they were a correct statement of

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[159](...continued)
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. at p. 22; *Gideon v. Wainwright, supra*, 372 U.S. at p. 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 YALE L.J. 1149, 1180-1192.) 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 v. Oregon, supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

law, the instructions 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 in appellant's 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 given here 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 they are as entitled as noncapital defendants – if not more entitled – 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 denying capital defendants such protection. (*See* U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, 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, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; 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. Reversal of his death sentence is required.

D. The Instructions Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (*See People v. Hayes, supra,* 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, did not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to appraise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XXVIII

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to CALJIC No. 8.85 [Penalty Trial - Factors For Consideration], the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (RT 18426-18428; CT 15820-15821) and pursuant to a modified CALJIC No. 8.88 [Penalty Trial - Concluding Instruction], the standard instruction regarding the weighing of these aggravating and mitigating factors.[160] (RT 18443-18445; CT 15846-15847) These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional. First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the introduction of evidence under Penal Code section 190.3, subdivision (b) violated appellant's federal constitutional rights to due process, equal protection and a reliable penalty determination. Even if this evidence were permissible, the failure to instruct on the requirement of jury unanimity with regard to such evidence denied appellant his federal constitutional rights to

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[160] CALJIC No. 8.88 was modified to instruct jurors that they had to determine penalty as to each defendant "for each count of first degree murder" and that they had to decide separately the question of penalty as to each of the defendants "and each count of first degree murder."

a jury trial and to a reliable penalty determination. Third, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Fourth, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fifth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Sixth, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Seventh, and finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

A. The Instruction On Penal Code Section 190.3, Subdivision (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Penal Code section 190.3, subdivision (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (RT 18426; CT 15820.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract –

it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California, supra,* 512 U.S. at p. 975.)

However, an analysis of how prosecutors actually use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright, supra*, 486 U.S. at p. 362.)

As applied in California, however, section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk.

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 argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[161] or because the defendant killed with a single execution-style wound;[162]

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[163] or because the defendant killed the victim without any motive at all;[164]

- because the defendant killed the victim in cold blood,[165] or because the defendant killed the victim during a savage frenzy;[166]

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[161] See, e.g., *People v. Morales*, Cal.Sup.Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

[162] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-3027 (same).

[163] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[164] 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).

[165] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

[166] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy).

- because the defendant engaged in a cover-up to conceal his crime,[167] or because the defendant did not engage in a cover-up and so must have been proud of it;[168]

- because the defendant made the victim endure the terror of anticipating a violent death,[169] or because the defendant killed instantly without any warning;[170]

- because the victim had children,[171] or because the victim had not yet had a chance to have children;[172]

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[167] See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 (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).

[168] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[169] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S14636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[170] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[171] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[172] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

- because the victim struggled prior to death,[173] or because the victim did not struggle;[174]

- because the defendant had a prior relationship with the victim,[175] or because the victim was a complete stranger to the defendant.[176]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a death sentence is the use of the circumstances-of-the-crime aggravating factor to embrace facts which cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating

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[173] 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).

[174] See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[175] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[176] See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[177]

- **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;[178]

- **The motive for 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;[179]

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[177] See, e.g., *People v. Deere*, No. S004722, RT 155-156 (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*, *supra*, 41 Cal.3d at p. 63 (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 4715-4716 (victim was "elderly").

[178] See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[179] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3544

(continued...)

- **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;[180]

- **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.[181]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

The circumstances-of-the-crime aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than

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[179](...continued)
(avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[180] 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 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

[181] See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

"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*, *supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

B. The Instruction On Penal Code Section 190.3, Subdivision (b) And Application Of That Sentencing Factor Violated Appellant's Constitutional Rights To Due Process, Equal Protection, Trial By Jury And A Reliable Penalty Determination

1. Introduction

Factor (b), which tracks Penal Code Section 190.3(b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." Pursuant to that factor, the prosecution in this case presented evidence of seven prior acts of alleged violence. (RT 18429-18430; CT 15826.)

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed. (RT 18426; CT 15820.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that appellant did in fact commit the criminal acts alleged. (RT 18430; CT

15826.) Although the jurors were told that all 12 must agree on the final sentence (RT 15822), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> 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 factor in aggravation.

(RT 18430; CT 15826.) The court further gave its special instruction no. 3: "No decision regarding the existence or nonexistence of any aggravating or mitigating circumstance in this case, or the weight to be assigned to such circumstances, need be reached unanimously. Only the final penalty decision must be unanimous." (RT 18428; CT 15822.) Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide, if any, and the special circumstance allegations.

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally permissible, the aspect of Penal Code section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. The Use Of Unadjudicated Criminal Activity As Aggravation Renders Appellant's Death Sentence Unconstitutional

The admission of evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst*, *supra*, 897 F.2d at p. 421.) And because the State applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., Amend. VI; Cal. Const., art. I, §§ 7 and 15.)

3. The Failure To Require A Unanimous Jury Finding on the Unadjudicated Acts Of Violence Denied Appellant's Sixth Amendment Right To A Jury Trial And Requires Reversal Of His Death Sentence

Even assuming, arguendo, that the evidence of the prior unadjudicated offenses was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to Penal Code section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia, supra,* 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana, supra,* 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth

Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[182]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona*, *supra,* 497 U.S. at p. 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Lines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent, supra,* 43 Cal.3d at p. 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona*, *supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to

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[182] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida, supra,* 430 U.S. at p. 357.) It is arguable, therefore, that where the State seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged act of violence, there is no need to reach this question here.

"aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exists]"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to determine if all 12 jurors would have agreed that appellant committed the alleged prior offenses. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Decliner* (1985) 163 Cal.App.3d 284, 302 [same].)[183]

4. Absent A Requirement Of Jury Unanimity On The Unadjudicated Acts Of Violence, The Instructions On Penal Code Section 190.3, Subdivision (b) Allowed Jurors To Impose The Death Penalty On Appellant Based On Unreliable Factual Findings That Were Never Deliberated, Debated Or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this

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[183] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra,* 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio*, *supra,* 438 U.S. at p. 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, (1985) 472 U.S. 320, 328-330; *Green v. Georgia, supra,* 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the State has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (CT 545; RT 2553.)

Thus, as noted above, members of appellant's jury were permitted individually to rely on this – and any other – aggravating factor any one of them deemed proper as long as all the jurors agreed on the ultimate punishment. Because this procedure totally eliminated the deliberative function of the jury that guards against unreliable factual determinations, it

is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous agreement reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas, J.).)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p.

333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of DOUGLAS, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi, supra,* 486 U.S. at p. 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

C. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those inapplicable factors from the instruction. Including these irrelevant factors

in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter, supra,* 21 Cal.4th at p. 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule, supra,* 28 Cal.4th at p. 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first

place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

D. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable And Evenhanded Application Of The Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – in this case factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon

the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens, supra,* 462 U.S. at p. 879.) Failing to provide appellant's jury with guidance on this point was reversible error.

E. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded The Jurors' Consideration Of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); RT 18427), and "substantial" (see factor (g); *Ibid.*), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. 367; *Lockett v. Ohio, supra*, 438 U.S. 586.)

F. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra,*

512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland, supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber, supra,* 2 Cal.4th at p. 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the State's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t 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 therefor." (11 Cal.3d at p. 267.) The same reasoning must apply 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].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen.

Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to

impose death.[184] California's failure to require such findings renders its death penalty procedures unconstitutional.

G. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Them To Capital Defendants Like Appellant Violates Equal Protection

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential

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[184] See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); 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(8)(a)-(b) (2003); 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., § 46-18-305 (1993); Neb. Rev. Stat., § 29-2521(2) and § 29-2522 (2002); 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); 41 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., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. 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.) "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* (1958) 356 U.S. 86, 102 . . . ." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," 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 affecting a fundamental interest without showing that a compelling interest 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 that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument XXV, *ante*, appellant explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such the requirement of written jury findings, unanimous agreement on violent criminal acts under Penal Code section 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants as set forth in this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

H. Conclusion

For all the reasons set forth above, appellant's death sentence must be reversed.

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XXIX

THE TRIAL COURT ERRED PREJUDICIALLY BY REPEATEDLY INFORMING THE JURY THAT THE COST OF THE INSTANT TRIAL WAS "ASTRONOMICAL"

The trial court erred in telling the jury that the cost of the trial was "astronomical." Informing the jury as to the cost of trial has the effect of creating pressure on the jury to convict so as not to waste public resources, regardless of the fact that the cost of trial is not a factor that is relevant to the guilt or innocence of a defendant or to the jury's determination of punishment. This served to deny appellant the right to a jury trial, to a fair trial, to due process of law and to the right to a reliable determination in a capital case under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and to parallel provisions in the state constitution.

A. The Trial Court's References To The High Cost Of Trial

Prior to trial, out of the 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. (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 9567.)

The expense of the trial to taxpayers was again brought to the jurors' attention at a later hearing. Because evidence had been introduced that the Family had hired attorneys when employees were arrested, the court

instructed the jury that the then-current defense attorneys were court appointed. (RT 11356.)

Finally, in answer to a jury question, the court again explained an admonition regarding the attorneys not being hired by the family telling jury that: "Nobody can hire a lawyer in a death penalty case. I don't care who you are, it costs too much money." The court then reminded the jurors that the attorneys in this case were being paid by the State of California. (RT 11363-11365.)

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 impropriety of the jury being informed of the costs of trial arises frequently in the context of cases in which the trial court is attempting to extract a verdict from a deadlocked jury. (See, e.g., *Allen v. United States, supra,* 164 U.S. 492.) The reasoning of this ruling on the impropriety of informing the jury of the cost of trial, and the effect of giving that information to the jury, applies with equal force to the issue in the context of this case.

The cost of trial has no tendency to prove any disputed fact, and is therefore irrelevant. (Evid. Code, § 210.) In *People v. Barraza* (1979) 23 Cal.3d 675, 685, this Court noted that, with regard to a jury charge which referred to the expense involved in retrying a case:

> We observed in *Gainer* 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. (*Gainer*, at p. 852, fn. 16.) That the reference here did not link the notion of expense to a prospective retrial is immaterial, for the link is obvious and will naturally be

> inferred by the jurors once the subject is introduced. It is not so much the irrelevance of such a reference that is troubling, however, as the additional pressure to decide thus created. Consideration of expense "may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government." (Note, The Allen Charge: Recurring Problems and Recent Developments (1972) 47 N.Y.U.L.Rev. 296, 304.)

In *United States v. Seawell* (9th Cir. 1977) 550 F.2d 1159, 1163 ("*Seawell*"), the Court stated that other courts have looked at the content, timing, and circumstances of an Allen charge. However, *Seawell* stated that "even in its most acceptable form," the *Allen* charge "approaches the ultimate permissible limits." (*Id.* at p. 1162 [citing *Sullivan v. United States* (9th Cir. 1969) 414 F.2d 714, 716].) The court then concluded that permitting the instruction to be given twice "would be an unwarranted expansion of its use." (*Ibid.*) As noted, in this case, the jury was told on multiple occasions, in a variety of ways, how expensive this trial was.

By analogy, the test for whether a jury instruction is coercive also informs the instant issue. The United States Supreme Court had held that the test 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.) Courts have held that one relevant circumstance is the timing of the instruction. Certainly, one that comes at a stage when the jury appears to be on the verge of deadlock is more likely to coerce the jury than one given during the trial; however, this factor is not dispositive. In *People v. Pitts, supra,* 223 Cal.App.3d 606 ("*Pitts*"), 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 retrial 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, because the jurors were California and Los Angeles County taxpayers, 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). And 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 [citation] and *neither should he appeal to their self-interests as taxpayers*. [Citations omitted]." (*Id.* at p. 920 [italics 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 objective 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; 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"].)

In sum, the trial court improperly pressured the jurors to convict appellant by repeatedly reminding them of the cost of the instant trial. This violated appellant's right to a jury trial, to a fair trial, to due process of law and to a reliable judgment of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution.

C. The Trial Court's Error In Informing The Jury Of The High Cost Of The Instant Trial Was Prejudicial

Since informing the jury of the cost of trial was substantially likely to improperly pressure the jury into convicting appellant regardless of any doubt about his guilt, this error must be judged under the standard of *Chapman v. California*, *supra*, 386 U.S. 18, requiring reversal unless 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. Second, from the outset the expense of this trial would be greater, and more apparently so, than any other case in Criminal Courts Building at the time. Apart from the unusual security measures taken, which the jury knew

about, the months of trial itself, with six defense attorneys and two prosecuting attorneys would make it obvious to the jury that this was no ordinary trial at no ordinary expense. Thus, the need *not* to draw their attention to this matter would be *greater* than normal. Third, *Andrews* involved a much stronger case against the defendant. In *Andrews,* this Court found "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. This is in contrast to this case where the prosecution presented no evidence of an explicit admission and where appellant testified and denied complicity in the instant crimes, and where there was no physical evidence linking him to the killings as opposed to the sale of drugs out of the house in which the killings took place.

In this case, the fact that the mention of a retrial was not expressly made is not important issue because the obvious reason why the jury is being informed as to the expense of the trial is to impress upon the jury the danger of anything happening that would mandate starting the process over again from the beginning. Although the jury may never hear the word "re-trial," the obvious implication is sure to hang over the trial.

Consequently, it cannot be concluded that informing of the jury of the cost of the trial did not have an effect on the jury's decision to convict. Therefore, appellant's conviction and death sentence must be reversed.

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XXX

THE TRIAL COURT ERRONEOUSLY EXCLUDED APPELLANT AND HIS COUNSEL FROM TRIAL PROCEEDINGS; REVERSAL IS REQUIRED

The trial court erroneously held ex parte proceedings from which both appellant and his counsel were excluded. In addition, appellant's absence from other critical stages of the proceeding was prejudicial error. These errors denied appellant his right to counsel, to confront witnesses against him, to be present at all critical stages of the proceedings against him, to a fair trial, to due process of law and to a reliable judgment of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, parallel provisions of the state constitution, and state statutory and decisional law. Reversal of his conviction is required.

A. The Applicable Law

The right of a criminal defendant to an adversary proceeding is fundamental to our system of justice. (See *Nix v. Williams* (1984) 467 U.S. 431, 454-55 (conc. opn. of Stevens, J.)); see also *Pointer v. Texas, supra,* 380 U.S. at pp. 404-405 [discussing right of confrontation and cross-examination].) This includes the right to be personally present and to be represented by counsel at critical stages during the course of the prosecution. (*United States v. Wade* (1967) 388 U.S. 218, 224-225.) Our system is grounded on the notion that truth will most likely be served if the decision maker – judge or jury – has the benefit of forceful argument by both sides. (*Herring v. New York* (1975) 422 U.S. 853, 862.) Ex parte proceedings thus are anathema in our system of justice and, in the context of a criminal trial, may amount to a denial of due process. (*United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1258-1259.)

A person charged with a felony has "a fundamental right to be present at every stage of the trial." (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 671 [citations omitted].) This right derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. (*United States v. Gagnon* (1985) 470 U.S. 522, 526 (per curiam); *Pointer v. Texas, supra,* 380 U.S. at p. 403; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 273, overruled on other grounds, *Campbell v. Wood, supra*, 18 F.3d at p. 672, fn.2.) It includes all proceedings at which the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (*United States v. Gagnon, supra*, 470 U.S. at p. 526 [quoting *Snyder v. Massachusetts, supra,* 291 U.S. at pp. 105-106].) Although the right does not come into play "when presence would be useless, or the benefit but a shadow" (*Snyder, supra*, 291 U.S. at pp. 106-07), under the Constitution, "[a] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; accord, *Gagnon, supra,* 470 U.S. at p. 526; *Faretta v. California, supra,* 422 U.S. at p. 819.) [185]

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[185] The test to determine when a defendant's absence rises to a denial of the right to attend every stage of trial has also been variously stated as "when his presence will be useful or of benefit to him and his counsel" (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1021); when his presence is "required in order to protect defendant's interests, to assure him a fair and impartial trial, or to assist counsel in the defense of the case" (*ibid.*); when "it will be in his power, if present, to give advice or suggestion" (*Snyder v. Massachusetts, supra*, 291 U.S. at p. 106); or when his "absence could, under some set of circumstances, be harmful." (*Polizzi v. United States* (9th Cir. 1976) 550 F.2d 1133, 1138.)

If a defendant is denied his constitutional right to be present during a critical stage of criminal proceedings, the reviewing court must evaluate the nature of the error. Reversal is automatic if the defendant's absence constitutes a "structural error," that is, an error that permeates "[t]he entire conduct of the trial from beginning to end" or "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310.) The Ninth Circuit has held that "a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal." (*Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476 .) To merit a finding of structural error, a defendant must have been excluded from a stage of the criminal proceedings at which he had an "active role to play." (*Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141 (en banc); see also *Hegler, supra*, 50 F.3d at pp. 1476-77 [holding that the "determinative factor" as to whether the defendant's absence constituted a structural error was whether the defendant's ability to "influence the process was negligible"].) In addition, the erroneous exclusion of the defendant must, "like the denial of an impartial judge or the assistance of counsel, affect the trial from beginning to end." (*Rice v. Wood, supra*, 77 F.3d at p. 1141.)

On the other hand, harmless error review is appropriate if the defendant's absences constitutes a "trial error," that is, an error which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-08.)

There is also a statutory right to presence. Penal Code section 977, subdivision (b) provides that the defendant must be present during most trial proceedings, and in fact *requires* him or her to be at all proceedings unless certain stringent written waiver requirements are met. The defendant must be present ". . . during those portions of the trial when evidence is taken before the trier of fact. . . ." In addition:

> The accused shall be personally present at all other proceedings unless he shall, with leave of court, execute in open court, a written waiver of his right to be personally present, as provided by paragraph (2).

(Pen. Code, § 977, subd. (b) [former section].) Paragraph (2) of that section sets forth the content of the required written waiver, and provides that it must also be approved by the defendant's counsel and filed with the court. (Pen. Code, § 977, subd.(b)(2).) Even compliance with these stringent requirements is not enough to authorize the absence of a *capital* defendant during the taking of evidence. (See Pen. Code, § 1043, subd. (b)(1) and (2).)[186]

Further, as a matter of state statutory law, in a capital case representation by counsel is mandatory at all stages of the criminal proceedings. (See Pen. Code, § 859 ["in a capital case . . . the defendant must be represented in court by counsel at all stages of the preliminary and trial proceedings . . . ."]; Pen. Code, §§ 686, subd. (2) and 686.1 [a capital defendant "shall be represented in court by counsel at all stages of the preliminary and trial proceedings"].)

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[186] Penal Code section 1043, subd. (b)(2) provides that the absence of the defendant in a felony case shall not prevent continuing the trial in "[a]ny prosecution for an offense *which is not punishable by death* in which the defendant is voluntarily absent." (Emphasis added.)

In this case, appellant and his counsel were excluded, over objection, from in camera proceedings relating to appellant's motion to recuse the LADA's Office (see Argument I, *ante*, incorporated by reference herein), as well as from ex parte proceedings between the trial court and the jury in which the trial court discussed security procedures the jurors were required to follow. (See Argument VI, *ante*, incorporated by reference herein.) In addition, there were numerous other trial proceedings in which appellant was not present, as detailed below.

Appellant's Sixth and Fourteenth Amendment rights to counsel, to confront witnesses against him, his Fifth and Fourteenth Amendment rights to due process of law, his Eighth Amendment right to a reliable determination of penalty, and his rights under the California Constitution and his statutory rights under the California Penal Code were all violated when the trial court took evidence and discussed critical issues in the absence of appellant, and on some occasions, his counsel. The trial court's failure to ensure appellant was afforded his rights to be present at all critical stages of the proceedings and to be represented by counsel at all stages of his capital case also violated his right to due process under both state and federal law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., Amends. VI and XIV; Cal. Const., art. I, §§ 7 and 15.) Reversal is required.

B. The Absence Of Appellant And His Counsel During In Camera Proceedings Relating To His Motion To Recuse The LADA's Office And During Ex Parte Proceedings Between The Trial Court And The Jury, As Well As Appellant's Absence During Numerous Other Trial Proceedings Requires Reversal

This case also presents a situation where the deprivation, by its very nature, precludes harmless error analysis. Appellant had a fundamental, personal right to be informed of and participate in the proceedings relating

to his motion to recuse the LADA's Office due to a conflict of interest. Just as plainly, appellant and his counsel had a right to be present at proceedings where the court spoke with the jurors who would decide appellant's fate. The exclusion of appellant and his counsel from these discussions affected the structure of the trial and the error mandates a finding of prejudice per se. (See Arguments I and VI, *ante*, incorporated by reference herein.)

However, even if reversal is not automatic, the burden is now on the State to show that the trial court's error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Wright, supra,* 52 Cal.3d at p. 403, cert. den. (1991) 502 U.S. 834 [any violation of a defendant's right to be present at all critical stages of his trial constitutes federal constitutional error, requiring reversal unless the error can be demonstrated to be harmless beyond a reasonable doubt].)[187] This

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[187] Although this Court has stated that the burden is upon the defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial (see e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 309-10, cert. den. (1981) 450 U.S. 1035, overruled on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn.3; *People v. Duncan, supra,* 53 Cal.3d at p. 975, cert. den. (1992) 503 U.S. 980), it is clear that this refers to the defendant's burden of establishing that his due process right to be present has been *implicated.* It is true that an accused has a due process right to be present only when his presence bears a reasonably substantial relations to the fullness of his opportunity to defend against the charge. (*Snyder, supra,* 291 U.S. at pp. 105-08.) However, once the defendant has shown that his presence would be useful or of benefit, and thus his lack of presence is a denial of due process, the burden is then on the State to prove that the constitutional violation was harmless beyond a reasonable doubt. (See *Rushen v. Spain* (1983) 464 U.S. 114, 119 (per curiam); *People v. Whitt* (1990) 51 Cal.3d 620, 671-72, cert. den. (1991) 501 U.S. 1213, (Broussard, J. conc. and dissenting) ["when the error violates the federal Constitution, the defendant need not show prejudice; rather, the prosecution must establish the absence of prejudice"].) In any

(continued...)

"burden of proving harmless error is a heavy one." (*Bustamante, supra*, 456 F.2d at p. 271.) "The standard by which to determine whether reversible error occurred . . . is not whether the accused was actually prejudiced, but whether there is 'any reasonable possibility of prejudice.'" (*Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1050.)

Certainly, there is a strong likelihood that appellant was prejudiced by the absence of both he and his counsel from the courtroom during proceedings at which the court took evidence from the various prosecutors, whom appellant alleged were too biased to prosecute his case. Appellant's presence at the hearing during which the prosecution defended itself against such charges would not have been "useless." (See *Snyder, supra*, 291 U.S. at pp. 105-07.) To the contrary, defense counsel plainly stated that the presence of the defense at those hearings was essential to a fair determination of the issue. During argument on the motion, counsel for one defendant said it was difficult to argue facts known only to the prosecution and the court, and asked if any additional evidence would be made available to the defense. (RT 4439.) Appellant's counsel followed-up that argument, and urged the trial court not to reach a decision based on information supplied to it by the prosecution in camera because the prosecution's credibility was in doubt; counsel then provided the court with specific examples of misrepresentations the prosecution made to both the trial court and the Court of Appeal. (RT 4439-4451; see also CT 11258-11262.) The trial court nonetheless denied appellant's motion to recuse, based almost

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[187](...continued)
event, for the reasons stated above, the burden is clearly on the State to show that the absence of both appellant and his counsel from the proceedings referred to herein was harmless beyond a reasonable doubt.

solely on the evidence disclosed during the in camera proceedings. (RT 4475-4481.)

The trial court initially granted the prosecution's request for an in camera hearing in order to argue that the information sought by the defense-- that is, information supporting the prosecution's allegations that the Family had infiltrated the LADA's Office-- was privileged. Appellant, then as now, was forced to argue blindly to the contrary, that the information was not privileged, or, if any privilege had attached, it had been waived by the prosecution. (CT 11898-11967 and Motion to Vacate Certification or, in the Alternative, to Correct, Augment and Settle the Record at pp. 3-6, 74-77, filed September 13, 2002 in this Court by appellant Bryant, incorporated by reference herein.) Next, because appellant and his counsel were excluded from the in camera proceedings, appellant was forced then, as now, to argue blindly the merits of the recusal motion itself. (See Argument I, *ante*.)

The trial court implicitly recognized the "critical" nature of the proceedings from which appellant and his counsel were excluded by using that precise legal label: the trial court stated that information "critical to the defense" was discussed. (RT 4422.) In short, appellant's and his counsel's presence, at the in camera proceedings would have contributed to the fairness of the procedure by providing him an opportunity to not only inform the court and counsel of his questions, concerns and observations, but to contradict allegations that he was somehow involved in or responsible for obtaining confidential information from employees of the LADA's Office. (See Argument XXXIV, *ante*, incorporated by reference herein.)

Likewise, the proceedings in which the trial court addressed ex parte the jury that would decide appellant's fate could only be considered a "critical stage" of the proceeding. The trial court, over appellant's objections, twice addressed appellant's jury regarding special security procedures implemented for the jurors' protection in this case. (RT 7980-7988, 8057-[8072-8075], 9567-9581.) The basis for its decision to exclude appellant and his counsel was (1) "activities alleged against the defendants;" and (2) it would be "awkward" for appellant's counsel to be present when the court so addressed the jury. (RT 7984-7985.) The court ruled it did not want counsel to know the route the jurors would be taking to enter and leave the building. (RT 7985.) When counsel suggested the court allow them to be present for the discussion and then to have the bailiffs, off the record, inform the jury of the route, the court cut off discussion and said simply that "it needs to make orders to the jury along those lines." (RT 7985-7987.) The court represented that it would make the statement in the most "neutral manner" possible. (RT 7986.)

Although a cold record of those proceedings has been supplied to appellant on appeal, the record cannot reflect whether the court was successful in being neutral in tone and manner. If appellant or his counsel had been present, he would have heard the court's voice, seen his actions, and measured the jurors' reactions. Appellant or his attorney could have made objections relevant to appellant's right to a fair trial by an impartial jury. Appellant again raised his concerns in this regard in his motion for a new trial, where he cited cases demonstrating that a defendant's right to a fair trial can be abridged by a trial judge through non-verbal communication. (CT 15884-15900, incorporated by reference herein, citing *People v. Franklin* (1976) 56 Cal.App.3d 18 [citing trial judge's

unconscious facial expressions towards defense witnesses]; *People v. Barquera* (1957) 154 Cal.App.2d 513 [trial judge communicated subliminally his beliefs regarding the proper outcome of the trial to the jury]; *Bellici v. United States* (D.C. Cir. 1950) 184 F.2d 39 [conviction reversed where trial judge bias indicated by gesture].) For all the foregoing reasons, the trial court's ex parte communications with the jurors was fatal constitutional error.

C. Appellant's Waiver Of His Right To Presence At Numerous Other Proceedings Was Invalid Under Federal Law

There were numerous proceedings in addition to the recusal hearing discussed above at which Bryant was not present. He was absent, without a waiver, for a discovery hearing during which Detective James Vojtecky testified. (CT 3449-3467.) Appellant's counsel waived appellant's presence for a hearing on a subpoena duces tecum during which Detective Vojtecky testified. (RT 4199-4218; CT 11115). Appellant was also not present, without a waiver, at the reassignment of his case after Judge Smith recused himself from presiding over appellant's trial. (RT 4999-5005.) Both appellant, after an oral waiver, and his counsel absented themselves from an Evidence Code section 402 hearing concerning codefendant Settle's statements at the time of his arrest. (RT 7990-8056.) Appellant's counsel orally and telephonically waived appellant's presence for proceedings relating to jury guilt phase deliberations after all guilt verdicts had been rendered against appellant, during which time court and counsel discussed the jury's confusion over the definition of an accomplice (see Argument XIV, *ante*, incorporated by reference herein). (RT 17803, 17805.) Appellant orally waived his presence for a hearing in which his

motion to limit aggravating evidence during the penalty phase was argued and ruled upon. (RT 17547-17561; CT 15603-15604.)

The right to be personally present in a capital trial is so fundamental that it has often been held to be unwaivable. In *Hopt v. Utah* (1884) 110 U.S. 574, 579, a capital case, the Supreme Court stated that a felony defendant's absence from any "stage of the trial when his substantial rights may be affected," voluntary or not, violated federal due process. In *Diaz v. United States* (1912) 223 U.S. 442, 455, the Court rescinded *Hopt*'s ban on waiver with respect to noncapital defendants, holding that "when the offense is not capital and the accused is not in custody" a defendant may waive his presence at critical trial proceedings. The Court reaffirmed that a capital defendant is regarded as "incapable of waiving the right [to presence] . . . because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction." *(Ibid.)*

In *Illinois v. Allen*, 397 U.S. 337, 345, a noncapital case, the Court suggested in *dicta* that a capital defendant could waive his right to presence through disruptive conduct, remarking that "criminal contempt has obvious limitations as a sanction when the defendant is charged with a crime so serious that a very severe sentence such as death or life imprisonment is likely to be imposed." The Supreme Court, however, has never held that a nondisruptive capital defendant may waive his right to presence. With respect to nondisruptive defendants, *Diaz*'s position that the right to presence cannot be waived in capital cases is still good law.

Federal circuit court decisions have recognized the continuing validity of *Diaz*. In *Near v. Cunningham* (4th Cir. 1963) 313 F.2d 929, 931, the Court of Appeal for the Fourth Circuit specifically held that a capital

defendant was entitled to a new trial when he was excluded from an in camera conference concerning whether or not to sequester the jurors. With respect to the right to be personally present at trial, the court cited *Hopt* for the proposition that "[s]o fundamental is this right that it may not be waived." (*Ibid.*) In *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1257-58, the court rejected the State's argument that a capital defendant's attorney could waive his right to be present at a hearing, citing *Hopt* and *Diaz* as holding that "the right to presence in capital cases is so fundamental that the defendant cannot waive it." It interpreted the *Illinois v. Allen* dictum as creating only "a limited exception to the no-waiver rule for defendants who willfully disrupt their trials." (*Ibid*; see also *Hall v. Wainwright* (11th Cir. 1984) 733 F.2d 766, 775.)

The Ninth Circuit, on the other hand, has indicated that a capital defendant might be able to waive the right to presence. In *Campbell v. Wood*, 18 F.3d 662, an en banc opinion, the court declared,

> There is no principled basis for limiting to noncapital offenses a defendant's ability knowingly, voluntarily, and willingly to waive the right of presence. Nor do we find logic in a position that a right that may be waived by disruptive behavior cannot be waived by an affirmative petition freely made and based on informed judgment.

(*Id.* at p. 672.)

The court relied upon *Snyder v. Massachusetts, supra*, 291 U.S. at p. 106, a capital case where the Supreme Court stated that the privilege of presence "may be lost by consent or at times even by misconduct," and *Illinois v. Allen, supra,* 397 U.S. at pp. 342-43, where the Supreme Court abandoned *Hopt*'s view that a felony trial could never continue in the defendant's absence, to illustrate that its ruling was not incompatible with Supreme Court precedents. *Allen*, however, addressed the narrow issue of

"whether an accused can claim the benefit of [the] constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." (397 U.S. at p. 338.) The Court did not touch upon the much broader issue of waiver by a nondisruptive or mildly disruptive defendant. And in *Snyder*, the defendant's right to be present at critical stages of his trial was not at issue. *Snyder* dealt with a trial court's refusal to let the defendant attend a jury view of the crime scene; the Court held that the refusal was not unconstitutional because the defendant had nothing to gain from presence at the view (291 U.S. at p. 108), and because "a view is not a 'trial' nor any part of a trial in the sense in which a trial was understood at common law. . . . To transfer to a view the constitutional privileges applicable to a trial is to be forgetful of our history." (*Id.* at pp. 114-15.)

Also, as the Eleventh Circuit pointed out in *Proffitt*, "[T]he *Snyder* Court relied on *Diaz*, which expressly recognized a limitation on waiver to noncapital cases. Moreover, in *Snyder* there was no allegation of waiver, and thus the Court was not specifically faced with the waiver issue in that case." (685 F.2d at p. 1258.) Neither *Snyder* nor *Allen* in any way questioned *Diaz*'s reasoning. *Campbell*'s rejection of *Diaz*'s distinction between noncapital and capital defendants was therefore unsupported. As the court stated in *Profitt*, "Until the Court expressly overrules its decisions in *Diaz* and *Hopt* . . . we are bound by the rule established in those cases that a capital defendant's right to presence is nonwaivable." (*Ibid.*)

Furthermore, in claiming that there was no principled rationale for allowing waiver of the right to presence in noncapital but not capital cases, *Campbell* ignored the unique public policy considerations that weigh in

favor of insuring a capital defendant's presence at all critical stages of his or her trial. As the North Carolina Supreme Court observed in *State v. Huff* (1989) 381 S.E.2d 635, 651, vacated on other grounds (1990) 497 U.S. 102, a defendant's presence at a capital trial is a matter of public as well as private concern, since the public has a compelling interest in protecting human life and in upholding the absolute integrity of the criminal justice system when the ultimate sanction of death is being imposed. (See also *State v. Braswell* (N.C. 1985) 324 S.E.2d 241, 246 ["when a defendant is being tried for a capital felony public policy prevents the accused from waiving his right to be present at any stage of the trial"]; *State v. Kelly* (N.C. 1887) 2 S.E. 185, 186 ["the rule that [the accused] must be so present in capital felonies is *in favorem vitae* . . . founded in the tenderness and care of the law for human life . . . "]; *State v. Paylor* (1883) 89 N.C. 539, 541 ["in favor of life, this rule is never relaxed . . ."].)

Finally, *Campbell* was directly concerned with a defendant's right to presence at empaneling of the jury, not with the right to presence when the jury received evidence. However, a capital defendant may not waive the right to be personally present for jury trial. The Eighth and Fourteenth Amendments require heightened reliability as to both the guilt and sentencing determinations in a capital case (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638; *Kyles v. Whitley* (1995) 514 U.S. 419, 422) and there is a substantial constitutional question whether any person may waive a right derived from the cruel and unusual punishments clause of the Eighth Amendment. (See, e.g., Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment By Selecting a Cruel and Unusual Punishment* (2000) 32 Conn.L.Rev. 615.) The Eighth Amendment not only protects the rights of individual, but also embodies a fundamental interest of society in

ensuring the reliability of procedures with which the State administers its ultimate punishment. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638; *People v. Chadd* (1981) 28 Cal.3d 739, 751-753.) Therefore, "society's independent stake in enforcement of the Eight Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver." (*Ibid*; see also, Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death* (1987) 55 Tenn.L.Rev. 95.)

Since a capital defendant's right to presence at trial exists not only for his benefit but for the benefit of the public at large, it is logical to prevent him from unilaterally waiving that right. This Court has held that "a law established for a public reason cannot be waived or circumvented by a private act or agreement." (*Bickel v. City of Piedmont* (1997) 16 Cal. 4th 1040, 1048 [quoting *Covino v. Governing Board* (1977) 76 Cal.App.3d 314, 322]; see also Cal. Civ. Code, § 3513 (Deering 1999) ("Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement"). The exception to the no-waiver rule made for disruptive defendants is not inconsistent with recognizing that a capital defendant's presence at trial serves important public interests. The ability to expel a disruptive defendant stems from a judge's inherent power to maintain order in his or her courtroom and, unlike the ability to accept a waiver of presence, it is essential to preserving the dignity and decorum of judicial proceedings. (See *Allen, supra*, 397 U.S. at pp. 343-344.)

For all these reasons, appellant could not waive his right to be present during any of the aforementioned proceedings.

D. Appellant's Waiver Of His Right To Presence Was Invalid Under State Law And The Federal Due Process Clause

This Court has held that "when read together, sections 977 and 1043 permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1)." *People v. Weaver* (2001) 26 Cal.4th 876, 967 [citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1210, cert. den. (1997) 520 U.S. 1216].) This Court has further recognized, however, that section 977, subdivision (b)(1) – the subdivision that authorizes waiver for felony defendants – expressly provides for situations in which the defendant *cannot* waive his right to be present, including during the taking of evidence before the trier of fact. Section 1043, subdivision (b)(2), further makes clear that its broad "voluntary" exception to the requirement that felony defendants be present at trial does not apply to capital defendants. (*Ibid.* at pp. 967-68 [citing *People v. Jackson, supra*, 13 Cal.4th at p. 1210].) As this Court has acknowledged, "[t]he Legislature evidently intended that a capital defendant's right to voluntarily waive his right to be present be severely restricted." (*People v. Jackson, supra*, 13 Cal.4th at p. 1211; accord, *People v. Weaver, supra*, 26 Cal.4th at p. 968.) Also, because appellant's waiver was oral, the court's acceptance of it would be statutory error *even if*, contrary to the holding of *Jackson*, a capital defendant's right to be present during the taking of testimony were waivable. (Pen. Code, § 977, subds. (b)(1) and (b)(2).)[188]

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[188] While this Court suggested in *People v. Visciotti* (1992)2 Cal. 4th (continued...)

Indisputably, the trial court in this case, by permitting a nondisruptive capital defendant to be absent during the taking of evidence, committed error under sections 977 and 1043. This Court has held that an error of this type, being merely statutory, requires reversal only if "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" *People v. Jackson, supra*, 13 Cal.4th at p. 1211 [citing *People v. Watson, supra,* 46 Cal.2d at p.

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[188](...continued)
1, 49-50, that failure to follow this procedure was possible grounds for reversal only if it cast doubt on the knowing and voluntary nature of the defendant's waiver, such an interpretation of the statute renders pointless the Legislature's inclusion of specific requirements for a valid waiver. Any waiver of a constitutional right has to be knowing and voluntary (see, e.g., *Brady v. United States* (1970) 397 U.S. 742, 748; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) By laying out a particular form for waivers of the right to presence, the Legislature must have intended to impose requirements beyond the general ones of knowingness and voluntariness. If section 977, subdivision (b)(2) is to have any import, acceptance of an oral waiver must be deemed statutory error. It is a well-established rule of construction that courts should reject interpretations of a statute that make some of its provisions useless or superfluous. (See, e.g., *United States v. Nordic Village, Inc.* (1992) 503 U.S. 30, 36 [applying "the settled rule" that "a statute must, if possible, be construed in such fashion that every word has some operative effect"]; *Beisler v. Commissioner* (9th Cir. 1987) 814 F.2d 1304, 1307 ["We should avoid an interpretation of a statute that renders any part of it superfluous . . . ."]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["[A]n interpretation (of a statute) which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning."]; 2A Norman J. Singer, Sutherland's Statutory Construction (5th ed. 1992 & Supp. 1995) § 46.06 ["A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."]; 7 B.E. Witkin, Summary of California Law (9th ed. 1988 & Supp. 1998) § 94.)

836]; *People v. Weaver, supra*, 26 Cal.4th at p. 968.) In this case, however, the statutory error was also a violation of appellant's constitutional right and the *Chapman* harmless error standard should apply. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The arbitrary deprivation of a right secured by state law – here, a capital defendant's nonwaivable right to presence at trial – is a denial of due process. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) In *Hewitt v. Helms* (1983) 459 U.S. 460, 466, the Supreme Court explained that "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the States." In *Ford v. Wainwright, supra,* 477 U.S. at p. 428, Justice O'Connor, concurring in part, stated, "Our cases leave no doubt that where a statute indicates with 'language of an unmistakably mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." (*Ibid.* [quoting *Hewitt, supra*, 459 U.S. at pp. 471-472].) Penal Code section 977, using "language of an unmistakably mandatory character,"[189] creates an expectation on the part of nondisruptive capital defendants that they will not be convicted and sentenced without having been present at the proceedings listed in subdivision (b)(1). The

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[189] As previously noted, subdivision (b)(1) provides that "the accused *shall* be present at the arraignment, at the time of the plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused *shall* be personally present at all other proceedings unless he or she *shall*, with leave of court, execute in open court a written waiver of his or her right to be personally present [. . .]." (Italics added).

trial court's acceptance of appellant's waiver violated that expectation, and infringed upon a liberty interest protected by the Fourteenth Amendment.

Accordingly, since acceptance of appellant's waiver was federal constitutional error in addition to statutory error, appellant's convictions must be reversed unless the government shows that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) It also "'is reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error.'" (*People v. Jackson, supra*, 13 Cal.4th at p. 1211 [citing *People v. Watson, supra*, 46 Cal.2d at p. 836]; *People v. Weaver, supra*, 26 Cal.4th at p. 968.)

Under any analysis, the error was prejudicial and appellant's conviction must be reversed and his death judgment vacated.

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XXXI

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

The United States is one of the few nations that regularly uses the death penalty as a form of punishment. (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.).) And, as the Supreme Court of Canada recently explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme 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 imposition of the death penalty is unlawful. 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* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

A. International Law

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 1992, and applies to the states under the Supremacy Clause of the federal Constitution. U.S. Const. art. VI, § 1, cl. 2. Consequently, this Court is bound by the ICCPR.[190] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the

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[190] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot (1991) *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties*, 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty. (See Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582.)

supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284 ; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent, supra,* 43 Cal.3d at pp. 778-779; see also *id.* at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 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. Day* (9th Cir. 1995) 57 F.3d 1461, 1487, dis. opn. of Norris, J.) Thus, appellant requests that the Court reconsider and, in the context of this case, find his death sentence violates international law.

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky, supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830.) Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of

August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[191]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because 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.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.) [quoting 1 Kent's Commentaries 1]; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*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*, *supra*, 356 U.S. at p. 100.)

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[191] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (See Amnesty International's "List of Abolitionist and Retentionist Countries.")

And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have 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 totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p, 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 pp. 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"].)

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 the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence must be set aside.

XXXII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris, supra*, 586 F.2d at p. 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The improper removal of a single juror for cause is grounds for reversal; in this case, three jurors were improperly removed for cause. In addition, numerous guilt phase evidentiary and instructional errors resulted in the admission of highly inflammatory and prejudicial evidence. As previously set forth in this brief, many of the errors complained of herein had a synergistic and prejudicial effect. For example, the trial court's erroneous ruling on appellant's marital privilege led to the erroneous

admission of section 1101 evidence relating to the Keith Curry bombing, which in turn led to the erroneous admission of additional section 1101 evidence of a subsequent attack on Curry. (See Arguments VII and VIII, *ante*.) The erroneous admission of the taped statement of Andre Armstrong led to the erroneous admission of section 1101 evidence relating to the bribe of Rhonda Miller in the guilt phase and to the erroneous admission of aggravating in the penalty phase regarding the alleged solicitation of the murder of Sofinia Newsome. (See Arguments VII, IX and XXIII, *ante*.) The trial court's failure to grant appellant's motion to sever his case from that of codefendant Settle was exacerbated by its failure to control the conduct of trial. (See Arguments III and IV, *ante*.) The trial court's multiple errors relating to guilt phase instructions lessened the prosecution's burden of proof and permitted the jury to convict appellant based on criminal propensity. (See Arguments XV, XVI and XVII, *ante*.)

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643. Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct];

People v. Holt (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes, supra,* 52 Cal.3d at p. 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown, supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Aside from the erroneous exclusion of prospective jurors, which is reversible per se if, the errors committed at the penalty phase of appellant's trial include numerous instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina, supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

XXXIII

IF THE CONVICTION PURSUANT TO ANY COUNT IS REVERSED OR THE FINDING AS TO ANY SPECIAL CIRCUMSTANCE IS VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

The jury made its decision to impose a death judgment after having convicted appellant of four counts of first degree murder and one count of attempted murder. They had also found the special circumstance of multiple murder to be true. If this Court sets aside the convictions on any of the counts or the findings on any of the special circumstances, the entire matter must be remanded for a new sentencing determination. (See *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 [court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal].)

Penal Code section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, inter alia, "the circumstances of the crime of which the defendant was convicted." (CT 15820.)

A reversal of any of the charges or allegations would significantly alter the landscape the jury was considering when making its determination to assess death. The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reversal of any of the counts or the vacating of any of the special circumstances. Accordingly, to

meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the fact finder to consider the appropriateness of imposing death.

Moreover, in *Ring v. Arizona, supra,* 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey*, *supra,* 530 U.S. 466 to capital sentencing procedures, and concluded that specific findings the legislature makes prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In California, jurors must determine two critical facts to determine at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists, and (2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt.

Further, this Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483].) Accordingly, because jury findings regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed or reduced.

XXXIV

THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE APPELLANT HAS BEEN DENIED A COMPLETE AND ACCURATE RECORD ON APPEAL, IN VIOLATION OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS

Both the United States Supreme Court and this Court have long recognized that, under the Due Process Clause of the Fourteenth Amendment, the State has the duty to provide every appellant an adequate, complete and effective appellate review of his conviction. (*Entsminger v. Iowa* (1967) 386 U.S. 748, 752; *Draper v. Washington* (1963) 372 U.S. 487, 496; *People v. Barton* (1978) 21 Cal.3d 513, 518.) A "complete and adequate" appeal constitutionally requires a competent attorney acting as an advocate for the appellant (U.S. Const., Amends. VI and XIV), and "an appellate record that will permit a meaningful, effective presentation of the indigent's claims." (*Barton, supra*, at p. 518 [citing, inter alia, *Britt v. North Carolina* (1971) 404 U.S. 226, 227, and *Griffin v. Illinois* (1956) 351 U.S. 12]; accord *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041 [reversible error for failure to provide complete transcript of first trial to indigent defendant].) Anything short of a complete transcript of the proceedings below is incompatible with effective appellate advocacy. (See, e.g., *Hardy v. United States* (1964) 375 U.S. 277, 282.)

A defendant's state as well as federal due process right to such a complete record on appeal as will assure him meaningful and effective appellate review has been recognized in numerous California cases reversing convictions or lower court rulings for violations of those fundamental constitutional protections. (See, e.g., *In re Steven B.* (1979) 25 Cal.3d 1; *People v. Barton, supra*; 21 Cal.3d at p. 518; *March v. Municipal*

Court (1972) 7 Cal.3d 422; *People v. Jones* (1981) 125 Cal.App.3d 298; *In re Roderick S.* (1981) 125 Cal.App.3d 48; *People v. Apalatequi* (1978) 82 Cal.App.3d 970; *People v. Gloria* (1975) 47 Cal.App.3d 1; *People v. Serrato* (1965) 238 Cal.App.2d 112.)

The right to a complete and accurate record is of particular importance in capital appeals, because of the Eighth Amendment requirement of heightened reliability in capital cases (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305), the constitutional function of appellate review in such cases, and California's independent interest in the reliability of its death judgments (see *People v. Chadd, supra,* 28 Cal.3d at pp. 751-753). Thus, the United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally" (*Parker v. Dugger* (1991) 498 U.S. 308, 321), and has stressed "the importance of reviewing capital sentences on a complete record." (*Dobbs v. Zant* (1993) 506 U.S. 357, 358, [citing *Gardner v. Florida, supra,* 430 U.S. at p. 361, and *Gregg v. Georgia, supra,* 428 U.S. at pp. 167, 198].)

This Court has likewise reaffirmed, in the capital context, "the critical role of a proper and complete record in facilitating meaningful appellate review." (*People v. Hawthorne, supra,* 4 Cal.4th at p. 63.) As this Court has emphasized: "We cannot urge too strongly that trial judges assiduously preserve a detailed account of all proceedings regardless of their perceived significance, particularly in capital cases, to minimize the need to reconstruct events." (*Ibid.*)

These constitutional rights to a complete and accurate record in capital cases have also been codified in sections 190.7 and 190.9. Section 190.7 defines the "entire record" in such cases to be not only the "normal"

appellate record, but also to include a copy of "any other paper or record filed or lodged with the superior or municipal court and a transcript of any other oral proceeding" in those courts pertaining to the case. (See also former rule 39.5, Cal. Rules of Ct. [applicable to appellant's appeal and essentially tracking the requirements of section 190.7 to provide "the entire record" in capital appeals]; and present rule 34.1(a)(1)(C), Cal. Rules of Ct. [requiring inclusion in clerk's transcript of "any other document filed or lodged in the case"].) Section 190.9 provides that *all* court proceedings in the case "shall be conducted on the record with a court reporter present," and transcribed.

In short, as this Court has summarized the constitutional requirements of a complete and adequate record on appeal: "Under the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review. [Citations.] Under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed." (*People v. Howard* (1992) 1 Cal.4th 1132, 1166.) That risk survives given the insufficient record in this case.

Appellant has vigorously, but unsuccessfully, sought to obtain a complete and accurate record of the trial court proceedings in this case. On February 26, 2001, appellant filed a motion to correct, augment and settle the record on appeal in Los Angeles County Superior Court. (4 SUPP CT 1-115.) After receipt and review of additional corrected record not previously received, appellant then filed an amended motion on April 23, 2001. (5 SUPP CT 147-262.) On June 12, 2001, appellant filed a noticed motion for order prohibiting review of confidential materials and for return and sealing of those materials pursuant to Penal Code section 987.2 and

California Rules of Court, rule 39.51(b).[192] (5 SUPP CT 265-312.) After review of still additional record, appellant Bryant filed a supplemental motion to augment and settle the record on August 23, 2001. (6 SUPP CT 3668-3678.) On March 12, 2002, appellant filed a second amended motion to correct, augment and settle the record. (6 SUPP CT 3734-3743.)

Appellant's motion to seal confidential section 987.2 records was denied in its entirety. (RCRT 1332-1339.) With regard to appellant's original motion to correct, augment and settle the record, the trial court denied appellant's requests to correct and settle the record in toto, without addressing the merits of the individual requests. (RCRT 1435-1443.) The remaining requests were granted in part and denied in part, as reflected in the RCRT. The record on appeal was certified to this Court on July 12, 2002.

On September 13, 2002, appellant filed in this Court a motion to vacate certification, or, in the alternative, to correct, augment and settle the record in this case (S049596)("Motion to Vacate"). That motion remains pending to date, and is incorporated by reference as if fully set forth herein.

The vast majority of settlement requests that were denied involve trial witnesses' physical gestures, which were employed by such witnesses as substitutes for, and as an integral part of, their oral testimony which the trier of fact – the jurors – saw and considered as evidence in evaluating such testimony. (Motion to Vacate, section V; see Evid. Code, §§ 140 ["'Evidence' means testimony, writings, material objects, *or other things*

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[192] On April 27, 2001, the trial court denied appellant's request to file the motion under seal; said motion was filed contemporaneously with his original motion to correct augment and settle the record. (RCRT 1192-1196.)

presented to the senses that are offered to prove the existence or nonexistence of a fact." (italics added)] and 225 ["'Statement' means . . . (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."]; *In re Horton* (1991) 54 Cal.3d 82, 89].) [settled statement to provide a record of gestures and tone of voice].)

Also missing are such matters as various "off the record" or unreported discussion between the lower court and counsel. (See Motion to Vacate, section V.) Appellant was also precluded from attempted to settle the record with regard to hearings that should have been reported, transcribed and included in the record on appeal (§ 190.9; see *People v. Seaton* (2001) 26 Cal.4th 598, 700 ["It is important that trial courts 'meticulously comply with Penal Code section 190.9, and place all proceedings on the record.'" (quoting *People v. Freeman* (1994) 8 Cal.4th 450, 511)]) and various charts and other visual aids used by both counsel in opening statements and closing. (See *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585 ["The rules authorizing settlement . . . are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court. . . . Defendant is entitled to an appellate record that accurately reflects what was said and done in the trial court. . . ."]; Motion to Vacate, section V.)

Further missing are sealed records and requested settlement items without which appellant cannot fully argue the merits of his claims of error. (Motion to Vacate, section IV; see, e.g., Arguments I, XIII and XV, *ante*.) Still further, appellant was denied an opportunity to correct the record on appeal. (Motion to Vacate, section III.)

The absence of the aforementioned records and the denial of appellant's requests to correct the record violates not only the applicable

statutes and court rules, but also appellant's state and federal constitutional rights to a complete and adequate record in a capital appeal and to the effective assistance of appellate counsel. (U.S. Const., Amends. VI, VII, XIV; Cal. Const., art. I, §§ 15, 17.)

Moreover, the failure to grant appellant's request to seal Penal Code section 979.2 records, which were erroneously included in the record on appeal under California Rules of Court rule 39.51(b), has denied appellant his state statutory right to confidentiality of trial preparations in a capital case, his federal constitutional rights to effective assistance of counsel, due process of law and the prohibition against forced self-incrimination, and the fundamental privileges against the disclosure of attorney work-product and attorney/client communications, in accordance with appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and Article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (Motion to Vacate, section VI; see also *Osband v. Woodford* (2002) 290 F.3d 1036, 1042 [petitioner in a habeas corpus action who raises a Sixth Amendment claim of ineffective assistance of counsel waives the attorney-client privilege as to the matters challenged, but it is within the discretion of the district court to issue an order limiting that waiver to the habeas proceeding in which the ineffective assistance question is raised].)

Appellant is aware of this Court's repeated rulings that "a complaining party bears the burden of demonstrating that the appellate record is not adequate to permit meaningful appellate review." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1334, fn. 70; accord *People v. Catlin, supra,* 26 Cal.4th at p. 166; *People v. Alvarez, supra,* 14 Cal.4th at p. 196, fn. 8.) However, that standard has been applied to cases in which the defendant was provided with a meaningful opportunity to develop the

appellate record in the trial court. Much of appellant's motion to correct, augment and settle the record was denied wholesale by the trial court, and his continued requests to correct, augment and settle the record on appeal remain pending in this Court to date. Appellant submits that, under such circumstances, basic of principles of due process and fundamental fairness (U.S. Const., Amend. XIV) and of the Eighth Amendment's requirements of heightened reliability and due process in capital cases preclude the imposition of the burden of proof upon appellant.

Assuming arguendo this Court rules the burden is on appellant, appellant respectfully asks this Court to reconsider its position on the basis of those same principles. (See, e.g., *United States v. Selva* (5th Cir. 1977) 559 F.2d 1303, 1305-1306; *Dunn v. State* (Tex.Crim.App. 1987) 733 S.W.2d 212, 216-217 [inadequate capital record mandates reversal absent any showing or even allegation by appellant of prejudice, as a matter of policy for the preceding 40 years].) It is simply unfair to require a criminal defendant to bear the burden of showing how missing portions of a record prevent him from raising issues the existence and nature of which he is forced to speculate about. "[W]hen a defendant is represented on appeal by counsel not involved at trial, counsel cannot reasonably be expected to show specific prejudice." (*United States v. Selva, supra,* 559 F.2d at p. 1306; cf. *Britt v. North Carolina, supra*, 404 U.S. at p. 230 ["A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight."]; *Madera v. Risley* (9th Cir. 1989) 885 F.2d 646, 648.) Under such "Catch-22" circumstances, to condition relief upon a specific showing of how the omission harms the appellant "would render illusory an appellant's right to notice plain errors or

defects, . . . and render merely technical his right to an appeal." (*United States v. Selva, supra*, 559 F.2d at p. 1306.)

Such logical considerations are especially vital in a capital case: "That this Court have before it the entire record in a capital case serves a public policy which considers assuring evenhanded imposition of the ultimate penalty as important, if not more so, than faulting the one condemned for inability to demonstrate on appeal how an error resulted in disadvantage." (*Dunn v. State, supra*, 733 S.W.2d at p. 216; internal quotation marks omitted.)

Appellant submits that an incomplete and inadequate record like appellant's is tantamount to a "structural defect affecting the framework within which the [appeal] proceeds," which requires reversal of the judgment without a specific showing of prejudice. (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310; see *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 281-282 [deficient reasonable-doubt instruction constitutes a structural error and is not subject to harmless-error analysis].) But even if an automatic-reversal standard is not applied here, prejudicial error must be found because of the critical nature of the missing record, the sealed proceedings not provided to appellant, and the lost or unlocated written materials.

The blatant failure to provide appellant with a complete and adequate record on appeal in itself requires reversal of the death judgment, because it has rendered the appellate record *not* "sufficient to ensure that there is no substantial risk the death penalty has been arbitrarily imposed." (*People v. Howard, supra*, 1 Cal.4th at p. 1166.) "It is far better that a defendant be retried than that the State should permit itself to be subject to the criticism

that it has denied an appellant a fair and adequate record on appeal." (*In re Steven B., supra*, 25 Cal.3d at p. 9; internal quotations omitted.)

Here, a review of the record as a whole demonstrates that appellant has not been provided with an adequate opportunity to develop the record, has not been provided with an adequate record, and that the record certified to this Court is inadequate to provide appellant the full and fair review of the proceedings below to which he is constitutionally entitled. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, §§ 7 & 15.)

Not only can this Court not "conduct a meaningful review" of the issues raised because of the inadequate settled record (*People v. Holloway, supra*, 50 Cal.3d at p. 1116), but it is impossible to determine how many other issues could have been raised on appellant's behalf were there a complete and adequate record. As the United States Supreme Court has noted: "Frequently, issues simply cannot even be seen – let alone assessed – without reading an accurate transcript." (*Hardy v. United States, supra*, 375 U.S. at p. 280, fn. 3.) Clearly, the right to notice errors or defects that might be raised on appeal is "illusory" without a complete and adequate record. (See *id.* at p. 280; see also *People v. Barton, supra*, 21 Cal.3d at pp. 519-520 ["Obviously, if counsel has a duty to cite to the appellate record in support of his contentions, then counsel has a duty to insure that there is an adequate record before the appellate court from which those contentions may be resolved on their merits."]; cf. *People v. Sarazzawski* (1945) 27 Cal.2d 7, 19 [a complete showing of prejudice cannot reasonably be required because "the very substance and nature of the error would normally operate to preclude the possibility of such a showing"].)

As a result, the entire judgment must be reversed. (See, e.g., *In re Steven B., supra*, 25 Cal.3d at pp. 7-9 [settled statement deemed inadequate

"substitute for complete record"]; *People v. Apalatequi, supra*, 82 Cal.App.3d at p . 973 [settled statement "insufficient to afford this defendant effective appellate review"]; *United States v. Selva, supra*, 559 F.2d at p. 1306 ["When, as here, a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal."].)

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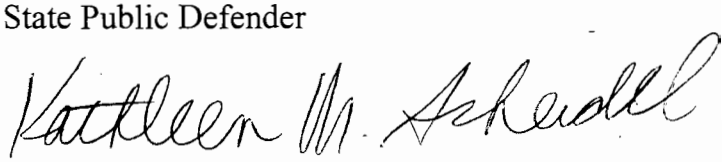
CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: December 13, 2004

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant Stanley Bryant in this automatic appeal. I instructed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 189,867 words in length.

Since the brief is over the 95,2000 word limit, I have filed simultaneously with this brief an application for leave to file an oversized brief.

Dated: December 13, 2004

Kathleen M. Scheidel

KATHLEEN M. SCHEIDEL
Assistant State Public Defender
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DECLARATION OF SERVICE

Re: People v. Bryant, Wheeler and Smith No. S049596

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
300 South Spring Street
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David Goodwin
P. O. Box 93579
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Conrad Petermann
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Stanley Bryant
CDC ID # J-83400
San Quentin State Prison
San Quentin, CA 94964
(TO BE DELIVERED BY HAND ON DECEMBER 14, 2004)

Each said envelope was then, on December 13, 2004, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on December 13, 2004, at San Francisco, California.

Glenice Fuller

DECLARANT