No. S031641

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GREGORY O. TATE,

Defendant and Appellant.

(Alameda County Superior
Court No. 93308

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda

HONORABLE ALFRED A. DELUCCHI, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GREGORY O. TATE, Defendant and Appellant.	No. S031641 (Alameda County Superior Court No. 93308)

APPELLANT'S OPENING BRIEF

INTRODUCTION

It has often been said that while the prosecutor may strike hard blows in his pursuit of a conviction, he is prohibited from striking foul blows.[1] Despite its frequent repetition in the decisions of this and other courts, this message appears to have been willfully ignored by the prosecutor in this case. To make matters worse, the trial court ultimately proved itself unable to effectively prevent and correct the prosecutor's many acts of misconduct. The unfortunate result was a trial fatally infected by unfairness, culminating in appellant's conviction and sentence of death.

Time and again, defense counsel's objections to the prosecutor's acts

[1] This image of the prosecutor as a combatant, constrained by moral force, originated in *Berger v. United States* (1935) 295 U.S. 78, 88.

of misconduct were met with, at best, the trial court's avuncular advice to the jury that they could disregard the prosecutor's misconduct, sometimes combined with a suggestion to the prosecutor to "keep it in the ballpark." Consequently, the jurors who decided appellant's fate could not help but be swayed by the prosecutor's improprieties, especially when he elicited inflammatory and inadmissible evidence of appellant's purported violent acts and accused defense counsel of colluding with appellant to fabricate the defense.

Unfortunately, the trial court's failings did not end with its failure to control the prosecutor. They began when the court largely failed in its duty to select an impartial jury. There, in addition to the wholesale and improper restriction of death-qualification voir dire, the trial court consistently misapplied the federal constitutional standard for disqualification, resulting in the improper exclusion of six prospective jurors. Among this group, the trial court excluded an African-American woman, previously found to be qualified after voir dire, on the prosecutor's bare assertion (made three weeks after the voir dire) that she had misstated her academic achievements in her jury questionnaire, without providing her or appellant an opportunity to contest the prosecutor's allegation. Further, the trial court excused, on hardship grounds, an African-American college student on the stated grounds that the court did not want to have jury service interfere with the prospective juror's schooling, even though the prospective juror had not requested to be excused.

Regrettably, the trial court was no more successful in rendering correct rulings during the presentation of evidence and in instructing the jury. Its rulings admitting evidence of appellant's admissions to law enforcement during custodial interrogation were contrary to evidence and

law, as were its rulings denying requested defense instructions and its delivery of several deficient instructions.

Stripped to its essentials, the question presented for appellant's jury at the guilt phase was one of identity: was the state's circumstantial case strong enough to prove beyond reasonable doubt that appellant was the person who killed the victim? Despite the simplicity of the issue, the jury's deliberations over three days show that is was not so easy for them to resolve that question. During those three days, the jurors communicated with the trial court frequently. They made eight separate written requests to the trial court, asking for additional instruction, readback of appellant's testimony, the playing of a tape-recording of appellant's interrogation after his arrest, and the opportunity to examine several exhibits.

The ultimate evidence of the trial court's misguided stewardship of appellant's trial can be found in the instructions given to the jury both before and during deliberations. Thus, for example, in the guilt phase the trial court delivered an instruction that directed the jury to find appellant guilty of murder if it found beyond a reasonable doubt that he had committed burglary, a crime with which appellant was not charged.

Equally astounding instructional errors characterized the penalty phase. Penalty-phase deliberations in this case lasted eight days, a sure sign of the closeness of the case in which the defense offered mitigating evidence of appellant's sordid and harrowing upbringing, depicting his childhood and teenage years as having been characterized by physical and mental abuse, the tragic and untimely deaths of close friends and kin, inadequate adult supervision, emotional support, and educational opportunity. These lengthy deliberations also demonstrate a clear rejection of any assertion that the prosecution's case for death was compelling.

During the second day of deliberations, the jury requested guidance on two mitigating factors. The trial court's response was both inadequate and incorrect. On the fifth day of deliberations, the court was informed that the jury was irrevocably deadlocked. During the ensuing discussion about how and whether to proceed, the jury asked the court which of the two available penalties was the more severe. Astonishingly, the trial court refused to answer this fundamental question, and instead told the jury that the issue was which penalty was appropriate, not which penalty was more severe.

In sum, appellant's trial was tainted with a myriad of errors, many of which went directly to the critical question of identity. These include evidentiary errors, systematic and pervasive prosecutorial misconduct, and instructional errors. The inescapable fact is that there are many reasons to reverse appellant's conviction and sentence. Some of those reasons mandate automatic reversal. Others require a showing of prejudice. Because the jury deliberations demonstrate that this was a close case, the many errors which characterize appellant's trial require reversal of the entire judgment.

STATEMENT OF THE CASE

By information filed on August 3, 1988, in Alameda County Superior Court, appellant was charged with a single count of murder under Penal Code section 187.[2] The offense charged was alleged to have been committed on or about April 18, 1988. A special circumstance of murder in the commission of a robbery was alleged within the meaning of section 190.2, subdivision (a)(17), as was a special circumstance of murder in the

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

commission of a burglary, also within the meaning of section 190.2, subdivision (a)(17). Personal use of a deadly and dangerous weapon, to wit, a knife, within the meaning of section 12022, subdivision (b), was alleged in connection with the charge of murder. A probation-ineligibility clause, within the meaning of section 1203.075, alleged that appellant had intended to, and did in fact, personally inflict great bodily injury on the victim of the murder during its commission or attempted commission. (1 CT 194-195.)[3]

On August 4, 1988, appellant was arraigned, entered a plea of not guilty, and denied the special circumstances and other allegations. (1 CT 198; 8/4/88 RT 1-2.)

On May 21, 1992, the matter was assigned to the Honorable Alfred A. Delucchi for trial. (1 RT 1.) Between May 21, 1992, and September 10, 1992, various pretrial motions were heard in the trial department. (2 CT 258-514.) On September 10, 1992, the information was amended on the People's motion by striking the term "intentional" from each of the two section 190.2, subdivision (a)(17), special circumstances, and by striking the section 1203.075 probation-ineligibility allegation. (2 CT 515; 1 RT 258-260.)

Jury selection commenced on September 10, 1992, with the distribution of questionnaires to the venire. (2 CT 515.) Thereafter, individual and sequestered voir dire was conducted between September 14, 1992, and November 23, 1992. (3 CT 607.) On November 30, 1992, the trial court entertained and denied appellant's motions to exclude various

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[3] "CT" refers to the clerk's transcript and "RT" refers to the reporter's transcript.

extrajudicial statements. (3 CT 627; 23 RT 3196-3263, 3273-3328.)

Jury selection was completed on December 1, 1992. (3 CT 631.) On December 2, 1992, testimony in the guilt phase began. (3 CT 635-636.) The prosecution rested on December 10, 1992 (3 CT 654), and the defense rested on December 15, 1992 (3 CT 658). The jury commenced deliberations at noon on December 22, 1992. (1 CT 240.) On December 28, 1992, the jury rendered its verdicts, finding appellant guilty of first degree murder and returned true findings as to both special circumstances as well as the personal-use-of-a-knife allegation. (3 CT 702-705; 34 RT 4639-4655.)

The penalty phase commenced on January 7, 1993 with pretrial motions. (3 CT 786.) The respective parties made their opening statements on January 11, 1993, and testimony in the penalty phase began that same day. (3 CT 812.)

Jury deliberations on penalty began at noon on January 27, 1993. (5 CT 1045.) On February 2, 1993, the jury requested assistance from the trial court, reporting themselves "irrivocably [*sic*] deadlocked." (5 CT 1055; 44 RT 5871-5872.) After receiving additional instructions from the court on February 2, 1993, the jury returned its death verdict on February 5, 1993. (5 CT 1059, 1102; 44 RT 5889-5892.)

On March 1, 1993, appellant filed a motion for new trial. (5 CT 1103-1105.)

On March 5, 1993, appellant's motion for new trial and the automatic motion for modification of sentence were heard and denied. On the same day, the court sentenced appellant to death for first degree murder with the robbery and burglary special circumstances. Additionally, the court imposed a determinate term of one year in state prison for the section

12022, subdivision (b) allegation and directed that the determinate term run concurrent with the death judgment. Credit for time served prior to imposition of judgment was allocated in the aggregate amount of 2,673 days, and a $200 restitution fine was imposed and stayed. (5 CT 1113, 1114-1132.)

On March 11, 1993, on its own motion, the trial court corrected its original judgment with respect to the section 12022, subdivision (b) allegation by striking this allegation for sentencing purposes rather than have the one year determinate term run concurrently with the death judgment. (5 CT 1134-1137.)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (§ 1239, subd. (b).) The appeal is taken from a judgment which disposes of all issues between the parties.

STATEMENT OF FACTS

A. The Guilt Phase

1. The Prosecution Case

a. Sarah LaChapelle's Body is Discovered

In the evening of April 18, 1998, Tanya DeLaHoussaye went to the home of her boyfriend's[4] mother, Sarah LaChapelle, to retrieve the phone book she had left there. (25 RT 3391-3393.) LaChapelle and DeLaHoussaye visited briefly. Before DeLaHoussaye left, she noted that LaChapelle's burgundy Oldsmobile was parked in the driveway. (25 RT 3394.) Other than the person or persons responsible for LaChapelle's

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[4] At the time, Tanya DeLaHousse was living with the victim's son, Anthony LaChapelle, and was the mother of his daughter. (25 RT 3425.)

death, DeLaHoussaye was the last person to see the victim alive.

On the following day, at around 11:00 a.m., Anthony LaChapelle went to his mother's home on 9938 Hesket Road in the city of Oakland. (25 RT 3398.) He noticed nothing unusual about his mother's house before entering. (25 RT 3422.) Anthony recalled that his mother's car was not in the driveway, nor anywhere around the house. (25 RT 3398.) The front screen door was closed, but the interior door was open.[5] Upon entering, Anthony found his mother, clad in a cotton gown, dead in the living room. (25 RT 3399, 3402.) His mother usually kept her home neat and clean, but when Anthony discovered her body, the house was not in an orderly condition. Things were turned over, including a chair, and it appeared as if things had been thrown about. (25 RT 3419-3420.) Anthony could only remember focusing on his mother's finger on the living room floor. (25 RT 3419.) Anthony briefly looked around the house and became scared after noticing a hole in the back door where it appeared as if it had been kicked in. He called Tanya and his father to give them the news. Anthony then called 911, and left the house to await the arrival of the police. (25 RT 3399, 3408.)

Although Anthony was unable to describe his mother's jewelry with any particularity, he did recall that she customarily wore a diamond wedding ring and a little band. (25 RT 3421.) He identified a photograph of his mother's left hand in which these two rings were visible. (25 RT 3401.) Anthony also identified a VCR and a small radio/TV depicted in a photograph of the back seat and floor area of his mother's car as items

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[5] The victim usually kept her car and house keys in the front door lock, but Anthony did not see them in their usual place when he discovered his mother's body. (25 RT 3416.)

belonging to his mother which she kept in her home. (25 RT 3403-3405.)

Anthony testified that his mother never kept her credit or bank cards in her car as these were items she always kept in her purse. (25 RT 3406.) According to Anthony, his mother owned a number of kitchen knives which she kept in a drawer rather than in a butcher block. (25 RT 3417.) She also owned tools, probably a hammer among them, which were stored in the kitchen and washroom area. (25 RT 3418.) According to Anthony, his mother also owned a clothing iron, which she kept openly visible in the washroom area, next to the kitchen. (RT 3420.)

Harriet Davis was one of the evidence technicians who responded to the LaChapelle residence. (25 RT 3436.) In the living room, she observed and photographed the victim's body. (25 RT 3443, 3467.) The victim's clothing was pulled up above her waist, and there was a telephone cord wrapped around the right wrist. (25 RT 3468-3470.) Davis was able to see that there was a knife protruding from the middle of her back as well as a fork protruding from the right side of her neck. (25 RT 3467.) Davis was able to observe a deep gash to the top of the victim's head, as well as a severed finger. (25 RT 3467, 3472.)

In the vicinity of the body, Davis observed two knives, one with a serrated blade, and what appeared to be the contents of the victim's purse strewn about. (25 RT 3472.) Davis could see signs of a bloody struggle in the living room, including an overturned chair, bloody footprints, and blood spattering on a radio, aquarium leg, chair cushion, wall picture, and curtain bottoms, as well as on the inside front door below the mail slot. (25 RT 3466, 3468-3470, 3495.)

Davis examined the two bedrooms located in the front part of the house which appeared to have been ransacked, and secured a number of

latent fingerprints from both. (25 RT 3437-3441, 3450; 26 RT 3487-3489, 3496-3498.) Inside the front bedroom, Davis located a jewelry box on the bed and took fingerprint lifts from it. (25 RT 3438-3439.) Davis also found a can resembling a flower pot on the bed containing coins wrapped in paper rolls. (25 RT 3445-3446.) She also lifted prints from a peanut can containing coins, and from a plastic box found on the floor underneath a dresser. (25 RT 3440.) She noted that the telephone in this bedroom was missing its cord, and she seized a green blouse from the bed which appeared to be blood-stained. (25 RT 3446-3447.)

In the hallway between the living room and the two bedrooms, Davis found a butcher knife with a serrated blade and a brown handle lying on a coat sleeve. Nearby was another butcher knife with a brown handle. (25 RT 3448.)

Examining the back of the house, Davis found obvious signs of a forced entry to the rear door. There were cracks around the doorknob and some of the wood had been forced away from the deadbolt lock. There was a hole in the lower portion of the door and the frame was broken below the doorknob. Broken floor paneling and dirt were found on the tiles leading from the back door into the den. (25 RT 3453.) The curtain covering the window in the upper area of the door appeared to be bloodstained, as did the adjacent wall in the laundry area by an ironing board. (25 RT 3454.) The tile floor in this area showed evidence of bloody footprints. (25 RT 3455-3456.)

In the kitchen, Davis saw that there was a cord protruding from the sink all the way down to the floor. In the sink, among other items, Davis

observed a broken hand iron, a pot of water, a hammer and a knife.[6] (25 RT 3459.) In the dish rack near the sink, Davis found a bowl that looked as if it contained blood. (25 RT 3460.) Also near the sink was a knife block containing three knives, with two empty knife slots. The kitchen trash can contained a paper towel with what appeared to be blood on it. The kitchen light switch also appeared to be blood-stained. Davis observed two separate phone cords criss-crossing the kitchen floor, as well as more footprints and blood drops. On the kitchen table, Davis found yet another knife which she described as a bloody steak knife. (25 RT 3461.) Also on the kitchen table was a plastic shopping bag with some blood on it. There was some blood spattering on the cabinetry by the refrigerator, moving downward to the floor. (25 RT 3462-3463.)

Officer Thomas Viglienzone was another evidence technician who responded to the LaChapelle home.[7] He assisted Officer Dale Burnell in photographing and removing certain kitchen tiles containing both a shoeprint and a footprint. (26 RT 3516, 3523.) Officer Burnell was the evidence technician who was primarily responsible for dusting the LaChapelle crime scene for fingerprints. (27 RT 3618.) To accomplish this task, Burnell dusted all the interior portions of the living room and kitchen areas, as well as the front and rear doors. As a result of this examination, Burnell was able to obtain four lifts: two from a telephone in the living-

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[6] Later in her testimony, Davis referred to the hammer as a mallet, observing that its handle appeared to have blood on it, as did a barbeque fork also found in the sink. (25 RT 3451-3462.)

[7] Officer Viglienzone responded to the LaChapelle home on April 19, 1988, after collecting evidence from the victim's car, which had been stopped on Kingsland Avenue in Oakland earlier that evening. (26 RT 3507.)

room area and two from the interior rear door. (27 RT 3619.) He also collected a number of knives, a mallet, and a barbeque fork with bent tongs for later fingerprint processing. (27 RT 3669.) In the living room, near where the victim's body was located, Burnell found two medicine bottles bearing the victim's name, as well as her purse, checkbook, driver's license, healthcare card, and a number of her credit cards. (27 RT 3634, 3638.) Finally, Burnell recovered a blouse from the kitchen floor which appeared to be blood-stained on the outside surface only. (27 RT 3647.)

b. The Pathologist's Evidence

Dr. Thomas Rogers performed the autopsy. (26 RT 3529.) He examined the body for evidence of stab, puncture or incised wounds and determined that the victim had suffered a number of such wounds, the majority of which were stab wounds to the back. (26 RT 3530-3531, 3538.) In addition to the previously-noted wounds, Dr. Rogers examined the body for evidence of blunt injury, i.e., injuries caused by blunt-force trauma. (26 RT 3539.) He noted several such injuries, mainly to the head and face. (26 RT 3539-3541, 3552.) Dr. Rogers also observed that the ring finger on the victim's left hand had been severed close to the knuckle. (26 RT 3543-3544.)

Although he believed the victim was alive at the time the multiple wounds were inflicted, Dr. Rogers could not say that she was conscious. (26 RT 3576-3577, 3578-3579.) It was certainly possible that the victim was in a state of shock, particularly at the time her finger was severed, as Dr. Rogers was only able to detect microscopic hemorrhaging at the margin of the finger. As for the cause of death, Dr. Rogers attributed the victim's death to multiple stab wounds, multiple puncture wounds, and multiple blunt injuries. (26 RT 3556.)

c. Appellant is Found Driving the Victim's Car

At approximately 6:00 p.m. on April 19, 1988, Oakland police officers Kevin Sullivan and Alex Boyovich were in a semi-marked police car on Kingsland Avenue in Oakland when Sullivan spotted a burgundy Oldsmobile that Boyovich was aware had been reported stolen. (26 RT 3586-3587.) The officers initiated a car stop and detained the driver. (26 RT 3587.)

Because of the passage of time, Sullivan could not definitively identify appellant as the driver he detained. However, Sullivan[8] testified that appellant resembled the driver, and that he was certain that the driver he detained and ultimately arrested that day was named Gregory Tate. (26 RT 3588, 3595-3596.)

Although appellant was the only occupant of the car, Sullivan observed a second person standing outside the right passenger door of the burgundy Oldsmobile who appeared to be talking to appellant. (26 RT 3589.) When Boyovich and Sullivan approached the car, this man attempted to leave and was detained but ultimately released. (26 RT 3599, 3605.) Appellant was ordered out of the car by Sullivan, handcuffed and placed in the police car. While in the police car, but before he was transported to the homicide bureau of the Oakland Police Department, appellant made a statement to Sullivan to the effect that he had received the car from "a guy named Fred Bush." (26 RT 3589.)

Sullivan searched appellant at the scene of the car stop, but found no weapons or jewelry on him. (26 RT 3590.) Although the burgundy

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[8] At the time of his trial testimony, Sullivan was no longer employed as a police officer but was a defendant in a pending robbery case prosecuted by the Alameda County District Attorney's Office. (26 RT 3596-3598.)

Oldsmobile was towed for the benefit of the homicide office, Sullivan and Boyovich did not "search" the car. However, Sullivan did note the presence of a small "meat carving" knife on the driver's floorboard, as well as the presence of certain electrical appliances in the back seat. (26 RT 3592.)

At the time the car was stopped, Sullivan was unaware that it was in any way implicated in a homicide case, but he soon learned from Boyovich that the car was being sought in a homicide investigation. (26 RT 3598, 3606.) Sullivan testified that at no time did he inform appellant that he was being transported to the homicide bureau or that the car appellant was driving was involved in a homicide. Sullivan could not recall whether he told appellant that the car he was driving was stolen, but it was standard police practice in an auto-theft case to inform the person arrested of the fact that the arrest was for auto theft. (26 RT 3607.) Eventually, Sullivan and Boyovich transported appellant to the homicide bureau, where appellant was placed in an interview room. (26 RT 3608.)

Officer Viglienzone responded to the scene of appellant's arrest on Kingsland Avenue and took responsibility for the victim's Oldsmobile. (26 RT 3507.) The keys to the car were in the ignition and the engine was running. (26 RT 3514.) The two automobile keys were on a key ring which did not contain any other keys. (26 RT 3524.) The car was towed to the Oakland transportation yard and processed for evidence. (26 RT 3508.) Latent fingerprint lifts were removed from locations on the car. (26 RT 3508-3510.) Viglienzone retrieved a knife from the front floorboard area underneath the driver's seat, as well as a TV/radio, a VCR, a pair of red leather pants and a children's book entitled "Bambi" from the rear seat and

floorboard area.[9] (26 RT 3512.) He did not locate any diamond rings. (26 RT 3514-3515.)

d. The Police Recover Property Belonging to the Victim at the Home of Appellant's Girlfriend, Lisa Henry

In April of 1988, Lisa Henry was appellant's girlfriend and three-months pregnant with appellant's child. At that time, she lived at 5320 Yuba Avenue in Oakland, with her younger brother Germaine and her father. (27 RT 3679, 3687.) Appellant stayed with Lisa on and off after he got out of the hospital that month. (27 RT 3683.) The Oakland police obtained a search warrant for the Henry home, which they executed on the morning of April 20, 1988. (30 RT 3970.) Sergeant Ramon Paniagua, the lead investigator in the LaChapelle homicide, was one of the officers who served the search warrant. (30 RT 3970.) Present at the time of the search were Lisa and Germaine. (30 RT 3972.) Among the items seized from the Henry home were a silver chain, a Timex watch, a Chase Manhattan Visa card in the victim's name, and a two-dollar nickel-paper wrapper. (30 RT 3972-3973.) The watch and the silver chain were given to the police by Lisa after Paniagua informed her that he was looking for evidence that could have been taken during the homicide. (30 RT 4053.) After completing the search, Paniagua took Lisa to the homicide section of the police department where appellant was being held. (30 RT 3973.)

e. The Police Begin to Question Appellant

On April 19, 1988, Paniagua arrived at Kingsland Avenue where Officer Sullivan had located the victim's car. There, he saw appellant in the

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[9] Viglienzone did not recover any fingerprints from the knife, VCR, or TV/radio. (26 RT 3525.)

back seat of a police car. At Paniagua's direction, appellant was transported to the homicide section and placed in interview room 202. (30 RT 3973.) Paniagua arrived at the homicide section at 7:25 p.m. that evening where he met Sullivan and Boyovich standing in front of room 202. Paniagua noticed a pair of shoes that had been taken from appellant in front of the door to the interview room. (30 RT 3974.) He examined the shoes and noticed a red liquid which looked like blood on the inside of the right shoe. (30 RT 3975.)

During the next two hours, Paniagua discussed the case with Sullivan and Boyovich. (30 RT 3979.) He also interviewed a potential witness, and, through official police channels, obtained a booking photograph of a Fred Bush, and learned that Fred Bush was presently in custody at the Santa Rita County Jail.[10] (30 RT 3979-3982.) By 9:25 p.m., Paniagua and his partner, Sergeant Medsker, were prepared to begin their questioning of appellant. (30 RT 3982-3983.)

When Paniagua entered the interview room, he noticed that there was blood on the sleeve of appellant's sweater. (30 RT 3984.) Although he was aware that appellant's shoes appeared to be bloody, and that appellant was found in the victim's car which also contained property removed from the victim's home, Paniagua claimed that he was unaware that appellant was a suspect in the victim's homicide. (30 RT 3986-3987.)

The first 35 minutes of Paniagua's interrogation were not tape-recorded. (30 RT 3985, 3998.) However, he took handwritten notes of this

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[10] Alameda County Sheriff's Department business records admitted in evidence at trial showed that Fred Bush was booked into jail on April 7, 1988, and remained in custody with that agency until July 18, 1988. (30 RT 4058-4062.)

portion of the interview. (30 RT 3990.) Although Paniagua advised appellant of his *Miranda* rights, he did not inform him that he was a suspect in the victim's murder until the interrogation was completed. Instead, Paniagua told appellant he had been arrested for car theft. (30 RT 3989.)

During this unrecorded portion of the questioning, Paniagua answered appellant's question as to the reason for his being in custody by explaining that he was in custody for auto theft and that Paniagua was involved in an investigation of the theft in which "a lady got hurt." (30 RT 4004.) Paniagua testified that he did not intend to deceive appellant in any way with this explanation. (30 RT 4004.) During the first two minutes of the resumed (and recorded) questioning, appellant can be heard on the tape asking Paniagua: "This is homicide?" (30 RT 4003.)

According to Paniagua, the unrecorded beginning of the interrogation was concerned with questions concerning appellant's background and where he lived. (30 RT 3990-3991.) However, Paniagua asked appellant about the blood on his sweater and appellant replied that the stain resulted from a nose-bleed. (30 RT 3990.)

When Paniagua asked appellant where he lived, he initially gave his grandmother's address as his own. (30 RT 3991.) Appellant's grandmother, Lurlean Jackson, resided on Hesket Road in Oakland, and was the victim's neighbor and friend. (27 RT 3680; 28 RT 3734; 35 RT 4678.) However, appellant also told Paniagua that he was staying with his girlfriend, Lisa, on Yuba Avenue. (30 RT 3991.)

Just prior to the interrogation, Paniagua had learned that the police had been dispatched to the grandmother's home on Hesket Road twice on April 18, 1988. (30 RT 3991-3992.) Paniagua asked appellant if he had been at his grandmother's home the previous day, and appellant replied that

he had been there between 2:00 and 3:00 p.m. (30 RT 3993.)

When Paniagua asked about appellant's whereabouts on the night of the homicide, he said that he was staying with Lisa at the time, and had slept at her home on Yuba Avenue on the night of April 18, 1988. (30 RT 3994.) Appellant said that he arrived at Lisa's house at around 8:00 p.m., after taking the No. 57 bus from Hegenberger Road. When he arrived, Lisa was present with her father (Reggie), her little sister (Mickie), and her brother (Germaine). (30 RT 3995.)

Appellant went on to explain that he woke up at about 10:00 a.m. on April 19, 1988, and proceeded to the 55th Avenue Motel near Foothill Avenue, where he met with Fred Bush. Bush was in a burgundy-colored car, the same one appellant was later stopped in. (30 RT 3996.) When Paniagua asked how appellant came to be in possession of the car, he said that Bush owed him $500 and was trying to sell him a VCR and a small TV set. Appellant made a deal with Bush that involved appellant trading two rocks of cocaine (worth $20 each) for the TV, the VCR, and the use of the car until 11:00 p.m., so that appellant could go to the drive-in movie with Lisa. (30 RT 3996-3997.)

Paniagua asked about the circumstances of Bush's $500 debt to appellant. Appellant explained that on the night of February 1, 1988, he and Bush were involved in a fight which resulted in appellant's arrest and jailing. Either Bush or Bush's mother took appellant's jacket when he was arrested, and the jacket contained $500 worth of rock cocaine. As a result, appellant felt that Bush owed him $500. (30 RT 3997-3998.) When Paniagua asked appellant to explain the peculiarity of this transaction, appellant said that he thought it was a fair trade to exchange $40 worth of rock cocaine and to forgive the $500 debt for the temporary use of Bush's

car and the TV and VCR contained in the car. It was at this point in the interrogation that Paniagua left the room to get a tape recorder in order to record appellant's statement.[11] (30 RT 3998.)

When the questioning resumed, Paniagua went over the same matters that were discussed in the initial, unrecorded part of the interrogation, except in more detail. (30 RT 4008.) He showed a copy of the Fred Bush booking photo to appellant and had him initial it, after appellant identified the person depicted as the Fred Bush from whom appellant had received the burgundy car. (30 RT 4007-4008.) Paniagua did not detect any sign that appellant was under the influence of any intoxicant or controlled substance. (30 RT 4048.) Appellant did not appear to have any scratches, bruises or bumps on his body. Paniagua looked at appellant's hands to see if there was any evidence that he had been involved in a fight, but found none. (30 RT 4048.) During the interrogation, Medsker seized a gold-colored ring with a red stone from appellant. (28 RT 3850.)

The recorded portion of the questioning ended at 10:33 p.m., but the questioning continued for a few more minutes until Paniagua and Medsker took a break for about an hour before resuming the interrogation at 11:29 p.m. (30 RT 4008-4009.) The resumed interrogation was not recorded on tape. Paniagua began by asking appellant about his relationship with Lisa. Appellant described her as "squirrelly" and unstable. Paniagua also asked appellant about his relationship with his family. Appellant said that he was not liked by his family, and they often blamed him if property was missing or when things went wrong in the house. (30 RT 4011.)

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[11] The tape recording of appellant's statement (Peo. Exh 74) was introduced into evidence and played to the jury. (3 CT 677; 30 RT 4003-4007.)

Paniagua asked appellant if anything had happened at his grandmother's house on April 18, 1988, and he said that nothing had happened. However, he said that he had gone there that day to get some money from his mother for a ticket to leave town, and that he had asked his grandmother for money as well, but they both refused. Later, he went to look for his gun, and gave this as a reason for entering his grandmother's room. Appellant denied taking anything from his family's home. (30 RT 4012.)

It was at about this time that appellant removed his sweater, saying it was too hot in the interview room. (30 RT 4012.) Paniagua confronted appellant with the fact that the police had twice been summoned to his grandmother's home on April 18, 1988. Appellant responded: "What if I did go back? But I didn't." When Paniagua accused appellant of lying, appellant, as if speaking to himself, muttered: "Going to jail for the rest of your life, man." (30 RT 4013.) His demeanor changed and he became very depressed. It appeared to Paniagua as if appellant was going to break down and cry. Appellant related that ever since he was a little boy, "they" used to put him in hot water and beat him up, and that is why they think he is crazy. Appellant made reference to the fact that his stepfather used to put him in the hot water, and said: "I'm going to kill his ass." (30 RT 4013-4014.)

After another hour or so of questioning, appellant appeared to regain his composure and continued to maintain that he had not returned to his grandmother's house. Appellant refused to admit to Paniagua that he was lying about this. (30 RT 4014.) At 1:40 a.m., Paniagua and Medsker took another break to strategize as to how to continue the interrogation. (30 RT 4014-4015.)

When the questioning resumed at 1:50 a.m., Paniagua and Medsker

continued to confront appellant with the incriminating evidence, including the fact that appellant's account of receiving the victim's car from Fred Bush was obviously false, as Bush was in county jail at the time. (30 RT 4015-4016.) According to Paniagua, when appellant was informed that Bush was in jail, appellant just shrugged his shoulders. At this point, Paniagua urged appellant to tell the truth. Appellant's response was: "Well, what's in it for me?" Paniagua replied that all he wanted was the truth, and there were no deals. After this, appellant seemed not to care. At 3:12 a.m., Paniagua arrested appellant for the murder of Sarah LaChapelle. (30 RT 4016.) However, appellant remained in the interview room until he was taken to jail at around 10:35 a.m., as Paniagua contemplated questioning appellant again after searching Lisa's house. (30 RT 4017.)

f. Lisa Henry's Conversation with Appellant in Room 202

Following the execution of the search warrant at her home, Lisa accompanied Paniagua to the homicide bureau where she was interrogated by Medsker. (30 RT 3973; 28 RT 3851.) This questioning was tape-recorded. (28 RT 3852.) According to Medsker, at the conclusion of the questioning, Lisa asked if she could talk to appellant. She was granted permission to do so, and entered room 202 where she spoke with him for about five minutes. (28 RT 3852-3853.) Thereafter, Medsker and Paniagua questioned her concerning her conversation with appellant. The second portion of the questioning of Lisa was also tape-recorded.[12] (28 RT 3854-

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[12] Over defense objection, the tape-recording of the second interview was admitted in evidence and played for the jury in open court. (Peo. Exh. 62; 3 CT 650, 677; 28 RT 3855-3864; 29 RT 3877-3879; 34 RT 4454-4459.)

3855.)

Lisa testified that after she was questioned by Paniagua and Medsker, she asked to speak to appellant and was allowed to do so. (28 RT 3754.) However, on cross-examination, Lisa denied asking to talk to appellant. Instead, she was told by Medsker and Paniagua that she could talk to him. (28 RT 3802.) At the time, she had been told that appellant would be in jail for the rest of his life and that she should just "go on" with her life and get over appellant. Lisa recalled that she was distraught and crying. (28 RT 3803.) She was led into a small room where appellant was seated, clad only in underpants. (28 RT 3756.) She could see that something was wrong with his arm and that he appeared to be cut on his wrist. (28 RT 3757.)

During the first portion of her interrogation, Medsker or Paniagua had asked her if she knew someone by the name of Freddie or Fred. (28 RT 3754.) Because the police had told her that the case under investigation concerned the murder of a woman and the police had brought up Fred's name, she assumed that Fred had something to do with the crime. (28 RT 3803.) Consequently, Lisa asked appellant about him, but appellant did not say anything about Fred. When Lisa asked appellant what had happened "with a lady," he was vague and "really didn't say." (28 RT 3758.) According to Lisa, appellant did not tell her anything about what happened. (28 RT 3759.)

The prosecutor sought to refresh Lisa's recollection by showing her the transcript of her statement to Medsker and Paniagua concerning her conversation with appellant in room 202. She admitted telling them that appellant had said he was present when the crime was committed and that "Fred did it." (28 RT 3764.) Lisa also admitted that she told Paniagua and

Medsker that appellant told her he tried to "stop Fred." (28 RT 3765.) She explained that she had not lied to the police when she gave her statement about her conversation with appellant, but she was "confused." She believed, based upon what the police had told her, that it was Fred rather than appellant who had committed the crime, and that appellant must have tried to prevent Fred from killing the victim. (28 RT 3759, 3764-3767.) According to Lisa, the words she attributed to appellant were her own words and not his. (28 RT 3765.)

Following Lisa's testimony, the prosecutor played the tape of her statement to Medsker and Paniagua. In that statement, Lisa said that appellant had denied committing the crime. When Lisa asked appellant who "did it," appellant did not immediately respond. However, when Lisa asked him if Freddie did it, appellant looked at her and told her: "Yeah, Freddie did it, I didn't do it." Thereafter, appellant told Lisa he tried to stop Fred. Lisa advised appellant to say who else was involved because that might result in a lesser sentence, but appellant replied that he would have to stay in jail anyway. The tape-recording concluded with Lisa's reply to a question posed by Paniagua: "No, you asked me just did I want to talk to him, maybe I can talk to him to convince him to tell the truth or to tell what happened." (Peo. Exh. 64; 3 CT 677; 29 RT 3878.)

g. Appellant Is Transported to the Hospital for Medical Treatment and a Blood Draw

After Lisa left appellant in room 202, Medsker and another officer entered to escort appellant to the bathroom. (29 RT 3883.) Once in the bathroom, appellant jammed his fists into the mirror. Medsker saw no cuts or evidence of bleeding before escorting appellant to the bathroom. (29 RT 3884.) However, when appellant was handcuffed following the bathroom

incident, Medsker noticed that appellant's wrist was now cut. Appellant was escorted back into room 202, where Medsker discovered a blanket. Medsker shook out the blanket and noticed a piece from a broken ashtray. (28 RT 3854; 29 RT 3884-3886.) Paniagua had appellant transported to the Highland Hospital emergency room for treatment of his cut wrist and for collection of blood samples. (30 RT 4018-4019.)

h. Evidence of Appellant's Activities Between April 17, 1988, and the Time of His Arrest

The prosecution presented testimony from appellant's acquaintances and family in an attempt to connect appellant with the murder and impeach his statements to Paniagua and Medsker. This evidence consisted of the testimony of appellant's aunt (Mamie Jackson), Lisa, and Germaine.

i. Mamie Jackson

On April 18, 1988, Mamie Jackson lived in a house near the victim's home on Hesket Road with appellant's grandmother (Lurlean Jackson), Mamie's sister and appellant's mother (Rosia Carter), and a number of other relatives. (28 RT 3732-3735) Although appellant had lived there as well when Mamie moved in in January of 1988, he was not living there on April 18, 1988, but as Mamie described it, "I mean, in his grandmother's house, you could come and go." (28 RT 3743.)

On the morning of April 19, 1988, Mamie received a phone call from Sylvester LaChapelle, asking her to check to see if the car belonging to his wife (the victim) was parked in the car patio of 9938 Hesket Road. (28 RT 3732.) Although Mamie could see the LaChapelle home from her window, she walked across the street to check. She did not see the victim's car, and relayed this information to Sylvester. (28 RT 3733, 3744-3745.)

Mamie recalled that the day before she received the call from

Sylvester, she had seen appellant at her house, either in the late afternoon or early evening. (28 RT 3735.) Appellant was wearing a red leather suit similar to the one seized by the police at Lisa's home. He came into the house to see his mother and went to the room she was in. (28 RT 3736.) Although Mamie did not know if anything was missing from the home after appellant left, she assumed this was the case, as Lurlean's room appeared to be ransacked. (28 RT 3746-3747.) Mamie was not in the house when appellant left later that night, as she had gone across the street to a neighbor's house. (28 RT 3738-3739.)

ii. Lisa Henry

Lisa was familiar with appellant's family and had visited his grandmother's home on Hesket Road several times. (27 RT 3682.) After appellant's release from the hospital in late March of 1988, he stayed at Lisa's house at 5230 Yuba Avenue. (27 RT 3683, 3696.) He did not stay there every night, and she believed he did not stay there on Monday or Tuesday night, April 18-19, 1988, although he came by the house briefly on Monday night, at around 8 o'clock, before leaving with Lisa's father. (27 RT 3683-3684, 3706, 3716.)

According to Lisa, she noticed that appellant was in her house on Tuesday morning at around 8:00 o'clock, when she woke up. (27 RT 3684; 28 RT 3791-3792.) She assumed that someone else in the house had let him in, but it was possible that appellant had arrived around midnight or after she fell asleep. (28 RT 3792.) She saw him at first in the living room wearing a red leather jacket and acid-washed jeans. (27 RT 3686.) Later that morning, Lisa did the laundry and washed pants and socks. (27 RT 3689.) After she washed appellant's clothes, she found the victim's Visa credit card in a paper bag. (27 RT 3712-3713.) Appellant gave his red

leather jacket to Germaine so that he could wear it to school, along with appellant's red leather pants, which Germaine retrieved from his room in the back of the house. (27 RT 3690, 3794.) Appellant gave Lisa a watch and a necklace, as well as two rings, that day. She described the rings as a wedding ring and an engagement ring. (27 RT 3693-3694, 3700-3702.) The wedding ring had three diamonds in a band, with one diamond larger than the other two. (27 RT 3700-3701.) The engagement ring had four or five diamonds all in a row. (27 RT 3701.) Both of the rings were 14-carat gold. (27 RT 3707.) Lisa wore the rings for a short time that day, but removed them in order to "clean up." (27 RT 3705, 3708-3709.)

Lisa also noticed that day that appellant was driving a burgundy car similar to the one taken from the victim. (27 RT 3697.) Appellant was silent when Lisa asked him where he got the car. (27 RT 3704.) Appellant did not tell Lisa where he had obtained the watch, the necklace or the rings, nor was he communicative about what he had done on Monday night, April 18. (27 RT 3702.) Appellant did not have a job at the time, and Lisa assumed that he had obtained the items from someone as a result of "dealing" or "what he was into on the streets." (27 RT 3702-3703.)

Germaine went to school that morning wearing appellant's red leather pants and jacket. (28 RT 3794.) Later on Tuesday, Lisa and appellant drove around in the victim's car and eventually appellant dropped her off at her house. Before leaving her that day, he asked her to return the two diamond rings, and she did so. (27 RT 3718-3719.) This took place at around 6:00 p.m. (28 RT 3801.)

iii. Germaine Henry

Germaine recalled being questioned about appellant by a police officer in front of his home on Yuba Avenue. (28 RT 3829-3830.) The

officer told him that a "bad thing" had happened. (28 RT 3831.) Germaine recalled telling the officer that on April 19, 1988, appellant came to the house on Yuba Avenue between 7:30-7:47 a.m. with a pillowcase containing a red jogging suit. (28 RT 3831.) However, at trial, Germaine disavowed this statement, testifying that the red jogging suit had been in his possession for weeks, and was not in a pillowcase. Germaine claimed to have worn the red jogging suit on occasion, but could not recall whether he wore it on April 19, 1988. (28 RT 3833-3844.) Germaine testified that when he put on the red jogging suit to go to school, he wiped off the bottom of the left pant leg with a wash cloth because it was dirty. (28 RT 3836-3837.) The soiled area appeared to contain little spots similar to those that would result from spilling a drink, and there was also dirt that needed to be wiped off. (28 RT 3838.) Germaine testified that the pants were seized by the police when the house was searched. (28 RT 3841.) Germaine could not recall appellant giving Lisa a watch. (28 RT 3835.)

Following Germaine's testimony, the prosecution offered as evidence a tape-recording (Peo. Exh. 62) of Germaine's statement to Medsker on April 20, 1988. The tape-recording was admitted in evidence and played in open court. (3 CT 642, 677; 28 RT 3844-3845; 34 RT 4454-4459.) In his statement, Germaine stated that appellant had not been at the house on Yuba Avenue on the night of April 18, 1988, but arrived the next morning with a pillowcase containing appellant's red jogging suit and acid-washed jeans. Germaine took the jogging suit and wore it to school. He did not notice any blood on the pants, but saw that they were dirty, so he wiped them with a wet rag. When he left to go to school, he saw a burgundy-colored car parked outside the house. When Germaine returned home from school, Lisa was wearing a watch, which he assumed she had

received from appellant. Germaine told Medsker that appellant showed him a gold ring with "something red" in it, which appellant had removed from his pocket. Germaine put the ring on his finger and then gave it back to appellant.

i. The Serological Evidence

Charles Alan Keel, a criminalist with the Oakland Police Department, testified as an expert witness in forensic serology. (29 RT 3899-3902.) Using electrophoresis, Keel identified a number of genetic markers from known blood samples of the victim and appellant. (29 RT 3905-3907, 3919-3921.) He then compared blood samples taken from the sweater appellant was wearing when arrested and the red leather pants seized from the Yuba Avenue address on April 20, 1988, with the known blood samples from appellant and the victim. (29 RT 3905, 3914.) Keel determined that the victim's ABO blood type was type B, a blood type found in 9 percent of the "white" population and 19 percent of the "black" population. (29 RT 3906-3907, 3918.) Appellant's ABO blood type was type O. (29 RT 3906.) Using simple ABO blood-typing, Keel was able to exclude appellant as the source of blood found on appellant's sweater and red leather pants, and to include the victim as a possible source. (29 RT 3907, 3915.)

Utilizing more sophisticated genetic markers than simple ABO typing, Keel determined that the type B blood found on the sweater was consistent with the victim's known blood, and appeared in approximately 3/10 of 1 percent of the "white" population and 1.2 percent of the "black" population, and that the blood on the red pants was also consistent with the victim's blood and appeared in 11 percent of the "black" population. (29 RT 3937, 3942.) Although Keel detected the presence of blood on the red

leather jacket seized from the Yuba Avenue address, and on a pair of size 7½ Fila tennis shoes retrieved by Paniagua in front of room 202 at the Oakland Police homicide bureau, he did not test these items for blood type or other genetic markers. (29 RT 3939-3941, 3958-3959.)

Keel also examined the red leather pants for blood-spatter evidence. He detected both blood spatter and transfer-type stains on the red leather pants along the leg inseam, at the knee, and by the belt area. (29 RT 3908-3914, 3938.) In examining the size 7½ Fila shoes, Keel located blood in the interior of both shoes, but not on the outer soles. (29 RT 3939-3941.)

2. The Defense Case

a. The Fingerprint Evidence

The defense presented the expert testimony of Curtis Sato, a fingerprint analyst employed at the Oakland Police Department Crime Laboratory. (31 RT 4068-4071.) Sato examined a number of latent fingerprint lift cards identified as originating from the crime scene at the victim's home and vehicle on April 18-19, 1988. (31 RT 4071.) From these lift cards, Sato was able to locate three fingerprints of sufficient quality for comparison purposes. (31 RT 4112.) Sato then compared these three useable fingerprint lifts with the known fingerprints of appellant, as well as seven other people who were described to Sato as persons who had access to the victim's home, but were not suspects.[13] (31 RT 4076, 4112.) One of the three useable prints was lifted from the exterior east bedroom door, and the other two from a telephone in the living room. (31 RT 4075-4080.) Sato concluded that neither appellant nor any of the other seven

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[13] These seven people were the victim, Anthony LaChapelle, Evelyn LaChapelle, Ronald LaChapelle, Tanya DeLaHoussaye, Tuana Williams, and Reginald Henry. (31 RT 4112.)

people was the source of the fingerprint on the bedroom door. (31 RT 4075-4076.) Sato was able to identify Anthony LaChapelle as the source of one of the two fingerprints on the telephone. (31 RT 4079.) However, neither appellant nor any of the other seven people was the source of the second latent print found on the telephone. (31 RT 4079-4080, 4113.)

Sato also examined latent lifts taken from the front bedroom door, a jewelry box found on a bed, a Planter's peanut can found on a dresser in the front bedroom, and the interior of the rear door, but none of those prints was of sufficient quality for comparison purposes. (31 RT 4073-4081.) Additionally, Sato was asked to develop latent prints from six knives found at the victim's home, as well as from a two-pronged fork taken from the victim's neck, two bottles containing pills, a wallet insert containing the victim's credit cards, a steam iron, and a plastic grocery bag. (31 RT 4082-4083.) Sato was unable to develop fingerprints of identifiable quality from any of these items. (31 RT 4083, 4114.)

b. Appellant's Testimony

On March 18, 1988, appellant had been shot and brought to Highland Hospital for treatment.[14] (31 RT 4124-4125.) The shooting was "somewhat related to drug dealing." (32 RT 4275.) When he was released from the hospital, appellant began to stay with his girlfriend Lisa at her home on Yuba Avenue. (31 RT 4120.)

On April 18, 1988, appellant learned from a friend that the person who had shot him in March was looking to shoot him again. (31 RT 4125.) Appellant was wearing his red leather Adidas suit. (31 RT 4130.)

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[14] While at the hospital, the police seized property from appellant, including his watch, clothing and shoes, and money. (31 RT 4125.)

Appellant decided to go over to his grandmother's house, where his mother also lived, to ask for money to purchase a ticket to Seattle, and to get a gun for self-protection. (31 RT 4124, 4131-4132.) Appellant was aware that his late grandfather possessed a number of guns, including a .38 caliber snub-nosed revolver. (31 RT 4132-4134.)

Once he arrived at his family's home, he explained the situation to his mother and grandmother. (31 RT 4131-4133.) Appellant was angry with "most" of his family that day, as he believed they had taken out a life insurance policy on him after he had been shot, and they had not visited him at the hospital when he was recuperating from his gunshot wound. (32 RT 4275.) Consequently, he did not seek his grandmother's permission to look around for the revolver. (32 RT 4275-4276.)

Appellant's grandmother kept a small police scanner tuned into a police frequency in her bedroom. (31 RT 4136-4137.) At the time he found the revolver in her bedroom, he could hear a broadcast on the scanner announcing that the police were looking for him.[15] (31 RT 4137.) Appellant took the gun and the scanner and fled out the back door. (31 RT 4137-4138.) Appellant was on probation at the time and feared that the police might catch him with a gun. He concealed it in a clubhouse on the side of the garage, and jumped over a fence into a nearby park. (31 RT 4138-4140, 4142.) He walked through a creek until he arrived at a bus stop on Hegenberger Road. (31 RT 4142-4143.)

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[15] For reasons unexplored by the parties during appellant's testimony, the police were summoned to look for appellant at this time. As can be inferred from the prosecutor's examination of Mamie Jackson, there was some type of dispute at her house involving appellant that resulted in a call to the police. (28 RT 3736-3739, 3746-3747.)

Traveling by bus and monitoring the police scanner, appellant made his way to Lisa's house. (31 RT 4145.) Lisa and her father were present. Before entering Lisa's house, appellant used a hose on the porch to wash off the mud and dirt that had accumulated on his Adidas suit and shoes while he had been in the creek. (31 RT 4145-4146.) His shoes were soaked. (31 RT 4146.) In the house, appellant changed his shoes and socks and borrowed Germaine's Fila tennis shoes, as Germaine had taken the pair of blue-and-white Nikes that appellant was looking for. (31 RT 4147.) Germaine's shoes were a size 7½ and were tight, as appellant wore a size 9½ shoe, but appellant wore them anyway. (31 RT 4148, 4190.)

Appellant asked Reggie Henry for a ride to Seminary Avenue, as appellant was looking to retrieve three rocks of crack cocaine he had hidden by a fence near a creek. (31 RT 4149.) Appellant intended to sell the cocaine. (31 RT 4152.) He was unsuccessful in finding his cocaine, and appellant and Reggie drove to a liquor store at the intersection of Seminary Avenue and Foothill Boulevard where they bought some beer. They each had a 40-ounce beer, which they drank over the next hour as they sat and talked in Reggie's truck. (31 RT 4153-4154.) Reggie then dropped appellant off near the Yuba Avenue house, but appellant did not enter, as he had been arguing with Lisa. (31 RT 4155-4156.) Instead, he walked to a store and bought a bottle of "Cisco," a strong wine. (31 RT 4156.) He made his way to an apartment on Elizabeth Street near Seminary Avenue, where his friends Roshan and Judo lived. (31 RT 4157-4158.) He stayed there for a few hours, drinking the Cisco. (31 RT 4158.) The apartment building where Roshan and Judo lived was a crack house, where some of appellant's "partners" sold drugs. (31 RT 4158-4159.) After staying at the apartment for a few hours, appellant decided to return to Hesket Road to

retrieve his gun. (31 RT 4160.)

Appellant took the bus and returned to Hesket Road. (31 RT 4160-4161.) He retrieved the gun from the clubhouse, but remained there for a little while longer as he finished the bottle of Cisco. (31 RT 4161.) He placed the gun in the waistband of his pants. (31 RT 4166.) At that time, he felt tipsy. The shoes he was wearing were uncomfortable, so he removed one for a moment. (31 RT 4165.)

Appellant left the clubhouse and walked past the victim's house on the way to the bus stop. (31 RT 4167-4168.) There he saw "two dudes" coming out of the victim's house, "carrying stuff." (31 RT 4169-4170.) One had a box and the other was carrying a pillowcase. (31 RT 4172.) When they spotted appellant, they started to run. The man carrying the pillowcase dropped it, but the man carrying the box ran away with it. Both men fled toward the park, where appellant lost sight of them. (31 RT 4173.) Appellant thought he recognized the men, and described them to the jury. (31 RT 4176-4181.)

When no one else emerged from the victim's house, appellant became curious as to what was going on. He saw that the front door to the house was open, and a light was on inside. Appellant saw that the pillowcase partially covered a VCR and a TV. He picked up the pillowcase, pushed the VCR back in it, and placed it in the carport area. (31 RT 4184.)

Appellant then entered the victim's house. He was not wearing gloves. (31 RT 4187.) Once inside, he saw the victim's body near the front door with a knife in her back. There was blood everywhere. Appellant tried to see if the victim was still breathing. (31 RT 4188.) As he looked, he heard a noise from the back of the house, as if something had fallen. The

noise startled appellant, causing him to reach for his gun. However, the gun caught on something and fell to the ground by the victim's body. (31 RT 4189.)

Appellant picked up the gun and made his way to the back where the noise came from, looking to see if anyone was still present. As his shoes were too small, he had been wearing them like slippers and one slipped off his foot at this time. (31 RT 4190.) Appellant went into the back area of the house and saw that the back door had been kicked in. He noticed that when his gun fell, blood had gotten on it, so he found a towel near the sink and wiped it off. (31 RT 4191.) Appellant also found the victim's car keys in the kitchen. (31 RT 4191-4192.) After he retrieved the shoe that had come off, he took the car keys and hurriedly left the house. (31 RT 4192-4193.) Appellant placed the TV, VCR, and pillowcase inside the victim's car and drove to Maxwell Park. (31 RT 4193.)

Once he arrived at Maxwell Park, appellant noticed that he had blood on his socks. He removed his socks and threw them away. (31 RT 4195.) He then drove around aimlessly until he stopped somewhere up in the hills of Oakland and fell asleep. (31 RT 4196.) He woke up on Tuesday morning and drove to Lisa's house. (31 RT 4197.)

There, he took off his leather pants, put them into the pillowcase and entered the house. (31 RT 4197.) The TV and VCR were also in the pillowcase, and he took these items into the house as well, placing them in a closet in Germaine's room. (31 RT 4198-4199.) Lisa was asleep on the living room couch. Germaine was awake, ironing in the kitchen. (31 RT 4199.) Appellant drank a beer. (31 RT 4200.) Germaine asked appellant if he could wear the red leather suit to school, and appellant agreed. Appellant was unaware that there was blood on the leather suit. (31 RT

4202.) Appellant retrieved the pants from the pillowcase. (31 RT 4200.) He emptied the pants' pockets to recover some medical papers and a gold ring with a red stone he had obtained on Seminary Avenue a few days before. Germaine asked to look at the ring, and appellant showed it to him. (31 RT 4201.) Appellant woke Lisa up, and then took a shower. By the time he dried off, Germaine was gone. (31 RT 4202-4203.)

Appellant then examined the contents of the pillowcase. After removing the TV and VCR, he dumped out a silver chain, a watch, some rings and a little brown bag. (32 RT 4220.) There was a credit card in the little bag. After looking at the rings in Germaine's bedroom, appellant took them into the living room and gave them to Lisa, along with the chain and watch. (32 RT 4221-4223.) Lisa did not ask where the rings came from. It was not unusual for appellant to give Lisa such items that he "had been coming across." (32 RT 4223.)

Appellant took a nap. After he woke up, he drove to the store to buy food and drink. He took his gun for protection. (32 RT 4225-4226.) When he returned, he took Lisa and her Godsister Yolanda to a Lucky's market and to get medicine. (32 RT 4228-4229.) When he dropped them off, he returned to Roshan's and Judo's apartment intending to sell the VCR and TV. There he remained, drinking and talking with his friends, but he did not get around to offering the victim's property for sale. (32 RT 4231-4232.) Appellant left his gun at Judo's apartment before he departed. (32 RT 4305, 4317.) On the way back to Lisa's house, appellant picked up his friend Arnold. (32 RT 4234.)

Appellant cooked a pizza for the two of them, but when Lisa arrived and noticed that Arnold was there, an argument broke out, as Lisa did not like Arnold. (32 RT 4234-4235.) Lisa demanded that Arnold leave, and

eventually appellant left with Arnold, taking the uneaten pizza into the car, along with a knife. (32 RT 4235-4236.) They went around the corner, met some friends and ate the pizza in the car. (32 RT 4235-4236.)

Appellant left Arnold and returned to Lisa's house. He and Lisa began to argue, and they then drove around for a while. When they returned to Lisa's house, they were still arguing in the car, and appellant threatened to leave her and their unborn child. (32 RT 4239-4240.) Lisa told appellant he would regret it if he did. When appellant told Lisa that he was not claiming the child anyway, Lisa got mad and threw at him the two rings he had given her earlier. (32 RT 4240.) Appellant picked up the rings and put them in the car's ashtray and drove off, leaving Lisa standing in front of her house. (32 RT 4240-4241.)

Appellant removed the TV and VCR from the trunk of the car and placed them in the passenger compartment, intending to sell them. (32 RT 4241.) On Kingsland Avenue, he stopped at an intersection when his brakes locked up, and there he encountered Rommell Jones. (32 RT 4241-4242.) Rommell came to the passenger side of the car and asked him if he had any cocaine. Appellant said he had none, but told him that Judo had some on Seminary Avenue. (32 RT 4242.) It was at this time that the police pulled up. (32 RT 4243.)

Officers Sullivan and Boyovich jumped out of their car, pointing guns at them. (32 RT 4243.) Sullivan ordered appellant to put his hands through the window of the car and to crawl out on the ground. Appellant complied and was told to place his hands on his head. As he did so, Sullivan handcuffed him, and kicked him in the head and butt. (32 RT 4245-4246.) Appellant was placed in a marked police car. (32 RT 4246.)

Eventually, Sergeant Medsker came up to the marked car and looked

at appellant. (32 RT 4246.) Appellant was transferred to the car that Sullivan and Boyovich were driving, but neither officer talked to appellant at the time. (32 RT 4247.) Eventually, appellant was driven downtown. During the ride, appellant made comments about suing Sullivan for kicking him. Later, Sullivan asked appellant where he got the car, and appellant falsely told Sullivan that he got the car from Fred Bush. Appellant lied because Bush was responsible for sending appellant to jail two months earlier, and had also stolen "some stuff" from appellant. (32 RT 4248.)

Appellant explained to the jury that he and Bush had been involved in a dispute in early February. Appellant had sold some cocaine to Bush, but Bush changed his mind and wanted his money back. (32 RT 4249.) Appellant took off his jacket and he and Bush fought, with appellant getting the best of the fight. Bush grabbed a crowbar and chased appellant. Appellant grabbed some bricks and tried to hit Bush. In the course of the melee, the windows of Bush's car were broken. When appellant fled, Bush grabbed appellant's jacket and gave it to a family member. The jacket contained rock cocaine. Appellant was arrested for the incident, and given a 90-day jail sentence, but was released early on a "kick out." As a result of this incident, appellant considered Bush to be "the enemy." Naming Bush as the source of the victim's car was appellant's way of getting "back" at him. (32 RT 4250-4251.)

Although no one told appellant that he was being taken to the homicide division, appellant was familiar with the location, as he had been taken there as a witness at the age of 16 when his friend Antoine Martin had been shot while standing beside him. Sergeant Medsker had investigated that case as well, so appellant recognized him. (32 RT 4251-4252.) Officers Boyovich and Sullivan placed appellant in a little room after taking

his shoes, jacket and beanie cap. (32 RT 4253.)

Paniagua and Medsker conducted the interrogation. (32 RT 4255.) At first, appellant was asked where he obtained the victim's car. He repeated the lie about getting it from Fred Bush because he had already told this story to Sullivan earlier. (32 RT 4256.) Appellant explained that he did not tell Paniagua and Medsker what had really happened, as he was now telling the jury, because he did not think it would help and because, in any event, he disliked Medsker. (32 RT 4256.) Appellant was not aware at the time that he would end up facing a possible death sentence for what had happened. (32 RT 4256.) Even when he learned within the week that he was facing the death penalty, he did not try to contact the police, relying on legal counsel's advice to not discuss the case with anyone. (32 RT 4257.) Appellant believed that, in any event, Medsker was determined to get him to confess, and Medsker had expressed confidence that appellant would be "going away." (32 RT 4283.)

The interrogation lasted from about 7:00 p.m. until 10-11:00 a.m. the following day. (32 RT 4258.) By 10:00 p.m., appellant's clothes had been taken from him so that he was clad in only his underwear. He did not receive a blanket until 6:00 a.m. (32 RT 4258.) Appellant explained that he hit the mirror in the bathroom essentially out of frustration and anger because his interrogators did not heed his request to stop the questioning. (32 RT 4258-4259.) After the incident with the mirror, the police noticed that appellant's wrist was cut when they handcuffed him. (32 RT 4259-4260.) Appellant's wound was self-inflicted in an effort to terminate the questioning and because his interrogators would not let him sleep. He was not trying to kill himself. (32 RT 4260.) Appellant reasoned that once his cut wrist was noticed, he would be removed from the room and given

medical treatment, or placed in "a camera room." In either event, his interrogation would cease. (32 RT 4262.)

During the interrogation, when appellant did not want to talk, Medsker obtained a morgue photo of Antoine Martin, knowing that showing this to appellant would upset him.[16] In the past, Medsker had played on appellant's emotions concerning Martin's death by calling appellant's mother. (32 RT 4261.)

Before the incident with the mirror, Lisa had been let into appellant's interrogation room. Appellant could not recall what he felt like at the time other than that he was "kind of mixed up." (32 RT 4264.) He could recall none of the details of their conversation even after having reviewed a transcript of the recording of Lisa's statement to the police. (32 RT 4265.) However, appellant denied discussing anything about the events that transpired within the victim's house, including saying anything about trying to stop Freddie. (32 RT 4265-4266.) Appellant denied killing the victim or being present when the she was killed. (32 RT 4266.)

c. The Defense Serological Evidence

Charles Alan Keel was called as a defense expert witness. (31 RT 4116.) He testified that he was asked to examine a knife found in the victim's vehicle for blood. (31 RT 4117.) There was "some stuff" visible on the blade of the knife, possibly consistent with pizza, but Keel found no evidence of blood on this knife. (31 RT 4117-4118.)

3. The Prosecution's Rebuttal Case

The prosecution called only one rebuttal witness, Officer

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[16] Paniagua denied that he or Medsker had shown appellant a photograph of Martin (Def. Exh. D-B), or any other photo other than that of Fred Bush. (30 RT 4045-4046.)

Viglienzone. Viglienzone testified that he found no blood during the search of the victim's car, including on the driver's door or the door window crank. Additionally, although he searched the vehicle's ashtray, he found no evidence there either. Viglienzone found nothing in the ashtray. (32 RT 4319.) On cross-examination, Viglienzone conceded that before he arrived at the Kingsland Avenue location, other officers including Sullivan and Boyovich were present, and he was unaware of which officers had originally secured the victim's vehicle. (32 RT 4320-4321.)

B. The Penalty Phase

1. The Prosecution Case

a. The Factor (b) Evidence

i. The March 7, 1986, Assault-with-a-Deadly-Weapon Incident

In the early evening of March 7, 1986, Althea Edwards was driving with her boyfriend, Clifford Parker, on Edes Avenue in Oakland. Parker was in the front passenger seat. (35 RT 4766-4768.) At the intersection of 98th and Edes, a truck making a left turn onto Edes collided with Edwards's car. Parker, a "buffed up, big man," jumped out and angrily confronted the driver of the truck. (35 RT 4767-4768, 4772.) Edwards quickly observed that the driver of the truck had a gun in each hand, and she verbally warned Parker of this fact while also honking the horn of her car. (35 RT 4768.) Edwards could not say whether the driver of the truck approached Parker with the guns in his hands, or drew them in response to Parker's angry words. (35 RT 4776, 4780.)

Parker quickly returned to the car, pushed Edwards over to the passenger side and drove off. The driver of the truck pursued Parker and Edwards at high speed, firing a total of three shots over the course of the

pursuit. (35 RT 4770, 4780.) The shooting only began once Parker returned to Edwards's car and drove away. (35 RT 4780.) No shots hit Edwards's car. (35 RT 4770, 4781.) During the pursuit, the driver of the truck rammed Edwards's car twice. (35 RT 4769-4770, 4782.)

Parker drove to the intersection of Hegenberger and Edes, where he found police officers. While reporting the assault, Edwards and Parker were taken to a DMV parking lot to attempt an identification. A man was brought out, illuminated by a spotlight. Edwards identified the man as her assailant. At trial, Edwards was unable to recall what that person looked like. (35 RT 4770-4771.)

California Highway Patrol (CHP) officer Dennis Gregorich was in the area of 66th and Hegenberger Road at around 8:00 p.m. on March 7, 1986, when he responded to a police radio call for a traffic accident at 66th and Coliseum. (35 RT 4786.) Gregorich was advised to be on the lookout for a black male wearing a red or orange jacket, blue jeans, and white tennis shoes. (35 RT 4788.) He spotted someone fitting that description running from a parking lot across from Hegenberger Road. Gregorich identified the suspect as appellant. (35 RT 4791-4792.) Gregorich pursued appellant into a residential area at Cairo and Coral. (35 RT 4788-4789.) While in pursuit, Gregorich put out a call for assistance. (35 RT 4787.) Another CHP officer arrived and assisted Gregorich in arresting appellant. (35 RT 4789-4790.) Preceding the arrest, and before complying with the officers' commands to drop to his knees, appellant continually looked at the officers and reached toward his waistband "a couple of different times."[17] (35 RT 4790.)

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[17] Gregorich did not prepare a report of the incident. His testimony at trial was the first time he had ever told anybody about appellant moving (continued...)

Appellant was searched by Gregorich before being handed over to the Oakland police. Gregorich removed two loaded handguns from appellant's waistband. One gun was a 2-inch Smith & Wesson revolver and the other was a semi-automatic pistol. The revolver contained one live round and four empty rounds. The other pistol contained an empty clip with a live round in the chamber. (35 RT 4791.)

Oakland Police officer Wendy Appleby responded to Gregorich's call for assistance and took custody of appellant as well as the handguns. (35 RT 4798-4799.) She transported appellant to a DMV parking lot at 85th and Edes for purposes of conducting a field identification. Two individuals involved in a traffic accident were asked to identify appellant after he was removed from a police car and illuminated by spotlight. Appellant was placed approximately 15 yards from the witnesses. Both positively identified him as the person who ran into their car and fired shots at them. (35 RT 4800.)

ii. The February 11, 1988, Assault and Battery of Marlena Bush

Marlena Bush is Fred Bush's sister. (35 RT 4805.) On February 11, 1988, Marlena went to a convenience store on Hegenberger Road on an errand. (35 RT 4804.) Inside the store, Marlena was approached by appellant, who asked if she was Fred Bush's sister. When Marlena replied that she was, appellant struck her with a backhand slap to the face. He then grabbed Marlena by the neck in a chokehold, and escorted her out of the store to a phone booth. (35 RT 4806-4807.)

On the way to the phone booth, appellant, who was armed with a

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[17] (...continued)
his hands toward his waistband. (35 RT 4795.)

gun, told Marlena that she was to call her brother. (35 RT 4807.) Appellant threatened to use the gun if she did not make the phone call. Marlena was very scared, so she made the call to her house and spoke to Fred. Fred could not understand what she was saying. Appellant took the phone from her and spoke to Fred. Marlena could not recall what was said in that phone conversation. Appellant left the phone booth, and Marlena was soon picked up by Curtis Brooks, who had been sent by Fred to help Marlena. (35 RT 4808, 4820.)

Marlena could not recall all the details of the incident at trial, even after having her memory refreshed with a police report of the incident that she and the prosecutor had reviewed in his office the day of her trial testimony. (35 RT 4809.) In particular, Marlena could not recall telling the police that appellant had punched her in the face before she entered the convenience store. However, if she had told the police about that punch, it would have been the truth. (35 RT 4809-4810.)

Marlena also saw appellant outside her house on February 1, 1988, or in the early morning hours of February 2. Appellant was involved in a confrontation with Fred by the gate of her house. Marlena and her mother witnessed the confrontation from the porch of her house. When Marlena's mother told appellant to leave, appellant angrily said he would "get" them. (35 RT 4810-4811.)

On cross-examination, Marlena conceded that she did not know who her brother was fighting with during the February 2nd incident, nor did she know who appellant was before he confronted her in the convenience store. (35 RT 4813, 4815.) Marlena could not say whether anyone in her household acquired appellant's jacket after he fought with Fred. (35 RT 4813.) When Marlena reported the convenience store assault incident to the

police, she identified her assailant as Gregory Jackson. (35 RT 4819.) She learned the assailant's name "because of her brother" and through the neighborhood grapevine, although she claimed that it was not her brother Fred who told her. (35 RT 4819-4820.) Marlena and Fred talked about the incident, but not on the day it occurred. (35 RT 4821.) Marlena admitted that when she reported the convenience-store incident to the police, she told them that her brother Fred had taken some money and rock cocaine from Gregory Jackson. (35 RT 4823-4824.)

iii. The September 29, 1987, Resisting Arrest Incident

Officer James Gordon was on patrol in the area of 98th Avenue and Hesket Road at about 2:00 a.m. on September 29, 1987. He observed a green sedan with expired registration tags. As he followed the car, it made a sharp turn and almost veered off the road. Suspecting that the driver was possibly under the influence, and also because of the expired registration, Gordon decided to stop the car. (35 RT 4826.)

Gordon activated his red lights and followed the green sedan for 300-400 feet before it made an abrupt turn into the driveway of a home on Hesket Road. Gordon observed that appellant was the driver of the sedan, and the vehicle also contained a male passenger. (35 RT 4828.) Appellant exited and walked to the front of the car, as did the passenger. Appellant then ran off in the direction of an RV which was also parked in the driveway. The passenger also fled, but not before telling Gordon that the car belonged to appellant. (35 RT 4828.)

Moments later, appellant reappeared and came toward Gordon. Gordon ordered appellant to stop. (35 RT 4829.) Gordon approached appellant and grabbed his coat, intending to arrest him for evading arrest.

Appellant pulled away from Gordon's grasp, but Gordon grabbed him again and pat-searched him for weapons. Finding none, Gordon attempted to escort appellant to the police car. Appellant pushed Gordon away and stood in the center of the street. When Gordon tried to grab him again, appellant took a swing at Gordon and struck him in the shoulder. Appellant then backed away and laughed. Appellant took off his coat and shirt and challenged Gordon to a fight in the middle of the street. Gordon tried to talk appellant out of engaging in a "silly" fight, but appellant rushed at Gordon, who had a short wooden baton. (35 RT 4830-4832.) As appellant came at Gordon, there was a brief struggle and Gordon struck him on the forearm and the forehead with the baton. (35 RT 4830, 4835.)

The blow to appellant's head stunned him, and both men fell to the street as Gordon attempted to get appellant to place his hands behind his back. Appellant resisted, but Gordon succeeded in partially handcuffing him. (35 RT 4845-4846.) During the struggle, Gordon radioed for assistance and when his cover unit arrived, another officer assisted Gordon in fully handcuffing appellant. (35 RT 4831.) Appellant was transported to the hospital emergency room where his head was stitched up, and then he was taken to jail. (35 RT 4845-4847.)

b. The Victim Impact Evidence

Anthony LaChapelle, the victim's son, was the prosecution's sole "victim impact" witness. Anthony testified that he has two children: an 11-year-old boy and a 7-year-old girl. Both of the children were severely affected by the victim's death. The boy was especially close to his grandmother, who often took care of him. The mention of grandparents around the children now caused them to cry, so the adults in the family refrained from talking about the victim in front of the two children. (36 RT

4870-4871.)

Anthony often dreamed about his mother after her death. The dreams about his mother were mostly pleasant, focusing on the good times they shared rather than reflecting on the time he discovered her dead on the floor. (36 RT 4871.) However, her death hit him hard. Anthony could not accomplish anything or face his friends. He began to drink heavily and was arrested for driving under the influence of alcohol. His friends counseled him to hunt down and kill his mother's killer. Because he could not face his friends, he moved to Los Angeles but continued to drink heavily. He was again arrested for drunk driving and spent time in jail. While in jail, his father passed away. (36 RT 4871.)

Because of the loss of his parents, Anthony had difficulty in his business ventures. To this day, Anthony had to rely on others to make business decisions he felt he should be able to make on his own. Losing his parents caused him to lose his contracting business. As for his feelings about appellant, Anthony expressed it this way: "Even now, I still want to get this guy. I want him to die, so I hope the law gets him for me." (36 RT 4872.)

2. The Defense Case

a. Introduction

Evidence in mitigation was presented by the defense depicting appellant's traumatic childhood years, primarily but not exclusively through the lengthy but disjointed testimony of his mother, Rosia Carter, in which she described how both she and appellant were subjected to prolonged physical and mental abuse by both appellant's father, Gregory Tate Sr., and appellant's stepfather, Wayne Carter. The defense presented testimony that Rose was a violent person as well, and that appellant was exposed to the

violence swirling around his mother. A number of teachers, counselors, school psychologists, administrators and probation officers testified to appellant's academic and behavioral difficulties during his school years, and the role his mother and stepfather played in addressing and, for the most part, neglecting those problems. The defense presented the testimony of three childhood friends of appellant who were subsequently incarcerated in the California prison system. These witnesses chronicled how appellant was unsupervised by his family at an early age, and how, as children, they consumed alcohol and drugs on a daily basis and engaged in minor criminal activity. Finally, the defense presented expert testimony concerning the general effect of child abuse and neglect on family dynamics.

b. Appellant's Dysfunctional Family

i. Pervasive Violence during Appellant's Childhood

Rosia Carter (hereinafter referred to as "Rose") gave birth to appellant on April 13, 1967. (36 RT 4876.) Appellant's natural father was Gregory Tate, Sr., commonly known as "Big Gregory." (36 RT 4879, 4885.) Appellant was born out of wedlock, and Rose made some effort to abort the pregnancy as she was not happy being pregnant. (36 RT 4882-4884.) In an effort to terminate the pregnancy, Rose took quinine and mustard powder. (36 RT 4920.) Although appellant's father came to the hospital to see his son at the time of birth, by that time he and Rose were no longer seeing each other. (36 RT 4893.) At the time of appellant's birth, Rose lived at her family's house on Hesket Road with her parents (Lurlean and Chester Jackson, Jr.), and her brother (Chester Jackson III) and sisters (Mamie, Chesterlene, Annette, Brenda, and Evelyn Jackson). (36 RT 4887-4893.) However, after appellant's birth, Rose began to work full time and

her family became involved in taking care of appellant. (36 RT 4894-4895.) Within the year, Rose resumed her relationship with Big Gregory and they moved to a house on 81st Avenue. (36 RT 4897.)

Rose and Big Gregory soon began to argue and fight, and gradually broke off their relationship. Big Gregory would frequently hit Rose in the face with his fists. On one occasion, he slashed her mattress and furniture. Appellant was two-or three-years old at the time and often witnessed the physical assaults on Rose. (36 RT 4903-4906.) The beatings Rose suffered at the hands of Big Gregory were so severe that they required medical attention. For example, Rose testified that her nose and cheekbones were broken and that she bore many permanent scars inflicted by Big Gregory. (36 RT 4922.) In one particularly harrowing incident, Rose described how she was assaulted by Big Gregory's girlfriend (and future wife) Pat Davis. During the fight, Rose "cut" Pat, and Big Gregory intervened, beating Rose so severely that she was hospitalized for four weeks and almost lost her right arm. (36 RT 4925-4927.)

In addition to the continuous domestic violence that permeated their household, Big Gregory abused narcotics. Rose recalled catching him immediately after he had injected "speed or something like that." She saw a syringe in the vicinity, and Big Gregory was wiping his bloody arm. (36 RT 4966.) Ultimately, Rose returned to the family home on Hesket Road and shortly thereafter, Big Gregory was sent to serve in Vietnam. (36 RT 4902.)

After Big Gregory left the country, Rose began a relationship with Wayne Carter and eventually married him. (36 RT 4909.) Wayne fathered Rose's second son, DeWayne, who was born in 1973. Wayne lived with Rose from the time appellant was three-years old until he was eight-years

old. (36 RT 4911, 4931.) Wayne was an extremely jealous man and often physically attacked Rose for perceived infidelities. (36 RT 4929.) He burned her clothes, locked her in the house, and often threatened her. (36 RT 4932.) On one occasion, he beat Rose while driving home with appellant in the back seat of the family car. When Rose fled, Wayne pursued her and continued to beat her. (36 RT 4932-4933.)

Wayne would also mentally torment Rose by separating her from her children. Over time, Rose suspected that Wayne caused appellant to become sick by giving him "reds," a kind of narcotic. Rose had to take appellant to the hospital because he became dizzy and could not walk. Initially, Rose was told that appellant's symptoms might have been caused by an allergic reaction to cough syrup. (36 RT 4929-4930.) On another occasion, Wayne gave appellant a bath in water that was too hot. (36 RT 4934.)

In spite of appellant's protests and Wayne's conduct toward him, Rose would leave appellant with Wayne because she did not want appellant to become a "mama's boy." (36 RT 4936.) On one such occasion, when Rose returned home she learned that Wayne had broken appellant's collarbone while beating him. On another occasion, Rose returned from a nephew's funeral to find appellant with a black eye after being with Wayne. (36 RT 4937.) Appellant had a bed-wetting problem which persisted until he was in sixth or seventh grade. Wayne dealt with the problem by punishing appellant, for example, by refusing to let him go outside to play, or by spanking him. (37 RT 4985-4989.)

Rose also learned that Wayne had become involved in illicit drug use and trafficking. Wayne used cocaine. (37 RT 4969.) Appellant told her that when he rode in Wayne's car, Wayne would put balloons in his pocket.

(36 RT 4939.) Ultimately, in 1975, Wayne was sent to the federal penitentiary for bank robbery. (36 RT 4940.) Wayne communicated with Rose while he was in prison. To this day, Rose is frightened for her safety and the safety of her grandchildren when required to answer questions about Wayne and his prison gang associates. (36 RT 4940-4941.)

Wayne's abuse of Rose and appellant continued after he was released from federal prison. Although Rose was trying to make the marriage work, Wayne accused her of seeing Big Gregory again. Rose did resume her relationship with Big Gregory in 1978 while Wayne was in prison. Big Gregory came back from Vietnam addicted to heroin. He would often beat Rose as a result of his drug addiction. Appellant was living with Rose and Big Gregory at the time. That year, Big Gregory beat Rose so severely that he broke her nose and lacerated her face. (37 RT 4989-4990.)

Wayne reverted to locking Rose in her room and keeping her from her children. On one such occasion, Wayne and his friend, Lonnie Cooper, came to the house. Rose and Wayne argued, and Wayne and Lonnie chased her out of the house with a hammer. Rose fell and shattered her kneecap. (37 RT 4974-4976.) On a subsequent occasion when Rose was recuperating from the knee injury and had a cast on her leg and was lying in bed with her leg suspended, Wayne came by. He dropped her suspended leg, causing Rose to holler in pain. Hearing their mother's cries, appellant and DeWayne entered the room. Wayne ordered appellant to go to his room, and then began beating DeWayne in an effort to learn from him what Rose had been doing while Wayne was in prison. Appellant jumped out of the window to summon the police. (37 RT 4970-4974, 4978-4979.) After this incident, Rose caused Wayne to be re-imprisoned for violating parole.

(37 RT 4981-4982.) They subsequently divorced. (37 RT 4984.)

Rose testified that appellant hated his stepfather because of his abusive conduct. (37 RT 4993.) However, it seemed to Rose that appellant either did not report the abuse he suffered at Wayne's hands or minimized it so as to avoid friction between Rose and Wayne. (47 RT 4994-4995.)

The defense presented evidence to corroborate Rose's account of her physical and mental abuse at the hands of Big Gregory and Wayne Carter. For instance, Sherrill Rogers, the girlfriend of Lonnie Cooper, knew Rose during the time that she was in relationships with both Big Gregory and Wayne Carter. She observed injuries that Rose suffered during fights with Big Gregory and Wayne Carter. Further, she corroborated Rose's testimony that Wayne was a drug dealer during his marriage to Rose. (38 RT 5197-5202.)

The defense called other witnesses to show that Rose, too, was a violent person and contributed to the chaos of appellant's formative years. One such witness, Norman Cooper, an employee of the Alameda County Probation Department and the brother of Wayne Carter's prison friend, Lonnie Cooper, testified about his interactions with Rose and Wayne between 1982 and 1984. He characterized Rose and Wayne as being "very aggressive" towards each other, and "at times they could be very violent." (38 RT 5086-5093.) Norman believed that there was too much aggression between the parents which negatively influenced their children. (38 RT 5094.) Norman viewed Rose as having a "mostly unbalanced personality" as she was very hyper, short-tempered, moody and demanding. (38 RT 5095.) Norman was told of instances in which Rose physically assaulted Wayne, as well as instances in which Wayne assaulted Rose. (38 RT 5098-5099.)

In his testimony, Big Gregory corroborated much of Rose's account of the violence that permeated their relationship during appellant's early years. He conceded that he had a short temper, but that Rose would provoke him by claiming that appellant was not his son. Inevitably, these arguments would escalate into violence, sometimes requiring Rose's hospitalization for injuries Big Gregory inflicted on her. (38 RT 5165-5166.) Zelma Richard, appellant's paternal grandmother, corroborated the account of the mutual physical combat between her son and Rose. (38 RT 5129-5130.) Big Gregory also admitted to substance abuse at that stage of his life. His drug abuse contributed to his short temper. (38 RT 5167-5171.) After Big Gregory left Rose, he dated and then married Pat Davis. (38 RT 5166.) While he admitted that there had been a fight between Rose and Pat, Big Gregory gave a very different account of the violent confrontation between the two women than the version to which Rose had previously testified.

In 1969, Big Gregory and Pat were in Oakland when Rose came up behind Pat and, without any provocation, stabbed her in the back with a knife. Big Gregory fought over possession of the knife and, in the process, Rose's hand was cut. (38 RT 5172-5173.) After this event, Big Gregory was sent to Vietnam where he became addicted to heroin. (38 RT 5168-5169, 5173.) When returned back home, his heroin addiction took him on daily forays to drug dealers to support his habit, and he committed many crimes at that point in his life in order to support his habit. (38 RT 5169-5171.) In 1971, Big Gregory met Wayne Carter at a drug dealer's house. He knew of Wayne's reputation as a heroin and cocaine dealer. (38 RT 5182-5183.) In 1978, Big Gregory resumed a relationship with Rose that lasted five- to-seven months. As before, the relationship was characterized

by frequent fighting during which Rose was again injured. Appellant may well have been present during these fights. (38 RT 5177-5179.) Later, when appellant was 18-years old, he told his father of his abuse at the hands of Wayne Carter. (38 RT 5179-5181.)

ii. Substance Abuse

In addition to the chronicled open use of drugs in the household by his father and stepfather during appellant's formative years, other members of appellant's extended family who lived with him at the home on Hesket Road were also afflicted with drug problems. Rose's sister, Mamie Spencer, had a serious drug problem, as did another sister, Brenda Jackson. (37 RT 5000-5003.) Mamie's daughter, Carla Spencer, also became involved with drugs. In Rose's view, the world that appellant lived in when he was a 16-to-17 year old teenager was one that included a family full of problems with a lot of drug use. (37 RT 5004.)

iii. Inter-Family Violence During the Teenage Years

Rose described the pervasive tension that existed between family members when appellant was a teenager. At times, the tension in the family would explode in the form of anger and physical fights between family members. (37 RT 5004.)

When appellant was 18-years old, he and Rose were not on good terms. At that time, they had their one and only physical altercation. Rose was cooking in the kitchen and told appellant she did not like the direction his life was taking. Appellant said that she had raised him that way, and Rose was stung by the remark. Their conversation escalated into an angry argument. Rose told him to leave the house, but appellant refused, claiming it was his grandmother's home and that Rose could not evict him. Rose,

with a knife in her hand, told appellant he had better get ready to leave. Appellant grabbed the knife, slapped her face, and left the house. Rose speculated that appellant thought she might have intended to cut him. Later, when Rose left the house, she discovered that all four tires on her car had been slashed. (37 RT 5004-5007.)

iv. Rose's Poor Parenting Skills

Evidence of Rose's poor parenting skills and her inability to properly take responsibility for appellant's development was a thread running throughout the defense case in mitigation. To this end, the defense presented the testimony of a probation counselor and a clinical psychologist who both had contact with appellant and Rose in 1975 and 1976, when appellant was between eight and nine years old.

Dr. Dietra Teichman, a clinical psychologist, testified that in February of 1975, she was a student working on her master's degree at California State University, Hayward. She was enrolled in an internship program under the supervision of a school psychologist at Toler Heights Elementary School, where appellant was a third-grade student. As part of her program, Dr. Teichman was expected to conduct a psychological evaluation of 10 students. Appellant was one of the children in the special-education program evaluated by Dr. Teichman. (39 RT 5240-5241.)

Dr. Teichman's evaluation consisted of observing the students in the classroom and on the playground, interviewing their teacher and their parents, performing a battery of tests, and reviewing whatever school records were available. Dr. Teichman learned that the first school appellant attended was Dag Hammarskjöld Elementary School and that he was transferred out of that school while still in the first grade. Dr. Teichman met with Rose, appellant, and DeWayne on the day of the interview. She

received information from Rose that appellant had developed a negative attitude toward school while at Dag Hammarskjöld and that Rose blamed his teachers for her son's attitude.[18] (39 RT 5242-5243.)

During the interview with Dr. Teichman, Rose described appellant as "being evil." This comment was made in front of appellant. Rose went on to tell Dr. Teichman that appellant resembled his father, and Rose "couldn't stand" his father. There was no time during the interview that Rose spoke kindly to appellant, in marked contrast to the friendly and open way she was interacting with her younger son, DeWayne. (39 RT 5246-5248.)

During the interview, Dr. Teichman was able to observe how appellant was trying to get Rose's attention, and she described Rose's negative reactions to his behavior. Rose told her that when appellant first started playing with other children, he would never stand up for himself, so in order to teach him how to be more aggressive, she used to whip him until he got angry enough that he would start fighting the other kids. Rose also told Dr. Teichman that she felt she might have gone "overboard" by doing this. Dr. Teichman understood Rose's remarks about whipping to mean that Rose had done more than just spanking. Further, Rose told Dr. Teichman that her objective was to make appellant more aggressive and to stand up for himself with other children, because appellant was a small

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[18] Rose consistently blamed the schools for appellant's problems. Appellant's third-grade teacher, Connie Peoples, later testified that Rose held the school responsible for appellant's behavioral problems. (39 RT 5346.) Similarly, when appellant was suspended from Fremont High School for fighting in class, Rose blamed the school for appellant's behavior. Rose angrily confronted Lee Mouton, the dean of students at Fremont High School, who testified that she threatened "to kick my ass." (39 RT 5396-5398.)

child when he was in the third grade. (39 RT 5248-5249.) Dr. Teichman could readily see that Rose's strategy bore fruit. For instance, Dr. Teichman was directed to observe appellant's interactions with other children in the playground, but could not recall ever doing so because he was constantly sitting in "time out" after having been involved in fights. She recalled that appellant's interaction with adults was very negative and that he was always scowling at them. Additionally, he was constantly hyperactive; on one occasion, she had to literally hug him to calm him down. (39 RT 5251-5253.)

Dr. Teichman concluded that appellant was severely handicapped by an emotional problem. She felt that his problems largely stemmed from his family environment. After she wrote her evaluation, she talked to her professor and mentioned that there were some things that she would have liked to place in the report but that it was her feeling that if those matters had been included and Rose had learned of them, appellant would be punished. (39 RT 5254.) Dr. Teichman ultimately recommended that appellant needed two-to-three years with a teacher who could be firm in a supportive and encouraging way. (39 RT 5256.)

In 1976, Michael Cholerton was employed with the Family Crisis Intervention Unit (FCIU) of the Alameda County Probation Department. The FCIU was a specialized unit designed to deal with minors who came to juvenile hall as status offenders. (38 RT 5110.) A status offender was a minor who came into the juvenile justice system under circumstances not involving his or her criminal acts, e.g., a child who ran away from home or was beyond the control of the parents. (38 RT 5110.) The function of FCIU was to divert such minors from the juvenile justice system and to avoid incarcerating them at juvenile hall together with delinquent children.

(38 RT 5110-5111.)

In February of 1976, Cholerton conducted an interview with Rose, who brought appellant and DeWayne to FCIU. Rose initiated the contact with Cholerton by calling to complain about appellant. During the interview, Rose made it plain that appellant had stolen some chewing gum and a toy car from a store. She went on to report that he had had several fights at school and he had a tendency to leave home and/or school without permission, and that he frequently remained away from home and from his grandparents' house for hours at a time without permission. Rose wanted appellant placed in a residential school. (38 RT 5113-5114.)

Cholerton noted that Rose was "very rejecting" of appellant and uninterested in becoming involved in the family counseling that Cholerton recommended as appropriate. All throughout the interview, appellant "clammed up" as his mother described her complaints. (38 RT 5115.) Cholerton believed that Rose had not come to SCIU for help, but rather to get rid of her son. Cholerton did not accommodate Rose's wishes, but instead referred the family to a mental-health professional. Cholerton did not believe that residential treatment for appellant was appropriate at the time, but that a mother's rejection of her child might call for such a measure. (38 RT 5116.) Cholerton had no follow-up visits with Rose or appellant. (38 RT 5117.)

In addition to the testimony of Dr. Teichman and Cholerton, Rose's parenting was addressed in the testimony of appellant's paternal grandmother, Zelma Richard. Zelma testified that when her grandson was very young, she tried to develop a relationship with him, but Rose would cut off their visits when she got angry with appellant or his father. (38 RT 5131.) When appellant was between four and six years old, Zelma would

see him periodically when his father brought him to the Richard home to stay overnight. Often during these visits, appellant seemed angry and kept within himself. (38 RT 5137.) Zelma described appellant as not "the cuddling kind." When she hugged him, she got no response. On one occasion, appellant kicked Zelma's son Terrell for no reason as he walked by. (38 RT 5138.)

Zelma talked to Rose after learning that appellant was having problems in elementary school. Rose could not accept the fact that appellant was misbehaving, nor did she hold appellant responsible for his conduct. (38 RT 5139.) Big Gregory told Zelma that Rose was "making a wimp" out of his son, and babying him. (38 RT 5140.) On one occasion, Zelma was asked to attend a social services conference involving appellant. When she arrived, appellant was there by himself and appeared to her as a forlorn little child. He told Zelma that Rose had ordered him out of the house. Rose showed up late, with an attitude. She was angry because appellant had accumulated a number of tickets for driving a moped without a license. Zelma thought Rose was at fault for "tempting" appellant by buying him a moped, but forbidding him to ride it. (38 RT 5141-4142.) On another occasion, Zelma was asked by school officials at Fremont High School to allow appellant to live with her, as there had been an incident involving a gun and there was a concern that appellant was going to get shot. The school officials had contacted Zelma because their contact with Rose had been unsatisfactory. Rose had come to the school drunk and was not "very nice." (38 RT 5146-5147.)

c. Death and Misfortune Mark Appellant's Childhood and Teenage Years

The jury was told about a series of devastating events which

indelibly marked appellant's childhood and teenage years. When appellant was seven or eight years old, Rose's sister, Evelyn Jackson, was his babysitter and favorite aunt. Evelyn was killed in a car accident in 1976, and her death was a traumatic event for appellant. (36 RT 4950-4951.)

In 1982, when appellant was 14, his first cousin, Clifford Spencer, was murdered when someone broke into the house where he was staying and stabbed him in the back. Appellant was close to Clifford. Rose could tell that appellant was quite affected by Clifford's death, as he carried Clifford's obituary in his wallet and would periodically take it out and read it. Although appellant attended Clifford's funeral, Rose did not see him cry. Appellant seemed to internalize his pain, and refused comfort from his mother. (36 RT 4953-4954.)

In April of 1983, appellant's friend, Antoine Martin, was gunned down in a drive-by shooting while standing next to appellant. Both appellant and Antoine were on their way to pick up some Amway products from Antoine's mother when the fatal shooting occurred. Rose could see that appellant was traumatized by the loss of his friend, as he could not sleep at night until he came to Rose's room and they talked. As he did with Clifford's obituary, appellant also carried Antoine's obituary in his wallet. (36 RT 4954-4956.)

Appellant's grandfather, Chester Jackson, was a beloved figure in the family and in the community in which he lived. He was responsible for many neighborhood projects, including the creation of a park and community center in what was an impoverished neighborhood. Chester purchased a motor home and used it to take neighborhood kids on campouts every August. He was an authority figure to appellant and was the only male adult who appellant was close to and heeded, according to Rose. (36

RT 4958-4960.) In March of 1984, Chester died unexpectedly after a stroke. (36 RT 4960-4961.) Appellant was deeply affected by his grandfather's death and would not attend the funeral. (36 RT 4958.) As Rose put it, the family fell apart after Chester's death. (36 RT 4961.)

On Christmas Eve of 1984, another of appellant's close friends died horribly. Willie Reed, who lived close to appellant on Best Avenue, spent the night in a rumpus room in the back of the house where appellant lived with Rose. While he was sleeping, Willie apparently kicked over a portable electric heater and burned to death in the resulting fire. (36 RT 4946-4947, 4955-4956.)

In addition to the many deaths in his circle of family and friends, appellant himself suffered an injury that cut short a childhood dream. Appellant was good at gymnastics, and was the youngest child accepted on Skyline High School's gymnastics team, as well as the only Black child on that team, according to Rose. Appellant often expressed his dream to go to the Olympic Games as a gymnast. He and Antoine Martin were practicing flips off a horse when appellant broke his ankle in a fall. The injury required two surgeries and the insertion of screws in the bone, which effectively ended his ability to perform gymnastics. (36 RT 4956-4957.) As Rose described it, this unfortunate accident took away the biggest positive force in appellant's life. (36 RT 4958.)

The culmination of all the death and misfortune that appellant experienced was his attempted suicide. In 1984, when appellant was 17 years old, he tried to hang himself. Rose was a witness to the event, and attempted to remove the rope from around appellant's neck. Rose's mother called the police. As Rose told the story, the police scuffled with appellant and told her that they felt that because appellant had failed in his attempted

suicide, he was trying to get the police to kill him. (RT 5030-5032.)

d. Appellant's Difficulties at School

i. Introduction

The defense called as witnesses a number of education professionals who either taught or evaluated appellant during his school years. Generally, they told a tale of appellant's various learning disabilities and emotional deficits which caused him to fail as a student and behave disruptively in class. Although it was recognized that appellant had special education needs, his school history did not reflect that those needs were adequately addressed.

ii. Kindergarten and Elementary School

Appellant was enrolled in kindergarten at Dag Hammarskjöld Elementary School when he was four and-a-half-years old, as Rose felt he was "ready." In order to accomplish this, Rose reported his birth date as April 13, 1966, rather than the true date of birth in 1967. (37 RT 5007-5008.) In the middle of first grade, appellant transferred to Charles Howard Elementary School, where Rose worked. (37 RT 5009-5010.) At Charles Howard, appellant began to experience problems concentrating and keeping up with the work. Rose blamed the problems on appellant's teacher, who thought she could "deal" with appellant by sending him to his mother. (37 RT 5010.)

By the time appellant reached second grade, it was already recognized that he had learning disabilities. Barbara Hanson, a counselor in the Oakland public schools, testified that she prepared an individual education plan (IEP) for appellant. In the IEP, she reported that appellant was a very active child who was extremely aggressive with other children, his performance in academics was below grade level, and he was easily

frustrated. Hanson recommended that appellant be placed in a learning-disability class in the special-education program. (39 RT 5272-5273.)

Appellant then transferred to Toler Heights School, a kindergarten-through-third-grade school with a special-education program for children with learning disabilities. (37 RT 5012-5013.) In Rose's view, this placement was counterproductive, as appellant had to ride to school in a "handicapped" bus and was teased about this by the kids in the neighborhood. (37 RT 5014.) At Toler Heights, appellant's third-grade teacher was Ellen O'Shea. In April of 1975, O'Shea prepared an annual evaluation for appellant, addressing his future needs upon transferring from Toler Heights. In this evaluation, O'Shea recommended that appellant continue in a self-contained special-education class. O'Shea believed that appellant's behavior had improved, as had his academic achievement, and appellant's progress would be jeopardized if he were to be "mainstreamed," i.e., placed in a regular classroom with part-time assignment to a special-education classroom. (39 RT 5222-5223.) According to O'Shea, mainstreaming appellant would be totally ineffective and would result in subjecting him to ridicule from other students when he made mistakes or failed. The resulting feelings of rejection and inadequacy would lead to an aggressive response. (39 RT 5227-5228.)

In appellant's 1976 IEP review, it became apparent that appellant had been mainstreamed. As Hanson noted in her testimony, appellant was back at the Charles Howard Elementary School for the fourth grade, and attending an educationally-handicapped class for two hours a day. He was reading considerably below his grade level; indeed, he was reading at the second-grade level. (39 RT 5276-5279.) Rose had appellant repeat fourth grade at Charles Howard, in part to see that he was in the proper grade for

his age and also because she did not believe he was mature for his age. (37 RT 5019.) He was also involved in frequent fights. (39 RT 5295.) According to Hanson, appellant was recommended for and continued in the same type of placement at Charles Howard through 1978, i.e., through sixth grade. (39 RT 5283-5284.) The goal of the school was always to move students back into the mainstream program. (39 RT 5281.) Hanson could not say if there was an opening available for appellant in the self-contained special-education classes that O'Shea had felt appellant required. (39 RT 5281-5282.)

iii. Junior High and High School

Defense counsel presented evidence that mainstreaming appellant with students who did not have learning disabilities or emotional deficits proved equally ineffective when appellant began to attend junior high school and high school. Nancy Downey, a school psychologist in the Oakland Unified School District, reviewed appellant's academic records for his junior high school years. She confirmed appellant's learning disabilities and perceptual handicaps. (39 RT 5380-5385.) Dolores Cober, appellant's counselor at King Estates Junior High School, testified that appellant was often suspended from his seventh-grade class for his involvement in fights. After an incident in which he was caught receiving a pellet gun from another student, appellant was suspended and placed on "home instruction" for the remainder of that school year. (39 RT 5356-5358.) Cober reviewed appellant's academic record and observed that after he was mainstreamed in a regular classroom, he received virtually all failing grades. (39 RT 5358.) In the eighth grade, and at the request of his stepfather, appellant was placed in a special-education class, and then transferred to Frick Junior High School where he attended ninth grade in emotionally-handicapped

classes. At Frick, his academic performance improved somewhat. (39 RT 5359-5362.) Rose believed that this improvement might have been attributable to the change in environment and the teachers at Frick. Also, at this time in her life, she was in a non-abusive relationship with Levi Warner, who had a good and stabilizing relationship with appellant and DeWayne. (37 RT 5027-5028.)

Margaret McCullum, who taught appellant in the seventh and eighth grades, recalled him as a pupil who was not a high academic achiever, but who also did not present her with unusual disciplinary problems on a daily basis. She recognized that he had learning disabilities. Appellant's attendance was not poor, but sporadic. (39 RT 5370-5371.) Appellant was not segregated from other students without learning disabilities or emotional deficits, but McCullum judged such students by different standards. (39 RT 5372.) McCullum recalled that a significant number of appellant's fellow students and peers became involved with drugs, committed crimes, and met untimely deaths. (39 RT 5375-5377.)

The only evidence of appellant's performance in high school was that presented in the testimony of Fremont High School dean of students, Lee Mouton, and appellant's grandmother, Zelma Richard. Both Mouton and Richard discussed the incident in which appellant was removed from the school for fear he would be shot after he was involved in a fight at the school. Because Mouton was disturbed by Rose's drunken and belligerent response to the incident when summoned to the school, Mouton suggested that appellant move in with his grandmother for reasons of safety. (38 RT 5146-5147; 39 RT 5396-5398.)

e. Referrals to the Juvenile Justice System

In November of 1983, when appellant was 16-years old, he was

referred to the juvenile probation intake unit after his arrest for a battery. The case was investigated by Alameda County probation officer Charles Simms. As it was soon determined that the case involved mutual combat and there was insufficient evidence to prosecute, the case was closed. (39 RT 5303-5304.) Simms next had contact with appellant at juvenile hall in December of 1983. Rose had contacted the police to take appellant away for "incorrigibility" and, because the police mistakenly believed that the November battery case was still active, appellant was brought to juvenile hall. (39 RT 5304-5305.) Rose recalled that she had appellant arrested for running away from home to her sister's house. Her thinking was that her child could either stay with her or go to juvenile hall. (37 RT 5060.) As appellant was considered no more than a status offender, Simms had him taken to Perry Place, a non-secure children's shelter.

That same day, appellant ran away from Perry Place. Simms next had contact with appellant within the week when he was arrested for a burglary. This case, too, was not pursued for lack of evidence, but shortly before Christmas, appellant was again arrested for a burglary. (39 RT 5307-5311.) He remained in custody at juvenile hall during the holidays, and only his stepfather attended the detention hearing. (39 RT 5312.) The case ultimately resulted in appellant's release to Rose after he spent additional time in custody at juvenile hall. (39 RT 5319.)

Simms testified about appellant's subsequent performance within the juvenile justice system. Appellant's arrest for burglary in February of 1984 resulted in his referral to Los Cerros County Camp, a boy's ranch. (39 RT 5319-5320.) That same year, he ran away from Los Cerros on two occasions, each time returning after surrendering himself. (39 RT 5318-5324.) Simms told the jury that he had discussed the circumstances of these

runaway incidents with Rose and learned from her that appellant was depressed over the recent deaths of friends and relatives and had attempted suicide. (39 RT 5324-5325.) When appellant was returned to Los Cerros after his last runaway, the juvenile court opted not to commit him to the California Youth Authority, which was the most restrictive disposition available to the juvenile court. (39 RT 5339-5340.)

f. Testimony from Appellant's Childhood Peers

Defense counsel presented the testimony of three of appellant's childhood friends who were serving prison sentences at the time of their trial testimony. Each told a similar tale, i.e., that appellant looked up to them as an older brother and that, due to a lack of parental supervision, appellant "ran" with them in the streets of Oakland as a child, drinking beer, smoking marijuana, and engaging in thefts, burglaries, and fights.

At the time of appellant's trial, Darryl Cooper was serving a state-prison sentence in Corcoran for robbery. (40 RT 5442.) He grew up together with appellant in the same neighborhood. (40 RT 5425.) Appellant became Darryl's best friend when they were in the fourth grade. Like appellant, Darryl lived on Hesket Road. (40 RT 5427.) They spent a great deal of time together when they were in the fourth or fifth grade. After school, they would go to the park, shoot dice, and drink beer which they bought in 40-ounce bottles. Typically, after drinking they would buy marijuana with money obtained from gambling and from selling property stolen from boxcars in nearby San Leandro. (40 RT 5430-5431.) Their friend, Eric Cato, taught Darryl how to break into the boxcars, and Darryl in turn taught appellant how it was done. Darryl and appellant did this two-or-three times a week. (40 RT 5433.) Darryl considered appellant to be an alcoholic when they met in the fourth grade. (40 RT 5435.) According to

Darryl, Rose had no real control over appellant after he entered the fourth grade. Appellant was permitted to stay out of the home for days at a time. (40 RT 5436-5437.) It appeared to Darryl that their friendship was more important than his family relationships, as was appellant's relationship with Eric Cato. Both Darryl and Cato were like big brothers to appellant. (40 RT 5441.)

Eric Cato's account of appellant's childhood years corroborated Darryl's testimony. Cato, like Darryl, grew up in the same neighborhood with appellant. They met when Cato was seven-or-eight years old, although appellant was about two-and-a-half-years younger than Cato. (40 RT 5468.) They attended different schools, but socialized together after class at Cato's home, where they raised pigeons. At the neighborhood park, they drank beer and smoked "weed." (40 RT 5470-5471.) Cato introduced appellant to beer drinking. Adults hanging out in front of the liquor store were enlisted to purchase beer for them. Appellant was as young as six when they passed their time in this manner. (40 RT 5471-5472.) Cato and appellant financed their drinking and smoking by committing "little crimes" such as stealing pigeons and burglarizing shacks and boxcars. (40 RT 5472-5477.)

Cato was considered a leader among boys of his age at this time, and exerted influence over appellant. (40 RT 5478.) Appellant was small for his age, and a follower among the boys they hung out with. (40 RT 5483.) Cato looked out for appellant, and when their group committed thefts in which appellant did not participate, Cato would give him a share of the stolen property. (40 RT 5489.) On some occasions, appellant stayed overnight at Cato's home. (40 RT 5480.) Their brother-like relationship lasted from the time Cato was 8 until he was locked up at the age of 16. At

the time of appellant's trial, Cato had served seven years of a state-prison sentence for kidnaping and robbery. (40 RT 5481.)

Arthur Simpson became appellant's uncle by marriage in 1984 when he wed Mamie Spencer, appellant's aunt. (40 RT 5411.) Prior to the marriage, Simpson knew appellant from the neighborhood and met him in 1981. (40 RT 5412-5414.) Only after Simpson's release from prison did he spend much time with appellant, but they corresponded while Simpson was in custody. (40 RT 5413-5415.) Simpson noted that appellant sought out friends who were older than he was, and that he was looking for approval and recognition. Simpson remembered that appellant was an overly emotional young man, quick to anger and easily upset "if it wasn't going his way." (40 RT 5419.)

g. Expert Testimony Regarding the Effects of Abuse on Family Dynamics

Daniel Sonkin testified as a defense expert in the field of family relationships and the general effect of child abuse on family dynamics.[19] (41 RT 5545-5546.) Sonkin was a licensed marriage and family counselor with training in psychology and a forensic-consultation practice. (41 RT 5511-5521, 5537-5539.) Sonkin provided the jury with the definition of child abuse recognized in the field of child treatment, and set forth a number of examples of such abuse, including physical abuse and neglect. (41 RT 5547-5557.)

Sonkin explained the various developmental effects of child abuse, emphasizing that the research has demonstrated that physically-abused children tend to become physically abusive themselves. (41 RT 5558.)

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[19] Sonkin did not examine appellant, review his records, or offer a diagnosis for appellant. (41 RT 5543-5546, 5584.)

Because the effects of abuse manifest themselves differently depending on the age of the child and the nature of the abuse, Sonkin gave specific examples of these effects as the abused child grew into adulthood. (41 RT 5560-5563.) For example, Sonkin observed that bed-wetting was "highly correlated" with child abuse. Similarly, constant fighting and acting up in the first three years of childhood was a common indicator of physical abuse or a hostile family. (41 RT 5563.) Long-term effects of child abuse include cognitive deficits which prevent the child, once grown, from thinking through situations and cause the child to engage in impulsive behavior. (RT 5567.) Visible emotional effects include rage, negative attitudes, depression and sadness. A high level of physical aggression toward one's peers is a clear symptom of child abuse. (41 RT 5572.) Noticeable behavioral effects include alcohol and drug abuse, acting-out behavior and, in children one often sees running away from home, dropping out of school and hanging out with a questionable crowd. (41 RT 5568.)

In Sonkin's experience, psychological abuse can be as traumatic as physical abuse. For example, a mother who takes her young child to the probation department and reports him as incorrigible gives the child a consistent message that the mother neither loves nor wants the child, and that the child "is no good." (41 RT 5569.)

Sonkin explained that the nefarious effects of child abuse could, in some cases, be ameliorated by the presence of "protective factors," which he defined as a child's experiences which mitigate or buffer the effects of abuse. (41 RT 5564.) Among such factors would be positive adult role models such as a coach, teacher or relative. Even IQ and gender can mitigate the effects of abuse. (41 RT 5564-5567.)

Without protective factors or treatment, children who are severely

abused end up with narrower choices as adults in dealing with their problems. (41 RT 5576-5577.) In Sonkin's opinion, abused children act very immaturely as adults. Their development has been arrested because of the abuse. (41 RT 5579.) In Sonkin's view, child abuse can lead to future murder by the abused child because the cumulative events that occur in his life only serve to make his life more dysfunctional, more self-destructive, and more destructive towards others. (41 RT 5577-5578.)

I

THE TRIAL COURT VIOLATED APPELLANT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, RELIABLE PENALTY DETERMINATION AND DUE PROCESS, AND COMMITTED REVERSIBLE ERROR, BY THE RESTRICTIONS IT IMPOSED ON VOIR DIRE

A. Introduction

Appellant's attorneys were rightly concerned that evidence of the circumstances of the crime was very likely to predispose members of the venire to vote for death and to not consider the evidence in mitigation and reject life imprisonment without possibility of parole as a possible penalty. Consequently, defense counsel drafted a script for the trial court to use in *Hovey* voir dire[20] which addressed the specific nature of the charged crime, special circumstances, and enhancements. The script called for each prospective juror to assume that certain case-specific aggravating facts had been proved beyond a reasonable doubt. Further, the script contained an

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[20] Here, as in *People v. Cash* (2002) 28 Cal.4th 703, "[t]he trial court conducted death qualification voir dire of each prospective juror individually and out of the presence of other prospective jurors (see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80 [168 Cal.Rptr. 128, 616 P.2d 1301]), followed immediately by general voir dire of that juror. Voir dire of each prospective juror proceeded in three steps: The court asked death-qualifying questions, attorneys for each side posed death-qualifying questions, and finally each side posed questions on general voir dire. After each step, the court entertained challenges for cause. All prospective jurors not excused for cause during this process were directed to return at a later date. When the prospective jurors remaining after voir dire assembled on that date, they were called into the jury box according to randomly assigned numbers, the court entertained the parties' peremptory challenges, and in this manner the final selection of the jury and the alternates was concluded." (*Id.* at pp. 718-719.)

explicit admonition against prejudging the case on the basis of these assumed facts. The script culminated with a question directed at each prospective juror: Would the prospective juror necessarily impose the death penalty or life imprisonment without possibility of parole on the basis of the facts and circumstances described if it was proved beyond a reasonable doubt that it was the defendant who had committed those acts?[21]

The People objected to defense counsel's *Fields* question as "too detailed" and because it would cause a prospective juror to prejudge the case. (1 RT 201.) Ultimately, the trial court rejected the proposed *Fields* question on the basis of its belief that the question would violate the principle that death-qualification voir dire must focus on a prospective juror's attitude toward the death penalty in the abstract, as enunciated in *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412. (1 RT 246-247.) As a substitute for defense counsel's proposed *Fields* question, the trial court restricted its (and counsel's) voir dire to a bare bones description of the charges as contained within the four corners of the charging document, i.e., that the case involved (1) the murder of a woman, (2) special circumstance allegations that the murder was committed while the perpetrator was engaged in the commission or attempted commission of a burglary and/or robbery, and (3) the use of a knife. (1 RT 247.)

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[21] A question of this type was understood by counsel and the trial court as generally permissible in the aftermath of this Court's discussion, in *People v. Fields* (1983) 35 Cal.3d 329, 357-358, of the scope and nature of permissible voir dire in capital cases. In the jargon of the trial court and counsel, such a question was referred to as the "*Fields*" question. For the sake of clarity, appellant will also utilize that characterization in the instant discussion.

By rejecting defense counsel's proposed *Fields* question, and limiting voir dire strictly to the facts alleged in the charging document, the trial court created the risk that a juror may have been empaneled who was inclined to vote for the death penalty because of the aggravating evidence presented in this case as a general fact or circumstance, regardless of the strength of the mitigating circumstances. By foreclosing the defense from probing into the prospective jurors' attitudes as to those facts and circumstances, the trial court's ruling denied appellant his right to an impartial jury, a reliable penalty determination and due process of law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article 1, sections 7, 15, 16, and 17 of the California Constitution. The consequence of such fundamental error requires the reversal of appellant's death sentence. (*Morgan v. Illinois* (1992) 504 U.S. 719, 739; *People v. Cash* (2002) 28 Cal.4th 703, 722-723.)

B. Procedural Facts

Defense counsel filed a written script to be used by the trial court during *Hovey* voir dire. (2 CT 503-505.) As a preamble, the script contained a number of admonitions, informing each prospective juror that (1) the trial court intended to summarize the accusations against the defendant for the sole purpose of making voir dire more meaningful; (2) the summary of the accusations did not presuppose that the evidence to be presented at trial would necessarily prove the truth of the accusations beyond a reasonable doubt, but was instead only intended to make voir dire more meaningful in the event of a possible penalty trial; (3) no inferences were to be drawn about the defendant's guilt or innocence from the summary of the accusations; and (4) the ultimate question of the defendant's guilt or innocence must be decided exclusively on the actual

evidence presented at trial and not from "any speculative inferences" arising from the summary of the accusations. (2 CT 504.)

The proposed script thereafter contained the following *Fields* question:

> If the evidence were to prove beyond a reasonable doubt and to a moral certainty that
>
> 1. Someone kicked in the backdoor and entered the residence of Sarah LaChapelle with the intent to commit a burglary or robbery, and
> 2. That someone murdered Sarah LaChapelle during the course of that burglary or robbery, and
> 3. Sarah LaChapelle died as a result of multiple stabbing, multiple blunt instrument blows to the head and neck, multiple puncture wounds, and
> 4. Sarah LaChapelle's ring finger was severed and her wedding rings were taken, and
> 5. Victim's adult son discovered her body,
>
> Would you necessarily impose either the death penalty or life without the possibility of parole in the above fact situation if it was proved to you beyond a reasonable doubt and to a moral certainty that the accused defendant committed those acts?

(2 CT 504-505.) The trial court addressed defense counsel's *Fields* question at three hearings. Although at first, the trial court was inclined to grant defense counsel's request and ask the *Fields* question in a form substantially similar to defense counsel's draft, by the time the trial court ultimately made its ruling, it had stripped the question of any meaningful substance.

1. The September 3, 1992, Hearing

At the first hearing which addressed the proposed script, the trial

court seemed inclined to include the substance of defense counsel's requested voir dire.[22] Although the prosecutor objected to the script as "too detailed," the trial court was not convinced, observing that "this goes into a lot of detail, and I said it was – I thought it was sort of lengthy when you first started these comments, but some of these things might be important." (1 RT 198-203.) Consequently, the trial court offered the prosecutor the opportunity to draft his own version of a *Fields* question which "covers the problem." The prosecutor indicated that he would do so. (1 RT 202-203.)

2. The September 8, 1992, Hearing

When the matter was next addressed, the trial court had reviewed a submission by the prosecutor modeled after a *Fields* question the trial court had used in previous capital cases.[23] (1 RT 224-225.) After hearing argument from defense counsel that this Court's opinion in *People v. Clark* (1990) 50 Cal.3d 583 recognized the propriety of including a fact-specific question concerning the evidence in aggravation that was likely to be presented at trial, if not during death-qualification voir dire, then during general voir dire (1 RT 225-226), the trial court proposed its own draft of a *Fields* question. This draft was motivated by the trial court's expressed concern that the question not result in the prospective jurors prejudging the

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[22] When appellant's case was first assigned to the trial court, preliminary discussions concerning general voir dire procedures were had, and the trial court confirmed that its practice was to always ask a *Fields* question. In the trial court's view, such a question would necessarily deal with the evidence which would be introduced at appellant's trial. However, the trial court expressed its wish that counsel attempt to reach agreement as to the parameters of the *Fields* question. (1 RT 9-10.)

[23] The exact language of the prosecutor's draft question does not appear in the record.

evidence:

> THE COURT: The problem is you also have to weigh the idea of whether or not you're going to ask the jurors in this case to prejudge the evidence. That's another problem I have to take into consideration. And I've – After giving this some thought, I came up with the following question to ask: The evidence in this case is likely to show that the victim's house was unlawfully entered, that she was robbed and burglarized, and that during the course of the crimes the victim was stabbed and bludgeoned to death, period. That's it.
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> MR. PINKNEY [defense counsel]: My response, Your Honor, is that *People v. Clark* supports the kind of question in the detail that we've suggested. But I do appreciate that the Court's suggested question comes a lot closer to the kind of question we formulated, and we appreciate that adjustment.
>
> THE COURT: What we have here, I'm leaving off a finger was severed, because this raises an issue with the jury. And then we are going to be inviting questions, and that will all come out in the evidence in this case. But the fact that there is a special circumstance alleged that there was a robbery and a burglary, what we have is if she was murdered in her own house, that she was robbed and burglarized, that is going to be evidence that is going to show or likely to show, according to my question, and that she was stabbed and bludgeoned to death. Otherwise, we get into a situation where we are asking the jurors to prejudge the evidence in this case. We are going to have to be very careful that we don't do that. All I'm asking – All I want to find out is if this is what the evidence shows happened in this case, that a woman was robbed, burglarized, and stabbed and bludgeoned to death in her own home, would both penalties still be open. That's all I want to know.

(1 RT 227-228.)

Defense counsel argued that the trial court's proposed *Fields* question eliminated reference to the most serious piece of aggravating

evidence – the severed finger, and would cause a prospective juror to automatically choose the death penalty without giving any consideration to the mitigating evidence. (1 RT 228-229.) The trial court disagreed:

> THE COURT: Well, that may be a characteristic of this case, but I don't think you can ask anything more inflammatory than this woman was stabbed and bludgeoned to death in her own house.
>
> MR. PINKNEY: The only distinction I would draw, your Honor, is those blows are received as blows, the cause of death, and indirectly causing the death. I think the severance of a finger is perceived as substantially worse and is a so significantly aggravating fact that it's the kind of fact that alone could shape people's position on the question.

(1 RT 229.)

The trial court recognized the validity of defense counsel's point, but wondered if it was a relevant consideration:

> THE COURT: I don't know how – how important the fact that one of her fingers was cut off has got anything to do with it, really. From your own *Fields* question, she died as a result of multiple stabbing, multiple blunt injuries to the head and neck, multiple puncture wounds. I'm going to say she was stabbed and bludgeoned to death. And whether or not her ring finger was severed or wasn't, that's one of the facts that they can take into consideration when they get into the penalty phase in this case. But all that – And the voir dire, all that opens up is why was her finger severed. We don't know why her finger was severed. At least now we don't know. We haven't heard any of the evidence in this case yet, and so I'm not going to speculate for that reason. All I'm doing is inviting inquiries from the jurors why that is significant, and so then we are going to have to be feeding them more and more of the facts of this case, and we are asking them to prejudge the evidence.

(1 RT 230.) The trial court thus noted both defense counsel's objection to, and the prosecutor's approval of, the trial court's proposed *Fields* question.

(1 RT 230-231.)

The trial court's ruling on September 8, 1992, was not the last word on the issue of the *Fields* question, however. Two days later, and after further research, the trial court withdrew its proposed question for fear it would violate *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, and substituted in its place a *Fields* question which was limited by the four corners of the charging document.

3. The September 10, 1992, Ruling

After making what seemed like its final ruling on the *Fields* question, the trial court apparently began to have second thoughts, as it continued to devote "a lot of time reviewing authorities," including "some of the briefs that were submitted on prior capital cases that the Court has tried and the manner in which the jury was selected." (1 RT 246.) It therefore, on its own motion, scheduled another hearing to give counsel notice of a new and final draft of the *Fields* question it intended to employ in voir dire. Before taking comments from counsel, the trial court expressed its belief that were it to use the *Fields* question submitted by defense counsel, it would be violating the law as set forth in *Witherspoon*. The subtext of the trial court's reading of the authorities, however, inexorably led it to conclude that not only would *Witherspoon* be violated by using defense counsel's *Fields* question, but also that the *Fields* question drafted by the trial court and approved on September 8, 1992, would violate *Witherspoon*.

First, the trial court observed that "the law was clear" that death-qualification voir dire "should focus on juror attitude toward the death penalty in the abstract and should not be used to seek a prejudgment of the facts to be presented at the trial." (1 RT 246.) In the view of the trial court,

it was necessary to restrict voir dire to how the charges in this case would relate to the jurors' attitudes toward the death penalty. (1 RT 247.)

Second, in order to implement its view of the law's requirements, the trial court intended to include in its voir dire only the question that if (1) the defendant was convicted of first degree murder and the alleged special circumstances, and (2) the murder at issue was committed during the commission of a burglary and/or a robbery in which a deadly weapon was used, would both of the possible penalties remain open? (1 RT 247.)

Third, because of the nature of the charges as set forth in the information, the trial court would permit counsel to voir dire on (1) the felony-murder rule, (2) the fact that the victim was a woman, and (3) the fact that a knife was used in the commission of the murder. (1 RT 247.)

Finally, the trial court intended to prevent "those specific little details about the case," e.g., the fact that (1) the victim was bludgeoned to death, (2) the victim's "fingers [*sic*]" were cut off, and (3) the victim was found nude from the waist down, to be mentioned during voir dire, as these matters were "condemned" under *Witherspoon*. (1 RT 247.) In the trial court's view, even though *Witherspoon* was arguably modified by *Wainwright v. Witt*, *supra*, to give the trial court "a little more latitude" in deciding death qualification, *Witt* did not change this aspect of *Witherspoon* to otherwise expand fact-specific voir dire. (1 RT 248.)

Defense counsel argued at length, but in vain, that the trial court had misunderstood the controlling authorities. Citing *People v. Pinholster* (1992) 1 Cal.4th 865, *Clark*, and *Fields*, defense counsel argued that fact-specific questions were permissible at least in the general voir dire, even if *Witherspoon* or *Witt* suggested that death-qualification voir dire should focus on the prospective jurors' views on the death penalty in the abstract.

(1 RT 248-249, 255-256.) In counter-argument, the prosecutor claimed that the trial court's view was entirely consistent with *Pinholster*, *Clark*, and *Fields*, and that the California Supreme Court had reaffirmed those holdings in *People v. Mason* (1991) 52 Cal.3d 909. (1 RT 249-251.)

Unswayed by defense counsel's arguments, the trial court reiterated its ruling that its *Fields* question would be confined to the four corners of the information, and that counsel's voir dire was similarly restricted to the factual matters and legal theories revealed or implicated by the charging document. Reference in voir dire to the factual specifics of the crime was expressly forbidden.[24] (1 RT 252-253, 256-258.)

In attempting to articulate its legal reasoning, the trial court put it this way:

> THE COURT: Well, I don't want to beat this to death with a stick. Now, I know it's a capital case. Let me just put my feelings on the record. According to – in *Clark*, a judge can excuse a juror who would be unable to faithfully and impartially apply the law. That's – That's *Wainwright v. Witt*. The inquiry was directed as to whether or not without knowing the specifics of the case the juror has an open mind on the penalty determination. And then in a footnote, it repeats the rule of *People v. Fields*, that 'excluding a juror for cause because he would vote against the death penalty based on evidence to be presented would violate *Witherspoon*.' If – If the juror was informed of the evidence to be presented rather than simply the charges, and on the basis of that evidence announced he would vote for the death penalty, or against the death penalty, for that matter, his exclusion because he would vote for the death penalty or not vote for the death penalty would violate state and federal

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[24] These specifics were referred to in the prosecutor's argument in opposition to the defense *Fields* question as "the horrors of this case." (1 RT 251.)

constitutional standards, and that's been watered down.

(1 RT 251-252.)

Nearing the conclusion of the hearing, the trial court also took refuge in the reasoning behind the prosecutor's argument:

> THE COURT: But I'm not going to let you go into the specific details. I think it's violative of *Witherspoon*, and I also think that under Prop. 115 I am on solid legal ground not to permit you to go into the specific details; because I think it has a tendency to, one, prejudge the evidence in this case, and, number two, that I think it indoctrinates the juror or tries to attempt to get the juror to vote in a specific way.

(1 RT 256.)

Finally, the trial court explicitly recognized that its ruling deprived defense counsel of the opportunity to ask questions on voir dire that delved into "more specific facts" than addressed in voir dire as permitted. (1 RT 257-258.) However, the trial court made it clear that defense counsel was not obliged, for preservation purposes, to ask the disputed questions of each prospective juror and to seek individual rulings. (1 RT 258.)

C. The Trial Court's Ruling Was Clearly Erroneous

Justice Kaufman, in his concurring opinion in *People v. Clark*, *supra*, 50 Cal.3d 583, 646-650, put his finger on the source of the trial court's mistake in this case: a myopic misinterpretation of *Witherspoon v. Illinois*, *supra*, prior to this Court's acknowledgment in *People v. Ghent* (1987) 43 Cal.3d 739, 767, that *Witherspoon* had been "substantially modified" by *Witt v. Wainwright*, *supra*.[25] As Justice Kaufman explained:

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[25] In *Clark*, the defense was prevented from inquiring in death-qualification voir dire whether serious burn injuries suffered by the homicide victims would cause the jury to automatically vote for the death

(continued...)

> [The *Witherspoon* standard] was sometimes viewed as permitting a challenge for cause on the ground of bias against the death penalty only if a prospective juror's responses made it unmistakably clear that he or she would always and in every case vote against imposition of the death penalty. If this were now the proper standard, then . . . death qualification voir dire could properly be limited to the views of the prospective jurors about capital punishment in the abstract, and questions regarding the facts of the case could properly be excluded.

(*People v. Clark*, *supra*, 50 Cal.3d at p. 648.)

Justice Kaufman hastened to defend this Court from any responsibility for this mistaken view of *Witherspoon*, pointing to *People v. Fields*, *supra*, 35 Cal.3d 329, and *People v. Hamilton* (1989) 48 Cal.3d 1142, as cases in which this Court had held that, notwithstanding the *Witherspoon* standard, a court might properly excuse for cause a prospective juror who would automatically vote against the death penalty *in the case before him*, regardless of his willingness to consider the death penalty in other cases. In the same breath, though, Justice Kaufman recognized that *Fields* contained language from which it could be inferred that during death qualification voir dire, prospective jurors "should be informed only of the charges involved in the case, and not of the evidence to be introduced." (*People v. Clark*, *supra*, 50 Cal.3d at p. 648, citing *People v. Fields*, *supra*, 35 Cal.3d at p. 358, fn. 13.) Yet Justice Kaufman forcefully argued that any such limitation was nonsensical:

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[25] (...continued)
penalty. This Court found that because the defendant was not precluded from making that inquiry during general voir dire and had not used all of his peremptory challenges, he was precluded from arguing on appeal that the jury was not properly constituted. (*People v. Clark*, *supra*, 50 Cal.3d at pp. 596-597.)

> But this limitation makes little sense since the scope of voir dire would then be dependent upon the level of detail in the charging document and, more importantly, as explained above, because it would allow many objectionable death penalty views to remain undiscovered. Our post-*Witt* decisions have not limited the death qualification voir dire to the prospective jurors' views on the death penalty either in the abstract or in the circumstances shown by the charges.

(*People v. Clark*, *supra*, 50 Cal.3d at p. 648.)

For Justice Kaufman, the bottom line was that, contrary to the view of the majority, death-qualification voir dire may properly focus on case-specific circumstances:

> If a certain factual circumstance by itself would cause a prospective juror automatically to vote either for or against the death penalty, regardless of other aggravating or mitigating circumstances, then that juror holds a capital punishment view impairing his or her ability to perform the duty of a penalty phase juror. Under the *Witt* standard, such a juror is subject to challenge for cause.

(*Id.* at p. 647.)

Thus, Justice Kaufman was of the view that limitations on death-qualification voir dire which prevented the defendant from exploring whether prospective jurors would automatically vote for the death penalty if a victim suffered serious burn injuries of the kind suffered in that case were clearly erroneous.[26] (*Id.* at pp. 646-650.)

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[26] The *Clark* majority held that inquiry into case-specific circumstances would have been relevant during general voir dire in aid of a challenge for cause. (*Id.* at p. 597.) Justice Kaufman concluded that the trial court's limitation on death-qualification voir dire did not preclude general voir dire on the same subject, and that therefore defense counsel's failure to attempt, during the general voir dire, to inquire whether the severe injuries suffered by the victim would have caused a prospective juror to

(continued...)

It now appears that this Court has adopted Justice Kaufman's position that death-qualification voir dire that inquires into case-specific circumstances does not offend the *Witherspoon/Witt* standard. In *People v. Cash*, *supra*, 28 Cal.4th 703, this Court clarified the law on the scope of permissible voir dire under circumstances virtually identical to those presented here, holding that restrictions on voir dire of the kind imposed at appellant's trial were utterly incompatible with implementing the guarantee of an impartial jury within the meaning of *Morgan v. Illinois*, *supra*, 504 U.S. 719.[27]

In *Cash*, the defendant was charged with capital murder. During individual and sequestered death-qualification voir dire, defense counsel attempted to ask a prospective juror "whether there were 'any particular crimes' or 'any facts' that would cause that juror 'automatically to vote for the death penalty.'" (*People v. Cash*, *supra*, 28 Cal.4th at p. 719.) The trial court ruled that the question was improper "because 'we're restricted to this case.'" (*Ibid.*) Outside the presence of any prospective jurors, the defense argued for reconsideration of the ruling, explaining that it wished to inquire whether "prospective jurors could return a verdict of life without parole for

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[26] (...continued)
automatically vote for the death penalty foreclosed the claim that reversible error was committed. (*Id.* at p. 646.)

[27] Indeed, Cash's case was tried virtually contemporaneously with appellant's case in another department of the same superior court, and voir dire was conducted in exactly the same fashion in both cases. (*People v. Cash*, *supra*, 28 Cal.4th at 718-719; *http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=29347.*)

a defendant who had killed more than one person." (*Ibid.*)[28] As evidence of the prior murders was sure to be presented at a penalty phase, defense counsel was concerned whether prospective jurors could return a verdict of life imprisonment without possibility of parole once they learned that defendant had committed prior murders. The trial court did not waver from its prior ruling, explaining its reasoning as follows:

> You cannot ask anything about the facts that are not charged in the Information, period. You can't raise one mitigating factor, nor can [the prosecutor] raise one aggravating [factor] that is not charged in the Information. . . . You cannot go past the Information.

(*Ibid.*) In light of the trial court's seeming obduracy, the defense took another tack. The defense filed a written motion seeking permission to ask prospective jurors "whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole." The trial court would not budge, commenting: "I am not permitting you to ask them about any specific acts of mitigation or aggravation, as that would in my opinion have them prejudge the evidence." (*Ibid.*) This ruling was enforced throughout all remaining voir dire so that defense counsel was prohibited from questioning the venire about uncharged facts or circumstances that might cause a prospective juror to vote automatically for the death penalty. (*Ibid.*)

This Court reversed the death judgment in *Cash*, holding that by preventing all voir dire on the issue of the aggravating evidence of the two prior murders, the trial court had denied the defendant his federal and state

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[28] Cash had been tried and committed as a juvenile for the murders of his elderly grandparents. (*People v. Cash*, *supra*, 28 Cal.4th at p. 717.)

constitutional rights to an impartial penalty jury. (*Ibid.*) In so holding, this Court flatly contradicted the very same position taken by the trial court at appellant's trial, i.e., that *Witt* would be violated if voir dire was conducted which embraced the subjects addressed in defense counsel's *Fields* question.[29] This Court took care to emphasize that even within the specialized realm of death-qualification voir dire, a trial court cannot categorically restrict voir dire to preclude "mention of any general fact or circumstance not expressly pleaded in the information [Citations]." (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.)

In recognizing *Witt*'s holding that prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors, this Court in *Cash* discerned that the truly relevant question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 719-720; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Hill* (1992) 3 Cal.4th 959, 1003.) Noting that the death-qualification standard operates in the same fashion regardless of whether the prospective juror favors or opposes the death penalty, this Court observed that "it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." (*Cash*, *supra*, 28 Cal.4th at

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[29] The trial court here correctly understood that *Witt* gave it more latitude in assessing death-qualification than did *Witherspoon*, which the trial court viewed as the main obstacle to the type of voir dire requested by defense counsel.

p. 720.)

Moreover, this Court acknowledged that a challenge for cause is justifiably based upon on a prospective juror's response upon being informed of the facts or circumstances that are likely to be adduced at trial.[30] (*Id.* at p. 720.) Because the fact of the defendant's guilt for the prior murder of his grandparents (1) was a general fact or circumstance present in the case, and (2) could cause some jurors "invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances" (*ibid.*),

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[30] In support of this proposition, this Court cited the following cases: *People v. Ochoa*, *supra*, 26 Cal.4th at p. 430 [prosecutor's voir dire as to whether juror could impose the death penalty on the defendant if the evidence showed he did not personally kill was proper]; *People v. Ervin* (2000) 22 Cal.4th 48, 70-71 [prosecutor's voir dire on co-defendant's lack of criminal record and fact that he did not personally kill the victim was proper in aid of a challenge for cause under *Witt*]; *People v. Earp* (1999) 20 Cal.4th 826, 853 [defense counsel's question as to whether prospective juror had personal experiences with child molestation, while relevant to death qualification, was adequately addressed by trial court's voir dire question whether "'the charges against defendant relating to allegations of sexual misconduct involving the death of child' would have any effect on the juror's sentencing decision"]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1320 [prosecutor's cause challenge proper when two prospective jurors expressed ability to impose death penalty only in extreme cases "not analogous to the circumstances of the murders at issue in the proceedings before them"]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [error to restrict defendant's case-specific voir dire on likely aggravating evidence as a basis for peremptory challenges only]; *People v. Livaditis* (1992) 2 Cal.4th 759, 772-773 [prospective juror's views on youth of defendant and the fact that he had not committed murder before were relevant on the issue of whether juror was substantially impaired under *Witt* standard]; and *People v. Pinholster*, *supra*, 1 Cal.4th 865, 916-917 [prosecutor's voir dire on burglary-murder facts mirroring evidence likely to be presented at trial properly informed the question of whether the juror could vote for death penalty in the abstract, i.e., in any burglary-murder case].

the defense was entitled to probe the prospective jurors' attitudes on those circumstances. As the prior murder was "a fact likely to be of *great significance*" (*ibid.*; emphasis added), the restriction of voir dire was error.

Here, the salient components of appellant's proposed *Fields* question were also certain to be of great significance, just as the prior murders were in *Cash*. As described by defense counsel in their *Fields* argument to the trial court here, the signature feature of appellant's case was that the victim's finger had been severed in the course of the felony murder in order to steal her wedding rings.[31] (1 RT 228-229.) Limiting a case-specific description of the crime to the four corners of the information "makes little sense since the scope of voir dire would then be dependent upon the level of detail in the charging document and, more importantly, . . . because it would allow many objectionable death penalty views to remain undiscovered." (*People v. Clark*, *supra*, 50 Cal.3d at p. 648 (conc. opn. of Kaufman, J.).)

That the aggravating circumstances surrounding the victim's death and the dismemberment of her ring finger were "fact[s] likely to be of great significance" (*Cash*, *supra*, 28 Cal.4th at p. 721) in the minds of the jurors when it came time to decide the sentence in this case was not merely surmise on the part of defense counsel. The actual voir dire of a number of prospective jurors contains proof of the demonstrable reality of defense counsel's worst fears. During the trial court's death qualification of prospective juror Michael Trimble, Trimble indicated that his feelings might disqualify him, as he "honestly" leaned toward the death penalty. (5 RT 671-672.) When the trial court asked its "four corners of the charging

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[31] As anecdotal and macabre evidence, defense counsel related that "all" the prosecutors in the courthouse cynically referred to appellant's case by holding up a hand with only three fingers visible. (1 RT 229.)

document" *Fields* question, Trimble responded that his openness to consider both possible penalties depended on just how aggravated was the attack on the victim.[32] (5 RT 673.) Similarly, the trial court's death-qualification voir dire of prospective juror Remedios Badar elicited the same type of concern. After hearing the trial court's *Fields* question, Badar responded that her willingness to keep both penalties open depended on how appellant killed the victim.[33] (7 RT 984.) Another prospective juror, Valerie Poerio, responded to the trial court's *Fields* question by stating that she would need to know more about the circumstances of what happened during the crime in order to decide whether both possible penalties were open to her. (11 RT 1743.) The prosecutor's death-qualification voir dire of prospective juror Isolete Gracio elicited a response that the death penalty was appropriate in cases in which the victim was tortured or shot for no reason. Defense counsel's request that the trial court follow up by asking the originally-requested *Fields* question was refused.[34] (18 RT 2993.) Finally, in the case of the prosecutor's and trial court's death-qualification voir dire of Yolanda Early, a seated juror who held wildly-vacillating views on the availability of the death penalty as a possible punishment but who ultimately cast a vote for the death penalty in this case, it was manifestly

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[32] Defense counsel's challenge for cause of Trimble on *Witt* grounds was overruled. (5 RT 705.)

[33] Defense counsels' *Witt*-based challenge for cause of Badar was overruled. (7 RT 1018.)

[34] In explaining its ruling, the trial court acknowledged that it was possible that had it asked Gracio the *Fields* question as proposed by defense counsel, Gracio might have been disqualified from serving as a juror under *Witt.* However, having once made a ruling, the court stated it was disinclined to "revisit" it. (18 RT 3014.)

clear that the circumstances of how hideous the crime was and the nature and extent of the injuries suffered by the victim were closely correlated to Early's view of the availability of the death penalty as an appropriate penalty.[35] (13 RT 2002-2014.)

From the foregoing, it is clear that the circumstances surrounding the victim's killing and dismemberment here are factually indistinguishable from the severe burns suffered by the victim in *Clark*, which Justice Kaufman rightly identified as a case-specific fact which by itself might cause a prospective juror automatically to vote for the death penalty. Because such a prospective juror holds a "capital punishment view" which substantially impairs his or her ability to perform the duty of a penalty-phase juror, it was clearly erroneous to completely cut off the type of inquiry contained within defense counsel's proposed *Fields* question.

D. Because the Trial Court's Ruling Was Categorical, the Error Must Be Deemed Prejudicial Per Se

Although there are cases in which error in the restriction of death-qualification voir dire does not inexorably lead to reversal (see, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 974), appellant's case is surely not among them. This Court has identified two often interrelated situations in which such error might be deemed harmless. The first such situation is where a defendant was given the opportunity to probe into prospective jurors' attitudes about case-specific facts during the general voir dire. The second such scenario is presented where it is possible to determine from the

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[35] During the prosecutor's death qualification voir dire of Early, the trial court interrupted and asked her if she wanted to know how brutal the killing was, how often the victim had been stabbed, whether the victim had been mutilated, and questions of this nature. Early replied in the affirmative. (13 RT 2014.)

record "that none of the jurors had a view about the circumstances of the case that would disqualify that juror." (*Ibid.*) In the case at bar, appellant was categorically precluded from exploring, in general voir dire, the prospective jurors' attitudes about the aggravating circumstances of the victim's demise. This categorical denial resulted in a record from which it is impossible for appellant to point to a particular biased or unbiased juror.

Thus, this case is squarely on "all fours" with *People v. Cash*, where this Court reversed the penalty judgment for the identical error in restricting death-qualification voir dire. Here, as in *Cash*, the general voir dire of each individual and sequestered prospective juror took place immediately following death-qualification voir dire, and, as in *Cash*, the restriction on voir dire was clearly understood by all to extend into general voir dire. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.)

As this Court has observed:

> A defendant who establishes that "any juror who eventually served was biased against him" is entitled to reversal. (Citations.) Here, defendant cannot identify a particular biased juror, but that is because he was denied an adequate voir dire about prior murder, a possibly determinative fact for a juror. By absolutely barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due process right to an impartial jury. (Citation.)

(*Ibid.*) Just as in *Cash*, because the trial court's error in foreclosing voir dire on the terms set forth in defense counsel's *Fields* question makes it impossible for this Court to determine from the record whether any of the people who were ultimately seated as jurors at appellant's trial held the

disqualifying view that the death penalty should be imposed automatically on any defendant who kills a female victim by means of multiple stab, puncture, and bludgeoning wounds and thereafter severs her ring finger to steal her wedding rings, such error may not be regarded as harmless here.

E. Conclusion

Under the compulsion of this Court's holding in *Cash*, reversal of the death judgment is required, because the trial court's error denied appellant his due process right to an impartial jury and a reliable penalty determination as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

II

THE ERRONEOUS HARDSHIP EXCLUSION OF PROSPECTIVE JUROR ROBERT WALKER, JR. REQUIRES REVERSAL OF THE CONVICTION, SPECIAL-CIRCUMSTANCE FINDING, AND DEATH JUDGMENT

A. Introduction

Robert Walker, Jr., a 19-year old African-American male prospective juror, was excused over defense objection for reasons of undue hardship, although he did not request to be so excused. The record does not support the trial court's action in removing Walker from the jury panel. The court's action in wrongly removing a prospective juror violated appellant's state and federal constitutional and statutory rights to a fair and impartial jury, and reversal of the conviction, special circumstances finding, and death sentence is therefore required.

B. Factual Background

On September 28, 1992, voir dire of Walker was conducted in the manner described in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, i.e., he was questioned individually by court and counsel. (8 RT 1117-1146.) Prior to his voir dire, the trial court addressed the panel of prospective jurors with some general remarks. In pertinent part, the trial court stated:

> It's not going to be easy to be excused from this case. The law requires that I impanel a fair and impartial jury to the best of our ability to judge Mr. Tate in this case. That's my responsibility, he has that right, and that's what we are going to be trying to do here in the next few months, is to get a fair, impartial jury in this case. Now, in order to be excused – I know some of you may have some problems – we all do – where you are not going to be able to sit for any period of time. So here is what you're going to have to do:
>
> . . .

> And if you're a student, you'll have to let us know then, too, because if you miss a month of school, you may not be able to pick up the time.

(2 RT 285-287.)

Court and counsel conducted their respective death-qualification voir dire of Walker before addressing his general qualifications to serve as a juror. (8 RT 1117-1133.) Only after the court and the prosecutor had concluded this portion of voir dire, and defense counsel began to question Walker, did the court interject an issue regarding potential hardship.

Defense counsel, having observed that Walker was pursuing a college degree with a major in criminal justice, asked what career path Walker contemplated. When Walker replied that he aspired to be a probation officer, the court interrupted counsel's voir dire and began to inquire as to Walker's school schedule. Walker stated that he was a full-time student at California State University, Hayward, and was taking 17 units of course work. (8 RT 1142.) Fearing that the court was about to invite an undue hardship request from Walker, the following colloquy ensued between counsel and the trial court:

> MS. BROWNE [defense counsel]: There hasn't been any complaint about that. We don't have anything written about that.
>
> THE COURT: But I'll accept it.
>
> MS. BROWNE: Mr. Walker, do you have a problem sitting on a jury that would maybe take one or two months?
>
> MR. WALKER: It depends on the time schedule.

(8 RT 1143.)

Court and counsel went on to explain that the trial schedule contemplated juror attendance on Mondays and Wednesdays from 1:30

p.m. to 4:30 p.m., Tuesdays and Thursdays from 11:00 a.m. to 4:30 p.m., and no court sessions on Fridays. Jury deliberations were described as all-day matters, involving three-to-four days or longer. (8 RT 1143.)

The court's approach to Walker soon became clear:

> THE COURT: The point is, Mr. Walker, we don't want to screw up your semester in school.
>
> MR. LANDSWICK [the prosecutor]: He did put it in his questionnaire that he's attending Cal State.
>
> MS. BROWNE: But the point is that if we can work around his schedule and he is not claiming a hardship, we don't have to insist that he take it.
>
> THE COURT: Well, you know –
>
> MR. LANDSWICK: I'll stipulate to it.
>
> MS. BROWNE: I will not. I want to hear what he has to say.
>
> THE COURT: What have you got to say? I notice here you circled full-time student. But let me ask you this: We've been letting students off, Mr. Walker, at least I have, because sometimes if you get involved in a jury trial and you get so far behind you can't catch up. That's my concern. And we've let a lot of students off here now.[36] If you think you can do it both ways, that's okay. But if you think it's going to be a burden, you know, to go to school full-time,

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[36] The trial court's assertion is not borne out in the record. Prior to Walker's voir dire, the trial court had excused but two prospective jurors who raised their student status as a basis for an undue hardship excusal. In both cases, these prospective jurors were excused at their request and after stipulation by counsel, i.e., Lisa. Shiu (see 2 RT 349-350; 13 CT 2991-3008 [questionnaire]) and Adam Kremen (see 7 RT 1048-1049; 13 CT 3205-3222 [questionnaire]). In Shiu's case, the stipulated excusal may well have been influenced by her strong pro-death penalty views and categorical refusal to consider life imprisonment without possibility of parole as a punishment.

taking 17 units and maybe sitting here as a juror for a month, two months, you let me know now. Because if it's going to be a real problem, I will seriously consider letting you go. What do you think?

MR. WALKER: This is during the month of December?

THE COURT: December and probably January. And that's around finals time; right?

MR. WALKER: Yeah.

THE COURT: See, that's the problem.

MR. WALKER: Most likely it would probably be a burden.

THE COURT: I think it will. Yeah. All right. Ms. Browne, over your objection I'm going to excuse Mr. Walker. *I don't see any point in having this kid lose two months of school sitting here.* I know you like him as a juror, but, on the other hand, he should be treated like everybody else. He is a full-time student. Seventeen units is a big load to carry. And to sit here for two months *I think would unduly burden him*, and he admitted as much just now.

(8 RT 1143-1145, emphasis added.)

Defense counsel complained that Walker had not raised the issue of hardship and that he was the one who sought to clarify that the trial would be conducted in half-day sessions, thereby suggesting that he could accommodate his jury service with his school schedule. Moreover, as defense counsel pointed out, Walker had only acquiesced in the court's suggestion that jury service would be a burden after long hesitation. (8 RT 1145.) Brushing aside defense counsel's complaints, the court made its reasoning unmistakably clear:

THE COURT: *I'm not here to have kids flunk out of school by taking two months sitting here as a juror when we have lots of other jurors.* I know he is 19 years old, he is an

> Afro-American. You probably want to see him as a juror. I understand that. *But I don't want Walker to blow a whole semester at school because of this case.*

(8 RT 1145.)

C. The Record Does Not Support the Hardship Excusal of Walker

Appellant's federal and state constitutional right to an impartial jury trial includes the right to a trial by a jury drawn from a representative cross-section of the community. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §16; *Taylor v. Louisiana* (1975) 419 U.S. 522, 526; *People v. Burgener* (2003) 29 Cal.4th 833, 855; *People v. Carter* (1961) 56 Cal.2d 549, 569.) It is axiomatic that jury service, unless excused by law, is a responsibility of citizenship. (*Taylor v. Louisiana*, *supra*, 419 U.S. at pp. 530-531; Cal. Rules of Court, rule 860(a).)

California Rules of Court, rule 860 sets forth the procedures and standards for granting excuses from jury service, implementing the mandate of Code of Civil Procedure section 204, subdivision (b). In pertinent part, rule 860 provides:

> (b) [Principles] The following principles shall govern the granting of excuses from jury service by the jury commissioner on grounds of undue hardship under Code of Civil Procedure section 204:
>
> . . .
>
> (2) A statutory exemption from jury service shall be granted only when the eligible person claims it.
>
> . . .
>
> (4) Inconvenience to a prospective juror or an employer is not an adequate reason to be excused from jury duty, although it may be considered a ground for deferral.
>
> (c) [Requests to be excused] All requests to be

> excused from jury service that are granted for undue hardship shall be put in writing by the prospective juror, reduced to writing, or placed on the court's record. The prospective juror shall support the request with facts specifying the hardship and a statement why the circumstances constituting the undue hardship cannot be avoided by deferring the prospective juror's service.

Subdivision (d) of rule 860 sets forth seven explicit grounds constituting undue hardship, none of which was implicated by the colloquy between the trial court and Walker.

Given the representative cross-section requirement, the authority of the trial court to exclude or exempt prospective jurors is strictly circumscribed. The relevant statutes are Code of Civil Procedure sections 204 and 218.

Code of Civil Procedure section 204 provides:

> (a) No eligible person shall be exempt from service as a trial juror by reason of occupation, race, color, religion, sex, national origin, economic status, or sexual orientation, or for any other reason. No person shall be excused from service as a trial juror except as specified in subdivision (b).
>
> (b) An eligible person may be excused from jury service only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council.

Code of Civil Procedure section 218 requires that excuses from jury service be made in writing:

> The jury commissioner shall hear the excuses of jurors summoned, in accordance with the standards prescribed by the Judicial Council. It shall be left to the discretion of the jury commissioner to accept an excuse under subdivision (b) of Section 204 without a personal appearance. All excuses shall be in writing setting forth the basis of the request and shall be signed by the juror.

To summarize,

> [Hardship excusals] are to be granted only on a sufficient showing that the individual circumstances of the prospective juror make it unreasonably difficult for the person to serve or that hardship to the public will occur if the person must serve in the particular case.

(*People v. Visciotti* (1992) 2 Cal.4th 1, 44, fn. 15.)

Turning to the record before the trial court, it is clear that the court's hardship excusal of prospective juror Walker did not comply with the applicable statute and rule of court. First, Walker did not request to be excused, either orally or in writing. Rather, the entire issue of his excusal was initiated by the trial court in what was likely a well-intentioned, but inappropriately personal and paternalistic, effort to shepherd a young African-American student through his college years without the distraction of serving as a juror in a capital case. As admirable as the trial court's efforts might be viewed in the abstract, they were neither authorized by law nor made in furtherance of appellant's clearly-defined right to a fair and impartial jury drawn from a representative cross-section of the community, a community that included young African-American students. Instead, they reflected the personal, rather than professional, views of the trial court. It was not appropriate for the trial court to interject his personal view that African-American kids would flunk out of school if required to serve on a capital jury and that such service would necessarily "screw up" Walker's semester, especially so in the absence of a request or indication from Walker himself. Indeed, Walker expressly told the court that he *wanted* to serve on a jury:

> THE COURT: You probably want to serve on a jury to get the experience, I would assume; right, Mr. Walker?

MR. WALKER: Yeah.

(8 RT 1145.)

As this Court has observed, excusing potential jurors for hardship is highly discretionary and the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258, 273.) For this reason, both the Legislature and the Judicial Council have formulated rules both restricting the instances in which hardship excusals may be granted and providing for the maintenance of a "paper trail" of the reasons for hardship requests.

> The obvious purpose [for maintaining records of hardship requests] is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool. . . . As noted, the keeping of such a record is not for historical purposes. It is kept because it along with other evidence may be useful in demonstrating that the manner in which potential jurors are excused for hardship, either by the jury commissioner or trial court, improperly results in panels not representative of the community.

(*People v. Basuta* (2001) 94 Cal.App 4th 370, 396.)

As significant as the fact that Walker never requested to be excused, but was finally led by the trial court's obviously suggestive questioning to admit that "most likely [jury service] would probably be a burden," is the circumstance that the speculative impact jury service would have on Walker's studies is not itself one of the enumerated categories establishing a grounds constituting undue hardship. The law recognizes that jury service inconveniences members of the community who are called to serve. Thus, in the context of claimed economic hardship (a ground actually defined by the Judicial Council), courts have held:

> If the crux of the hardship was loss of earnings, it must be remembered that some potential diminution of earnings is not a valid hardship excuse. "Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear."

(*People v. Kwee* (1995) 39 Cal.App 4th 1, 5-6, fn. 1, quoting *People v. McDowell* (1972) 27 Cal.App.3d 864, 874.)

Indeed, none of the seven grounds set forth in subdivision (d) of rule 860, justifying the granting of an excusal, was addressed either by the trial court or by prospective juror Walker.[37] It would seem that of the cognizable grounds constituting undue hardship enumerated in rule 860, the financial impact of jury service is most analogous to the "student hardship" that so concerned the trial court. Yet for financial hardship to constitute a proper ground for excusal, the financial burden must be extreme. Surely, if Walker viewed the likely impact of serving on a jury as "extreme," one might have expected him to promptly request an excusal or deferment of jury service, rather than endure lengthy death-qualification voir dire. Instead, the record reflects that the court telegraphed its obvious desire to see that Walker did not "screw up" his education by serving as a potential juror in appellant's case. Clearly, the excusal was not authorized by law.

D. The Erroneous Excusal of Prospective Juror Walker Requires Reversal of Both the Guilt and Penalty Judgments

The improper removal of prospective juror Walker from the jury

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[37] Clearly, financial hardship was not in issue, as Walker made it clear that he would receive compensation from his part-time employer during the entire term of his jury service. (8 RT 1125.)

panel violated the statutory provisions for removal of jurors for undue hardship (Code Civ. Proc., § 204, subd. (b); Cal. Rules of Court, rule 860), infringed upon appellant's Sixth and Fourteenth Amendment rights to an impartial jury (*Duncan v. Louisiana* (1968) 391 U.S. 145 [Sixth Amendment right to jury trial]; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 (1961) [due process right to trial by impartial jury]); arbitrarily deprived him of a state-created liberty interest guaranteed by the Due Process Clause (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347); and violated his Eighth Amendment right to reliable sentencing determinations in a capital case.

Appellant is aware that this Court has recognized that under state law, a trial court has the authority to excuse a person from jury service for undue hardship, but that the exercise of such authority is reviewed for abuse of discretion. (*People v. Mickey* (2001) 54 Cal.3d 612, 664; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 273.) Moreover, even were such an abuse of discretion to be found, this Court hews to the view that such error is neither prejudicial per se, nor as a practical matter can prejudice be demonstrated.[38] (*People v. Holt* (1997) 15 Cal.4th 619, 656; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 666-667.) With all due respect, appellant asserts that the error in excusing Walker is not amenable to harmless error analysis, and that this Court should reconsider its holdings in *Holt* and *Mickey*.

Just as the erroneous exclusion of even one prospective juror on the basis of his or her views on the death penalty requires automatic reversal of the death penalty (*Gray v. Mississippi* (1987) 481 U.S. 648), the erroneous

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[38] Appellant's research has revealed no instances in which this Court has found such an abuse of discretion.

exclusion of a prospective juror in a capital case for reasons unrelated to death qualification is not amenable to harmless-error analysis. However, this Court's decisions demonstrate precisely the opposite: that the erroneous exclusion of a juror for cause, not related to the jurors' views on the imposition of the death penalty, is almost *always* harmless error. (*People v. Holt*, *supra*, 15 Cal.4th at p. 656.) According to the decision in *Holt*, a "defendant has a right to jurors who are qualified and competent, not to any particular juror. [Citation.] He does not assert that, as a result of the excusal of [the challenged juror], a juror was seated who did not meet those criteria or that, as a result of her excusal, he was tried before a jury that was not fair and impartial." (*Ibid.*) Therefore, this Court concluded in *Holt* that any error in removing a juror for cause is harmless. A virtually identical analysis was employed in *People v. Mickey*, *supra*, where a capital appellant challenged the removal of 229 prospective jurors for undue hardship.

Appellant submits that this Court should reconsider its position that the improper removal of jurors for reasons not related to their view of the death penalty is harmless error. To sanction this Court's analysis of the effect of an erroneous excusal for undue hardship – i.e., that such errors are harmless absent a showing that a biased juror sat on the defendant's jury – is to insulate such an error from meaningful appellate review and to give the prosecution and trial court complete immunity from jury-selection statutory violations. This Court's position on the effect of an erroneous removal for undue hardship creates an error with no remedy and renders Code of Civil Procedure section 204 a statute that cannot be enforced. Such a circumstance invites abuse: theoretically, an unscrupulous prosecutor who was able to convince a trial judge to grant unfounded hardship excusals

could eliminate prospective jurors with impunity. Similarly, as this Court explicitly recognized in *People v. Wheeler*, *supra*, 22 Cal.3d at page 273, excusing jurors for hardship is highly discretionary and reviewing courts must be alert to possible abuses that would negatively affect the creation of juries reasonably reflecting a cross-section of the community.

In *Mickey*, this Court's analysis of why no error appeared under the federal or state constitutions did not even identify the means by which a defendant could show prejudice from the erroneous exclusion of a prospective juror for undue hardship. A defendant who is able to show that a biased juror sat on the jury – the only means cited by this Court for showing prejudicial error under *Holt* – is already entitled to relief, regardless of a violation of Code of Civil Procedure section 229, because his rights to an impartial jury under the state and federal constitutions have been violated. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) However, under the reasoning in *Holt* and *Mickey*, a defendant who is unable to make such a showing has *no* remedy for the unlawful removal of a prospective juror.

Instead of finding that the error will always be harmless, the harm from an erroneous hardship excusal such as was granted to prospective juror Walker in this case should be recognized for what it is: interference with appellant's rights to an impartial jury and due process and one that requires automatic reversal of the conviction and death sentence. 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." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282, quoting *Arizona v. Fulminante* (1991) 499

U.S. 279, 309.)[39] Such errors always require invalidation of a judgment. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

The United States Supreme Court has held in the context of death-qualification of jurors that the erroneous exclusion of a "scrupled, yet eligible, venire member" is not amenable to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 23. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668.) When it is known that death-qualified jurors have been removed from the jury, there is a demonstrable risk that the seated jury is skewed toward death. (*Id.* at pp. 667-668.) Arguably, if the prosecution could show that this was not true – i.e., other scrupled, eligible jurors were seated – then harmless error analysis would apply. However, because it is not always possible to discern whether a prosecutor was using his *peremptory* challenges as well as his cause challenges to eliminate scrupled, yet death-qualified jurors, the Court in *Gray* held that "a court cannot say with confidence" that the elimination of even one juror was an isolated incident, and therefore harmless-error analysis cannot be applied. (*Id.* at p.

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[39] 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* (4th Cir. 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 selection of an impartial jury in a criminal case, especially a capital case, must be deemed to embody such policy considerations.

668.)

In the case at bar, in which a juror was wrongly excluded for a reason unrelated to death qualification even though there is no indication that his exclusion skewed the seated jury in favor of the prosecution, the same analysis logically applies. Appellant submits that the issue is not whether a particular juror was excluded from the panel as a result of the trial court's erroneous ruling. Rather, "[t]he proper focus of [the reviewing court's] inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error." (*Moore v. Estelle* (5th Cir. 1982) 670 F.2d 56, 58 (conc. opn. of Goldberg, J.) cert. den. (1982) 458 U.S. 1111; emphasis in original.) When the issue is framed as it was by Judge Goldberg in *Moore* – "how can we know beyond a reasonable doubt that the selection of the remainder of the jury panel would have been unaffected?" – then it is clear that the error in excusing a young African-American student as a prospective juror on grounds of undue hardship in the absence of request or reason, but rather for paternalistic reasons, is not amenable to harmless-error analysis and requires reversal.

In addition, as explained in the concurring opinion in *Moore*, the improper exclusion of a prospective juror effectively gave the prosecutor an extra peremptory challenge. Regardless of whether the prosecutor used all of his peremptories, Judge Goldberg noted that the very fact of having more discretionary challenges available to him than did the defense could have had an effect on the jury selection process:

> . . . when a trial court erroneously excludes veniremen, "for cause," it allows the prosecutor to save peremptory challenges it would otherwise have had to use to exclude those prospective jurors. Armed with more peremptory challenges than she would have if the trial court had ruled correctly, a

> prosecutor may feel that she is in a position to exclude jurors she might otherwise have accepted. We can thus imagine a situation in which the composition of the jury panel as a whole could indeed have been affected by the erroneous ruling of the trial court. Therefore, we cannot say that such error can be characterized as harmless beyond a reasonable doubt.

(*Moore v. Estelle*, supra, 670 F.2d at p. 59; see also *Gray v. Mississippi*, *supra*, 481 U.S. 648 [rejecting "unused peremptory"argument and citing opinion in *Moore*].)

Disparity in the number of peremptory challenges between the prosecution and the defense implicates the defendant's due process rights under the Fourteenth Amendment:

> Peremptory challenges are a significant means of achieving an impartial jury, and as between the defendant and the prosecution, the "balance" struck to achieve an impartial jury and a fair trial is one of at least equivalent rights, and arguably weighs in favor of the defendant. In addition, that balance serves an important function in maintaining the appearance, as well as the reality, of justice. [Citation.] Therefore, a shift in the balance of peremptory challenges favoring the prosecution over the defendant can raise due process concerns.

(*United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, 541.)

The unlawful removal of a prospective juror in a capital case should not be an unenforceable violation. On the contrary, because of the constitutional implications of any interference with jury selection procedures, as well as the impossibility of assessing prejudice when it occurs, the error mandates automatic reversal of the guilt conviction and death judgment. Therefore, the erroneous removal of prospective juror Robert Walker, Jr., requires reversal of the conviction, special-circumstance finding and death judgment.

III

THE ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR ALEAN SAUNDERS-PINKNEY REQUIRES REVERSAL OF THE CONVICTION, SPECIAL CIRCUMSTANCE FINDING AND DEATH JUDGMENT

A. Introduction

On October 28, 1992, and over defense objection, a 52-year-old female African-American prospective juror, Alean Saunders-Pinkney, was removed by the trial court after having been death-qualified during sequestered and individual voir dire on October 6, 1992. Between those two dates, the prosecutor claimed to have conducted an investigation of Saunders-Pinkney and alleged that she had falsely represented her academic credentials and achievements in her juror questionnaire. Without stating legal grounds, the prosecutor challenged Saunders-Pinkney for cause. Over defense objections that the challenge was untimely, and that excusal of the prospective juror would be unauthorized on the mere representations of the prosecutor without further examination of Saunders-Pinkney, the court summarily sustained the challenge and excused the prospective juror. The following day, the trial court belatedly explained its ruling was based upon the authority of *Wainwright v. Witt* (1985) 469 U.S. 412, and not on Code of Civil Procedure section 229. The record does not come close to supporting the trial court's action in removing Saunders-Pinkney from the jury panel. The court's action in wrongly removing this prospective juror violated appellant's constitutional and statutory rights and requires reversal of appellant's conviction and death sentence. (*People v. Heard* (2003) 31 Cal.4th 946, 966-967.)

B. Factual Background

On October 6, 1992, voir dire of Alean Saunders-Pinkney was conducted in the manner described in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81, i.e., she was questioned individually and while sequestered by court and counsel. (10 RT 1569-1603.) At the conclusion of Saunders-Pinkney's voir dire, neither the prosecutor nor defense counsel voiced any objection to her qualifications to sit as a juror in appellant's case, and the court ordered her to return to court on December 1, 1992, for the exercise of peremptory challenges, making the following pertinent observation:

> THE COURT: Based upon your answers, you've qualified yourself to serve on a capital jury. Okay? Not everybody makes it all the way through but you have.

(10 RT 1602.)

On October 27, 1992, some three weeks after having been found qualified to serve on a capital case, Saunders-Pinkney was belatedly challenged for cause by the prosecutor. (13 RT 2089.) When asked by defense counsel what the basis for the belated challenge was, the following colloquy ensued:

> MR. LANDSWICK [the prosecutor]: Well, Ms. Saunders-Pinkney told our bailiff to call – for him and for us to call her "doctor." She stated in her questionnaire that she had attained a doctorate in education, and I had a funny feeling about that so I called the University of San Francisco and found that she has lied to us. She is not a doctor in education.
>
> MS. BROWNE [defense counsel]: Is she getting her doctorate degree now?
>
> MR. LANDSWICK: She has not submitted her dissertation yet.
>
> MS. BROWNE: So she is in their Ph.D. program?

MR. LANDSWICK: She is in the program.

(13 RT 2090.)

After hearing a complaint from defense counsel that the prosecutor's challenge for cause was made without prior notice to the defense, and that the defense was placed at a disadvantage for lack of access to Saunders-Pinkney's questionnaire, the court took the matter under submission in order to allow defense counsel to review the questionnaire and to respond to the challenge. (13 RT 2091.) However, before the court commenced the voir dire of the next scheduled prospective juror, the prosecutor expanded upon his allegations, representing that he had called an administrative aide at the University of San Francisco (hereinafter referred to as "USF") who reviewed Saunders-Pinkney's file and reported that while she was a candidate for a doctorate, she was not yet a Ph.D. (13 RT 2092.) Consequently, and in direct response to the court's question, the prosecutor alleged that Saunders-Pinkney had perjured herself by noting in her questionnaire that she received a doctorate of education in 1992.[40] (13 RT 2092.)

Although the prosecutor couched his challenge as based on his accusation that she had committed perjury, the court perceived the issue as somewhat more nuanced:

> THE COURT: Well, it's not a question of perjury. It's a question of her credibility in the way she answered her other questions. If she purports to be something she isn't, how can we lend any credence to the way she answered her other questions? That's the problem. I'll take it under submission, and you guys can go get your questionnaire and

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[40] See Question No. 15(b). (18 CT 4685.)

take a look at it.

(13 RT 2092.)

At the end of the day, and after having conducted *Hovey* voir dire of three other prospective jurors, the court returned to the matter of the prosecutor's challenge to Saunders-Pinkney. Defense counsel questioned the propriety of the court entertaining the prosecutor's challenge, especially based upon information the prosecutor obtained in a telephone conversation:

> MS. BROWNE: I am concerned about a number of things. First, Ms. [Saunders]-Pinkney is apparently the only person we're aware of that Mr. Landswick has personally looked into the background of.
>
> THE COURT: I wouldn't take that as gospel.
>
> MS. BROWNE: I would not take it as gospel, either. That's the only person that I'm aware of at this time. What I'm also aware of, that Ms. Saunders-Pinkney is an African-American woman with a high education. Whether, in fact, she has her doctorate at this time or whether, in fact, she is going to get it in 1992 or some other time is information developed by Mr. Landswick over the telephone. Should the court be entertaining a cause of action challenge, I don't believe the Penal Code allows for a cause challenge under these circumstances. But should the court be interested in entertaining that, I think the only appropriate thing to do would be to call Ms. Saunders-Pinkney back and question her about her answer on the questionnaire. For all I know, she has a Ph.D. somewhere else or she read that as being she would getting her Ph.D. in 1992. But I don't think that a telephone conversation in which somebody on the telephone says she is in the doctorate program should be sufficient to challenge her. But, in addition, I don't think the Penal Code allows for that as a challenge for cause.

(13 RT 2148-2149.)

The court was of the opinion that it had statutory authority to

consider the credibility of a prospective juror once that credibility was placed in question. (13 RT 2149.) Moreover, the court observed that it had no reason to disbelieve the representations of the prosecutor, an officer of the court, and that it had no reason to disbelieve the administrative aide at USF, who provided the prosecutor with the information about Saunders-Pinkney.[41] (13 RT 2149.) Thus, the court simply accepted the prosecutor's representations as true and rejected defense counsel's suggestion that Saunders-Pinkney may have been confused in answering the questions on voir dire or in the questionnaire:

> THE COURT: She told the bailiff to refer to her as doctor. We referred to her as doctor. *She is not a doctor.* She is in a program. *She hasn't been awarded a Ph.D. so she is holding out to be something she isn't.*

(13 RT 2150; emphasis added.)

Defense counsel objected to the court's conclusions, arguing for a further inquiry into the matter by recalling Saunders-Pinkney in order to question her concerning the prosecutor's representations:

> MS. BROWNE: One. I under no circumstances in any fashion disbelieve Mr. Landswick. I'm sure that he has represented exactly what's happened over the telephone. Two, the woman over the telephone could have been mistaken. She was not answering a questionnaire under penalty of perjury. Ms. Saunders-Pinkney was. Three, I don't think that one should assume that the person over the telephone who looked up some records and could have been mistaken should be believed over Ms. Saunders-Pinkney, who came into court and asked to be referred to as doctor. If one is going to challenge a person like – for this reason, one should be sure of the facts, and the way one would be sure of

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[41] Speaking rhetorically, the court asked: "What would her reason for deceiving Mr. Landswick be, I'd like to know?" (13 RT 2149.)

> the facts is to bring her in and ask her whether, in fact, this is true or whether the person on the phone was correct. It doesn't make sense to me to sit there and presume that the person over the telephone is correct and the person who answered the questionnaire under penalty of perjury is lying.

(13 RT 2150-2151.)

The court again wondered about what motive the USF administrative aide would have to lie about the matter. Defense counsel suggested that the aide might have been mistaken, whereupon the prosecutor furnished more detail about his inquiries. He asserted that he was "curious" about Saunders-Pinkney's dissertation in international multi-cultural education, and desired to read it to determine whether or not to "keep" Saunders-Pinkney as a juror. Thus, on October 20, 1992, he called a Vickie Rose, a librarian at USF, who informed him that the dissertation was neither "on file" nor catalogued. (13 RT 2151-2152.) The prosecutor asked Rosen if she could search for the dissertation, and she agreed to do so. According to the prosecutor, Rosen "spent several days looking for the dissertation."[42] (13 RT 2152.)

When the prosecutor learned that there was no dissertation, he asked Rosen if that meant that Saunders-Pinkney had no doctorate in education. He was informed that Rosen assumed so, but he was referred to the administrative office where he spoke to Sunny Kidd, an administrative aide

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[42] In contradiction to this representation, the prosecutor shortly thereafter represented to the court that "[Rosen] explored that for me and called me back on the *20th of October* and told me that there is, in fact, no dissertation presented by Ms. Saunders-Pinkney." (13 RT 2152.) Thus, in virtually the same breath, the prosecutor provided two contradictory versions of the extent of Rosen's search for the dissertation: one version asserting that the search lasted "several days" while the other version asserted that search was initiated and concluded on the same day.

on October 21, 1992. According to the prosecutor, Kidd "pulled" Saunders-Pinkney's file and informed the prosecutor that there was no dissertation on file and that Saunders-Pinkney had not received a doctorate degree. (13 RT 2152-2153.) The prosecutor emphasized that, during her oral voir dire, Saunders-Pinkney had asked the bailiff to address her as "doctor." (13 RT 2153-2154.) In the prosecutor's view, Saunders-Pinkney neglected to "correct" the court each of the 26 times the court addressed her as "doctor" during voir dire. (13 RT 2154.) The prosecutor claimed that he purposely refrained from obtaining a letter from USF to verify that Saunders-Pinkney had neither presented a dissertation nor obtained a doctorate prior to answering the relevant questions in her questionnaire and on voir dire in order to avoid prejudicing her chances of ultimately receiving a degree. (13 RT 2154-2155.)

Defense counsel persisted in requesting that the court refrain from ruling on the prosecutor's challenge until Saunders-Pinkney was afforded an opportunity as a matter of due process to respond to the prosecutor's accusations, especially since Saunders-Pinkney's character was being impugned. (13 RT 2155.)

The court expressly assumed that the prosecutor's representations were both accurate and truthful.[43] Also, the fact that Saunders-Pinkney did

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[43] There is very good reason to question the accuracy of the prosecutor's (Mr. Landswick's) representation to the trial court that Saunders-Pinkney had misrepresented her academic credentials. In a petition for writ of habeas corpus currently pending before this Court (*In re Robert Young*, Case No. S115318, filed April 23, 2003), Young claimed that Mr. Landswick committed misconduct at petitioner Young's capital trial by, inter alia, falsely representing that a female African-American prospective juror had "exaggerated her qualifications or credentials" in

(continued...)

not "disabuse" the court whenever it addressed her as "doctor" caused the court both to reject out of hand that Saunders-Pinkney might have been confused or misled by Question No. 15 in the questionnaire, and to distrust Saunders-Pinkney entirely. Indeed, the court described the situation in this fashion :

> THE COURT: Now, the problem with what's happened here is she's been caught misrepresenting her credentials pure and simple. That's pretty good, solid evidence that's been represented to the Court by Mr. Landswick, and I'll accept his representation. She's telling us that she is something she isn't. This casts some question on her veracity in my mind. How can you believe her answers to her other questions? She is playing games with the court.

(13 RT 2156-2157.)

> . . .
>
> THE COURT: She has not been forthright with us in

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[43] (...continued)
order to justify his peremptory challenge of this prospective juror. In support of that claim (Claim One, pp. 24-32), Young presented documentary evidence of the curriculum vitae of the improperly-challenged prospective juror at his trial, as well as documentary evidence that Mr. Landswick had committed similar misconduct at appellant's trial. (See Exhibit 148 ["Doctoral Dissertation of Dr. Alean Saunders-Pinkney (excerpt)"]; Exhibit 127 ["Dr. Alean Saunders-Pinkney, University of San Francisco, Transcript of Academic Record"]; Exhibit 153 [Excerpts of Reporter's Transcript, *People v. Gregory Tate* (S031641)].) These documents demonstrate that Pinkney-Saunders had in fact presented her doctoral dissertation and was awarded the degree of Doctor of Education from the School of Education at the University of San Francisco on May 21, 1992, some five months before Mr. Landswick made his contrary representations to the trial court. Appellant requests that this Court take judicial notice of the fact of the pendency of Claim One in *In re Young*, *supra*, and of the lodging of Exhibits 127, 148, and 153 in support of that claim. (Evid. Code, §§ 452, subd. (d); 459.)

> telling us what her credentials are. Maybe that's one little white lie, and how many others are there in that particular questionnaire. Now she's been caught in perpetrating – I'm not going to say a fraud, but a misconception on this court and on everybody in this courtroom. How can you trust the rest of her answers? How do I know?

(13 RT 2158.)

Defense counsel attempted to answer that question by renewing her request that Saunders-Pinkney be permitted to return to court to respond to the prosecutor's representations. (13 RT 2158.) The court flatly refused, ruling as follows:

> THE COURT: I'm not going to bring her back. It doesn't serve any useful purpose, number one, because she's already written down her answers. And, number two, it might be very embarrassing for this lady to come down here and be called on the fact that she misrepresented her credentials. I mean, I don't want to put her through this embarrassment. There is no question in my mind, based upon the representations from the University of San Francisco, from the people who are running the program, that she doesn't have a Ph.D. degree or doctor of education. So what am I going to bring her down and ask her for, did you lie to us, Ms. [Saunders-]Pinkney, and why did you do it? This isn't an inquisition. I'm going to grant the challenge for cause because, based upon her representation and her answers, the court has some questions about the veracity of the rest of her answers, because apparently she has not been forthcoming with the court in answering these questions truthfully.

(13 RT 2159.) Defense counsel[44] repeated their objections that the court's procedure for resolving the challenge was improper (13 RT 2159) and that the challenge was untimely (13 RT 2161.)

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[44] Appellant was represented by Deputy Public Defenders Judith Browne and J. Dominique Pinkney.

The following day, the court explained its ruling before commencing with the voir dire of another prospective juror:

> THE COURT: Before you bring him in, in reviewing yesterday's dailies with respect to the basis for the disqualification of Mrs. [*sic*] [Saunders-] Pinkney, I should say that that's based on *Wainwright vs. Witt*, because the impression is that it's under 229 CCP, and that's not correct.
>
> MS. BROWNE: I don't understand. She certainly qualified as a death qualified juror in what she said.
>
> THE COURT: It's a *Wainwright vs. Witt* challenge. That is the basis for the challenge as far as I'm concerned."

(13 RT 2163.)

C. Saunders-Pinkney's Juror Questionnaire

As did all other prospective jurors, Saunders-Pinkney received a detailed juror questionnaire, consisting of 18 pages and containing 61 questions. The truth and accuracy of her responses were attested to under penalty of perjury on October 5, 1992, when she signed the questionnaire. (18 CT 4681-4698.)

1. Educational Achievements

Concerning her educational attainments, Saunders-Pinkney noted that she received a Bachelor of Arts degree in 1969 and a Master's degree in 1977. (18 CT 4684.) She did graduate work at the University of San Francisco in international and multi-cultural education and received a doctoral degree in education in 1992. (Question No. 15; 18 CT 4685.)

2. Attitudes Regarding the Death Penalty

The questionnaire contained a section entitled "Attitudes Regarding the Death Penalty." (18 CT 4696-4697.) Saunders-Pinkney responded affirmatively to Question Nos. 55 and 56, which asked whether she had any feelings about the death penalty. (18 CT 4696.) She reported that her

views about the death penalty had not changed in the last few years and that she did not belong to any organization that either advocated for the death penalty or for its abolition. (Question Nos. 56 and 59; 18 CT 4696-4697.) Her questionnaire contained no response to the remaining three questions in the death penalty section, i.e., Question No. 57 ("Do you hold to any religious or philosophical principle that would affect your ability to vote for the death penalty as a judgment in this case? Yes ___ No ___. If yes, please explain."), Question No. 58 ("What are your feelings about the punishment of life imprisonment without the possibility of parole?"), and Question No. 60 ("If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote? For ___ Against ___ Not sure ___.") (18 CT 4697.)

D. Saunders-Pinkney's Voir Dire

Saunders-Pinkney's panel of prospective jurors was sworn on October 5, 1992. (10 RT 1494.) As noted previously, her voir dire was conducted in the manner described in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1. Death-qualification questioning was first conducted by the court, with follow-up questions on that issue put by respective counsel. (10 RT 1570-1593.) Thereafter, both the court and counsel questioned her as to her general qualifications to serve as a trial juror. (10 RT 1593-1603.)

1. Educational Achievements

During the trial court's death-qualification voir dire, it was mentioned that Saunders-Pinkney had a degree in sociology; she clarified the court's remark by noting that this was an undergraduate degree. (10 RT 1587.) Not a single question was asked of her by the court or counsel regarding her post-graduate studies, any dissertation she may have written or any post-graduate degrees she may have obtained.

2. Attitudes Regarding the Death Penalty

At the outset, Saunders-Pinkney made it clear to the court that she could vote for the death penalty. (10 RT 1570.) After the court explained the procedures at a potential penalty trial, including, among other matters, the nature of the evidence that could be presented and the individual juror's broad discretion to weigh that evidence, Saunders-Pinkney was asked:

> THE COURT: So here is my question to you, Doctor: Do you have any feelings about either the death penalty or life with the possibility of parole that you think might prevent you from making a choice between those two penalties in this case if you were selected as a trial juror?
>
> MS. SAUNDERS-PINKNEY: I believe not.

(10 RT 1574.)

Thereafter, the trial court generally sketched out the nature of the specific charges alleged in the information, asking Saunders-Pinkney to assume that she was a member of a jury that found that appellant committed the murder while burglarizing the victim's residence, that appellant had also robbed the victim, a woman, and that appellant committed the murder by stabbing the victim to death with a knife. Saunders-Pinkney informed the court that, even under these circumstances, she could still choose between the two available penalties.[45] (10 RT 1575.)

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[45] At the conclusion of the prosecutor's death-qualification voir dire, the trial court expanded on this hypothetical question based upon its concern that Saunders-Pinkney's background in sociology might give rise to a challenge for cause:

> THE COURT: I have one other question I want to ask Dr. Saunders, and I'm going to expand my question about that only because of her background being – having a degree in sociology.

(continued...)

The court then asked Saunders-Pinkney if she could consider mitigating evidence before deciding which penalty was appropriate. Her response was: "I feel that would be a requirement." (10 RT 1576.) The court proceeded to inquire as to whether she could follow the court's legal instruction at the conclusion of a penalty phase:

> THE COURT: There is an instruction I'm going to give you, and it goes like this, bearing in mind now you only have this choice, either the death penalty or life without parole. That's it. The instruction goes like this: Is that before the jury in this case can return a verdict of death, the jury must be satisfied that the factors in aggravation are so substantial when compared to the factors in mitigation that the

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[45] (...continued)

> MR. LANDSWICK [the prosecutor]: I can't hear you.
>
> THE COURT: I'm going to expand my so-called *Fields* [*People v. Fields* (1983) 35 Cal.3d 329] question just because of her background.
>
> MR. LANDSWICK: Got you.
>
> THE COURT: I just want to make sure because it may go to a challenge for cause. I'm not so sure. Dr. Saunders, I know you have a degree in sociology.
>
> MS. SAUNDERS-PINKNEY: Undergraduate degree, yes.
>
> THE COURT: The evidence in this case might show – and you're a female and you're African-American. The evidence in this case might show that the lady who was murdered was an African-American woman who was a social worker, a background a lot like yours. Would that affect your ability in this case to keep both of these penalties open?
>
> MS. SAUNDERS-PINKNEY: No.
>
> THE COURT: Okay. I just wanted to make sure.

(10 RT 1587-1588.)

jury feels that death is warranted in this case and not life without the possibility of parole. Okay?

MS. SAUNDERS-PINKNEY: Yes.

THE COURT: Could you – can you live with an instruction like that?

MS. SAUNDERS-PINKNEY: Yes.

(10 RT 1576-1577.)

During the prosecutor's death-qualification voir dire, Saunders-Pinkney was asked to elaborate on her feelings about the death penalty. She explained that she had feelings concerning the issue of "timeliness" rather than whether or not the death penalty should be used, and the method the State of California used to implement the death penalty:

THE COURT: You're concerned about the unreasonable delay between the pronouncement of judgment and when the state gets around to actually implementing the jury's decision?

MS. SAUNDERS-PINKNEY: Right.

(10 RT 1578.)

Following up on this point, the prosecutor learned from Saunders-Pinkney that her concern regarding timeliness also related to the time between the crime and the date of conviction. Pointing out that there was a gap of almost four-and-a-half years between the time the victim was murdered and the commencement of appellant's trial, the prosecutor asked:

MR. LANDSWICK: Do you feel that that is a time where you would have a length of time [*sic*] where you would have reservations about selecting the penalty of death?

MS. SAUNDERS-PINKNEY: No, because this is the process that currently exists. The question was whether I had any feelings about it, and my answer was "yes."

MR. LANDSWICK: Okay.

MS. SAUNDERS-PINKNEY: Can I abide by the law as it exists, and can I – do I feel as though I can be fair in my judgment, the answer is yes.

(10 RT 1582.)

The prosecutor elicited from Saunders-Pinkney that she was in favor of lethal injection when compared to the gas chamber, but her preference for that method of execution would not make her opposed to the death penalty in appellant's case if the state only provided for execution in the gas chamber. (10 RT 1580-1581.)

The prosecutor expressed an interest in why Saunders-Pinkney did not respond to Question No. 58 in the questionnaire, calling for whether she had any feelings about life imprisonment without possibility of parole. Saunders-Pinkney responded that at the time she was completing the questionnaire on the previous day, she had no response to articulate and wanted to give the matter some thought, and having now thought about the matter, she did not have the same concerns with life imprisonment without possibility of parole as a penalty when compared to the two concerns that came to mind about the death penalty. (10 RT 1583.) Similarly, she did not respond to Question No. 60 in the questionnaire, calling for whether she would vote to retain the death penalty in California if the matter were to be placed on the ballot. As she explained, when faced with that question yesterday after a very long day, that was one of the questions she could not answer at that time, but upon further reflection, she would now vote to retain that penalty. (10 RT 1583-1584.)

As he did with the majority of other prospective jurors, the prosecutor asked Saunders-Pinkney a hypothetical question on the assumption that she was the foreperson in this case:

MR. LANDSWICK: Let me ask you this, and this makes it very real for you. Okay? Let's assume that you're on the jury and you're the forelady. And you know the responsibility of the foreperson is to sign a verdict for if you can reach a verdict. Right?

MS. SAUNDERS-PINKNEY: Yes.

MR. LANDSWICK: And you and your fellow jurors have rendered a guilty verdict of first-degree murder against the defendant, you found one or both of the special circumstance clauses to be true, and we have gone into the penalty phase and presented whatever evidence we have to present for you to make your decision, and you and your fellow jurors determine that death is warranted. Could you sign your name – is it Alean?

MS. SAUNDERS-PINKNEY: Alean.

MR. LANDSWICK: – Alean Saunders-Pinkney, to such a verdict form that says, "We fix the punishment at death," but you don't know whether it will be by gas or by lethal injection? Could you sign your name to it?

MS. SAUNDERS-PINKNEY: Yes.

MR. LANDSWICK: Okay, That's all I have.

(10 RT 1586-1587.)

During defense counsel's voir dire, the topic of Saunders-Pinkney's concerns with timeliness were explored further. In explaining her feelings, Saunders-Pinkney observed that perhaps the community and the defendant would be better served if there was less time between the commission of the crime and the imposition of punishment, agreeing with the court's observation that "quicker apprehension and quicker comprehension might have a stronger message to the law breakers in the community." (10 RT 1589.) Defense counsel continued by inquiring into Saunders-Pinkney's views on the death penalty as distinct from life imprisonment without

possibility of parole:

> MS. BROWNE [defense counsel]: What purpose do you see the death penalty serving that you don't see life without the possibility of parole as serving?
>
> MS. SAUNDERS-PINKNEY: Ultimately as a deterrent, as a message for people who may commit such crimes.

(10 RT 1590.)[46]

Saunders-Pinkney expressed no difficulty in envisioning the death penalty as warranted in a case involving a single murder. (10 RT 1591-1592.) She confirmed that she could consider both the death penalty and life imprisonment without possibility of parole as possible penalties under the circumstances alleged against the defendant. (10 RT 1592.)

E. The Record Does Not Support the Excusal of Saunders-Pinkney for Cause under *Wainwright v. Witt*

1. The Standard of Review

This Court has held that a prospective juror is properly excluded on *Witt* grounds only if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate and, on appeal, "[it] 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. Cunningham* (2001) 25 Cal.4th 926, 975.)

However, the trial court's ruling must be founded on an inquiry

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[46] Saunders-Pinkney's views in this regard had evolved, as at one time she "didn't believe that the death penalty served much purpose." (10 RT 1590-1591.)

sufficiently searching to permit it to reliably determine a *Witt* impairment:

> Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath)
> . . . .

(*People v. Stewart* (2004) 33 Cal.4th 425, 445, quoting *Witt*, *supra*, 469 U.S. at p. 424.)

Because there was nothing conflicting or ambiguous about Saunders-Pinkney's statements concerning capital punishment so as to substantially impair her in performing her duties as a juror, the trial court's determination cannot be accepted as proper on appeal.

2. Saunders-Pinkney Was Not Substantially Impaired in Performing Her Duties as a Juror in a Capital Case

In harmony with decisions of the United States Supreme Court, this Court has repeatedly and emphatically held that a prospective juror may be challenged for cause based upon his or her views regarding capital punishment *only* if those views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 441; *People v. Heard*, *supra*, 31 Cal.4th at p. 958; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) There is simply nothing within the record which could have supported the trial court's ruling that Saunders-Pinkney held views concerning capital punishment which would have prevented or substantially impaired her in performing her duties as a juror.

The trial court's and counsel's death-qualification voir dire of

Saunders-Pinkney was focused, and led both predictably and correctly to the trial court's original finding that "[b]ased upon [her] answers, [she had] qualified [herself] to serve on a capital jury. . . " (10 RT 1602.) As this Court has recognized:

> The *Witherspoon-Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote against the death penalty without regard to the evidence produced at trial.' [Citations.] Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination.

(*People v. Clark* (1990) 50 Cal.3d 583, 597.)

The voir dire of Saunders-Pinkney revealed that (1) she had no feelings about the two possible penalties in a capital case that might prevent her from choosing between them in a capital case generally (10 RT 1574) or in appellant's case as described by the trial court (10 RT 1575, 1587-1588); (2) she could consider mitigating evidence before deciding which penalty was appropriate (10 RT 1576); and (3) she could follow the trial court's instructions concerning the legal standard to be applied before a death sentence could be selected as the appropriate punishment (10 RT 1576-1577).

When asked to elaborate upon her response (or lack of response) to selected questions in her juror questionnaire, Saunders-Pinkney revealed that her feelings about the death penalty included a "concern" that the "unreasonable delay" between when a capital crime was committed and the jury's decision to impose death was implemented might dilute any deterrent effect of the death penalty (10 RT 1578, 1589-1590), but her concern in that

regard would not cause her to have reservations about selecting the death penalty or otherwise impair her ability to "abide by the law as it exists." (10 RT 1582.)

Similarly, although she preferred lethal injection as opposed to gas as a method of execution, Saunders-Pinkney stated that her preference in that regard would not prevent her from selecting the death penalty if gas were the only legal means for implementing the state's death penalty. (10 RT 1580-1581.) Additionally, although she had neglected to provide an answer in her questionnaire as to whether she would currently vote to retain the death penalty in California were the matter presented to the electorate, upon reflection she stated in open court that she would indeed vote to retain the death penalty. (10 RT 1583-1584.) Finally, her answer to the prosecutor's question regarding her ability to personally sign the death verdict form, if chosen as the jury's foreperson, provided, if nothing else, direct evidence that she was prepared to assume the greater moral burden and responsibility of formally memorializing the jury's decision imposing the death penalty. (10 RT 1586-1587.) In short, nothing whatsoever was revealed during voir dire or by perusal of Saunders-Pinkney's questionnaire that would even hint at a basis for excusing her under the *Witt* standard. Consequently, her improper excusal requires that appellant's death sentence must be reversed without inquiry into prejudice. (*Gray v. Mississipi* (1987) 481 U.S. 648, 659-667; *Davis v. Georgia* (1976) 429 U.S. 122, 123 [holding that where record does not support trial court's excusal for cause of prospective capital juror under the governing legal standard, penalty reversal is automatic]; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.)

F. The Trial Court's Inquiry in Response to the Prosecutor's Challenge for Cause After Saunders-Pinkney Was Initially Death-Qualified Was Inadequate

In rejecting defense counsel's request that Saunders-Pinkney be summoned to court and examined under oath in order to determine the truth and accuracy of the prosecutor's accusations, and in excusing her without further hearing, the trial court fundamentally erred. As a matter of practice, this Court has long recognized the inadequacy of discharging jurors on the basis of mere allegations of misconduct. Thus, this Court has held:

> When the trial court discovers during trial that a juror misrepresented or concealed material information on voir dire tending to show bias, the trial court may discharge the juror if, *after examination of the juror*, the record discloses reasonable grounds for inferring bias as a "demonstrable reality," even though the juror continues to deny bias.

(*People v. Price* (1991) 1 Cal.4th 324, 400; emphasis added.)

Although addressed in a slightly different context, this Court recently identified the applicable rule:

> When a trial court learns that good cause to discharge a juror may exist, that court has a duty to conduct whatever inquiry is reasonably necessary to determine if the juror should be discharged. Failure to make this inquiry is error.

(*People v. Farnam* (2002) 28 Cal.4th 107, 141, cert. den. *sub nom. Farnam v. California* (2003) 537 U.S. 1124.) Clearly, the purpose of any adequate inquiry, i.e., one that can be considered "reasonably necessary" in this case, is to determine first whether there was any evidence that Saunders-Pinkney concealed or misrepresented facts, and if so, to determine whether that concealment or misrepresentation necessarily suggested a valid basis for a challenge for cause. (See, e.g., *In re Hitchings* (1993) 6 Cal.4th 97, 112; *People v. Diaz* (1984) 152 Cal.App 3d 926, 932.)

Indeed, the United States Supreme Court has addressed the issue of the proper assessment of alleged juror concealment on voir dire:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a *material* question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

(*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556 (plur. opn. of Rehnquist, J.), emphasis added.)

It is evident that the trial court's ruling was not the product of any such inquiry, especially as the reliability of such inquiry must be assured by ascertaining facts concerning the juror that are either true or not subject to dispute. As this Court has observed:

> As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case. . . .

(*People v. Cleveland* (2001) 25 Cal.4th 466, 478, citing *People v. Ray* (1996) 13 Cal.4th 313, 343.) Only when the facts are uncontroverted is the court absolved of the necessity of conducting a hearing in which sworn testimony is taken. (See, e.g., *People v. Abbott* (1956) 47 Cal.2d 362, 371.)

While the contours of what constitutes "evidence" or "sufficient information" to permit a reliable determination of whether cause for a juror's discharge was established have not been precisely delineated, pronouncements of this Court provide a reasoned basis for concluding that the trial court's ruling here was neither based on sufficient information nor otherwise reliable so as to justify the ruling.

In *People v. Burgener* (1986) 41 Cal.3d 505, the trial court was confronted with accusations from the foreman of a deliberating jury that

another juror was intoxicated. According to the foreman, four other jurors also expressed concern about the matter. The trial court did not examine the juror to determine whether she was incapacitated. The trial court offered to examine the juror, or simply to substitute an alternate juror. Defense counsel "demurred" to both suggestions, but agreed to the trial court's third suggestion, i.e., to admonish the jury as a whole to refrain from the use of intoxicants until the trial was over. (*People v. Burgener*, *supra*, 41 Cal.3d at p. 521.) The juror was not excused, and the jury returned a guilty verdict. On appeal, the defendant claimed that his right to trial by jury was violated by the trial court's failure to conduct an adequate inquiry. This Court found the failure to conduct an adequate inquiry to be an abuse of discretion, and thus error.

> [O]nce the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error. [Citation.]

(*People v. Burgener*, *supra*, 41 Cal.3d at p. 520.) Moreover, the Court went on to explain that the record was inadequate to show that the juror in question was incapacitated from further participation in the case:

> [T]he record on appeal is insufficient to establish that Juror M. had actually used intoxicants or that her ability to deliberate was affected by them. *The record contains only the foreman's unsupported assertion that Juror M. appeared intoxicated. The foreman's claim that four other jurors had expressed concern, while suggestive, is hearsay of limited probative value.*
>
> *Juror M. was given no opportunity to explain her behavior, the trial judge conducted no examination to determine whether in his opinion Juror M.'s abilities were impaired, and no other jurors were questioned to ascertain whether they*

> *could corroborate the foreman's report.* While we have no reason to doubt the foreman's sincerity, we also cannot conclude on this record that she was not mistaken or that she had not been prompted to act by other jurors motivated by annoyance at Juror M. rather than by concern for the integrity of the deliberative process.

(*Id.* at p. 521; emphasis added.)

If a fellow juror's statement is deemed to be hearsay of limited probative value, so to was the prosecutor's account of his conversations with the librarian and administrative aide at USF. Further, as a means of arriving at reliable evidence, this Court has observed that in the case of equivocal extrajudicial remarks made by a challenged juror, a trial court is well-advised to inquire of the juror himself:

> In the case at bar the extrajudicial remarks of [the juror] were, as the trial court recognized, equivocal: they could have signified that he was incapable of "acting with entire impartiality" (Pen. Code, § 1073), but they could also have meant only that he found the facts of the case distasteful and would be compelled to make a special effort to remain objective, although he was capable of doing so. *Yet the trial court did not question the person most likely to know that meaning,* [the juror] *himself.*

(*People v. Compton* (1971) 6 Cal.3d 55, 59-60; emphasis added.) The *Compton* court cited *People v. Huff* (1967) 255 Cal.App.2d 443 as an object lesson for what an adequate hearing entails:

> The trial court's action in summarily declaring a mistrial solely on the basis of the officer's testimony that he had observed defendant talking with two of the jurors during the recess on their way back to the court room from the water cooler, was unjustified and constituted an abuse of discretion. *Before the matter was ruled on, defendant should have been given a reasonable opportunity to present his version of the incident and with proper participation by his counsel. In a nutshell, the circumstances called for a hearing to determine*

what had actually taken place.

(*People v. Huff, supra*, 255 Cal.App.2d at pp. 447-448; emphasis added.)

This Court has recognized that the nature of voir dire contemplates a reasonable opportunity to rehabilitate a juror when a bias that may form a basis for a challenge for cause appears:

> The duty to examine prospective jurors and to select a fair and impartial jury is a duty imposed on the court, although counsel must be given reasonable opportunity to examine the prospective jurors. [Citations.] Counsel may conduct that voir dire of prospective jurors to determine the basis for a challenge for cause. [Citations.] . . . When a bias that may form a basis of a challenge for cause appears during such voir dire, *opposing counsel may seek to rehabilitate the prospective juror, but this further voir dire, like that directed to uncovering bias, is subject to reasonable limitation at the discretion of the trial judge.*

(*People v. Mattson* (1990) 50 Cal.3d 826, 845; emphasis added.)

As defense counsel requested, an adequate hearing contemplated that the juror in dispute be questioned in order to determine the validity of the challenge. Defense counsel's position finds solid support in this Court's analysis in *People v. Stewart, supra*, 33 Cal.4th 425: "The prosecution, as the moving party, bore the burden of demonstrating to the trial court that [the *Witt*] standard was satisfied as to . . . the challenged jurors." (*Id.* at p. 445.) Citing *Witt*, this Court recognized that such a burden requires questioning of the juror:

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper.

(*Ibid.*; *Wainwright v. Witt, supra*, 469 U.S. at p. 412.)

Finally, the trial court's adamant refusal to allow Saunders-Pinkney to defend herself against the accusations leveled by the prosecutor must be contrasted with the way in which it handled another accusation of juror misconduct which occurred during the trial. The contrast between the way the trial court handled both matters is striking.

During the penalty phase, the prosecutor informed court and counsel that one of the jurors (Jim Amos) approached him during a recess and handed him the business card of a deputy district attorney (Matthew Golde) and colleague of the prosecutor. The juror told the prosecutor that he and Golde had been involved in a "very minor" traffic collision in the parking lot. Amos requested that the prosecutor talk to Golde on his behalf. The prosecutor got the impression that Amos wanted him to communicate to Golde that the matter was "not worth thinking about." (41 RT 5617-5618.)

Defense counsel expressed that Amos's conduct placed his objectivity to serve as an impartial juror in question, and requested his removal from the jury. (41 RT 5618-5619.) The trial court agreed that Amos's objectivity was in question, and made the following observation:

> THE COURT: I think it's something that we may have to take up with Mr. Amos in chambers and find out what happened and then pursue this issue. Because, Mr. Landswick, it is arguable that if you intercede on his behalf that some way or the other he may look upon you more favorably than he would upon a defense argument, and this is a capital case, and that injects a cancer into this case, which may or not be important, but it is something.
>
> MR. LANDSWICK: And that's why I reported it.
>
> MS. BROWNE: Any cancer would be important to the defense, Your Honor.
>
> THE COURT: Of course. I'm aware of that fact. I think we should find out from Mr. Amos – We'll do it when

he comes back here on Tuesday. I thought it was sort of stupid of him even to talk to the D.A. on the way out, to tell you the truth.

MR. PINKNEY [defense counsel]: My response, Your Honor, I believe Ms. Browne would agree, is that at this time we would like to make it clear that we are asking to have him removed from the case on the basis that's been articulated. And I think, frankly, that any answers he will give will eliminate the serious concern that there may be a problem, and I think we need to be very cautious under these circumstances.

"THE COURT: I don't disagree with that. *But I think I should at least find out what he meant by that.*

(41 RT 5619, emphasis added.)

After this colloquy, juror Amos was examined and ultimately removed at as juror. (41 RT 5684-5686.) Clearly, the procedure employed by the court to resolve the issue of the necessity to remove Amos as a juror was the correct one, as it made for an appropriate factual record upon which the court could decide the facts and exercise discretion. In contrast, the trial court's treatment of prospective juror Saunders-Pinkney resulted in a record devoid of the necessary facts.

To summarize, the trial court's treatment of the matter of Saunders-Pinkney's alleged resumé-inflation was wholly inadequate to constitute a reliable determination of the facts. The trial court should have heeded defense counsel's repeated requests to re-open the voir dire examination of Saunders-Pinkney in order to address the prosecutor's assertions. (See *People v. McNeal* (1979) 90 Cal.App.3d 830, 839.)

G. The Trial Court's Error Requires That, at Minimum, Appellant's Death Judgment Be Reversed

More than once, this Court has recently had occasion to lament the necessity of reversing a death judgment for trial court error in the jury

selection process that was easily avoidable. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 966-967; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 454-455.) This case presents yet another variation on the same theme.

> Unlike other duties imposed by law upon a trial court that may call for the rendition of quick and difficult decisions under unexpected circumstances in the midst of trial, the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion.

(*People v. Heard*, *supra*, 31 Cal.4th at p. 966.) It is precisely because of the "extremely serious consequence" that results from trial court error in improperly excluding a prospective juror for cause during death-qualification voir dire that this Court expects the trial court to make "a special effort" to be aware of and to follow "well-established principles and protocols" pertaining to the death-qualification of a jury. (*Id.* at p. 967.) Trial courts must operate with "special care and clarity" in conducting voir dire in capital cases to avoid the introduction of a poisoned pill into the proceedings. (*Ibid.*) Here, the record demonstrates that the trial court proceeded both rashly and imprudently in excusing Saunders-Pinkney for cause. Consequently, the result is a record that cannot support the trial court's excusal for cause of Saunders-Pinkney under *Witt*. Under these circumstances, this error requires reversal of the resulting death sentence without inquiry into prejudice. (*Davis v. Georgia*, *supra*, 429 U.S. at p. 123, *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.)

There remains the matter of assessing the impact of the trial court's error in excusing Saunders-Pinkney on the judgments rendered in the guilt phase of appellant's trial. Both the United States Supreme Court and this Court have held that the improper removal of a prospective juror on

Witherspoon/Witt grounds impacts only the death judgment. "The exclusion of a prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal – but only as to penalty and not as to guilt." (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; see *Gray v. Mississippi* (1987) 481 U.S. 648, 668.).

Here, it is indisputable that three weeks before the prosecutor raised the issue of Saunders-Pinkney's resumé-inflation, she had been found fully qualified to serve as a juror following general and death-qualification voir dire. The trial court's acceptance of the prosecutor's representations concerning Saunders-Pinkney caused the court to distrust her voir dire responses generally, not just her responses in the death-qualification voir dire. However, the record below does not show any basis for the trial court to have separately questioned the credibility of Saunders-Pinkney's responses during death-qualification apart from her responses during general voir dire. Thus, the trial court's error in excusing Saunders-Pinkney infringed upon not only appellant's right to a fair and impartial jury determination of penalty, but of guilt as well.

As appellant has demonstrated with respect to the improper excusal of prospective juror Robert Walker, Jr., the erroneous exclusion of a prospective juror in a capital case for reasons unrelated to death qualification is not amenable to harmless-error analysis.[47] (*Sullivan v.*

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[47] For example, error in the improper excusal of a prospective juror for group bias is prejudicial per se, without reference to whether the resulting judgment concerned guilt or punishment. (Cf. *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258, 283.)

Louisiana (1993) 508 U.S. 275, 281-282, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; see also Argument II, *ante*; pp. 101-107.) The trial court's error thus requires automatic reversal of the entire judgment.

IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY, AND COMMITTED REVERSIBLE ERROR, BY ERRONEOUSLY EXCUSING FOR CAUSE PROSPECTIVE JURORS BARBARA EDMISTON, ALVIN DEAN, PAUL MERZ, MARIA RAMIREZ AND ROBERTA FINCH

A. Introduction

The trial court sustained the prosecution's challenges for cause, resulting in the excusal of four prospective jurors (Alvin Dean, Paul Merz, Maria Ramirez, and Roberta Finch), based on their ostensible views on the death penalty. Further, on its own motion, the trial court excused prospective juror Barbara Edmiston, finding that she too would be substantially impaired in performing her duties as a trial juror in a capital case. Because the record does not support the trial court's rulings, its actions in excusing the qualified prospective jurors violated appellant's rights to an impartial jury, a fair and reliable capital sentencing hearing, and due process 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.

B. The Controlling Law

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722, quoted in *Morgan v. Illinois* (1992) 504 U.S. 719, 727.) "The state may not, in a capital trial, excuse all jurors who express conscientious objections to capital punishment. Doing so violates the defendant's Sixth Amendment-based right to 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* (1968) 391 U.S. 510, 521.)

Challenges for cause of prospective jurors regarding views on the death penalty are assessed by the same analysis whether challenged by the prosecution or the defense.[48] (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Cox* (1991) 53 Cal.3d 618, 648.) The lodestar for this analysis is found in *Wainwright v. Witt* (1985) 469 U.S. 412. There, the United States Supreme Court held that "[a] prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would 'prevent or substantially impair' the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*Id.* at p. 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) This Court has adopted the high court's "substantial impairment" standard as its own. (*People v. Ghent* (1987) 43 Cal.3d 739, 767.)

A prospective juror is substantially impaired or prevented from performing as a capital juror only if, as a result of views concerning capital punishment, he or she cannot conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. Such a prospective juror is properly excluded. (*People v. Stewart* (2004) 33 Cal.4th 425, 441.)

Where one or the other party seeks exclusion of a biased prospective juror, the party making the challenge bears the burden of demonstrating that

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[48] Presumably, the analysis for evaluating excusals for cause made on the trial court's own motion is also the same. (See *People v. Ketchel* (1963) 59 Cal.2d 503, 528-529, revd. in part on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637; *People v. Carter* (1961) 56 Cal.2d 549, 574.)

the challenged potential juror lacks impartiality. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; accord, *Morgan v. Illinois*, *supra*, 504 U.S. at p. 733.) "A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699; see *People v. Mickey* (1991) 54 Cal.3d 612, 681, fn. 14 [prospective juror whose personal opposition to death penalty would appreciably impede him from engaging in weighing process and returning capital verdict may be excluded for cause from sitting on capital case].)

In reviewing the correctness of a trial court's determination on whether or not a prospective juror was excludable for cause because of his or her views, this Court has held that it will uphold the trial court's decision where it is fairly supported by the record. Moreover, where the prospective juror has made statements that are conflicting or ambiguous, this Court accepts as binding the trial court's determination as to the prospective juror's true state of mind. (*People v. Heard* (2003) 31 Cal.4th 946, 958.)

Finally, the consequences of an erroneous decision by the trial court on *Witt/Witherspoon* grounds are weighty. "The exclusion of a prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal – but only as to penalty and not as to guilt." (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; see *Gray v. Mississippi* (1987) 481 U.S. 648, 668.).

C. The Voir Dire Procedure Utilized At Appellant's Trial

As previously set forth in a separate and earlier argument

challenging the improper excusal of prospective juror Alean Saunders-Pinkney on *Witt* grounds, voir dire of appellant's venire was conducted in the manner described in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81.[49] To assist in expediting the sequestered and individual "death qualification" voir dire, court and counsel utilized a questionnaire consisting of 18 pages and containing 61 questions. (6 CT 1204-1222.) The questionnaire contained a section entitled "Attitudes Regarding the Death Penalty," consisting of six questions.[50] When necessary to the following analysis, reference will be made to the questionnaire responses of the challenged prospective jurors.

D. Prospective Jurors Improperly Excused

1. Barbara Edmiston

a. The Voir Dire

Prospective juror Barbara Edmiston completed all the questions in the section of the questionnaire dealing with attitudes toward the death penalty and life imprisonment without possibility of parole. (12 CT 2704-2721.) None of her written answers revealed any difficulty she might have in choosing between the two available penalties were she to be selected as a juror. For instance, she professed to hold no religious or philosophical principles that would affect her ability to vote for the death penalty in appellant's case, and she would vote to retain the death penalty as a punishment in California were the matter to be placed on the ballot in a coming election. On the other hand, she also recognized that life imprisonment without possibility of parole was a "just punishment" for

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[49] See Argument III, *ante*.

[50] Questions 55 through 60.

"very severe crimes." (12 CT 2719-2720.)

The manner in which the trial court conducted the voir dire of Edmiston lends little credence to the trial court's finding that she was substantially impaired within the meaning of *Witt*, and appears to have been influenced in part by time constraints.[51] (9 RT 1354, 1356.) Careful analysis of the voir dire reveals that Edmiston was not substantially impaired as a result of her views on the death penalty. To the contrary, Edmiston's responses indicate both a willingness and ability to follow the law in deciding which of the two possible penalties was appropriate after giving full consideration to the evidence.

After explaining that it was seeking first to determine her feelings about the two possible penalties and, second, to determine whether, if selected as a juror, she was able to keep both penalties open throughout the trial, the trial court commenced the voir dire by asking about Edmiston's views in the abstract:

> THE COURT: Now before we start talking about the penalty phase, I want you to forget about Mr. Tate here, and I want to ask you this one question: Do you think that you

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[51] Edmiston's voir dire provides a good example of the self-inflicted problems created by the trial court's erroneous treatment of the *Fields* question submitted by defense counsel. (See Argument I, *ante*.) To a significant extent, the "inconsistencies" noted by the trial court in Edmiston's answers can be traced to her attempts to honestly answer the trial court's questions about her ability to vote for the death penalty in the abstract, or "philosophically," as opposed to whether she could consider imposing such a penalty after hearing the evidence in this case. "The real question is 'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror.'" (*People v. Heard* (2003) 31 Cal.4th 946, 958-959 (internal citations omitted).) As will be shown, the answer to that question in Edmiston's case is "no."

personally – Could you ever vote to execute another human being? Could you do something like that?

MS. EDMISTON: I've given that considerable thought, and I came to the conclusion that I could not because I don't have that strong a sense of myself.

THE COURT: A lot of people have said that.

MS. EDMISTON: Especially when you don't know the circumstances of what it is that you're dealing with.

(9 RT 1339.)

In an attempt to better understand Edmiston's views, the trial court sought to clarify whether Edmiston was saying that she lacked the "makeup" to ever vote to execute another human being, or that she could vote for the death penalty if she felt a defendant deserved it based upon his conduct. As the trial court observed, these were questions that were "a little different." (9 RT 1339-1340.) The following exchange ensued:

THE COURT: But the first – The threshold question is, like I said, forgetting about this case –

MS. EDMISTON: I understand.

THE COURT: – Ms. Edmiston, do you have it in you to vote to execute another human being? That's the issue.

MS. EDMISTON: No.

THE COURT: Okay.

MS. EDMISTON: No.

(9 RT 1340.)

Still not satisfied that it understood Edmiston's position correctly, the trial court sought to assure itself that Edmiston's sense of self necessarily meant that she was not qualified to serve as a juror in a capital case. Thus, it prefaced its next question by observing that some prospective jurors were flatly incapable of rendering a death verdict simply because

they were unwilling to have the matter on their conscience in the distant future, others were prohibited from doing so because of religious conviction, and yet another group favored the death penalty but were unwilling to participate in the process of deciding penalty because they viewed the matter as one for the state to decide. The trial court thus asked Edmiston:

> THE COURT: So if I understand you correctly, then your feeling is that you just – physically or mentally, that that is not something you have in you; you cannot do that?
>
> MS. EDMISTON: Well, it may sound like a contradiction. I think I would have it in me to do if the circumstances were devastating enough.
>
> "THE COURT: Okay. Well, then you're telling me if the case is bad enough, you can vote for the death penalty. Is that what you're saying?
>
> MS. EDMISTON: Yes.
>
> THE COURT: Okay.
>
> MS. EDMISTON: If it were devastating enough.
>
> THE COURT: All right. Okay. So then you can come to the conclusion that somebody has done something so bad in your mind that he's earned the death penalty?
>
> MS. EDMISTON: Yes.
>
> THE COURT: Okay. Fair enough. Now, Ms. Edmiston, that would require you – Now, you know, if you say that, that may require you to say I think that person should be executed.
>
> MS. EDMISTON: I realize that.
>
> THE COURT: You can do that?
>
> MS. EDMISTON: I realize that.

(9 RT 1341.)

After explaining the intricacies of a penalty trial to Edmiston, and informing her that if she was the type of prospective juror who would automatically vote for the death penalty or, alternatively, would never vote for the death penalty in a case of this type, she would not be permitted to serve as a juror because she had "already eliminated one of the penalties before you've heard any of the evidence in this case" (9 RT 1345), the court next asked:

> THE COURT: Now, let me ask you this question again. It's a little more than the first question. Do you have any feelings about either the death penalty or life without the possibility of parole that you think might prevent you from making a choice between those two possible penalties in this case if you were selected as a trial juror?
>
> MS. EDMISTON: I don't believe I do.

(9 RT 1346.)

The trial court then asked Edmiston its *Fields* question.[52] She replied that her "gut feeling" was to vote for life imprisonment without possibility of parole under those assumed facts. (9 RT 1346.) Expanding on this topic, the following colloquy ensued:

> THE COURT: Then just so I get it straight, because I have to make a judgment value [*sic*] here, Ms. Edmiston, you're of the opinion that if under the circumstances of that case that the death penalty is – you've eliminated the death penalty; correct?
>
> MS. EDMISTON: Without knowing any more facts, that will be my inclination to go with the other, life without possibility of parole. At this point that's my inclination.

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[52] See Argument I, *ante*, in which appellant challenges the restrictions placed on voir dire by the trial court's rulings on defense counsel's proposed *Fields* question.

THE COURT: Okay. All right. You haven't eliminated the death penalty then? Or have you?

MS. EDMISTON: I guess I haven't eliminated it. It's difficult for me to make –

THE COURT: Well, here is the point.

MS. EDMISTON: Yeah, without knowing more, and I realize that's not possible.

(9 RT 1347.)

The court then repeated its *Fields* question, and asked:

THE COURT: And – And, well, my question is: Are both of those penalties open to you?

MS. EDMISTON: I lean more toward – Yes, they're both open.

THE COURT: They're both open?

MS. EDMISTON: Yes, that's – Yeah, that's the way I would be.

(9 RT 1347.)

The court emphasized that the prosecutor needed to know that "he is on a level playing field." Edmiston replied that she understood what the court was aiming for, and repeated that both penalties were open to her, based on the court's hypothetical *Fields* question. (9 RT 1348.) She further indicated that she was "absolutely" willing to listen to and consider the evidence in aggravation and mitigation before deciding which penalty to impose (9 RT 1349), and could follow the court's instruction that a death verdict could not be returned until the jury was satisfied that the factors in aggravation were so substantial in comparison to the factors in mitigation that a death sentence was warranted rather than a sentence of life imprisonment without possibility of parole. (9 RT 1349-1350).

During the prosecutor's voir dire, he elicited that Edmiston had

responded "No" to the question in the questionnaire calling for whether she had any feelings about the death penalty, whereas she had articulated her feelings about life imprisonment without possibility of parole in her written response to a similar question.[53] In open court, she explained that her feelings about the death penalty were the same as towards life imprisonment without possibility of parole, i.e., emotional feelings that both penalties were "a just punishment" for very serious crimes. Further, Edmiston felt that the death penalty was justified in light of some crimes "committed in society today." (9 RT 1351-1352.) The following exchange ensued:

> MR. LANDSWICK [the prosecutor]: You simply have reservations that you can impose it yourself?
>
> MS. EDMISTON: I feel that I could under certain circumstances and given what a criminal has done. I don't – feel that I have any hard and fast reservations there.
>
> MR. LANDSWICK: When you were asked if you could ever vote to execute anyone, you said, "No, I don't have the strength." You kind of swallowed that sentence.
>
> MS. EDMISTON: I said, "No, I don't have the strength"?
>
> MR. LANDSWICK: That was the first question the Judge asked you this afternoon.
>
> MS. EDMISTON: But "I don't have the strength"?
>
> MR. LANDSWICK: Well, that's what I wrote down.
>
> MS. EDMISTON: Yeah, I don't – I don't believe I said that. No, I don't believe I did. Maybe I did, but I don't think I did.
>
> THE COURT: Well, it's in the record. We can look it

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[53] Question Nos. 55 and 58. (12 CT 2719-2720.)

up, but it's not that important.

MR. LANDSWICK: I'm sorry. I just may have misunderstood it.[54]

(9 RT 1352.)

Edmiston went on to explain her response to the court's initial question:

MS. EDMISTON: Because when I thought about it, it was because I wasn't sure about if I had that strong of a understanding of myself. I think that for me I want to – This is a – perhaps one of the heaviest decisions I would ever have to make in my life. I would want to be sure that I was strong enough within myself that I can make it, that I can make a decision.

MR. LANDSWICK: And you felt when you came in that you could not?

MS. EDMISTON: It was one of the reservations that I've had, that I wasn't sure I had that strong of a sense of myself with respect to this particular issue. On the other hand, when I think about some of the horrid crimes that have been committed, I feel, yes, I could say that a person should be executed."

(9 RT 1352-1353.)

When the prosecutor began to probe into the type of "devastating" crimes Edmiston had in mind, she mentioned as examples serial murder, murder involving children, and "real, real heinous crimes." The

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[54] In fact, Edmiston's recollection was correct, and the prosecutor had misunderstood her reply. In response to the court's question as to whether she could ever vote to execute another human being, Edmiston replied: "I've given that considerable thought, and I came to the conclusion that I could not because I don't have that strong a sense of myself. . . . Especially when you don't know the circumstances of what it is you're dealing with." (9 RT 1339.)

prosecutor's observation that this case did not involve a serial murder or child murder drew an objection from defense counsel.[55] (9 RT 1353.) Before allowing the prosecutor to resume his voir dire, the trial court confirmed that Edmiston saw the case as one where the death penalty was a proper option:

> THE COURT: Well, heinous crime would be in the eye of the beholder. The point here, Ms. Edmiston, getting back to this case, the – you know generally what the evidence in this case might show. You've told me that in your opinion in your mind Mr. Tate would be eligible for the death penalty, so I must assume that that's the kind of a case where you feel he should be eligible for the death penalty. Is that right? Am I reading you correctly?
>
> MS. EDMISTON: Yes, given what you said, the –
>
> THE COURT: Right.

(9 RT 1353-1354.)

The prosecutor noted that Edmiston had first said that the death penalty would not be an option in this kind of case, but now it was. He asked her to reconcile those (seemingly) contradictory views:

> MR. LANDSWICK: And what I'm trying to find out – you know, is this case something that measures up in your mind as being a death penalty type case rather than just sitting here thinking in the abstract. Because those are the questions that were designed to try to draw you into this and see if they

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[55] Although defense counsel did not state grounds for the objection, it seems clear that the prosecutor was taking unfair advantage of the court's ruling on the scope of the *Fields* question. Just as that "sanitized" question was inadequate to identify prospective "death-leaning" jurors who would be substantially impaired in considering life imprisonment without possibility of parole as a realistic option in this case (see Argument I, *ante*), so too was it inadequate to identify scrupled jurors who would not be substantially impaired in considering the death penalty as a viable option here.

measure up to your standard, and if it doesn't, fine. You know?

MS. EDMISTON: Yes, I understand what you're saying, and I wish that I could be – I wish that I had a very clear, direct answer for you. I'm having a bit of trouble reaching a strong conclusion on that because I don't know what has happened, really.

MR. LANDSWICK: Exactly, and we don't want you to prejudge things. You see? We don't.

MS. EDMISTON: Right. Yeah, I understand that part of it, too.

MR. LANDSWICK: We want to know whether you have it or whether you don't.

MS. EDMISTON: Mm.hm.

THE COURT: Can I borrow your question?

MS. EDMISTON: I think I have enough strength to make a decision that I would feel would be a right decision and a proper decision based on what – what would be forthcoming.

(9 RT 1356.)

At this point, the trial court interrupted the prosecutor's voir dire, citing time pressure, and posed a question that was part of the prosecutor's death-qualification repertoire:

THE COURT: Let me give you a hypothetical question, Ms. Edmiston. And I'll give you a chance to ask a couple of questions because we've got to move along. We've got two more jurors.

MR. LANDSWICK: I know.

THE COURT: Ms. Edmiston, let's assume for a minute you were selected as a juror in this case, and let's say you were in the penalty phase. And let's say you and the other 12 jurors – Based upon what you heard and the aggravating and mitigating circumstances, you came to the

conclusion that Mr. Tate should die for what he did. Let's assume that's what happened. And you were the foreperson, and you had a verdict up there that says, "We, the jury in the above-entitled action, fix the penalty at death." And there's a space for your signature. Could you put your name down there, Barbara Edmiston, bring that down to me, give that verdict to me, knowing that you're going to start him on his way to the gas chamber, or lethal injection, as the case may be? Could you do that? That's all we need to do. Not will you, but could you.

MS. EDMISTON: Going with my feelings that are being stirred up by this –

THE COURT: That's the point of the question.

MS. EDMISTON: – and by what your question was there, I would say no.

(9 RT 1356-1357.)

Defense counsel then undertook to crystalize Edmiston's views. After defense counsel elicited that Edmiston believed in the death penalty and agreed that such a penalty was warranted in some cases, the following exchange was had:

MS. BROWNE [defense counsel]: You're saying that personally you're not sure that you could impose the death penalty; is that correct?

MS. EDMISTON: That's probably – That's probably what I am saying. Based on my understanding of the crime, that's the only way I know how to express it.

(9 RT 1357.)

Defense counsel repeated the bare facts contained in the court's *Fields* question, and Edmiston agreed that as a philosophical matter, a person committing the crime so described was properly eligible for either the death penalty or life imprisonment without possibility of parole. Were she to sit as a juror on such a case, Edmiston said that she saw both

penalties as legitimate options. (9 RT 1367-1358.) Further, if she were a juror on the jury that convicted the defendant and, after a full consideration of all the aggravating and mitigating evidence, decided that the death penalty was warranted, Edmiston said she could personally vote for the death penalty:

> MS. BROWNE: Now if you were sitting there and you had heard all of this evidence at the penalty trial, which is basically a sentencing hearing for the jury to decide what to do –
>
> MS. EDMISTON: Mm-hm.
>
> MS. BROWNE: – and you personally decided that it warranted the death penalty, would you be able to vote for the death penalty?
>
> MS. EDMISTON: If I personally decided it, yes.
>
> MS. BROWNE: Well, philosophically, you could decide it?
>
> MS. EDMISTON: Mm-hm.
>
> MS. BROWNE: Is that what you're saying?
>
> MS. EDMISTON: I think philosophically I probably would have already decided it.

(9 RT 1359.)

Here again, the trial court interrupted counsel's voir dire and began to ask its own questions. First, it asked if Edmiston understood the difference between a philosophical and a personal belief and if she understood that appellant would never be "eligible" for the death penalty unless the jury made that decision.[56] Edmiston replied that she understood

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[56] The trial court's question created a false dichotomy for Edmiston. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 447 [circumstance "that a (continued...)

the point. (9 RT 1359.) The court then repeated that all it wanted to know was if Edmiston could make the decision:

> THE COURT: We can talk about the death penalty philosophically.
>
> MS. EDMISTON: I understand, yes.
>
> THE COURT: And argue its pros and cons.
>
> MS. EDMISTON: Yes, I understand.
>
> THE COURT: The question is when you get right down to it, is it something that you could do. That's all I want to know.
>
> MS. BROWNE: If you –
>
> THE COURT: Wait. Let her answer my question. Is that something you could do? And if you can't, that's okay. Nobody cares.
>
> MS. EDMISTON: I understand what you're saying.
>
> THE COURT: What do you think?
>
> MS. EDMISTON: I think I could. I think I could. I think –
>
> THE COURT: You're giving me a lot of inconsistent answers here now.
>
> MS. EDMISTON: I'm giving inconsistent –
>
> THE COURT: You tell me one thing. You tell me something else.
>
> MS. EDMISTON: But had I not said that I can?
>
> THE COURT: Well, I still have –

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[56] (...continued)
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*"].)

MS. EDMISTON: And then I assume from the other evidence I'm saying –

MS. BROWNE: What you're doing is working yourself through it as we talk to you. Right?

THE COURT: I'm not going to ask anymore questions. I'm going to cut you off.

(9 RT 1360-1361.)

Over defense objection and in the absence of a challenge for cause by the prosecutor, the trial court excused Edmiston. In doing so, the trial court made the following observations:

THE COURT: Ms. Edmiston, I'm going to excuse you, okay, based upon that, because based upon your answers, I think this is going to be a real problem for you. And under the guidelines that we have, I don't think you're qualified to sit.

. . .

THE COURT: This is a judgment decision I have to make, so I'm going to state for the record that based upon the inconsistent answers of the potential juror, the long pauses before she answered, I feel – and based upon her answers and observing the juror, I think this is a *Wainwright v. Witt* bonafide challenge. So I'm going to excuse you, Ms. Edmiston.

(9 RT 1361.)

In response to the trial court's ruling, the following colloquy ensued:

MR. PINKNEY [defense counsel]: One additional – Just for the record, it's our position that this juror was willing and able to vote for the death penalty but she wanted to qualify that answer by simply adding if she were convinced the circumstances justified it.

THE COURT: Doesn't the record reflect that? And it's arguable – I'm sure that if your client gets convicted on appeal, some appellate lawyer is going to make that argument.

> But the case law also says that the reviewing court will defer to the judgment of the trial court. I've said I've observed her demeanor, I listened to her answers, her long pauses, her vacillation. I think under *Wainwright v. Witt* she is disqualified.

(9 RT 1361-1362.)

b. Edmiston's Qualifications for Jury Service

The trial court's precipitous excusal for cause of Edmiston cannot be justified on this record. First, it must be noted that the trial court excused Edmiston before defense counsel's voir dire was complete and after Edmiston had informed the court that she could follow the law even if that meant voting for a death sentence. Second, it bears repeating that the challenge originated with the court and had not yet been made by the prosecutor. Third, the so-called "inconsistencies" relied upon by the trial court to justify its ruling were manifestly a product of the court's earlier, and erroneous, ruling to restrict case-specific references in the voir dire.

Fairly read, the record reveals that whatever initial reservations Edmiston may have had with respect to imposing the death penalty in the abstract, or upon appellant himself, were based not upon any view or belief she held with respect to capital punishment, but rather upon the attempts made by the trial court and the prosecutor to determine whether she was capable of voting for the death penalty without sufficient knowledge that the circumstances of the crime would make the death penalty an appropriate punishment. While there may have been a kernel of truth in the trial court's observation that Edmiston might experience "a real problem" if seated as a juror in this case, that "problem" was not one that made her substantially impaired. As this Court has observed, it is neither unusual nor disqualifying for prospective jurors to experience real problems in rendering a death

verdict:

> 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. As explained below, however, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

It is clear that Edmiston was not opposed to capital punishment. She explicitly expressed her belief in the death penalty and recognized it was the appropriate punishment for particularly aggravated crimes. Indeed, she was prepared to vote to retain the death penalty if the matter was placed on the ballot. Moreover, at no time in her voir dire did Edmiston say that she was unwilling or unable to follow the law and abide by the court's instruction. To the contrary, she consistently said that she understood the guiding principles in the penalty phase and would follow them. There was no hint in Edmiston's voir dire that her views on capital punishment reflected a bias such that her ability to judge appellant's guilt or innocence might be affected. This Court has explained that even a prospective juror who is opposed to capital punishment may yet be capable of following his or her oath and the law, and that such a prospective juror, if capable of following his or her oath and the law, is qualified to serve on a capital jury. (See *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.)

Surely, if even a juror who opposes capital punishment, yet professes to put aside that personal opposition and subordinate herself to the requirements of the law, is qualified to serve on a capital jury, then one such

as Edmiston, unencumbered by any antipathy to the death penalty, was qualified as well. Certainly, nothing in Edmiston's responses gave the trial court or counsel cause to believe that she was insincere about understanding the law or professing to follow it. To the contrary, the only issue seemed to be whether Edmiston had a strong enough sense of herself to return and confirm a death verdict.

To be sure, at times in her voir dire, Edmiston expressed the belief that she could not impose the death penalty, or confirm it by placing her signature on the verdict form if chosen as the foreperson. However, that belief was invariably expressed as an abstraction. Because she viewed the decision to sentence a person to death as perhaps the gravest task she would ever undertake, she was naturally concerned with having the inner strength to render that decision correctly. As she expressed it, she needed to know what the facts of the case revealed before making that momentous decision. Thus, it was not truly inconsistent for Edmiston to balk at committing to consider death as an option in the absence of such facts, or upon skeletal facts as revealed by the trial court's *Fields* question. When Edmiston was given an opportunity to explain her responses, she made the point that there were very heinous crimes for which the death penalty was appropriate, and that she could vote for the death penalty if she felt appellant's conduct warranted it. When defense counsel pointed this out, the trial court expressly agreed that the record reflected this characterization of Edmiston's views. (9 RT 1362.)

This Court has held that prospective jurors with a similar mindset are not "substantially impaired" within the meaning of *Witt*:

> *Kaurish*, *supra*, 52 Cal.3d 648, [citation], recognizes that a prospective juror may not be excluded for cause simply

> because his or her conscientious views relating to the death penalty would lead the juror to impose a *higher threshold* before concluding that the death penalty is appropriate or because such views would make it *very difficult* for the juror ever to impose the death penalty. 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 [citation].

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447 (emphasis added).)

This case provides a good example of the erroneous trial-court reasoning which necessitated a reversal in *Stewart*:

> The record here, however, suggests that the trial court erroneously equated (i) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty. . . .

(*Ibid.*)

The determinative question ultimately utilized by the trial court to "test" Edmiston's resolve is reflective of that erroneous reasoning. Simply put, a prospective juror who is otherwise able to vote for the death penalty, but expresses an inability to sign a verdict form resulting from an unanimous jury's decision to impose the death penalty, is not substantially impaired under the *Witt* standard.

This Court has recognized that there is a significant distinction between the ability to vote for a death sentence when appropriate and an inability to act as the foreperson for the jury, including the signing of a

death verdict. In *People v. Chacon* (1968) 69 Cal.2d 765, three jurors were excused for cause after answering that they would not be able to sign the death verdict form as foreperson. As this Court observed, "[t]hat answer indicated that they would not undertake what they regarded as the greater moral burden of the jury foreman, but it did not show that they would have refused to vote for the death penalty." (*Id.* at p. 772.)

The same point was made in *Alderman v. Austin* (5th Cir. Unit B Dec.1981) 663 F.2d 558, reinstated en banc, 695 F.2d 124 (1983), where the Fifth Circuit Unit B (now the Eleventh Circuit) reversed a death sentence rendered by a jury from which three prospective jurors had been excluded for cause on the state's challenge as a result of their expressed inability to sign, as jury foreperson, a death-verdict form. The court rejected the notion that such a mindset constituted a view on capital punishment that would prevent or substantially impair the jurors' duties under *Witherspoon v. Illinois* and *Adams v. Texas*. (*Id.* at p. 563.) Noting that it knew of "no Georgia law requiring any juror to serve, against his will, as foreman of the jury in any case," the court held that "[w]hether a venireman could sign, in good conscience, a verdict that would result in a defendant's execution is immaterial under *Witherspoon*." (*Ibid.*) In reversing the death sentence, the court explained:

> The action by the state court leaves us, to be sure, "with veniremen . . . excluded on (a) . . . broader basis than" *Witherspoon* and subsequent authority [footnote omitted] permit, and with a "death sentence (that) cannot be carried out . . . ." [footnote omitted] . . .

(*Id.* at pp. 563-564.) Thus, *Chacon* and *Alderman* stand for the proposition that the exclusion of a prospective juror, on the basis of an expressed inability to sign a death verdict while acting as the jury's foreperson,

violates *Witt*, *Witherspoon*, and *Adams* so long as the prospective juror is otherwise able to vote for the death penalty. (See also *O'Bryan v. Estelle* (5th Cir.1983) 714 F.2d 365, cert. denied, *sub. nom O'Bryan v. McKaskle* (1984) 465 U.S. 1013.)

After the trial court had elicited Edmiston's response that she could not sign, as the jury's foreperson, a verdict form announcing a death verdict she had voted for, further questioning of Edmiston by both defense counsel and the court confirmed that she *could* vote for death in this case if she felt that it was warranted after due consideration of the aggravating and mitigating evidence. However, the trial court viewed Edmiston's ultimate responses as being inconsistent with what she had said in the earlier portion of voir dire. Referring explicitly to those inconsistent answers, "long pauses" before Edmiston answered some of the questions, and her "vacillation," the trial court found her substantially impaired to serve.

It is true that a juror's bias need no longer be shown with "unmistakable clarity." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424 [clarifying contrary language in *Witherspoon*].) This Court has held that it is enough if the record fairly reflects a substantial impairment when the prospective juror has made statements that are conflicting or ambiguous. In such a case, but in no other, this Court will accord "appropriate deference" to determinations made by the trial court concerning the "true state of mind" of the prospective juror. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.). "A reviewing court examines the context in which the trial court ruled to determine if its decision is fairly supported by the record." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 122.) Here, the trial court expressed its belief that by referring to Edmiston's demeanor, its ruling could be insulated from meaningful scrutiny when challenged on appeal. (9

RT 1361-1362.) Yet in spite of invoking Edmiston's demeanor during voir dire, "the trial court in the present case has provided [a reviewing court] with virtually nothing of substance to which [it] might properly defer." (*People v. Heard*, *supra*, 31 Cal.4th at p. 968.)

In *Heard*, this Court rejected the People's contention that demeanor evidence supported the excusal of a prospective juror. There, the court reporter had noted a "lengthy period of silence" following an abstract question.[57] Finding that the challenged juror's reflection upon the question was "appropriate," this Court concluded:

> In our view, the circumstance that Prospective Juror H. took some time to think about and respond to the court's imprecise questioning as to whether he thought that "if there were past psychological factors" he "probably wouldn't impose the death penalty," provides no legitimate basis for concluding that the prospective juror's views would prevent or substantially impair him in performing his duties.

(*Ibid.*)

In comparison with the facts in *Heard*, the record here is, if possible, even less worthy of the type of deference the trial court was aiming for. First, the record here does not shed light on where and when Edmiston paused before answering questions. Thus, it is difficult, if not impossible, to make sense out of the trial court's reference to "long pauses." Second, the questions that seemed to cause the trial court to speculate that Edmiston was substantially impaired were either immaterial, e.g., the "foreperson signing the death verdict" question, or too abstract, e.g., "do you have the make up to vote to execute a human being," or "could you vote for the death penalty

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[57] The trial court had asked: "Do you think that if there were past psychological factors that they would weigh heavily enough that you probably wouldn't impose the death penalty?" (31 Cal.4th at p. 967.)

if the defendant were guilty of murder on the general facts implicated by the charging document?" type questions. Third, the trial court failed to provide a sufficient explanation of its reasons for the excusal. At best, the court articulated that Edmiston would have "real problems" were she to sit as a juror in this case. That explanation is but a reiteration of the reason found patently insufficient by this Court in *Stewart*. In short, as in *Heard*, the trial court here has provided "virtually nothing of substance" to which proper deference might be accorded.

Edmiston's answers at the conclusion of the voir dire qualified her to serve on appellant's jury. (See *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 653-659 [holding trial court erred in excusing for cause juror who initially equivocated but ultimately said she could vote for death sentence].) This Court has recognized that prospective jurors give their most meaningful answers at the conclusion of voir dire:

> In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected.

(*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.)

Often, it is only after prospective jurors undergo a probing voir dire that they crystalize their views on the death penalty and their ability to follow the law as explained by the court.[58] Consequently, Edmiston's

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[58] This Court frequently relies on prospective jurors' concluding answers in determining whether they were qualified to serve, whether in upholding the trial court's ruling denying for-cause challenges in the case of pro-death jurors who initially gave disqualifying answers but ultimately

(continued...)

responses to the trial court's clarifying questions at the conclusion of her voir dire best reflect her thinking and provided the surest indicator of whether she was qualified to serve on a capital jury. (See *Gall v. Parker*

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[58] (...continued)
affirmed their ability to follow their oath and the law (see, e.g., *People v. Ervin* (2000) 22 Cal.4th 48, 72 [challenged jurors were not subject to exclusion as they "eventually affirmed their ability to follow the law and give defendant a fair trial"]; *People v. Mason* (1991) 52 Cal.3d 909, 953-954 [upholding denial of defense challenge to juror who initially stated she would automatically vote for death where murder took place in jail, but ultimately stated she would attempt to keep an open mind and consider mitigating evidence]; *People v. Kelly* (1990) 51 Cal.3d 931, 960 [upholding denial of defense challenge to jurors who first gave conflicting answers on their views concerning the death penalty, but eventually confirmed their intent to follow the court's instructions and to keep an open mind as to life imprisonment without possibility of parole as an alternative punishment]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 103 [same]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1224 [upholding denial of defense challenge to prospective jurors favoring the death penalty as each such juror ultimately declared an intent to follow the law and vote for life imprisonment without possibility of parole if appropriate]), or conversely in upholding the excusal for cause of life-leaning jurors who initially appeared open-minded but eventually provided responses revealing that they would be substantially impaired as jurors (see, e.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 728 [upholding excusal of prospective juror who initially expressed opposition to the death penalty in some cases, but eventually said she would automatically vote for life imprisonment without possibility of parole in every case]; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1095 [upholding excusal of prospective juror who first said she would weigh all aggravating and mitigating factors, but later indicated she would only truly consider two mitigating factors]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279 [upholding ruling that prospective juror was properly disqualified based on his replies to the trial court's final clarifying questions]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1061-1062 [trial court properly excluded challenged prospective juror who initially replied he would not feel compelled to vote for life imprisonment without possibility of parole, but ultimately indicated he would never vote for a death sentence]).

(6th Cir. 2000) 231 F.3d 265, 330-332 [reversing death sentence because trial court violated *Witherspoon/Witt* standard by removing for cause prospective juror who said his mind was undecided and not closed regarding imposing death penalty].)

To summarize, Edmiston's responses on voir dire, when considered under the totality of the circumstances, demonstrate that she was qualified to serve on appellant's jury. Fairly viewed, her responses at the time the trial court cut off further voir dire demonstrated no more than that she might find it very difficult to return a death sentence. Under the controlling authority of decisions of this Court and the United States Supreme Court, Edmiston could not properly have been deemed substantially impaired to serve as a juror, and the trial court's contrary ruling was erroneous.

c. Accepting the Trial Court's Ruling as Binding Would Violate Appellant's Eighth and Fourteenth Amendment Right to Meaningful Appellate Review

In *People v. Moon* (2005) 37 Cal.4th 1, 14, this Court reconfirmed that it applies a substantial-evidence test in reviewing the trial court's exercise of discretion in assessing the qualifications of trial jurors. Where substantial evidence supports the trial court's ruling, this Court has construed language in *Witt* as requiring that the trial court's determination as to the juror's true state of mind be binding on a reviewing court. (*People v. Moon*, *supra*, 37 Cal.4th at p. 14.) Thus, if the trial court, after observing the juror in question, "is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law" (*People v. Cain* (1995) 10 Cal.4th 1, 60), such a determination will not be subject to second-guessing on appeal if it is buttressed by substantial evidence. *Moon* rejected the federal constitutional challenge to a standard of complete

appellate deference to a trial court's rulings.[59] Although it recognized that the United States Supreme Court had refused to accord deference to the trial court's impression that a prospective juror was substantially impaired under *Witt* (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 659), this Court found *Gray* inapposite.[60]

Notwithstanding this Court's analysis in *Moon*, the reasoning of the United States Supreme Court in *Gray v. Mississippi* is applicable here. In *Gray*, the high court refused to accord deference to some of the trial court's findings *not* because the trial court's "apparent ulterior motives" made it obvious that it was inappropriate to defer to the trial court, as this Court reasoned (*People v. Moon*, *supra*, 37 Cal.4th at pp. 13-14), but rather because the trial court made those findings while erroneously applying federal law:

> The State has 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. Such deference is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law, *Rogers v. Richmond*, 365 U.S. 534, 547, 81 S.Ct. 735, 743, 5 L.Ed.2d 760 (1961), and are internally inconsistent. We rest our reasoning on the

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[59] The appellant in *Moon*, citing *Gray v. Mississippi*, *supra*, 481 U.S. 648, claimed that the removal of a prospective juror who equivocated during voir dire violated the Sixth and Fourteenth Amendments.

[60] This Court distinguished *Gray* on the bases that (1) the issue presented in *Gray* was whether to retain the "per se reversal" rule of *Davis v. Georgia* (1976) 429 U.S. 122 and not a reexamination of *Witt*'s language concerning the quantum of deference due to a trial court's ruling on a juror's qualifications, and (2) *Gray* presented a unique situation justifying eschewal of deference; i.e., deference was not appropriate where the trial court's error was based on an ulterior motive. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 13-14.)

> one unambiguous finding made by the trial court and affirmed on appeal – that the court was not authorized under the *Witherspoon-Witt* standard to exclude venire member Bounds for cause.

(*Gray v. Mississippi*, *supra*, 481 U.S., at p. 661, fn. 10.)

The high court's reference to *Rogers v. Richmond* and "the one unambiguous finding made by the trial court" is telling. In *Rogers*, the Supreme Court explained why it was inappropriate to defer to the trial court's findings:

> With due regard to these considerations, it would be manifestly unfair, and afford niggardly protection for federal constitutional rights, were we to sustain a state conviction in which the trial judge or trial jury – whichever is charged by state law with the duty of finding fact pertinent to a claim of coercion – passes upon that claim under an erroneous standard of constitutional law. [Footnote omitted.] In such a case, to look to the wholly undisputed evidence, in the event conflicting evidence is presented, would deprive the state criminal defendant of the benefit of whatever credit his testimony might have been given by the state judge or the state jury, had the judge or jury employed a proper legal standard. Nor, in a case where specific findings are made concerning the allegedly coercive circumstances, can those findings be fairly looked to for the "facts," since findings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for. Historical facts "found" in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them.

(*Rogers v. Richmond* (1961) 365 U.S. 534, 547.)

Moreover, the "unambiguous" trial court finding relied upon by the high court in *Gray* was explicitly based on the prospective juror's response ("I think I could") to the court's ultimate question ("You could vote for the

Death Penalty?"). In this respect, Edmiston's response is virtually identical to that of the erroneously-excluded prospective juror in *Gray*. Finally, to the extent that a trial court's apparent ulterior motives are relevant in the "appropriate deference" calculus, appellant submits that when a trial court explicitly comments that its ruling will be insulated from appellate review because of a deference rule, it injects an unseemly ulterior motive into the record.

Consequently, if this Court considers itself bound by the trial court's determination that Edmiston was not qualified to serve as a juror because she gave inconsistent or vacillating answers on voir dire, it deprives appellant of his Eighth and Fourteenth Amendment rights to meaningful appellate review of his capital sentence; the type of review that is required for a capital-sentencing scheme to be considered constitutionally acceptable. (See *Clemons v. Mississippi* (1990) 494 U.S. 738, 749; *Pulley v. Harris* (1984) 465 U.S. 37, 53; *Gregg v. Georgia* (1976) 428 U.S. 153, 194 (lead opn. of Stewart, Powell, and Stevens, JJ.).) Such an approach also deprives him of the right to meaningful review that this Court has recognized as his constitutional right. (See, e.g., *People v. Howard* (1992) 1 Cal.4th 1132, 1166.)

d. Conclusion

In conclusion, the trial court erred in removing prospective juror Edmiston for cause. This Court has explained that "[i]n 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 . . . however, a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury,

unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) Edmiston's final answers at voir dire, as well as her consistent statements that she would be fair and open-minded, demonstrated that she was able to engage in the penalty-phase weighing process and return a death sentence. Thus, she was able to follow her oath and the law and was not substantially impaired from performing her duties as a juror. Consequently, appellant's death sentence cannot stand because the trial court erroneously excused Edmiston for cause. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 668 [holding erroneous exclusion for cause of death-qualified prospective juror with conscientious scruples against death penalty requires automatic reversal of death sentence]; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962 [same].)

2. Alvin Dean

a. The Voir Dire

Prospective juror Alvin Dean, a 68-year-old African-American Vietnam veteran and retired postal clerk, with previous experience as a teacher, answered three of the six questions in the "Attitudes Regarding the Death Penalty" section of his questionnaire. (16 CT 3979-3996.) He was not sure if he would vote to retain the death penalty if the matter were to be placed before the electorate, and he belonged to no organization that either advocated for or against the death penalty. With respect to the question calling for his feelings on life imprisonment without possibility of parole as a punishment, Dean wrote that he "[c]an not answer without hearing or knowing nature of crime." (16 CT 3994-3995.)

In the initial phase of the voir dire of Dean, the trial court asked him if, in the abstract, he could ever vote to execute another human being. Dean

replied that he did not know, and that he would have to engage in deep introspection to fully answer that question. (14 RT 2371.) He volunteered that the question brought to mind a personal experience in which his daughter had been killed in an automobile accident and the person responsible had received a very lenient sentence after extremely prolonged legal proceedings. Dean felt that he been shabbily treated by the criminal justice system. When the trial court asked if this personal experience might affect his ability to be impartial in this case, Dean responded that he did not know. The trial court asked counsel if they were prepared to stipulate to excuse Dean. When the prosecutor expressed his willingness to do so, the trial court commented: "I think by his answers he is probably a *Wainwright v. Witt*." (14 RT 2372.) Defense counsel declined to stipulate to the excusal and took over the questioning:

> MR. PINKNEY: Are you saying that because of that negative experience in your background you would be inclined to vote for the worst penalty, that is the death penalty, because of your bad feelings about the criminal justice system?
>
> MR. DEAN: No, no, no, no. I'd probably would be inclined (*sic*) to vote for life without possibility of parole.
>
> MR. PINKNEY: And why is that?
>
> MR. DEAN: Well, when I look at this young man, I look at my son, also. I have a son 35 years old, very quiet, very unassuming. He doesn't make a lot of noise. That sometimes tells me that if he was pushed into a corner where he cannot retreat any further, he may do something that he would regret.

(14 RT 2374-2375.)

At this point, the trial court interrupted defense counsel's voir dire to "disabuse [Dean] of that notion." It explained that appellant's case was one

that had potentially two phases: the first phase to decide guilt, and the second to decide whether appellant should be executed or receive a sentence of life imprisonment without possibility of parole in the event appellant was found guilty of first-degree murder with special circumstances. It asked Dean to assume that appellant had been found guilty of breaking into the home of the female victim, an African-American like Dean, burglarizing and robbing the victim, and then stabbing her to death with a knife.[61] (14 RT 2375.) The trial court then asked:

> THE COURT: In your mind, would both of those penalties be open, Mr. Dean? We are not talking about anybody being in a corner or any – Any self-defense he may have had or any type of defense he may have had would have been resolved against him in the guilt phase, you see, or else we never would get to a guilt phase (*sic*).
>
> MR. DEAN: Yeah, I understand that, sir, and my alluding to my son was the mere fact that someone acting to determine whether he should live or die.
>
> THE COURT: Okay.
>
> MR. DEAN: That was the point.
>
> THE COURT: All right. You think that that would affect your ability to be objective with respect to deciding which of these two –

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[61] The trial court's ad hoc modification of its *Fields* question to include the race of the victim during its voir dire of African-American prospective jurors like Dean begs the question of why it was improper to include the circumstance that the victim's finger was severed to obtain her wedding ring. Surely, if it was proper to inquire whether the fact that the victim of the crime was of the same race as the prospective juror might cause the prospective juror to automatically vote for death, it should also have been proper to inquire whether the signature grisly circumstance of the crime operated in the same fashion.

MR. DEAN: Well, at the moment, yes.

(14 RT 2375-2376.)

The trial court stated that it would entertain a challenge for cause, believing Dean to be disqualified under *Witt*, "[a]s clear as can be." (14 RT 2376.) Defense counsel was permitted to inquire further:

> MR. PINKNEY: If you were selected to serve as a juror in this case – and, again, possibly against your will – and the judge told you that you had to consider two penalties – And again at this point I'm not asking about inclinations. I'm just telling you the judge told you you had to consider two penalties, the death penalty or life without possibility of parole – isn't it correct that you would follow the judge's instructions and you would consider both of the penalties?
>
> MR. DEAN: I'd have to.
>
> MR. PINKNEY: And what I think I hear you saying is you're being honest, that because you have a young son –
>
> MR. DEAN: Yes.
>
> MR. PINKNEY: – you wonder about whether or not you could ever vote for the death penalty?
>
> MR. DEAN: That's correct, sir.
>
> MR. PINKNEY: But that you would consider it, and it's possible in your mind that a crime could be bad enough that you would be convinced that the death penalty was the appropriate sentence. I'm not saying you would make that conclusion, but you acknowledge that it's possible the facts could convince you that that's the appropriate vote?
>
> MR. DEAN: If I said yes to that right now, I feel like I would be committing myself –
>
> MR. PINKNEY: No one wants you to –
>
> MR. DEAN: – without having heard sufficient, oh, debate as to whether – you know, what happened, what took place.

MR. PINKNEY: Right. No one wants you to commit yourself. And what you're saying – I think is you would look at all the facts. You would consider his age. The fact that you have a son maybe around his age would have some impact on you. But you would consider both penalties, and depending upon the facts, you'd make a decision about which –

MR. DEAN: The instructions of the judge, I will have to consider both penalties.

(14 RT 2377-2378.)

Without further ado, the trial court entertained and granted the People's challenge to Dean, making these comments:

THE COURT: I think this is a case of *Wainwright v. Witt*, notwithstanding his last answer that was the result of a bunch of leading questions by defense counsel. The court observed the juror's demeanor, the court observed the way the juror answered these questions from the very beginning with respect to the system, and I'm not satisfied that he would be the type of juror that will pass under *Wainwright v. Witt*. So, for that reason, over the defense's vigorous objection, I'm excusing Mr. Dean.

(14 RT 2378-2379.)

Defense counsel noted his disagreement with the trial court's comments concerning Dean's demeanor and responses, claiming that the record did not support the trial court's characterizations. (14 RT 2379-2380.) Although the trial court did not elaborate further in describing Dean's demeanor, it would not brook any disagreement:

THE COURT: Well, of course, Mr. Pinkney. But it's the Court who has to make the decision. I saw the way he sat there, I saw the way he answered those questions, I saw the way that he responded to my questions, and I saw the way he responded to your questions. It's my judgment call, and if you didn't see what I saw, so be it. All right? . . . I also should point out that Mr. Dean left out the answer to the

question about how he felt about the death penalty. That's left – also left blank in the questionnaire, and we'll just leave it at that.

(14 RT 2380.)

b. The Trial Court Erred in Granting the Prosecution's Challenge for Cause

The trial court's decision to grant the prosecution challenge for cause under *Witt* cannot be supported on this sparse record. Simply put, the trial court was predisposed to excuse Dean and, as a result, granting the prosecutor's challenge was premature. As this Court has warned:

> "Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties (as defined by the court's instructions and the juror's oath) . . . in the case before the juror."

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) Assuredly, the trial court lacked sufficient information about Dean to make such a reliable determination.

Dean was the first prospective juror to be summoned into the courtroom for voir dire on November 3, 1992. The voir dire commenced in a somewhat unusual fashion:

> THE COURT: Well, I've got Alvin Dean first. Bring him in.
>
> MR. LANDSWICK: Who is this?
>
> THE COURT: Alvin B. Dean, Johnny B. Bad. He left it blank. Good morning, Mr. Dean.

(14 RT 2370.)

It is clear that the trial court's comment ("He left it blank") referred

to the fact that Dean did not provide a written response to the "attitude toward the death penalty" question in the jury questionnaire.[62] The fact that Dean did not provide a written response to this question was later specifically relied upon by the trial court as a subjective reason justifying the excusal of Dean under *Witt*. (14 RT 2380.) As appellant will demonstrate, it was singularly unfair and improper for the trial court to have done so.

During the trial court's introductory remarks and instructions to each of various panels of prospective jurors, it was made clear that answering all questions in the questionnaire was not required, but that doing so would shorten the in-court voir dire. (2 RT 277-279, 294-25;10 RT 1512-1516; 14 RT 2355, 2359, 2365-2368.) Each panel was told that their questionnaire responses were not confidential and would be available to the press. Specifically, each panel was told that in the event any prospective juror did not want to provide an answer to a question or questions in the questionnaire, they were to leave the answer blank. Further, the prospective jurors were told that if court or counsel wished to pursue questions for which answers were omitted in the questionnaire, an opportunity to do so would be provided during the individual and sequestered voir dire. (2 RT 293-294; 10 RT 1515; 14 RT 2365.) For example, Dean's panel was told:

THE COURT: If for some reason there is a question

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[62] The question at issue is Question No. 55. (16 CT 3994.6 CT 3994.) Less clear is why the trial court referred to Dean as "Johnny B. Bad" and whether the remark was made in Dean's presence. Certainly, nothing in his questionnaire suggests a reason for the trial court's uncalled-for label for Dean. As Dean was a 68-year old Vietnam veteran, retired postal worker and teacher, it is difficult to see what it was about him that would cause the trial court to refer to him in such an inappropriate manner.

> which is here that you don't want to answer, *just leave it blank*, and if *we* think it's important, we'll ask it to you when you're here all by yourself.

(10 RT 1515, emphasis added.) Thus, the fact that Dean did not provide a written response to Question No. 55 was hardly unexpected or unusual.[63] Standing alone or in combination with Dean's other responses, it can hardly be credited as providing a factual basis for his excusal for cause under *Witt*, *Stewart* or *Heard*.

At no time did Dean ever express a belief or view about either of the two available punishments that indicated he would have great difficulty or be unable to follow the trial court's instructions and the law in impartially considering the evidence to be presented before arriving at a decision on penalty. To the contrary, Dean twice explicitly stated that he would have to follow the court's instructions with regard to penalty. (14 RT 2377-2378.)

To be sure, there were two instances in the voir dire in which Dean expressed that he was unsure about his ability to be impartial in general, but

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[63] In contrast to all other close-ended questions in the section of the questionnaire entitled "Attitudes Regarding the Death Penalty," prospective jurors were not provided with designated spaces to mark a "yes" or "no" answer to Question No. 55. Moreover, the prospective jurors were directed to expand on an answer *only* if they or their spouses *had* feelings about the death penalty. Like Dean, other prospective jurors chose not to provide any written response to Question No. 55 (see, e.g., Glenn McLaughlin (13 CT 3112), Primus Jones (19 CT 4856), James Brown (18 CT 4862), Roberta Finch (18 CT 4570), Sassni Prasad (18 CT 4570), and Mary Smith (16 CT 4084)), or simply answered the question with a "no" or "not really" without further elaboration (see, e.g., seated jurors Veronica Escorcio (6 CT 1277), David Nielsen (6 CT 1239), Yolanda Early (6 CT 1315), James Robinson (6 CT 1334), and Linda Churchill (6 CT 1391)). On the rare occasions when court or counsel asked why the prospective juror neglected to provide a written response, the prospective juror explained that she was "wasn't sure of an answer" (12 RT 1927) or "had to think about it" (14 RT 2257).

those general musings had nothing to do with his views about the death penalty or life imprisonment without possibility of parole as a punishment. The first such instance arose when Dean was attempting to answer the trial court's question as to whether, in the abstract, he could ever vote to execute another human being.[64] Dean volunteered that, in thinking how to answer that question, he was reminded of a personally tragic incident involving his daughter's death in a traffic accident. Given the circumstances of how long it took to bring to justice the person responsible for his daughter's death, as well as the leniency of the sentence imposed, Dean expressed ambivalence as to whether his feelings about being treated shabbily by the criminal justice system would affect his ability to be impartial in appellant's case.

Rather than inquire further into the issue of death qualification, the trial court followed up on Dean's response by asking him if he thought "that" (i.e., being treated shabbily by the system) would affect his ability to be a fair juror in appellant's case. In other words, the trial court segued into a general voir dire question, probing for implied bias. The question, and Dean's response, did not implicate death-qualification issues. The mere possibility that Dean would lean for the prosecution and against appellant, or vice versa, as a result of his less-than-positive feelings about how criminal responsibility was adjudicated in the (non-capital) case of his daughter's death could hardly have implicated *Witt* issues. As this Court has observed, the only question that need be resolved during death-qualification voir dire is whether any prospective juror has such

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[64] This question was typically used by the trial court at the very beginning of its individual voir dire, as a prelude to other questions intended to determine whether the prospective juror could follow the law and the court's instructions in the particular case.

conscientious or religious scruples about capital punishment that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. (*People v. Clark* (1990) 50 Cal.3d 583, 596-597; *People v. Mattson* (1990) 50 Cal.3d 826, 845-846.)

Whatever else Dean may have said or suggested by his responses, it would be the grossest speculation to infer that on the basis of personal experience, his views on the death penalty would have caused him to convict appellant of first-degree murder and find the special circumstances true regardless of the state of the evidence to ensure that he received the death penalty or, conversely, acquit in spite of the evidence to foreclose the possibility of appellant receiving the death penalty. Therefore, and contrary to its hair-trigger belief that Dean's responses up to this point in the voir dire rendered him substantially impaired under *Witt*, the trial court was in no position to reliably decide that issue.

The second instance in which Dean made a statement that gave the trial court pause occurred during voir dire by defense counsel. Defense counsel asked Dean if his sour experience with the criminal justice system's resolution of his daughter's death would incline him to vote for the death penalty for appellant. Dean emphatically denied such a cause-and-effect interpretation of his earlier remarks. Instead, he expounded that he probably would be inclined to vote for life imprisonment without possibility of parole. When asked to explain, Dean replied that when he looked at appellant, he was reminded of his own son, and he could envision a "young man," pushed into a corner without means of retreat, doing something he would later regret. As can be seen by its subsequent remarks, the trial court clearly misinterpreted this response as an indication that Dean believed that

life imprisonment without possibility of parole could be imposed if appellant had acted in self-defense. Acting quickly to "disabuse" Dean of such a notion, the trial court interrupted defense counsel's voir dire, informed Dean of the anticipated facts in the case by asking its *Fields* hypothetical question, and underscored that if appellant were convicted of the charged crime and special circumstances, all possible defenses would have been resolved against him before reaching the penalty phase. However, in making this point, the trial court spoke quite carelessly and in a manner that rendered Dean's subsequent responses less than probative on the issue of whether he could consider both the death penalty and life imprisonment without possibility of parole as viable alternatives.

This is what the trial court said:

> THE COURT: In your mind, would both of those penalties be open, Mr. Dean? *We are not talking about anybody being in a corner or any – Any self-defense he may have had or any type of defense he may have had would have been resolved against him in the guilt phase, you see, or else we never would get to a guilt phase* [*sic*].
>
> MR. DEAN: Yeah, I understand that, sir, and my alluding to my son was the mere fact that someone acting to determine whether he should live or die.
>
> THE COURT: Okay.
>
> MR. DEAN: That was the point.
>
> THE COURT: All right. You think that that would affect your ability to be objective with respect to deciding which of these two –
>
> MR. DEAN: Well, at the moment, yes.

(14 RT 2375-2376; emphasis added.)

The problem with the trial court's explanation is that it was reasonably susceptible of being understood to mean that it would be

impermissible ("we are not talking about . . . any self-defense . . . or any type of defense . . .") for penalty phase jurors to consider, as a mitigating factor, circumstances of a defendant's conduct that did not amount to a legal defense. Understood in this manner, the trial court's statement would clearly be contrary to California law.

Penal Code section 190.3 provides that, in determining the penalty, the trier of fact shall take into account, if relevant, the age of the defendant, circumstances surrounding his mental and emotional state and capacity at the time of the crime, as well as any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. (See *People v. Frye* (1998) 18 Cal.4th 894, 1015; CALJIC No. 8.85.) Dean's statement explaining why he might be inclined to impose a sentence of life imprisonment without possibility of parole on appellant implicated appellant's age as well as possible circumstances attending the commission of the offense which might have caused him to regret committing the offense. These were perfectly proper factors for him to take into account and, if supported by the evidence at trial, to be considered in choosing life imprisonment without possibility of parole rather than the death penalty. Thus, it is not surprising that Dean would reply that his ability to be "objective" in choosing between the two penalties would be affected by an instruction that would foreclose him from taking into account circumstances that a lay person (as well as state law) considers to be mitigating.

Under these circumstances, not only was the trial court's conclusion that it was "as clear as can be" from Dean's response that he was substantially impaired under *Witt* erroneous, but the so-called disqualifying response itself was induced by the trial court's poorly-phrased instruction and question. Consequently, any deference that might otherwise be

accorded to that conclusion would be unwarranted. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 967-968 [deference to trial judge's ruling unwarranted where vagueness of prospective juror's responses can be reasonably attributed to "trial court's own unclear inquiries"].)

By this time, it was abundantly clear that the trial court had made up its mind to grant the prosecutor's challenge for cause. However, defense counsel was permitted to attempt to "rehabilitate" Dean. Defense counsel elicited direct responses from Dean that he would consider both the death penalty and life imprisonment without possibility of parole as viable options in this case and that he would follow the law and the court's instructions. Although the trial court rejected this so-called rehabilitation testimony as the product of defense counsel's "leading" questions, it is clear that the People, as the proponent of the challenge, had the burden of demonstrating to the trial court that the applicable standard was satisfied as to Dean, and failed to carry that burden. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270.)

c. Accepting the Trial Court's Ruling As Binding Would Violate Appellant's Eighth and Fourteenth Amendment Right to Meaningful Appellate Review

In an earlier section of this argument concerning the trial court's excusal of prospective juror Edmiston, appellant explained why unblinking acceptance of the trial court's assessment of a prospective juror's true state of mind would violate the Eighth and Fourteenth Amendments, and run afoul of the reasoning of the high court in *Gray v. Mississippi*, *supra*, 481 U.S. 648. (See section D.1.c., *ante*.) Rather than needlessly repeat that explanation here (or with any of the other prospective jurors whose improper excusal for cause is addressed in this argument, *post*), appellant

respectfully points out that for the same reasons as were stated earlier, it is equally inappropriate to accord deference to the trial court's conclusions with respect to Dean. Moreover, the same factors that caused this Court to distinguish *Gray* in *People v. Moon*, *supra*, 37 Cal.4th at pages 13-14, are present here, thus making *Moon* distinguishable and *Gray* the controlling authority. Here, as in *Gray*, the trial court misapplied the applicable legal standard and misstated the law in formulating critical voir dire questions. Further, the trial court prejudged Dean prior to hearing from him, and generally treated him differently than other similarly-situated prospective jurors, thus suggesting an apparent ulterior motive in inviting and granting the prosecutor's challenge for cause.

d. Conclusion

In conclusion, the trial court erred in granting the prosecution's challenge for cause as to prospective juror Dean. Dean never expressed a view concerning the death penalty that indicated he would be unable to impose or be substantially impaired in imposing such a punishment, either in the abstract or in this case. His final answers at voir dire demonstrated that he was able to engage in the penalty-phase weighing process and return a death sentence if he felt it was appropriate. Neither the mere expression of lingering dissatisfaction with the criminal justice system in general for its slow and lenient adjudication of the person responsible for his daughter's death, nor the mere expression of empathy as the father of a son of similar age as appellant, amounted to a showing that Dean would "invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances." (*People v. Heard*, *supra*, 31 Cal.4th at p. 959.) Because the trial court's ruling is not fairly supported by

the record, it cannot be upheld. Consequently, appellant's death sentence must be reversed. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 668 [holding erroneous exclusion for cause of death-qualified prospective juror with conscientious scruples against death penalty requires automatic reversal of death sentence]; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962 [same].)

3. Paul Merz

a. The Voir Dire

During the trial court's comprehensive death qualification voir dire, prospective juror Paul Merz gave every indication that he was qualified to serve as a juror in a capital case. He said he was capable of voting in the abstract for the execution of another human being. He would be very cautious and conservative before casting such a vote, and he would not do it "enthusiastically," but in an appropriate case, he personally viewed the death penalty as an option. (16 RT 2785-2786.) When the trial court expanded the inquiry into Merz's attitudes about either of the two available penalties, Merz's reply was the same:

> THE COURT: So here is my question to you, Mr. Merz. You sort of answered this for us before. Do you have any feelings about either the death penalty or life without possibility of parole that you think might prevent you from making a choice between those two penalties in this case if you were selected as a trial juror?
>
> MR. MERZ: It would be something that I would do with reluctance, but it is something which I could do.

(16 RT 2790.) In this regard, Merz's replies were fully consistent with the

written responses he had provided in the questionnaire.[65]

When confronted with the trial court's *Fields* question, Merz first indicated that if the law recognized both penalties as options under the facts presented by the court's hypothetical question, he as a citizen would be obliged to follow the dictates of the law and consider both penalties as viable. (16 RT 2791.) After the trial court assured Merz that the law does not dictate a death verdict, it rephrased the *Fields* question and asked:

> THE COURT: Now if that's what happened, in your mind are both of these penalties still open to you, or have you eliminated one of these penalties? Just that question.
>
> MR. MERZ: As I understand what you have explained so far, the two options are open at that point.
>
> THE COURT: Okay.
>
> MR. MERZ: There would need to be presented both aggravating and mitigating arguments.
>
> THE COURT: Okay. So at least based upon that hypothetical I just gave you, I haven't pushed you over the edge where you say, horrors, I would always pick the death penalty?
>
> MR. MERZ: I would not always pick the death penalty.

(16 RT 2792-2793.)

Merz said he would reserve judgment on which penalty was appropriate until he heard the mitigating and aggravating evidence, and could follow an instruction that the death penalty could not be imposed unless the factors in aggravation were so substantial when compared to the

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[65] In response to Question No. 55 (feelings about the death penalty), Merz had written: "I'll think about it more – nothing significant at the moment. Obviously it's a serious act." In response to Question No. 58 (feelings about life imprisonment without possibility of parole), Merz wrote: "None." (20 CT 5108-5109.)

factors in mitigation that the death penalty was warranted and life imprisonment without possibility of parole was not warranted. (16 RT 2793-2795.)

During his death-qualification voir dire of Merz, the prosecutor raised the question of what kind of case Merz viewed as appropriate for the death penalty. Merz replied, using descriptors such as "heinous" and "quite extreme" to describe cases that evoked "more than the ordinary repulsion" and thus were death-worthy. When the prosecutor asked if Merz viewed the killing of a single victim as a death-worthy crime, defense counsel unsuccessfully objected that the question called for an answer based on the facts of the case.[66] The trial court added its own question to that of the prosecutor, asking if Merz was only referring to serial killers when he spoke of heinous crimes, and explained the purpose of the prosecutor's question. Merz replied that for him, it was not a matter of merely quantifying the victims. (16 RT 2797-2798.)

When the prosecutor sought to confirm that Merz believed the death penalty was appropriate for extreme crimes causing "extraordinary

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[66] The defense objection was the logical outgrowth of the trial court's erroneous ruling confining the *Fields* question to the four corners of the charging document. (See Argument I, *ante*.) If the defense was foreclosed from asking jurors if they would reject life imprisonment without possibility of parole because the victim's ring finger was severed to steal her wedding ring, why should the prosecutor be permitted to ask if a prospective juror would reject the death penalty because "only" one victim was murdered in this case? Yet this Court has held that the prosecutor's question was a proper one. (See, e.g., *People v. Noguera* (1992) 4 Cal.4th 599, 646.) In any event, defense counsel's objection was the first of many during Merz's voir dire and contributed to a contentious atmosphere which the trial court noted on the record prior to its precipitous and improper excusal of Merz. (16 RT 2816.)

repulsion," Merz observed that "[t]here's the question of rehabilitation, as well." (16 RT 2798.) In context, it seems reasonably clear that Merz's comment suggested that the death penalty might be appropriate for a defendant who could not be rehabilitated, i.e., an incorrigible criminal or a recidivist. Unfortunately, it appears that the trial court did not understand Merz's comments this way, as it again interrupted the prosecutor's voir dire to correct an illusory problem:

> THE COURT: Mr. Merz, I want to disabuse you of that notion. Some people think we are talking about rehabilitation here. Because of the draconian nature of these two penalties, the death penalty or life without parole, we are not talking about rehabilitating anybody. This is the end result, period. So we are not trying to – Nobody will be arguing to you about rehabilitating the defendant because we are only talking about which is the appropriate penalty. That's it. You see what I'm saying?

(16 RT 2798.)

The trial court's comments were simply beside the point and erroneous.[67] However, because the trial court's question called for a response, Merz's voir dire drifted off on a tangent that may well have

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[67] Whether or not Merz's belief that the penal system engaged in rehabilitation was factually correct could not have made a difference as to whether he was qualified to serve as a juror within the meaning of *Witt*. It was only necessary that Merz understand that each penalty meant what was explicit in its description, i.e., that the death penalty meant that appellant would be executed, whereas life imprisonment without possibility of parole meant that he would be confined in prison for life without possibility of parole. The trial court eventually recognized this when it prevented the prosecutor from lecturing Merz about rehabilitation when he resumed his voir dire. In doing so, the trial court explicitly confirmed that whether the Legislature had removed rehabilitation as a consideration in the state's penal laws was irrelevant in this case. (16 RT 2789-1801.)

colored the trial court's ultimate view of his qualifications:

> MR. MERZ: Somewhere in the course of 48 years, I've acquired the notion that the court system in the United States is set up in order to administer rehabilitation in part.
>
> THE COURT: That's correct.
>
> MR. MERZ: If not largely.
>
> THE COURT: Except that in this case, since it's a capital case and we only give you two options, either the death penalty or life without parole, we're talking about the ultimate sanctions that our society can provide, either the death penalty or you spend the rest of your life in prison. So nobody is talking here about rehabilitating anybody. We are talking about penalties pure and simple, because he's never going to get out. There is no reason to prepare him to get back into society. You see what I'm saying? There is no – There is no reason to teach him a trade, to teach him to be a printer, unless he is going to be printing books in prison for the rest of his life. You see what I'm saying? Does that make a difference to you?
>
> MR. MERZ: I think I understand it.

(16 RT 2798-2799.)

During the remainder of the prosecutor's voir dire, Merz reaffirmed that he accepted the law of the state and would carefully and conscientiously apply that law. Any decision he made to impose the death penalty on appellant would not be a spontaneous one, but the product of a careful review. (16 RT 2801-2802.) When the prosecutor asked Merz to clarify his earlier response that he would do what the law dictated, the following colloquy ensued:

> MR. MERZ: My feelings on the matter are they're ambivalent. I find myself in a rather unfortunate situation that I have to simply comply with the law, comply with what society requires, and that will in part, I suppose – How shall I say? By law in the State of California, capital punishment

exists.

MR. LANDSWICK: True.

MR. MERZ: I must comply with that.

MR. LANDSWICK: Okay.

MR. MERZ: That is to say, if it is appropriate, then I must find appropriately.

THE COURT: That's fair enough. There's nothing wrong with that.

MR. LANDSWICK: Pardon me?

THE COURT: *There's nothing wrong with his answer.*

MR. LANDSWICK: No.

THE COURT: I've already explained to Mr. Merz, and I'm sure that he knows, that I will never tell him that he must impose the death penalty. What I think Mr. Merz is saying is if he comes to the conclusion that the death penalty is warranted in this case, he would be prepared to select it as a penalty. Correct?

MR. MERZ: That's correct.

(16 RT 2802-2803; emphasis added.) The prosecutor then commenced a lengthy and confusing explanation of the distinction between the respective duties of the prosecution and defense counsel in the proof of the aggravating and mitigating evidence, as well as what the penalty-phase jurors were permitted to consider in that regard.[68] (16 RT 2803-2807.)

It is quite clear that the prosecutor's confusing soliloquy, in combination with defense objections that the prosecutor was misstating the law, caused the trial court to lose patience. (16 RT 2805-2807.) It therefore

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[68] During this portion of the voir dire, the trial court asked Merz: "Does he have you confused yet?" (16 RT 2806.)

took it upon itself to explain the weighing process, and attempted to make it clear that although the law allocated to the prosecution the burden of proving the existence of aggravating factors beyond a reasonable doubt before the jury could properly consider them, the defense did not have a corresponding burden to prove the mitigating factors.[69] (16 RT 2907-2811.) This explanation caused Merz to pose two questions for the court:

> MR. MERZ: May I ask a question, Your Honor, or two?
>
> THE COURT: Yes, you can.
>
> MR. MERZ: Is the existence of one or more aggravating factors required for capital punishment?
>
> THE COURT: No.[70] You can take into consideration the crime itself if you wanted to.
>
> MR. MERZ: In the event there are aggravating factors, does the law require capital punishment?
>
> THE COURT: No. It's your call. The law never requires capital punishment. Never. The issue of whether or not capital punishment will be imposed in this case is solely in the discretion of the jury, and only if the jury finds that the factors in aggravation again are so substantial when compared

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[69] In the course of the prosecutor's and the court's voir dire, defense counsel objected to analogizing the weighing process with "balancing" the mitigating and aggravating evidence on a scale. These objections were either overruled or not entertained. (16 RT 2805 [prosecution voir dire], 16 RT 2808-2811 [trial court voir dire].)

[70] The trial court's reply was clearly wrong. In order to impose the punishment of death, the jury must reach certain necessary conclusions or make implicit "findings" at the penalty phase – that is, that at least one aggravating factor exists *and* that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. (§ 190.3; *People v. Brown* (1985) 40 Cal.3d 512, 541-542; see *Ring v. Arizona* (2002) 536 U.S. 584, 604.)

to the factors in mitigation that the jury feels that death is warranted in this case. Not me and not Mr. Landswick, the jury. Okay? It's your call from the get go.

(16 RT 2809.)

After hearing argument from defense counsel, the trial court overruled the objection to the continuing usage of the "balanced scale" analogy.[71] (16 RT 2908-2811.) It permitted further voir dire from the prosecutor, but admonished him that too much time was being expended on asking Merz questions:

THE COURT: Let's get going.

MR. LANDSWICK: Thank you very much.

THE COURT: He's been here now for 40 minutes.

MR. LANDSWICK: Well, Mr. Merz presented a different –

THE COURT: I understand that, Mr. Landswick. But, you know, we could go on for two hours and still be in the same place. *You are going to have to make a judgment decision based upon your questions and his answers, or we're going to be here all day with this juror.*

(16 RT 2811; emphasis added.)[72]

The prosecutor concluded his voir dire by asking his stock question:

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[71] Defense counsel's point was correct. (See *People v. Brown*, *supra*, 40 Cal.3d at p. 541 ["In this context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them"].)

[72] Clearly, at this point the trial court was suggesting that the prosecutor would have to decide whether or not to exercise a peremptory challenge to excuse this otherwise death-qualified prospective juror.

If Merz were selected as the foreperson of a jury that decided death was an appropriate punishment for appellant, could he sign his name to a verdict announcing that sentence knowing that it would start appellant on the road to the death chamber? Merz replied that he could do so. (16 RT 2812.)

Defense counsel's voir dire was brief. It focused on learning from Merz what type of evidence about appellant he would find helpful in deciding the appropriate penalty. (16 RT 2813-2814.) Merz asked if there were mitigating arguments that could or could not be considered. The trial court replied in the affirmative, and proceeded to enumerate the kinds of evidence that were typically admissible at a penalty phase. It concluded by making the point that the scope of mitigating evidence was very broad, but undefined by law. As the trial court explained, it included anything the defense might present that might persuade a juror that a penalty other than death was appropriate. (16 RT 2814-2815.) The following exchange then took place:

> MR. MERZ: May I ask a question, please?
>
> THE COURT: Certainly.
>
> MR. MERZ: The option of imprisonment for life, that is an option?
>
> THE COURT: Correct.
>
> MR. MERZ: Is it guaranteed that it would be?
>
> MR. LANDSWICK: You must assume that.
>
> MR. MERZ: It would be for life?
>
> THE COURT: Absolutely.
>
> MR. LANDSWICK: You must assume that for the –
>
> THE COURT: Mr. Landswick, can I answer his questions? He is directing them to me. The answer is "absolutely." He doesn't get out ever again.

MR. MERZ: I may be wasting the Court's time.

THE COURT: Well, tell us if you are.

MR. MERZ: I – Perhaps that is the case.

THE COURT: It's getting contentious in here, as you can see.

MR. MERZ: It is perhaps the case that I'm wasting the Court's time. There are matters on which people cannot decide. This may be one of them. I can feel the whole thing is – It's if there is the option of life in prison without the possibility of release, that is perhaps insurmountably the way to go.

THE COURT: All right. And are you telling me –

MR. MERZ: In which case I'm afraid I may be wasting the Court's time.

THE COURT: All right. Then I'm not trying to put words in your mouth, Mr. Merz, but then I have to make a judgment decision here because of the gravity of this case, whether I excuse you or not. Are you telling us in so many words that if you're satisfied that this man would spend the rest of his life in prison that the death penalty would not be an option for you in this case?

MR. MERZ: I am saying that I'm very confused.

THE COURT: Okay. And would you have some difficulty in making this decision?

MR. MERZ: I sure would.

THE COURT: All right.

MS. BROWNE: Well, I object to that, Your Honor. We all have difficulty making a decision in that fashion.

THE COURT: You're making it very simplistic. It's much more complicated to this man than just making a simple choice. Challenge by the People?

MR. LANDSWICK: Thank you.

MS. BROWNE: Your Honor, I'd like to object. I'd like to go ahead and ask a few more questions.

THE COURT: No more questions.

MS. BROWNE: No more questions?

THE COURT: I'm satisfied this is a *Wainwright v. Witt* failure.

(16 RT 2815-2817.)

The trial court then excused Merz. After brushing aside defense counsel's complaints that she was not provided an adequate opportunity to question Merz, the trial court observed that "it was like pulling teeth through the whole voir dire." (16 RT 2817-2818.)

b. The Trial Court Erred in Granting the Prosecution's Challenge for Cause

The trial court cannot properly dismiss a prospective juror unless the prosecutor has demonstrated that the juror's views on capital punishment would substantially impair his or her performance as a juror. (*Wainwright v. Witt*, *supra*, 469 U.S. at p.424; *People v. Heard*, *supra*, 31 Cal.4th at pp. 958-959.) Here, it is clear that the prosecutor failed to show that Merz was not qualified to serve on appellant's jury. Indeed, despite every effort from the prosecutor to elicit disqualifying responses over the course of a voir dire that had consumed 40 minutes to that point, the trial court pointedly told the prosecutor that further death-qualification questioning was futile.[73] (16 RT 2811.) Everything that Merz had said up to that point was consistent and unambiguous. As the trial court bluntly put it, "we could go on for two

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[73] Although the prosecutor was granted permission to keep trying, all the he could elicit from Merz in the remaining questioning was the fact that Merz could assume the greater moral burden of signing a death-verdict form in this case in the event he was elected foreperson.

hours and *still be in the same place.*" (16 RT 2811; emphasis added.)

It is important to remember where that "place" was. Merz was not opposed to the death penalty, whether as an abstract proposition (16 RT 2790) or in the case before him (16 RT 2792). He said he understood the court's explanation of the nature of a capital trial, and that he could and would follow any instructions the court would give notwithstanding any theoretical personal reservations he might have. (16 RT 2793-2795, 2801-2802.) He asked clear and intelligent questions about the mechanics of a death-penalty trial. (16 RT 2809, 2814-2815.) In short, as the trial court confirmed from Merz, he was prepared to select the death penalty in appellant's case if he came to the conclusion that it was warranted. (16 RT 2802-2803.) Surely, such a prospective juror cannot be fairly characterized as "substantially impaired" within the meaning of *Witt.* Yet shortly after the prosecutor's voir dire was completed, the trial court's assessment of Merz's qualifications took a radical 180-degree turn, resulting in his abrupt and improper excusal. One can only marvel at how this Damascene conversion came about, as the record does not fairly support the excusal of Merz.

The tipping point seems to have been reached shortly after defense counsel began her death-qualification voir dire. When the prosecutor interrupted the trial court's response to a question from Merz about life imprisonment without possibility of parole, there followed a "contentious" exchange between the trial court and the prosecutor as to who would answer Merz's question. (16 RT 2816.) Thus, it was only at the eleventh hour that any question as to Merz's qualifications surfaced. In very equivocal language, Merz suggested that "perhaps" he was wasting the court's time. Without specifying whether he was talking about the wisdom of retaining

the death penalty in California or applying it in appellant's case, Merz mused that there were "matters on which people cannot decide" and "this *may* be one of them." (16 RT 2816; emphasis added.) When the trial court asked Merz point-blank if, by those comments, he meant to say that he could not consider the death penalty as an option in a case where the alternative punishment was life imprisonment without possibility of parole, Merz replied: "I am saying that I'm very confused." (16 RT 2817.) Being "confused" hardly equates with or rises to the level of a "substantial impairment." Given the contradictory, confusing, and at times irrelevant instructions delivered by the trial court and the prosecutor, one can sympathize with Merz. It would simply be unfair to Merz (and, more importantly, appellant) for this Court to defer to the trial court's reliance on Merz's confusion when the trial court and the prosecutor were primarily responsible for creating confusion in the first place.

It cannot be denied that the trial court both misinformed Merz about the law and misinterpreted some of his responses. First, as appellant has demonstrated (see section D.3.a., *ante*), the instructions on the question of rehabilitation were irrelevant to the case and completely missed the point of Merz's response. For the trial court to have misunderstood Merz's response and thereafter forcefully explained that rehabilitation had nothing to do with appellant's case was to create the risk that Merz would in turn misunderstand that the law did not preclude a juror from properly deciding that the death penalty was not appropriate for a defendant whom a juror deemed salvageable. The reactions and responses of a juror who was misinformed in this way may well have been colored by the perception that, by following the law, he would be a participant in a system that was tilted in favor of imposing the death penalty. Second, the trial court's explanation

that the existence of one or more aggravating factors was not required to impose the death penalty was even more confusing and counterintuitive. (16 RT 2809.) Certainly, such an explanation was flatly incorrect and it, too, may well have strengthened any scruples Merz may have had against the imposition of the death penalty. Third, both the trial court and the prosecutor utilized an analogy to describe the weighing process which this Court expressly disapproved in *People v. Brown*, *supra*, 40 Cal.3d at page 541, some seven years before appellant's trial. Finally, the prosecutor's convoluted explanation of the law concerning the burden of proving aggravating and mitigating factors was rife with the likelihood of confusing Merz, as the trial court itself pointed out. (16 RT 2806.) Under these circumstances, the trial court's resulting precipitant ruling can hardly be justified.

Rather than assure itself that Merz, who heretofore seemed to be a model prospective juror, was actually substantially impaired, the court simply asked a single (and highly leading) follow-up question, i.e., would Merz have "some difficulty" in deciding between death or life imprisonment without possibility of parole. When Merz replied that he "sure would," the trial court invited and granted a *Witt* challenge from the prosecution. This Court has recently held that even prospective jurors who would find it "very difficult" *ever* to impose the death penalty are both entitled and duty-bound to serve as jurors in a capital case unless their personal views on capital punishment actually prevent or substantially impair their performance. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, emphasis added.) Here, in unseemly haste, the trial court disqualified a prospective juror who at most indicated that he would have "some difficulty" in imposing the death penalty.

c. The Trial Court Improperly Restricted Appellant's Voir Dire of Merz

The trial court's ruling was all the more suspect because defense counsel's request to resume the questioning of Merz in order to "rehabilitate" him was summarily denied. The record reveals that defense counsel's initial voir dire of Merz had barely begun when the trial court interceded. (16 RT 2813-2814). Other than a question or two about the pronunciation of Merz's name and the nature of his occupation, defense counsel succeeded in asking but *two* questions before the court took over the voir dire and eventually excused Merz. Especially when contrasted with the extensive voir dire the prosecution was allowed, covering 18 pages of reporter's transcript (16 RT 2795-2812), the limitations imposed by the trial court amounted to a violation of appellant's right to be tried by an impartial jury and an abuse of discretion. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1084-1085; cf. *People v. Carpenter* (1997) 15 Cal.4th 312, 355 [discretion not abused where prospective juror's answers made his disqualification "unmistakably clear"].)

This Court has not yet addressed "the question of the circumstances under which defense counsel has a right to rehabilitate a prospective juror." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 450.) However, a fair reading of this Court's jurisprudence reveals that the trial court is possessed of the discretion to limit rehabilitation voir dire within reason (see, e.g., *People v. Mattson*, *supra*, 50 Cal.3d at p. 845 ["When a bias that may form a basis of a challenge for cause appears during such voir dire, opposing counsel may seek to rehabilitate the prospective juror, but this further voir dire, like that directed to uncovering bias, is subject to reasonable limitation at the discretion of the trial judge"]), but such voir dire may only be foreclosed

when a prospective juror has given unequivocally disqualifying answers (see, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 824).

The guiding principle is that while the trial court is vested with broad discretion as to questions to be asked during voir dire, that discretion is subject to the essential demands of fairness. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 730; *Aldridge v. United States* (1931) 283 U.S. 308, 310.) Thus, where, as here, the prospective juror has not given unequivocally disqualifying answers, the trial court must allow counsel a reasonable opportunity to question the juror (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 824 ["A trial court . . . may subject to reasonable limitation further voir dire of a juror who has expressed disqualifying answers"]), or be deemed to have abused that discretion (see, e.g., *People v. Wilborn* (1999) 70 Cal.App 4th 339, 348 [reversible error when trial court abused discretion by failing to allow voir dire for implied or actual bias on account of racial prejudice]; *People v. Chaney* (1991) 234 Cal.App.3d 853, 861 [same]; *People v. Chapman* (1993) 15 Cal.App.4th 136, 141-142 [trial court abused discretion in foreclosing voir dire on issue of defendant's status as a felon; error required reversal]).

Trial courts must be evenhanded in their questions to prospective jurors during death-qualification voir dire. (*People v. Champion* (1995) 9 Cal.4th 879, 908-909.) Similarly, trial courts must allow for a level playing field for both the defense and the prosecution during voir dire, as state procedures which create a playing field tilted in favor of the prosecution violate due process. (*Wardius v. Oregon* (1973) 412 U.S. 470, 475.) Here, where the prosecutor was given free rein in his attempt to establish that Merz was disqualified to serve as a juror because of his views on capital punishment, but defense counsel was completely shut off from

demonstrating that Merz was qualified, the trial court's conduct of the voir dire 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. at pp. 664-668.)

d. Conclusion

To sum up, prospective juror Merz had given every indication that he was fully qualified to serve as a capital juror prior to the single remark about having some difficulty imposing the death penalty after he had just received assurances from the trial court that the alternative penalty of life imprisonment without possibility of parole "absolutely" guaranteed that appellant would never be released from prison. Up to that point, it was absolutely clear that Merz was qualified to serve and not impaired, much less substantially impaired. The state of the record, even after Merz made the remarks the trial court found decisive, is not such that Merz's excusal can be justified under *Witt* and after this Court's holding in *Stewart*, especially in light of the failings of the trial court's and the prosecutor's voir dire. Because the defense was completely foreclosed from "rehabilitating" Merz, this Court cannot and should not be bound by the trial court's ruling. Consequently, appellant's death sentence must be reversed. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 668; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962.)

4. Maria Ramirez

a. The Voir Dire

Prospective juror Ramirez's questionnaire responses indicated that, although she harbored feelings against the death penalty, she held no religious or philosophical principles which would affect her ability to vote for the death penalty in appellant's case. In a nutshell, Ramirez simply felt

that life imprisonment without possibility of parole was a better punishment than death. (14 CT 3346-3347.) The oral voir dire did not contradict this assessment.

As it did with all other prospective jurors, the trial court began the voir dire of Ramirez by telling her to "forget about Mr. Tate and forget about this case." (6 RT 845.) Ramirez was asked if she could ever vote to execute another human being. She replied that she could if guilt was proved. Because Ramirez had indicated in her questionnaire (and confirmed in open court) that she was "against" the death penalty, the trial court continued:

> THE COURT: Based upon what you said, is it fair for me to assume that because you're opposed to the death penalty there is no way you can ever vote for the death penalty in a case like this?
>
> MRS. RAMIREZ: I'm not really sure. I guess it depends on what the person did.

(6 RT 846.)

When the trial court expressed confusion at hearing such a response, Ramirez said she was confused as well.[74] (6 RT 846.)

Defense counsel objected to the logical premise underlying the trial court's subsequent questions to Ramirez, i.e., that because she was opposed to the death penalty, she could never vote to execute someone. As defense counsel explained, a person could be opposed to the death penalty yet give

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[74] One can sympathize with Ramirez. First, the trial court told her to forget about Mr. Tate and this case when answering the court's questions; immediately thereafter, she was asked if she could vote for death in "this case." Of course, Ramirez knew virtually nothing about "this" case. It was entirely natural for her, like any other prospective juror, to hesitate about sentencing someone to death without first knowing the facts.

due consideration to both the death penalty and life imprisonment without possibility of parole if selected as a juror. The trial court was perplexed at the nature of defense counsel's objection, stating that it was "totally confused whether or not [Ramirez] could or could not vote to execute." (6 RT 848.) At this point in the voir dire, the prosecutor challenged Ramirez for cause. In doing so, he made a telling remark:

> MR. LANDSWICK: Well, then I would ask the Court to exercise its discretion and excuse this young lady.
>
> THE COURT: That's what I was trying to do before I was interrupted.
>
> MR. LANDSWICK: *No. But you keep confusing her, she keeps confusing you.*
>
> THE COURT: Well, somewhere along the line the confusion is going to end, as soon as I make up my mind. Okay?

(6 RT 849.)

Before allowing questioning from defense counsel, the trial court confirmed that Ramirez had noted her opposition to the death penalty in the questionnaire, and by that response she meant to convey that she could not vote to execute anybody. The trial court then asked:

> THE COURT: Okay. Then can you explain to me in this case how you could ever vote to execute anybody if you're opposed to it?
>
> MRS. RAMIREZ: Well, I don't know how to explain myself, but I just – My belief, I don't think – You know, I don't think anybody should be executed to death penalty.

(6 RT 849.)

Defense counsel elicited from Ramirez that there were some cases in which she could vote for the death penalty, such as the Manson case she had mentioned earlier. Further, Ramirez indicated that she could vote for

the death penalty for some, but not all, cases involving murder. When defense counsel described a case involving the facts contained within the trial court's *Fields* question, Ramirez stated that she would consider both the death penalty and life imprisonment without possibility of parole. (6 RT 850-852.) When the question was rephrased, she indicated a preference for life imprisonment without possibility of parole:

> MS. BROWNE: Both of those penalties are something you would consider?
>
> MRS. RAMIREZ: I would consider one of them.
>
> THE COURT: Which one would you consider?
>
> . . .
>
> MRS. RAMIREZ: I would probably say the life.
>
> THE COURT: Without parole?
>
> MRS. RAMIREZ: Without parole.
>
> MS. BROWNE: I understand that. The question was, would you consider both penalties? Would the death penalty be a possibility in that situation?
>
> MR. LANDSWICK: And her answer was no, one.
>
> MS. BROWNE: She was just getting ready to say something.
>
> THE COURT: When you say would you, yeah, I'd consider for about one second.
>
> MS. BROWNE: Well, that's basically what we are getting on the other side.
>
> THE COURT: No, I respectfully disagree with you.
>
> MS. BROWNE: Would you seriously consider the death penalty in that situation?
>
> MRS. RAMIREZ: In that situation? Maybe. Is it a maybe or –

MS. BROWNE: Well, we really –

THE COURT: Ms. Browne – Ms. Browne –

MS. BROWNE: We really want to know that the death penalty would be an option in that situation, that that is one of the two possible sentences, and that you would seriously look at that as a possible sentence.

MRS. RAMIREZ: Not for – I guess not for burglary. I know it's burglary and –

THE COURT: Ms. Browne, this is a failure under *Wainwright v. Witt*. In looking at the potential juror, listening to her responses, I am satisfied that she's a *Wainwright v. Witt* failure. So I'm going to excuse her on the district attorney's motion.

(6 RT 852-853.)

b. The Court Erred in Granting the Prosecutor's Challenge

In order for the trial court's ruling to withstand scrutiny by this Court, the record must *fairly* support the determination that prospective juror Ramirez was unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 441; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 975.) The record here cannot be fairly read to support Ramirez's excusal for cause.

It bears repeating that, as the prosecutor himself pointed out, the trial court's voir dire confused Ramirez and thus her responses to that confusing voir dire in turn caused the trial court to be confused. The situation was exacerbated because of the imprecise and inconsistent nature of the trial court's questions. For example, the trial court frequently utilized the concept of "voting to execute someone" in its voir dire of Ramirez, yet it failed to clearly differentiate between voting for the death penalty as a

judgment in this case, as opposed to casting a vote to decide whether California should have a death-penalty law.[75] The confusion engendered by the trial court's careless use of voting terminology was what prompted defense counsel's objection to the court's voir dire:

> MR. PINKNEY: All I want to do is point out that I believe that a person could, if given an option to vote, vote against the death penalty; however, if selected to serve in such a case, consider both penalties.
>
> THE COURT: Well, if a person is opposed to the death penalty, Mr. Pinkney, could never vote to execute anybody and is opposed to the death penalty, how could both penalties be open to them? It's a non sequitur. It doesn't make any sense. I'm just trying to find out from this lady. I'm totally confused whether or not she could or could not vote to execute.

(6 RT 848.)

Of course, if the trial court had been presented with a prospective juror who said that not only was she opposed to the death penalty, but, because of that belief, she could never vote to execute anybody, its determination of substantial impairment would have been bullet-proof. But Ramirez was not that prospective juror. She had twice told the court that she *could* consider the death penalty as a viable option, depending on what the defendant's conduct was. On the basis of those answers, she was certainly not a person who could never vote to execute anybody.

The ultimate source of the trial court's confusion was its curious inability to reconcile how a person could be opposed to the death penalty,

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[75] Question No. 60 in the questionnaire asked the prospective juror how he or she would *vote* if the issue of whether California should have a death-penalty law was on the ballot in a coming election. (Emphasis added.)

but still be able to vote to execute a defendant, a viewpoint that the court expressed in the presence of Ramirez on more than one occasion. The basis of the trial court's confusion was erroneous as a matter of law. As this Court has observed, "[d]ecisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt* [citation]." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) Prospective jurors who firmly oppose the death penalty may nevertheless sit as jurors in capital cases so long as they clearly indicate they are willing to follow the law as explained by the court, notwithstanding their conscientious beliefs in opposition to capital punishment. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) Because the trial court could not appreciate that it was possible for Ramirez to oppose capital punishment in the abstract, based upon her belief that life imprisonment without possibility of parole was a "better" punishment, and still impose a death sentence depending upon what the defendant did, it would be inappropriate to accord the trial court's assessment of Ramirez as a "*Witt* failure" any deference.[76] (*People v. Heard*, *supra*, 31 Cal.4th at p. 968.)

Additionally, other circumstances make it inappropriate to accept the trial court's determination of Ramirez's unsuitability. Foremost is the fact that the trial court deemed Ramirez substantially impaired without ever

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[76] As was set forth in the discussion of the excusal of prospective jurors Edmiston, Dean and Merz, *ante*, deference to the ruling of a trial court is inappropriate where the record does not fairly demonstrate impairment and where any claimed ambiguity in the prospective juror's responses stems from the trial court's deficient voir dire.

determining whether she was willing to subordinate any personal feelings she harbored against the death penalty in deference to the rule of law. The failure of the trial court to inquire into Ramirez's willingness to follow the law was even more critical in light of her less than categorical opposition to the death penalty. Also, in view of the fact that Ramirez had already indicated that she was confused by some of the court's questions, it is significant that the court neglected to explain to her, as it did with virtually all of the other prospective jurors, the nature of a penalty-phase trial, the scope of aggravating and mitigating evidence that could be considered, and the legal standard to be applied before a juror could render a death sentence.

The point at which the trial court "gave up" on Ramirez was when she said that "maybe" she would seriously consider the death penalty on the facts contained within the court's *Fields* question, but "I guess not" for burglary. Ramirez's dismissal was premature and improper. Even a cursory examination of Ramirez's voir dire demonstrates that the trial court did not possess sufficient information to make a fair and reliable determination of her ability to serve. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

c. Conclusion

Although prospective juror Ramirez was generally opposed to the death penalty, and preferred life imprisonment without possibility of parole as the "better" punishment, she indicated that she could return a death verdict depending upon what the defendant did. The trial court's confusing and inadequate voir dire produced a record from which it cannot reliably or fairly be determined that Ramirez was substantially impaired under *Witt*. Thus, the error in granting the prosecutor's challenge for cause requires reversal of appellant's death sentence.

5. Roberta Finch

a. The Voir Dire

At the beginning of voir dire by the trial court, prospective juror Roberta Finch stated that she did not know whether she could vote to execute another human being, either in the abstract or even if she believed that the death penalty was an appropriate penalty in appellant's case. (12 RT 1915-1916.) The prosecutor promptly moved to exclude her under *Witt*, arguing that Finch did not know if she could apply the law. (12 RT 1917.) The trial court indicated that it was not sure that Finch was excludable. The following exchange was had:

> THE COURT: You are going to have to explain to us that you could make a choice between these two penalties, either the death penalty or life without parole. If one of those penalties isn't open to you, is not in the ball park, then you've already eliminated one of the penalties before you heard any of the evidence. See what I'm saying?
>
> MRS. FINCH: Mm-hm.
>
> THE COURT: And so those penalties would not be open to you. Does that help at all?
>
> MRS. FINCH: I think I misunderstood the previous question. I could make a decision between one or the other.
>
> THE COURT: Okay. Now, let me ask you this. If you felt that the death penalty was the appropriate penalty in this case, could you vote for the death penalty?
>
> MRS. FINCH: That's the question that I do not know –
>
> THE COURT: Okay.
>
> MRS. FINCH: – down deep whether I can.
>
> THE COURT: What else do you need to know? What are some of the things you need to know to help you make that decision? I'm not asking you would you vote for the

death penalty in this case because you haven't heard the evidence.

MRS. FINCH: Well, that's what I believe I would need to hear to do –

THE COURT: But assuming you did hear the evidence and you felt that the death penalty was an appropriate penalty in this case, is that a penalty that you could vote for?

MRS. FINCH: Yes, I think I could."

(12 RT 1918-1919.)

The court explained the nature of the two phases of a capital case, including a general description of aggravating and mitigating factors, and the weighing process in which each juror can individually determine how much weight to assign to any aggravating or mitigating factor according to the juror's personal moral standards and values. (12 RT 1919-1923.) The court then asked:

THE COURT: So here is my question to you: Do you have any feelings about either the death penalty or life without possibility of parole that you think might prevent you from making a choice between those two penalties in this case if you were selected as a trial juror? Could you pick either penalty?

MRS. FINCH: Yes, I think I can.

(12 RT 1923-1924.)

The court went on to pose its fact-specific *Fields* hypothetical question. Again, Finch maintained that if those were the facts in appellant's case, she still would be able to choose between the two penalties. (12 RT 1924.) After the court elaborated on the type of evidence that might be presented in mitigation, Finch confirmed that she could take such evidence into consideration before deciding which of the two penalties was

appropriate. (12 RT 1925.) Finally, the court asked Finch if she could follow a legal instruction that informed the jury that before it could return a death verdict, it must be satisfied that the factors in aggravation were so substantial, when compared to those in mitigation, that death was the appropriate penalty in appellant's case and not life imprisonment without possibility of parole. Finch replied that she understood the instruction and could follow it. (12 RT 1926.)

The prosecutor observed that Finch had not provided a written response to the "feelings about the death penalty" question in her questionnaire. Recognizing that the trial court had told the venire it could leave questions unanswered and have those questions addressed in the individual and sequestered voir dire, the prosecutor asked Finch why she had not responded to the particular question. Finch replied that at the time, she was unsure of her answer but, having given the matter much thought, she concluded she could choose between the two penalties. (12 RT 1927-1928.) Finch described the factors which would influence her penalty decision: the circumstances surrounding the crime and the defendant's background and education. (12 RT 1929.) When the prosecutor asked Finch which crimes society should reserve the death penalty for, she replied that it was "a hard question to answer." The trial court intervened in the voir dire and asked a series of questions which were, if not entirely irrelevant, at least inconsistent with its rulings when similar questions were posed by defense counsel. For example, the court asked Finch if she believed that only defendants charged with murder should be eligible for the death penalty? Should someone accused of rape or child molestation

face the death penalty?[77] When Finch responded that she believed that one who premeditated or planned a murder should be eligible for execution, the court asked if she believed that one who planned a rape should be eligible for death. Finch replied that she did not know. The court continued in this vein:

> THE COURT: Okay. If you're capable of selecting either the death penalty or life without the possibility of parole, you must feel that the death penalty accomplishes something. Do you feel that way, that we should have the death penalty?
>
> MR. LANDSWICK: May the record reflect that between each interrogation –
>
> THE COURT: I'll take care of that.
>
> MR. LANDSWICK: Thank you.
>
> THE COURT: Can you answer the question, Mrs. Finch?
>
> MRS. FINCH: I'm trying to, Your Honor. And it's difficult. I don't know. I've – I really don't.

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[77] While appellant recognizes that the trial court possesses sufficiently broad latitude to determine a prospective juror's true views on the death penalty, the trial court's questions put to Finch appear to have been inappropriate because of the state of the law. Thus, if questions about whether a juror would vote to execute in cases completely dissimilar to the one at trial, i.e., involving genocidal war criminals (Adolph Hitler) or infamous historical killers (Charles Manson) were irrelevant, as the court ruled they were during the voir dire of prospective juror Ramirez, *ante*, surely questions about Finch's views on cases for which state law did not provide for the death penalty were also irrelevant. (See *People v. Fields*, *supra*, 35 Cal.3d at 374, conc. opn. of Kaus, J. [hypothetical questions as to whether death penalty could be imposed in the event Adolf Hitler was a defendant were improper]; *Coker v. Georgia* (1977) 433 U.S. 584, 592 [death penalty for rape of adult woman constituted grossly disproportionate and excessive punishment forbidden by the Eighth Amendment].)

THE COURT: Okay. Is this whole thing sort of too much for you?

MRS. FINCH: It's a little mind boggling yes.

THE COURT: Do you think you're sort of up to sitting as a juror in a case like this? They are going to be hard choices to make here.

MRS. FINCH: I know they are.

THE COURT: And what do you think about that?

MRS. FINCH: I don't know whether I could do it to be honest.

THE COURT: Okay. If I told you, Mrs. Finch, in this case that in order to serve as a juror that you'd have to be able to make a choice between the two possible penalties if we got to the penalty phase, is that something you could do? Or do you think that's too much of a strain on you? And nobody cares. That's why you're here.

MR. PINKNEY: Your Honor, I apologize for the interruption. But may I object? I think we've asked her that question a number of times.

THE COURT: No, I don't think so.

MRS. FINCH: I think I could do it if I knew the circumstances and everything that goes with it.

(12 RT 1931-1932.)

The court then reminded Finch that it had given her the hypothetical containing facts likely to be shown by the evidence, and asked her if she felt she could choose between the two penalties under those facts. Without hesitation, Finch replied that she believed she could make the necessary choice. (12 RT 1933.) For unexplained reasons, the court returned to philosophical questions:

THE COURT: If you could pick the death penalty in this case as a possible penalty, in your mind what do you

think the death penalty accomplishes by executing somebody? Or what – what do we get? What good does society get out of that?

MRS. FINCH: Really nothing.

THE COURT: Hmm?

MRS. FINCH: Really nothing.

(12 RT 1933.)

The court pursued a similar line of questioning regarding life imprisonment without possibility of parole. Finch believed that, in contrast with the death penalty, life imprisonment without possibility of parole served the purpose of allowing the offender to reflect on his or her conduct. However, like death, Finch believed that life imprisonment without possibility of parole was a true punishment. In response to another question from the court, Finch believed that life imprisonment without possibility of parole was a more severe punishment than the death penalty.[78] (12 RT 1933-1934.) The court again borrowed the prosecutor's stock question:

THE COURT: Okay. Now, let me take it one step further now, Mrs. Finch. I know this is all make believe now, *but we want to make this as real as we can for you so you really understand what is going on here.* Supposing you were selected as a juror in this case. Supposing that happened. And supposing we got to the penalty phase. And you heard some evidence about the two possible penalties, and you went upstairs with the other jurors, and you were elected foreperson. Say they picked you to be the head of the jury. Okay? And you and the other eleven jurors in this case decided that for what Mr. Tate did, he should be executed. Supposing you decided that. And I've given you when you

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[78] The court qualified this question by explaining that there was no right-or-wrong answer. Moreover, it did not inform Finch that, under California law, death was considered the more severe penalty.

went upstairs a verdict form that says, "We, the jury in the above-entitled action, set the penalty at death." And there's a space for the foreperson's signature and the date. And you're the foreperson. Could you sign your name there, Roberta Finch, and date it and bring it down here, give it to me, knowing that by signing that verdict you're starting Mr. Tate on the way to the gas chamber? Is that something that you could do, Mrs. Finch?

MRS. FINCH. No.

THE COURT: Okay. I thought maybe that would be the problem. Challenge for the People?

MR. LANDSWICK: Thank you.

(12 RT 1934-1935; emphasis added.)

Although the trial court was clearly skeptical that questioning from defense counsel could change its impression that Finch was substantially impaired, it permitted defense counsel to ask some questions. However, as it transpired, only two questions were permitted before the court again took over:

MS. BROWNE: Mrs. Finch, are you telling us that when push comes to shove, you would not be able to vote for the death penalty regardless of whether you thought it was warranted or not?

MRS. FINCH: If I would be able to vote for it?

MS. BROWNE: Yeah.

MRS. FINCH: Yes.

MS. BROWNE: What are you saying? You're saying you would or would not be able to vote for it if you thought it was warranted?

MRS. FINCH: If it was warranted, yes.

THE COURT: Then what reservation would you have, Mrs. Finch, from signing the verdict form? What reservations would you have about that? If you thought that this man

deserved the death penalty, why couldn't you sign the verdict form and bring it down and give it to me. See, it's an inconsistent answer, so I want to know if you can explain it to me. See, you just told me –

MRS. FINCH: Oh, yeah I just told – No, I couldn't.

THE COURT: You couldn't do it?

MRS. FINCH: I told her yes, I could.

THE COURT: Yeah.

MRS. FINCH: No, I think it would be the responsibility of being foreperson and signing my name to it.

THE COURT: Then you could do it then?

MRS. FINCH: No, I couldn't do that.

THE COURT: Pardon me?

MRS. FINCH: No, I cannot do that.

THE COURT: You cannot do it. Okay. You want to ask her anymore questions?

MS. BROWNE: Well, what is the difference then between being able to vote for the death penalty and being able to put your name on a verdict form that says we will vote for the death penalty? What is the difference in your mind?

MRS. FINCH: Put it that way, there is no difference.

(12 RT 1935-1937.) At this point, the trial court cut off further questioning, and granted the People's *Witt* challenge over defense objection. (12 RT 1937.) In doing so, it made the following observations:

THE COURT: All right. Now, the lady has left the courtroom, and I'm going to put the reasons on the record why I excused Mrs. Finch. First of all, after every question there was a long, long pause while she groped for an answer. She gave inconsistent answers – She gave inconsistent answers to the questions. She seemed totally confused by the process. She would say one thing to defense counsel, one thing to the Judge, another thing to the district attorney. I'm

> of the opinion in examining her demeanor as she sat there in the jury box answering these questions that she would be unable to effectively deliberate in this case and to be a contributor to the deliberative process. I think she is totally confused, and I don't think she could make up her mind one way or the other. And so based on *Wainwright v. Witt* and for the reasons stated, I've decided not to belabor the point. I've given her plenty of time to make her position clear, and from the get go in this voir dire process she's been inconsistent. So I don't know where she stands.

(12 RT 1938.)

To no avail, defense counsel complained that they had been foreclosed from conducting a meaningful voir dire, and had been permitted to ask no more than two questions before being cut off by the court. The court's response was that it was not obliged to permit any opportunity to rehabilitate a prospective juror. Defense counsel also made two other points. First, Finch gave prompt responses to the two questions posed by defense counsel because Finch was able to understand those questions. More significantly, by her answers to all questions with the sole exception of the court's question about her ability to sign a death verdict form as the foreperson, Finch was qualified to serve. Thus, defense counsel argued, had the court allowed Finch to explain her position, she would have said she preferred not to take on the additional duties and responsibilities of a foreperson. Having the last word on the matter, the court voiced its disagreement with defense counsel. It stated that the "foreperson" question was not decisive: "It was the way she answered all the questions, and it was the way she comported herself in response to the questions." The court noted the lengthy pauses during the voir dire by the court and the prosecutor while Finch "was attempting to grasp for an idea in order to respond" to the questions, in contrast to providing an answer "within a reasonable period of

time" to "the one question" asked by defense counsel. (12 RT 1938-1941.)

b. The Court Erred in Granting the Prosecutor's Challenge

The trial court made it unmistakably clear that it believed Finch was substantially impaired under *Witt*. In challenging the trial court's ruling, appellant is mindful that this Court will not second-guess the excusal of a prospective juror who leaves the trial court with the definite impression that he or she would be unable to faithfully and impartially apply the law, so long as substantial evidence exists in the record to fairly support the ruling. (*People v. Cain*, *supra*, 10 Cal.4th at p. 60) Yet, as this Court has held, a trial court will not be able to insulate itself from appellate review by conducting a confusing and faulty voir dire and thereafter relying on the difficulties the prospective juror may have in furnishing truthful and reflective answers in response to the court's questions as a basis to justify the excusal of a prospective juror. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 967-968.) As defense counsel aptly observed, but for the trial court's erroneous fixation (see *People v. Chacon*, *supra*, 69 Cal.2d at p. 772) on Finch's response to the question of whether she could fulfil the duties of a foreperson by signing a death verdict which was the product of an unanimous jury determination, Finch was clearly qualified within the meaning of *Witt*.

In this respect, the trial court's approach to determining whether Finch was qualified to serve on the jury was fundamentally misguided. It is well to start with the lodestar language in *Adams v. Texas*, *supra*, 448 U.S. 38, given particular emphasis by the high court in *Witt* when it modified the *Witherspoon* standard for disqualification. "[A] juror may not be challenged for cause based on his views about capital punishment *unless*

those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 420.) Therefore, it is necessary to parse the record for Finch's views on capital punishment. As defense counsel was, for all practical purposes, foreclosed from participating in the voir dire of Finch, we must concentrate on the voir dire conducted by the court and the prosecutor.[79] That voir dire reveals that Finch expressed no opposition to the death penalty, either in theory or in practice. To the contrary, Finch's responses unmistakably demonstrated that she could and would impose the death penalty if a defendant deserved it. Both the court and the prosecutor frequently asked Finch whether she could choose the death penalty in this case. Indeed, as soon as Finch understood the question, she consistently said that she could, or thought she could, select the death penalty if she believed it was the appropriate penalty in this case.[80]

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[79] Finch's questionnaire responses only disclose that she did not belong to any organization that either advocated for or against the death penalty, and that she was not sure how she would vote if the matter of the retention of the death penalty in California were to be placed on the ballot in a forthcoming election. (18 CT 4588-4590.) Thus, the questionnaire responses hardly support the view that Finch possessed views on the death penalty that would prevent or substantially impair her ability to follow the law. Those responses alone would be an improper basis for excusing her in any event. (See *People v. Stewart*, *supra*, 33 Cal.4th at pp. 449-450.)

[80] At the start of voir dire, Finch was first instructed to ignore appellant's case and asked whether she could ever vote to execute another human being. When Finch responded that she honestly did not know, she was asked if she could do so if she felt it was the appropriate penalty "in this case." Finch replied she could not honestly answer the question. Once the trial court explained its purpose, Finch realized that she had misunderstood the court's original question. Thereafter, Finch had no

(continued...)

(12 RT 1918 [question by the court], 1919 [same], 1924 [same, two questions], 1927 [questions by the prosecutor and the court], 1928 [prosecutor], 1930 [court], 1932 [same], 1933 [same], 1937 [defense counsel].) Thus, completely contrary to the trial court's findings, Finch gave entirely consistent responses regardless of who asked the questions.

Similarly, the record does not support the trial court's conclusion that Finch was confused about "the process" involved in a death-penalty trial. Like many, if not most, prospective jurors, Finch was far more comfortable discussing what she could or could not do once she knew more about the facts and circumstances of the case and the process itself. At no time during the court's explanation of the process did Finch give any inkling that she did not understand what was being said. She posed no questions signaling a lack of understanding. Finch told the court that she was prepared to consider the aggravating and mitigating evidence, that she understood the weighing process, and that she held no views about either the death penalty or life imprisonment without possibility of parole that might prevent her from choosing the appropriate penalty. (12 RT 1921-1925.) She expressly informed the court that she both understood and could follow the court's instruction concerning the prerequisites for rendering a death verdict. (12 RT 1926.)

Absolutely nothing in Finch's responses to the prosecutor's voir dire

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[80] (...continued)
further difficulties answering this question. (12 RT 1916-1918.) Any initial confusion expressed by Finch was attributable to the trial court's practice of asking a question about the death penalty in the abstract and immediately asking a follow-up question that referred to appellant's case. Here, as in the case of prospective juror Ramirez, *ante*, such a practice was hopelessly confusing.

was inconsistent, much less in contradiction, to her responses to the court's questions. Finch's responses were perfectly appropriate and uncontroversial. For instance, before sentencing a defendant to death, Finch said she would deem the circumstances of the crime and the background and education of the defendant important. (12 RT 1929.) Certainly, her belief that one who plans a murder should face the possibility of the death penalty was hardly a disqualifying response. (12 RT 1931.) More to the point, Finch stated on more than one occasion that if appellant was convicted under the circumstances described by the trial court in its hypothetical question, she could sentence him to death after weighing the aggravating and mitigating evidence. (12 RT 1924, 1933.) On this record, it is simply impossible to have confidence in the trial court's determination that Finch gave conflicting responses depending on who was asking the questions. As this Court remarked in *Heard*, "given the absence of substantial support in the record for the trial court's ruling, it cannot stand." (*People v. Heard*, *supra*, 31 Cal.4th at p. 968.)

This Court should also take into account the circumstance that defense counsel was provided with virtually no opportunity to voir dire Finch. While it is true that at the time of appellant's trial, Code of Civil Procedure section 223 provided no right to attorney-conducted voir dire, but rather left the matter to the discretion of the trial court, the fact remains that the trial court had granted counsel's pretrial motion for attorney-conducted voir dire. (1 RT 57-60.) In granting that motion, the trial court made the following observations:

> THE COURT: And I'm mindful that some other judges don't permit the questions by defense counsel, but inasmuch as – because the Court's concerned with the gravity of this case, and in fairness, I think that the defense and the

> prosecution should have an ample time to voir dire the prospective jurors. And so that's the way the Court feels about it.

(1 RT 60.)

As this Court has observed, "[w]e agree with defendants that trial courts should be evenhanded in their questions to prospective jurors during the 'death-qualification' portion of the voir dire. . . ." (*People v. Champion*, *supra*, 9 Cal.4th at pp. 908-909.) That principle should resonate with the same force where the trial court exercises discretion to permit attorney-conducted voir dire, especially as the United States Supreme Court has held that the exercise of trial court discretion in the conduct of voir dire is subject to the Fourteenth Amendment's essential demands of fairness. (*Ham v. South Carolina* (1973) 409 U.S. 524, 526.) Thus, appellant should have been given an opportunity equivalent to that of the prosecutor to develop a record of Finch's responses on the issue of death-qualification. Surely, Finch had not given unequivocally disqualifying answers by the time defense counsel's turn to begin her voir dire arrived. Even under this Court's precedent, appellant was entitled to at least a reasonable opportunity to "rehabilitate" Finch. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 355; *People v. Mattson*, *supra*, 50 Cal.3d at p. 845.)

Ultimately, what we are left with as the actual basis for the trial court's ruling is its fixation with two abstractions. The first is the trial court's frustration at Finch's inability to articulate what the death penalty accomplishes. In spite of having prefaced the voir dire by reminding Finch that "there are no right or wrong answers to any of these questions" (12 RT 1916), the court asked Finch if she felt "we" should have the death penalty, prefacing the question with a loaded comment: "If you're capable of

selecting either the death penalty or life without possibility of parole, you must feel that the death penalty accomplishes something." Not surprisingly, Finch expressed some difficulty in answering a question of that type.[81] Clearly, "[r]eflection at this point was appropriate." (*People v. Heard*, *supra*, 31 Cal.4th at p. 967.)

It does not logically follow that a prospective juror who is capable of choosing between death and life imprisonment without possibility of parole must, of necessity, feel that the death penalty accomplishes something. A civic desire to follow the law that provides for two severe punishments, one of which (i.e., death) is deemed the more severe, may well be sufficient as a reason for choosing that penalty as appropriate under the circumstances. The comment by the trial court was simply not appropriate or relevant, and any difficulty Finch had in answering the court's question should not be credited as a basis for disqualifying her. Yet, it is clear that the trial court took Finch's inability to articulate a justification for the death penalty into account in deeming her substantially impaired. It immediately asked Finch: "Is this whole thing sort of too much for you?" and "Do you think you're sort of up to sitting as a juror a case like this?" (12 RT 1932.) Questions of this type were no more than variations on the theme of whether it would be very difficult for a penalty-phase juror to make a "hard choice," as the trial court put it. However, jurors who would find it very difficult to impose the death penalty simply cannot be excluded on that basis. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) There must be more to justify the exclusion of a prospective juror, i.e., personal views about capital punishment which

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[81] The prosecutor seized upon that difficulty by attempting to have the record reflect an apparent pause before Finch's response, but the trial court interrupted with "I'll take care of that." (12 RT 1931.)

would prevent or substantially impair the performance of the duties of a juror in a capital case.

The second abstraction that the trial court focused on was Finch's professed inability to perform the task of a foreperson by signing a death-verdict form on behalf of the jury that had unanimously deemed that death was the appropriate punishment in this case. As appellant has demonstrated earlier in this argument when discussing the improper excusal of prospective juror Edmiston, California law neither requires that a prospective juror serve as a foreperson against his or her will nor sign a verdict form. (See *People v. Chacon*, *supra*, 69 Cal.2d at p. 772; *Alderman v. Austin*, *supra*, 663 F.2d at p. 563.) At most, the authentication of a verdict is accomplished when a party exercises its statutory right to request that the jurors be polled prior to the recording of a verdict, in which case the jurors must be "severally asked" whether the verdict is theirs. (See §§ 1163, 1164.) These statutes provide the sole "culminating formal procedure for verifying the unanimity of the jury in open court." (*People v. Bento* (1998) 65 Cal.App.4th 179, 191.)

Just as there is no provision forcing a juror to look the defendant square in the eye at the time a death verdict is announced, so there is no requirement that each or any juror sign a verdict form. Indeed, under California law, there is no directive that a general verdict be in writing, much less signed.[82] "There is no requirement that the verdict be in written

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[82] Only special verdicts must be in writing. (§ 1152.) However, even special verdicts need not be in any particular form nor is there a requirement that the verdict be signed by the foreperson or any other juror. It is sufficient if it intelligibly presents the facts found by the jury. (§§ 1153, 1154.) In any event, a verdict fixing penalty is a general verdict.

form." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 511; see also *People v. Lankford* (1976) 55 Cal.App.3d 203, 211; *People v. Mestas* (1967) 253 Cal.App.2d 780, 786 ["While it is the established custom in modern practice for the court to submit verdict forms to the jury, the oral declaration by the jurors unanimously endorsing a given result is the true 'return of the verdict' prior to the recording thereof"]; *People v. Wiley* (1931) 111 Cal.App. 622, 625 ["The signing of a verdict by a foreman is a mere means of authenticating the finding of the jury. . . . Indeed, the law does not even require a verdict to be signed by a foreman"]; § 1149 ["jury . . . must be asked whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same"].)

To summarize, the two keystones to the trial court's ruling that Finch was disqualified under *Witt* consisted of two interlocking hypotheses which were both artificial and illogical. First, Finch could not properly be excluded for her unwillingness to act as the jury's foreperson, and go beyond the baseline requirements of a juror, i.e., following the court's instructions, weighing the aggravating and mitigating evidence, and choosing the appropriate penalty from the two options provided by law. Second, Finch was not required to believe that the death penalty served a purpose in order to be able to impose it in appellant's case, if the evidence warranted such a result.

Finally, one cannot read the trial court's comments without observing that it faulted Finch out of a fear that she would be an indecisive juror because of a lack of firm, articulable beliefs. The trial court expressly stated that it was not sure that Finch knew what she stood for. (12 RT 1941.) Significantly, it believed Finch would be "unable to effectively

deliberate in this case and to be a contributor to the deliberative process." (12 RT 1938.) The trial court's prediction about how Finch would perform as a juror in this case was nothing more than rank speculation. The fact that a juror takes care and time during voir dire in expressing matters of great importance is hardly a basis for assuming that the juror will be unable to effectively deliberate or contribute to the deliberative process. This was a death-penalty case, not a shopping excursion.

More to the point, the characteristics that the trial court divined in Finch were not of the kind that could cause her to be disqualified under *Witt* or even under the general grounds for disqualification as set forth in Code of Civil Procedure section 228.[83] A juror must, of course, be impartial, and willing and able to follow instructions of law, and participate in deliberations. (*People v. Diaz* (2002) 95 Cal.App.4th 695, 702-703; see Code Civ. Proc., §§ 225, 229.) Nothing that Finch said remotely indicated that she was unwilling or unable to perform the duties of a juror. The trial court's comments, fairly read, communicate its clear belief that Finch would not be an ideal juror. Even assuming arguendo that such a prediction of Finch's performance was well-founded, it was hardly grounds for her summary disqualification. "The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a

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[83] Section 228 provides, in pertinent part, that:

> Challenges for general disqualification may be taken on one or more of the following grounds, and for no other:
>
> . . .
>
> (b) The existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

refusal to deliberate and is not a ground for discharge." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.)

c. Conclusion

In her answers, prospective juror Finch never communicated that she had particular views about either the death penalty or life imprisonment without possibility of parole such that she could not consider one or the other as viable options in this case. At worst, she indicated late in the voir dire that she did not wish to undertake the greater moral burden of performing the customary tasks of the jury's foreperson. The state of the record, even after Finch made the remarks that swayed the trial court, is not such that her excusal can be justified in light of this Court's holdings in *Stewart* and *Heard*. This is all the more true because of the trial court's improper voir dire and the unfair limitation placed on defense counsel's opportunity for voir dire. For all of these reasons, this Court cannot and should not consider itself bound by the trial court's ruling. Consequently, the erroneous excusal of Finch requires that appellant's death sentence must be reversed. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 668; *Aldridge v. United States*, *supra*, 283 U.S. at p. 310. *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962.)

E. Appellant's Death Judgment Must Be Reversed

As appellant has demonstrated, the trial court erred in excusing prospective jurors Edmiston, Dean, Merz, Ramirez and Finch for cause. With the sole exception of Ramirez, none of these prospective jurors maintained so much as even a general opposition to the death penalty. Thus, for four out of the five prospective jurors at issue, the trial court's ruling never properly addressed "[t]he real question [of] whether the juror's views about capital punishment would prevent or impair the juror's ability

to return a verdict of death in the case before the juror." (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 431.) Because the record, fairly read, demonstrated that Ramirez could set aside her personal distaste for the death penalty and decide whether appellant deserved the death penalty for what he had done, she, like the other four, cannot be said to be "[a] prospective juror who would *invariably vote either for or against the death penalty* because of one or more circumstances likely to be present in the case being tried, *without regard to the strength of the aggravating and mitigating circumstances.*" (*People v. Heard*, *supra*, 31 Cal.4th at p. 959 (original emphasis).)

Where, as it did here with all five prospective jurors in question, "the trial court conducted a seriously deficient examination of [the] prospective juror[s] . . . and, in the absence of adequate justification, erroneously excused the juror[s] for cause based upon the [jurors'] ostensible views regarding the death penalty" (*id.* at p. 951), the trial court's error must be considered reversible per se with regard to the ensuing death-penalty judgment. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 664-666; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Heard*, *supra*, 31 Cal.4th at p. 951.)

V

THE PROSECUTOR'S PERVASIVE MISCONDUCT DURING TRIAL VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RELIABLE GUILT AND PENALTY DETERMINATIONS

A. Introduction

Shortly after the prosecutor started to outline his case to the jury in his opening statement at the guilt phase, a pattern began to emerge: the prosecutor began to operate outside the rules that govern the conduct of a prosecutor in a criminal trial, and the judge failed to put a halt to the prosecutor's excesses. The prosecutor, in the manner of a probationer testing the limits of his probation officer, learned a valuable lesson: it was possible to behave improperly with little or no consequences. And behave improperly he did, throughout both phases of the trial, thereby unfairly placing his thumb on death's side of the scale. Considered either singly or in combination with one another and the other errors which occurred in this case, reversal is required.

B. The Special Role of the Prosecutor and the Standard of Review

As the advocate for the interests of the People of the state of California, the prosecutor plays a unique role in our criminal justice system, and one that deserves exacting scrutiny when he urges a jury to impose the death penalty in the name of the state. "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 819.) A prosecutor represents "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." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

This Court has long recognized the esteem in which prosecutors are held by juries: "[J]uries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247; accord *People v. Brophy* (1954) 122 Cal.App.2d 638, 652; *People v. Talle* (1952) 111 Cal.App.2d 650, 677.) This universal perception of the public prosecutor as a guarantor of impartial justice provides additional justification for holding the prosecutor to higher standards than that imposed on other attorneys. When, therefore, a prosecutor's practice demonstrates prejudice, partiality, and partisanship, the peril to the defendant's rights to a fair trial is very real.

A prosecutor's behavior violates federal constitutional due process principles when it is "so egregious that it infects the trial with unfairness." (*People v. Hill*, *supra*, 17 Cal.4th at p. 818; *People v. Morales* (2001) 25 Cal.4th 34, 43.) A prosecutor commits misconduct under California law when engaging in behavior involving the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Hill*, *supra*, 17 Cal.4th at p. 818.) Significantly, the motive of the prosecutor when crossing the line of permissible conduct is not determinative: there is no requirement that a prosecutor's misconduct when arguing his or her case be intentional. (*Id.* at p. 822.) However, there must be a reasonable likelihood that the jury will understand the prosecutor's remarks in an objectionable fashion. (*People v. Morales*, *supra*, 25 Cal.4th at pp. 43-44.)

In this case, the prosecutor, who was entrusted with the formidable

power and the commensurate duty to ensure that justice be done, engaged in a systematic course of misconduct. Reversal of the entire judgment is now required.

C. The Guilt Phase Misconduct

1. Misconduct in the Prosecutor's Opening Statement

The prosecutor wasted little time in landing the first low blow at appellant's trial. In his opening statement, the prosecutor discussed how the evidence would show that appellant had been interrogated by the police following his arrest in the victim's vehicle. As the prosecutor explained, the evidence would show that appellant denied involvement in the crime, and provided the alibi that he had been at his girlfriend's house. The prosecutor then told the jury:

> MR. LANDSWICK: After the denial by the defendant, a request was made for the defendant to consent to the search of the place he was staying at, meaning Lisa Henry's house. He denied such consent.
>
> MS. BROWNE: Objection. I believe that's prosecutorial error.

(24 RT 3378.)

The prosecutor's comment on appellant's exercise of his Fourth Amendment rights was clearly misconduct, as such evidence was inadmissible to show a consciousness of guilt. (*People v. Keener* (1983) 148 Cal.App.3d 73, 78.) The trial court also recognized that the prosecutor had acted improperly, and sustained defense counsel's objection, albeit ineffectually, as appellant will demonstrate, *post*. (24 RT 3378.)

All experienced criminal trial lawyers and jurists recognize that the prosecutor's opening statement is a critical event in the trial. The defense has not yet spoken, nor is it a certainty that the defense will outline their

case since they carry no burden of proof. At the outset of the case, jurors may be more attentive than later, especially if the trial is a lengthy one. Every prosecutor knows that what the jury hears in the opening statement may very well set the tone for all that follows.

A prosecutor is obliged to avoid making statements of fact to the jury not supported by proper evidence introduced during trial. (*Gaither v. United States* (D.C. Cir. 1969) 413 F.2d 1061, 1079.)

> [T]he prosecutor's opening statement should be an objective summary of the evidence reasonably expected to be produced, and the prosecutor should not use the opening statement as an opportunity to "poison the jury's mind against the defendant" or "to recite items of highly questionable evidence [citations]."

(*United States v. Brockington* (4th Cir. 1988) 849 F.2d 872, 875.)

Prosecutorial misconduct in the opening statement to the jury poses a particular risk:

> [W]here the prosecutor informs the jury that the government will produce certain evidence to show a defendant's guilt and then, without good cause, fails to do so, the prosecutor fails to give a proper opening statement to the jury. Otherwise, the risk to the defendant is that the jury's mindset will be tainted, resulting in an unfair trial. [Citation.] The risk to the government is that it may have to retry the case.

(*United States v. Thomas* (D.C. Cir 1997) 114 F.3d 228, 245.)

As this experienced prosecutor had to know, he could not have legitimately introduced evidence that appellant refused to consent to a warrantless search.[84] Appellant had a constitutional right to withhold consent to a warrantless search of his home, and his exercise of that right

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[84] Indeed, the prosecutor did not seek to introduce such evidence at trial.

could not constitute evidence of his guilt. (*People v. Wood* (2002) 103 Cal.App 4th 803, 808-810; *People v. Keener*, *supra*, 148 Cal.App.3d at p. 79; *United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1352.) The prosecutor's poisonous reference to appellant's exercise of his Fourth Amendment rights was calculated to strike at the same nerve as the impermissible reference to the exercise of the Fifth Amendment right to remain silent condemned in *Griffin v. California* (1965) 380 U.S. 609, or to the exercise of the Sixth Amendment right to counsel forbidden in *People v. Schindler* (1980) 114 Cal.App.3d 178, 187-189, and *United States ex rel. Macon v. Yeager* (3rd Cir. 1973) 476 F.2d 613, 616-617. In each case, the prosecutor strives for the same result, i.e., attempting to convince the jury that the accused has something to hide, as the acts of consulting with an attorney, refusing to permit a search, or refusing to respond to police questions are proof of a consciousness of guilt. After all, innocent people do not need lawyers, have nothing to fear from police questioning, nor anything to hide from police searches.

Permitting the prosecutor to introduce evidence of, or comment upon, the exercise of appellant's Fourth Amendment right would exact a penalty for exercising a constitutional privilege. Such evidence was inadmissible at trial and the prosecutor can hardly claim to have believed otherwise. Consequently, telling the jury that they would hear clearly inadmissible and prejudicial evidence as part of his case-in-chief was flagrant misconduct. (*People v. Purvis* (1963) 60 Cal.2d 323, 343-346 [prosecutor's bad-faith opening-statement assertion that the accused was involved in a knifing in another state, when he lacked the evidence to prove it, was grounds for reversal].)

The trial court was aware that the prosecutor had exceeded the

bounds of permissible conduct, and impliedly sustained the objection. Unfortunately, the trial court's efforts to remedy the violation were inadequate to cure the harm, and this initial failure of the trial court to rein in the prosecutor sent a message to the jury that the prosecutor could cross the line with relative impunity. After trial counsel's objection, the following colloquy ensued:

> THE COURT: The jury can disregard that.
>
> . . .
>
> MS. BROWNE: Are you going to assign prosecutorial misconduct?
>
> THE COURT: No, I'm not going to assign prosecutorial misconduct. I'm going to ask the jury to disregard that.

(24 RT 3378.)

Clearly, the trial court's solution to the problem caused by the prosecutor's egregious misconduct was incapable of curing the harm. As this Court has recognized, the manner in which a trial court confronts prosecutorial misconduct is often determinative of whether the accused will receive a fair trial. "However, unless the [cautionary] instruction is sharply worded, it may only exacerbate the problem by calling the jurors' attention to the improper remarks. '[Merely] to raise an objection to [improper] testimony – and more, to have the judge tell the jury to ignore it – often serves but to rub it in." (*People v. Bolton* (1979) 23 Cal.3d 208, 216, fn. 5, quoting *United States v. Grayson* (2nd Cir. 1948) 166 F.2d 863, 871 (conc. opn. of Frank, J.).)

In *Bolton*, the prosecutor, in his closing argument, twice hinted that but for certain rules of evidence which shielded the defendant, he could prove that the defendant had a criminal record and a propensity to commit

wrongful acts. In discussing how best to curb prosecutorial conduct, this Court commented on the prerequisites of an effective admonition to the jury:

> [The trial judge] should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks. In the present case, such a counterbalancing statement might have taken the following form: "Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you [to] back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks."

(*People v. Bolton*, *supra*, 23 Cal.3d at p. 216, fn.5.)

The *Bolton* court's directive has not gone unheeded. (See, e.g., *People v. Greenberger* (1997) 58 Cal.App.4th 298, 356 [finding that trial court's admonition comported with *Bolton*].) Yet what passed for an admonition in appellant's case is a far cry from what was necessary to assuage the harm caused by the prosecutor's improper insinuation. First, the trial court's language was insufficiently forceful. Rather than direct the jury that it was required to disregard the statement of the prosecutor, the trial court's words expressly stated that it was within the jury's purview to accept or reject the prosecutor's remarks. Simply stated, "can" is not the same as "must." Jurors, as laypersons, would understand the difference and believe that the court meant that it was within the jury's discretion to ignore the prosecutor's remarks; otherwise the court would have used more direct and mandatory language.

Second, the trial court's ill-considered language was exacerbated by its reply to trial counsel's question regarding whether the court would "assign prosecutorial misconduct." This Court has long held that as a prerequisite to appellate review, a defendant is obliged to "assign misconduct" in the trial court. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) Whether or not the practice of referring with particularity to the nature of an objection as "assigning misconduct" is archaic (see, e.g., *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1459, fn. 14), defense counsel can hardly be faulted for trying her best to preserve the prosecutorial-misconduct claim for appeal as well as to alleviate the harm to her client. Yet, the trial court's troublesome response only diminished what little force its early "admonition" had with the jury.

Informing defense counsel in the presence of the jury that it would not "assign prosecutorial misconduct" could only be understood by the jurors as meaning one of two things: (1) that the prosecutor had done nothing wrong, or (2) if the prosecutor had crossed the boundaries of propriety, it was inadvertent, accidental, or of little consequence. Both interpretations would have been wrong. The type of misconduct committed by the prosecutor was both egregious and intentional. Indeed, a number of courts have held that error of this type strikes so directly at the heart of the defense that reversal was required even though the court gave curative admonitions. (See, e.g., *Hill v. Turpin* (11th Cir. 1998) 135 F.3d 1411, 1419 [reversal required in spite of "trial court's valiant and well-intentioned attempt to remedy the *Doyle* error through curative instructions]; *United States v. Kallin* (9th Cir. 1995) 50 F.3d 689, 694-695 [same].)

It was crucial for the trial court to rein in the prosecutor by, at a minimum, admonishing the jury that the prosecutor's remarks were

improper, would not find support in the evidence, and must be disregarded. Instead, the trial court, after expressly declining to "assign prosecutorial misconduct" in the jury's presence, "ask[ed] the jury to disregard that." Leaving the matter to the whim of individual jurors who might have preferred the prosecutor's inference was woefully insufficient to cure the harm caused by the misconduct. Moreover, it should come as no surprise that the prosecutor saw the trial court's timidity as a license to push the envelope of prosecutorial propriety to the limit and well beyond.

2. The Prosecutor Committed Egregious Misconduct by Engaging in Character Assassination of Appellant

Beginning at the guilt phase of appellant's trial, the prosecutor engaged in a concerted campaign of character assassination, repeatedly and improperly bringing before the jury assertions that appellant was regarded and feared by his own family as a very violent person, and that he had kicked in the door to his aunt's home on three separate occasions.[85] The tools the prosecutor employed to wreak havoc on appellant's ability to receive a fair trial included, but were not limited to, introducing these improper matters in the guise of refreshing a witness's recollection, and arguing facts not in evidence.

At the guilt phase of the trial, the prosecutor called appellant's aunt, Mamie Jackson, as a witness. The prosecutor elicited from Jackson that she

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[85] The campaign of character assassination reached its crescendo in the penalty phase, where the prosecutor brought before the jury assertions that appellant had "struck" his cousin and two aunts, stolen and wrecked his grandparents' truck in a fit of anger, hit a store owner on the head three times with a rock, cut the throat of one Patrick Shields, and committed burglary while wearing gloves. These instances of prosecutorial misconduct will be addressed in section D of this argument, *post*.

lived together with appellant's mother, grandmother, and other family members at the house on Hesket Road in April of 1988. (28 RT 3734-3735.) On the day that the victim was found dead in her home, Jackson had received a phone call from Sylvester LaChapelle asking her to check if the victim's car was parked by the victim's house. She did so and reported that the car was not there. (28 RT 3733.)

Soon, however, the prosecutor's primary purpose in calling Jackson became apparent. Alluding to a document that he had given to the witness for her to review earlier that morning, the prosecutor began to question Jackson about events on April 18, 1988, the day before the discovery of the victim's body. Jackson testified that appellant had been present at his family's home that day, in the late afternoon or early evening.[86] (28 RT 3735.) He was wearing a red leather suit. (28 RT 3736.) He entered the house and went to his mother's bedroom. Jackson did not see appellant remove anything from the home, and did not know if anything was missing when appellant left. She could not say how long appellant stayed, as she was ironing clothes and not paying attention to time.[87] (28 RT 3735-3736.)

Suddenly, the prosecutor asked Jackson if she had told the police on April 19, 1988, that when appellant entered her home, everybody in the house "ran" because appellant "is very violent." This immediately drew an objection from defense counsel that the question called for speculation and was prejudicial. Before defense counsel could completely articulate her objection, the trial court overruled it, commenting that the witness had

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[86] Jackson testified that appellant lived at this address, but was not staying there on April 18, 1988. (28 RT 3735.)

[87] While appellant was present, Jackson left to see her neighbor, Mr. Richardson. (28 RT 3738.)

stated she could not remember and the prosecutor was merely "refreshing her memory." When defense counsel addressed the trial court's rationale by observing that the prosecutor's question was an improper method to refresh recollection, the court disagreed, stating: "He can ask her if that refreshes her recollection and that that's what she told the police." (28 RT 3737.) The court itself asked the witness the objected-to question, whereupon Jackson stated that she could not remember now. The prosecutor then elicited Jackson's response that she had reviewed the document earlier that morning, and that at the time the statement to the police was made, she had initialed and signed it. (28 RT 3737.) Encouraged no doubt by the trial court's ruling and the leeway for further cross-examination it suggested, the prosecutor continued with his assault on appellant's character:

> MR. LANDSWICK: As a matter of fact, Mr. Tate has kicked in the door to your house –
>
> MS. BROWNE: Objection, Your Honor. Objection, Your Honor.
>
> MR. LANDSWICK: – on three occasions?"
>
> THE COURT: What is the basis for your objection? If you'll give me a reason.
>
> MS. BROWNE: Irrelevant. It's irrelevant.
>
> THE COURT: Okay. Sustained.
>
> MS. BROWNE: Thank you. Move to strike, admonish the jury.
>
> THE COURT: The jury may be admonished to disregard the question. All right. Let's keep it in the ballpark, Mr. Landswick.

(28 RT 3738.)

During pretrial hearings, the trial court had ruled that the prosecution

was prohibited from introducing evidence of violent acts that appellant was alleged to have committed on members of his family, including Mamie Jackson. (1 RT 205-207, 211, 216, 220.) That ruling had no apparent deterrent effect on the prosecutor when he examined Mamie Jackson. It would be difficult to overstate the effect the prosecutor's flagrant misconduct must have had on the jurors' decision on whether to convict appellant. Surely, the prosecutor's direct violation of the court's in limine rulings regarding the admissibility of the instances of violence directed at Jackson and other family members, is eloquent proof that the prosecutor was confident that such evidence was virtually certain to bolster his circumstantial case for guilt. It also demonstrated that the prosecutor did not believe he had enough *admissible* evidence with which to convince the jury to return a guilty verdict.

The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct.[88] (*People v. Bell* (1989) 49 Cal.3d 502, 532.) It is misconduct for a prosecutor to question a witness solely to elicit "facts" implied by the questions before the jury. (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

As this Court has noted, "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Holt* (1984) 37 Cal.3d 436, 458, quoting *People v. Thompson* (1980) 27

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[88] A showing that the prosecutor operated in bad faith, or otherwise acted intentionally, is not a prerequisite to a finding of reversible misconduct. The harm caused by prosecutorial misconduct is no less crippling because it was inadvertently, rather than intentionally, inflicted. (*People v. Hill*, *supra*, 17 Cal.4th at p. 822; *People v. Bolton*, *supra*, 23 Cal.3d at pp. 213-214.)

Cal.3d 303, 314.) The "admission of this evidence produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts' (Wigmore, *Evidence*, § 194, p. 650)." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317.) In light of the trial court's in limine rulings and the state of the case, the prosecutor knew, or should be held to know, that he could not properly have elicited the evidence set forth above.

The questions directed at Mamie Jackson during the prosecution's case-in-chief were intended to produce inadmissible responses. Whether the occupants of her home "ran" from the house on April 18, 1988, because appellant was viewed as "very violent" was irrelevant, more prejudicial than probative, and called for speculation on the part of the witness. (*People v. Bell*, *supra*, 49 Cal.3d at p. 532.) The prosecutor's question was nothing more than a crude attempt to show the jury that appellant was regarded and feared as a person of bad character by his own family. Such "bad character" evidence was patently inadmissible in the absence of appellant having placed his character in issue, an impossibility during the prosecutor's case-in-chief. (Evidence Code §§ 1101, 1102; *People v. McFarland* (2000) 78 Cal.App 4th 489, 494-495; *People v. Garcia* (1984) 160 Cal.App.3d 82, 91.) The questions were no less objectionable when characterized as a device to refresh recollection.[89] (*Douglas v. Alabama* (1965) 380 U.S. 415, 419; *United States v. Zackson* (2nd Cir. 1993) 12 F.3d 1178, 1184-1185.)

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[89] Putting aside the question of whether the foundational requirements of Evidence Code section 1237 were met here (a point that appellant does not concede), the threshold question remains: was the evidence relevant? Clearly, it was not.

The damage caused by the trial court's error in allowing the prosecutor to "refresh recollection" in this manner was great. First, by referring during direct examination to the statement the witness gave to the police, the prosecutor effectively had the out-of-court statement admitted as evidence, and verified its truth in the face of the witness's trial testimony that she could not recall what she had said to the police four years ago.[90] Second, having succeeded in convincing the trial court to allow this line of inquiry, the prosecutor immediately followed it by asking whether it was a "fact" that appellant had kicked in the witness's door on three occasions. Even though the trial court sustained defense counsel's relevance objection, the clear implication of the question was that the prosecutor had admissible evidence that appellant had acted violently toward his aunt, and that her statement to the police contained that "fact."

A prosecutor commits misconduct when he refers to facts that have not been introduced into evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 827.) These statements "tend to make the prosecutor his own witness – offering unsworn testimony not subject to cross-examination." (*Ibid.*, citations omitted.) Significantly, this species of prosecutorial misconduct violated appellant's federal constitutional right to confrontation, due process of law, and a fair jury trial. (U.S. Const., 6th & 14th Amends.; see *People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) Moreover, although these statements are "[w]orthless as a matter of law," they can be "[d]ynamite to the jury because of the special regard the jury has for the prosecutor,

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[90] The prosecutor was able to accomplish this not by asking if the substance of the out-of-court statement was true, but rather by eliciting that the witness had signed and initialed the statement she gave to the police.

thereby effectively circumventing the rules of evidence." (*People v. Hill*, *supra*, 17 Cal.4th at p. 827.) Here, the reference to the "facts" was explosive, as the prosecutor knew that "evidence" that appellant was prone to kick in doors and steal from elderly women, was likely to resonate with the jury in this case, where entry into the victim's house had been accomplished by kicking in her back door.

In sum, these initial instances of character assassination constituted misconduct which contributed greatly to undermine appellant's ability to receive a fair trial. (*People v. Hill*, *supra*, 17 Cal.4th at p. 838; *People v. Criscione* (1981) 125 Cal.App.3d 275, 292 [improper cross-examination "inflammatory in its open appeal to the jury's sense of fear and anger"].) Of course, it is also misconduct for a prosecutor to misstate the evidence. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at pp. 823-826; *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 700, 709 [prosecutor's misstatement of evidence violated defendant's federal constitutional right to due process].)

3. The Prosecutor Committed *Doyle* Error during Cross-Examination of Appellant and Exploited That Error in Closing Argument by Disparaging Defense Counsel and Suggesting That Appellant's Post-Arrest Consultations with Counsel Resulted in a Fabricated Defense

a. Introduction

During direct examination of appellant at the guilt phase, defense counsel asked appellant why he had not told officers Medsker and Paniagua the same account of what had happened at the victim's house as he had told the jury during his earlier testimony. Appellant explained that he did not feel that it would do him any good, as he "didn't too much like" Medsker. In any event, about a week after his arrest, he learned from appointed

counsel that he was facing the death penalty and had been counseled not to discuss the case with anybody. (32 RT 4256-4257.)

The prosecutor seized upon this testimony to ask questions about appellant's conversations with defense counsel and to insinuate that appellant had fabricated his trial testimony in collusion with defense counsel. Later, in his guilt- and penalty-phase closing arguments, the prosecutor argued that defense counsel had created a "phantom killer" in the guilt phase, ultimately urging the jury to reject defense counsel's mitigation case just as it had rejected the "fabricated" defense in the guilt phase. The prosecutor's cross-examination constituted error under *Doyle v. Ohio* (1976) 426 U.S. 610, and the exploitation of that error in closing argument was misconduct.

b. The Improper Cross-Examination of Appellant

The prosecutor began his cross-examination of appellant by asking if he had "rehearsed" his testimony. After appellant's denial, the prosecutor elicited testimony that appellant had been visited by defense counsel on the Friday and Sunday preceding his trial testimony, and that appellant had "somewhat" discussed his testimony with counsel. (32 RT 4267.) When the prosecutor learned from appellant that his first attorney, James Chaffee, who had advised him not to discuss his case with anyone, was a member of the same office as current defense counsel, the prosecutor sarcastically commented: "Oh, they were from the same office." After trial counsel's objection was sustained and the jury admonished that it could disregard the prosecutor's comment, the prosecutor was directed to proceed by way of question and answer. (32 RT 4268.) The prosecutor then continued:

MR. LANDSWICK: Mr. Tate, when your other lawyer told you not to tell anybody about what you had seen

the night that you went over to Mrs. LaChapelle's, had he made notes of what you said to him?

MS. BROWNE: Your Honor, we're getting into attorney-client confidential communication.

THE COURT: He is just asking if he made notes. That's all. He brought this up himself.

(32 RT 4268.)

Shortly thereafter, the prosecutor returned to the topic of appellant's privileged communications. Shifting from questions concerning appellant's interrogation by Medsker and Paniagua, the prosecutor asked:

MR. LANDSWICK: When did you tell Mr. Chaffee that you saw two men coming out of Mrs. LaChapelle's house?

MS. BROWNE: Objection, Your Honor; attorney-client confidentiality.

THE COURT: Sustained.

MS. BROWNE: Thank you.

MR. LANDSWICK: He brought it –

MS. BROWNE: Admonish.

THE COURT: That's going beyond. That's going beyond what he said Chaffee told him. It's also assuming a fact not in evidence.

(32 RT 4284.)

Determined to make the point that appellant's trial testimony was a fabrication, the prosecutor again returned to the theme of appellant's post-interrogation silence:

MR. LANDSWICK: Okay. And did you make any effort to call the police to tell them that Mrs. LaChapelle was murdered?

APPELLANT: No.

MR. LANDSWICK: Did you make any effort to call the police and tell them that you saw two men coming out of her home?

APPELLANT: No.

MR. LANDSWICK: As a matter of fact, you never told that to anyone until this jury heard it for the first time?

APPELLANT: Heard what? What part?

MR. LANDSWICK: The whole thing, sir.

MS. BROWNE: Your Honor, I object. There's attorney-client privilege that's involved here.

THE COURT: Sustained.

(32 RT 4300.)

c. The Doyle Misconduct Was Exploited During Closing Argument

To begin his guilt-phase rebuttal argument, the prosecutor accused defense counsel of fabricating a defense: "Ladies and gentlemen, the interesting thing about Ms. Browne's preparation for her argument over this weekend was that she created a phantom killer." (34 RT 4549.) He would return to this theme several times during his guilt-phase rebuttal argument, e.g., "[t]here was no phantom killer" (34 RT 4551); "[s]he wants you to start guessing about a phantom killer" (34 RT 4552); phantom-killer defense intended by defense to create sympathy and to negate premeditation (34 RT 4555); phantom-killer defense is "preposterous" (34 RT 4567); "There is no phantom killer. The defendant started it, and we're going to finish it" (34 RT 4575).[91]

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[91] Lest the jury forget the insinuation that defense counsel, together with appellant, had "cooked up" a false defense, the prosecutor revisited the fabrication claim in his penalty-phase closing argument:

(continued...)

d. The Prosecutor's Cross-Examination and Its Exploitation During Closing Argument Were Improper

Cross-examination of a defendant which seeks to impeach the defendant's testimony with post-arrest silence violates due process (U.S. Const., 14th Amendment), as does a closing argument which comments on such silence. (*Doyle v. Ohio*, *supra*, 426 U.S. 610, 619; *People v. Lindsey* (1988) 205 Cal.App.3d 112, 114-118; *People v. Galloway* (1979) 100 Cal.App.3d 551, 556-559.) The basis for the *Doyle* rule is that if a defendant has been advised of and exercises the right to remain silent, it would be unfair to permit the prosecutor to use that silence against him at trial. (*People v. Galloway*, *supra*, 100 Cal.App.3d at p. 557.)

While it may have been permissible for the prosecutor to contrast the statements that appellant gave to the police after he had been advised of his right to remain silent with appellant's trial testimony without committing *Doyle* error (see, e.g., *Anderson v. Charles* (1980) 447 U.S. 404, 408), it was manifestly improper for the prosecutor to inquire into the

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[91] (...continued)

> He was trying to set up Bush as a fall guy for this murder. That's how sophisticated he is. And it just makes your blood curdle to think if Fred Bush had not been in custody. But it destroyed the defendant's defense, *and then he had to concoct another one for you. And then they said, well, not only that, but there's a phantom killer. Because if you reject the fact that he wasn't there and you say that he was there, then like I said back in December, she tried to create a phantom killer* and that it was a frenzied killing and, therefore, not a first degree but only a second-degree, and my guy only participated as an aider and abetter.

(43 RT 5711, emphasis added.)

circumstances and content of privileged attorney-client communications and to insinuate through questioning and argument that appellant had colluded with defense counsel to fabricate a defense.[92]

> However, *Charles* does not mean that anytime a defendant makes a post-*Miranda* statement the prosecution has carte blanche to use the defendant's silence to impeach him. See, e.g., *United States v. Laury*, 985 F.2d 1293, 1303-04 (5th Cir.1993) ("That [the defendant] did not remain completely silent following his arrest did not give the prosecutor unbridled freedom to impeach [him] by commenting on what he did not say following his arrest."). Where prosecutorial comments are "designed to draw meaning from silence," [citation], they remain subject to the rule in *Doyle*. In other words, prosecutorial statements that are either intended to or have the necessary effect of raising a negative inference simply because of the defendant's exercise of his right to remain silent are prohibited.

(*Pitts v. Anderson* (5th Circ. 1997) 122 F.3d 275, 280.)

Clearly, the prosecutor's cross-examination and argument to the jury were designed to draw meaning from appellant's "silence" in not contacting the police before trial and informing them of what took place inside the victim's home. The meaning the prosecutor attempted to attribute to appellant's silence in relying on advice from defense counsel was multifaceted, i.e., that (1) appellant had made up his trial testimony, (2) appellant had communicated a false story to defense counsel, (3) defense counsel did not trust appellant's story sufficiently so as to communicate it to the police and the prosecution before trial, and (4) appellant and defense

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[92] Impeachment of appellant's trial testimony with prior inconsistent statements made during post-*Miranda* interrogation, and comment thereon, assumes that the post-*Miranda* statements were properly admitted in evidence. In an argument to follow, appellant will demonsrate that his post-*Miranda* statements were inadmissible. (See Argument VI, *post.*)

counsel colluded to fabricate a trial defense. (See *People v. Bain* (1971) 5 Cal.3d 839, 847; *People v. Lindsey*, *supra*, 205 Cal.App.3d at p. 117.)

The rationale of *Doyle* is applicable in cases where the evidence demonstrates that a defendant chooses not to discuss the facts of his case on the advice of counsel. (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520-1521.) As the Court of Appeal observed in *Eshelman*, "[t]he danger in focusing on defendant's post-*Miranda* silence is that the jury is likely to assign much more weight to defendant's previous silence than is warranted." (*Id.* at p. 1521.)

Right from the outset, the prosecutor planted the seed that appellant's trial testimony was contrived with the active assistance of defense counsel. His first questions to appellant probed into whether and to what extent his testimony was rehearsed with defense counsel. The implication was clear that defense counsel had coached appellant. This was improper.

> A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable." [Citation.]

(*People v. Hill*, *supra*, 17 Cal.4th at p. 832.)

This Court has observed that prosecutors must avoid "locutions" such as "coached testimony" in the absence of evidence. Here, there was no such evidence. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1081-1082; *People v. Hadley* (1948) 84 Cal.App.2d 687, 692 [expressing "no doubt" that the introduction, deliberate or not, of prosecutorial insinuation that defense counsel had the "habit of coaching witnesses" was improper].)

Additionally, the prosecutor committed misconduct in asking questions in front of the jury that he knew would trench upon appellant's attorney-client privilege. Allowing a witness to be examined knowing that the witness will exercise a privilege before the jury would only invite the jury to make an improper inference, and such a practice constitutes misconduct. (*People v. Johnson* (1974) 39 Cal.App.3d 749, 760 [Fifth Amendment privilege]; *People v. King* (1968) 266 Cal.App.2d 437, 464 [newsman's privilege]; *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1222-1223 [marital privilege]; *People v. Paasche* (Mich.App. 1994) 525 N.W.2d 914, 919-920 [attorney-client privilege].) Under the circumstances presented here, it was highly likely that the jury would draw the improper inference that there was collusion between defense counsel and appellant in the presentation of his testimony. Defense counsel was placed in a no-win situation as a result of the prosecutor's practice. To sit on their hands and remain silent would allow the prosecutor to inquire with impunity into confidential matters, whereas to object as they did would lend credence to the prosecutor's insinuation that both appellant and defense counsel were hiding important facts from the jury.

Even more troublesome was the prosecutor's exploitation of his misconduct during his closing argument. There is no other way to interpret the prosecutor's refrain that defense counsel herself "created a phantom killer" than as a frontal attack on the integrity and ethics of defense counsel. This tactic and argument was gross misconduct. It is hardly a novel proposition that such ad hominem attacks on defense counsel constitute serious misconduct. (See, e.g., *People v. McCracken* (1952) 39 Cal.2d 336, 348 [condemning prosecutor's comment that "this is a planned defense and it didn't grow out of the mind of this Defendant"]; *United States. v.*

Rodrigues (9th Cir. 1998) 159 F.3d 439, 451, amended 170 F.3d 881 (9th Cir. 1999) [prosecutor's statement that defense counsel had "from the start been trying to deceive the jury and had told the jury what was 'flat out untrue'" was improper].) Where the prosecution's case depended entirely on circumstantial evidence, and appellant's credibility was crucial to his guilt-phase defense as well as his prospects of avoiding a death sentence, the prosecutor's misconduct in accusing defense counsel of creating a false defense together with appellant carried a very high likelihood of prejudice.

4. Appellant's Trial Was Permeated With Gratuitous Prosecutorial Misconduct

In addition to the thematic prosecutorial misconduct which has been set forth above and which would repeat itself more forcefully in the penalty phase, as will be shown *post*, appellant's trial was infected by prosecutorial misconduct of a more general and gratuitous character. When viewed in isolation, each such instance of the prosecutor's improper practice might not warrant reversal. However, when viewed as a whole and especially in conjunction with the prosecutor's largely successful campaign of character assassination, the conclusion is inescapable that the prosecutor's behavior at appellant's trial was "so egregious that it infect[ed] the trial with unfairness" thereby violating federal constitutional due process principles. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *People v. Hill*, *supra*, 17 Cal.4th at p. 818; *People v. Morales*, *supra*, 25 Cal.4th at p. 43.)

a. Disparaging Facial Gestures

During both the direct and cross-examination of appellant, the prosecutor engaged in unprofessional and juvenile behavior by making demeaning facial and verbal gestures. The prosecutor smiled, smirked, and

laughed, all in an attempt to communicate to the jury that he believed that appellant's testimony was either false or ridiculous. (See 32 RT 4236, 4253-4254, 4291-4292; 5 CT 1203.18-1202.19.) In the first instance, defense counsel attempted to object by requesting a sidebar, but the trial court refused to interrupt the proceedings to hear defense counsel's objection. (32 RT 4236.) At the first available recess during appellant's testimony, the trial court heard from counsel (32 RT 4253-4254; 5 CT 1203.18), and then admonished the jury as follows:

> THE COURT: I want to admonish you that you're not to take into consideration any facial expressions of Mr. Landswick as the defendant is testifying in this case. You're going to have to draw your own conclusions as to the veracity of the defendant's testimony and not rely on Mr. Landswick's reaction to this testimony. So if Mr. Landswick smiles or whatever he does, grimaces, I want you to disregard any looks on his face and just rely on your own common sense with respect to evaluating the testimony of this defendant and whatever jury instructions I give in that regard.

(32 RT 4254.)

As can be inferred from the trial court's admonition, it expected the prosecutor to express himself inappropriately again, and the prosecutor did not disappoint. During his cross-examination of appellant, his conduct drew another objection from defense counsel:

> MS. BROWNE: Objection to his attitude, Your Honor.
>
> THE COURT: Well, I can't –
>
> MR. LANDSWICK: My attitude is my attitude.
>
> THE COURT: I will just caution the jury that if Mr. Landswick laughs when he is asking questions to disregard it.

(32 RT 4291-4292.) Again, the prosecutor was repeating the same behavior

that caused the court to admonish the jury during appellant's direct examination. (5 CT 1203.18-1203.19.)

"A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, citing *People v. Harris* (1989) 47 Cal.3d 1047, 1084; U.S. Const., 14th Amend.) Conduct virtually identical to that engaged in by the prosecutor here has been aptly condemned as improper. (*United States v. Collins* (6th Cir. 1996) 78 F.3d 1021, 1039; see also *United States v. Peters* (8th Cir. 1995) 59 F.3d 732, 733-734 [single unintentional incident where prosecutor made facial gestures and sarcastic comments during cross-examination of defendant not reversible misconduct because trial court's stern rebuke was effective in preventing recurrence of misconduct]; *State v. Armstrong* (Mont. 1980) 616 P.2d 341, 353 [prosecutor's use of blackboard to fashion defendant's answers on cross-examination into the words "lie" and "lies" constituted the "sort of conduct [which] stretche[d] [the Montana Supreme Court's] lenience to the fullest extent"].)

b. Self-aggrandizing Conduct

When both sides rested after presentation of evidence at the guilt phase, the trial court addressed the matter of the scheduling of closing arguments in open court in the presence of the jury. The court proposed a schedule which had the potential of interfering with the prosecutor's scheduled Christmas vacation in Paris.[93] (32 RT 4325-4329.) The

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[93] Earlier that day, and in a hearing outside the presence of the jury, the court entertained defense counsel's request for a short continuance in (continued...)

prosecutor began to interpose his views about the scheduling change, and started to refer to his vacation. Defense counsel objected to having the matter addressed in front of the jury. (32 RT 4326.) The prosecutor then made a seemingly noble gesture: "I'll tell you what I'm going to do. I'm going to cancel my flight." (32 RT 4327.) The trial court told the prosecutor that it was not necessary to do so, and scheduled arguments to begin on a Thursday afternoon.[94]

Self-aggrandizing remarks such as those employed by the prosecutor here are highly improper. (See, e.g., *United States v. Castillo* (5th Cir. 1996) 77 F.3d 1480, 1497-1498 [eliciting testimony in narcotics conspiracy case that prosecutor was to receive "Prosecutor of the Year" award from Texas Narcotics Officer's Association was "obviously improper"]; *Rodriguez v. State* (Ind. 2003) 795 N.E.2d 1054, 1060 (conc. opn. of Brook, J.) [recognizing "that a prosecutor must be passionate to be an effective advocate, but this passion cannot take the form of grandstanding or injecting personal opinion into a case"]; *State v. Sinvil* (Conn. 2004) 853 A.2d 105, 110 [remarks by prosecutor during closing argument seeking sympathy for feeling fatigued during trial were "conceded" to be improper].) The clear message that the prosecutor was sending to the jurors was that he was so committed to the justice of his cause, and such a noble and selfless person, that he was prepared to sacrifice a Christmas vacation

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[93] (...continued)
order to better prepare her closing argument. There, defense counsel reminded the trial court that it had decided that if the case were not submitted to the jury by December 23rd, proceedings would have to be continued to allow for the prosecutor's Christmas vacation in Paris. (32 RT 4213.)

[94] There was no Friday session before the jury.

to Europe. Moreover, the trial court's response, made in the presence of the jurors, that it was not necessary for the prosecutor to cancel his vacation plans, sent a subtle message to the jurors that lengthy deliberations would adversely impact the "selfless" prosecutor's vacation plans during the Christmas holidays.

5. The Guilt-Phase Misconduct Was Prejudicial and Requires Reversal

This Court has held that the test of prejudice in evaluating generic prosecutorial misconduct is the traditional harmless-error rule which places the burden on the party aggrieved by the prosecutor's missteps to show that they resulted in a miscarriage of justice. (*People v. Green* (1980) 27 Cal.3d 1, 34-35.) However, when the misconduct impacts upon a defendant's federal constitutional rights, "the burden shifts to the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Bolton*, *supra*, 23 Cal.3d at p. 214.) A defendant's Sixth and Fourteenth Amendment right to confrontation is violated when a prosecutor commits misconduct by serving as an unsworn witness in referring to facts not in evidence. (*Id.* at pp. 214-215.) Similarly, a defendant's Fifth and Fourteenth Amendment right to a fair trial is subverted when the prosecutor's misconduct consists of commenting on a defendant's privileged refusal to testify. (*Griffin v. California*, *supra*, 380 U.S. 609.) Significantly, the Due Process Clause of the Fourteenth Amendment may also be violated where a prosecutor's pervasive misconduct results in an unfair trial. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) In each such instance, application of the stricter federal standard of prejudice is required. This case, however, obviates the need for this Court to parse which of the state or federal standards should apply, to which error

and to what end. Whether viewed singly or in combination, reversal is required in this case under any standard of prejudice.

A suitable place to begin assessing prejudice is to consider the lengthy jury deliberations during the guilt phase. Appellant's credibility was the primary contested issue in this case, given the straightforward nature of the evidence. The prosecution's theory of a brutal felony murder, in which the victim was robbed and killed as she interrupted a burglary in progress, stood in stark contrast to appellant's testimony in which he admitted coming upon the victim's dead body and taking advantage of the situation by absconding with her car and belongings. Yet, despite the simplicity of this issue, the jury deliberated for eight hours over three court days. Courts have long recognized that this type of long deliberation indicates a close case. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour jury deliberation shows close case]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [12 hours is a "graphic demonstration of the closeness of [the] case"]; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 [nine hours of deliberation over three days indicated jurors did not believe case to be "clear cut"]; *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855 ["Even accepting the prosecution's version, however, it does not seem possible that the jury would have deliberated nine hours over several days if the jurors did not have serious questions as to the credibility of the eyewitnesses"].)

Over the course of three days of deliberation, the jurors communicated with the trial court frequently. They made eight separate written requests to the trial court, calling for additional instruction, readback of appellant's testimony, the playing of a tape-recording of appellant's interrogation after his arrest, and taking the opportunity to examine several

exhibits. (3 CT 680, 690-694, 698-705.) "[J]uror questions and requests to have testimony re-read are indications the deliberations were close." (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.)

Given how close the guilt-phase determinations were, the misconduct in this case requires reversal under either the federal or state standards of prejudice. At the guilt phase, the prosecutor referred to facts that were not in evidence, including evidence that appellant was viewed as a very violent person by his own family, and a person who had repeatedly kicked down the door to his aunt's house and stole from his grandparents. He commented on appellant's exercise of constitutional and statutory privileges to infer a consciousness of guilt and to suggest that appellant colluded with defense counsel to fabricate a false defense. On occasion, the prosecutor made facial gestures during appellant's testimony to communicate to the jury his disbelief in that testimony. When the time was opportune, the prosecutor engaged in transparently self-aggrandizing behavior to ingratiate himself in the jury's eyes. Whenever possible, the prosecutor wielded foul blows directed at the critical issues in the case: appellant's character and credibility.

Appellant recognizes that the trial court, on numerous occasions, attempted in its own quaint way to ameliorate the harm caused by the prosecutor's misconduct. Unfortunately, the language employed by the trial court was simply inadequate to constitute an effective antitoxin to the venom injected into appellant's trial by the prosecutor.

It has been generally recognized that even a full and forceful admonition may, in some circumstances, be inadequate "to overcome the substantial danger of undue prejudice. . . ." (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.) The cases are legion in holding admonitions to be

insufficient: e.g., *Bruton v. United States* (1968) 391 U.S. 123, 135-136; *People v. Wagner, supra*, 13 Cal.3d 612; *People v. Matteson* (1964) 61 Cal.2d 466, 469-470; *People v. Hardy* (1948) 33 Cal.2d 52, 61-62; *United States v. Figueroa* (2nd Cir. 1980) 618 F.2d 934, 943; *United States v. Schiff* (2nd Cir. 1979) 612 F.2d 73, 82; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129 [other crimes evidence]; *People v. Johnson* (1964) 229 Cal.App.2d 162, 170 [opinion of police officer that defendant was guilty]; *People v. Roof* (1963) 216 Cal.App.2d 222, 225 [prior charge]; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 ["ex-convict"]; *People v. Figuieredo* (1955) 130 Cal.App.2d 498, 505-06 [defendant "did time"].)

Here, the trial court employed the most permissive and lax language in addressing the prosecutor's misconduct, so that the jury must have understood that it could choose to ignore or accept the innuendos by the prosecutor. The trial court would typically "ask" the jury to disregard a question or answer, or tell the jury it "can" or "may" disregard the improper comments by the prosecutor. Surely, the situation called for "you will" and "you must" disregard those remarks. The trial court was obliged to throw its figurative weight behind its admonitions in order to give them the necessary substance as counterweights to the prosecutor's excesses. It was not enough to say "I'll ask the jury" to disregard any improper remark; the court was duty-bound to *order* the jury to erase the stain from its collective mind. It should be no surprise that defense counsel did not often repeat their request for stronger language, as the trial court had already indicated in front of the jury that it would not "assign" prosecutorial misconduct when requested to do so upon the first instance of the prosecutor's misconduct during his opening statement when he commented upon

appellant's exercise of his Fourth Amendment rights.[95]

Moreover, as this Court is surely aware, there are circumstances of misconduct so egregious that no admonition will undo the harm: "It is, of course, well recognized that facts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof, supra*, 216 Cal.App.2d at p. 225; see also *People v. Ozuna, supra*, 213 Cal.App.2d at p. 342 ["The human mind is not so constructed as to permit a registered fact to be unregistered at will"].) This case was saturated with such indelible misconduct. (See, e.g., *Werts v. Vaughn* (3rd Cir. 2000) 228 F.3d 178, 211 (disn. opn. of McKee, J.) ["[I]t is hard to imagine how the smell could be ignored once the prosecutor deftly tossed that skunk into the jury box"]; *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886 ["After the thrust of the saber it is difficult to forget the wound"].) By the time the jury instructions were read to the jury, the trial court had permitted so much prosecutorial misconduct that the bell could not be unrung. (*People v. Hill, supra*, 17 Cal.4th at pp. 845-856 ["Given, however, the onslaught of the misconduct that occurred in this case, it became increasingly difficult for the jury to remain impartial. 'It has been

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[95] Later, at the penalty phase, the trial court sarcastically derided defense counsel for urging the court to be more forceful in admonishing the jury in the wake of the prosecutor's outrageous behavior in tainting the jury with the excluded allegations that appellant had slashed the throat of Patrick Shields, as discussed *post*. (37 RT 5072-5073.) Similarly, when the trial court admonished the prosecutor for expressing his personal opinion that appellant's mother was not to blame for her son's misdeeds, as discussed *post*, it chose the opportunity to again sarcastically chide defense counsel about whether they were satisfied that the admonition was forceful enough. (37 RT 5078.)

truly said: "You can't unring a bell."'" [citation].) As in *Hill*, during appellant's trial "the jury heard not just a bell, but a constant clang of erroneous law and fact." (*Ibid.*)

Even under the best circumstances, limiting instructions do not have "any realistic effect" upon the jury's consideration of highly prejudicial evidence. As the high court has recognized, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Bruton v. United States*, *supra*, 391 U.S. at p. 135.) California courts have also acknowledged this unescapable aspect of human nature:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. Of what value are the declarations of legal principles . . . if we permit the violation of such principles in their practical application? We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(*People v. Gibson*, *supra*, 56 Cal.App.3d at p. 130; see also *Krulewitch v. United States* (1949) 336 U.S. 440, 453 (conc. opn. of Jackson, J.) [value of limiting instructions described as a "naive assumption" and "unmitigated fiction"].) In sum, the prosecutor's misconduct was so serious and pervasive, and the trial court's efforts to counteract it so ineffective, that reversal of the guilt judgments is required under any standard of review.

D. Misconduct in the Penalty Phase

1. Introduction

As egregious as the prosecutor's misconduct was in the guilt phase,

he outdid himself in the penalty phase. Beginning with his attempt to introduce inadmissible evidence that appellant had committed a sophisticated burglary, the prosecutor continued on the campaign of character assassination he had begun in the guilt phase. Ultimately, and in flagrant violation of the trial court's in limine rulings excluding evidence of appellant's alleged violent conduct against members of his family, the prosecutor repeatedly exposed the jury to highly inflammatory and inadmissible evidence.

2. The Prosecutor Committed Egregious Misconduct by Engaging in Character Assassination of Appellant Throughout the Penalty Phase

During the testimony of Mamie Jackson at the guilt phase, the prosecutor had succeeded in improperly exposing the jury to evidence that appellant was regarded and feared as a very violent person, a person who had forced his way into his aunt's home on multiple occasions, and from whose presence his family had fled on the day the victim was killed. Not content to heed the trial court's advice to "keep it in the ballpark," the prosecutor successfully exposed the jury to even more outrageous instances of this kind at the penalty phase, as well as inadmissible evidence that appellant was a sophisticated burglar as a juvenile. The prosecutor was able to accomplish these underhanded feats by asking appellant's mother whether she was present in juvenile court for matters involving appellant which were not otherwise admissible at trial, or by asking her if she had "knowledge" of the alleged and inadmissible misdeeds of her son.

a. Suggesting That Appellant Committed a Burglary As a Juvenile in Which He Used Gloves

Appellant's mother, Rosia (Rose) Carter, was called as a defense

witness in the penalty phase of the trial. Her testimony in support of the case for mitigation primarily detailed the conditions of appellant's upbringing, including his lack of education and a number of tragic and traumatic events that shaped his life. However, during cross-examination, the prosecutor consistently asked Rose irrelevant and inflammatory questions concerning appellant's alleged criminal behavior as a juvenile. Such evidence was either categorically inadmissible or had been excluded during in limine proceedings as presumptively inadmissible under the authority of *People v. Phillips* (1985) 41 Cal.3d 29 unless the prosecutor could provide further foundation and the matter was ruled upon by the trial court prior to being submitted to the jury. (1 RT 205-219.)

The first such instance of misconduct occurred when the prosecutor was cross-examining Rose on the incident in which appellant's childhood friend, Willie Reed, had died in a fire in a playhouse behind her home. The prosecutor asked if it was true that appellant had been in jail for committing a burglary at the time of Reed's death. When Rose replied that she was not sure, but seemed to recall that appellant was in custody for a probation violation, the prosecutor struck:

> MR. LANDSWICK: Incidentally, in February of 1984 did you ever receive or go to pick up the gloves that [appellant] used in a burglary from my office?"
>
> MS. BROWNE: Objection, Your Honor; irrelevant.
>
> THE COURT: Sustained.

(37 RT 5048.)

It is obvious that the prosecutor's question carried with it two insinuations, both of which were improper. The first is that there was admissible evidence that appellant was involved in a burglary at all; and

second, that there was admissible evidence that appellant possessed gloves or used them in a burglary. It is clear that the question was designed to elicit irrelevant evidence prejudicial to appellant. Here, in addition to the blatant attempt to portray appellant as a sophisticated burglar as early as his teenage years, the prosecutor's improper question attempted to deflect the nascent lingering doubt raised by the defense in introducing evidence at the guilt phase that appellant's fingerprints were not found at the scene of the homicide, whereas unidentified fingerprints were discovered at that location by evidence technicians.

b. Suggesting That Appellant Hit a Store Owner Three Times on the Head with a Rock

Continuing with his penalty-phase cross-examination of appellant's mother, the prosecutor asked her if she attended court in a case involving appellant:

> MR. LANDSWICK: Did you – Did you attend court in July and August of 1983 for [appellant] when he hit a store owner with a rock three times in the head?

(37 RT 5061.)

This question drew defense counsel's objection that the case had been resolved in appellant's favor, by acquittal. (37 RT 5061-5062.) Rather than rebuke the prosecutor for the irrelevant and highly prejudicial question, the trial court instead admonished defense counsel for making "a speech." (37 RT 5062.) Asking that the question be read back before ruling on the objection, the court made these comments after hearing readback:

> THE COURT: Change that to accused of hitting a store owner in the head three times with a rock.
>
> MR. LANDSWICK: Okay.

THE COURT: The issue is did you go to court?

MRS. CARTER: I don't know.

MR. PINKNEY: Is it clear that we're objecting to the question, Your Honor?

THE COURT: Yes. And I changed the question to "accused," not convicted or that he did it. And the question was did she go to court. That was the question.

MR. PINKNEY: Okay. We continue to object to permitting that question and ask that the jury be admonished with respect to the content of that question.

THE COURT: All right. I changed it. The objection is overruled.

(37 RT 5061-5062.)

It is difficult to see how evidence of Rose's attendance at juvenile court was relevant to any issue raised by the defense when it called her as a witness in the penalty phase. After all, the defense sought to portray Rose as a parent who considered her son incorrigible and who wanted her son confined within the juvenile justice system. Even if her attendance at juvenile court was marginally relevant, the reference in the prosecutor's question to appellant's violent conduct was wholly gratuitous and highly inflammatory in a case in which appellant was on trial for his life for having bludgeoned the victim to death.

c. Suggesting That Appellant Physically Assaulted Family Members, Slashed the Throat of His Cousins' Father, and Stole and Wrecked His Grandparents' Truck in a Fit of Anger

As the climax to his cross-examination of appellant's mother, the prosecutor asked Rose whether she witnessed or was aware of a series of violent acts committed by appellant. Even before the guilt phase, the trial

court had ruled that the prosecutor could not introduce evidence of certain of these acts, and had reserved ruling on the admissibility of the alleged throat-slashing incident until the prosecutor provided an adequate foundation. (1 RT 205-221.) In utter disregard of the letter and spirit of the trial court's ruling, the prosecutor figuratively went through the backdoor and right at appellant's jugular with his cross-examination. First, he asked if appellant's mother witnessed an incident in which appellant struck his cousin Carla Spencer.[96] (37 RT 5071.) Then he asked if Rose knew if appellant struck his aunt Mamie in October of 1985 (37 RT 5071), his aunt Brenda in November of 1985 (37 RT 5071), his cousin Carla Spencer in January of 1986 (37 RT 5072), and Trina Berry in September of 1987.[97] (37 RT 5072.) In each case but one, Rose replied that she had no knowledge of the incidents the prosecutor was referring to.[98]

In a matter completely unrelated to permissible aggravation evidence or, for that matter, to any topic broached on direct examination, the prosecutor asked Rose if she aware that appellant stole her grandparents'

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[96] The trial court sustained defense counsel's objection that the question assumed facts not in evidence. This did not deter the prosecutor from asking the same question in a slightly different form. (37 RT 5071.)

[97] At the in limine hearing, the trial court had ruled that the prosecutor could not present evidence of appellant's alleged assaults on Carla Spencer, Brenda Jackson, and Mamie Spencer. (1 RT 206-207, 211, 216.)

[98] In the case of appellant's aunt Brenda, Rose replied: "Well, that could be a yes or no answer." (37 RT 5072.) Although permitted by the trial court's in limine ruling to present evidence in aggravation concerning an alleged assault on Trina Berry, the prosecutor never produced such evidence other than the insinuation implicit in his question to Rose. (1 RT 207, 209, 213.)

truck and wrecked it because he was mad at her grandmother.[99] Rose replied that appellant merely took the vehicle when his grandmother was out of town and the opportunity presented itself, not out of anger. (37 RT 5072.)

As the denouement to his cross-examination, the prosecutor asked:

MR. LANDSWICK: Do you know Patrick Shields?

MRS. CARTER: Yes, I do.

MR. LANDSWICK: And who is Patrick Shields?

MRS. CARTER: He's the father of five of my nieces and nephews.

MR. LANDSWICK: Do you know if your son –

MS. BROWNE: Your Honor –

MR. LANDSWICK: – cut Patrick Shields' throat?

MS. BROWNE: I object to this, Your Honor. There is no evidence to that. It assumes a fact not in evidence, and there is no evidence that it's going to be presented.

THE COURT: Sustained.

MS. BROWNE: It's extremely –

THE COURT: Sustained. Sustained. Sustained. Sustained. Sustained. Sustained. Sustained.

MS. BROWNE: Could we have an admonishment?

THE COURT: The jury may be admonished to disregard that.

MS. BROWNE: With a little more force, Your Honor?

THE COURT: Ms. Browne, this is not Hollywood.

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[99] Apparently, the prosecutor misspoke as he was referring to appellant's grandparents, not Rose's grandparents.

MS. BROWNE: Well, the district attorney seems to be creating a drama.

THE COURT: You made your objection, I ruled on it, and I told the jury to disregard it. You want me to stand on my feet and stomp and hold my breath?

MS. BROWNE: That's what the district attorney is doing. I would like an admonishment at least equal to his.

THE COURT: I did it legally. I'm not going to engage in histrionics up here.

MS. BROWNE: Okay.

(37 RT 5072-5073.)

It would be difficult to overstate the devastating effect the prosecutor's flagrant misconduct must have had on the jurors' decision on whether appellant should live or die. Surely, the prosecutor's direct violation of the court's in limine rulings regarding the admissibility of the throat-slashing incident, as well as the instances of violence directed at other family members, is eloquent proof that the prosecutor was confident that such evidence was virtually certain to place the proverbial thumb on death's side of the scale. It also demonstrated that the prosecutor did not believe he had enough *admissible* evidence with which to convince the jury to return a death verdict.

Although the trial court sustained some of defense counsel's objections to the prosecutor's improper questions, the prosecutor succeeded in placing before the jury inflammatory evidence of such a character that no jury could be trusted to have ignored it, especially in light of the trial court's impotent attempts at admonishing the jury and reining in the prosecutor's excesses.

First, it bears repeating that the questions put to appellant's mother

by the prosecutor called for irrelevant matter. This Court has held, in circumstances remarkably similar to those presented in this case, that a defendant does not "open the door" by presenting any mitigating evidence relating to a defendant's background or character, and thereby provide the prosecutor with a broad license to present other evidence of the defendant's background to give the jury "a more balanced picture of his personality." (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1192.)

> In the present case . . . much of the evidence introduced by the prosecution on cross-examination of defendant's mother was not responsive to the evidence presented by the defense. As we have seen, on direct examination defendant's mother did not testify generally to defendant's good character or to his general reputation for lawful behavior, but instead testified only to a number of adverse circumstances that defendant experienced in his early childhood – e.g., an alcoholic father who did not provide adequately for his family and who beat his mother, a number of serious illnesses leading to some disability, his parent' divorce and the early death of his father. Although the prosecution was very properly permitted to bring out, on cross-examination, a number of facts that helped place the mother's direct examination testimony in proper perspective . . . the trial court also permitted the prosecution to go beyond these aspects of defendant's background and to introduce evidence of a course of misconduct that defendant engaged in throughout his teenage years that did not relate to the mitigating evidence presented on direct examination. . . . Because the defense had presented no evidence to suggest that defendant had not engaged in any such misconduct in his childhood, this evidence was not proper rebuttal evidence and went beyond the scope of permissible cross-examination. Accordingly, we conclude that the trial court erred in permitting the prosecution to question defendant's mother with regard to such incidents.

(Id. at p. 1193.)

While the defense had raised the issue that the tragic death of

appellant's boyhood friend, Willie Reed, was an influence on appellant's later behavior, it was impermissible for the prosecutor to have asked appellant's mother if appellant was in local custody for a burglary at the time, and then to insinuate that appellant had used gloves to commit the burglary. The scope of aggravating evidence admissible at the penalty phase of a capital trial is strictly limited by statute. Thus, section 190.3, subdivision (b), limits the type of evidence the prosecutor can introduce: "[N]o evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (*Ibid.*; see also *People v. Boyd* (1985) 38 Cal.3d 762, 772.) Second, although the trial court sustained the defense objection to the prosecutor's question concerning the burglary and the gloves, the prosecutor again succeeded in drawing the jury's attention to a point it would later emphasize in closing argument: appellant was a sophisticated burglar who used gloves to avoid leaving fingerprints. (43 RT 5708.)

Undoubtedly, the most egregious instances of misconduct took place at the conclusion of the prosecutor's cross-examination of appellant's mother. There, under the guise of asking her whether she had attended a court session in a case involving appellant, the prosecutor insinuated that appellant had "hit a store owner with a rock three times in the head." The trial court's ruling that the prosecutor could properly ask a question of this type was flatly wrong. It was wholly irrelevant whether appellant's mother attended such a court session. Although such an assaultive incident might, under different circumstances, have been admissible under section 190.3, subdivision (b), it was never included in the prosecutor's notice of aggravation evidence and was not any part of the prosecutor's case in

aggravation.[100] (2 CT 258-260; 1 RT 205-219.) Surely, the prosecutor was not permitted to introduce otherwise inadmissible evidence of criminal conduct under the ruse of cross-examination where the issue itself had not been raised on direct examination by the defense. (*People v. Ramirez*, *supra*, 50 Cal.3d at pp. 1192-1193; *People v. Wagner*, *supra*, 13 Cal.3d at p. 619; *People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. St. Andrew* (1980) 101 Cal.App.3d 450, 461.) The trial court was insufficiently heedful of this Court's admonition that "[e]vidence that a defendant suffered abuse in childhood generally does not open the door to evidence of defendant's prior crimes or other misconduct." (*In re Lucas* (2004) 33 Cal.4th 682, 733.)

Even more odious was the prosecutor's successful attempt to expose the jury to the "fact" that appellant had cut the throat of Patrick Shields.[101] Here, the prosecutor blatantly violated the trial court's in limine ruling that evidence of appellant's alleged involvement in this incident could not be admitted unless the prosecutor laid a proper foundation under *People v. Phillips*, *supra*, 41 Cal.3d 29. Again, whether appellant's mother "knew" that her son had cut Patrick Shields's throat was completely irrelevant to any matter at issue in the penalty phase of the trial. Yet, the fact that the

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[100] Defense counsel represented to the trial court that appellant had been acquitted of the accusation, a fact which would have barred admissibility. (See § 190.3, subd. (b).)

[101] The prosecutor began this line of questioning by referring to a number of incidents the trial court had ruled inadmissible in in limine rulings; i.e., by asking appellant's mother if she had witnessed or had knowledge of appellant's assaults on various family members, and then asking if she was aware that appellant had stolen his grandparents' truck and wrecked it in a fit of anger.

jury became aware of the incident as a result of the prosecutor's treacherous question cannot be disputed. Nor is it likely that the stench of figuratively dropping this skunk in the jury box was dispelled by the trial court's admonition. The ugly insinuation of the prosecutor's question was not likely to have been ignored by the jurors in a case where appellant was on trial for a murder involving the use of knives. (See, e.g., *McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, 1380-1386; *People v. Hill*, *supra*, 17 Cal.4th at pp. 845-856 ["Given, however, the onslaught of the misconduct that occurred in this case, it became increasingly difficult for the jury to remain impartial. 'It has been truly said: "You can't unring a bell."'" [citation].)

> It is, of course, well recognized that facts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court.

(*People v. Roof*, *supra*, 216 Cal.App.2d at p. 225; see also *People v. Ozuna*, *supra*, 213 Cal.App.2d at p. 342 ["The human mind is not so constructed as to permit a registered fact to be unregistered at will."]

In sum, the prosecutor's concerted campaign of character assassination constituted misconduct which contributed greatly to undermine appellant's ability to receive a fair trial. (*People v. Hill*, *supra*, 17 Cal.4th at p. 838; *People v. Criscione* (1981) 125 Cal.App.3d 275, 292 [improper cross-examination "inflammatory in its open appeal to the jury's sense of fear and anger"].) Of course, it is also misconduct for a prosecutor to misstate the evidence. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at pp. 823-826; *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 700, 709 [prosecutor's misstatement of evidence violated defendant's federal constitutional right to due process].)

3. Referring to Facts Not in Evidence and Expressing Personal Opinion

On several occasions during the trial, the prosecutor referred to facts not in evidence or stated his personal opinion. Each such incident constituted misconduct.

During cross-examination of appellant's mother, the prosecutor attempted to rebut the defense theory that appellant was an unwanted child who was deprived of appropriate maternal affection and supervision. He asked Mrs. Carter whether she blamed herself for appellant's predicament, and the following exchange ensued:

> MRS. CARTER: I don't feel like I'm responsible. I question myself as to what I could have done to change it or make it better.
>
> MR. LANDSWICK: That's a fair and honest question, what could I have done. And – But I don't believe you're to blame.
>
> THE COURT: Well, that is your opinion. The jury may be admonished to disregard that.

(37 RT 5078.)

During his guilt-phase closing summation, the prosecutor argued that appellant's explanation for how the victim's bloodstains got on his clothing, i.e., that blood spatter resulted when appellant's gun fell from his pants onto the floor near the victim's body, was incredible. In so arguing, the prosecutor asked the jury to consider the size of a Smith & Wesson revolver and demonstrated this by using his hands. (34 RT 4484.) Defense counsel's objection that no evidence was presented to permit such argument was sustained, and the trial court again delivered its customary, but flawed, admonishment: "The jury can disregard it." (34 RT 4484.)

The prosecutor engaged in similar tactics in his penalty-phase

closing argument. Clearly appealing to the passions of the jury with a sympathetic portrayal of the victim, the prosecutor began by referring to her as "a wholesome, sweet grandmother, whose life was committed to helping make poor and disadvantaged people's lives [better]." Defense counsel objected that there has been no evidence of this. However, before the court could rule, the prosecutor compounded the error by also arguing that the victim was a "social welfare worker." The trial court sustained the objection, commenting: "There was no evidence to that. The jury can disregard that." (43 RT 5692.)

As appellant has pointed out earlier while discussing the prosecutor's misconduct in engaging in the campaign of character assassination directed against appellant, it is misconduct for a prosecutor to suggest the existence of facts known to him that are not in evidence. (See, e.g., *People v. Bell*, *supra*, 49 Cal.3d at p. 539; *People v. Bolton*, *supra*, 23 Cal.3d at p. 212; *People v. Kirkes* (1952) 39 Cal.2d 719, 724; see also *People v. Galloway*, *supra*, 100 Cal.App.3d at p. 564.) The vice in such practice is that it tends to make the prosecutor his own witness, but under highly favorable conditions, where he can give unsworn testimony and avoid cross-examination. Thus, this kind of misconduct violates a defendant's federal constitutional right to confrontation, due process of law, and a fair jury trial. (U.S. Const., 6th & 14th Amends.; see *People v. Harris*, *supra*, 47 Cal.3d at pp. 1083-1084; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) This Court has recognized the perils of such "testimony." Although legally worthless, the prosecutor's representations carry undue weight with a jury because of the prestige of the prosecutor's office. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 213; accord *Douglas v. Alabama*, *supra*, 380 U.S. at pp. 419-420 [prosecutor's reference to extrajudicial

evidence violated defendant's Sixth Amendment right to confrontation]; *People v. Bell*, *supra*, 49 Cal.3d at pp. 533-534 [same].) Similarly, a prosecutor may not properly inject his personal opinion into the mix, whether in argument or during examination of a witness. (See, e.g, *People v. Avena* (1996) 13 Cal.4th 394, 420 [prosecutor's expression during closing argument of personal belief in truth of witness's testimony was improper]; *People v. Criscione*, *supra*, 125 Cal.App.3d at p. 286 [prosecutor's expression of personal opinion during cross-examination of witness was "patent" error].)

Clearly, the prosecutor assumed the role of "witness-advocate" when he referred to matters for which no evidence was or could have been introduced at trial when he argued that the victim was essentiality a saintly public servant, toiling in order to uplift the downtrodden. Similarly, he provided his own testimony in support of his argument that appellant's trial testimony was not credible. Finally, his editorial remarks expressing his own belief that appellant's mother was not to blame for appellant's predicament was no different than expressing his personal belief in appellant's guilt. However, the danger in expressing these beliefs at the penalty phase of the trial was much greater than if a similar comment had been made at the guilt phase, as the decision the jurors faced at the penalty phase was an individual, normative one rather than simple fact-finding. (*People v. Harris* (2005) 37 Cal.4th 310, 375; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 262.) The prosecutor's personal feeling that Rose was not to blame for appellant's plight not only struck at the heart of the defense mitigation case, it strongly implied that appellant alone was to blame for what he had done without regard to his upbringing, and that death was the only appropriate penalty given appellant's blameworthiness. Any

individual juror convinced of the "correctness" of the prosecutor's views on this subject may well have been swayed to vote for death.

E. Given the Pervasiveness of the Misconduct, and the Obvious Closeness of This Case As Reflected in the Extensive Nature of Both Guilt and Penalty-Phase Deliberations, Reversal is Required

The penalty-phase deliberations show clearly that this case was in equipoise. The defense offered mitigating evidence of appellant's sordid and harrowing upbringing, depicting a childhood and teenage years characterized by physical and mental abuse, tragic death, and inadequate adult supervision, emotional support, and educational opportunity. In contrast, the state's penalty-phase case in aggravation consisted largely of a single aggravated incident in which appellant, 18 years of age at the time, was involved in a traffic collision and recklessly pursued the other parties to the accident while brandishing and firing a gun.[102]

As might be expected from this record, the jury deliberations reflect an extremely close case as to penalty. The jury was told it could consider lingering doubt in deciding whether appellant should die. (44 RT 5827.) As in the guilt phase, the jury made multiple requests to examine evidentiary exhibits, including the defense chart and photographs depicting appellant's "lifeline," the notes and tape-recording of appellant's

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[102] The prosecution also presented evidence of two other incident involving the use or threatened use of force, but these incidents were relatively innocuous when contrasted to the circumstances of the crime itself and to the principal assault-with-a-deadly-weapon incident. (Appellant refers here only to the penalty-phase aggravation evidence that was properly admitted at trial. Of course, the prosecutor's misconduct resulted in the jury's exposure to a number of other, highly prejudicial, aggravating incidents which were not admissible, but of a nature and character approaching the brutality of the victim's murder.)

interrogation, and the photographs and diagram of the exterior of the victim's house.[103] Additionally, the jury requested and received clarification as to the meaning of CALJIC No. 8.85, factors (d) and (g). Faced with this evidence and the court's instructions, the jury struggled with appellant's fate through five days of deliberation before announcing itself deadlocked. After receiving further instructions, the jury continued to deliberate for an additional three days before returning a death verdict. (44 RT 5871; 5 CT 1045, 1049, 1051, 1054, 1056-1059, 1101.)

As appellant has demonstrated, at the penalty phase, the prosecutor behaved even more egregiously than at the guilt phase. He continued his campaign of character assassination by asking questions of appellant's mother in an attempt to elicit inadmissible evidence that appellant (1) committed a burglary with gloves, (2) repeatedly bludgeoned a shopkeeper on the head with a rock, (3) cut the throat of a relative, (4) "beat on" his female kin, and (5) wrecked his grandparents' truck in a fit of anger. Indeed, the prosecutor was completely undaunted by the fact that appellant's mother did not "confirm" the insinuations in the improper questions put to her. In his penalty-phase closing argument, the prosecutor simply became his own witness. He argued: "[Appellant] became more violent and wilder as he got older. Beatings of relatives. Remember all those pictures down there? And I asked his mother, did you know that he beat Carolyn Spencer, Carla Spencer? Do you remember those questions, series of questions I asked the mother? *He beat on all his family.*"[104] (43

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[103] It seems abundantly clear that at least one of the jurors was struggling with lingering doubts of appellant's guilt.

[104] Defense counsel's objection that the prosecutor's argument (continued...)

RT 5715, emphasis added.) The prosecutor repeated his slander of defense counsel, reminding the jury in his closing argument that defense counsel had created a guilt-phase defense from whole cloth and that the defense mitigation case should similarly be rejected. He injected his own opinion that appellant's mother was not to blame for appellant's predicament, and pandered to the jurors' natural sympathy for the victim by attempting to portray her as an altruistic social-welfare worker whose life assisting the downtrodden was cut short by appellant's brutality. Although state law permits a death sentence only when aggravation substantially outweighs mitigation, the prosecutor argued just the opposite to the jury. His argument to the jury that "[i]t's for you to make a determination of whether or not that mitigation dominates the aggravation and, therefore, life imprisonment should be the proper punishment and not death," flatly misstated the law on this crucial point. (43 RT 5723.)

Further, in assessing the likely impact of the incessant misconduct committed by the prosecutor at the penalty phase, this Court should not ignore the lingering and cumulative impact of the prosecutor's significant misconduct during the guilt phase, as it is highly unlikely that the jury "forgot" all the prejudicial information it was exposed to at that stage of the case. And without needlessly repeating the same points made earlier in this argument addressing the inadequacy of the trial court's response to the prosecutor's guilt-phase misconduct, the trial court's performance in reining in the prosecutor's excesses was no more effective at the penalty phase, where appellant's life was at stake. Indeed, as pointed out previously,

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[104] (...continued)
misstated the evidence and was intended solely to prejudice the jury was overruled. (43 RT 5715.)

defense counsel's plea for effective judicial intervention to cure the prosecutor's misconduct was more likely to be met with sarcasm by the trial court directed at defense counsel rather than a meaningful rebuke of the prosecutor combined with an effective admonition to the jury.

In sum, the prosecutorial misconduct at both phases of the trial was of such a volume, din, and frequency, that the trial court's attempts to drown it out must have fallen on deaf ears. Given the record of jury deliberations, which graphically demonstrates the agonizing closeness of the case, it does not matter what standard of prejudice is applied. Reversal of the entire judgment is required.[105]

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[105] In many capital cases, the state urges the Court to avoid the merits of misconduct claims by arguing that they have not properly been preserved by timely objection. It is therefore to be anticipated that this argument will be repeated in this case.

Yet, in connection with the claims of misconduct in this case, and as discussed in detail above, defense counsel did object to the vast majority of misconduct. (See, e.g., 24 RT 3378; 28 RT 3737-3738; 32 RT 4236, 4253-4259, 4268, 4284, 4291-4292, 4300, 4326; 34 RT 4484, 4564-4565, 37 RT 5048, 5061-5062, 5071-5073; 43 RT 5692.) To the extent that counsel failed to object to any of the misconduct described above, or failed to do so with sufficient particularity, however, the pervasive nature of the misconduct in this case rendered such additional objections unnecessary and futile. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821; *People v. Antick* (1975) 15 Cal.3d 79, 98.)

VI

THE ERRONEOUS ADMISSION OF APPELLANT'S IN-CUSTODY STATEMENTS TO THE POLICE AND TO LISA HENRY, OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, REQUIRES REVERSAL OF THE GUILT AND PENALTY JUDGMENTS

A. Introduction

After appellant was arrested in possession of the victim's car and other property taken from the victim's home, he was taken to the homicide section of the Oakland Police Department and subjected to custodial interrogation. During this interrogation, appellant denied involvement in the victim's homicide as well as the knowing possession of stolen property.

During a break in the interrogation, the lead investigator in the victim's killing executed a search warrant at the home of appellant's girlfriend, Lisa Henry, in which additional property belonging to the victim was found, as well as bloody clothing belonging to appellant. At the time, appellant was staying at Lisa's home and she was pregnant with his child. Lisa was questioned and admitted receiving jewelry from appellant which matched the description of items taken from the victim's person. Thereafter, Lisa was taken to the police department, where she was placed in an interrogation room immediately adjacent to the room in which appellant was being held, and subjected to additional questioning.

Because the police were convinced that appellant was being untruthful during his interrogation, they agreed that it would be useful to send Lisa into the room where appellant was being held in order to see if she could elicit the truth from him. Lisa was then permitted to enter the room, where she briefly and emotionally conversed with appellant. During

their conversation, appellant made a number of incriminating admissions, including an admission that he was at the scene of the victim's homicide with another man ("Fred"), and that he had attempted to stop Fred from killing the victim. Lisa related these statements to the police, and her conversation with the police was recorded.

At trial, appellant unsuccessfully sought to suppress his statements to the police as well as Lisa's testimony concerning her conversation with him.[106] He claimed that his statements were the product of deceptive means employed by his interrogators, including minimizing the crime under investigation in order to obtain a waiver of appellant's Fifth Amendment rights, and the subsequent surreptitious use of Lisa as an agent to obtain statements from appellant once the initial efforts of the police had been, for the most part, frustrated. In allowing the jury to hear the police account of appellant's interrogation, Lisa's testimony, and the tape-recording of her statement to the police, all obtained in violation of appellant's Fifth Amendment right against self-incrimination and his Sixth and Fourteenth Amendment rights to counsel and due process, the trial court committed reversible error.

B. Procedural Facts

The admissibility of statements made by appellant to the police and to Lisa Henry during custodial interrogation on April 19-20, 1988, was litigated in limine on September 1, 1992. (23 RT 3196-3329.) Prior to the in limine hearing, defense counsel had filed a written motion to exclude this

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[106] During her testimony, Lisa attempted to blunt the import of what appellant told her. The prosecution was permitted to introduce in evidence the tape-recording of Lisa's statement to the police as a prior inconsistent statement.

evidence on Fifth and Sixth Amendment grounds, contending (1) that appellant's statements were involuntary in that the police had deceived and coerced him during their interrogation by using Lisa Henry as an agent to elicit statements from him, and (2) that appellant had not voluntarily, knowingly, or intelligently waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. (3 CT 608-614.)

1. The Miranda/Voluntariness Evidence Code Section 402 Hearing

Both Sergeants Paniagua and Medsker, the two primary investigating officers in the LaChapelle homicide, testified at the Evidence Code section 402 hearing. A summary of their testimony follows.

The officers commenced their interrogation of appellant on April 19, 1988, at 9:25 p.m. in room 202 of the homicide bureau at the Oakland police station. (23 RT 3198, 3277.) From 9:25 p.m. until 10:07 p.m., the interrogation that took place was not tape-recorded. (23 RT 3201, 3279.) During this unrecorded portion of the interrogation, Paniagua advised appellant of his *Miranda* rights from a written form. Appellant placed his initials on the form, acknowledging the advisement and his willingness to talk. (23 RT 3200, 3277-3278; Peo. Exh. 1.) During the approximately 42-minute portion of the interrogation before a tape recorder was activated, appellant was not threatened, harmed, or promised anything in connection with the questioning. (23 RT 3201, 3278.)

At the time Paniagua advised appellant of his *Miranda* rights and obtained a waiver of those rights, Paniagua avoided any direct mention that he was questioning appellant as a suspect in the victim's homicide. Instead, he told appellant that he was investigating the theft of a car from a lady who had been "hurt." (23 RT 3240-3243, 3277, 3292.) Other than asking

appellant general booking questions and how appellant came into possession of the victim's car, Paniagua furnished appellant with no details of the matters under investigation during this initial and unrecorded portion of the interrogation.[107] (23 RT 3294.)

The next portion of the interrogation, from 10:07 p.m. until 10:33 p.m., was tape-recorded. (23 RT 3201, 3279.) This taped session covered roughly the same topics that were discussed in the unrecorded session preceding it, including a reiteration of the *Miranda* advisement and appellant's waiver.[108] (23 RT 3242-3244, 3278, 3294.) The transcript of the recording reveals the following colloquy between Paniagua and appellant:

> PANIAGUA: Okay, Mr. Tate we began talking to you at 9:25 –
>
> APPELLANT: This homicide –

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[107] Paniagua's log was admitted in evidence at the section 402 hearing. (3 CT 627, Def. Exh. A.) The log indicates that appellant told the officers he had been staying with his girlfriend, Lisa Henry, on Yuba Avenue, and had spent the night of April 18-19 at her house. Appellant also stated that at about 10:00 a.m. on April 19, he walked to 55th Avenue and Foothill Boulevard, where he obtained the victim's car, TV and VCR from Fred Bush as payment for a debt.

[108] A transcript of the tape-recorded portion of the interrogation from 10:07 p.m. to 10:33 p.m. was admitted in evidence at the hearing. (3 CT 627, Def. Exh. D.) In addition to being questioned about the circumstances in which he obtained the victim's car and the property contained therein, appellant was closely questioned about his whereabouts on the day preceding the homicide, including his visits to his family's home on Hesket Road, his activities on the day following the homicide, and whether he knew the victim and had been to her house. Finally, the officers asked appellant if he had been drinking alcoholic beverages or using drugs the previous evening.

PANIAGUA: I'm sorry?

APPELLANT: This is homicide.

PANIAGUA: This is homicide section, yes I –

APPELLANT: – so I'm here for a car was stolen.

PANIAGUA: As I explained to you initially, we are doing an investigation on the car. The car was stolen in which a lady got hurt and so I'm investigating that case in which the lady got hurt and the car got stolen. And I want it to be clear in your mind I'm not here to trick you into anything.

APPELLANT: I know you ain't just tell me, you just said a car was stolen.

PANIAGUA: I said you were arrested for being in the car stolen and that I'm investigating the incident which the car was taken.

APPELLANT: Whatever you said. Okay.

PANIAGUA: Now is everything clear in your mind?

APPELLANT: Yeah.

(3 CT 627, Def. Exh. D.) The officers took a break and resumed the interrogation at 11:29 p.m.[109] (23 RT 3202, 3279-3280, 3295.) Appellant was allowed to use the bathroom and declined an offer of food. (23 RT 3244.)

When the interrogation resumed at 11:29 p.m., appellant was explicitly told for the first time that he was a suspect in the victim's

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[109] The remainder of appellant's interrogation from 11:29 p.m. to 3:12 a.m., including the portion of the interrogation referred to by Paniagua as "the confrontation," was not tape-recorded. (23 RT 3244, 3250.) Medsker testified that the room in which the interrogation took place was wired for sound, and that it was technologically feasible to have recorded appellant's interrogation in its entirety without having a recorder visible. (23 RT 3238.)

homicide. (23 RT 3280, 3295.) The officers indicated that they had "problems" with appellant's earlier statements, and they questioned him about problems he had with his family the day before. (23 RT 3247.) During this phase of the interrogation, Paniagua accused appellant of lying and pressed him to tell the truth. He observed appellant to mutter that he was going to jail for the rest of his life. (23 RT 3280.) During the same time frame, Medsker made observations about appellant's demeanor and found him to be free of any signs of being under the influence of alcohol or narcotics. (23 RT 3202-3203.)

At 1:40 a.m., Paniagua and Medsker left the interrogation room to strategize how to continue with the interrogation in light of appellant's denial of knowledge or participation in the homicide. The officers believed it was necessary to convince appellant to tell the truth about his involvement. (23 RT 3281.) The portion of the interrogation between 1:50 a.m. and 3:12 a.m. was referred to by the officers as the "confrontation time," as it was here that the officers accused appellant of lying, and confronted him with the fact that his clothing was bloody and that his account of receiving the victim's car and property from Fred Bush was patently false, because Fred Bush was in jail at the time. (23 RT 3203-3204, 3282-3283, 3297.) After about 90 minutes of "confrontation time," Paniagua terminated the interrogation and informed appellant that he was under arrest for the murder of the victim. Paniagua seized appellant's sweater and gave him a blanket before leaving him to reflect in the interrogation room.[110] (23 RT 3252, 3283.)

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[110] At 4:10 a.m., Paniagua returned to the interrogation room and seized appellant's pants which he believed contained bloodstains and

(continued...)

At 3:35 a.m., Medsker returned to the interrogation room where he requested and was refused consent from appellant to search Lisa Henry's home on Yuba Avenue. (23 RT 3204-3205, 3252-3253, 3285.) Accordingly, the officers drafted and obtained a search warrant for Lisa's residence. The warrant was executed in the early morning hours of April 20, 1988. Lisa was present during the search, and accompanied the officers back to the homicide bureau where she gave them a statement.[111] (23 RT 3206-3207, 3286.)

Medsker interrogated Lisa by himself, without recording their conversation, from 9:17 a.m. to 9:50 a.m. in interview room 201, immediately adjacent to the room where appellant was being held. (23 RT 3207-3208.) Thereafter, Paniagua joined in, and their joint questioning of Lisa from 9:50 a.m to 10:10 a.m. was tape-recorded. (23 RT 3207-3208.) During this conversation, the officers mentioned that they had been questioning appellant "all night" in an effort to get him to tell the truth. Lisa requested an opportunity to talk to appellant. The officers granted her request, without conditions or instructions as to what to ask appellant, and did not consider her their agent in questioning appellant. (23 RT 3208, 3256-3257, 3289.) Paniagua elaborated that Lisa had asked if appellant had been truthful, and when the officers replied that appellant had been lying, Lisa suggested that she might be able to convince appellant to tell the truth. Paniagua responded that "that would be great" because, up to that point, appellant had done nothing but lie to the officers. (23 RT 3287.) Further,

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[110] (...continued)
therefore had evidentiary value. (23 RT 3284.)

[111] Paniagua claimed that Lisa came to the police station voluntarily. (23 RT 3298-3299.)

Paniagua testified that before allowing Lisa to talk to appellant, he had not told her the particulars of any of appellant's statements to the police recounting how he had obtained the victim's car from Fred, or that it was impossible for appellant to have done so. According to Paniagua, Lisa was essentially kept in the dark about the circumstances surrounding appellant's arrest. (23 RT 3289.)

Lisa entered room 202 and spoke to appellant outside the presence of the officers for five minutes, from 10:15 a.m. to 10:20 a.m. (23 RT 3212.) Medsker and Paniagua next spoke to Lisa at 10:50 a.m., and she briefed them "off tape" from 10:50 a.m. to 10:57 a.m. as to what appellant had told her. Thereafter, from 10:57 a.m. to 11:03 a.m., Medsker tape-recorded Lisa's account of her conversation with appellant.[112] (23 RT 3209, 3214.)

Between the time that the officers took Lisa into the room where appellant was being held for questioning and the time they debriefed her, the officers learned that appellant was injured. At 10:22 a.m., Medsker entered room 202 with Sergeant Thiem to escort appellant to the bathroom. On the way, Medsker noticed that appellant's left wrist was bleeding. (23 RT 3212, 3255-3256.) Once in the bathroom, appellant "slammed" his fist into the bathroom mirror, but the mirror did not break. Appellant was then handcuffed and returned to the interrogation room. (23 RT 3212.) In the room, Medsker found a broken glass ashtray wrapped in a blanket in the corner. (23 RT 3212-3213.) At 10:25 a.m., appellant was taken to the

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[112] A transcript of the tape-recording of the officers's questioning of Lisa from 10:57 a.m. to 11:03 a.m. was admitted in evidence at the section 402 hearing. (3 CT 627, Def. Exh. C.) Among other matters, Lisa told the officers that "[h]e said he didn't do it. He said Freddie, Fred did it." Further, appellant told Lisa that "he tried to stop Fred." Lisa also recounted that appellant said that the victim "was a lady."

hospital for treatment and then to the jail for booking. (23 RT 3213.)

At the conclusion of Lisa's debriefing by Paniagua and Medsker, the officers engaged in the following colloquy with her:

> MEDSKER: Before you went in did Sgt. Paniagua tell you that we'd been talking to him –
>
> LISA: Yes.
>
> MEDSKER: – a lot of the night?
>
> LISA: Yes.
>
> MEDSKER: And we encouraged him to tell the truth?
>
> LISA: Yes.
>
> MEDSKER: Okay.
>
> PANIAGUA: Did I tell you to do anything else?
>
> LISA: No. You asked me just did I want to talk to him, maybe I can talk to him to convince him to tell the truth or to tell what happened.
>
> PANIAGUA: Okay.
>
> MEDSKER: Is this a true statement?
>
> LISA: Yes.

(23 RT 3257-3259, Def. Exh. C.)

Given that both officers denied having recruited Lisa as a means of obtaining a truthful statement from appellant, defense counsel asked both Medsker and Paniagua why they did not contradict or correct her when she said "you asked me just did I want to talk to him, maybe I can talk to him to convince him to tell the truth or to tell what happened." Medsker suggested that fatigue was to blame, as he and Paniagua "were getting pretty well bleary." (23 RT 3260.) Paniagua, on the other hand, testified that he had acted deliberately in failing to rebut what Lisa had said on tape. He denied that Lisa was truthful when she told him that he was the one who suggested

that she talk to appellant in order to convince him to make a statement. Paniagua did not think "it would have been beneficial to anybody" for him to contradict Lisa. Consequently, he "chose not to pursue that line of questioning." (23 RT 3203.)

2. The Ruling

The trial court found that appellant had received adequate *Miranda* warnings and that he waived those rights. The trial court found that his statements to the police were voluntary, without threat or inducement. (23 RT 3325.) Further, the trial court found that Lisa initiated the request to talk to appellant, and therefore did not act as a police agent. Citing *Illinois v. Perkins* (1990) 496 U.S. 292, the trial court found that even if Lisa were to be considered an agent of the police, there was no requirement that appellant receive *Miranda* admonitions as a precondition of admitting his statements to her. (23 RT 3327.) Finally, citing *People v. Wallace* (1992) 9 Cal.App.4th 1515, 1520, the trial court ruled that appellant's Fifth Amendment rights were not violated when the police allowed Lisa to speak to him and thereafter obtained her account of the conversation. (23 RT 3328.)

C. Appellant's Statements to Medsker and Paniagua Were Obtained in Violation of His Fifth Amendment Right Against Self-Incrimination

Preliminarily, as he did in the trial court, appellant challenges the admissibility of all statements he made in response to interrogation by Paniagua and Medsker. In doing so, appellant does not contest that he was informed of his *Miranda* rights at the commencement of his interrogation by the officers in room 202 of the homicide section of the Oakland police station. However, appellant does contest that he voluntarily, knowingly, and intelligently waived his right to remain silent and to consult with

counsel prior to questioning, as the trial court found. The gist of his claim in this regard is that the two officers affirmatively deceived him as to the subject and scope of their questions, and in a manner calculated to elicit false admissions from him.

In order for a court to find a valid Fifth Amendment waiver, it must make two independent, but related inquiries:

> The inquiry whether a waiver is coerced "has two distinct dimensions." [Citation.] First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]

(*Colorado v. Spring* (1987) 479 U.S. 564, 573.) The state's burden of proving that a suspect's waiver was voluntary, knowing, and intelligent is a "heavy" one. (*Miranda v Arizona*, *supra*, 384 U.S. at p. 475.) Additionally, courts are directed to "indulge every reasonable presumption against waiver" of fundamental constitutional rights and to eschew a presumption of "acquiescence in the loss of fundamental rights." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

Both the United States Supreme Court and this Court have recognized that there are circumstances in which affirmative misrepresentations by the police are sufficient to invalidate a suspect's waiver of his Fifth Amendment privilege. (See, e.g., *Lynumn v. Illinois* (1963) 372 U.S. 528, 534; *Spano v. United States* (1959) 360 U.S. 315, 323;

People v. Boyde (1988) 46 Cal.3d 212, 240.) Specifically, the United States Supreme Court has left open the question of whether a waiver of Fifth Amendment rights would be invalidated upon a showing of "an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation." (*Colorado v. Spring*, *supra*, 479 U.S. at p. 576, fn.8; cf. *People v. Sanders* (1990) 51 Cal.3d 471, 512.)[113]

Here, in marked contrast to *Spring* and *Sanders*, the evidence before the trial court clearly demonstrates that the officers interrogating appellant affirmatively minimized the nature of their inquiry by withholding from appellant the fact that they were investigating the murder of Sarah LaChapelle. Instead, they purposely informed appellant that they were investigating the theft of a car from a lady who got "hurt." (23 RT 3292.) Notwithstanding Paniagua's protestations to the contrary, this was a form of deceit or trickery, a variety of "psychological ploy[], such as . . . to minimize the moral seriousness of the offense. . . ." (*Rhode Island v. Innes* (1980) 446 U.S. 291, 299.) The use of deceit "as to an important aspect of his case can affect the voluntariness of [a] confession or admission." (*People v. Engert* (1987) 193 Cal.App.3d 1518, 1524 [citing *Miller v. Fenton* (3rd Cir. 1986) 796 F.2d 598, 607 and *Frazier v. Cupp* (1969) 394 U.S. 731, 737].)

Although some courts have observed that "[s]o long as a police officer's misrepresentations or omissions are not of a kind likely to produce

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[113] In *Colorado v. Spring*, the high court held "that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." (479 U.S. at p. 577.)

a false confession, confessions prompted by deception are admissible in evidence" (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280, but cf. *Colorado v. Spring*, *supra*, 479 U.S. 564; *Moran v. Burbine* (1986) 475 U.S. 412), the deception employed by Paniagua and Medsker was of the kind which was likely to, and did in fact, produce false admissions from appellant. Indeed, it was the very falsity of those admissions which was utilized by the prosecutor to persuade the jury to convict appellant and sentence him to death. (34 RT 4471-4472, 4479-4480, 4482, 4486-4487, 4489-4490, 4492, 4558, 4561-4564, 4575.) By utilizing the interrogation technique of minimizing the crime under investigation to a car theft vaguely connected to a lady who was "hurt," it was likely that the police would receive a false story such as the one appellant gave them: that he received the victim's car and property in exchange for a drug debt.[114] Moreover, by attempting to minimize the crime under investigation, the police officers made it more likely that appellant would forego electing to consult with counsel prior to submitting to questioning, and instead attempt to "talk" his way out of his predicament. (See, e.g., *Commonwealth v. DiGiambattista* (Mass. 2004) 813 N.E.2d 516, 527 [common sense, confirmed by scientific research, supports conclusion that interrogation technique of minimizing seriousness of the offense under investigation encourages suspect to make admissions]; *State v. Free* (N.J. 2002) 798 A.2d 83, 95-96 [coercive factors in interrogation techniques, including "minimization," have the potential for causing a false confession].)

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[114] The technique of "minimization/maximization," when successful, leads to the "breakthrough," which need not be a confession, but only an incriminating admission. (See Inbau et al., *Criminal Interrogations and Confessions* (4th ed. 2004), pp. 232, 235-236, 253-254, 258, 271-278, 281.)

In sum, under the totality of the circumstances and the uncontradicted evidence before the trial court, it is clear that the officers deceived appellant into waiving his Fifth Amendment rights. As a result, statements obtained from appellant in exploitation of this deception were just as inadmissible as if the police had not scrupulously honored appellant's invocation of the right to remain silent. (*Colorado v. Connelly* (1986) 479 U.S. 157, 163; *Haynes v. Washington* (1963) 373 U.S. 503, 513-514.) Consequently, the trial court's ruling that appellant freely, knowingly, and intelligently waived his rights cannot be sustained upon this Court's independent review. (*People v. Memro* (1995) 11 Cal.4th 786, 827; *People v. Hill* (1992) 3 Cal.4th 959, 979; see also *State v. Denny* (Ariz. 1976) 555 P.2d. 111, 114 [finding that inculpatory statement was untrustworthy and obtained by coercion, having been induced by police deceit in informing suspect that her husband was alive and would recover from gunshot wounds when he had in fact already died as a result of those wounds].)

D. The Admission in Evidence of Lisa Henry's Various Accounts of Her Conversations with Appellant during His Interrogation Violated Appellant's Fifth Amendment Rights

Notwithstanding the trial court's ruling to the contrary, the evidence presented at the in limine motion to exclude appellant's statements to Lisa Henry unequivocally shows that she was acting as a police agent when she was allowed to talk to appellant during his interrogation by Paniagua and Medsker. The legal principles supporting appellant's contentions are relatively straightforward.

For close to 40 years, and despite numerous frontal attacks, the United States Supreme Court has held that "the Fifth Amendment privilege

against self-incrimination prohibits admitting statements given by a suspect during 'custodial interrogation' without a prior warning. Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody. . . .'" (*Illinois v. Perkins*, *supra*, 496 U.S. at p. 295, quoting *Miranda v. Arizona*, *supra*, 384 U.S. at p. 444; see also *Dickerson v. United States* (2000) 530 U.S. 428, 435.) The prophylactic warnings required by *Miranda* were

> meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." [Citation.] That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." [Citation.] "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." (*Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S.Ct. 3138, 3148, 82 L.Ed.2d 317 (1984).)

(*Illinois v. Perkins*, *supra*, 496 U.S. at p. 295.)

In *Rhode Island v. Innis*, *supra*, 446 U.S. 291, the high court had occasion to review the police practices that had evoked *Miranda*'s concern about the coerciveness of the "interrogation environment." Among the questionable police practices recognized by the *Innis* Court were trickery "and a variety of 'psychological ploys.'" (*Id.* at p. 299.) Although none of the questionable practices involved express questioning, the Court found that any of them, when combined with the "interrogation environment," was likely to "subjugate the individual to the will of his examiner" and "thereby undermine the privilege against compulsory self-incrimination." (*Ibid.*) Ultimately, the high court concluded that the goals of *Miranda* would be best effectuated if the *Miranda* warnings extended not only to express

questioning, but also to "its functional equivalent." (*Id.* at p. 301.) The phrase "functional equivalent" of interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Ibid.*)

Turning to the undisputed facts before the trial court, it is readily apparent that appellant was still being held for further interrogation at the time that Lisa Henry was ushered into the interrogation room to talk to appellant. In fact, appellant had been subjected to concerted questioning for approximately 6 hours (from 9:25 p.m. to 3:35 a.m.) before his frustrated interrogators temporarily cut off the questioning in order to strategize over a more effective means of getting appellant to be truthful. Ultimately, that strategy led to the use of Lisa Henry as a means of getting appellant to talk.. It is true that appellant had chosen to talk to the police after receiving *Miranda* advisements, but only after having been misled to believe that he was discussing a car theft for which he was being held. Over the course of the interrogation, he had been stripped down to his underwear after the police had seized his shoes, pants and sweater. After giving the police an explanation for his possession of the victim's car and its contents which the police believed to be demonstrably false, the police revealed to him that they were investigating a murder. Moreover, appellant refused to consent to a search of the residence where he lived with his girlfriend, Lisa. Admittedly frustrated and stymied by appellant's responses, and clearly believing that he was not telling the truth about his involvement in the murder of Sarah LaChapelle, the police temporarily suspended the interrogation to obtain a search warrant and to investigate further, in hopes of again confronting appellant so that he would "tell the truth."

During the execution of the search warrant, the interrogating officers encountered Lisa Henry in possession of jewelry, a credit card, and a videotape belonging to the victim. Lisa told the police that she obtained these items from appellant, as well as two rings matching the description of rings taken from the victim's severed finger. Lisa told the police that she rode around with appellant in a car that matched the description of the victim's car. She also told the police that she had washed soiled clothing she had received from appellant after he came home on the morning following the murder, and that appellant was all "muddy." Finally, the police learned from Lisa that, contrary to appellant's alibi for the night of the murder, he had not been with her in the house they shared.

The police returned to the homicide bureau with Lisa in tow for further questioning. After they took a taped statement from her, she was taken into room 202 where appellant, almost naked, was being held. After about five minutes, Lisa was taken from the room. During those five minutes, appellant's wrist was cut, apparently with the shards of a broken ashtray. Immediately after Lisa left his interrogation room, appellant was escorted to the bathroom where he engaged in further self-destructive behavior by slamming his fists into a mirror.

During the taped debriefing, in addition to informing the police that appellant had told her he was present when the victim was killed and had tried to prevent "Fred" from killing the victim, Lisa also told the police that she advised appellant to tell the officers who else was involved in the murder, as being forthcoming with them might result in leniency. Significantly, when Paniagua asked her whether he had directed her to "do anything else," Lisa replied: "No, you asked me just did I want to talk to him, maybe I can talk to him to convince him to tell the truth or to tell what

happened." To this statement, Paniagua replied: "Okay."

The significance of the above-enumerated facts is readily apparent. First, unlike the authority relied upon by the trial court (i.e., *Illinois v. Perkins*, *supra*, 496 U.S. 292), appellant was in the throes of custodial interrogation at the very time that Lisa Henry was introduced into the room where the police were questioning him. The suspect in *Perkins* was sitting in jail awaiting trial in an unrelated case, where he was introduced to an inmate and an undercover police agent who had been placed in the jail in order to engage the suspect in conversations about an unsolved murder case. That jail setting was deemed fundamentally different from the "incommunicado interrogation of individuals in a police-dominated atmosphere" against which *Miranda* was designed to preserve the Fifth Amendment privilege. (*Id.* at p. 295.) Second, it is clear that appellant did not initiate the request to speak to Lisa. In this respect, appellant's case is distinguishable from such cases as *People v. Mayfield* (1997) 14 Cal.4th 668, and *Arizona v. Mauro* (1987) 481 U.S. 520.

In *Mayfield*, this Court was confronted with a case in which the defendant claimed the police placed his father in an interrogation room in order to obtain and surreptitiously record their conversations after defendant had invoked his *Miranda* rights to cut off questioning.[115] This Court rejected Mayfield's *Innis*-based argument that placing the father in the interview room constituted custodial interrogation because such conduct

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[115] The trial court had excluded the tape-recording of the father-son conversation on discovery grounds, but admitted the father's statement of his son's admissions which had been communicated to the investigating officer, just as in appellant's case. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 757.)

was reasonably likely to elicit an incriminating response: "We reject this argument 'because it is clear that defendant's conversations with his own visitors are not the constitutional equivalent of police interrogation.'" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 758, quoting *People v. Gallego* (1990) 52 Cal.3d 115, 170.) In rejecting the *Innis* argument, this Court found dispositive the fact that Mayfield had initiated the contact:

> This is particularly true here because defendant had specifically and repeatedly asked to be allowed to speak with his father. *The meeting occurred on defendant's initiative, not that of the police. Granting defendant's request cannot be equated with custodial interrogation.*

(*People v. Mayfield*, *supra*, 14 Cal.4th at p. 758, emphasis added.)

Additionally, the *Mayfield* Court rejected the defendant's claim that his statements to his father were obtained in violation of *Miranda* because the father was acting as an unwitting or implied police agent who interrogated the defendant after an invocation of the right to counsel. (*Ibid.*) In rejecting that argument, this Court cited *Illinois v. Perkins* for the broad proposition that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*," and found as a factual matter that the father was not a police agent sent to elicit incriminating information from his son.[116] (*Ibid*, quoting *Illinois v. Perkins*, *supra*, 496 U.S. at p. 296.) Here, by way of contrast, appellant played no part in

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[116] The requirement of a *Miranda* warning may apply to questioning by persons who are not law enforcement officers. (See, e.g., *Estelle v. Smith* (1981) 451 U.S. 454 [court-appointed psychiatrist must provide warning and get waiver before examining a defendant if information is to be used against him].) The question is whether the person with whom the defendant speaks is involved "on behalf of the state. . . ." (*Jones v. Cardwell* (9th Cir. 1982) 686 F.2d 754, 756.)

initiating the confrontation with his pregnant girlfriend, and the evidence before the trial court demonstrates that the police utilized Lisa Henry to obtain statements from appellant because they were frustrated with the responses they received during the earlier stages of the interrogation.

In *Arizona v. Mauro*, *supra*, 481 U.S. 520, the United States Supreme Court distinguished *Innes* when faced with a case in which a murder suspect had invoked his right to have counsel present before interrogation could proceed. The suspect's wife, who had also been questioned, insisted upon speaking to her husband. The police reluctantly agreed, but only on the condition that an officer be present during the conversation and that the conversation be recorded. Both Mauro and his wife were informed of these conditions, and during the ensuing conversation, Mauro urged his wife to remain silent and to seek advice from counsel. During Mauro's trial, the prosecution used Mauro's statements to his wife at this meeting to rebut his insanity defense. (*Id.* at pp. 521-524.) The high court held that under the peculiar facts presented, Mauro was not subjected to interrogation:

> The tape recording of the conversation between Mauro and his wife shows that [the officer present during the conversation] asked Mauro no questions about the crime or his conduct. [Footnote omitted.] Nor is it suggested – or supported by any evidence – that [the supervising officer's] decision to allow Mauro's wife to see him was the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation. [Footnote omitted.]

(*Id.* at p. 527.) Thus, the *Mauro* Court held that the facts "completely rebut the atmosphere of oppressive police conduct. . . ." (*Id.* at p. 528.) Believing that, in some cases, the suspect's perspective may be relevant in determining whether police actions constitute interrogation, and especially

in light of the fact that an officer was present openly observing and recording the conversation, the *Mauro* Court expressed its "doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way." (*Ibid.*)

The facts and circumstances in the case at bar are fundamentally different from those posed in *Mayfield* and *Mauro*. Instead, appellant's case is much more akin to the facts in *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928.

In *Nelson*, the petitioner was subjected to interrogation, advised of his *Miranda* rights, and invoked his right to remain silent. His alleged partner in the crime, Moore, confessed and implicated Nelson. Thereafter, the police engineered a confrontation between Nelson and Moore by placing Moore in the room where Nelson was being questioned and directed him to tell Nelson that he had confessed and implicated Nelson. During their conversation, Nelson made an incriminating statement which Moore promptly conveyed to the police. (*Id.* at pp. 929-930.) The Court of Appeals held that the police conduct constituted custodial interrogation and was the type of psychological ploy identified in *Innis* as the raison d'être for *Miranda*'s prophylactic rule.[117] (*Id.* at p. 935.)

In distinguishing petitioner's case from *Illinois v. Perkins*, the Court of Appeals noted that Nelson, unlike Perkins, was in custodial interrogation

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[117] The *Nelson* Court remanded the matter to the district court to determine if Nelson's incriminating statement to Moore was made after he learned that Moore had already confessed. If the district court so found, it was directed to grant habeas corpus relief. (*Id.* at pp. 938-939.)

at the time of the confrontation with Moore.[118] Moreover, the Court of Appeals observed that:

> [T]he Court in *Perkins* addressed a situation where the police through "strategic deception" took advantage of the suspect's "misplaced trust in one he suppose[d] to be a fellow prisoner." [Citation.] This misplaced trust led Perkins to believe that his statements would not reach police ears. As a result, Perkins was not influenced by the two factors that *Miranda* identified as contributing to the inherently coercive nature of custodial interrogations: fear of reprisal for keeping silent, and hope for leniency for confessing. [Citation.] By contrast, when a suspect is confronted with an accomplice who he knows has confessed, he has every reason to believe that the accomplice is cooperating with the police and that whatever he says will be communicated to them. The suspect will thus have the same incentive to speak as he would in any interrogation by the police.

(*Id.* at p. 938.)

Here, like the situation in *Nelson*, when appellant was being confronted by Lisa, he knew he was dealing with a person who had been in possession of property taken from the victim, and who had assisted him in disposing of physical evidence of the crime. Lisa was thus known to

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[118] The *Nelson* court also distinguished the facts before it from those presented in *Arizona v. Mauro*, *supra*, 481 U.S. 520, noting that Justice Stevens, in his dissenting opinion in *Mauro*, had warned that "'[i]t is undisputed that a police decision to place two suspects in the same room and then listen to or record their conversation may constitute a form of interrogation even if no questions are asked by any police officers.'" (911 F.2d at p. 933, quoting *Arizona v. Mauro*, *supra*, 481 U.S. at p. 535 (Stevens, J., dissenting).) In particular, the *Nelson* court cited with approval the reasoning of the Court of Appeals in *United States v. Vasquez* (1st Cir. 1988) 857 F.2d 857. The *Vasquez* court observed that *Mauro* would not control where the evidence demonstrated that the police placed two suspects together who had given conflicting accounts during interrogation in an effort to elicit incriminating statements. (*Id.* at p. 863.)

appellant as an accomplice or an accessory after the fact to the murder of Sarah LaChapelle. Moreover, appellant was aware that she had been placed in the room by the police shortly after appellant had refused consent to the search of premises he shared with her, and presumably the police were aware of his activities on the preceding day from what they had learned from Lisa.

Of even greater significance is the uncontroverted fact that Lisa implored appellant to be forthcoming about what happened because he could expect leniency in exchange for telling the police what happened during the crime. Clearly, the police conduct in this case, whether one credits the testimony of Paniagua and Medsker that Lisa "initiated" the request to speak to appellant or not, was exactly the type of psychological ploy criticized in *Miranda* and *Innis*. Under these circumstances, the trial court's finding that Lisa initiated the request to speak to appellant is constitutionally irrelevant. What is significant is that the police exploited the situation to garner information about appellant's statements to Lisa. This is a far cry from a case such as *Mayfield*, in which the defendant's father, otherwise uninvolved in the crime under investigation, was permitted access upon the express invitation of the son.

It would stretch any legitimate application of the substantial-evidence rule to lend support to the trial court's conclusion that allowing Lisa into the interview room to speak to appellant under these circumstances was constitutionally permissible in the absence of fresh warnings to appellant that what transpired between them would be used against him in court. After all, it was the police who wished to record on tape their supposed pure motives in allowing Lisa into the room with appellant. Instead, what they received, and what the tape reveals, is Lisa's

statement that the police had asked her to speak to appellant in order to persuade him to tell what had happened. Rather than contradict that statement, the officers chose to acknowledge it and to ask her if what she told them was true. When she did so, the officers again remained silent. It is difficult to lend credence to Paniagua's explanation that it served no useful purpose to contradict or deny Lisa's statement, especially as the police were clearly taping the statement for the sake of subsequent use at trial. Under these circumstances, the officer's silence and acquiescence constitutes a compelling adoptive admission of the truth of what Lisa told them about the circumstances surrounding her entry into the room where appellant was being interrogated. (See Evid. Code, § 1221; *People v. Roldan* (2005) 35 Cal.4th 646, 710-711.) The trial court's conclusion to the contrary is simply unsupportable by any reasonable interpretation of the record. Accordingly, its finding that Lisa, rather than the police, initiated the request to speak to appellant is not entitled to deference on appeal. (*In re Thomas* (2006) 37 Cal.4th 1249; *People v. Ayala* (2000) 24 Cal.4th 243, 279; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Finally, it should not be forgotten that the product of the encounter between appellant and Lisa produced a result consistent with the expectations of the police. Appellant discussed "what happened" at the crime scene with Lisa, but there was more. As soon as Lisa left appellant, the police immediately became aware that appellant was bleeding from his wrist, as a result of a cut from a broken ashtray. Within two minutes of seeing Lisa, appellant was escorted to a bathroom where he smashed his fists into a mirror. This uncontroverted evidence strongly suggests that appellant was emotionally overcome during the confrontation with Lisa. This was compelling evidence that when the police introduced Lisa into the

interrogation room with a nearly naked and powerless appellant, they were utilizing a psychological ploy designed to undermine appellant's Fifth Amendment rights. Consequently, the trial court's findings that appellant's statements to Lisa were admissible cannot be sustained on appeal upon this Court's independent review.[119]

E. The Error in Admitting Appellant's Statements to the Police and to Lisa Henry Was Prejudicial and Requires Reversal of Both the Guilt and Penalty Judgments

1. The Standard of Review for Prejudice

"The admission of testimony in violation of *Miranda* constitutes a violation of appellant's due process rights. [Citations.] . . . The erroneous admission of statements taken in violation of a defendant's Fifth Amendment rights is subject to harmless error analysis. [Citations]." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1126.) The "harmless error" analysis referred to in *Ghent* requires that the state show beyond a reasonable doubt that the erroneous admission of appellant's statements did not contribute to appellant's conviction and death sentence. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295-296; *People v. Cahill* (1993) 5

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[119] The trial court's reliance on *People v. Wallace* (1992) 9 Cal.App.4th 1515, is of no moment. Although some of the facts in *Wallace* bear a passing resemblance to the facts in appellant's case, the Court of Appeal rejected the claim that the police had utilized Wallace's wife as a police agent, commenting that "the argument is made by extensive recitation of matters of fact lacking any citation whatsoever to controlling case authority." (*Id.* at p. 1521.) However, the *Wallace* court likewise failed to cite or discuss any of those controlling authorities, i.e., *Innis*, *Mauro*, *Perkins*, or *Mayfield*, and simply accepted the trial court's factual conclusion that Wallace's wife was not acting as a police agent. Consequently, the discussion by the Court of Appeal is little more than ipse dixit and adds nothing to the relevant discussion.

Cal.4th 478, 510.)

2. The Admission in Evidence of Appellant's Statements to the Police and to Lisa Henry Cannot Be Shown to Have Been Harmless in Proving Guilt

The prosecutor's consistent exploitation of appellant's statements in his closing arguments belies any assertion respondent may make to somehow convince this Court that the error in this case was harmless beyond a reasonable doubt. The central thread running throughout the prosecutor's closing argument was that appellant was not to be believed, and that his trial testimony denying involvement in the murder was just as false as his statements to the police and to Lisa Henry. Thus, the prosecutor repeated this assertion through his closing argument as if it were a refrain in a song: "He's trying to deceive you as he tried to deceive the police" (34 RT 4482); "I submit to you that it is him who is trying to deceive you as he tried to deceive the police" (34 RT 4486); "That's how this has been woven by the defendant for you to swallow, just as he tried to do the same with the police" (34 RT 4490); "When you consider the defendant's credibility, the various things that the defendant has said, then you know that the defendant is not truthful with you, just as he was not truthful with the police" (34 RT 4492). After defense counsel attempted to repair the damage to appellant's credibility in her closing argument, the prosecutor repeated the refrain in his rebuttal argument.[120] Thus, he reiterated: "Now, what would be a reason why Gregory Tate would not want to tell a finder of fact the truth? It would be the same reason that he told non-truths to the police. He doesn't want to

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[120] For defense counsel's argument addressing Lisa Henry's testimony, see 34 RT 4536-4538; for defense counsel's argument in response to the prosecutor's attack on appellant's statements to Paniagua and Medsker, see 34 RT 4540-4545.

be held responsible for his actions. And that's what we are here to try to do" (34 RT 4561); "The charade is over. He cannot fool you, either, like he didn't fool the police" (34 RT 4575).

In addition to this thematic assault on appellant's credibility, the prosecutor time and again referred to specific instances in appellant's statements to the police and to Lisa Henry as proof that appellant was not to be believed, either in or out of court, e.g., appellant's false statement to Lisa Henry that Fred Bush was the killer demonstrated the inherent weakness of defense counsel's theory that if appellant was culpable for the killing of the victim, it was only as an aider or abettor (34 RT 4471-4472); appellant's false statement to Paniagua about the number and extent of his activities at his family's home on Hesket Road in the hours before the homicide was proof that his trial testimony was false (34 RT 4479-4480); appellant's false statement to Paniagua that the victim owned a green car was contradicted by his admission that he was living across the street from the victim when she purchased a burgundy car (34 RT 4487); appellant's false statement that he obtained the victim's car from Fred Bush was contradicted by evidence that Bush was in jail at all relevant times (34 RT 4487-4488); appellant's statements to Medsker concerning his alcohol consumption contradicted appellant's trial testimony (34 RT 4489).

Three other excerpts from the prosecutor's closing argument clearly demonstrate the prosecutor's telling use of the evidence of appellant's statements to the police and to Lisa Henry. First, when referring to appellant's false statement that he obtained the victim's car from Fred Bush, and to Lisa Henry's taped statement in which she said that appellant had told her that Fred Bush was the murderer, the prosecutor argued that pinning the murder on an innocent man was chilling evidence of appellant's

callousness:

> MR. LANDSWICK: The only evidence in this case that there is aiding and abetting another person to commit a crime is in the second statement of Lisa Henry, which you have heard, and you also know that what the defendant told Lisa Henry is untrue because Fred could not have done it. The defendant could not have tried to stop Fred because, unbeknownst to the defendant at that time, Fred had been in jail for a week. Now, how cold – Other than this murder, how cold and calculated is it to blame a vicious, bloody, torturous murder on your enemy? That is cold. If Fred Bush was not in jail, Fred Bush would have been answering questions, I guarantee you, and questions that would have made him shudder.

(34 RT 4492.)

Second, the prosecutor explicitly referred to appellant's false statements to the police as proof of a consciousness of guilt, and tied this evidence to the relevant jury instruction given by the court on the basis of this evidence.[121] (34 RT 4558.)

Finally, the prosecutor argued in rebuttal that the circumstance that the police permitted Lisa Henry to talk to appellant while he was still being held for additional custodial interrogation constituted proof that appellant had testified falsely about the police not honoring his attempt to terminate the interrogation:

> MR. LANDSWICK: Now, see, Sgt. Paniagua – Here's an interesting thing. And it wasn't argued, and I forgot to argue it on Thursday simply because I was in just a little bit of a rush. But you remember Sgt. Paniagua said that they left the defendant in that interview room when they went out to execute the search warrant at Lisa Henry's house and because they wanted – In case they found something there,

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[121] CALJIC No. 2.03 (Consciousness of Guilt – Falsehood)

they wanted to talk to the defendant about it, they would still have him there rather than down in the jail. And recall they've already arrested him. But that doesn't matter. He's still in their custody. But there's a principle of law that says that if a person who is a suspect and is in custody – there are two requirements, a suspect and in custody. You have to have custodial interrogation for the *Miranda* principle to operate, and the *Miranda* principle is you have the right to remain silent, etc., etc., etc. That's a constitutional guarantee of ours. During the time that Sgt. Paniagua went to get the search warrant he said the defendant had not invoked his *Miranda*. During the defendant's testimony, he said that I had told them when they came in, leave me sleep, allow me to sleep. I don't want to talk to you guys anymore. When you tell a police officer who is investigating you and interrogating you, I do not want to talk to you anymore –

MR. PINKNEY [defense counsel]: Objection; this is not part of the evidence.

MR. LANDSWICK: It is part of the evidence.

THE COURT: Well, he's – That's what he testified to. Overruled.

MS. BROWNE [defense counsel]: But, Your Honor, he is now arguing law that's not before the jury and won't be before the jury in instructions.

THE COURT: Overruled. Go ahead. You can argue that.

MR. LANDSWICK: The police officer, when you say that, the police officer is required by law to stop talking to you.

MS. BROWNE: Your Honor –

MR. LANDSWICK: Stop. Just a moment, please.

MS. BROWNE: I'm objecting to –

THE COURT: Wait. Don't tell her just – Mr. Landswick, you can't go too far beyond it. I let you come to the point because I'm sure you're going to be attacking his

statement, but I don't want you to go too far.

MR. LANDSWICK: No.

THE COURT: So don't embellish that.

MR. LANDSWICK: I'm only going to that point. What was in Paniagua's mind? To leave the defendant in the room because he had not invoked, to talk to him if they found something in the search warrant they needed to talk about. If he had invoked, the police could not allow Lisa Henry in to talk to him and then take a statement about what he said to her. But the defendant told you that he told them he didn't want to talk to them anymore. That's believability? Who is going to believe the defendant in that case when the other has happened?

(34 RT 4561-4564.)

In addition to the prosecutor's heavy reliance on appellant's false out-of-court statements to attempt to convince the jury that appellant was a callous liar as well as a cold-blooded murderer, it must be remembered that the prosecution's entire case was circumstantial, and that the jury deliberated over the course of three days before returning its guilt-phase verdicts.[122] Further, during deliberations on December 23, 1992, the jury requested to hear the tape recording of appellant's interrogation by Paniagua and Medsker, and the tape was played in open court. (34 RT 4632; 3 CT 699.) Thereafter, the jury requested and received a readback of portions of appellant's trial testimony. (34 RT 4633, 3 CT 699.) During deliberations that same day, the trial court was advised of the heated nature of deliberations, and responded by instructing the jury in the language of

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[122] Deliberations began on Tuesday, December 22, 1992, at noon and continued on December 23, 1992, before resuming again on Monday, December 28, 1992. The jury returned its verdict at 11:16 a.m. that day. (3 CT 680, 694, 702.)

CALJIC No. 1.00.[123] (34 RT 4634-4637; 3 CT 694, 698.) From the foregoing, it is clear that the prosecution's case was not so compelling as to have rendered harmless beyond reasonable doubt the trial court's error in admitting appellant's statements to the police and to Lisa Henry, and that the jury was acutely concerned with assessing appellant's credibility.

3. The Admission in Evidence of Appellant's Statements to the Police and to Lisa Henry Contributed to the Death Judgment

"The question is whether there is a reasonable possibility that the evidence complained of might have *contributed* to the conviction." (*Chapman v. California* (1967) 386 U.S. 18, 23, quoting *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87 (emphasis added).) Unless the People can demonstrate beyond a reasonable doubt that the improperly-admitted evidence did not play a part in the ensuing death judgment, appellant's death sentence must be reversed. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 257-258; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) As appellant will explain, that heavy burden cannot be carried by the state.

As he did in the guilt phase of the trial, at the penalty phase, the prosecutor emphasized appellant's callousness by pointing to the false statements he made to the police and to Lisa Henry during his interrogation, and linked the lies to appellant's lack of remorse:

> MR. LANDSWICK: Is there remorse for killing Mrs. LaChapelle? None. He lied to you. I was outside. Well, that was after he said to the police – and this – this is how cold,

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[123] The foreperson had informed the court that "Personal feelings have come into play, and we don't want to coerce this person. We feel this person is using criteria other than evidence and the law." (34 RT 4637.) The court responded by reading CALJIC No. 1.00 [Respective Duties of Judge and Jury].

how cold this guy is. I was – I was at home. I was at home. I was – I had laid down with my girlfriend, Lisa Henry, and I had not left the house at all the night of the murder. The next day, I went up to 55th and Foothill, and there was Fred Bush. And he had this car, and he told me it was a rental car. And he had a VCR and a TV in the back seat. And – And he says I can use it because he owed me some money. And I was going to take Lisa to the movie. That's what he told the police. And as I mentioned to you back in December, how cold is it to accuse or to blame or to try to accuse another person of killing your victim? That's what he was trying to do. He was trying to set up Bush as a fall guy for this murder. That's how sophisticated he is. And it just makes your blood curdle to think if Fred Bush had not been in custody. But it destroyed the defendant's defense, and then he had to concoct another one for you.

(43 RT 5710-5711.)

Not content to carefully confine his comments to what was admittedly a brutal crime, the prosecutor could not resist relying on the statements that appellant made during police interrogation in an attempt to poke holes in the defense mitigation case. Thus, in discussing whether appellant was able to appreciate the criminality of his conduct or conform his conduct to the requirements of law as a result of the effects of intoxication, the prosecutor referred the jury's attention to appellant's statement to the police on the topic of the negligible amount of alcohol he had imbibed at the time of the crime, in contradiction to his trial testimony. (43 RT 5722.) And finally, in an argument that grossly mischaracterized the applicable standard for weighing aggravating evidence against mitigating evidence, the prosecutor again honed in on appellant's lack of credibility:

MR. LANDSWICK: Now this is the paragraph (k), and I'm going to try to get – Here. This is where the nuts and

> bolts of the defense mitigation case took place, *and it's for you to make a determination of whether or not that mitigation dominates the aggravation and, therefore, life imprisonment should be the proper punishment and not death.* Any other circumstance which extenuates the gravity of the crime. What circumstance extenuates the gravity of Mrs. LaChapelle's death? The burglary? No. The robbery? No. The beating? No. The stabbing? No. The dismembering? No. *The lying? No. I was at home. I was in bed. I wasn't anywhere near there. Why would I go there? Well, why don't you tell the truth? What's in it for me? That's in evidence back in the guilt phase.*

(43 RT 5723-5724, emphasis added.)

In addition to acknowledging the prosecutor's heavy reliance in securing a death verdict on the evidence admitted as a consequence of the trial court's guilt-phase error, this Court must also recognize that the balance of evidence and the length of jury deliberations demonstrated that a death judgment was far from inevitable on the basis of the aggravating evidence in this case. The defense mitigation case that appellant grew up in the midst of incessant neighborhood and inter-family violence went largely uncontradicted. The mitigating evidence also demonstrated that appellant was raised without adequate adult supervision and that he was largely shut out from a meaningful education because of failings in the schools he attended. Instead, appellant received an education in the street school of "hard knocks" where he emulated older peers in an increasingly criminal lifestyle. Finally, the mitigating evidence also demonstrated, without contradiction, that appellant's teenage years were overshadowed by the premature and tragic death of close friends and family. By way of contrast, the prosecution's case in aggravation, apart from the obviously brutal nature of the capital crime, was not particularly weighty. Faced with this

evidence, the jury struggled with appellant's fate through five days of deliberation before announcing itself deadlocked. After receiving further instructions, the jury continued to deliberate for an additional three days before returning a death verdict. (44 RT 5871; 5 CT 1045, 1049, 1051, 1054, 1056-1059, 1101.)

As appellant has demonstrated in the previous argument addressing the prosecutor's misconduct (see Argument V, section D, *ante*), courts have long recognized the obvious: that lengthy deliberation indicates a close case. Many cases involving deliberations far shorter than the deliberations of appellant's jury have rightly been described as close cases. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Woodard* (1979) 23 Cal.3d 329, 341; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637; *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d, 851, 855.)

Significantly, during deliberations on February 4, 1993, the seventh day of deliberations and the day before it returned its verdict, the jury requested to see Paniagua's handwritten notes, as well as to re-hear a portion of the tape recording of appellant's interrogation.[124] (44 RT 5883-5888.) This is compelling evidence that the jury, having previously announced its seeming inability to arrive at a penalty verdict, was again focusing on appellant's statements to the police in deciding whether he should live or die. Here, too, this Court has recognized that the jury's requests during deliberations provide strong clues to the importance of

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[124] Since Paniagua's notes were not admitted in evidence at trial, this request was refused by the trial court. (44 RT 5884.) However, the jury was shown portions of the transcript of appellant's interrogation, after a stipulation by counsel that the transcript could serve as a substitute for the replaying of the tape. (44 RT 5883-5887.)

evidence implicated by those requests. (*People v. Garcia* (2005) 36 Cal.4th 777, 782 [jury's request to visit crime scene indicated likelihood of lingering questions about shooter's location; failure to heed the request was not harmless].) Thus, it would defy both logic and common sense to conclude that the People have shouldered their heavy burden of proving beyond a reasonable doubt that the erroneous admission of appellant's statements did not contribute to the resulting death judgment. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448.)

F. Conclusion

The record is replete with instances of the prosecutor's incessant exploitation of the statements appellant made to the police in his interrogation and in the staged meeting with Lisa Henry. As the state cannot possibly be said to have carried its federal constitutional burden of demonstrating beyond a reasonable doubt that the erroneous admission of those statements did not contribute to the jury's guilt and penalty verdicts, reversal of appellant's convictions and the death judgment is required.

VII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED REVERSIBLE ERROR BY GIVING A UNANIMITY INSTRUCTION WHICH DIRECTED A GUILTY VERDICT OF FIRST DEGREE MURDER

A. Introduction

Appellant was prosecuted for first degree murder on the dual theories of felony murder and deliberate, premeditated murder. The only special circumstances alleged were that the murder was committed in the perpetration of, or attempted perpetration of burglary and robbery. Appellant was *not* charged with the substantive crimes of burglary, robbery, or the attempt to commit those crimes. Instead, the only crime charged in the Information was murder. (1 CT 194-195.)

The trial court orally instructed the jurors that if they were satisfied beyond a reasonable doubt that appellant made an entry with the specific intent to steal or to commit robbery, they "must" find appellant guilty. This instruction was based on CALJIC No. 14.59 (Burglary – Agreement as to Theft or Felony Not Necessary). The written instruction did not contain a title or heading other than "1459," and employed the word "should" rather than "must." Neither the written nor oral instruction contained language identifying the crime as to which the jury "should" or "must" find guilt. This instruction therefore directed the jury to find appellant guilty of murder.

The instruction given by the trial court, as its title and Use Note make clear, is intended for use only in cases in which burglary is charged *and* there is evidence of an intent to commit some felony or felonies in addition to theft. As stated, appellant was not charged with the substantive

crimes of burglary or robbery, and the prosecution only sought to prove that appellant entered the victim's residence with the intent to steal. Thus, when the trial court instructed pursuant to CALJIC No. 14.59, it delivered a dangerously irrelevant instruction. More significantly, because the only crime available upon which the jury could return a guilty verdict consistent with CALJIC No. 14.59's language was first degree murder, the trial court's instruction directed such a verdict in contravention of appellant's Sixth and Fourteenth Amendment rights to trial by jury and due process and their state constitution counterparts under article I, sections 7, 15, and 16. Consequently, reversal of the entire judgment is required.

B. Factual Background

After orally instructing the jury on first degree felony murder (34 RT 4600-4602) and the felony-murder special circumstances (34 RT 4603-4607), the trial court undertook to explain the law relating to the crimes of burglary and robbery. The trial court prefaced its explanation as follows: "Now, I've been telling you about robbery and burglary, and I'm going to define those crimes for you so you know what we are talking about." (34 RT 4608.) After defining those two crimes, the trial court delivered the following instruction, based on CALJIC No. 14.59:[125]

> If you are satisfied beyond a reasonable doubt and agree unanimously that the defendant made an entry with the specific intent to steal or to commit robbery, a felony, you

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[125] CALJIC No. 14.59 provides as follows:

If you are satisfied beyond a reasonable doubt and agree unanimously that defendant made an entry with the specific intent to steal or to commit _____, a felony, you should find the defendant guilty. You are not required to agree as to which particular crime the defendant intended to commit when [he][she] entered.

must find the defendant guilty. You are not required to agree as to which specific crime the defendant intended to commit when he entered. Okay. Now, I'm going to give you the concluding instructions.

(34 RT 4610.) The printed instruction contained the same instruction with one change: instead of the word "must," the word "should" was employed, which made the written instruction conform to the exact language of CALJIC No. 14.59. (3 CT 764.) Here, as appellant will demonstrate, this irrelevant unanimity instruction inexorably had the constitutionally-impermissible consequence of directing a verdict of guilty to first-degree murder.

C. The Sixth and Fourteenth Amendments Preclude the Trial Court From Directing a Guilty Verdict of First Degree Murder

The rule against directed verdicts is both venerable and a bedrock of the right to trial by jury and due process of law under the Sixth and Fourteenth Amendments. (*United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 572-573; *Brotherhood of Carpenters v. United States* (1947) 330 U.S. 395, 40; *Sparf v. United States* (1895) 156 U.S. 51, 105.) It remains the rule today. (See *Connecticut v. Johnson* (1983) 460 U.S. 73, 84 ["The Court consistently has held that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction'" (plurality opn., Blackmun, J.).)

Justice Scalia explained the principle in this fashion:

> The constitutional right to a jury trial embodies 'a profound judgment about the way in which law should be enforced and justice administered.' [Citation.]. It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over

> the life and liberty of the citizen to one judge or to a group of judges." [Citation]. A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt.

(*Carella v. California* (1989) 491 U.S. 263, 268 (conc. opn. of Scalia, J.).)

Indeed, the Supreme Court has underscored the right to have a jury, rather than a judge, make the decision whether the defendant is guilty or not, as the single most important element of the constitutional right to trial by jury in serious criminal cases. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277.) This Court, too, has recognized the federal constitutional underpinnings of the rule against directed verdicts. (*People v. Figueroa* (1986) 41 Cal.3d 714, 724.)

That rule is also violated even where the trial court's charge to the jury is indirect or conditional. Thus, it was not necessary for the judge to have baldly told the jurors that they should or must find appellant guilty of murder for the line to have been crossed. Consequently, the instruction operated as an impermissible mandatory conclusive presumption of guilt of murder upon a finding that "defendant made an entry with the specific intent to steal or commit robbery. . . ." (See *Sandstrom v. Montana* (1979) 442 U.S. 510.) "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 so doing by eliminating other relevant considerations if the jury finds one fact to be true.'" (*People v. Figueroa*, *supra*, 41 Cal.3d at p. 724, quoting *United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144.) Drawing from precedent from the Fifth Circuit, this Court in *Figueroa* illustrated the point that the rule against directed verdicts is violated by instructions that have the effect of

directing a verdict. "[No] fact, not even an undisputed fact, may be determined by the judge." *(Roe v. United States* (5th Cir. 1961) 287 F.2d 435, 440, cert. den. (1961) 368 U.S 824; accord *United States v. Musgrave* (5th Cir. 1971) 444 F.2d 755, 762.)" This is precisely what occurred at appellant's trial, whether one views the written or oral charge to the jury under CALJIC No. 14.59.

1. The Instruction Unconstitutionally Directed a Verdict of First Degree Murder By Employing Language That the Defendant Should/Must Be Found Guilty

As delivered in this case, CALJIC No. 14.59 unconstitutionally directed a guilty verdict because it employed language that channeled the jury's decision down a one-way street toward conviction.[126] (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 277; *Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 521-522.) As this Court has recognized, the prohibition against directed verdicts includes situations in which the judge's instructions fall short of directing a guilty verdict but effectively achieve that result by eliminating relevant considerations upon proof of one fact. (*People v. Figueroa*, *supra*, 41 Cal.3d 714, 724.) That is exactly what was accomplished at appellant's trial by giving CALJIC No. 14.59. The jury was implicitly told that if they unanimously agreed beyond a reasonable doubt that appellant committed a burglary, but no more, he should (written instruction) and must (oral instruction) be found guilty – of first degree

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[126] As appellant will demonstrate, *post*, the instruction was also constitutionally defective because it failed to identify burglary as the crime implicated by the legal principles set forth in the instruction.

murder.[127]

Even before *Figueroa*, this Court has recognized and applied the rule that instructions which have the effect of directing a verdict upon the fulfillment of conditional jury findings will result in reversible error. (*People v. Guerra* (1985) 40 Cal.3d 377, 386 [defective instruction on attempted murder implied that jury should find defendant guilty under circumstances in which specific intent to kill was not necessarily proved].) Indeed, in *Figueroa*, this Court cited *United States v. Hayward*, *supra*, 420 F.2d 142, 144-145, as an illustration of how the rule is violated by instructions that have the effect of directing a verdict. (*People v. Figueroa*, *supra*, 41 Cal.3d at p. 724.) In *Hayward*, the Court of Appeals found reversible error in an instruction that informed the jury the defendant must be found guilty if it believed beyond a reasonable doubt that he was present when and where the offense was committed, in light of his alibi defense. (*United States v. Hayward*, *supra*, 420 F.2d at pp. 144-145; accord *Watts v. United States* (D.C. 1974) 328 A.2d 770, 773; *Baker v. United States* (D.C. 1974) 324 A.2d 194, 197.) Further, in the context of directing a verdict, it has been recognized that there is little difference between the words "should" and "must" when they are uttered by the trial judge during instructions. (*United States v. Pierre* (D.C. Cir.1992) 974 F.2d 1355, 1357.)

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[127] Under California law, in order to find burglary felony murder, it is not enough that a murder occur during a burglary or vice-versa. The prosecution must prove beyond a reasonable doubt that the defendant had an independent felonious purpose to commit one of the felonies enumerated in section189 (*People v. Green* (1980) 27 Cal.3d 1, 61-62; *People v. Anderson* (1968) 70 Cal.2d 15, 35-36), and that intent must be *concurrent* with the killing.

It is instructive that the "should find the defendant guilty" terminology employed in CALJIC No. 14.59 has not been carried over in California's new pattern criminal instruction, the California Judicial Council California Criminal Instructions (CALCRIM), which became effective on January 1, 2006. Thus, the legal principle embodied in CALJIC No. 14.59 appears at the conclusion of CALCRIM No. 1700 [Burglary], and reads as follows:

> [The People allege that the defendant intended to commit (theft/[or] <insert one or more felonies>). You may not find the defendant guilty of burglary unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes (he/she) intended.

As can be seen, the CALCRIM instruction remedies both of the inherent defects in CALJIC No. 14.59 as it was given at appellant's trial. First, it makes it clear that the legal principle embodied in the instruction is germane only to whether the defendant is guilty of burglary, and no other crime. Second, the new instruction eschews language which directs a verdict. Instead, it phrases the legal principle in a way that precludes conviction for burglary unless the jury unanimously agrees that the defendant effected entry with the intent to commit any of the designated crimes.

The new CALCRIM formulation was not the only way to skin the cat. For the purpose of getting the point across that the jury need not unanimously agree on which crime the defendant intended to commit at the time of entry, a trial court could have simply instructed the jury by modifying CALJIC No. 14.59 as follows:

> For the purpose of deciding whether the defendant committed a burglary, you must be satisfied beyond a

> reasonable doubt and agree unanimously that he made an entry with the specific intent to steal or to commit (<insert one or more felonies>). You are not required to agree as to which particular crime the defendant intended to commit.

It should not matter that the written instruction used the term "should" and the oral instruction used the word "must" as the terms are not contradictory. (See *Francis v. Franklin* (1985) 471 U.S. 307, 322 [language that merely contradicts but does not explain a constitutionally infirm instruction cannot suffice to absolve the infirmity, as a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors followed in reaching a verdict].) This is not a situation in which it is necessary to employ the presumption that the jury applied the "correct" written instruction instead of the improper oral rendition. (*People v. Crittenden* (1994) 9 Cal.4th 83, 138.) Regardless of whether the court instructed the jury with the word "should" or "must," the inescapable message was the same: the physical embodiment of authority, legal knowledge, and sagacity was telling the jury to find appellant guilty. "The influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest word or intimation is received with deference, and may prove controlling." (*People v. Proctor* (1992) 4 Cal.4th 499, 563, quoting *Bollenbach v. United States* (1946) 326 U.S. 607, 612.) It is of no consequence that the trial court may not have intended to direct the jury to find appellant guilty of murder when it delivered CALJIC No. 14.59. It surely had that effect. Just as in the case of prosecutorial misstatement in closing argument, the intent behind the trial court's misguided instruction does not make the resulting injury any less painful. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

Even in its written form, the instruction created an impermissible

mandatory presumption that required the jury to accept as reasonable the conclusion that appellant was guilty of first degree murder if he committed burglary, unless appellant could somehow rebut the presumption by producing a reason why the jury should not find him guilty. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin*, *supra*, 471 U.S. at p. 314, emphasis 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.)

2. The Instruction Was Defective By Failing to Identify the Crime For Which the Defendant Should/Must Be Found Guilty

By the very terms of the instruction, the jury was told they should (written instruction) and must (oral instruction) find appellant guilty, if they were satisfied beyond a reasonable doubt and agreed unanimously that appellant made an entry with the specific intent to steal or to commit robbery. The critical question posed by the instruction was: Guilty of what? Because the only verdict form that called for a guilty verdict was the verdict form for murder (see 3 CT 703), the instruction "perforce" directed the jury to find appellant guilty of that crime. Thus, the jury was effectively told that so long as they unanimously found that appellant made an entry with the specific intent to steal or rob, he should/must be found guilty of murder. According to the very terms of the instruction, the prosecution was required to prove nothing more.

This Court has twice had occasion to confront similar claims, but never where the defendant was solely accused of murder. In both cases, that distinction made all the difference.

In *People v. Osband* (1996) 13 Cal.4th 622, the defendant was charged and convicted in connection with two separate incidents. The first incident resulted in charges of capital murder, robbery, attempted rape and burglary, whereas the subsequent incident led to charges of attempted murder, robbery, assault with intent to commit rape and burglary. (*Id.* at pp. 652-653.) The trial court instructed the jury in writing pursuant to CALJIC No. 14.50, which defined the crime of burglary, and followed that instruction with other instructions germane to the law of burglary, including a modification of the then-applicable version of CALJIC No. 14.59.[128] However, the trial court's oral version of CALJIC No. 14.59 omitted the words "of burglary" so that it read that if the jury found Osband had entered with intent to steal or rape, it "should find the defendant guilty. . . ." (*Id.* at pp. 686-687.)

In rejecting Osband's claim that the trial court's oral instruction directed the jury to find him guilty of all crimes charged if it decided he entered the respective structures with intent to steal or rape, this Court found that the trial court's misstatement of CALJIC No. 14.59 was error, albeit harmless. (*Id.* at p. 687.) First, this Court noted that the written form of the instruction was not contended to be erroneous. Second, the jury "had before them six copies of the written version when they began to deliberate,

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[128] Osband's jury received this modification of CALJIC No. 14.59: "If you agree unanimously that defendant made an entry with the specific intent to steal or to commit rape, a felony, you should find the defendant guilty of burglary, and you are not required to agree on which particular crime the defendant intended to commit when he entered." (*Id.* at pp. 686-687.)

and we presume that they were guided by those copies."[129] (*Ibid.*, citing *People v. Crittenden*, *supra*, 9 Cal.4th at p. 138.) What is significant in this Court's decision in *Osband* is the recognition that eliminating the words "of burglary" from CALJIC No. 14.59 constitutes error.

Clearly, that error is to be found in the plain language of the instruction which directs the jury to convict the defendant of a crime distinct from burglary upon a mere finding that burglary has been proved beyond a reasonable doubt. Of course, the potential that such error will taint the jury's verdict is greatest where, as here, there is a close relationship between (1) the uncharged burglary and (2) the prosecutor's felony-murder theory of liability and/or the felony-murder special circumstance allegation.

One year after *Osband*, this Court was again faced with a challenge to CALJIC No. 14.59. In *People v. Holt* (1997) 15 Cal.4th 619, the defendant was charged with burglary, robbery, and rape in addition to capital murder. He claimed that instructing his jury in the language of CALJIC No. 14.59, i.e., by telling the jurors that "[i]f you are satisfied beyond a reasonable doubt and agree unanimously that the defendant made an entry with the specific intent to steal or commit rape or sodomy, felonies, you should find the defendant guilty" (*id.* at p. 680), created a mandatory presumption that he was guilty of all the charged crimes. Without even a passing citation to *Osband*, which recognized that such an instruction is erroneous, this Court rejected the "mandatory presumption" argument:

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[129] Even though this presumption rendered the error harmless, presumably in the absence of a claim that giving CALJIC No. 14.59 erroneously directed a verdict in all cases where the accused was charged with offenses in addition to burglary, this Court emphasized the importance of trial judges delivering jury instructions with care. (*Id.* at p. 688.)

> Even without consideration of the instructions on the other charged offenses, each of which advised the jury of all of the elements of the crimes and that each element had to be proven, the claim lacks merit. The burglary instructions themselves made it clear that this language referred only to defendant's guilt of burglary.

(*Ibid.*)

Initially, it cannot be overemphasized that the case at bar differs essentially from *Holt* (and *Osband*, for that matter) in that appellant was not facing a substantive charge of burglary as to which the jury would have been required to deliver a guilty/not guilty verdict. Indeed, at the conference to resolve the appropriate jury instructions for this case, defense counsel's attempts to have the jury instructed on burglary as a lesser-related offense to murder under *People v. Geiger* (1984) 35 Cal.3d 510 were vigorously and successfully resisted by the prosecutor.[130] There, he argued that appellant could only properly be found guilty of murder or not at all. (RT 4345-4351.) In marked contrast to *Holt*, finding appellant guilty of the substantive and separate crime of burglary was not "on the table" for the jury to decide.

To reiterate the key point, it was impossible for the remaining burglary instructions to have made it clear that the "should/must find the defendant guilty" language in either version of the trial court's CALJIC No. 14.59 instruction referred only to defendant's guilt of burglary, since this

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[130] *Geiger*'s holding, entitling a defendant to instructions on lesser-related offenses, was overruled by *People v. Birks* (1998) 19 Cal.4th 108, 136. However, the *Geiger* rule was in effect at the time of appellant's trial. It was in connection with the defense request for comprehensive burglary instructions that defense counsel initially submitted a list of requested instructions which included CALJIC No. 14.59. (3 CT 660-662.)

defendant's *guilt* of burglary was not a matter the jury was required to decide. And unlike *Holt*, the instructions for the only charged crime, i.e., murder, did not make it clear that each element of the crime of murder had to be proved separately and distinct from the uncharged crime of burglary. Under one of the two available theories of murder liability, a finding of burglary substituted for the malice otherwise required to be proved for a murder conviction.

F. The Error in Giving CALJIC No. 14.59 Requires Reversal

When a verdict of guilt is directed, the error is automatically reversible. (*Carella v. California*, *supra*, 491 U.S. at p. 266; *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282; see also *People v. Hutchins* (1988) 199 Cal.App.3d 1219, 1223 (conc. opn. of Benke, J.).) Because the rule against directed verdicts flows directly from the Sixth Amendment's "clear command" to afford jury trials in "serious criminal cases," the courts will not brook the state's contention that the error in directing a verdict is harmless in light of the evidence marshaled against the defendant at trial. The error in directing a verdict is that the wrong entity has decided guilt, and that error is immune from cure by yet another judicial body. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281.) When a judge rather than a jury has decided the outcome of a criminal jury trial – as here, by communicating to the jury that it either should or must find that appellant guilty if he entered the victim's home with the intent to steal or rob – the conviction cannot stand consistent with the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process of law. (See also *People v. Figueroa*, *supra*, 41 Cal.3d 714.)

G. Conclusion

CALJIC No. 14.59, as delivered at appellant's trial, is an instruction that can only be justified, if at all, in a case in which burglary is substantively charged as a separate crime and where the evidence shows that entry was effected with a specific intent to do more than merely steal. This is emphatically not such a case. Because the trial court's instructions told the jury that it should and must find the defendant guilty if it was satisfied he committed mere burglary, it for all practical purposes directed a guilty verdict on the only charged crime, i.e., first degree murder. Consequently, automatic reversal of the entire judgment is required under the Sixth and Fourteenth Amendments.

VIII

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

After the trial court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 3 CT 739-740; 34 RT 4599-4600) or killed during the commission or attempted of burglary and/or robbery (CALJIC No. 8.21; 3 CT 741; 34 RT 4600-4601), the jury found appellant guilty of murder in the first degree (3 CT 702-703). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[131]

The information read that "[t]he District Attorney of the County of Alameda hereby accuses GREGORY O. TATE of a felony, to wit, Murder, a violation of Section 187 of the Penal Code of California, in that on or about the 18th of April, 1988, in the County of Alameda, State of California, said defendant did then and there murder SARAH LACHAPELLE, a

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[131] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, it contained an entirely correct charge of second degree malice murder in violation of section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony murder in violation of section 189.

human being." (1 CT 194.) Both the statutory reference ("Section 187 of the Penal Code") and the description of the crime ("did then and there murder") establish that appellant was charged exclusively with second degree malice murder in violation of section 187, not with first degree murder in violation of section 189.[132]

Section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)

Subdivision (a) of section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." "Section 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies. . . ." (*People v.*

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[132] The information also alleged burglary and robbery special circumstances. (1 CT 194-195.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Also, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61).

Watson (1981) 30 Cal.3d 290, 295.)[133]

Because the information charged only second degree malice murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon]).

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by section 187, so that an accusation in the language of that statute

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[133] In 1988, when the murder at issue allegedly occurred, section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Sections 288, is murder of the first degree; and all other kinds of murders are of the second degree.

adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[134] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

(*Id.* at pp. 107-108.)

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder

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[134] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344; citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was not "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472; emphasis added [fn. omitted].)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be section 189.

No other statute purports to define premeditated murder (see § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly are distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[135]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of section 187, second degree malice murder includes the element of malice (*People v. Dillon*, supra, 34 Cal.3d at p. 475; *People v. Watson*, *supra*, 30 Cal.3d at p. 295), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a

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[135] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.); original emphasis.)

lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.'" (*Id.* at p. 476; emphasis added [citation omitted.])[136]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (§ 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime

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[136] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's conviction for first degree murder must be reversed.

IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

As previously noted (see Argument VIII, *ante*), the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 3 CT 739-740; 34 RT 4599-4600) and on first degree felony murder predicated on burglary/attempted burglary and on robbery/attempted robbery (CALJIC No. 8.21; 3 CT 741; 34 RT 4600-4601). However, the court did not instruct the jury that it had to agree unanimously on the same type of first degree murder.

The failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was erroneous, and the error deprived appellant of his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100,

1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) However, appellant submits that this conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." (*Id.* at p. 475.) It then declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.)[137]

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712 [holding that "[f]elony murder and premeditated murder are not distinct crimes]"), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at page 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, quoted above, "meant that the elements of the two types of murder are not the

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[137] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference. . . ." (*People v. Dillon*, *supra*, at pp. 476-477; fn. omitted.)

same" (original emphasis). Similarly, this Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.), quoted in fn. 135, at p. 330, *ante*) and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S. 227, 232). Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those crimes are different or the same. The question first arose as an issue of statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each

provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockburger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[138] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.)).

Malice murder and felony murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." (*Blockburger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony

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[138] "The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence – including the 'same elements' test for determining whether two 'offence[s]' are 'the same,' see *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.), original emphasis.)

listed in section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, that the language in *People v. Dillon*, *supra*, on which appellant relies, "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394; first italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476; see *id.* at p. 490.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict 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 (1980) 447 U.S. 343, 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. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) 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* (1980) 447 U.S. 625, 638). Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*.) There are three reasons why this is so.

First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th

647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony has likewise been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Steger* (1976) 16 Cal.3d 539, it declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.]

(*Id.* at p. 545 [emphasis added], quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[139]

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[139] Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written [*sic*] by the Legislature" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; see also *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839). Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433;

(continued...)

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (§ 189), not means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (§§ 189 & 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 301-307; *Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, include the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice

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[139] (...continued)
citations and internal quotation marks omitted.)

while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; accord, *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Malice is a true "element" of murder in anyone's book.

Accordingly, it was error for the trial court to fail to instruct the jury that it must agree unanimously on whether appellant had committed a premeditated murder or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless-error analysis can operate. The failure to so instruct was a structural error, and reversal of the entire judgment is therefore required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

X

A SERIES OF INSTRUCTIONS UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

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." (3 CT 733; 34 RT 4596-4597.) (See *Taylor v. Kentucky* (1978) 436 U.S. 478; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463-464.)

These principles were supplemented by several instructions that explained the meaning of reasonable doubt. As delivered at appellant's trial, CALJIC No. 2.90 defined reasonable doubt for the jurors 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 that 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, to a moral certainty, of the truth of the charge.

(3 CT 733; 34 RT 4597.)

This version of CALJIC No. 2.90 suffered from the archaic defects discussed by the United States Supreme Court in *Victor v. Nebraska* (1994) 511 U.S. 1, and by this Court in *People v. Freeman* (1994) 8 Cal.4th 450, which led to an amendment to section 1096 in 1995 and a corresponding change in CALJIC No. 2.90 that same year. Although that instruction was not held violative of due process in *Victor*, the majority was "concerned" with the "moral certainty" language, did "not condone the use of the phrase," and warned that the evolution of its meaning may at some point be

deemed to "conflict[ ] with the *Winship* standard." (511 U.S. at pp. 13-16; see *Freeman*, at p. 504.) One of the concurring justices in *Victor* found California's use of the term "moral evidence" even more "troubling" than the reference to "moral certainty," and "quite indefensible," and warned that "[t]he inclusion of words so malleable, because so obscure, might in other circumstances, have put the whole instruction at risk." (511 U.S. at p. 23 (concurring opn. of Kennedy, J.).) Here, in combination with the other instructions, it was reasonably likely to have led the jury to convict appellant on proof less than beyond a reasonable doubt in violation of appellant's Fourteenth Amendment right to due process (see *In re Winship* (1970) 397 U.S. 358).

Appellant's jury was given four interrelated instructions on the meaning of reasonable doubt which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence, and addressed proof of specific intent and/or mental state.[140] Excepting the fact that they were intended to address different evidentiary points, each of these four instructions informed the jury, in essentially identical terms, that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation appears to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (3 CT 715, 717, 753-754, 757; 34 RT 4589, 4591, 4606-4607.)

This instructional mantra, here repeated four times, was contrary to

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[140] CALJIC No. 2.01 [circumstantial evidence re: guilt of crimes (3 CT 715; 34 RT 4588-4589); CALJIC No. 2.02 [specific intent or mental state re: crimes (3 CT 717; 34 RT 4590-4591); CALJIC No. 8.83 [circumstantial evidence re: special circumstances (3 CT 753-754; 34 RT 4605-4606); CALJIC No. 8.83.1 [mental state re: special circumstances] (3 CT 757; 34 RT 4607).

the due process requirement that the defendant may be convicted only if guilt is proved beyond a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. 358; *Jackson v. Virginia* (1979) 443 U.S. 307.)

These instructions misled the jury into believing that it could find appellant guilty if he reasonably appeared guilty, even when jurors still entertained a reasonable doubt of appellant's guilt. This is constitutionally defective for at least two reasons. First, telling jurors that their "duty" is to accept a guilty interpretation of the evidence as long as it "appears to be reasonable," is inconsistent with proof beyond a reasonable doubt; it allows a finding of guilt based on a degree of proof below that required by the Due Process Clause. (See *Cage v. Louisiana* (1990) 498 U.S. 39.)

Further, the instructions required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." The jurors were told that they "must" accept or adopt such an interpretation. Thus, the instruction operated as an impermissible mandatory conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (See *Sandstrom v. Montana* (1979) 442 U.S. 510.)

The instruction also misled the jury by stating that if there are two reasonable interpretations, one pointing to guilt and the other to innocence (or one pointing to the truth of a special circumstance and the other to its untruth), it should accept the one pointing to innocence (or the one pointing to the untruth of the special circumstance). (3 CT 715, 753; 34 RT 4589, 4606.) The prosecution's burden of proof beyond a reasonable doubt means that a defendant is not required to put forward any theory of innocence in order to be entitled to an acquittal, or to explain the incriminating evidence; a juror could therefore appropriately conclude from the prosecution's evidence that only incriminatory inferences "appear" to be reasonable, and

yet also conclude that a conviction is unwarranted because there were insufficient incriminating inferences to establish guilt beyond a reasonable doubt. However, under the facts of this case, this instruction had the effect of reversing the burden of proof, since it required the jury to find appellant guilty, and to find the special circumstances true, unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecutor. Given the prosecution's total reliance on circumstantial evidence to prove first degree murder and the two special circumstances allegations, the erroneous instructions were prejudicial with regard to guilt, special circumstances, and the death sentence.

Moreover, defense counsel presented the trial court with an alternative circumstantial evidence instruction; one that did not contain the aforementioned flaws. Defense counsel proposed that the jurors be instructed with a modified version of CALJIC No. 2.01, as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence alone, unless such circumstantial evidence "produces a reasonable and moral certainty that the accused, and that no other person, committed the crime charged."[141]
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> "In order to convict the defendant upon the evidence of

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[141] Defense counsel indicated, in the written proposed instruction, that the internally quoted language originated in *People v. Madison* (1935) 3 Cal.2d 668 at page 677.

> circumstances it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the information, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant not guilty."

(3 CT 664.)[142] The prosecutor opposed the modified instruction for no reason other than the fact that cited authorities were not of recent vintage. The trial court, however, refused the requested instruction, explaining that "I slavishly adhere to the CALJIC instructions."[143] (33 RT 4351-4353.)

Clearly, the proposed defense modification of the circumstantial evidence instruction both properly stated the law and remedied the indicated flaw in CALJIC No. 2.01. The defense instruction should have been given, and its refusal here was erroneous, both standing alone and in combination with the giving of the other instructions referenced herein, all of which had the synergistic effect of undermining and diluting the reasonable doubt standard. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

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[142] Defense counsel indicated, in the written proposed instruction, that the internally quoted language originated in *People v. McClain* (1931) 115 Cal.App. 505 at page 510.

[143] While the trial court, for the most part, rigidly conformed to CALJIC, it should be noted that the court was not reluctant to grant the prosecution's requested People's Special Instruction No. 3, instructing the jurors that "[t]o prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act" (3 CT 675), even after defense counsel had pointed out that the prosecutor's request was not a CALJIC instruction. (33 RT 4389-4391.)

The jury's puzzlement over the meaning of reasonable doubt must also have been underscored by other instructions, which misdirected the jury by informing them that their duty was to establish whether appellant was guilty or innocent, not whether he was guilty or not guilty beyond a reasonable doubt, further violating appellant's constitutional rights as enumerated above. 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." (3 CT 710; 34 RT 4586.) CALJIC No. 2.51, addressing motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence."[144] (3 CT 728; 34 RT 4594.) This latter instruction also characterized the jury's choice as one of determining guilt or innocence. Such instructions alleviated the prosecutor's burden of proof because the issue is not one of guilt or innocence, but whether there is a reasonable doubt as to the prosecution's evidence. The errors encouraged jurors to find appellant guilty because it had not been proven that he was "innocent." This serious flaw in CALJIC No. 2.51 caused the instruction to be revised in the latest edition of CALJIC, so that the concluding sentence of the instruction now reads: "Absence of motive may tend to show the defendant is not guilty." (CALJIC No. 2.51 (6th ed. 1996).) Similarly, the California Judicial Council California Criminal Instructions (CALCRIM), which became effective on January 1, 2006, eliminated the improper

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[144] The giving of CALJIC No. 2.51 in this case was error for other reason, as set forth in greater detail in Argument XII, *post*.

reference to "innocence" so that the motive instruction (CALCRIM No. 370) correctly informs the jurors that "[n]ot having a motive may be a factor tending to show the defendant is not guilty."

CALJIC No. 2.21.2, also given at appellant's trial, further lightened the prosecution's burden of proof. (See *Sandstrom v. Montana*, *supra*.) This instruction informed the jury that a witness "who is willfully false in one material part of his or her testimony, is to be distrusted in others" and that it could "reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (3 CT 725; 34 RT 4593-4594.) This instruction lightened the prosecution's burden of proof by allowing the jury to gauge prosecution witnesses by seeking only a probability of truth in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040.)

CALJIC No. 2.21.2 also improperly created and heightened a burden of proof for appellant to meet: For instance, if the jury found some part of appellant's own testimony not to be true, appellant did not merely have to raise a reasonable doubt about the prosecution's case; he also had to establish that "the probability of truth favor[ed] his [own] testimony." In addition, the instruction appeared in this case to be directed at appellant's testimony exculpatory of first degree murder and the special circumstance allegations and thus improperly lessened the prosecution's burden by singling out appellant's testimony for suspicion.

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 caprice, 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.

(3 CT 726; 34 RT 4594.) This instruction plainly informed the jurors that their ultimate concern must be to determine which side has presented evidence that is comparatively more convincing than that presented by the other side. 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 a measure virtually indistinguishable from the lesser "preponderance of the evidence standard," viz., "not in the relative number of witnesses, but in the convincing force of the evidence." Moreover, the essential directive of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven 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* (1993) 508 U.S. 275, 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

When viewed with the other instructions discussed above, it is clear that the reasonable doubt instruction was vitiated and the burden on the prosecution was diminished. In essence, the jury was instructed that the fundamental question was "guilt" versus "innocence," and that the evidence bearing on that question was to be weighed as the jury saw fit.

CALJIC No. 2.27, concerning the sufficiency of the testimony of a single witness to prove a fact (3 CT 727; 34 RT 4594), likewise was flawed because it erroneously suggested to the jurors that the defense, as well as the prosecution, had the burden of proving facts. The defense cannot constitutionally be required to establish or prove any "fact." Here, appellant took the stand and denied committing any charged crime or any act necessary for the proof of the charged special circumstances, although he did admit stealing the victim's personal property and car. However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists" – without qualifying this language to apply only to prosecution witnesses – would permit a reasonable juror to conclude that (1) appellant himself had the burden of convincing them that the homicide was not a felony murder or premeditated and deliberate, and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a moral 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 the instruction in question, and this Court should now find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, the instruction 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. . . ." (3 CT 739; 34 RT 4599; emphasis added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely preclude the possibility of premeditation – as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632.)

"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." (*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 required the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – -that he or she must find the defendant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions complained of herein violated appellant's constitutional rights cited above.

In a case in which the questions of guilt of first degree murder and of the truth of the special circumstances were so demonstrably close (see Argument V, at pp. 254-255, ante), this 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; *Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 526-527; *Chapman v. California* (1967) 386 U.S. 18, 24.)

The entire judgment must be reversed.

XI

THE TRIAL COURT VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AND COMMITTED PREJUDICIAL ERROR BY DELIVERING, OVER APPELLANT'S OBJECTIONS, CALJIC NOS. 2.03 AND 2.06

A. Introduction

At the guilt phase, the trial court delivered two instructions relating to appellant's purported consciousness of guilt: CALJIC Nos. 2.03 and 2.06. These instructions, which were given at the request of the prosecution and over defense objection, erroneously and unfairly permitted the jury to draw critically adverse inferences against appellant with respect to the charged offense of first degree murder and the special circumstance allegations. The instructional errors discussed herein, especially when considered in combination, deprived appellant of due process, a fair jury trial, and reliable jury determinations on guilt, special circumstances and penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.) Accordingly, they require reversal of the entire judgment.

B. On the Facts of This Case, the Trial Court Prejudicially Erred by Giving CALJIC Nos. 2.03 and 2.06

At the prosecution's request and over appellant's objection, the trial court gave CALJIC No. 2.03 (Consciousness of Guilt – Falsehood). The instruction as given to the jury read as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crime for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(34 RT 4591; see 3 CT 718 [written version].) At the jury instruction

conference, defense counsel specifically objected to the giving of this instruction. (33 RT 4402.)

Again at the prosecution's request, the trial court gave a similar instruction, i.e., CALJIC No. 2.06 (Efforts To Suppress Evidence). This instruction, as given to the jury, read as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(34 RT 4591-4592; see 3 CT 719 [written version].) During the hearing to resolve which instructions were to be given, defense counsel objected to instructing the jury pursuant to CALJIC No. 2.06, arguing that the evidence did not support the instruction. (33 RT 4356-4358.)

On the facts of appellant's case, these consciousness-of-guilt instructions unconstitutionally embodied improper permissive inferences. For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County v. Allen* (1979) 442 U.S. 140, 142; *United States v. Gainey* (1965) 380 U.S. 63, 66-67.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313; see also *People v. Hannon* (1977) 19 Cal.3d 588, 597 ["It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the

suggested inference."].) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28.) This test is applied to judge the inference as it operates under the facts of each specific case. (*Id.* at pp. 157, 162-163.)

CALJIC No. 2.03 created such a constitutionally improper permissive inference in this case. Although not articulated by the court or the prosecutor, the delivery of CALJIC No. 2.03 was obviously based on the fact that, in his interviews with the police and in his statements to Lisa Henry, appellant repeatedly denied any involvement in the homicide of Sarah LaChapelle. Instead, he told the police that he had obtained the victim's car and some personal property belonging to her from Fred Bush, and he told Lisa Henry that he was present at the time that Fred Bush killed the victim, but had tried to stop the killing. (See, e.g., 26 RT 3589; 28 RT 3764-3765; 30 RT 3996-3998, 4015-4016.) At trial, appellant readily acknowledged that he had lied to the police about how he came into possession of the victim's car and personal property (see, e.g., 32 RT 4248, 4256), however, he continued to maintain that he had not killed Sarah LaChapelle (32 RT 4266). Thus, at least some of his pretrial statements undeniably were "willfully false or deliberately misleading." (See CALJIC No. 2.03.)

As for CALJIC No. 2.06, the trial court specifically pointed to appellant's testimony as having provided a factual basis for the giving of this instruction, noting that appellant had testify that he disposed of his bloody socks between the time he had been in the victim's house and his arrival at the house he shared with Lisa Henry. Although defense counsel argued there was no evidence of appellant's intent in disposing of the socks,

the trial court found that the jury could infer that appellant was attempting to suppress evidence that could be used against him. (See, e.g., 33 RT 4357 [trial court's reasoning]; 31 RT 4195 [appellant's testimony].)

As can be seen by its very terms, however, CALJIC No. 2.03 allowed the jury to consider appellant's false pretrial statements as a circumstance in deciding his guilt "for the crime for which he is being tried." The sole crime of which appellant was charged, and for which the prosecutor was vigorously pursuing a conviction, was first degree murder. (1 CT 194-195.) The two theories of first degree murder for which appellant was being tried were willful, premeditated and deliberate murder and felony murder (burglary/robbery). However, there was no rational connection – much less one more likely than not – between appellant's admittedly false statements to the police and an inference that he premeditated and deliberated the homicide or that he committed or attempted to commit burglary of the LaChapelle residence and/or robbery of Sarah LaChapelle. All that it logically shows is that he was denying any involvement in her homicide at all; it cannot reasonably be deemed to evince a further denial that he had the requisite mental state for a first degree murder, as opposed to a second degree murder or manslaughter. Indeed, this Court has expressly recognized that while consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is irrelevant to his state of mind immediately prior to or during the killing:

> [E]vidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, *but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.*

(*People v. Anderson* (1968) 70 Cal.2d 15, 33, emphasis added.) Thus,

consciousness of guilt merely establishes fear of apprehension (*ibid.*), not premeditation, deliberation, or specific intent to make illegal entry with intent to steal or rob, attempted burglary/robbery or actual burglary/robbery.

Specifically with respect to the felony-murder allegation, moreover, appellant's general, blanket denials of any involvement in Sarah LaChapelle's death could not even conceivably be deemed to indicate a consciousness of guilt of burglary, robbery, or the attempt to commit burglary and/or robbery unless one first assumes that appellant in fact committed such a crime. (See *United States v Durham* (10th Cir. 1998) 139 F.3d 1325, 1332; *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149.) Embodying such "circular" reasoning (*ibid.*) in a jury instruction permitting a jury to arbitrarily infer guilt therefrom would – and in this case did – constitute a clear denial of due process (U.S. Const., 5th & 14th Amends.).

The same reasoning applies to CALJIC No. 2.06. That instruction operates to create the same constitutionally improper permissive inference in this case as does CALJIC No. 2.03. There was no rational connection – much less one more likely than not – between appellant's discarding his bloody socks and an inference that he premeditated and deliberated the homicide or that he committed or attempted to commit burglary of the LaChapelle residence and/or robbery of Sarah LaChapelle. All that it logically shows is that he was fearful that possession of the bloody socks would connect him to the victim's violent death; it cannot reasonably be deemed to evince a further belief that he had the requisite mental state for a first degree murder, as opposed to a second degree murder or manslaughter.

Appellant is well aware that this Court has repeatedly rejected such constitutional challenges to CALJIC Nos. 2.03 and 2.06 (see, e.g., *People v.*

Schmeck (2005) 37 Cal.4th 240, 291; *People v. Breaux* (1991) 1 Cal.4th 281, 303-304). This Court has, however, recently held that the trial court's inclusion of nontheft offenses like rape or murder in CALJIC No. 2.15 (inference of guilt from possession of recently-stolen property) is erroneous. (*People v. Prieto* (2003) 30 Cal.4th 226, 248-249.) The analytical basis for this holding – i.e., that a defendant's conscious possession of recently stolen property "'simply does not lead naturally and logically to the conclusion the defendant committed' a rape or murder" (*id.* at p. 249, citation omitted) – is logically indistinguishable from appellant's instant argument regarding the impermissible inferences allowed by CALJIC Nos. 2.03 and 2.06, but he respectfully asks this Court to reconsider and overrule its rulings in *Schmeck* and *Breaux*. Even if this Court is not inclined to do so as a general proposition, the delivery of that instruction on the peculiar facts of appellant's case must be deemed improper and unconstitutional.

This Court has asserted that "[a] reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'" (*People v. Crandell* (1988) 46 Cal.3d 833, 871.) Even accepting the correctness of this dubious assumption – which flies directly in the face of the express "crime for which he is now being tried" language of CALJIC No. 2.03 – it would render the instruction irrelevant in appellant's case, where he admitted on the witness stand that he falsely accused Fred Bush of satisfying his debt to appellant by giving him the victim's car and personal property, as well as taking the victim's property at the scene of her violent death with no plausible claim of right to do so, i.e., that he was guilty of "some wrongdoing." Moreover, this Court more recently has specifically acknowledged that "[t]he language of CALJIC No.

2.03 is clear" in "restrict[ing] consideration of prior statements as reflecting consciousness of guilt *to false statements about the charge for which the defendant is being tried.*" (*People v. Mattson* (1990) 50 Cal.3d 826, 871, emphasis added.) Thus, this Court has contradicted itself in its analysis of the purpose and effect of the instruction in question.

At the very least, the court should have given an instruction which would have expressly limited the jury's consideration of his pretrial falsehood and efforts to suppress evidence to the question of the defendant's identity as the killer. (See Evid. Code, § 355 [". . . the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"]; CALJIC No. 2.09 [Evidence Limited as to Purpose].) The court's failure to give such a limiting instruction, like the delivery of CALJIC No. 2.03 itself, lessened the prosecution's burden of proof and allowed the jury to draw impermissible inferences of guilt in violation of appellant's constitutional rights to due process and a fair jury trial (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 and 16) and his right to reliable guilt and special circumstance determinations in a capital case (U.S. Const., 8th & 14th Amends.).

In addition to the vices described above, CALJIC Nos. 2.03 and 2.06 in their standard form are impermissibly argumentative and, as such, are unconstitutionally one-sided in the prosecution's favor. This Court has repeatedly held that trial courts must refuse to give argumentative instructions. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 560.) Such instructions 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.)

Argumentative instructions are defined as those which "'invite the

jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437; accord, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 361.) 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 therefore must be refused (*ibid.*).

Judged by this standard, CALJIC Nos. 2.03 and 2.06 are improperly argumentative instructions, contrary to this Court's past conclusions on this issue. There is no discernible difference between an instruction which "properly advised the jury of inferences that could *rationally* be drawn from the evidence" (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 128, emphasis added [approving CALJIC No. 2.03]) and an argumentative instruction which "*improperly* implies certain conclusions from specified evidence" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137, emphasis added). The former holding, one of many cases decided by this Court approving the delivery of CALJIC No. 2.03, operates to a criminal defendant's substantial detriment. The latter pronouncement is reflective of, and consistent with, numerous such holdings also operating to a criminal defendant's substantial detriment – even though the two analyses and results are logically inconsistent with each other.

By permitting such pinpoint instructions in the prosecution's favor, while deeming functionally equivalent defense pinpoint instructions to be impermissibly argumentative, this Court denies criminal defendants the fundamental fairness required by the Due Process Clause of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 475-476.)

Specifically with respect to this case and this defendant, this unconstitutional one-way street (see *id.* at p. 475) was applied by the trial court in giving CALJIC No. 2.03, as well as CALJIC No. 2.06, while denying requested defense instructions as argumentative (see, e.g., 34 RT 4385).

In this case, where the jury's lengthy deliberations on the issue of guilt indicate that the prosecution's case was less than overwhelming under either theory of first degree murder, an instruction arbitrarily and unfairly permitting the jury to infer guilt of first degree murder from the defendant's general denials of responsibility for the homicide and/or from his efforts to suppress evidence cannot conceivably be deemed harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Even if viewed only as a violation of state law, it is at least reasonably probable that this instructional error would have made the difference in such a demonstrably close case. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

This inherent prejudice was compounded by the prosecutor's closing argument to the jury, in which he used CALJIC No. 2.03 to great effectiveness in his efforts to obtain a first degree murder conviction with special circumstances. In his closing summation urging the jury to return a first degree murder conviction and to find the two special circumstance allegations true and to reject the arguments of defense counsel concerning the consciousness of guilt instructions, he emphasized CALJIC No. 2.03 in conjunction with appellant's numerous false pretrial statements to the police:

> When she said the consciousness of guilt instruction, which is instruction 2.03, if you find that before this trial the defendant

> made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conflict is not sufficient by itself. By itself. And what she then tried to say to you is that does not put on the defense the burden of proving the defendant innocent. That was exactly her next line. And she's correct. But what it does tell you is that it is one circumstance that you may consider in determining *the degree of the defendant's responsibility in such a case.*

(34 RT 4558- 4559, emphasis added.)

The prosecutor's arguments juxtaposing CALJIC No. 2.03 with appellant's pretrial lies to the police, and with his asserted fabrications at trial, "demonstrate just how critical the State believed the erroneously [delivered instruction] to be." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; see *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."]; *People v. Roder* (1983) 33 Cal.3d 491, 505.) The People therefore cannot be heard to claim otherwise on appeal (see *Ghent*, *supra*, at p. 1131), especially since appellant's mental state and credibility were central to the guilt phase, and his testimony went "to the heart of [his] defense" (*id.* at p. 1130). The entire judgment must be reversed.

XII

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crime 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.

(3 CT 728; 34 RT 4594.) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const. 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

A. The Instruction Allowed The Jury To Determine Guilt Based On Motive Alone

CALJIC No. 2.51 informs the jury that motive may tend to establish that a defendant is guilty. 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* (1979) 443 U.S. 307, 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 stood out from the other standard evidentiary instructions given to appellant's jury. Notably, the other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (See 34 RT 4591-4592 [CALJIC No. 2.03 stating that with regard to whether the defendant, before trial made willfully false or deliberately misleading statements concerning the charged crime, and CALJIC No. 2.06 stating with regard to an attempt to suppress evidence, that each circumstance "is not sufficient by itself to prove guilt . . . ."].)

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon 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. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7 & 15.

B. The Instruction Impermissibly Lessened The Prosecutor's Burden Of Proof And Violated Due Process

The jury was instructed that an unlawful killing during the commission of a burglary or robbery is first degree murder when the perpetrator has the specific intent to commit burglary or robbery. (34 RT 4600-4601.) By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on three crucial, contested elements of the prosecutor's capital murder case – i.e., that appellant had the intent to steal, to rob, and 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* (1979) 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"].)

There is no logical way to distinguish motive from intent in this case. The only theory supporting the first degree felony-murder allegation was

that appellant killed the victim in order to rob her. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms. (See, e.g., *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87 [purpose, motive and intent used synonymously to describe necessary mental state of an aider and abettor]; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008 [intent to rob described as the motivating factor of the crime of kidnaping for the purpose of robbery]; *People v. Bowman* (1958) 156 Cal.App.2d 784, 795 [conspiracy instruction proper because jury would understand that essential element of evil intent was synonymous with a "corrupt motive"]; *Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6 [intent, purpose and motive were synonymous].) Quite clearly, the terms "motive," "intent" and "purpose" are commonly used interchangeably to mean the same thing.

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The Court of Appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case.

The jury was instructed to determine if appellant had the intent to rob and/or steal, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The Instruction Shifted The Burden Of Proof To Imply That Appellant Had To Prove Innocence

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.[145] 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* (1970) 397 U.S. 358, 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* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required

Appellant testified that he was not involved in Sarah LaChapelle's death. The motive instruction given in this case diluted the prosecution's obligation to prove beyond a reasonable doubt that appellant had a specific intent to steal, rob and kill. CALJIC No. 2.51 erroneously encouraged the jury to conclude that proof of a specific intent to steal or rob was unnecessary for guilty verdicts on the first degree murder charge and a true

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[145] As set forth earlier in this brief, the delivery of CALJIC No. 2.51 in combination with other instructions, diluted and diminished the prosecution's burden of proof. (See Argument X, *ante*.)

finding of the special circumstance allegations. Accordingly, this Court must reverse the judgments on Count One and the special circumstance allegations because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

XIII

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO ANSWER THE DEADLOCKED JURY'S QUESTION AS TO WHETHER THE DEATH PENALTY WAS THE MORE SEVERE OF THE TWO AVAILABLE PUNISHMENTS

A. Introduction

On the fifth day of penalty deliberations, the trial court received a written note from the jurors indicating that because it appeared that they were irrevocably deadlocked, they wished to address the court. In open court, the jury foreperson reported that some jurors believed it would be helpful if the court were to provide further instructions. When the trial court expressed a willingness to re-read portions of the instructions and sought to identify the topic that concerned the jury, the foreperson asked for clarification as to whether death was the more severe punishment. Without having first discussed the content of an appropriate response to this critical question with counsel, the trial court immediately informed the jury that it was not permitted to clarify that point, and that the jury's task was to decide the appropriate penalty. Further, the trial court stated that in making the penalty decision, the issue was not which of the two penalties was the more severe, but rather which penalty is the most appropriate based on the evidence. Thereafter, the trial court again instructed the jury with CALJIC No. 8.88.

Immediately before the jury was directed to resume deliberations, defense counsel requested that they be instructed that, under California law, the death penalty was the more severe of the two available punishments. Defense counsel requested this instruction in order to avoid the looming possibility that those jurors who believed that life imprisonment without

possibility of parole was the more severe penalty would believe they could properly select the death penalty as "appropriate," out of mercy for appellant, unless they were instructed otherwise. The trial court refused the defense request, in part because it did not interpret the jury's request as creating a risk that the jurors would sentence appellant to death improperly, and in part out of belief that re-instructing the jury with CALJIC No. 8.88 was sufficient and preferable to "extemporaneous, off-the-cuff instructions or comments." (44 RT 5879.) After three additional days of deliberation, the jury returned its death verdict.

In failing to consult with counsel prior to instructing the jury, as well as failing to adequately address the jury's request for clarification, the trial court violated state law and, more significantly, committed federal constitutional error. Appellant's right to a determination of penalty by a jury "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," guaranteed by the Eighth and Fourteenth Amendment, was violated by the trial court's abdication of its duty to clarify the law, as requested by the jury, an error exacerbated by failing to consult with counsel prior to instructing the jury at this obviously critical stage of deliberations. These errors require that appellant's death judgment be reversed. (See Pen. Code, § 1138; *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613; *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 575; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836-841 (en banc), implicitly overruled in part on other grounds, *Calderon v. Coleman* (1998) 525 U.S. 141, 146.)

B. The Deadlocked Jury's Request and the Trial Court's Response

On the fifth day of deliberations, during which the jury made

multiple requests to examine evidentiary exhibits and was re-instructed with CALJIC No. 8.85, the foreperson sent a written request to the trial court in which she announced an apparent irrevocable deadlock, and further informed the trial court that "[W]e need to talk to you." (5 CT 1055.) Counsel were notified of the jury's request and summoned to court. The trial court told counsel that it intended to ask the jurors about their request. In open court, with all parties and jurors present, the trial court asked the foreperson how it could be of help, and was told:

> THE FOREPERSON: Well, your Honor, we wondered if there were further instructions that you could give us? As you finished your instructions the last time, you know, some of us thought you said if you need more help, I can give you more help or something to that effect.

(44 RT 5872.)

The trial court prefaced its reply by noting that "there's not any more jury instructions I could give you," but offered to re-read "some" of the instructions. (44 RT 5972.) As this was agreeable to the jury, the following colloquy ensued:

> THE COURT: And while [the bailiff] is getting [the jury's written copy of the instructions], is it the part about deciding the penalty, about the circumstances and the weighing of the aggravating and mitigating? Is that the stuff you want to hear?
>
> THE FOREPERSON: Mm-hm, mm-hm. Okay. And, your Honor, the other thing to clarify for us, when you're weighing the severity of the punishment –
>
> THE COURT: Crime.
>
> THE FOREPERSON: – of the punishment, *is death the more severe punishment, or is life without chance of parole*?
>
> THE COURT: *I can't tell you that.* You have to

> decide the appropriate penalty based upon the evidence in this case. *It's not an issue of which is the most severe punishment. The issue is which is the most appropriate punishment in this case based upon the evidence, not which is the most severe punishment.* Which is the appropriate punishment based on the evidence.
>
> THE FOREPERSON: Okay. Okay.

(44 RT 5872-5873, emphasis added.)

The trial court then re-read CALJIC No. 8.88 and a portion of CALJIC No. 8.85.[146] However, before sending the jury back to the jury room for further deliberations, the trial court reinforced its view that the matter of which penalty is the more severe was not relevant to the jury's task:

> THE COURT: *And, remember, I want to advise you again we are not talking about which is the worst penalty.* You are to find which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances; and 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.

(44 RT 5876, emphasis added.)

Before the jury left the courtroom, defense counsel requested a sidebar at which defense counsel reminded the trial court that a number of prospective jurors, including some who were now sitting jurors, had expressed the feeling that the sentence of life imprisonment without the possibility of parole was a more severe penalty than death. During voir

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[146] By the time the trial court had completed its oral delivery of CALJIC No. 8.85 up to and including subsection (d) of the instruction, the jury indicated it needed no further re-reading. (44 RT 5875.)

dire, the trial court had instructed these prospective jurors that they were not to select the death penalty as an act of mercy. Defense counsel requested that the jury be instructed now, consistent with the trial court's earlier instructions during voir dire, that the death penalty was not to be imposed as an act of mercy. (44 RT 5877-5878.)

The trial court refused defense counsel's request, expressing confidence that its instructions during voir dire had resulted in the selection of jurors who would not impose the death penalty as an act of mercy:

> THE COURT: And I'm of the position that based upon our very careful voir dire of this jury that *I don't think anybody is up there deciding this case based upon executing your client as an act of mercy. I don't interpret that by what they mean. There may be some dispute up there among themselves which is worse, the death penalty or life without parole, but I don't think they're deciding it on the basis of one being an act of mercy and the other one being more lenient than the other one.* Secondly, I do believe that by instructing the jury that they are to pick the appropriate penalty based on the weighing process that I gave them by considering the aggravating and mitigating factors and they can only return a verdict of death if they are satisfied that the factors in aggravation are so substantial when compared to the factors in mitigation, that that takes care of the problem. I don't like to give extemporaneous, off-the-cuff instructions or comments to the jury. I'd like to stick to the jury instructions. But, in any event, I appreciate your suggestion, Mr. Pinkney. But, I – I decided not to do it. And so your objection to the Court's instruction may be noted accordingly.

(44 RT 5878-5879, emphasis added.)

Two facets of the trial court's ruling are striking. First, the unavoidable fact that the jurors explicitly asked the court, at this critical stage of deliberations, which of the two penalties was the more severe utterly undermines the trial court's sanguine conclusion that the jury was in

a position to appropriately decide whether appellant should live or die. Second, in spite of the trial court's professed distaste for extemporaneous instructions and comments to the jurors, the trial court's actions belie its words. It is difficult to imagine anything the trial court could have said or done which would have demonstrated less sagacity than to instruct the jurors as the trial court did here.

C. The Trial Court Abdicated its Duty under Penal Code Section 1138 to Accurately Advise the Deliberating Jury on a Point of Law

Like many trial judges, the trial court here was fearful of straying from the narrow path defined by the CALJIC pattern instructions, lest it "get into any trouble" (1 RT 108.) Indeed, earlier in the trial, the trial court frankly informed counsel "that I slavishly adhere to the CALJIC instructions." (33 RT 4351.) Obviously, ritualistic and repetitive adherence to CALJIC was unlikely to clarify the legal point addressed by the jury's question, as the jury had already heard the original CALJIC instruction before, and had access to the written instructions over the course of five days of deliberation. (See *McDowell v. Calderon*, *supra*, 130 F.3d at pp. 838-841 [holding there was "no point" in reiterating instructions which had not enlightened the jurors].) Even worse, and as will be discussed *post*, the trial court viewed the jury's question as one that was essentially irrelevant to its task in deciding the penalty to be imposed. Influenced by this curious and illogical notion, the trial court's instructions affirmatively misinformed the jurors when it informed them that which of the two penalties was the more severe was not an issue germane to their deliberations. Such misinstruction effectively undermined whatever correct statements of the law were contained within the instructions repeated by the trial court.

The starting point for any analysis of the trial court's conduct is

Penal Code section 1138, which provides in pertinent part:

> After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . .

The trial court has the primary duty to help the jury understand the legal principles it is asked to apply. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250-251.) In *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212, this Court held that section 1138 imposes on the trial court a mandatory duty to clear up any instructional confusion expressed by the jury. Moreover, not just any ad hoc response will satisfy that duty. Thus, a cursory response which does not clarify the confusion is insufficient. (*People v. Thompkins*, *supra*, 195 Cal.App.3d at p. 250; see also *United States v. Peterson* (9th Cir. 1975) 513 F.2d 1133, 1136 [giving cursory supplemental instruction in face of jury confusion was insufficient].) As the United States Supreme Court counseled long ago: "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States*, *supra*, 326 U.S. at p. 612-613; accord *Powell v. United States* (9th Cir. 1965) 347 F.2d 156, 157-158; *United States v. Harris* (7th Cir. 1967) 388 F.2d 373, 377.) "It must at least *consider* how it can best aid the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (original emphasis).) While jury questions can present a court with vexing challenges, a trial court must do more than figuratively throw up its hands and tell the jury it cannot help. (See *People v. Beardslee*, *supra*, 53 Cal.3d at p. 97; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331-1332.) Yet this is essentially what the trial court did when it repeated the very language in CALJIC that had already proven

itself to be inadequate to guide the jury in its life-or-death decision.

To be sure, this Court has held that a trial court has a limited discretion under section 1138 "to determine what additional explanations are sufficient to satisfy the jury's request for information," a discretion that comes into play where "the original instructions are themselves full and complete." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.) Yet the discretion given to the trial court to fashion a satisfactory supplementary explanation presumes that whatever the trial court ultimately says will sweep away the jurors' difficulties with concrete accuracy, and is itself a considered response. (See, e.g., *People v. Beardslee, supra*, 53 Cal.3d at p. 97 [peremptory declaration to counsel, upon receipt of jury request for explanation of instructions, that court would not further explain instructions for fear of criticism by appellate court, was an abuse of discretion]; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 390-391 [reading several instructions already given, telling the jury to use its common sense, and concluding instruction by stating: "That is as far as I can go," constituted reversible error under section 1138]; *People v. Miller* (1981) 120 Cal.App.3d 233, 236 [failure to define term after deliberating jury communicated its confusion over the meaning of the term constituted reversible error].)

It has long been the law, as interpreted by decisions of this Court, that death is the ultimate punishment that may be inflicted by the state, and a more severe punishment than life without possibility of parole. (See, e.g., *People v. Memro* (1995) 11 Cal.4th 786, 879; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 477.) This Court has most recently reaffirmed that the proposition that death is considered to be a more severe punishment than life imprisonment without possibility of parole "is explicit in California

law" as conveyed to the jury by CALJIC No. 8.88. (*People v. Harris* (2005) 37 Cal.4th 310, 361.) While it obvious that the jury in the present case did not consider that the language of CALJIC No. 8.88, as quoted by this Court in *Harris*, truly made the proposition explicit, there can no longer be doubt after *Harris* that a jury instruction explaining that death is a more severe penalty than life imprisonment without possibility of parole is an accurate exposition of the law.[147] (*People v. Memro*, *supra*, 11 Cal.4th at p. 879 [explaining that "indeed death is the worse punishment"]; *People v. Baciagalupo*, *supra*, 6 Cal.4th at p. 477 [death penalty "more severe" than life imprisonment without possibility of parole]; *People v. Brown* (1985) 40 Cal.3d 512, 541 ["extinction of life itself" is "the law's single more severe penalty"].) Indeed, under the Eighth Amendment's command, the imposition of the death penalty by a jury that did not appreciate that death is the more severe penalty would be unconstitutional. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 184 [decision that death may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the death penalty]; *Furman v.*

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[147] Justice Marshall explained in his concurring opinion in *Furman v Georgia*: "While the contrary position has been argued, (footnote omitted) it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. Admittedly, there are some persons who would rather die than languish in prison for a lifetime. But, whether or not they should be able to choose death as an alternative is a far different question from that presented here – i.e., whether the State can impose death as a punishment. Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such." (*Furman v. Georgia* (1972) 408 U.S. 238, 345-346.)

Georgia (1972) 408 U.S. 238, 388, (disn. opn. of Burger, C.J.) [death is the "ultimate" punishment].)

As part of its duty to clear up the jury's expressed difficulty, it was critical that the trial court instruct the jury in such a fashion as to "sweep away" any notion that the death penalty was a less severe punishment than life without possibility of parole. Otherwise, the trial court tolerated the risk that appellant could be sentenced to death by a tribunal that was composed of jurors, some or all of whom believed that a death sentence was an expression of mercy. The instructions given by the trial court not only tolerated this risk but exacerbated it. Thus, they fell short of the duty to provide correct and accurate instructions, or to answer the jury's question at all. (*Bollenbach v. United States*, *supra*, 326 U.S. at pp. 612-613; *People v. Wickersham* (1982) 32 Cal.3d 307, 330 [trial court "is charged with instructing the jury correctly"].)

It was not sufficient, for the trial court to merely focus the jury's attention on the language in CALJIC No. 8.88 that aligned the aggravating circumstances with the appropriateness of a death sentence and the mitigating circumstances with the jury's consideration of life imprisonment without possibility of parole as a possible sentence. Since CALJIC No. 8.88 had previously been delivered both orally and in writing, and was thus available to the jury for all five days of its deliberations before a deadlock was announced to the court in conjunction with its plea for help, it is obvious that simply re-reading the instruction had proven inadequate to assist the jury. "It is hardly preferable for a judge to merely repeat for a jury the text of an instruction it has already indicated it doesn't understand." (*People v. Thompkins*, *supra*, 195 Cal.App.3d at p. 253; see also *People v. Gonzales*, *supra*, 74 Cal.App.4th at pp. 390-391 [trial court left the jury

floundering when it refused to go beyond instructions already given]; *McDowell v. Calderon*, *supra*, 130 F.3d at p. 838 [holding there was "no point" in reiterating instructions which had not enlightened the jurors].)

Moreover, the jury's question is itself the best evidence that the original instruction had not driven home the central premise of the jury's task in the penalty phase, i.e., that selecting the "appropriate" penalty presupposes clarity as to which penalty is more severe. (*Belmontes v. Brown* (9th Cir. 2005) 414 F.3d 1094, 1136-1337; see also *Shafer v. South Carolina* (2001) 532 U.S. 36, 53 [jury's question "left no doubt" that it did not clearly understand from trial court's original instructions what "a life sentence" meant]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 178 [jurors' question asking if parole was available proved that they did not know whether or not a life-sentenced prisoner will be released from prison].)

The trial court should have responded by telling the jurors in no uncertain terms that death was a more severe punishment than life imprisonment without possibility of parole. Contrary to what the trial court assumed, it was not only permitted to answer the jury's question; it was required to do so. It was critical for the jurors to know that it would have been improper to sentence appellant to death as an act of mercy, based upon the fundamentally mistaken perception that the law recognized life imprisonment without possibility of parole as a more severe punishment than death.

As this Court has recognized:

> Any meaningful assessment of the moral culpability of a defendant convicted of the crime of capital murder will invariably include some facts about the offense and the offender that will weigh in the sentencing decision in favor of

> *the more severe penalty of death*. The section 190.3 'aggravating' factors in California's capital scheme do no more than direct attention to such facts.

(*People v. Baciagalupo*, *supra*, 6 Cal.4th at p. 477; emphasis added.)

When the trial court told the jury that "it's not an issue of which penalty is the most severe punishment" (44 RT 5873), and underlined the repetitions of CALJIC No. 8.88 with the coda "[a]nd, remember, I want to advise you again we are not talking about which is the worse penalty" (44 RT 5876), it drained the pertinent language in CALJIC No. 8.88 of whatever force was discerned therein by this Court when it, in *People v. Harris*, *supra*, 37 Cal.4th at page 361, deemed that instruction to explicitly inform the jury of the ultimate severity of the death penalty under state law. More to the point, the trial court was dead wrong.

The instructions given by the trial court in response to the jury's request were inadequate, incomplete, and inaccurate. At a minimum, these instructions must have confused the jury rather than clear away its difficulties. As such, the trial court's responses violated section 1138 and, to the extent that the trial court was possessed of any discretion in this matter, that discretion was abused here. (*Bollenbach v. United States*, *supra*, 326 U.S. at pp. 612-613; *People v. Beardslee*, *supra*, 53 Cal.3d at p. 97; *People v. Moore*, *supra*, 44 Cal.App.4th 1331-1332; *United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 810 -811.)

D. The Trial Court's Response to the Jury's Question Violated Appellant's Rights Under the Eighth and Fourteenth Amendments

The trial court's response to the jury's question not only violated state law, it more fundamentally collided with appellant's rights under the federal Constitution. The subversion of appellant's federal constitutional

rights commenced when the trial court gave its response without affording defense counsel "an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection or suggest a different reply more favorable to the defendant's case." (*People v. Wright* (1990) 52 Cal.3d 367, 402.)

Not only were the procedures the trial court followed in responding to the jury's question flawed, the substance of the court's response itself violated appellant's substantive rights under the federal constitution.

> Jurors' uncorrected confusion regarding the law may lead to verdicts reached outside of the channel required by *Godfrey* [*v. Georgia* (1980) 446 U.S. 420] and the Eighth Amendment. This risk was identified in *Lockett* [*v. Ohio* (1978) 438 U.S. 586]. The unremarkable prescription for such confusion is that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

(*McDowell v. Calderon*, *supra*, 130 F.3d at p. 839.)

Similarly, because the trial court is duty-bound to govern the trial for the purpose of assuring its proper conduct and of determining questions of law (*Quercia v. United States* (1933) 289 U.S. 466, 469), when constitutional requirements are involved, the proper execution of that duty "is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. (Cf. *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (jury instruction violates Due Process Clause if it affects an identifiable constitutional right)." (*McDowell v. Calderon*, *supra*, 130 F.3d at p. 839.)

The United States Supreme Court has long held "that where discretion is afforded a sentencing body on a matter so grave as the

determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 189.) As this Court has often explained, the decision as to which penalty to impose in a capital case is a normative one. (*People v. Weaver* (2001) 26 Cal.4th 876, 985; *People v. Boyde* (1988) 46 Cal.3d 212, 253.)

In light of the question posed by the jurors, it was especially important for the trial court to assure itself that all 12 jurors involved in making such a decision clearly understood that death was the more severe penalty. Without such assurance, a juror who believed that life imprisonment without possibility of parole was the more severe penalty could well have decided to vote for death without a belief that the evidence in aggravation qualitatively called for the ultimate sentence, or as a misguided act of mercy. This was especially likely here, where the trial court not only withheld the simple answer to the jury's straightforward question, but told the jury that the answer to its question was not germane to the life-or-death decision it was being asked to make. Thus, the instructions actually given by the trial court "undid" whatever good work may have been accomplished during voir dire on the issue of which penalty was the more severe. A verdict from such a misguided jury cannot withstand scrutiny under the Eighth and Fourteenth Amendments. (See *Beck v. Alabama* (1980) 447 U.S. 625, 643 [instructions "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case"].)

If, as the high court has held, it is constitutionally impermissible to rest a death sentence on a determination made by jurors who have been led to believe that the responsibility for determining the appropriateness of a

defendant's death rests elsewhere (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329), so too is it constitutionally impermissible to accept a death verdict rendered by jurors unclear on the concept of death as the more severe, and indeed the ultimate, punishment, as such a verdict is necessarily the reflection of the exercise of an arbitrary and capricious discretion (*Gregg v. Georgia*, *supra*, 446 U.S. at p. 427). Simply put, jurors who are not aware which punishment is worse cannot properly decide which punishment is appropriate. A jury panel composed of such jurors is the quintessential "unguided missile." As the Ninth Circuit observed in a similar case:

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

(*McDowell v. Calderon*, *supra*, 130 F.3d at p. 836.) The death verdict in this case represents the collateral damage caused by that unguided missile, and the responsibility for its errant course rests directly with the trial court's ill-considered instructions.

E. The Error Requires Reversal of the Death Judgment

1. The Error is Reversible Per Se

Perhaps the single most pernicious result of the trial court's response to the jury's question was the "green light" it gave to the jurors, allowing them to conclude that they could vote for appellant's death as an act of mercy alone. The trial court's response effectively permitted the jurors to ignore the mitigating evidence for its only relevant purpose: as a reason to impose the *lesser* of the two sentences. A line of authority from the High

Court has reversed death judgments, without regard for a showing of prejudice, resulting from trials where the mitigating evidence was excluded or the jury not permitted to consider mitigation. (See, e.g., *Tennard v. Dretke* (2004) 542 U.S.274, 285; *McKoy v. North Carolina* (1990) 494 U.S. 433, 441; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319, 327-328; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 8-9; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114, 117; *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605, 608-609.) It is precisely because the trial court's response subverted the relevant purpose of appellant's mitigating evidence that reversal of the death judgment is required without regard to a showing of prejudice.

2. The State Cannot Show that the Error Was Harmless

In the event that the trial court's error is subject to harmless error analysis, any attempt by the state to show that the error was harmless would be doomed to failure. In reviewing an erroneous instruction, this Court inquires as to "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*People v. Frye* (1998) 18 Cal.4th 894, 957, quoting *Boyde v. California* (1990) 494 U.S. 370, 380.) As part of such an inquiry, the challenged instruction is viewed in context, and as part of the entire charge to the jury. (*People v. Frye*, *supra*, 18 Cal.4th at P. 957; *Cupp v. Naughten* (1973) 414 U.S. 141, 146-147; see also *People v. Burgener* (1986) 41 Cal.3d 505, 538 [under California law, correctness of jury instructions determined from entire charge of the court].)

The reasonable likelihood that at least one juror voted for death because of a mistaken belief that in doing so, mercy could be accorded to appellant, is amply borne out by the question itself and the voir dire

responses of a number of the prospective jurors, including the foreperson and three other jurors who ultimately voted for appellant's death, as well as one of the alternate jurors.[148] Thus, in spite of the trial court's comments indicating otherwise, the record bears out defense counsel's fears that the trial court's response to the jury's question was inadequate.

For example, during voir dire of the eventual foreperson, Marianne Somers, the issue of whether death was the more serious penalty was discussed at some length.[149] Somers volunteered that if she sat in appellant's shoes, she might well prefer to be executed rather than serve a sentence of life imprisonment without possibility of parole. (11 RT 1806.) The trial court did not initially address this comment, but defense counsel

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[148] The belief that life imprisonment without possibility of parole is at least as severe as the death penalty is by no means uncommon. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946, 963 [holding that a juror who entertained such a view was not excusable for cause absent an indication that it would prevent or substantially impair him from following the contrary and controlling California law].) Further, this Court has held that it is not irrational for a defendant to prefer death over life imprisonment without possibility of parole. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1223; *People v. Guzman* (1988) 45 Cal.3d 915, 963-966.)

[149] The same topic was broached during the voir dire of eventual trial jurors James Robinson, Linda Churchill, David Nielsen, and eventual alternate juror Gary Heider. During the voir dire of Robinson, defense counsel asked if Robinson believed that the two possible penalties were equally severe, or if one was worse. Robinson explained that he thought the death penalty was a little worse. (6 RT 806.) Churchill also believed that death was a more severe penalty. (9 RT 1407.) Nielsen was asked a similar question, but when he replied that he did not understand the question, defense counsel did not pursue the matter. (10 RT 1559.) Heider, in response to questions from the prosecutor, expressed the view that life imprisonment without possibility of parole "is probably a death penalty," and that the death penalty might well be a gentler form of life imprisonment without possibility of parole. (2 RT 359-361.)

did during their questioning of her. Defense counsel asked Somers if her response to the trial court's *Fields* question[150] indicated a predisposition to impose the death penalty. In reply, Somers stated that she had meant to convey that were she the defendant, the death penalty might be preferable to a sentence of life imprisonment without possibility of parole. Defense counsel then sought assurance from Somers that she understood that the defense would not be arguing for the jury to impose the death sentence as an expression of the jury's mercy. (11 RT 1827.) When Somers professed not to understand defense counsel's question, the following colloquy ensued:

> THE COURT: Let me see if I can paraphrase it. What they're saying is they are going to be arguing for you to spare his life. They wouldn't want you to vote to execute him out of some sort of charitable feeling you may have because you feel that the death penalty is more humane than spending the rest of your life in prison. You see what I'm saying?
>
> MS. SOMERS: I would not vote the death penalty on the basis of what I would choose for myself.
>
> MS. BROWNE [defense counsel]: We're working under the presumption that the death penalty is a worse punishment than life.
>
> MS. SOMERS: Yes, I understand that is your position, that's your argument.
>
> MS. BROWNE: But as a juror, you would work under the same presumption; is that correct?

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[150] Pursuant to *People v. Fields* (1983) 35 Cal.3d 329, 357-358, the trial court drafted a case-specific question, for use in death-qualification voir dire, which incorporated facts concerning the circumstances of the crime as it was pled in the Information. In another section of this brief, appellant has challenged the adequacy of the trial court's *Fields* question. (See Argument I, *ante*.)

MS. SOMERS. Okay.

(11 RT 1828.)

From the foregoing colloquy, it is apparent that the even the foreperson of appellant's jury could not readily accept and agree with the proposition that the death penalty was the more severe of the two punishments, and that every juror was duty-bound to deliberate upon that assumption. Taking the foregoing colloquy together with the jury's question after protracted deliberations and upon announcing a deadlock, there is a virtual certainty that the divergent and deep-rooted beliefs about which penalty was the more severe (and, by extension, which penalty was "appropriate" for appellant), were at the root of the deadlock. Under these circumstances, the trial court's musings that the jury's question was merely the product of "some dispute" among the jurors as to which of the two penalties was the more severe, rather than as a reflection of the desire to vote for death as an expression of mercy, can hardly be credited.

Unquestionably, the fact that the question was asked, standing alone, demonstrates a reasonable possibility that an erroneous or confusing response must have had an effect on the ultimate verdict. (See *Shafer v. South Carolina*, *supra*, 532 U.S. at p. 39; *Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 169-171.)

But there was more. The length and the quality of the deliberations show even more clearly that this case was evenly balanced on a fulcrum. The defense had presented mitigation evidence of appellant's sordid and harrowing upbringing, depicting how his childhood and teenage years were stamped by physical and mental abuse, tragic death, and inadequate adult supervision, emotional support, and educational opportunity. In contrast, the state's penalty-phase case in aggravation, beyond the circumstances of

the murder of which appellant had been convicted, consisted largely of a single aggravated incident in which appellant, 18 years of age at the time, was involved in a traffic collision and pursued the other parties to the accident while brandishing and firing a gun. The prosecution also presented evidence of two other incidents involving the use or threatened use of force, but these incidents were relatively innocuous when contrasted to the circumstances of the crime itself and to the principal assault-with-deadly-weapon incident.

As could be predicted from this record, the jury deliberations reflected an extremely close case as to penalty. The jury was told it could consider lingering doubt in deciding whether appellant should die. (44 RT 5827.) As in its guilt-phase deliberations, the jury made multiple requests to examine evidentiary exhibits, including the defense chart and photographs depicting appellant's "lifeline," the notes and tape-recording of appellant's interrogation, and the photographs and diagram of the exterior of the victim's house.[151] (5 CT 1045-1046, 1051-1053, 1057-1058; 44 RT 5883-5887.) Additionally, the jury requested and received clarification as to the meaning of CALJIC No. 8.85, subsections (d) and (g). (5 CT 1050; 44 RT 5871-5876.) Faced with this evidence and the court's instructions, the jury struggled with appellant's fate through five days of deliberation before announcing itself deadlocked, apparently on the question of which penalty was the more severe. After receiving the erroneous instructions, the jury continued to deliberate for an additional three days before returning a death verdict. (44 RT 5871; 5 CT 1045, 1049, 1051, 1054, 1056-1059,

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[151] It thus seems abundantly clear that at least one of the jurors was struggling with lingering doubts of appellant's guilt.

1101.)

If nothing else can be said about the jury's deliberations, one fact remains clear: this jury could not vote for "the more severe punishment" on the evidence alone. (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 [finding that penalty phase jury's question concerning the nature of the penalty of life without possibility of parole suggested that a death sentence was not inevitable].) Aside from the closeness of the guilt, special circumstance and penalty determinations as revealed by a review of the evidence presented at trial, the jury's inquiry as to which penalty was the more severe indisputably showed that a death sentence for appellant "was not a foregone conclusion, especially given that the jurors' only task at that point was to decide between a sentence of life without parole and death." (*Silva v. Woodford*, *supra*, 279 F.3d at pp. 849-850.) There can be no doubt that the trial court's responses to the jury's question failed to properly guide its deliberations and thus clearly impacted its ultimate decision.

F. Conclusion

In sum, as a matter of both state law and federal constitutional law, appellant's jurors should have been given an explicit instruction that death was a more severe punishment than life imprisonment without possibility of parole. The absence of such an instruction was reversible error under all of the circumstances of this case. It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Because the trial court's response made it impossible for the jury to properly decide which penalty was appropriate, reversal is required without the need to parse the record for prejudice. Even under a harmless-

error standard of review, it certainly cannot be established that the trial court's error had "no effect" on the penalty verdict. (*Boyde v. California*, *supra*, 494 U.S. at pp. 380-381; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Finally, had the jury been instructed that death was the more severe of the two possible penalties, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; see *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 446-448 ["reasonable possibility" standard].) Accordingly, the judgment of death must be reversed.

XIV

THE TRIAL COURT ERRONEOUSLY, UNCONSTITUTIONALLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

In this case, the trial court breached its instructional obligation by failing to instruct the jury on the proper use of victim-impact evidence. The victim's son – Anthony LaChapelle – testified for the prosecution as a victim-impact witness, and related, in highly emotional terms, the impact his mother's death had on him and his children. (36 RT 4870-4872.) His testimony, culminating in his wish that the jury's verdict accomplish what the law forbade him – appellant's death – inevitably had a strong emotional effect on the jury.

Given the in turn heart-breaking and vengeful testimony of the victim's son, it is a gross understatement to say that there was a very real danger that emotion would overcome the jurors' reason, hindering them from making a detached penalty decision, unless – assuming for the sake of argument that anything could have prevented that result – the trial court

gave them guidance on how the victim-impact evidence should be used. An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore it should have been given on the court's own motion. (See generally *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; *People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022.)[152]

"Because of the importance of the jury's decision in the sentencing phase of a death-penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee, and Georgia have held that, in every case in which victim-impact evidence is introduced, the trial court must instruct the jury on the appropriate use, and admonish the jury against the misuse, of the victim-impact evidence. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

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[152] Here, appellant requested, and was refused, a limiting and cautionary instruction on "victim-impact" evidence. (5 CT 1020; 42 RT 5665.)

Although the language of the required instruction varies in each state, depending upon the role victim-impact evidence plays in that state's statutory scheme, common features are an explanation of how the evidence can properly be considered and the admonition not to base a decision on emotion or the consideration of improper factors. An appropriate instruction for California would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Further, you must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the appropriate punishment to be imposed.

The first four sentences of this instruction duplicate the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at page 159. The last sentence is based on *State v. Koskovich*, *supra*, 776 A.2d at page 177.[153] It is difficult to conceive of a

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[153] In *State v. Koskovich*, *supra*, the New Jersey Supreme Court held:

> We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must

(continued...)

factual situation in which this instruction would have been more appropriate, and necessary, than in the instant case, where the victim's son made a direct and naked appeal to the jury for vengeance. Indeed, during this portion of Anthony LaChapelle's testimony, the trial court had observed that the prosecutor was "getting a little far afield." (36 RT 4872.)

This Court addressed a different proposed limiting instruction in *People v. Ochoa* (2001) 26 Cal.4th 398, 445, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, an instruction which was also given in this case (5 CT 1062; 44 RT 5812).[154] However, CALJIC No. 8.84.1 does not cover any of

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[153] (...continued)
draw no inference whatsoever by a witness's silence in that regard.

(776 A.2d at p. 177.)

[154] The version of CALJIC No. 8.84.1 given to appellant's jury read as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(5 CT 1062; 44 RT 5812)

the points made by the instruction proposed here. It does not tell the jurors why victim-impact evidence was introduced. It does not caution the jurors against an irrational assessment of the defendant's culpability. Nor does it warn the jurors not to consider what they may perceive to be the opinions of the victim-impact witnesses – a clearly improper factor. (*Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2; *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; *People v. Smith* (2003) 30 Cal.4th 581, 622.) Nor does it admonish them not to employ the improper – but, in this case, likely-employed – factor of vengeance in their penalty determination. (See, e.g., *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713 [prosecutor's "role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim"].)

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim-impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victim's relatives, or by any direct appeal for vengeance on behalf of the victim's family or society as a whole.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction proposed here would have conveyed that message to the jury;

none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion and other improper considerations, including vengeance and explicit wishes of the victim's son, from tainting the jury's decision. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The violations of appellant's federal constitutional rights require reversal unless the state can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the emotionally volatile nature of the victim-impact evidence presented in this case, the trial court's instructional error cannot be considered harmless, and therefore reversal of the death judgment is required.

XV

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN ITS RESPONSE TO THE DELIBERATING JURY'S REQUEST FOR CLARIFICATION OF THE TERM "DURESS" AS USED IN CALJIC NO. 8.85

A. Introduction

On the second day of penalty deliberations, the trial court received a written note from the jurors indicating that they needed clarification as to CALJIC No. 8.85, factors (d) and (g).[155] In open court, the foreperson indicated that the term "duress" in the instruction was at the core of the jurors' concerns; they wanted to know (1) how "direct" or "indirect" duress had to be in order to give credence to it, and (2) how, both physically and in the abstract, one person might place another person under duress.

The trial court and counsel attempted to fashion an adequate

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[155] In pertinent part, CALJIC No. 8.85 [Penalty Trial – Factors for Consideration] as given by the trial court, read:

> "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> . . .
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person."

(5 CT 1092-1093; 44 RT 5825-5826.)

response. Ultimately, the trial court instructed the jury that it was to use its commonsense understanding of duress. Additionally, and drawing from a dictionary definition, the trial court further instructed the jury that duress could be defined as "compulsion or coercion." Finally, the trial court told the jurors that they were to decide for themselves the question of whether duress "can be directed from the outside" based on the evidence and any reasonable inferences based on that evidence. The trial court concluded its instruction by observing: "See, I can't tell you stuff that's not in the evidence." (44 RT 5855.)

In failing to adequately address the jury's request for clarification, the trial court violated state law and committed state and federal constitutional error. Appellant's right to a determination of penalty by a jury "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," guaranteed by the Eighth and Fourteenth Amendments, and article I, §§ 7, 15, and 17 of the California Constitution, was violated by the trial court's abdication of its duty to clarify the law, as requested by the jury. This error requires that appellant's death judgment be reversed. (See Pen. Code, § 1138; *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613; *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 575; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836-841.)

B. The Jury's Request and the Trial Court's Efforts to Craft a Response

In the middle of their second day of penalty deliberations, the jurors submitted a written request for instructional clarification: "May we come down and have you clarify pg. 885, sections D, G." (5 CT 1050.) The trial court took this to mean that the jury was concerned with factors (d) and (g) of CALJIC No. 8.85. (44 RT 5835.)

Before addressing the jury in open court, the trial court suggested to counsel that it intended to instruct the jury that the factors designated in the jurors' request were mitigating factors which might or might not be applicable in appellant's case, depending on the evidence presented and any conclusions the jurors might arrive at from the evidence. This response was agreeable to both the prosecution and the defense. (44 RT 5836.) The trial court expressly assured defense counsel that it would "clear" any additional instructions with counsel. (44 RT 5837.)

In open court, the trial court informed the jury that factors (d) and (g) in CALJIC No. 8.85 were mitigating factors, orally recited both factors, and instructed:

> Whether or not that is a fact is for you to decide based upon the evidence that you heard in this case. That's a factual issue for you to resolve based upon what you heard. Does that answer your question?

(44 RT 5838.)

It immediately became apparent that this response was insufficient, as the foreperson told the trial court: "I think we would like a good definition of "duress." (44 RT 5838.) The foreperson made it evident that the jurors wanted a "good legal definition" (44 RT 5838):

> THE FOREPERSON: And the – the – And I think that the other – the part of "duress" that we are concerned with is how direct or indirect can the duress be, at what distance might duress be impacted.
>
> THE COURT: At what distance?
>
> THE FOREPERSON: Well, both in a physical and in an abstract sense, how does – how does one person put another person under duress.

(44 RT 5839.) Before adjourning to discuss a proposed response with

counsel, the trial court was asked the following question by one of the jurors:

> JUROR NUMBER TWO: Your response to us when you said that it should be based on evidence in fact, was that regarding both issues?
>
> THE COURT: Yes. If those conditions exist in this case, it is for you to decide. You're the trier of fact. You heard the evidence. You make the call.

(44 RT 5839-5840.)

During the adjournment, defense counsel expressed the view that it appeared that the jury was asking if duress triggered by long-past circumstances, including childhood experiences, could be considered as a mitigating factor. He therefore suggested that the trial court ask the jurors if this was the thrust of their question. (44 RT 5840-5841.) The trial court appeared to interpret the request in this fashion as well:

> THE COURT: Well, my feeling is once they found out what "duress" is, then they are going to have to decide whether or not the duress was of such long-lasting effect that it could have affected whatever misconduct your client committed in 1988. That's a real long stretch by this jury, but it's something that they're considering or wrestling with.

(44 RT 5841.)

The prosecutor requested that the jury be instructed pursuant to CALJIC Nos. 4.40 and 4.41, and directed the trial court's attention to language in *People v. Pena* (1983) 149 Cal.App.3d Supp.14, 17, footnote 2, discussing the defense of duress.[156] From this language in *Pena*, the trial

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[156] At the time of appellant's trial, both CALJIC No. 4.40 [Threats and Menaces] and CALJIC No. 4.41 [Threats and Menaces – When Not a Defense] were the pattern guilt-phase instructions explaining that, under

(continued...)

court gleaned that duress was interchangeable with terms such as "coercion," "compulsion," "necessity," and "justification." (44 RT 5842-5843.)

Defense counsel argued that "duress," as used in CALJIC No. 8.85 and for the purposes of a penalty-phase decision, was to be understood in its common usage and not in conjunction with its meaning as a legal defense to crime. Further, she argued that because the weight to assign to mitigation was essentially a subjective decision for each individual juror, the jury should be told that it had the leeway to decide "how far back you want to go" in assessing the relationship between duress and the crime. (44 RT 5844.)

The trial court was of the mind that defense counsel was correct. (44 RT 5845.) After conducting some research, the trial court decided to instruct the jury that it was to use its common sense understanding of "duress"; that Webster's New 20th Century Dictionary Unabridged, defines "duress" to mean "compulsion" or "coercion"; and that whether or not duress was present in appellant's case depended upon the evidence heard by the jurors and any inferences they might draw from the evidence. (44 RT 5846-5850.)

Defense counsel was satisfied with this proposed instruction as far as it went, but requested that the trial court give a more direct response to the question of how long duress could last. In that regard, defense counsel

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[156] (...continued)
California law, a person is not guilty of a crime when acting under threats and menaces under specified circumstances, but such a defense was unavailable to one (like appellant) who commits a crime punishable with death. (CALJIC (5th ed.); Pen. Code, § 26.)

asked that the jury be instructed "that the application of duress can extend to as far in time as they deem appropriate." (44 RT 5851.) Here the trial court drew the line. It rejected the proposed instruction as a comment on the evidence:

> Now whether or not the duress in this case has existed for a long period or a short period of time is a factual issue for them to determine from the evidence in this case and the inferences therefrom.

(44 RT 5851-5852.)

The prosecutor persisted in urging that CALJIC Nos. 4.40 and 4.41 should be given, but the trial court declined to do so, finding that giving those instructions would confuse the jurors. (44 RT 5850.)

C. The Trial Court's Ultimate Response to the Jury Request

When it came time to bring the jurors back to the courtroom and answer their questions, the trial court extemporized upon the portion of the response deemed acceptable by defense counsel, as can be seen from the resulting colloquy between the trial court and the foreperson:

> THE COURT: Mrs. Somers, we've given this – tried to give this response a lot of thought, and I'm not so sure this will be a satisfactory answer to you, but this is the best thing we can come up with. First of all, with respect to the definition of "duress," I'm going to tell you to use your common sense understanding of what "duress" means. To assist you, in Webster's New 20th Century Dictionary Unabridged, it can be defined as "compulsion or coercion." All right? The second thing, as I understand Mr. Morales's question, is whether or not you can have direct or indirect duress and how long can it last. Is that what you're asking? Is that the question?
>
> THE FOREPERSON: If duress can be directed from outside.
>
> THE COURT: Okay. Now, see, you're asking me to

testify and give you information. I can't do that.

THE FOREPERSON: Oh.

THE COURT: All I can tell you is, is that – that you have to decide that yourself based upon the evidence that you've received in this case and any reasonable inferences that you, as the fact finders, come to. See, I can't tell you stuff that's not in the evidence. Okay?

THE FOREPERSON: I see.

THE COURT: So I hope that helps you with the definition of duress. All right? Okay. We'll send you upstairs.

(44 RT 5854-5855.)

In light of the question asked by the jurors during this colloquy, defense counsel renewed his request that the jury be instructed that the application of duress could extend as far back as each juror deemed appropriate. The trial court refused, expressing its satisfaction with the instructions given. (44 RT 5856.)

D. The Trial Court's Response to the Jurors' Request for Clarification on the Meaning of Factors (d) and (g) Was Inadequate to Satisfy the Requirements Imposed by the Eighth and Fourteenth Amendments As Well As State Statutory Law

1. Introduction

In an earlier argument asserting that the trial court erred by failing to properly respond to the deliberating jury's question as to which of the two available penalties was the more severe, appellant demonstrated that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy" (*Bollenbach v. United States*, *supra*, at pp. 612-613; see also *People v. Beardslee*, *supra*, 53 Cal.3d at p. 97), and that the failure to adequately fulfill that duty in the penalty phase of a capital

trial violates a defendant's rights to a reliable penalty determination and due process of law under the Eighth and Fourteenth Amendments. (*Beardslee v. Woodford*, *supra*, 358 F.3d at p. 575; *McDowell v. Calderon*, *supra*, 130 F.3d at pp. 836-841; see Argument XIII, *ante*.) Here, as with its response to the jurors' question concerning which penalty was the more severe, the trial court failed to accurately clear up the jurors' difficulties.

2. The Explanation of Duress Given to the Jurors Was Defective In Light of Their Request

Preliminarily, it should be noted that appellant has no quarrel with the trial court's ruling that the jury was to view "duress" in a commonsense fashion, and to construe the term by its common usage, rather than as the term is used in instructions governing threats or menaces as a defense to crime, as was suggested by the prosecutor. (See Pen. Code, § 26; CALJIC Nos. 4.40 & 4.41 (5th ed.).) This Court has recently recognized that the term "duress" has different meanings depending on the context and purpose in which it is used. (*People v. Leal* (2004) 33 Cal.4th 999.) In *Leal*, this Court approved of the reasoning of the Court of Appeal in *People v. Pitmon* (1985) 170 Cal.App.3d 38, which differentiated between the meaning of duress as a defense and its meaning as an element of a crime. (*People v. Leal*, *supra*, 33 Cal.4th at pp. 1004-1008.) Thus, as the trial court here properly intuited, instructing the jurors on duress as a defense to crime would have confused them by encroaching on their ability to consider the full scope of potentially mitigating evidence. After all, as this Court has held, "factors (d) and (g) do not, when read in conjunction with the catchall provisions of factor (k), preclude the jury from considering less extreme forms of duress, emotional disturbance, or domination." (*People v. Vieira* (2005) 35 Cal.4th 264, 303; *People v. Turner* (1994) 8 Cal.4th 137,

208-209.)

The defects in the trial court's ultimate instruction were threefold. First, the trial court neglected to answer the jurors' multifaceted question as to whether duress could be "indirect" or directed from "outside," and how one person could place another under duress. Thus, the trial court's instruction was incomplete. Second, when the jurors asked if duress could be directed from outside, the trial court responded that such a question in effect called for testimony and information which the court was not permitted to provide. This response was incorrect, as no further testimony was called for. The question should have been answered affirmatively, as it was a question concerning the applicable law. Moreover, the trial court's parting words ("See, I can't tell you stuff that's not in the evidence") were susceptible of being understood by the jurors as a comment that no evidence had been presented from which the jurors could find that appellant had acted under duress from "outside." Third, the trial court instructed the jurors that they would have to decide the issues raised by their question based on the evidence and any reasonable inferences they, as factfinders, were to arrive at. The reference to "reasonable inferences" was an improper limitation on each juror's discretion to view the mitigating evidence subjectively in making the quintessentially normative decision of whether appellant's conduct warranted the death penalty.

a. The Response Was Incomplete

First, it is well to recall the scope of what the jurors were asking for, as demonstrated by their explicit reference to factors (d) and (g). Factor (d) refers to "whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," while factor (g) posits for the jury the task of considering "whether or not the

defendant acted under extreme duress or under the substantial domination of another person." (CALJIC No. 8.85.) Taking into account the questions that the jurors put to the trial court to refine their request, and the various versions of how the crime was committed as reflected by the evidence, defense counsel's belief that the jurors were concerned with whether duress was legally bounded by time or space was eminently reasonable.[157] As defense counsel argued, it appeared that the jurors were asking whether duress could extend back as far as events in appellant's childhood.[158] (44 RT 5847.) The jurors' question concerned a point of law that required a clarifying response. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.) "The jurors did not ask how to determine the facts; they asked for guidance in using those facts to reach a proper verdict using applicable law. Their questions could and should have been answered." (*People v. Thoi* (1989)

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[157] The prosecution theory of the case was that appellant acted wilfully and alone in committing the crime. In contrast, appellant's trial testimony consisted of a denial. The prosecution also presented Lisa Henry's account of appellant's in-custody statement to her, in which appellant said he had been present when Fred Bush committed the killing, but that he had tried to prevent it. No party presented evidence that appellant was directly menaced or threatened to enter the victim's home with an intent to steal or rob, or to kill the victim.

[158] Although not discussed by court and counsel, there was other evidence which the jury might have considered as germane to the issue of whether appellant acted under duress. Appellant testified that on the day of the victim's murder, he had learned from a friend that the person or persons who had shot him on March 18, 1988, were again seeking to kill him. Consequently, appellant was seeking a weapon for self-protection as well as money so he could leave Oakland and travel to Seattle. (31 RT 4124-4125, 4131-4132.) It was shortly after obtaining a gun, but failing to receive money from his family, that appellant entered the victim's home. It is possible that the jurors were considering this evidence in connection with their question concerning duress.

213 Cal.App.3d 689, 698.)

By failing to fully answer the jurors' question, the trial court incurred the risk that one or more jurors might not give consideration to the mitigating evidence that appellant acted as he did as a result of indirect duress. In the commonsense manner by which the jury was to assess the meaning of duress, coercion or compulsion that is synonymous with duress may be either direct or indirect. (*Thomas v. Review Bd.* (1981) 450 U.S. 707, 718; *People v. Mabry* (1969) 71 Cal.2d 430, 450.) Similarly, "[T]here is some overlap between what constitutes duress and what constitutes force. This is because duress is often associated with the use of physical force, which may, but need not be present to have duress." (*People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 50.)

It is evident that the jurors were not aware of these points. (See, e.g., *Belmontes v. Brown* (9th Cir. 2005) 414 F.3d 1094, 1136-1337 [juror's question made it clear that she was unsure how to follow the court's instructions on the proper consideration of defendant's mitigating evidence]; *Shafer v. South Carolina* (2001) 532 U.S. 36, 53 [jury's question "left no doubt" that it did not clearly understand trial court's original instructions]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 178 [jurors' question asking if parole was available proved that they did not know whether or not a life-sentenced prisoner will be released from prison].) Thus, it was incumbent on the trial court to communicate to the jury that duress could be either direct or indirect; thus, it could be exerted upon appellant from "the outside" just as much as if, e.g., a person present at the time and place of the murder had pointed a gun at appellant's head and

directed him to kill or be killed.[159] The trial court's duty to provide a definition of the term was not fulfilled by the instruction provided in light of the jurors' response to whether the instruction given answered the original question.

> [W]here the jury during its deliberations indicates confusion over the meaning of the term and specifically requests a definition of the term, [fn. omitted] we believe the court must honor the request. When the jury asks for clarification, it no longer can be presumed that the jury understands the meaning of the term. Only by answering the jury request does the court fulfill its duty to instruct on those elements of the case necessary for the jury to reach an informed decision [citation].

(*People v. Miller* (1981) 120 Cal.App.3d 233, 236.)

Moreover, whatever conceptual difficulties the trial court may have had in formulating a response which correlated the mitigating evidence in the case with any possible temporal or qualitative limitations suggested by the language of factor (d) ("[w]hether or not the *offense was committed while* the defendant was under the influence of *extreme* mental or emotional disturbance") or factor (g) ("[w]hether or not defendant acted under *extreme* duress or under the *substantial* domination of another person"), this Court has recognized that factor (k) provides a vehicle by which the jury can properly give mitigating effect to evidence that a defendant was influenced by mental or emotional disturbance, duress or domination by another which

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[159] Clearly, the example of "direct" duress would not constitute a cognizable defense to the crime of murder itself. (See Pen. Code, § 26.) Nonetheless, as this Court has recognized, factor (k) permits the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Pen. Code, § 190.3(k); *People v. Vieira*, *supra*, 35 Cal.4th at p. 303; *People v. Turner*, *supra*, 8 Cal.4th at pp. 208-209.)

was neither so extreme nor so substantial as to be covered by factors (d) or (g). (*People v. Vieira*, *supra*, 35 Cal.4th at p. 303; *People v. Turner*, *supra*, 8 Cal.4th at pp. 208-209; *People v. Clark* (1992) 3 Cal.4th 41, 163.) Just as the trial court realized that defining duress as suggested by the prosecutor carried the untenable risk of encroaching on the jurors' ability to give full scope to the potentially mitigating evidence, so too was it necessary to remind the jury, while responding to its question, that factor (k) was applicable in the event that a juror was satisfied that the evidence presented was such as to extenuate the gravity of the crime even though it was not a legal excuse for the crime.

The danger that the jury, if not properly instructed in response to their question, would not give proper consideration to the mitigating evidence, was made clear by Juror Number Two's question to the court, seeking and receiving assurance that the jury was to look to "the evidence in fact" with respect to determining the applicability of factors (d) and (g). (44 RT 5839.) Thus, not only did the trial court's ultimate response (omitting reference to factor (k)) to the jurors' question improperly shape the jury's determination of whether the evidence supported factors (d) and (g), it diminished the jurors' ability to apply factor (k) to the mitigating evidence. As this Court has held:

> [I]nstructions in the language of section 190.3, factor (g), which allows the jury to consider whether defendant acted under "extreme" duress or under "substantial domination" of another person, include lesser forms of duress and domination *when read in conjunction with factor (k)*, and therefore do not act as a barrier to the consideration of mitigating evidence.

(*People v. Adcox* (1988) 47 Cal.3d 207, 270, emphasis added.) Jury instructions which fail to convey to the jurors that they must consider all

relevant mitigating evidence do not pass constitutional muster. (*Buchanan v. Angelone* 1998) 522 U.S. 269, 278; *Penry v. Lynaugh* 1989) 492 U.S. 302, 319; *Belmontes v. Brown* (9th Cir. 2005) 414 F.3d 1094, 1131-1132.)

b. An Accurate Response to the Jurors' Question Would Not Have Impinged on the Jury's Decision, As Did the Ultimate Response Given By the Trial Court

The trial court felt constrained from replying to the jurors' question as to whether duress could be directed from the "outside," as it felt that any answer it could give would necessarily interject testimony or evidence into the case and thus impinge on the jury's duty to find the facts. Although the introduction of extraneous and improper considerations into the jury's deliberations would have been improper (see, e.g., *People v. Hinton* (2004) 121 Cal.App.4th 655), the trial court's fear of interjecting such considerations into the case was not well-founded. It would have been perfectly proper to have told the jury: "Yes, duress can be directed from the outside, as it can be both direct and indirect. However, whether there was duress in this case is for you to decide based upon the evidence you heard, and any inferences from that evidence that you, as factfinders, arrive at." Such a reply, in conjunction with the dictionary/common-usage definition of duress, would have both explained the legal concept at the heart of the jury's question, and channeled the jury's deliberations within the framework of the evidence. (See, e.g., *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331-1332; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250-251.) Nothing less was sufficient to satisfy the demands of the federal Constitution. "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any indication of perplexity on their part." (*Kelly v.*

South Carolina (2002) 534 U.S. 246, 256; U.S. Const., 8th & 14th Amends.)

Ironically, not only was the trial court's fear of stepping on the jurors' toes unfounded, the instruction actually given managed to accomplish exactly what the trial court professed to be at pains to avoid. By unnecessarily articulating to the jurors its view that telling them about duress directed from "outside" would involve impermissible testimony and "stuff that's not in the evidence," the trial court communicated that it did not believe the evidence at trial demonstrated "indirect" duress.[160]

> The urgency to respond with alacrity must be weighed against the need for precision in drafting replies that are accurate, responsive, and balanced. When a question shows the jury has focused on a particular issue, or is leaning in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination.

(*People v. Moore*, *supra*, 44 Cal.App.4th at p. 1331.)

While Article VI, section 10 of the California Constitution provides for judicial comment on the evidence, such comments must comport with stringent requirements. Thus, this Court has held that such comment "'be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.'" (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1218, quoting

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[160] Even if the trial court did not mean to convey to the jury its personal views about the existence or non-existence of duress, the harm caused by the trial court's instruction was just as damaging as if the trial court was motivated by animus. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

People v. Rodriguez (1986) 42 Cal.3d 730, 766.)

The same principles apply to supplemental instructions. Although the true meaning of the phrase "fair and balanced" may have become somewhat obscure in its popular usage, it is undeniably true that supplemental instructions must truly be fair and balanced. (*Davis v. Erickson* (1960) 53 Cal.2d 860, 863-864; *United States v. Skarda* (8th Cir. 1988) 845 F.2d 1508, 1512; *United States v. Sutherland* (5th Cir. 1970) 428 F.2d 1152, 1157-1158.) Here, the supplemental instruction given by the trial court was neither fair nor balanced.

Clearly, the trial court believed that although the jury was considering whether events in appellant's past were so enduring that they affected his conduct while committing the crime, such consideration was "a real long stretch by this jury." (44 RT 5841.) But it was not the trial court's role to determine the facts, or to shape the inferences the jurors could draw from the facts. The ill-considered reply made by the trial court here was sure to especially resonate with jurors like Juror Number Two, who had asked the trial court if factors (d) and (g) must be based on "evidence in fact." (44 RT 5840.) In sum, the trial court's reason for not fully answering the jurors' question cannot withstand scrutiny, and, with the inartful articulation of its reasoning to the jury, the trial court unwittingly usurped the very factfinding function it purportedly sought to preserve for the jurors.

c. The Trial Court's Instruction Improperly Restricted the Jurors' Normative Penalty Decision

In combination with the language suggesting that the evidence lacked the type of duress the jurors were concerned with, the trial court also instructed the jurors that they were to decide the issue raised by their

question by reference to the evidence presented at trial, as well as "any reasonable inferences" drawn from the evidence. (44 RT 5855.) In using the qualifying term "reasonable," the trial court not only departed from the precise language consented to by defense counsel (44 RT 5850), but also created a substantial risk that the jurors would misunderstand the proper scope of their consideration of potentially mitigating evidence.

It is axiomatic that the trial court must answer the deliberating jurors' questions in a way which will eliminate the confusion they are experiencing. (*Bollenbach v. United States*, *supra*, 326 U.S. at pp. 612-613 [judge must give "lucid" statement of relevant legal criteria so as to guide jury in drawing appropriate conclusions]; *People v. Vela* (1985) 172 Cal.App.3d 237, 241; *United States v. Walker* (9th Cir. 1978) 575 F.2d 209, 213.) The trial court's answer was neither lucid nor correct.

It is beyond dispute that the task facing a penalty-phase capital jury is sui generis, and, if nothing else, such a jury does far more than engage in mere fact-finding. As this Court has observed:

> At the penalty phase of a capital trial, the jury has the especially delicate task of deciding whether the accused should live or die. Jurors are called upon to "express the conscience of the community" (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776.) It is undeniable that jurors making the penalty decision are entitled to, and in fact must of necessity, exercise considerably more subjective discretion in performing this task than they do in reaching a decision on guilt or innocence. (See *Adams v. Texas* (1980) 448 U.S. 38, 46, 100 S.Ct. 2521, 2527, 65 L.Ed.2d 581, 590.)

(*People v. Harris* (1981) 28 Cal.3d 935, 982.) Further, as one commentator has noted:

> [T]he nature of the penalty phase necessarily endows a jury

> with greater discretion than does the guilt phase. Guilt phase jurors are expected to make findings of fact and apply the law to the facts without injecting their personal feelings or sense of justice. [Footnote.] Penalty phase jurors, by contrast, are expected to bring their own values into play. . . . Since the jury cannot be instructed regarding the proper expression of these values, the death penalty decision necessarily involves subjective and discretionary elements not present when a jury decides the question of guilt.

(Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases - A Comparison & Critique* (1991) 26 U.S.F. L.Rev. 41, 52-53.)

Because "the focus of the penalty-selection phase of a capital trial is more normative and less factual than the guilt phase" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267), and "[w]hat is important. . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime" (*Zant v. Stephens* (1983) 462 U.S. 862, 879), courts must be especially sensitive to instructing the jury in ways which render its decision a mechanical application of facts. The penalty decision is not to be resolved by a mechanical finding of facts but rather by "the jurors' moral assessment of those facts as they reflect on whether defendant should be put to death" (*People v. Brown* (1985) 40 Cal.3d 512, 540).

Ordinarily, it would seem counterintuitive to find fault with an instruction directing the jurors to assess evidence logically and objectively. For instance, in deciding whether circumstantial evidence is sufficient to support a finding of guilt beyond a reasonable doubt, jurors are required to be instructed they must accept reasonable inferences flowing from circumstantial evidence, but reject unreasonable inferences. (CALJIC No.

2.01, *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) Such a rule is arguably appropriate when it guides jurors who, as triers of fact, must decide whether the prosecution has met its burden of proving guilt beyond a reasonable doubt.[161] (*People v. Redrick* (1961) 55 Cal.2d 282, 289.) However, the decision a penalty-phase jury makes is not one that inexorably requires the exercise of logic or objectivity. Within certain limits not implicated here, the heart may prevail over the head. Hence, such a rule is unduly restrictive where the jurors are not deciding whether either party has placed enough evidence on the scale to warrant a particular penalty. Instead, the entire task is to decide which penalty is appropriate on evidence that every juror may properly view differently, according to his or her own moral compass.

To say that the jurors must draw only reasonable inferences from the evidence would be the equivalent of saying that it would be illogical for jurors to be swayed by evidence that a remorseless serial killer was loved by his family and therefore should not be put to death. Yet, as this Court has held, such evidence is relevant as mitigating evidence because it constitutes indirect evidence of the defendant's character, and when a jury spares the life of such a killer, it may nonetheless be faithfully following the law. (*People v. Smithey* (1999) 20 Cal.4th 936, 999; *People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

Appellant is aware that this Court did not find fault with a somewhat similar instruction in *People v. Wrest* (1992) 3 Cal.4th 1088. In *Wrest*, a

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[161] This Court has rejected the argument (see Argument X, *ante*), that circumstantial-evidence instructions are unconstitutional because they mislead jurors regarding the reasonable doubt standard and impermissibly lighten the prosecution's burden of proof. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714, and cases collected therein.)

deliberating penalty-phase jury submitted a request to the court asking if they could properly develop mitigating circumstances by drawing inferences from other evidence.[162] With defense counsel's express approval, the jurors were told that the mitigating factors were set forth in the instructions and no further elaboration on those instruction was permissible. However, the jury was also told it was entitled to draw reasonable inferences from the evidence, but not entitled to speculate. (*Id.* at pp. 1111-1112)

On appeal, the defendant argued that (1) the instruction inhibited the jury's ability to find mitigation from evidence of defendant's state of mind (i.e., probable mental illness) presented in inferences drawn from the prosecution's evidence of the vicious and unrelenting attack on the victims, and (2) the trial court's admonishment that the jury avoid speculation and refusal to elaborate on the remaining instructions implied that, absent speculation, there was no mitigating state-of-mind evidence and that mitigation was necessarily limited to the enumerated factors in former CALJIC No. 8.84.1. (*Id.* at pp. 1111-1112.) This Court "perceive[d] no

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[162] The precise request in *Wrest* called for the trial court to answer these questions:

> Is the jury allowed to develop mitigating circumstances that were not explicitly presented in the courtroom by making inferences based upon other evidence or testimony?
>
> For instance, can the jury attempt to develop the state of mind of the defendant by inference from other evidence in spite of the fact that the defense did not specifically make a claim covering or presenting direct evidence of the state of mind of the defendant?

(*People v. Wrest, supra*, 3 Cal.4th at p. 1111.)

such implications in the court's remarks." (*Id.* at p. 1112.) It found that the enumeration of aggravating and mitigating factors in former CALJIC No. 8.84.1, which "specifically directed jurors to consider '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 which may have been offered by the defendant as a basis for a sentence less than death, whether or not related to the offense for which he's on trial,'" demonstrated no reasonable likelihood that the jurors misunderstood the nature or scope of the factors they were to consider in deciding the appropriate penalty. (*Ibid.*)

Wrest can be distinguished from the case at bar. First, appellant's counsel here did not give express approval to the language used by the trial court. The trial court "ad-libbed" the comments, suggesting that answering the jurors' narrow question required additional evidence not otherwise presented at trial. Further, the trial court, after consultation with counsel, had indicated that it would instruct the jurors that they could properly consider "inferences" drawn from the evidence, not just "reasonable inferences." Thus, that language was likewise interjected without notice and without express approval from counsel.[163] Second, the trial court's comments were substantively incorrect. Providing an answer to the jurors' question did not call for "additional" evidence. Consequently, the comments made by the trial court here were far more suggestive than the comments in *Wrest*, where the trial court merely told the jurors to avoid speculation by drawing reasonable inferences from all the evidence. Third,

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[163] In any event, the trial court had an affirmative duty to instruct the jury correctly. (*People v. Stewart* (1976) 16 Cal.3d 133, 140.)

the evidence of duress in this case was evidence the defense presented to explain appellant's conduct. Whether duress was temporally distant, as defense counsel believed, or more immediate, as suggested by appellant's own guilt-phase testimony that his conduct on the day of the murder was driven by threats made to his life by an enemy who had shot him the month before, that evidence was nonetheless part of the defense case, and not a product of the jurors' speculation, derived from the prosecution's evidence, as in *Wrest*. Finally, it appears that the issue of whether it was proper for a trial court to guide penalty-phase jurors' consideration of mitigating factors by instructing them to draw reasonable inferences from the evidence was not contested or decided in *Wrest*. Consequently, the holding in that case should not be considered as authority supporting the trial court's instruction in this case. (*People v. Mazurette* (2001) 24 Cal.4th 789, 797.)

Should this Court consider the circumstances at bar sufficiently similar to those presented in *Wrest* so as to deem the reasoning in that case applicable here, appellant respectfully requests that the Court reconsider such reasoning. As previously noted, the unique role of the jury in the penalty phase of a capital trial calls for the exercise of a discretion that should not be unnecessarily constrained by instructions that direct the jurors to objectively and reasonably evaluate the evidence in aggravation and mitigation. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 826-827 ["Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality. . ."].) Further, in *Tennard v. Dretke*, *supra*, 542 U.S. at pp, 284-285, the high court emphasized that once the "low threshold" for admissibility of mitigating evidence was met, there were "virtually no limits" placed on the jury's consideration of such evidence.

The broad and expansive latitude referred to by the United States Supreme Court in *Payne* and *Tennard* would be unconstitutionally restricted if a trial court were permitted to instruct a penalty jury that it must apply logic and objectivity to its sentencing decision.

E. The Instructional Error Was Prejudicial

The state law standard for assessing error in the penalty phase of a capital trial is whether there is a reasonable possibility such an error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) This Court has observed that the state standard is the same as for error of federal constitutional dimension under the "reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) This standard, rather than the "miscarriage of justice" standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) used to gauge the impact of error on the results of jury fact-finding, is appropriate and workable in assuring reliability because what the jury does at the penalty phase is fundamentally different than a mere objective finding of facts. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330; *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.) Here, several factors come into play which establish such a reasonable possibility.

First, it has long been recognized that erroneous supplemental instructions given in response to inquiries from the jury are especially likely to be prejudicial because they deal with the very issues which the jurors themselves have identified as the critical issues in the case. (*Shafer v. South Carolina*, *supra*; 532 U.S. at p. 53; *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 178; *People v. Beeman* (1984) 35 Cal.3d 547, 562-563; *People v. Thompkins*, *supra*, 195 Cal.App.3d at pp. 250; *United States v. Stephens* (5th

Cir. 1978) 569 F.2d 1372, 1374.) Moreover, these instructions will in all likelihood be perceived by the jurors as the most important instructions in the case. (*Bollenbach v. United States*, *supra*, 326 U.S. at pp. 612-613; *People v. Woppner* (1859) 14 Cal. 437, 438; *People v. Thompkins*, *supra*, 195 Cal.App.3d at pp. 252-253; *United States v. Carter* (5th Cir. 1974) 491 F.2d 625, 633; *United States v. Workcuff* (D.C. Cir. 1970) 422 F.2d 700, 702 [jury likely to attach "particular significance" to supplemental instructions].)

Second, the jurors' focus on the specific factors (d) and (g) of CALJIC No. 8.85 was not mere idle musing on their part; the evidence and argument of counsel touched on these factors. For example, the prosecutor specifically argued that neither factor applied. In particular, he incorrectly argued that factor (g) did not apply: "Well, we know that isn't so because he acted alone."[164] (43 RT 5721-5722.) Defense counsel time and again made reference in their penalty summations to the fact that appellant had been "molded" and "directed" as a youth by the "mentoring" of his substitute family, the band of criminals consisting of Eric Cato, Darryl Cooper, and Arthur Simpson. (43 RT 5747, 5754, 5775, 5822.) Similarly, defense counsel argued that appellant, in his later teenage years, "projected violence" to those around him as a result of the substantial domineering presence of "the monster," his stepfather, Wayne Carter. (43 RT 5774, 5796-5797.)

Third, appellant's own testimony provided a factual basis for the

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[164] The prosecutor treated the two factors differently. He argued that there was no evidence of "extreme" mental or emotional disturbance, whereas he concentrated on the fact that appellant had acted alone to argue for the inapplicability of factor (g).

jurors' consideration in determining whether appellant committed the offense while under the influence of extreme mental or emotional disturbance, or extreme duress. At the guilt phase, appellant testified that he had learned, on the day of the victim's murder, that his life was again threatened by the man who had shot him a month ago. (31 RT 4124-4125, 4131-4132.) In reaction to that threat, appellant urgently needed money to leave California and to get a gun for self-protection. Moreover, the taped statement that appellant gave to the police after his arrest referred to those very facts.[165]

Finally, it must be recognized that the trial court's response substantially undercut the jury's ability to otherwise channel, through factor (k), its consideration of "duress" or any other factual consideration generally contemplated by the terminology employed in factors (d) and (g). Thus, in the event the jurors determined that appellant acted under duress that was not "extreme," or was dominated by another, but the domination was not "substantial," or that he committed the offense while under the influence of a less-than-extreme mental or emotional disturbance, the trial court's response functioned to diminish their ability to give proper expression to the mitigating evidence through factor (k).

Taking all of the above circumstances into account, it would not be unreasonable to conclude that the jurors were considering one or more of the above matters in deciding whether either or both of the specified

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[165] Two days later in their deliberations, the jurors asked to review this statement. (44 RT 5883-5887.) In the statement, appellant had told the police that he had gone to his family's home on Hesket Road earlier on the day of the victim's murder to get a gun and money for a ticket to travel to Washington because he had been shot and did not want to remain in Oakland. (Peo. Exh. 73 (tape); Peo. Exh. 74 (transcription of tape).)

mitigating factors were applicable, and did not fully grasp that factor (k) could function as a "catch-all" provision to accommodate any evidence under consideration that might not otherwise precisely meet the conditions described in factors (d) and (g). Yet this is not all that we have to work with in deciding whether there is a reasonable possibility that the jury's death verdict was affected by the erroneous instructions. The determination of which penalty was appropriate was exceedingly close, as reflected by the jury's announcement of a deadlock on the fifth day of deliberations, followed by a further three days of deliberations after the trial court's utterly inexplicable and erroneous failure to answer the jurors' question as to which of the two possible penalties was worse.[166] And, as shown earlier in connection with that discussion of the trial court's failure to properly instruct the deliberating jury, the expressed interest of the jurors in requesting and re-examining defense exhibits during deliberations, and the fact that the evidence in aggravation was not overwhelming when contrasted with the mitigating evidence, makes it impossible to conclude that the trial court's error in answering the request to clarify CALJIC No. 8.85 could not conceivably have had an influence on the ultimate penalty verdict.

F. Conclusion

For all of the above-stated reasons, the trial court's erroneous response to the deliberating jurors' requests for assistance in understanding CALJIC No. 8.85 denied appellant his rights to due process of law and a reliable penalty determination, and requires that the death judgment be reversed. (*Buchanan v. Angelone*, *supra,* 522 U.S. at p. 278; *Bollenbach v.*

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[166] See Argument XIII, *ante*.

United States, *supra*, 326 U.S. at pp. 612-613; *McDowell v. Calderon*, *supra*, 130 F.3d at pp. 836-841.)

XVI

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 a modified version of CALJIC No. 8.85, 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 (5 CT 1092-1094; 44 RT 5825-5827), and pursuant to a modified version of CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (5 CT 1090-1091; 44 RT 5824-5825). These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional. First, the application of section 190.3, factor (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable and evenhanded application of the death penalty. Third, 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 violated appellant's federal constitutional rights to meaningful appellate review and equal protection of the law. Fourth, 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, Factor (a), and Application of That Sentencing Factor, Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, factor (a) violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within that statute's meaning, even ones squarely at odds with others deemed supportive of death sentences in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-976), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law (U.S. Const., 14th Amend.) and the Eighth Amendment.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, e.g., the defendant: had a "hatred of religion";[167] sought to conceal evidence three weeks after the crime;[168] threatened witnesses after his arrest;[169] disposed of the victim's body in a

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[167] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.

[168] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[169] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

manner precluding its recovery;[170] or had a mental condition that compelled him to commit the crime.[171]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) It is, therefore, unconstitutional as applied. (*Ibid.*)

B. The Failure to Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded the Fair, Reliable and Evenhanded Application of the Death Penalty

Despite appellant's request therefor, 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

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[170] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

[171] *People v. Smith* (2005) 35 Cal.4th 334, 352.

mitigating depending upon the evidence.[172] Yet, as a matter of state law, each of the two factors introduced by a prefatory "whether or not" – i.e., factors (d) and (h) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance as to which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to either 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 non-existent or irrational aggravating factors, which precluded the reliable, individualized capital-sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

It is not merely idle speculation for appellant to point out the failure of the trial court to provide meaningful guidance as to the proper consideration of aggravating and mitigating factors, as reflected in the

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[172] Appellant requested an instruction informing the jurors, inter alia, that "[t]he factors in [CALJIC No. 8.85] which you determine to be aggravating circumstances are the only ones which the law permits you to consider" and that they were "not allowed to consider other facts or circumstances" as aggravation (see 5 CT 995); and an instruction informing the jurors that they were not permitted to "double count" as an aggravating factor any circumstance of the offense which was also found to be a special circumstance (see 5 CT 990). Appellant also requested an instruction specifically enumerating the factors that can only be mitigating (see 5 CT 996-997); that the evidence presented "regarding the defendant's background" could only be considered as mitigating evidence (see 5 CT 1011); and that the absence of any statutory mitigating factor did not constitute an aggravating factor (see 5 CT 1013-1014). These requests were refused by the court. (See 42 RT 5652-5664.)

actual instructions given and the refusal of the otherwise appropriate instructions requested by defense counsel. This Court need only look at the comments of the prosecutor at the conference to resolve the penalty-phase jury instructions. There, the prosecutor argued that in addition to factors (a) through (c), which could only be considered as aggravating factors, factors (d) through (j) could be aggravating as well as mitigating factors. (44 RT 5658-5662.) If this experienced prosecutor can be taken at his word, he completely misunderstand the proper use of the aggravating and mitigating factors. Moreover, his "misunderstanding" was later reflected in his penalty-phase closing argument, in which he converted the evidence of appellant's background into a reason to execute appellant, culminating in the assertion that appellant would ignore any mercy the jury might grant him, just as he had "ignore[d]" and "reject[ed]" everything given to him in his life, including leniency by the juvenile courts. (44 RT 5701-5710.) Such an argument misapprehends the proper scope of the permissible aggravating factors. (*People v. Hardy* (1992) 2 Cal.4th 86, 207-208.) Under those circumstances, one can hardly feel sanguine that a lay jury would have understood the law any better. Failing to provide appellant's jury with guidance on this point was reversible error.

C. 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 Nos. 8.85 and 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* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 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) 372 U.S. 293, 314).

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland* (1988) 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.* at 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* (1992) 2 Cal.4th 792, 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." (*Id.* 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.*; § 1170, subd. (c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 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* (1990) 897 F.2d 417, 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* (1990) 52 Cal.3d 577, 643), and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), does not mean that 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, 26 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.[173] California's failure to require such findings renders its

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[173] 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); (continued...)

death-penalty procedures unconstitutional.

D. 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

The United States Supreme Court has repeatedly asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1988) 524 U.S. 721, 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 treatment violates the constitutional guarantee of equal protection of the laws. (U.S., Const., 14th Amend.).

Equal protection analysis begins with identifying the interest at

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[173] (...continued)
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. Crim. Law art., § 2-304 (2002); 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).

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 itself, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights. . . .'" (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 102.)

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. Mihaly* (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*, 17 Cal.3d at p. 251; *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.

This Court has most explicitly responded to equal protection challenges to the death-penalty scheme by rejecting claims that failure to afford capital defendants the disparate-sentence review provided to

non-capital defendants violates equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) This Court's reasons were a more detailed version of the rationale used to justify not requiring any burden of proof in the penalty phase of a capital trial, or unanimity as to the aggravating factors justifying a sentence of death, i.e., that death sentences are moral and normative expressions of community standards. However, that rationale does not support denying those sentenced to death procedural protections afforded other convicted felons.

In holding that it was rational not to provide capital defendants the disparate-sentence review provided to noncapital defendants, *Allen* distinguished death judgments by pointing out that the primary sentencing authority in California capital cases is normally the jury, "[a] lay body [which] represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality are manifested in death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia* (1977) 433 U.S. 584), or offenders (*Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782). Juries are not immune from error, and may stray from the larger community consensus as expressed by statewide sentencing policies. Disparate-sentence review is designed to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices.

While the state cannot preclude a sentencer from considering any factors that could cause it to reject the death penalty, it can and must provide rational criteria to narrow the sentencer's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the statutory criteria that narrow death eligibility, or the flat judicial prohibitions against imposing the death penalty on certain offenders, or for certain crimes.

Moreover, jurors also are not the only sentencers. A verdict of death is always subject to independent review by the trial court, which not only can reduce a jury's verdict, but must do so under some circumstances. (See § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the lack of disparate-sentence review cannot be justified on the ground that reducing a jury's verdict would interfere with its sentencing function.

A second reason *Allen* offered for rejecting the equal protection claims was that the range available to a trial court is broader under the Determinate Sentencing Law ("DSL") than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments narrows to death or life without parole." (*Allen*, *supra*, 42 Cal.3d at p. 1287.) That rationale cannot withstand scrutiny, because the difference between life and death is not in fact "narrow"; and particularly not when contrasted with that between sentences of two years and five years in prison.

The notion that the disparity between life and death is "narrow" not only violates common sense, it also contradicts specific pronouncements by the United States Supreme Court: "Th[e] especial concern [for ensuring that every possible procedural protection is provided in capital cases] is a

natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305 (opn. of Stewart, Powell, and Stephens, JJ.); see also *Reid v. Covert* (1957) 354 U.S. 1, 77 (conc. opn. of Harlan, J.); *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 (conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.); *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 (opn. of Stewart, Powell, and Stevens, JJ.); *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.) The qualitative difference between a prison sentence and a death sentence militates for, not against, requiring disparate review in capital sentencing.

Finally, this Court in *Allen* said that the additional "nonquantifiable" aspects of capital sentencing, as compared to noncapital sentencing, support treating felons sentenced to death differently. (42 Cal.3d at p. 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification, because it is one with very little difference. A trial judge may base a sentence choice under the DSL on a set of factors that includes precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare § 190.3, factors (a) through (j), with Cal. Rules of Court, rules 421 and 423.) It is reasonable to assume that the Legislature created the disparate-review mechanism discussed above because "nonquantifiable factors" permeate all sentencing choices.

This Court has also said that the fact that a death sentence reflects community standards justifies denying capital defendants the disparate-sentence review provided all other convicted felons. (*Allen*, *supra*, at p. 1287.) But that fact cannot justify depriving capital defendants of this procedural right, because that type of review is routinely provided in virtually every state that applies the death penalty, as well as by the federal courts in considering whether evolving community standards permit the imposition of death in a particular case.

Nor can the fact that a death sentence reflects community standards justify refusing to require written jury findings, or accepting a verdict that may not be based on a unanimous agreement that particular aggravating factors are true. Those procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death-sentencing proceedings (see *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 demeans the community as irrational and fragmented, and cannot withstand the close scrutiny that should apply when a fundamental interest is affected.

The denial of equal protection in not affording California capital defendants the procedural safeguards described above violated appellant's Eighth and Fourteenth Amendment rights and requires reversal of his death judgment.

XVII

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

A. Introduction

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read in pertinent part 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 the defendant.
>
> After having heard all of 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 does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is

> justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> In order to make a determination as to the penalty, all twelve jurors must agree.

(5 CT 1090-1091; see 44 RT 5824-5825.)

The above-quoted 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. Whether considered singly or together, the flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

B. The Instruction Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

The sentence of the foregoing instruction that purported to guide the jurors' decision on which penalty to select told them they could vote for death if "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it [*sic*] warrants death instead of life without parole." (5 CT 1091; 44 RT 5825.) Thus, the decision whether to impose death turned on the words "so substantial," an impermissibly vague phrase which bestowed intolerably broad discretion on the jury.

To meet constitutional muster, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death-penalty sentencing scheme must adequately inform the jurors of "what they must find to impose the death penalty. . . ." (*Id.* at pp. 361-362.) A death-penalty sentencing scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth Amendment. (*Ibid.*)

The phrase "so substantial" is so lacking in any precise meaning that it did not inform the jurors what they were required to find to impose the death penalty, and so varied in meaning, as well as so broad in usage, that it is virtually incapable of explication or understanding in the context of deciding between life and death. It suggests a purely subjective standard, 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*. . . ." (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.) In short, the words "so substantial" provided the jurors with no guidance as to "what they must find to impose the death penalty." (*Id.* at p. 361-362.)

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, 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.]"

(*Id.* at p. 391; see *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)[174]

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. [fn.] 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.)

It is true 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* (1991) 1 Cal.4th 281, 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. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, but appellant submits that their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

First, 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 which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*; emphasis added), while the instruction given here, like the one in *Breaux*,

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[174] The Georgia Supreme Court seems to have analyzed the vagueness issue in Arnold under the Due Process Clause of the Fourteenth Amendment. (224 S.E.2d at p. 391; compare *Maynard v. Cartwright*, *supra*, 486 U.S. at pp. 361-362.)

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.)[175]

In fact, using the term "substantial" in CALJIC No. 8.88 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* (1980) 446 U.S. 420, 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, 235-236.) It is constitutionally impermissible to base the decision to impose death on such unspecific and subjective criteria. Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th and 14th Amends.), the death judgment must be reversed.

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[175] Significantly, the United States Supreme Court has noted with apparent approval *Arnold*'s conclusion that the term "substantial" is impermissibly vague in the context of determining whether a defendant had a "substantial history of serious assaultive criminal convictions." (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 867, fn. 5.)

C. The Instruction Did Not Convey That the Central Determination Is Whether the Death Penalty Is Appropriate, Not Merely Authorized under the Law

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court has consistently held that it would mislead jurors to say that the deliberative process is merely a simple weighing of factors, in which the appropriateness of the chosen penalty should not be considered. (*People v. Brown* (1985) 40 Cal.3d 512, 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]; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; *People v. Champion* (1995) 9 Cal.4th 879, 947-948 [instruction may not properly lead the jury to believe that the process of weighing factors in aggravation and mitigation is a "mere mechanical counting of factors"]; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962-963.)

Here, the instruction under CALJIC No. 8.88 told the jurors they could "return a judgment of death [if] . . . persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." In addition to infecting the deliberative process with ambiguity by using the term "so substantial," this instruction also failed to inform the jurors that the central inquiry was not whether death was "warranted," but rather whether it was appropriate.

Those two determinations are clearly 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." Webster's Third New International Dictionary, Unabridged (1976 ed.) defines the verb "warrant" as, inter alia, "to give authority or power to for doing or forebearing to do something," or "to serve as or give sufficient ground or reason for" doing something. (*Id.* at p. 2578.) By contrast, "appropriate" is defined as "specially suitable" or "belonging peculiarly." (*Id.* at p. 106.) 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 legally or morally permitted. That is a far different finding than the one the jury is actually required to make: that death is a "specially 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 that earlier stage in our statutory sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding that special circumstances authorize the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 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 passing reference to a "justified and appropriate" penalty. (5 CT 1091; 44 RT 5825 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate. . . ."].) That sentence did not tell the jurors they could return a death verdict only if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" 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 deliberative instruction 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 both state law and the federal Constitution. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.), denied appellant due process (U.S. Const., 14th Amend.; see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

D. The Instruction Did Not Tell the Jury That a Life Sentence Is Mandatory If the Aggravating Factors Do Not Outweigh the Mitigating Ones

A capital-sentencing jury which finds that death is not an appropriate punishment is required to return a sentence of life without the possibility of parole. (§ 190.3; see *People v. Brown*, *supra*, 40 Cal.3d at pp. 540-542, and fn. 13.) The jury is also required to return a life verdict if it finds that the

factors in aggravation do not outweigh those in mitigation. (See § 190.3; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) The sentencing instruction given in this case was additionally flawed because it did not include a clear statement of those principles.

Although this Court has previously held that CALJIC No. 8.88 is valid even though it fails to advise the jury concerning these principles (see *People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan*, *supra*, 53 Cal.3d at p. 978), those holdings should be reconsidered. *Duncan* reasoned that, because the instruction directs the jurors to impose the death penalty only if they find that the aggravating circumstances outweigh the mitigating circumstances, it is unnecessary "to additionally advise [them] of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (53 Cal.3d at p. 978; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1243.)

However, *Duncan* cited no authority for that position, and appellant submits that it conflicts with numerous opinions disapproving instructions which emphasize the prosecution's theory of the case while minimizing or ignoring the theory of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [trial court should instruct on every aspect of the case and avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[176]

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[176] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the (continued...)

People v. Moore, *supra*, 43 Cal.2d 517, is particularly instructive on this point. In that case, this Court explained as follows why a set of one-sided self-defense instructions was erroneous:

> 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.*

(*Id.* at pp. 526-527; emphasis added [internal quotation marks omitted].)

In other words, contrary to *Duncan*'s apparent assumption, the law does not rely on jurors to infer a rule from the statement of its opposite. The instruction at issue here stated only the conditions under which a death verdict could be returned, and not those under which a life verdict was required.

Because it failed to inform the jurors of the specific mandate of

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[176] (...continued)
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. (*Id.* at p. 473, fn. 6; see also *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 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, as a matter of due process the same principle should apply to jury instructions.

section 190.3, CALJIC No. 8.88 arbitrarily deprived appellant of a right created by state law and thus violated his Fourteenth Amendment right to due process of law. (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 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* (1993) 508 U.S. 275, 281; original emphasis.)

The defective instruction also violated appellant's Sixth Amendment rights. Slighting a defense theory in instructions not only violates due process, but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the case. (*Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, affd. and adopted in *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; see *Cool v. United States* (1972) 409 U.S. 100 [disapproving an instruction placing an unauthorized burden on the defense].)

For all of these reasons, reversal is required.

E. The Instruction Did Not Tell the Jury That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life without the Possibility of Parole

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." (§

190.3.)[177] 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* (1990) 494 U.S. 370, 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 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.

By failing to conform to the specific mandate of section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Additionally, it suffers from all of the constitutional defects described in Section D, *ante*.

F. The Instruction Did Not Tell the Jury It Could Impose a Life Sentence Even If Aggravation Outweighed Mitigation

CALJIC No. 8.88 was also defective because it implied that death was the only appropriate sentence if the aggravating evidence was "so

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[177] 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.)

substantial in comparison with the mitigating circumstances. . . ." However, it is clear under California law that a penalty jury may always return a verdict of life without the possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown*, *supra*, 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed that in mitigation. (Cf. *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

The failure to instruct on this crucial point[178] was prejudicial because it deprived appellant of his right to have the jury given proper information concerning its sentencing discretion. (*People v. Easley* (1983) 34 Cal.3d 858, 884.) Moreover, since the defect in the instruction deprived appellant of an important procedural protection that California law affords capital defendants, delivery of the instruction deprived appellant of due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 343, 346; see *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and made the resulting verdict unreliable (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Furman v. Georgia* (1972) 408 U.S. 238). The death judgment must therefore be reversed.

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[178] Appellant tendered a number of instructions on this principle, making the point directly (see 5 CT 1003 [jurors have discretion to reject death even when aggravation outweighs mitigation]) and indirectly (see 5 CT 1000 [any mitigating evidence standing alone may be sufficient for deciding that life imprisonment without possibility of parole is the appropriate punishment] and 5 CT 1002 [jury may conclude that aggravating evidence is not comparatively substantial enough to warrant death even in the absence of mitigating evidence].) However, these instructions were refused by the court. (See 42 RT 5640-5641.)

G. The Instruction Did Not Tell the Jury That Appellant Did Not Have to Persuade Them That the Death Penalty Was Inappropriate

CALJIC No. 8.88 was also defective because it failed to inform the jurors that 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* (1990) 52 Cal.3d 577, 643.)[179] That failure was error, because no matter the nature of the burden, and even where no burden exists, a capital-sentencing jury must be clearly informed of the applicable standards, so 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, 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.]

(*Id.* at pp. 727-728.) Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, the district court in *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instant instruction, taken from CALJIC No. 8.88, suffers from the same defect, with the result that capital juries in California are not

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[179] This argument alleges that the instruction was deficient under the rules of law currently applied by this Court. In Argument XIX, *post*, appellant argues that there must be a burden of proof at the penalty phase of a capital case and that the instructions should inform the jury that it is the prosecution which bears that burden.

properly guided on this crucial point. The death judgment must therefore be reversed.

H. Conclusion

The state and federal constitutions require capital sentencing juries to be carefully advised in order to avoid arbitrary and capricious application of the death penalty. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.) Because CALJIC No. 8.88, the main sentencing instruction given to the penalty jury, failed to comply with that requirement, appellant's death judgment must be reversed.

XVIII

THE ADMISSION AND USE OF EVIDENCE OF UNADJUDICATED CRIMINAL ACTIVITY VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. Introduction

At the penalty phase of appellant's trial, the prosecution introduced in aggravation evidence of three incidents of alleged prior criminality under factor (b) of section 190.3: evidence of assault with a firearm on Althea Edwards and Clifford Parker in March of 1986; evidence of a battery on Marlena Bush in February of 1988; and evidence that appellant resisted arrest in September of 1987. (35 RT 4766-4800; 35 RT 4805-4824; 35 RT 4826-4847.)

Appellant submits that reliance on such unadjudicated criminal activity during the penalty phase deprived him of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition, even if (arguendo) a jury may properly rely upon this type of evidence in determining penalty, the jury's reliance on the particular evidence of unadjudicated criminal activity in this case was particularly unreliable and therefore violative of appellant's rights to due process and a reliable penalty determination. Appellant's death judgment must therefore be reversed.

B. The Use of Factor (b) Violated Appellant's Constitutional Rights, Including His Sixth, Eighth and Fourteenth Amendment Rights to Due Process and a Reliable Penalty Determination[180]

Factor (b), which tracks section 190.3, subdivision (b), permitted appellant's jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crime 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." (5 CT 1092; 44 RT 5825.) Pursuant to that factor, the prosecution in this case presented evidence of three incidents of alleged prior criminal activity by appellant, and the jury was expressly told to consider the presence or absence of this alleged criminal activity. (5 CT 1077, 1092; 44 RT 5818-5819, 5825.) The admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated appellant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276.) Admission of the unadjudicated prior criminal activity also denied appellant the rights to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offenses") by an impartial and unanimous jury, and to effective confrontation of witnesses, under the Sixth and Fourteenth Amendments, and to equal protection of the

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[180] Although the United States Supreme Court, in *Tuilaepa v. California* (1994) 512 U.S. 967, 977, determined that factor (b) was not unconstitutionally vague, that opinion did not address the issues raised herein.

law under the Fourteenth Amendment. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

Factor (b), as written and as it has been interpreted by this Court, is an open-ended and vague aggravating factor that fosters arbitrary and capricious application of the death penalty in violation of the Eighth Amendment requirement that a rational distinction be made "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted the section in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be more rigorous than those provided noncapital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606), this Court has turned this mandate on its head, singling out capital defendants for less procedural protection than that afforded other criminal defendants. For example, this Court has ruled that, in order to consider evidence under factor (b), it is not necessary for the 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057); it has held that the jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192); and it has held that the trial court is not required to enumerate the other crimes that the

jury should consider or to instruct on the elements of those crimes (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207). This Court has ruled that unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under subdivision (b), but that felony convictions, even for violent crimes, rendered after the capital homicide are not admissible (*People v. Morales* (1989) 48 Cal.3d 527, 567); and it has ruled that a threat of violence is admissible if, by happenstance, the words are uttered in a state that has made such threat a criminal offense (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261). Juvenile conduct is admissible under this factor (*People v. Burton* (1989) 48 Cal.3d 843, 862), as is an offense dismissed pursuant to a plea bargain (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659).

In sum, this Court has indeed treated death differently by lowering rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same jury for the penalty-phase adjudication of other-crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital-sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585) and the jurors must give the exact same level of deliberation and impartiality as would have been required of them in a separate criminal trial, for when a state provides for capital

sentencing by a jury, the Due Process Clause of the Fourteenth Amendment requires that such jury be impartial.[181] (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 (1971) [where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand]; *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of his guilt of the previously-unadjudicated offenses were the same jurors who had just convicted him of capital murder. It would seem self-evident that a jury which already has unanimously found a defendant guilty of capital murder cannot be impartial in considering whether unrelated but violent crimes have been proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).

Even in the unlikely event that only a single juror was impermissibly prejudiced against him, appellant's rights would still be violated. (See *People v. Pierce* (1979) 24 Cal.3d 199, 208 ("[A] conviction cannot stand if even a single juror has been improperly influenced"]; *United States v. Aguon* (9th Cir. 1987) 813 F.2d 1413, 1421, mod. (en banc 1988) 851 F.2d 1158 ["The presence of even a single partial juror violates a defendant's rights under the Sixth Amendment to trial by an impartial jury"].)

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[181] The United States Supreme Court has consistently held that a capital-sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.) Similarly, due process protections apply to a capital-sentencing proceeding. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358.)

A finding of guilt by such a biased fact-finder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554, relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of trial forced appellant to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. (*Pointer v. United States* (1894) 151 U.S. 396, 408-409; *Lewis v. United States* (1892) 146 U.S. 370, 376.) The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. (*Dyer v. Calderon* (9th Cir. en banc 1998) 151 F.3d 970, 973.) In this case, counsel for appellant understandably did not question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and questioning the potential jurors about other violent crimes unquestionably would have tainted the impartiality of the jury that was impaneled. Counsel could not adequately examine potential jurors during voir dire as to their biases and potential prejudices with respect to the prior unadjudicated crimes without forfeiting appellant's constitutional right not to have such subjects brought before the jurors. Requiring appellant to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury, and a reliable and non-arbitrary penalty

determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

Further, because California does not allow the use of unadjudicated offenses in noncapital sentencing, the use of this evidence in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. It also violated appellant's Fourteenth Amendment right to due process because the state applies its law in an irrational and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

Finally, as shown elsewhere (see Argument XIX.D, *post*, and Section C of this argument, *post*), the failure to require jury unanimity with respect to such unadjudicated conduct not only exacerbated this defect, but itself violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

C. The Alleged Criminal Activity Was Improperly Considered in Aggravation Because It Was Not Required To Be Found True Beyond a Reasonable Doubt by a Unanimous Jury

The application of the *Apprendi* line of cases to California's capital-sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See *Blakely v. Washington* (2004) 542 U.S. 296, 313; *Ring v. Arizona* (2002) 536 U.S. 584, 609; *Apprendi v. New Jersey*, *supra*.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in appellant's case was instructed that the prosecutor had the burden of proving the other-crimes evidence

beyond a reasonable doubt (5 CT 1077; 44 RT 5818-5819), the jury was not instructed on the need for a unanimous finding; nor is such an instruction required under California's sentencing scheme. The jurors' consideration of this evidence thus violated appellant's rights to due process of law, to trial by jury, and to a reliable capital-sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

D. Conclusion

For all the foregoing reasons, use of the evidence of unadjudicated criminal activity against appellant requires reversal of the judgment of death. (See *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

XIX

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 and elsewhere in this brief, 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.[182] Not only is intercase proportionality review not required; it is not permitted. (See Argument XX, *post.*) 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 Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

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[182] Appellant, however, requested that the jurors be instructed that if they had a doubt as to which penalty to impose, they "must give the defendant the benefit of that doubt and return a verdict fixing the penalty at life in prison without possibility of parole." (5 CT 1019.) The trial court refused to give the instruction. (42 RT 5665.)

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" (§ 190.3) and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541; 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.[183] 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 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) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme

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[183] There are two exceptions to this lack of a burden of proof. The special circumstances (§ 190.2) and the aggravating factor of unadjudicated violent criminal activity (§ 190.3, factor (b)) must be proved beyond a reasonable doubt.

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) 542 U.S. 296.

Apprendi considered a New Jersey state law that authorized a maximum sentence of 10 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. The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring v. Arizona*, *supra*, 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." (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 had previously 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.)[184] The Court observed: "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. We hold that the Sixth Amendment applies to both." (*Ibid.*)

In *Blakely v. Washington*, *supra*, 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." (542 U.S. at pp. 299-300.) The

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[184] Justice Scalia distinctively distilled the holding: "[A]ll facts essential to 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*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

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. (*Id.* at p. 300.) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at pp. 313-314.)

In reaching this holding, the high 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*, *supra*, 542 U.S. at pp. 303-304; original emphasis.)

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.[185] Only

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[185] 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 1988); 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. 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

(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* (1992) 4 Cal.4th 43, 79 [penalty-phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially

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[185] (...continued)
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* (Ariz. 2003) 65 P.3d 915.)

outweigh any and all mitigating factors.[186, 187] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was given to appellant's jury, "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; 5 CT 1090; 44 RT 5824.)

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 inevitable verdict; the jury can still reject death as the appropriate

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[186] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460; fns. omitted.)

[187] 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* (1988) 46 Cal.3d 432, 448; original emphasis.)

punishment notwithstanding these factual findings.[188]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2, subd. (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, 126, fn. 32.)

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 renders 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 pp. 585-586.) As Justice Breyer, in 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,

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[188] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown*, *supra*, 40 Cal.3d at p. 541.)

but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.); original emphasis.)

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 that authorized by the jury's guilty verdict?" (*Apprendi*, *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 (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604, quoting *Apprendi*, *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*, *supra*, 536 U.S. at p. 604, quoting *Apprendi*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives" (*Ring*, *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. This Court has held, however, that *Ring* does not apply 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.) This 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 aggravating factors may be sufficient to impose death; no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the

defendant does not comport with the federal Constitution.

In *People v. Prieto*, *supra*, this 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 determine "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; emphasis added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present; otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty-phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, 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* (Ariz. 2003) 65 P.3d 915, 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People*

(Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[189]

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*, 542 U.S. at p. 305.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made

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[189] 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).

beyond a reasonable doubt.[190]

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

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[190] 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 much 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 argument 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.

CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; and (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*, supra, 536 U.S. at p. 606, quoting with approval *Apprendi*, *supra*, 530 U.S. at p. 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* (1988) 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 factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.

(536 U.S. at pp. 589, 609.)

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 proceedings violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. The State and Federal Constitutions Require That the Jury 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 Amendments. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases, "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty-phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

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 to 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. (*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, 754; 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 *Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal. 3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator]. The decision to take a person's life must be made under no less demanding a standard. 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. 754), 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." The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, 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."

(*Id.* at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427 [citations omitted].)

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." (*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* (1976) 428 U.S. 280, 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 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 (quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423-424); emphasis added.) The sentencer of a person facing the death penalty is required by the Due Process Clause and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but 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* (2004) 33 Cal.4th 536, 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. 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* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

This Court, too, has recognized that although the jury's decision to impose or reject a death sentence was a discretionary one, "it would be more satisfactory in death penalty cases if the court would instruct the jurors that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser." (*People v. Cancino* (1937) 10 Cal.2d 223, 230.)[191] Although obviously a pre-*Gregg* case, the opinion in *Cancino*, like that of the Connecticut

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[191] Appellant cited *Cancino* as the basis for his requested instruction that the jury be informed it must give him the benefit of any doubt as to which penalty to impose by returning a verdict of life imprisonment without possibility of parole. (5 CT 1019.) Such an instruction states a rule that is analogous with the core requirements of *Blakely*, *Ring*, *Apprendi*, and *Winship*.

Supreme Court in *Rizzo*, demonstrates that there is no inconsistency between applying a reasonable-doubt standard to the moral quandary facing a jury in deciding whether a defendant should live or die.

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.) 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 has also held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (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* (1982) 455 U.S. 104, 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 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 assigned the burden of proof and persuasion to the state while another assigned 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* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and 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 §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. 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."[192]

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]; 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 wrongdoing (such as, for example, age when it is

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[192] As discussed below, the Supreme Court has consistently held that a capital-sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Evidence Code section 520 is a legitimate state expectation in adjudication and is therefore constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments. In addition, as explained previously, 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* (9th Cir. 1990) 897 F.2d 417, 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 that 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*, *supra*, 428 U.S. at p. 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* (1993) 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 that the burden should be on the defendant to prove mitigation in the 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 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 constitutionally-minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*, 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 could make a death sentence appropriate. 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 death was either warranted or appropriate.[193] 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* (1991) 1 Cal.4th 103, 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*

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[193] In fact, as a result of the trial court's grievous error in failing to make it crystal clear to the jury, in response to its specific question during deliberations, that death was a more severe punishment than life imprisonment without possibility of parole, it is probable that at least one juror voted for appellant's death as an act of mercy. (See Argument XIII, *ante*.)

v. Georgia (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[194]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin 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*, *supra*, makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[195]

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."

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[194] 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 v. Hoboken Land & Improvement Co.* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[195] Appellant acknowledges that this Court has held that *Ring* does not require a California sentencing jury to unanimously find the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 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].)

(*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* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida*, *supra*, 430 U.S. at p. 359; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments likewise are 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* (1978) 22 Cal.3d 258, 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 to noncapital cases in California.[196] For example, in cases where a criminal defendant has

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[196] 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 Ariz. Rev. Stat., § 13-703.01(E) (2002); Ark. Code Ann. § 5-4-603(a) (Michie 1993); 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.

(continued...)

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., § 1158a.) Since capital 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, the Supreme Court interpreted 21 U.S.C. section 848(a), and held that the jury must

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[196] (...continued)
Ann. art. 905.6 (West 1993): Md. Crim. Law art., § 2-304 (2002); 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).)

unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. (*Id.* at pp. 815-816.) 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 prosecution 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 did not 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* (1992) 4 Cal.4th 43, 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 types of factual determinations for which appellant was entitled to unanimous jury findings beyond a reasonable doubt.

E. The Penalty Jury Should Also Have Been 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* (1993) 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., 14th Amend.; 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., 8th and 14th Amends; Cal. Const. art. I, § 17), and his right to the equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7).

In *People v. Arias* (1996) 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 sections 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.

F. 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.

XX

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

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 and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

B. 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* (1983) 463 U.S. 939, 954 (plur. opn.; alterations in original), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 [opn. 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 *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258; *Gregg v. Georgia* (1976) 428 U.S. 153, 198.) 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 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 (CA9 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.); alternate citations omitted.)

The time has come for *Pulley v. Harris* to be reevaluated, since the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 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.[197]

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[197] 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* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1981) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d

(continued...)

The capital-sentencing scheme in effect at the time of appellant's trial was the type of scheme that the high court in *Pulley* had in mind when it acknowledged 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 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 Arguments XVI-XIX, *ante*, which are incorporated here. 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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[197] (...continued)
1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 (comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

XXI

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States is one of the few nations that regularly use the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 846-847 (conc. & 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* (2002) 536 U.S. 304, 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.[198] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty

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[198] 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, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 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).

became, coexistent with the United States Constitution and federal statutes, the 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. Appellant recognizes that this Court has previously rejected international-law claims directed at the death penalty in California. (See, e.g., *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 this Court reconsider its prior stance on this issue and, in the context of this case, find that appellant's death sentence violates international law. (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].)

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 (plur. opn.).) 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*>.)

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*," *supra*.)

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; see also *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 federal Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The

Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have 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 p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

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 therefore be set aside.

XXII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

The erroneous delivery of an instruction that directed a guilty verdict of first degree murder is reversible per se as to the entire judgment. (See Argument VII, *ante*.) Further, the erroneous excusal of prospective jurors Walker and Saunders-Pinkney also requires automatic reversal of the entire judgment (see Arguments II and III), while the erroneous excusal of 5 other prospective jurors during death-qualification voir dire requires automatic reversal of the death sentence imposed on appellant (see Argument IV.)

However, numerous other errors, many of federal constitutional dimension, also occurred at appellant's trial. Appellant has explained why each of those errors was prejudicial. Assuming arguendo that this Court rejects appellant's arguments urging automatic reversal, and that none of the other errors identified by appellant is deemed prejudicial by itself, their cumulative effect undermines any confidence in the integrity of the proceedings which ultimately resulted in a death judgment against appellant. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1206-1208; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985-986; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d

614, 622, *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 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]; see *People v. Brown* (1988) 46 Cal.3d 432, 446-448 ["reasonable-possibility test" for state-law penalty-phase errors]; *People v. Ashmus* (1992) 54 Cal.3d 932, 965 [reasonable-possibility test and *Chapman* standard "are the same in substance and effect"].) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 366; *People v. Pierce* (1979) 24 Cal.3d 199, 208.) Here, it certainly cannot be said that the errors identified by appellant had "no effect" on any juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Pervasive prosecutorial misconduct infected both the guilt and penalty phases of appellant's trial to such an extent that the trial can only be characterized as so unfair as to have deprived appellant of due process of law. (See Argument V, *ante*.) The erroneous admission at the guilt phase of statements made by appellant during custodial interrogation contributed to the guilt and penalty verdicts. (See Argument VI, *ante*.) The erroneous and prejudicial restrictions placed on death-qualification voir dire by the trial court contributed to the death verdict by making it impossible to select

an impartial jury on the issue of penalty. (See Argument I, *ante*.) In addition to these errors, the trial court erroneously responded to requests by the jurors during their penalty deliberations, misinstructing them on the scope of mitigating factors and refusing to answer their question as to which of the two available penalties was the more severe at a time when the jury had announced itself hopelessly deadlocked. (See Arguments XV and XIII, *ante*.) Finally, the trial court's instructional errors placed in question other fundamental aspects of the guilt and penalty determinations (see Arguments VII-XII, XIV, XVI-XIX, *ante*).

Given the severity of the errors in this case, their cumulative effect was to deny appellant due process, a fair trial by jury, and a fair and reliable penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments. Appellant's conviction s and death sentence must therefore be reversed.

CONCLUSION

For the foregoing reasons, the entire judgment must be reversed.

DATED: June 16, 2006

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Harry Gruber, am the Deputy State Public Defender assigned to represent appellant Gregory O. Tate in this automatic appeal. I conducted 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 146, 041 words in length excluding the tables and certificates.

Dated: June 16, 2006

Harry Gruber
Deputy State Public Defender

DECLARATION OF SERVICE

Re: *People v Tate* No. S031641

I, Jeffrey McPherson, 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:

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Gregory O. Tate
(Appellant)

Each said envelope was then, on June 16, 2006, 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.

Signed on June 16, 2006, at San Francisco, California.

_____
DECLARANT