No. S053228

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANDRE STEPHEN ALEXANDER

Defendant and Appellant.

(Los Angeles County
Sup. Ct. No. BA065313)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

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INTRODUCTION

In this supplemental brief, appellant augments the federal constitutional bases of arguments I through III, V through XX and XXIII previously presented to this Court in his opening brief. (See *Bell v. Cone* (2005) 543 U.S. 447, 451, fn. 3, citing *Baldwin v. Reese* (2004) 541 U.S. 27, 30-32 [burden on petitioner to raise federal law claim in the state court when state procedural law permit its consideration on the merits].) In order to avoid confusion, Arguments I through XX and XXIII correspond with the original argument numbers of appellant's opening brief. Argument IV of this supplemental brief additionally argues that four prospective jurors plus one prospective alternate juror, beyond the four prospective jurors discussed in the opening brief, were wrongly subjected to peremptory challenges by the prosecution.

This supplemental brief also includes eight additional arguments in support of appellant's automatic appeal. To avoid confusion, these new claims, Arguments XXV through XXXII, are numbered sequentially to the arguments previously raised in the opening brief.

I

THE IDENTIFICATION OF PHOTOGRAPHS OF APPELLANT WAS THE RESULT OF AN IMPERMISSIBLY SUGGESTIVE SHOW UP PROCEDURE WHICH VIOLATED HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS

Appellant has argued that Lloyd Bulman's identification of his photographs was the result of an unduly suggestive photo array and that admission of the identification violated his due process right to a fundamentally fair trial as provided by the Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, sections 7 and 15 of the California Constitution. (AOB, 182-208; ARB, 14-32.)[1] The record is undisputed that prior to viewing the photo array, which was tantamount to a single photo show-up put together by the prosecution the night before Bulman was to testify at trial, Bulman had been unable to identify appellant. The failure of Bulman to make any kind of identification of appellant prior to trial occurred even though he had previously seen appellant in a line-up and on numerous occasions in court. The record is clear as well that Bulman was unable to make an in-court identification of appellant during the trial proceedings. No other evidence directly linked appellant to the homicide.

In addition to the state and federal constitutional bases as argued in appellant's opening brief, the admission of Bulman's eleventh hour, and highly unreliable, identification of appellant's photographs also deprived

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[1] In the supplemental brief, the following abbreviations are made: "AOB" refers to appellant's opening brief; "ARB" refers to appellant's reply brief; "RT" refers to the reporter's transcript on appeal; "CT" refers to the clerk's transcript on appeal; and "Supp. CT II" refers to the second supplemental clerk's transcript on appeal.

appellant of his constitutional rights to a fair trial, confrontation and effective assistance of counsel under the Sixth Amendment as well as reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment. (See *United States v. Wade* (1967) 388 U.S. 218, 227, 232 and 251 (White, J., concurring and dissenting); *Powell v. Alabama* (1932) 287 U.S. 45, 53, 58-60; *Offor v. Scott* (5th Cir. 1999) 72 F.3d 30, 33-34; *People v. Carlos* (2006) 138 Cal.App.4th 907, 912; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

II

THE TRIAL COURT'S REFUSAL TO APPOINT MADELYN KOPPLE TO REPRESENT APPELLANT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued that the trial court's refusal to appoint Madelyn Kopple, who had previously represented him throughout the municipal court proceedings, violated his federal and state constitutional rights to counsel and to equal protection of the law. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 7, subd. (a).) Not only did Kopple have extensive knowledge of the specific facts relating to the charged capital offense, but she was also familiar with the facts of appellant's prior murder case which served as the basis of one of the special circumstances alleged. The record shows appellant had no confidence in counsel who was initially appointed instead of Kopple, and that the breakdown in their relationship was substantial. Application of the law of the case doctrine to this case would result in a manifestly unjust decision. (AOB, 209-236; ARB, 33-45.)

In addition to the state and federal constitutional grounds argued in appellant's opening brief, the refusal to appoint Kopple violated appellant's fundamental constitutional right to due process under the Fifth and Fourteenth Amendments, a fair adversary proceeding under the Sixth Amendment, and reliable determinations of guilt, death-eligibility and penalty under the Eighth Amendments. (See *United States v. Gonzalez-Lopez* (2006) ___ U.S. ___, [126 S.Ct. 2557, 2562]; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

III

PREJUDICIAL REFERENCES DURING VOIR DIRE TO THE INVALID SPECIAL CIRCUMSTANCE ALLEGATION OF MURDER OF A PEACE OFFICER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued that the numerous and repeated references to the invalid special circumstance allegation of murder of a peace officer by the trial court during voir dire was prejudicial, resulting in the denial of his constitutional right to a fair trial by impartial jurors. Appellant has also argued that neither the doctrine of waiver nor invited error precludes appellate review because appellant challenged the validity of the special allegation in his pretrial motion to dismiss pursuant to Penal Code section 995.[2] The trial court ultimately granted appellant's motion to strike the peace officer special circumstance as invalid at the conclusion of the guilt phase. The detrimental impact it had on the jury, however, had already occurred because of the court's repeated emphasis on it during voir dire as a "factor" rendering appellant death-worthy as well as the resulting inference that the status of the victim alone justified imposition of the death penalty. (AOB, 234-236; ARB 46-52.)

The prejudicial effect of the voir dire references to the invalid murder of a peace officer special circumstance not only violated appellant's constitutional right to a fair trial by impartial jurors (U.S. Const., 6th and 14th Amends.), but it also impermissibly lessened the prosecution's burden of proof and violated his right to due process (U.S. Const. 5th and 14th Amends.) and deprived appellant of his right to reliable determinations of

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

guilt and death-eligibility (U.S. Const. 8th Amend.). (See *Groppi v. Wisconsin* (1971) 400 U.S. 505, 509-510; *Duncan v. Louisiana* (1968) 391 U.S. 145, 148; *Irwin v. Dodd* (1961) 366 U.S. 717, 722; *Beck v. Alabama, supra,* 447 U.S. at p. 638; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

IV

THE PROSECUTOR'S JUSTIFICATIONS FOR EXCUSING BLACK PROSPECTIVE JURORS WERE INADEQUATE TO REBUT THE PRIMA FACIE SHOWING OF DISCRIMINATION AND THE TRIAL COURT FAILED IN ITS DUTY TO PROPERLY EVALUATE THE PROSECUTOR'S REASONS FOR EXCUSING EACH BLACK PROSPECTIVE JUROR IN THIS CASE

The prosecutor used peremptory challenges against nine Black prospective jurors as well as one Black alternate juror on the basis of their race in violation of appellant's right to equal protection as provided by the Fourteenth Amendment to the United States Constitution as well as article I, section 16 of the California Constitution. In his opening brief, appellant set forth points and authorities to show that the trial court erred when it denied appellant's *Wheeler/Batson* motion[3] because: (1) the question whether there was a prima facie case of discrimination is moot and, (2) the record demonstrates a prima facie case of discrimination by the prosecutor in his exercise of peremptory challenges against those ten Black prospective jurors. Appellant also discussed the challenges of four of the ten jurors to establish that the prosecutor failed to meet his burden of rebutting the prima facie showing. (AOB, 237-243; ARB, 53-83.)

Under the circumstances of this case there was substantial evidence to conclude that a prima facie case of discrimination had been established by the prosecutor's exercise of the ten peremptory challenges against Black prospective jurors and the alternate. Rather than simply reiterate an argument already made, appellant relies on the authorities set forth previously in his opening and reply briefs and the arguments made therein

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[3] See *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277, and *Batson v. Kentucky* (1984) 476 U.S. 79, 84-89.

support of this point. (AOB, 237-240; ARB, 53-65; see also *People v. Huggins* (2006) 38 Cal.4th 175, 228.)

In this supplemental brief, appellant will instead address four of the remaining five challenges to Black prospective jurors, plus the additional challenge made to a Black prospective alternate juror, to show that the prosecutor did not sustain his burden of justification that the removal of each was race-neutral.[4] Appellant will show that: (1) the prosecutor's stated reasons were not supported by the record in that they failed to comport with the prospective jurors' actual remarks during voir dire and/or responses to the Questionnaire, (2) the prosecutor took comments they had made out of context and did not account for everything the prospective juror had said on a particular topic, (3) justifications were insufficient as a matter of law, and (4) even if some of the proffered reasons were genuine or race-neutral, the prosecutor failed to show how the finding was "related to the particular case to be tried" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 98).

Appellant will also demonstrate by comparative analysis with the jurors the prosecutor permitted to serve on the jury that the prosecutor's reasons for challenging these five prospective jurors were simply pretextural, and that there was instead purposeful discrimination by the prosecutor in removing the Black prospective jurors. (*Miller-El v. Dretke* (2005) 545 U.S. 231, ___ [125 S.Ct. 2317, 2325-2326]; *Kesser v. Cambra* (9th Cir. Sept. 11, 2006, No. 02-15475) ___ F.3d ___ [2006 WL 2589425, 15-16].) Finally, appellant will show that the trial court failed in its duty to conduct a sincere and reasoned evaluation of the genuineness and

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[4] Appellant renewed his *Wheeler/Batson* motion following the prosecutor's peremptory challenge of prospective alternate juror No. 162. (44 RT 4496-4497.)

sufficiency of the prosecutor's reasons as to each individual prospective Black juror challenged in this case. (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; see *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) Because the record shows that at least one juror was impermissibly excluded on the basis of his/her race, reversal of the judgment of conviction is required. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 100; accord, *Kesser v. Cambra*, *supra*, ___ F. 3d ___ [2006 WL 2589425, 16].)

A. Juror No. 184

The justifications proffered by the prosecutor for exercising the peremptory challenge against Juror No. 184 were that the juror: (1) had had an unpleasant experience with police officers pointing their guns at him; (2) believed the Los Angeles Police Department (LAPD) treats Blacks differently; and, (3) did not favor the death penalty, categorized it as not a "comfortable" way to punish people and that it served no purpose. (44 RT 4493-4494.) In so alleging, the prosecutor took Juror No. 184's questionnaire responses out of their proper context and ignored the substance of them as a whole. The prosecutor also ignored the voir dire of Juror No. 184 which clarified responses made in his questionnaire and substantiated that the prosecutor's reasons for removing him were simply pretexts.

Juror No. 184 was a juror who would be more likely to favor the prosecution because of his connections to law enforcement. (*Kesser v. Cambra*, *supra*, ___ F.3d ___ [2006 WL 2589425, 18].) He had a friend who was employed with the Los Angeles Sheriff's Department (LASD) (Question 20, 15 SUPP CT II 4174), and he had contact with almost all of the computer programmers at LASD who also happened to be former

colleagues (43 RT 4329-4330).

On this record, Juror No. 184's past "unpleasant experience" with the police (see Question 36, 15 SUPP CT II 4177) was not a valid justification. While in general such an experience might indicate unfavorable disposition toward the government, review of Juror No. 184's voir dire reveals that the "unpleasant experience" occurred eight to ten years earlier, and was a situation where he had been mistaken for someone else sought by the police. It is hardly surprising that such a situation, especially one where guns were leveled against him, would be characterized by Juror No. 184, or anyone else for that matter, as "unpleasant." Notwithstanding this fact, the voir dire discussion on this subject does not reflect any animosity on Juror No. 184's part with regard to LAPD, and it is likely that the negative impact of the experience would have lessened with time. Moreover, when asked by the court whether anything about the incident would affect his deliberations to decision in this case, he clearly said that it would not. (43 RT 4331.)[5]

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[5] The relevant colloquy on this is issue is as follows:

"The Court: You mention an incident that took place, I guess, you say a long time ago in L.A. involving you and some officers. [¶] Which department was that? [¶] Do you know?

"Prospective Juror No. 184: That was in Los Angeles. I guess that might be Los Angeles City.

"The Court: When you say a long time ago, how long ago?

"Prospective Juror No. 184: That was like eight or ten years, I guess.

"The Court: Is there anything about that incident that you think would affect you or your deliberations or decision in our

(continued...)

Likewise, Juror No. 184's belief that LAPD treats Blacks differently than Caucasians was merely a pretextural reason for the prosecutor to exercise a peremptory challenge against him. This is particularly so since Juror No. 184 qualified his response on this point by stating he believed the "percentage" of unequal treatment is "decreasing." (Question 39, 15 SUPP CT II 4177.) In addition, responses he submitted to questions concerning situations where there were racial differences between a defendant and investigating officers showed he would not be an unfair juror based on any belief of unequal treatment of Blacks by the police. When faced with the situation posed in Question No. 40A where the defendant is African American, the victim a Caucasian Secret Service Agent, and the investigating officer a Caucasian LAPD detective, Juror No. 184 said he would not side with either the prosecution or the defense and that he "would evaluate the facts." (15 SUPP CT II 4177-4178.) He also stated that in a case where the defendant was a Caucasian and the victim and investigating officer were African American his opinions would again "be based on facts." (Question No. 40B, 15 SUPP CT II 4178.)

That this was indeed not a genuine reason, but instead a pretext, for Juror 184's challenge is established by the prosecutor allowing others to serve on the jury who also believed that LAPD treats Blacks differently. (Juror No. 187; Question No. 39, 15 SUPP CT II 4268; Juror No. 130,

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[5] (...continued)
case?

"Prospective Juror No. 184: Not really because I think we were just mistaken identity. They thought I was somebody else."

(43 RT 4331.)

Question No. 39, 14 SUPP CT II 3852; Juror No. 192, Question No. 39, 11 SUPP CT II 3089; alternate Juror No. 132, Question No. 39, 14 SUPP CT II 3865.) Where, as here, the prosecution employs a double standard against members of the excluded group in favor of persons permitted to serve as jurors such action by the prosecution is strongly suggestive of group bias and can in itself warrant the conclusion that the prosecutor used peremptories for pretextural reasons. (See *Miller-El v. Cockrell* (2003) 537 U.S. 322; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695.) Indeed, this pretextural justification undermines the prosecutor's entire credibility with regard to his peremptory challenges. (See *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831 [proffer of faulty reasons combined with only one or two otherwise adequate reasons may undermine the prosecutor's credibility to such an extent that *Batson/Wheeler* challenge should be sustained]; accord, *Kesser v. Cambra*, *supra*, ___F.3d ___ [2006 WL 2589425, 16].)

Although Juror No. 184 indicated in his questionnaire and during voir dire that he did not favor the death penalty, when questioned by the court about his opinion he stated he would follow the law as provided notwithstanding his personal beliefs. More importantly, he made it clear that he would be able to impose a death or life verdict in this case if

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warranted. (43 RT 4330-4333.)[6]

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[6] The relevant voir dire on this issue is as follows:

"The Court: On the death penalty questions, page 10, you indicate you don't favor the idea of the death penalty and so forth. [¶] Do you – you were asked this. 54 and 55. [¶] You were asked if you felt the death penalty was appropriate in this case based on the evidence, could you impose that penalty, and you said 'I guess'. [¶] And then they asked you in the next question if you could impose the penalty of life without parole if you felt under the evidence and the law that was appropriate and you said yes. [¶] Do you have any doubt about your abilities to impose a death penalty in this case if the evidence or the law leads you to that result?

"Prospective Juror No. 184: No, I don't. I just - my personal opinion is that I don't favor death penalty. But if the instruction that I can follow, then I am sure I can follow the instruction. . . .

"The Court: Well, the instructions, there will be a lot of instructions and if we have a penalty phase, you have a lot of instructions. [¶] But basically what it boils down to in terms of how you will decide it, the law won't tell you add these up and this death and add these up and this is life without. [¶] It will tell you this. If the mitigating factors are less than or equal to the aggravating, it is life without. [¶] But in terms of the death decision, it leaves that up to you. If the aggravating factors in evidence so substantially outweigh the mitigating that you feel death is appropriate, that is when you can vote for death. [¶] Nobody can order you to vote for death. It is up to you to make that decision. [¶] I don't want you to assume that you will be given the type of guidance.

"Prospective Juror No. 184: I am not assuming. I am just saying that if the law that – if it applies, then I will follow and decide on that.

"The Court: I just told you basically what the law is. [¶] My question is under that set of circumstances in this case, can

(continued...)

B. Juror No. 145

The grounds articulated by the prosecutor for exercising a peremptory challenge against Juror No. 145 were that the juror: (1) believed the prosecution had not proved that O.J. Simpson (Simpson) committed homicide; (2) believed that the coroner and police lab should have some kind of protocol to follow, and the coroner and LAPD would be testifying in this case; and, (3) believed LAPD treats Blacks differently than Caucasians. (44 RT 4494.) Each of these reasons were pretextural.

The fact that Juror No. 145 did not believe the prosecution had met their burden of proof in the *Simpson* case was not a race-neutral justification for the prosecutor's peremptory challenge of him. If it was in fact race-neutral, only those prospective jurors who believed the prosecution proved Simpson's guilt beyond a reasonable doubt would have been allowed to serve on the jury. This was not the case, however. As noted above, the prosecutor permitted at least two others to sit who believed the prosecution in the *Simpson* case had not met their burden of proof. Thus, this reason for excusing Juror No. 145 was simply a pretext. (Juror No. 130, Question No. 34, 14 SUPP CT II 3852; Juror No. 146, Question No. 34, 14 SUPP CT II 3969.)

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[6] (...continued)
you envision coming to that conclusion?

"Prospective Juror No. 184: Yes.

"The Court: And likewise the other conclusion, life without parole, without regard to your personal opinions about the death penalty.

"Prospective Juror No. 184: Yes."

(43 RT 4330-4333.)

The record shows that the prosecutor not only misconstrued Juror No. 145's comment regarding the coroner's office and crime lab, but that he also took it out of its proper context. As such, any inference he would be unfavorably disposed towards the prosecution because of it is not supported by the record. Juror No. 145's actual comment on the questionnaire was that he believed the "coroner's office [and] crime lab *could* have some protocol to follow." (Question No. 35, 14 SUPP CT II 3956, emphasis added.) It is apparent that the response Juror 145 provided to Question 35 was based on the publicity surrounding the forensic issues in the *Simpson* case, and not necessarily indicative of criticism of the prosecution.[7] That this reason was a pretext as well is demonstrated by the fact that seated Juror No. 146 shared a view similar to that held by Juror No. 145 on the issue of forensic protocols. As set forth in his Questionnaire, Juror No. 146 likewise expressed a concern that evidence be of "high quality and processed correctly" when asked his opinion of "law enforcement agencies or defense attorneys based on any current publicity, including but not limited to the *Simpson* case." (Question, No. 35, 14 SUPP CT II 3969.)

The prosecutor's final justification for challenging Juror No. 145, that he believed Blacks were treated differently by LAPD, is also inadequate and not a race-neutral reason for removing him. The response Juror No. 145 submitted to Question 40A, which had to do with an instance

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[7] Question No. 35 asked: "Do you have any opinions about law enforcement agencies or defense attorneys based on any current publicity, including, but not limited to the *Simpson* case? (E.g., LAPD, District Attorney's Office, Coroner's Office, LAPD Crime Lab, FBI Crime Lab, etc.) If so, what are those opinions?" Juror No. 145's response was: "Coroner's office, crime lab could have some protocol to follow." (14 SUPP CT II 3956.)

where there are racial differences between a defendant and investigating officers, reveal he would not be a less than impartial juror because of his belief. When faced with the situation where the defendant is African American, the victim a Caucasian Secret Service Agent, and the investigating officer a Caucasian LAPD detective, Juror No. 145 said he would not be tempted to side with either the prosecution or the defense, and that he would "listen to the evidence with an open mind and judge." (Question No. 40A, 14 SUPP CT II 3956-3957.) Even assuming a belief that the police treat Blacks differently supported an inference of an unfavorable disposition towards the prosecution, this was still not a race-neutral reason for his challenge. The inadequacy and pretextural nature of the justification on this basis is established by the prosecutor allowing jurors to serve who also believed that LAPD treats Blacks differently. (Juror No. 187; Question No. 39, 15 SUPP CT II 4268; Juror No. 130, Question No. 39, 14 SUPP CT II 3852; Juror No. 192, Question No. 39, 11 SUPP CT II 3089; alternate Juror No. 132, Question No. 39, 14 SUPP CT II 3865.)

C. Juror No. 143

The prosecutor alleged that the bases for his peremptory challenge of Juror No. 143 were that the juror: (1) had been jailed for traffic violations; (2) had a brother who had been convicted of a domestic violence related offense, believed his brother had been treated unfairly and had worked with defense counsel in that case; (3) believed evidence in *Simpson* case had not been proven beyond reasonable doubt; (4) believed Blacks were stopped more often for traffic violations; and (5) had been in court for a bankruptcy. (44 RT 4495.) Each of these reasons were pretextural and failed to adequately justify the prosecutor's peremptory challenge.

The prosecutor's reliance on Juror No. 143's previous confinement in jail for traffic violations as a reason to challenge him was a pretext. First, the record shows that the confinement occurred 20 years before, and there is no indication that at the time of appellant's trial Juror No. 143 harbored negative feelings because of it. (43 RT 4364.)[8] Even assuming Juror No. 143 was unfavorably disposed towards the police or prosecution because of the violations or the punishment he received, the passage of time would have likely diffused any negative impact. That this reason was indeed a sham, however, is demonstrated because Juror No. 69, who the prosecutor allowed to serve on the jury, had also served jail time for traffic violations. (Question No.23, 12 SUPP CT II 3444.) In addition, Juror No. 84, who also served on the jury, had spent time in jail. (Question No. 23, 13 SUPP CT II 3576.)

The prosecutor's next asserted reason for challenging Juror No. 143, that he had a brother who had been found guilty of a domestic violence offense, also does not constitute a valid justification. There is nothing on

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[8] The relevant voir dire on this issue is as follows:

"The Court: You have been inside a facility due to traffic violations.

"Prospective Juror No. 143: Yes.

"The Court: What happened? Warrants?

"Prospective Juror No. 143: Yes.

"The Court: How long ago was that?

"Prospective Juror No. 143: 20 years.

"The Court: Fair enough."

(43 RT 4364-4365.)

this record that shows that Juror No. 143 would be unfair or unfavorable towards the prosecution because of his brother's case. Moreover, Juror No. 143 indicated in his Questionnaire that with regard to his brother's case, the legal system, which included the police, courts, prosecution and defense, was fair. (Question No. 24, 14 SUPP CT II 3928.) The prosecutor is wrong in stating that Juror No. 143 "assisted" defense counsel in his brother's case; the record only shows that he "spoke" with defense counsel about a bail reduction. (Question No. 24, 14 SUPP CT II 3928; 43 RT 4366.) In addition, when questioned specifically about this incident during voir dire, nothing about Juror No. 143's responses support a conclusion that he would be unfair towards the prosecution because of it. (43 RT 4365.)[9] That this

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[9] The relevant voir dire on this topic is as follows:

"The Court: Your brother's matter in January. What became of that case? Was it tried to a jury? [¶] Had he had problems in the past of a similar nature?

"Prospective Juror No. 143: Yes.

"The Court: Are they together?

"Prospective Juror No. 143: No. Divorced.

"The Court: Did those threats or what have you arise during the course of a divorce proceeding?

"Prospective Juror No. 143: Yes.

"The Court: They did. [¶] You say you spoke with defense counsel in that case on a bail issue. [¶] Do you recall who the attorney was on that?

"Prospective Juror No. 143: I beg your pardon?

"The Court: Who was the attorney on the case.

"Prospective Juror No. 143: I don't remember, your honor. It

(continued...)

reason was simply a pretext, however, is demonstrated by the prosecutor's failure to exercise a peremptory challenge against Juror No. 23 who also had a brother who had been jailed (Question No. 23, 12 SUPP CT II 3260), or the failure to excuse Juror No. 192 who also had a brother who had been arrested and/or charged with spousal abuse (Question No. 24B, 11 SUPP CT II 3087.)

The prosecutor's additional reason for challenging Juror No. 143, that he believed the prosecution in *Simpson* had not met their burden of proof, is also sham. Even assuming his belief that the prosecution did not meet their burden of proof in *Simpson* is indicative of an inference that he would be unfavorable towards the government, this justification for challenging him is pretextural. As noted above, jurors who felt the same served on the jury without challenge by the prosecution. (Juror No. 130, Question No. 34, 14 SUPP CT II 3852; Juror No. 146, Question No. 34, 14 SUPP CT II 3969.)

Similarly, the prosecutor's final reason for excusing Juror No. 143, his belief that Blacks are stopped more often than Caucasians for traffic violations, was a pretext. None of the responses Juror No. 143 provided to the race-related questions in the Questionnaire show that he would be unfair

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[9] (...continued)
was a public defender.

"The Court: Do you recall who the prosecutor was in that case?

"Prospective Juror No. 143: No.

"The Court: Where did your brother go to court?

"Prospective Juror No. 143: Norwalk."

(43 RT 4365.)

or a less than impartial juror based on his race. In response to Question 40A, which asked if he would tend to favor either the prosecution or the defense in a situation where the defendant is African American, and the victim as well as investigating officer are Caucasian, Juror No. 143 answered that he would not favor either side based on those factors alone. (14 SUPP CT II 3930-3931.) When asked how he would evaluate the case if the defendant is Caucasian and the victim as well as investigating officer African American, he indicated he would handle the situation in the same way, stating it "does not matter what race as long as facts are presented." (Question 40B, 14 SUPP CT II 3931.) Even assuming, arguendo, that Juror No. 143's belief that the police treat Blacks differently supported an inference he would be unfavorably disposed towards the prosecution, the fact that it was not a genuine reason for his challenge is established by the prosecutor permitting jurors to serve on the jury who had similar views. (Juror No. 187; Question No. 39, 15 SUPP CT II 4268; Juror No. 130, Question No. 39, 14 SUPP CT II 3852; Juror No. 192, Question No. 39, SUPP CT II 3089; alternate Juror No. 132, Question No. 39, 14 SUPP CT II 3865.)

Finally, the fact that Juror No.143 had previously been in bankruptcy court does not constitute a valid justification. (Question No. 22, 14 SUPP CT II 3927.) Neither the response in his Questionnaire nor his voir dire explain what his involvement was in bankruptcy court and any effect the experience had on him (e.g. whether it was fair or unfair). Without details as to those factors, it would be purely speculative to presume that he would be unable to be a fair or impartial juror because of it.

D. Juror No. 196

The prosecutor's stated reasons for challenging Juror No. 196 were

that: (1) her husband had been arrested for driving under the influence by the LASD and an LASD deputy would be testifying in this case; (2) she believed the prosecution had not met their burden of proof in the *Simpson* case, and that the victim's family in *Simpson* was too involved; (3) she said discrimination by the LAPD is "out of control" and there is a "police code of silence;" (4) she believed LAPD treats Blacks differently; (5) she stated the death penalty is morally wrong; and (6) she said some convicted defendants have "been railroaded." (43 RT 4388-4389, 44 RT 4492-4493.)

Review of the voir dire proceedings and of Juror No. 196's responses to the questionnaire show that the prosecutor's purported reasons for removing her were simply pretexts for improper racial discrimination because the proffered justifications were not supported by the record, the prosecutor misconstrued information this juror had provided, or the prosecutor took her responses out of context. If anything, the record indicates that she was more likely to favor the prosecution because a member of her family was in law enforcement (*Kesser v. Cambra*, *supra*, ___ F.3d ____ [2006 WL 2589425, 18]) and her nephew had recently been the victim of a murder. (Question No. 20, 15 SUPP CT II 4226; Question No. 25, 15 SUPP CT II 4227; 43 RT 4293-4294.)

Although Juror No. 196's husband had an arrest for driving under the influence, there was no evidence on the record that her husband's arrest left her with an unfavorable attitude towards law enforcement, the prosecution, or the criminal justice system. Her husband's arrest had occurred seven or eight years prior to the trial in this case; apparently, it had been uncontested and did not involve injury or property because her husband received probation. According to Juror No. 196, the disposition on her husband's case had been fair. (Question No. 24E, 15 SUPP CT II 4227;

43 RT 4293-4294.)[10] To the extent that the prosecution attempted to portray Juror No. 196 as an advocate of a less than law-abiding lifestyle, and that by inference she would be unfavorably disposed towards any deputy sheriff who testified in this case, that characterization is refuted by her comments regarding her husband's case as well the circumstances surrounding her nephew's murder. In her questionnaire, Juror No. 196 made clear that her husband had been treated fairly by the legal system, including the Sheriff's Department which was the agency involved in his arrest, the prosecutor and

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[10] The relevant voir dire of Juror No. 196 on this issue is as follows:

"The Court: Okay. Let me ask you then about the matter – your husband had a matter some time ago. DUI case.

"Prospective Juror No. 196: That's correct.

"The Court: How long ago was that?

"Prospective Juror No. 196: Seven or eight years ago.

"The Court: Do you know what police agency was involved in that case?

"Prospective Juror No. 196: It was the Sheriff's Department.

"The Court: Where did your husband go to court on that matter?

"Prospective Juror No. 196: Pasadena court.

"The Court: Did he have a trial?

"Prospective Juror No. 196: No, he did not.

"The Court: Were you with him at the time of his stop?

"Prospective Juror No. 196: No.

"The Court: Was there any accident in the case, if you know?

"Prospective Juror No. 196: No."

(43 RT 4293-4294.)

the court. (Question No. 24H, 15 SUPP CT II 4227.) When asked to describe her nephew's death, she stated that it had likely been the result of gang violence. She said her nephew had been a gang member whose lifestyle and values she did not share. (Question No. 25, 15 SUPP CT II 4227; 43 RT 4294-4296.)[11]

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[11] The relevant colloquy is as follows:

"The Court: Let me ask you about the situation involving your nephew. [¶] He was a homicide victim; is that correct?

"Prospective Juror No. 196: That is correct.

"The Court: How long ago was that?

"Prospective Juror No. 196: I think that was approximately three years ago, sir.

"The Court: Tell me what happened as far as you know.

"Prospective Juror No. 196: Truthfully, I don't know much about it. He is a second generation nephew and his lifestyle and my values didn't go the same way. [¶] I really don't know what went on with that.

"The Court: Where did it occur?

"Prospective Juror No. 196: I believe it was in Long Beach.

"The Court: And you say his lifestyle. [¶] Was there something about his lifestyle that leads you to believe that it may have contributed to his demise?

"Prospective Juror No. 196: Yes, sir.

"The Court: How so?

"Prospective Juror No. 196: I do believe he was affiliated with a gang.

"The Court: Was it a gang shooting?

"Prospective Juror No. 196: As far as I know, it could have

(continued...)

Notwithstanding the fact that there was nothing about her husband's prior conviction which would have made a less than favorable prosecution juror, the prosecutor's challenge of her on this basis was not genuine and simply a pretext. The record shows that the prosecutor allowed a number of other jurors to serve on the jury who either themselves or their close friends and/or family members had the same, similar or more serious prior arrests and/or convictions. (Juror No. 23, Question No. 24, 12 SUPP CT II 3260; Juror No. 68, Question No. 23, 12 SUPP CT II 3430; Juror No. 69, Question No. 23, 12 SUPP CT II 3444; Juror No. 81, Question No. 24, 13 SUPP CT II 3550; Juror No. 84, Question No. 24, 13 SUPP CT II 3576; Juror No. 106, Question No. 24, 13 SUPP CT II 3732; Juror No. 147, Question No. 24, 14 SUPP CT II 3980; Juror No. 192, Question No. 24, 11 SUPP CT II 3087; Alternate Juror No. 180, Question No. 24, 11 SUPP CT II 3061.)

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[11] (...continued)
been, yes.

"The Court: Was anybody else either injured or killed?

"Prospective Juror No. 196: Not to my knowledge.

"The Court: Was anybody apprehended on the case?

"Prospective Juror No. 196: Not to my knowledge.

"The Court: And the source of your information on that matter is –

"Prospective Juror No. 196: My sister. It is her grandchild.

"The Court: Do you think that incident will affect your verdict in this case?

"Prospective Juror No. 196: Not at all."

(43 RT 4294-4296.)

Similarly, the prosecutor's inference that Juror No. 196 would be unable to be a fair and unbiased judge of the evidence because she believed that the prosecution had not met their burden of proof in the *Simpson* case, or that the victims' family were "too involved" in *Simpson*, is not supported by the record. Although Juror No. 196 said she believed the *Simpson* jury had done a "good job" because the "evidence presented was not proof beyond a reasonable doubt" (Question No. 34, 15 SUPP CT II 4229), she had stated in an earlier response to the Questionnaire that "if police work and investigation are done properly," there should be no problem obtaining a conviction. (Question No. 32, 15 SUPP CT II 4228.).[12] If the prosecutor hoped to show that Juror No. 196 was pro-defense and anti-prosecution based on her opinion of the Simpson case, that inference is dispelled by her thoughts on the *Mendendez* case. Apparently, she was of the belief that there was more than adequate proof of guilt in the latter matter. (Question No. 34, 15 SUPP CT II 4229.)[13] In addition, Juror No. 196's comment about the *Simpson* victim family members being too involved in that case was taken out of context. The record shows that the comment was made in conjunction with her opinion on the intense, and apparently often less than

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[12] Question No. 32 asked: "Do you believe the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes?" The response given by Juror No. 196 was that she did not, stating that "[i]f the police work and investigation is done properly there would not be a problem of convicting." (15 SUPP CT II 4228.)

[13] Question No. 34 asked: "What are your thoughts, feelings and opinions about following cases [*Simpson* and *Menendez*] and their results? Please explain in detail." Juror No. 196's response with regard to the *Mendendez* case was: "Admitted guilt! And the money and time spent in court is ridiculous. These boys were adults and could have moved on and out. They committed cold blooded murder." (15 SUPP CT II 4229.)

accurate, media coverage of the *Simpson* case. (Question No. 34, 15 SUPP CT II 4229.)[14] If anything, her comment indicated an unfavorable disposition towards the news media for their saturated coverage of the case rather than against the prosecution or the families of victims.

That Juror No. 196's opinion that the prosecution had not met their burden of proof in the *Simpson* case was indeed a pretext on the part of the prosecutor is shown by the fact that two of the sitting jurors, Juror Nos. 130 and 146, were also of the opinion that there was reasonable doubt of guilt in that case. (Juror No.130, Question No. 34, 14 SUPP CT II 3852; Juror No. 146, Question No. 34, 14 SUPP CT II 3969.)

The allegation that Juror No. 196 felt that the discrimination by the prosecution's office was "out of control" takes a seemingly strong characterization out of its proper context and disregards the responses she provided when questioned by the court about this particular comment. Juror No. 196 initially made the comment when she answered Question No. 35 of the questionnaire which solicited respondents for "any opinions about any law enforcement agencies or defense lawyers based on any current publicity, including but not limited to the Simpson case." (Question No. 35, 15 SUPP CT II 4229.)[15] That her comment was directed to publicity in the *Simpson* case was made clear during the court's voir dire on the matter. There, Juror No. 196 attributed her belief of discrimination by the prosecutor's office to news media reports that the district attorney's office

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[14] The relevant portion of Juror No. 196's response to Question No. 34 with regard to the *Simpson* case was: "News media and victims families were too involved and not listening in court."

[15] Juror No. 196's full response to Question No. 35 was: "They all need to clean up their act. Discrimination is running out of control."

had ignored certain evidence in order to make their case in the *Simpson* matter.[16] Regardless of any opinion she had of the prosecution in the *Simpson* case, however, Juror No. 196 stated that it would not affect her judgment in a case prosecuted by the same office, and that she would not

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[16] Relevant voir dire of Juror No. 196 on this point is as follows:

"The Court: You have indicated that discrimination is running out of control. [¶] Does that include the office of the District Attorney in your opinion?

"Prospective Juror No. 196: Yes. With some recent incidents, I do believe so.

"The Court: That is what we are here to talk about. [¶] What incident are you referring to?

"Prospective Juror No. 196: Well, I guess it is probably the large case that we all just recently have seen.

"The Court: The big one down the hall, Simpson case?

"Prospective Juror No. 196: Wherever it was.

"The Court: What was it about the District Attorney's Office that makes you think that there is discrimination by that office or within that office?

"Prospective Juror No. 196: Well, because of the news media and the things you would hear through the news and read in the paper, it seemed to me as though there were a lot of things that the district attorney's office more or less did not want to give credence to. [¶] They wanted to make their case and no matter what they had to do, they were going to do that."

(43 RT 4297-4298.)

assume that prosecutors in this case engaged in misconduct. (43 RT 4298-4299.)[17] Juror No.196 also made clear that any feelings she had concerning any or all of the law enforcement agencies involved would not affect her ability to be a fair and impartial juror in this case. (43 RT 4299-4300.)[18]

Juror No. 196's comment about a police "code of silence" is also taken out of context, and the prosecutor's reliance on it as a reason to challenge her because of an inference she would be unfavorable against the

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[17] The relevant colloquy is as follows:

"The Court: And, how if at all, do you believe your opinions about the district attorney's office would affect your judgment in a case being prosecuted by that office?

"Prospective Juror No. 196: As long as I am a juror, I will look at all the evidence and then use my reason and logic to make an opinion of it.

"The Court: Are you going to assume that the prosecutors before you have engaged in misconduct?

"Prospective Juror No. 196: No, I can't do that."

(43 RT 4298-4299.)

[18] The relevant voir dire of Juror No. 196 on this point is as follows:

"The Court: . . . . Are your feelings about any or all of those agencies [LAPD, Coroner's Office, LAPD Crime Lab] such that you can be an impartial judge in this case?

"Prospective Juror No. 196: Yes. I think I can be. If I commit myself to something, yes, I can.

"The Court: By that I simply mean not going in with any prejudgment pro and con on these various matters and deciding this case on your perception of what happened in the other matter. [¶] Any problem with that?

"Prospective Juror No. 196: No."

(43 RT 4299-4300.)

police is not supported by the record. The comment was part of a response Juror No. 196 gave in the questionnaire when respondents were asked whether they would "believe or disbelieve the testimony of a law enforcement officer simply because he/she is a law enforcement officer." (Question No. 35, 15 SUPP CT II 4229.) Her full response was: "I think they have a 'code of silence,' and sometimes put themselves about [sic] the law." (*Ibid.*) During voir dire, Juror No. 196 qualified this response by stating that she would not automatically mistrust the testimony of law enforcement witnesses and she would not believe or disbelieve a witness in this case merely because of their occupation. (43 RT 4300.)[19]

The prosecutor's challenge of juror No. 196 because she had said LAPD treats Blacks differently than Caucasians (see Question No. 39, 15 SUPP CT II 4229) is also pretextural. Review of her responses to questions concerning situations where there were racial differences between a defendant and investigating officer show that she would be a fair and

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[19] The relevant voir dire is as follows:

"The Court: You referred to a code of silence, Question 37. [¶] And same question. [¶] Do you believe that your feelings about when it comes to the testimony of police officers from whatever agency we may see represented, do you believe that you mistrust that testimony going in?

"Prospective Juror No. 196: Not going in, no.

"The Court: How about coming out? [¶] I am not asking you how you will vote or who you believe or disbelieve. I just wanted to see if you are of a mind set that you will be prone to either believe or disbelieve a witness simply because of the place that the witness works or the occupation of the witness."

"Prospective Juror No. 196: No sir. I would not."

(43 RT 4300.)

impartial juror even though she believed Blacks were treated unequally by the police. When faced with the situation posed in Question No. 40A where the defendant is African American, the victim a Caucasian Secret Service Agent, and the investigating officer a Caucasian LAPD detective, Juror No. 196 said she would not side with either the prosecution or the defense and that she would "need to hear both sides." (15 SUPP CT II 4229-4230.) Similarly, she stated that she would evaluate the case in the same way if the defendant was a Caucasian and the victim and investigating officer were African American. (Question No. 40B, 15 SUPP CT II 4230.)

Even assuming that Juror 196's belief that LAPD treats Blacks differently than Caucasians shows an inference that she would be unfavorable towards the prosecution in this case, it was still not a race-neutral reason upon which to justify the prosecutor's peremptory challenge of Juror No. 196. The record shows that the prosecutor in fact allowed jurors to serve who similarly believed LAPD treat Blacks differently. (Juror No. 187; Question No. 39, 15 SUPP CT II 4268; Juror No. 130, Question No. 39, 14 SUPP CT II 3852; Juror No. 192, Question No. 39, 11 SUPP CT II 3089; alternate Juror No. 132, Question No. 39, 14 SUPP CT II 3865.) Thus, under the circumstances, this reason for excusing Juror No. 196 was merely a pretext. (See *Collins v. Rice* (9th Cir. 2003) 348 F.3d 1082, 1095 [discriminatory intent found where the prosecutor excused a Black juror because she had a daughter who had completed rehabilitation for cocaine addiction but did not excuse a white juror whose son had recovered from cocaine addiction].)

The prosecutor's reliance on Juror No. 196's "disfavor" of the death penalty was also an invalid justification upon which to base a peremptory challenge, and is yet again an instance where the prosecutor failed to

acknowledge the entire record relating to a particular juror. In her Questionnaire, Juror No. 196 made clear that the death penalty was appropriate in cases where there is "Death or harm to children and premeditated murder." (Question No. 49, 15 SUPP CT II 4232.) During voir dire on the matter, Juror No. 196 explained that she had been brought up to believe the death penalty was wrong, but because of the many "wrongdoings" in society, she was of the belief that something could or should be done. (43 RT 4300-4301.)[20] Nonetheless, she specifically stated that she could vote for the death penalty, and any feelings she had about it being morally wrong would not influence a penalty verdict she would be asked to impose. (Question No. 54, 15 SUPP CT II 4233.)

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[20] The relevant voir dire on this point is as follows:

> "The Court: . . . . You indicate that you believe the death penalty is morally wrong but could be inappropriate in some cases. [¶] Can you expound on that for me a bit?
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> "Prospective Juror No. 196: Well, I guess in my upbringing when I said morally wrong, I do feel that it is one of those instances of judge not and you should not be judged. [¶] Yet still society has come to a point where there are so many wrongdoings in my estimation that something could possibly or should possibly be done about this.
>
> "The Court: In terms of your own service on the case, would your feelings that in some sense there is moral wrong attached to the penalty influence your verdict if we have a penalty phase?
>
> "Prospective Juror No. 196: No, sir. It would not.
>
> "The Court: You won't be wrestling with the idea?
>
> "Prospective Juror No. 196: No."

(43 RT 4300-4301.)

Juror No. 196's comment that some people have been "railroaded" ignores the context in which it was made, and is yet another pretext for excusing her. When asked in the Questionnaire whether her views on the death penalty were based on religious convictions, Juror No. 196's full response was: "Somewhat. But more so that there has been a lack of proper defense for some, and many convicted have been railroaded." (Question No. 52, 15 SUPP CT II 4232.) If anything, Juror No. 196's response cannot be said to be indicative she would be unfavorable towards the prosecution, but instead not favorable to defense counsel.

E. Alternate Juror No. 162

The prosecutor's alleged justifications for his peremptory challenge of Black prospective alternate juror No. 162 were that: (1) she had served on civil and criminal trials which each resulted in a hung jury; (2) she had concerns about the evidence and Officer Fuhrman in the *Simpson* case; (3) she said that sometimes innocent people are sentenced to death; and, (4) she had mixed feelings about the death penalty. (44 RT 4497.) None of these reasons constitute valid justifications for a peremptory challenge.

Without anything more, the fact that Juror No. 162 had served on two juries in which no verdict had been rendered does not indicate she would be an unfair or less than impartial juror. Even assuming that her service on a criminal case resulting in a hung jury indicates an inference she would be unfavorably disposed towards the prosecution, this speculative inference cannot legitimately be made. As was revealed during voir dire on the matter, Juror No. 162 was an *alternate* in the criminal proceeding and

thus did not participate in the deliberations which resulted in a hung jury. (44 RT 4440.)[21] Nonetheless, this particular justification for excusing Juror. No. 162 was indeed a pretext is demonstrated by the fact that the prosecutor failed to excuse Juror No. 147 who also served on a case which resulted in a hung jury. (Question No. 27, 14 SUPP CT II 3980.)

Similarly, Juror No. 162's "concerns" about the *Simpson* case do not support an inference she would be unfavorable to the prosecution. Review of her Questionnaire reveal that the prosecutor took her comment out of context; her response was that she had "doubts about the evidence" and an inability to be "certain about the accuracy of it" based upon mishandling

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[21] The relevant voir dire on this point is as follows:

"The Court: And then the charge of arson. How long ago was that one?

"Prospective Alternate Juror No. 162: Almost 10 years.

"The Court: Was that here in this building?

"Prospective Alternate Juror No. 162: It was in Compton.

"The Court: No verdict on that one either?

"Prospective Alternate Juror No. 162: No, I was an alternate, but I did not participate in the deliberations. But I found there was no verdict. It was a hung jury."

(44 RT 4440.)

and the "possibility" of evidence "being planted." (Question No. 34, 14 SUPP CT II 4073.)[22] As with the other jurors who believed that the prosecution had not met their burden of proof in the *Simpson* case, her "concerns" or "doubts" in this regard, without anything more, do not indicate she would be unfavorable towards the prosecution.

Even assuming her concerns could be interpreted in this manner, this justification for challenging Juror No. 162 is nonetheless a pretext. As noted above, jurors who also felt the prosecution had not met their burden of proof in the *Simpson* case served on the jury without challenge by the prosecution. (Juror No. 130, Question No. 34, 14 SUPP CT II 3852; Juror No. 146, Question No. 34, 14 SUPP CT II 3969.) Moreover, to the extent any concerns she had with regard to the *Simpson* case could be interpreted to mean that she would be unfavorably disposed to evidence presented by the prosecution, this reason was a pretext as well. Juror No.146, who the prosecutor permitted to serve on the jury, also expressed an opinion that prosecution evidence be of "high quality and processed correctly." (Question, No. 35, 14 SUPP CT II 3969.)

The prosecutor's reliance on the fact that Juror No. 162 believed innocent people are sentenced to death also takes a comment she had made in her Questionnaire out of its proper context. Contrary to the implication the prosecutor sought to raise by isolating her comment on "innocent

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[22] Question No. 34 asked: "What are your thoughts, feelings, and opinions about the following cases and their results? Please explain in detail." Alternate Juror No. 162's response regarding the *Simpson* case was: "Had doubts about evidence. Couldn't be certain about accuracy of it since it had been mishandled & possibility of it being planted especially after facts about Mark Furman [sic] became known." (14 SUPP CT II 4073.)

people," the record reveals she felt the death penalty is used "about right." (Question No. 51, 14 SUPP CT II 4076.) Moreover, in light of the full explanation she provided on the "use of the death penalty," her comment about "innocent people" was made only in reference to the right of appeal which should be given to those sentenced to death. (*Ibid.*)[23] Regardless of her views on the death penalty, however, Juror No. 162 said she would be able to impose it if the evidence so warranted. (Question No. 54, 14 SUPP CT II 4077.)

Similarly, the prosecution's final reason for challenging Juror No. 162, that she had "mixed feelings" about the death penalty, constitutes an inadequate justification. Although Juror No. 162 did indicate in her questionnaire that her general feelings about the death penalty were mixed, she qualified her response by stating that her training as a nurse was "to assist in saving, maintaining & improving the quality of life." (Question No. 48, 14 SUPP CT II 4076.) To the extent that the prosecutor sought to infer that Juror No. 162 might be unfavorably disposed to the prosecution, or unable to impose a death verdict, because of her "mixed feelings"on such a penalty, that inference is dispelled by additional responses she provided in her questionnaire and during voir dire. Juror No. 162 also made clear that in certain circumstances the death penalty is appropriate, including instances where there is murder of infants, children, the elderly, murder for hire, or to obtain money or property. (*Ibid.*) In addition, she specifically stated that the death penalty is "needed in cases of murder of children,

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[23] The full explanation given by Juror No. 162 to Question No. 51, which sought respondent's opinion on the use of the death penalty, was: "All people sentence [sic] should have right to appeal [;] sometimes innocent people have been sentenced to death." (14 SUPP CT II 4076.)

elderly & other heinous crimes" (Question No. 53, 14 SUPP CT II 4076), and that regardless of her views on the death penalty she could impose it if warranted by the evidence (Question No. 54, 14 SUPP CT II 4077; 44 RT 4441). She also said that she could give the prosecution and the defense "a fair call on penalty" if a penalty phase were necessary in this case. (44 RT 4441.)[24]

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[24] The relevant colloquy is as follows:

"The Court: You said sometimes you believe that innocent people have been sentenced to death. [¶] I want to ask who you are thinking of specifically or what case?

"Prospective Alternate Juror No. 162: No case specifically that I can recall.

"The Court: Well, do you understand that if we have a penalty phase you will be asked to vote either death or life without possibility of parole in here?

"Prospective Alternate Juror No. 162: Yes

"The Court: Do you understand the process that you will be asked to go through in arriving at that decision?

"Prospective Alternate Juror No. 162: Yes.

"The Court: Do you believe honestly speaking that you could render both of those depending on the evidence in this case?

"Prospective Alternate Juror No. 162: Yes.

"The Court: Do you think you could give the prosecution and the defense a fair call on penalty if we have a penalty phase?

"Prospective Alternate Juror No. 162: Yes."

(44 RT 4441.)

F. The Trial Court Failed to Properly Evaluate the Prosecutor's Reasons for Excusing Each of the Black Prospective Jurors as Well as the Black Prospective Alternate Juror in this Case

The trial court had an obligation to make a "sincere and reasoned" effort to evaluate the genuineness and sufficiency of the prosecutor's reasons as to each individual juror challenged and to clearly express its findings. (*People v. Silva*, *supra*, 38 Cal.4th at pp. 385-386; *People v. Fuentes* (1991) 54 Cal.3d 715, 721; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220 ["trial court has duty to determine the credibility of the prosecutor's proffered explanations"].)[25] However, without inquiry into or evaluation of the prosecutor's reasons to distinguish bonafide reasons from sham excuses as to each of the challenged jurors, the trial court simply accepted the reasons at face value without regard to the record of voir dire and the questionnaires and denied appellant's *Wheeler/Batson* motion. (44 RT 4497-4499.)[26]

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[25] As this Court stated in *People v. Fuentes*, *supra*:

> "[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [under *People v. Hall* (1983) 35 Cal.3d 161] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge."

(*People v. Fuentes*, *supra*, 54 Cal.3d at p. 720.)

[26] In denying the defense *Wheeler/Batson* motion, the trial court simply ruled that the reasons stated for the exercise of each challenge were not sham reasons, and that with the exception of two of the challenges, the reasons proffered were compelling and obvious. (44 RT 4498.) The ruling (continued...)

As demonstrated above, the prosecutor's purported justifications for peremptorily excusing the jurors in question were either implausible or suggestive of bias. They, therefore, "demanded further inquiry on the part of the trial court." (*People v. Hall* (1983) 35 Cal.3d 161, 169.) The trial court's failure to determine the legitimacy of each of the prosecutor's reasons as to each of the challenged Black prospective jurors at issue undermines the trial court's ruling regarding those justifications and its ultimate denial of appellant's *Wheeler/Batson* motion (see e.g., *Lewis v. Lewis*, *supra*, 321 F.3d at p. 830; *United States v. Chinchilla*, *supra*, 874 F.2d at pp. 698-699), and thus constitutes reversible *Wheeler* error (see,

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[26] (...continued)
issued by the trial court is as follows:

> "The Court: Although there is no prima facie showing, the court rules that there are also reasons stated for the exercise of each challenge and those are not sham reasons; that as to all but two of those jurors the reason was compelling and obvious. [¶] As to two the court will indicate the following: [¶] While the court believes the people, and accept the people's representation, but the court feels that tactically they were not wise. [¶] Mr. Klein pointed that out yesterday and the court does not disagree. [¶] Two of those jurors struck the court as – I don't want to say pro-defense or pro-prosecution but jurors that typically would be allowed to sit. [¶] Nonetheless, the court makes it clear that the people – the court does not feel they are sham reasons. [¶] One does not grant a Wheeler motion because one side is using tactics that the court might not agree with in terms of the wisdom of their challenges as opposed to their motivation in making the challenge. [¶] The court finds as to the people, A, No prima facie showing, but B, even assuming one was made there has been no showing of bias as to any of the challenges."

(44 RT 4498-4499.)

e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386.)

In *People v. Hall*, *supra*, 35 Cal.3d 161, where this Court reversed for *Wheeler* error, this Court held that,

> "it is imperative, if the constitutional guarantee is to have real meaning, that once a prima facie case of group bias appears the allegedly offending party be required to come forward with explanation to the court that demonstrates other bases for the challenges, and that the court satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for "we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination."

(*Id.* at pp. 167-168; see also *People v. Turner* (1986) 42 Cal.3d 711, 728.)[27]

More recently, in *People v. Silva*, *supra*, 25 Cal.4th 345, this Court reversed the judgment of death because it was "unable to conclude that the trial court met its obligation to make 'a sincere and reasoned attempt to

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[27] In *People v. Turner*, *supra*, 42 Cal.3d 711, this Court reversed the death judgment, concluding that the prosecution had failed to meet its burden of showing that the challenged prospective jurors were not excluded because of group bias and that the trial court had failed to discharge its duty under *People v. Hall*, *supra*, 35 Cal.3d at pp. 168-169, "to inquire into and carefully evaluate the reasons offered by the prosecutor." (*People v. Turner*, *supra*, 42 Cal.3d at p. 728.)

evaluate the prosecutor's explanation' and to clearly express its findings." (*Id.* at p. 385, citations omitted.)[28] In *Silva*, *supra*, the defense alleged that the prosecutor had improperly used his peremptory challenges against five Hispanic prospective jurors. The trial court found a prima facie case had been established and asked the prosecutor to explain the reasons for his challenges. After the prosecutor had presented its various reasons, the trial court denied the defense motion, finding only that reasons given by the prosecutor appeared to be valid. On appeal, this Court found numerous discrepancies between the prosecutor's reasons and the responses of the challenged jurors in the record, especially as to one of the challenged prospective jurors, Jose M., whom the prosecutor said he challenged because M. said that he thought the death penalty "'was the toughest penalty, and he would look for other options.'" (*Id.* at p. 376.) The prosecutor also said that he felt that M. "'was an extremely aggressive person and might hang the jury with his thoughts at that point . . . .'" (*Ibid.*) This Court found that the record provided no support for either of the prosecutor's two stated reasons. (*Id.* at p. 377.) This Court also found that the trial court committed reversible error in its review of the reasons given by the prosecutor's challenge to prospective juror Jose M., holding:

> "We agree with defendant that the court erred in denying the motion as to Prospective Juror Jose M. Nothing in the

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[28] In *People v. Reynoso* (2003) 31 Cal.4th 903, this Court carved out an exception to the requirement that a trial court make explicit and detailed findings regarding the prosecution's use of peremptory challenges. In that case, this Court held that a trial court is not required to make specific findings in instances where the trial court decides to credit the prosecution's demeanor-based reasons for exercising a peremptory challenge. (*Id.* at p. 929.) None of reasons proffered by the prosecutor in this case were demeanor-based and the *Reynoso* exception is inapplicable here.

> transcript of voir dire supports the prosecutor's assertions that M. would be reluctant to return a death verdict or that he was "an extremely aggressive person." Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent [citation], it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue [citations]. We find nothing in the trial court's remarks indicating it was aware of, or attached any significance to, the obvious gap between the prosecutor's claimed reasons for exercising a peremptory challenge against M. and the facts as disclosed by the transcripts of M.'s voir dire responses. On this record, we are unable to conclude that the trial court met its obligations to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation" [citation] and to clearly express its findings [citation]."

(*Id.* at p. 385.)

Had the trial court in this case engaged in a reasoned evaluation of each of the prosecutor's various reasons as to each of the Black prospective jurors as well as the alternate juror removed by peremptory challenge by the prosecutor, it would have concluded that the justifications failed to establish that the challenges against each of the jurors were exercised for motives other than specific group bias.

G. Reversal of the Entire Judgment is Required

The various justifications proffered by the prosecutor in this case were either contradicted or unsupported by the record, and/or were undermined by his acceptance of jurors who shared the same views or characteristics as the challenged Black prospective jurors at issue. As such, the prosecutor's various justifications were pretexts for purposeful racial discrimination. In addition, even if this Court were to find that one or more

valid, race-neutral reasons remained for any of the nine peremptory challenges discussed in appellant's opening as well as in this supplemental opening brief, the sheer number of reasons falling squarely in the pretext category is strong evidence that the reasons given as a whole are insufficient and lack credibility. (See, e.g., *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831.)

Finally, as noted, the appellate record does not support a finding that the trial court engaged in a reasoned attempt to evaluate each of the prosecutor's various reasons for challenging each of the Black prospective jurors at issue here. All the trial court did was to enter a global finding that the justifications proffered by the prosecutor were not sham reasons. As held by this Court in *People v. Silva*, *supra*, 25 Cal.4th at p. 386, when, as here, the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear to be sufficient.

Accordingly, reversal of the entire judgment is required. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

V

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE TWELVE YEAR DELAY BETWEEN THE CRIME AND HIS ARREST

Appellant has argued in his opening brief that his state and federal constitutional rights to due process and fair trial (U.S. Const.., 5th and 14th Amends.), as well as his right to speedy trial provided by the California Constitution (art. I, § 15), were violated because of the substantial and actual prejudice he suffered as the result of the twelve-year delay by the prosecution in filing charges against him. The record reveals that the delay not only resulted in the unavailability of material witnesses and the loss or fading of memories, but it also resulted in the destruction of critical evidence which was potentially exculpatory. (AOB, 243-253; ARB, 84-98.)

In addition to the constitutional grounds already raised, appellant now alleges that the pre-accusation delay also violated his rights to a fair trial, present a defense as well as witnesses and evidence on his behalf, effective assistance of counsel and to reliable determinations of guilt, death-eligibility and penalty as provided by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States. (See *Faretta v. California* (1975) 422 U.S. 806, 818; *Chambers v. Mississippi* (1973) 410 U.S. 484; *Howell v. Barker* (4th Cir. 1990) 904 F.2d 889, 895; *United States v. Barket* (8th Cir. 1976) 530 F.2d 189, 196; *Miller v. Vasquez* (9th Cir.1989) 868 F.2d 1116, 1120-1121; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304- 305; .)

VI

THE STATE'S FAILURE TO PRESERVE EVIDENCE IN THIS CASE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued in his opening brief that the government's failure to preserve and/or destruction of certain material evidence, and that which could not be replaced by comparable evidence, violated his constitutional rights to due process and a fair trial. (U.S. Const., 5th and 6th Amends.; Cal. Const., art. I, §§ 1, 7, 15). Appellant has also argued that the failure to preserve evidence in this case was done in bad faith as the exculpatory value of the destroyed evidence was readily apparent to the government. (AOB, 258-264; ARB, 99-113.)

In addition to the state and federal constitutional bases argued in appellant's opening brief, the government's failure to preserve and/or destruction of the evidence at issue further violated appellant's constitutional rights to due process and a fundamentally fair trial under the Fourteenth Amendment. The government's actions also violated appellant's rights to present a defense under the Sixth Amendment and Fourteenth Amendments, and reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *Arizona v. Youngblood* (1988) 488 U.S. 51, 58; *California v. Trombetta* (1984) 466 U.S. 479, 488-490; *Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, 1119-1120; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Washington v. Texas* (1967) 388 U.S.14, 20-23.)

VII

THE FAILURE TO APPLY THE PROCEDURAL SAFEGUARDS OF EVIDENCE CODE SECTION 795 TO THIS CASE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued that the failure to apply Evidence Code section 795 to the 1980 hypnosis sessions of Lloyd Bulman violated his federal and state constitutional rights to equal protection pursuant to the Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution. Under section 795, unless certain specified procedures have been followed, a witness who has undergone a hypnosis procedure for the purpose of recalling events which are the subject of the witness' testimony is barred from testifying.[29] Because section 795 has been found to be applicable only to hypnosis sessions conducted after January 1, 1985, appellant was not entitled to its protection. The record clearly shows, however, that the government failed to fulfill the required procedures and guidelines of section 795 regarding statements made by an individual who has undergone hypnosis because a law enforcement officer was present and participated in the 1980 hypnosis session. (Evid. Code § 795, subd.(a)(3)(D).) (AOB, 258-263; ARB, 112-113.)

Therefore, besides violating appellant's constitutional right to equal protection, as argued in appellant's opening brief, the failure to apply section 795 procedures to the 1980 hypnosis sessions deprived appellant of his rights to due process (U.S. Const., 5th and 14th Amends.), confrontation and a fundamentally fair trial based on reliable evidence (U.S. Const., 6th

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[29] See Evidence Code section 795, which is set out in full in Appellant's Reply Brief, pp. 115-116, fn. 53.

and 14th Amends.), his state-created liberty interest (U. S. Const., 5th and 14th Amends.) and reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (See *Estelle v. McGuire* (1991) 502 U.S. 62; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *Jamal v. Van De Kamp* (9th Cir. 1991) 926 F. 2d 918, 919-920; *United States v. Adams* (9th Cir. 1978) 581 F.2d 193, 198-199; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638;*Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.)

VIII

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED BY THE FAILURE TO EXCLUDE BULMAN'S TESTIMONY UNDER EVIDENCE CODE SECTION 795

Appellant argued in his opening brief that Bulman's testimony should have been excluded because the record shows he had undergone hypnosis during a 1987 interview and that the reliability requirements set forth in Evidence Code section 795 concerning procedures to be followed during the conduction of hypnosis sessions had not been met. The record shows that one of the procedural requirements of section 795, that a law enforcement officer not be present or participate when hypnosis of an individual is being conducted, was violated during the 1987 session of Bulman in this case. However, the trial court erroneously applied the incorrect standard to determine that section 795 did not apply to the 1987 hypnosis sessions of Bulman. Contrary to the court's determination, the record shows that Bulman had "undergone hypnosis" within the meaning of section 795. The failure to apply section 795, resulting in the admission of Bulman's testimony and including his highly unreliable identification of appellant's photographs, was prejudicial and violated appellant's fundamental constitutional rights to due process and a fair trial. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15. (AOB, 264-268 ; ARB, 114-124.)

Appellant now additionally contends that the failure to exclude Bulman's testimony under section 795 seriously undermined his constitutional rights to confrontation and the reliability of the guilt, death-eligibilty and penalty determinations in this case (U.S. Const., 6th and 8th Amends.). (See *Jamal v. Van De Kamp*, *supra*, 926 F. 2d at pp. 919-920;

United States v. Adams, *supra*, 581 F.2d at pp. 198-199; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Moreover, the failure to apply section 795 in this case resulted in an arbitrary deprivation of a purely state law entitlement as provided by the Fifth and Fourteenth Amendments of the United States Constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 346.)

IX

ADMISSION OF EXPERT TESTIMONY REGARDING PRESUMPTIVE BLOOD TESTS ON APPELLANT'S JACKET VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued that prosecution expert witness testimony regarding presumptive blood tests conducted on appellant's jacket should have been excluded because such testimony was irrelevant, prejudicial and violated appellant's constitutional right to a reliable determination of guilt pursuant to the Eighth and Fourteenth Amendments of the United States Constitution. (AOB, 268-273; ARB,125-134.)

Additionally, appellant now contends that the erroneous admission of irrelevant expert testimony on the presumptive blood tests further violated appellant's fundamental constitutional rights to due process and a fair trial (U.S. Const., 5th and 14th Amends.) as well as reliable determinations of death-eligibility and penalty (U.S. Const., 8th Amend.) (See *Estelle v. McGuire* (1991) 502 U.S. 62, 68; *Estes v. Texas* (1965) 381 U.S. 532, 559-560; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *Jamal v. Van De Kamp*, *supra*, 926 F. 2d 918, 919-920; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304- 305.) Because the prejudice from admitting the irrelevant and speculative evidence of the tests far outweighed its probative value under Evidence Code section 352, admission of the evidence also resulted in an arbitrary deprivation of a purely state law entitlement and appellant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

X
ADMISSION OF IRRELEVANT TESTIMONY BY APRIL WATSON AND OF IMPROPER HEARSAY TESTIMONY BY DETECTIVE HENRY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued in his opening brief that the trial court improperly admitted irrelevant testimony of April Watson regarding a phone call appellant had made to her as well as improper hearsay testimony by Detective Henry regarding what Watson had allegedly told him about the call. Watson's testimony should not have been admitted because the record shows that the inquiry appellant made about Terry Brock during his phone call with Watson was not relevant to the case at hand, but instead to the prior triple murder case to which appellant and Brock had both been charged. The testimony of Henry regarding what Watson had told him about her phone conversation with appellant constituted multiple hearsay for which there were no applicable exceptions. Accordingly, the erroneous admission of the testimony of both witnesses at issue was prejudicial, improperly contributed to the jury's determination of guilt, and violated appellant's constitutional right to due process as provided by the Fourteenth Amendment to the United States Constitution. (AOB, 273-278; ARB, 135-149.)

Admission of the irrelevant and prejudicial testimony of Watson as well as the improper hearsay testimony of Henry further violated appellant's fundamental rights to due process and a fair trial under the Fifth Amendment, as well as reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment. (See *Estelle v. McGuire* (1991) 502 U.S. 62; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357;

Ferrier v. Duckworth, *supra*, 902 F.2d at p. 548; *Terravona v. Kincheloe* (1988) 852 F.2d 424, 428-429; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Admission of the challenged testimony of Watson and Henry was in contravention of state evidentiary rules, Evidence Code sections 210, 350, 1201, 1235 and 1237. As such, admission of the improper evidence also resulted in the arbitrary deprivation of appellant's state law entitlement in violation of the Due Process Clause of the Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at o, 346.)

XI

ADMISSION OF EVIDENCE APPELLANT HAD REFUSED TO STAND IN A LINEUP VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant argued in his opening brief that the trial court improperly admitted evidence of his refusal to stand in a lineup because it was not evidence of appellant's consciousness-of-guilt, and it was in violation of Evidence Code section 352 because its prejudicial effect outweighed any probative value. Appellant had been advised by his attorney not to participate in the lineup and that his refusal could not be used against him. The improper admission of appellant's refusal to stand in the lineup as consciousness-of-guilt evidence impermissibly lightened the prosecution's burden of proof, was more prejudicial than probative and cannot be deemed harmless beyond a reasonable doubt. (AOB, 279-281; ARB 150-153.)

In addition to the improper lessening of the prosecution's burden of proof (see *In re Winship* (1970) 397 U.S. 358, 364), admission of the improper consciousness-of-guilt evidence violated appellant's constitutional rights to due process and a fair trial (U.S. Const., 5th and 14th Amends.), not incriminate himself (U.S. Const., 5th Amend.), and reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (See *Estelle v. McGuire* (1991) 502 U.S. 62, 68; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *Jamal v. Van De Kamp*, *supra*, 926 F. 2d at pp. 919-920; *United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1352; *State v. Palenkas* (Ariz.Ct.App.1996) 933 P.2d 1269, 1278 [use of attorney contact and refusal to search without warrant as consciousness-of-guilt violates due process]; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305; see also, *People v. Partida*

(2005) 37 Cal.4th 428, 435-436; *People v. Wood* (2002) 103 Cal. App.4th 803, 808-809.) Moreover, the trial court's failure to exclude evidence of appellant's refusal to participate in the line up under Evidence Code section 352 resulted in an arbitrary deprivation of a purely state law entitlement as provided by the Fifth and Fourteenth Amendments of the United States Constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

XII

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE EXCLUSION OF TESTIMONY OF INCULPATORY STATEMENTS MADE BY CHARLES BROCK REGARDING THE MURDER OF JULIE CROSS

In his opening brief appellant argued that the trial court erroneously excluded testimony by Jacqueline Sherow as to inculpatory statements Charles Brock had made to her regarding his involvement in the Julie Cross murder because the statements should have been properly admitted as declarations against penal interest under Evidence Code section 1230. Appellant argued that the failure to admit Sherow's testimony deprived him of critical evidence which was necessary to support his defense that he was not responsible for the murder, and that the exclusion was highly prejudicial because not only was the identity of the perpetrator at issue but the circumstantial evidence of appellant's culpability was weak. The exclusion of Sherow's testimony as to statements made by Charles Brock violated appellant's constitutional rights to due process, to present witnesses in his behalf and to present a meaningful defense as provided by the Sixth and Fourteenth Amendments to the United States Constitution. (AOB, 282-286; ARB, 154-170.)

Exclusion of Sherow's testimony also deprived appellant of his right to due process and a fundamentally fair jury trial under the Fifth Amendment as well as his right to present witnesses in his defense under the Sixth Amendment. In addition, exclusion of the testimony deprived appellant of his right to reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment. (See *Holmes v. South Carolina* (2006) ___ U.S. ___, 126 S.Ct. 1727, 1734-1735; *Estelle v.*

McGuire (1991) 502 U.S. 62; *Pennsylvania v. Richie* (1987) 480 U.S. 39, 60; *Chambers v. Mississippi* (1973) 410 U.S. 284, 298-302; *Washington v. Texas* (1967) 388 U.S. 14, 19; *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304-305.) In addition, the failure to admit the testimony under Evidence Code section 1235 deprived appellant of his state-created liberty interests in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. 343.)

XIII

INSTRUCTING THE JURORS WITH MULTIPLE CONSCIOUSNESS-OF-GUILT INSTRUCTIONS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant has argued in his opening brief that the trial court improperly gave two consciousness-of-guilt instructions, CALJIC Nos. 2.04 and 2.05. These instructions were not justified by the facts in this case and were impermissibly argumentative. Giving these instructions to the jury violated appellant's right to due process under the Fourteenth Amendment of the United States Constitution and article I, sections 7, 15 and 24 of the California Constitution because they were inapplicable to this case and because they lessened the prosecution's burden of proof by permitting the jury to draw inferences of guilt against appellant, thus permitting the jury to convict him on less than proof beyond a reasonable doubt as provided. (AOB, 286-289; ARB 171-182.)

Notwithstanding the impermissibly argumentative nature of CALJIC Nos. 2.04 and 2.05, these consciousness-of-guilt instructions also improperly duplicated the circumstantial evidence instructions, and were thus unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (*See People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on another ground, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00 and 2.01. (XV CT 3921-3922.) These instructions informed the jurors that they may draw inferences from the

circumstantial evidence, *i.e.* that they could infer facts tending to show appellant's guilt from the circumstances of the alleged crimes. There was no need to repeat this general principle under the guise of permissive inferences of consciousness-of-guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [requiring defendant to reveal alibi defense without providing discovery of prosecution's rebuttal witnesses gives prosecution unfair advantage that violates due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].)

Instructing the jury in this case with CALJIC Nos. 2.04 and 2.05 deprived appellant of a fair jury trial as well as his due process right to have a properly instructed jury find that all elements of the charged crimes had been proven beyond a reasonable doubt in contravention of the Fifth, Sixth and Fourteenth Amendments. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Sullivan v. Louisiana* (1993) 508 U.S. 275.) Moreover, the improper consciousness-of-guilt instructions reduced the reliability of the jury's determination, created the risk that the jury would make erroneous factual determinations, and deprived appellant of his right to reliable determinations of guilt, death-eligibility and penalty provided by the Eighth and Fourteenth Amendments. (See *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

XIV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BY GIVING PREJUDICIAL AIDING AND ABETTING INSTRUCTIONS WHICH WERE NOT SUPPORTED BY THE EVIDENCE

In his opening brief appellant has argued that the trial court improperly provided aiding and abetting instructions during the guilt and special circumstance phases which were not justified by the facts in this case. In addition to being irrelevant and sure to confuse and mislead the jury, the aiding and abetting instructions at issue were prejudicial because they effectively allowed the jury to convict appellant on a theory which was not advanced by either the prosecution or the defense. At no time did the prosecutor argue that appellant was liable as an aider and abettor to the murder of Julie Cross - i.e., that appellant was the man who initially approached Bulman. Appellant's defense was that he was not the shooter and that he was not even present. Giving the option that appellant could be culpable under an aider and abettor theory of liability left the jurors with a way to convict appellant for murder even though they did not believe him to be the shooter. Had the option not been available, however, the jury would have had to acquit appellant. Under the facts of this case, giving the jurors the improper instructions on aiding and abetting resulted in the deprivation of appellant's right to due process under the Fourteenth Amendment to the United States Constitution. (AOB, 289-300; ARB 183-189.)

In addition to the constitutional basis set forth in his opening brief, the erroneous aiding and abetting instructions given in this case violated appellant's rights to due process, a fundamentally fair jury trial, prepare an adequate defense, and counsel (U.S. Const., 5th and 6th Amends.) as well as

reliable determinations of guilt, death-eligibility and penalty. (U. S. Const., 8th Amend.) (See *Calderon v. Prunty* (9th Cir. 1995) 59 F.3d 1005, 1009-1010; *United States v. Dinkane* (9th Cir. 1994) 17 F.3d 1192; *United States v. Gaskin* (9th Cir. 1988) 849 F.2d 454, 459-460; *Alaskan Airlines v. Ozman* (1950) 181 F.2d 353, 368; *Beck v. Alabama, supra*, 447 U.S. at p.628; *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304-305.)

XV

PERMITTING THE PROSECUTION TO ELICIT PREJUDICIAL AND INFLAMMATORY EVIDENCE THAT APPELLANT HAD COMMITTED A PRIOR SERIOUS OFFENSE WITH TERRY BROCK VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant argued in his opening brief that the trial court committed constitutionally improper error when it permitted the prosecution to elicit from Jessica Brock highly inflammatory evidence that appellant had committed a prior serious offense with Terry Brock ("Brock"). The prosecution sought to have the other-crimes evidence admitted in order to bolster Jessica's credibility and recollection of two separate occasions that appellant had visited her house. Admission of this evidence was prohibited by Evidence Code 1101, subdivision (b); moreover, any probative value of the evidence was substantially outweighed by its prejudicial effect and thus was similarly inadmissible under Evidence Code sections 210, 250 and 352.

Evidence that appellant had engaged in serious criminal activity with Terry Brock was especially prejudicial, as Brock was the very person Bulman had repeatedly identified as being one of the two perpetrators in this case. It would have been virtually impossible for the jury to ignore the association between Brock and appellant as crime partners and refrain from concluding that appellant must have been involved with Brock during the Cross homicide. The improper admission of the other-crimes evidence deprived appellant of his rights to due process, a fair trial and state-created liberty rights under the Fourteenth Amendment to the United States Constitution. (AOB, 300-307; ARB, 190-198.)

In addition to the constitutional bases set forth in his opening brief, admission of the inflammatory other-crimes evidence violated appellant's

constitutional rights to due process, a fair trial and a trial which does not impermissibly lighten the prosecution's burden of proof (U. S. Const., 5th, 6th and 14th Amends.), and to reliable determinations of guilt, special circumstances and penalty (U.S. Const., 8th Amend.). (See *Estelle v. McGuire*, *supra*, 502 U.S. 62; *In re Winship* (1970) 397 U.S. 358, 364; *Walters v. Maass*, *supra*, 45 F.3d 1355, 1357; *McKinney v. Rees* (9th Cir. 1993) 993 F. 2d 1378, 1385-1386; *Jamal v. Van De Kamp*, *supra*, 926 F.2d, 918, 919-920; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.)

XVI

DENIAL OF APPELLANT'S MOTION FOR MISTRIAL BASED ON EVIDENCE THAT HE HAD PREVIOUSLY COMMITTED A TRIPLE MURDER WITH TERRY BROCK VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant argued in his opening brief that his constitutional rights to due process and a reliable determination of guilt were violated when the trial court failed to grant his motion for mistrial based on the improper admission of evidence that he had committed a prior triple murder in 1978 with Terry Brock. The inflammatory nature of evidence of the prior murder was well recognized by the trial court as the prosecution was instructed not to elicit the information and prosecution witness Jessica Brock was specifically admonished to not mention the prior crime during her testimony.

The record shows that defense counsel's mistrial motion was based on contamination of all of the seated jurors and each alternate. Accordingly, replacement of the two jurors who admitted hearing Jessica's statement about the prior triple murder appellant had committed with alternates, who had similarly been subjected to the inflammatory other-crimes evidence, would not have remedied the error. Apart from the devastating impact of information that appellant had previously committed not one but three murders, the impact of the propensity evidence was even greater because the prior incident also involved Terry Brock. Any doubts the jury may have had concerning appellant's involvement in the Cross murder were resolved by the knowledge that appellant's crime partner in the prior murder was the same person Bulman had identified as one of the men

who confronted them moments before Cross was killed.[30]

Appellant now additionally contends that the improper admission of evidence appellant had previously committed a triple murder with Terry Brock violated appellant's rights to due process, a fair trial, an impartial jury, a trial which does not impermissibly lighten the prosecution's burden of proof and reliable determinations of death-eligibility and penalty provided under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See *Estelle v. McGuire*, *supra*, 502 U.S. 62; *In re Winship* (1970) 397 U.S. 358, 364; *Estes v. Texas* (1965) 381 U.S. 532, 565; *Irwin v. Dowd* (1961) 366 U.S. 717, 721-722; *Simmons v. United States* (1891) 142 U.S. 148, 171; *Walters v. Maass*, *supra*, 45 F.3d 1355, 1357; *McKinney v. Rees* (9th Cir. 1993) 993 F. 2d 1378, 1385-1386; *Jamal v. Van De Kamp*, *supra*, 926 F.2d at pp. 919-920; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.)

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[30] As set forth in Argument XV, *supra*, the bad character/propensity evidence previously committed by appellant and Terry Brock only led to the inference that appellant was one of the perpetrators in the Cross homicide.

XVII

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

Appellant has argued in his opening brief that there was insufficient evidence to support the robbery-murder special circumstance allegation because any taking of property belonging to Agents Bulman and Cross was incidental to murder. The record demonstrates there was no solid or credible evidence that the men approached the agents with the requisite intent to steal, or that the murder occurred during the commission of a robbery. The undisputed facts show that once the men encountered the agents, a standoff occurred with both parties pointing guns at one another, which was then followed by a chain of events leading to Cross'death and the incidental removal of the car key and shotgun from the scene. There was no demand for property made by either man prior to or during the confrontation; similarly, there was no evidence that either the car key or the shotgun were removed from the car for a larcenous purpose or that Cross was killed in order to acquire those items. Insufficient evidence to support the determination that the robbery-murder special circumstance is true beyond a reasonable doubt violates appellant's right to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. (AOB, 311-315; ARB, 205-212.)

In addition to the constitutional basis raised in his opening brief, appellant now argues that the fact that the evidence of the special circumstance determination is insufficient violates appellant's rights to due process and reliable determinations of death-eligibility and penalty under

the Fifth and Eighth Amendments to the United States Constitution. (See *In re Winship*, *supra*, 397 U.S. at p. 364; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.)

XVIII

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED BECAUSE THE TRIAL COURT DENIED DEFENSE COUNSEL'S REQUEST FOR A CONTINUANCE TO PREPARE A MOTION FOR NEW TRIAL AND BECAUSE THE COURT LACKED THE AUTHORITY TO MAKE THE NEW TRIAL MOTION ON APPELLANT'S BEHALF

Appellant has argued in his opening brief that the trial court committed prejudicial error when it denied defense counsel's request for a continuance to prepare a motion for new trial and when it subsequently went on to make the new trial motion on appellant's behalf. The record shows there was good cause to grant the continuance. This is especially so since a primary reason the continuance was requested was to afford defense counsel the opportunity to conduct jury investigation. The record reveals there had been dissension between the jurors during both the guilt and penalty deliberations, as evidenced by the multiple communications from the jury and at least one deadlocked vote during each phase of the trial. It was likely, therefore, that the jury investigation defense counsel sought to conduct may have resulted in grounds for a new trial. Similarly, the trial court lacked any authority to make the new trial motion on appellant's behalf. The trial court's action in denying appellant's continuance motion, as well as taking it upon itself to make the new trial motion in defense counsel's stead, constituted a refusal to hear or determine a motion for new trial before sentencing in violation of statutory law. (Pen. Code §§ 1181, 1202.) The court's denial of the continuance motion as well as its action in making the motion for new trial on appellant's behalf violated appellant's fundamental constitutional rights to due process of law, a fair trial, effective assistance of counsel and state-created liberty interests pursuant to the Sixth

and Fourteenth Amendments (AOB, 326-329; ARB 213-229).

In addition to the constitutional bases raised in his opening brief, appellant now argues that the improper actions by the court deprived him of his constitutional rights to present a defense, due process and reliable determinations of guilt, death-eligibility and penalty under the Fifth, Sixth and Eighth Amendments to the United States Constitution. (See *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 298-302; *Washington v. Texas*, *supra*, 388 U.S. at p. 19; *Chia v. Cambra*, *supra*, 360 F.3d 997; *Chandler v. Fretag* (1954) 348 U.S. 3, 9-10; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.)

XIX

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO GIVE HIS REQUESTED INSTRUCTION THAT THE MITIGATING CIRCUMSTANCES NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT AND THAT MITIGATION MAY BE FOUND NO MATTER HOW WEAK THE EVIDENCE

Appellant has argued in his opening brief that the trial court committed reversible error when it refused to give his special instruction which clarified for the jury that they could reject a death verdict based on sympathy or compassion alone, and that a mitigating factor does not have to be proved beyond a reasonable doubt. This instruction would have provided needed guidance to the jury as to the scope and proof of mitigating evidence in general, and it was especially necessary in light of the specific mitigation evidence regarding appellant's relationships with various members of his family that was presented in this case. Although the standard jury instruction regarding mitigating and aggravating factors that was provided, CALJIC No. 8.85, informed the jury they could consider any sympathetic aspect of the appellant's character or record as "factor k" mitigation, the instruction did not inform the jury that they had the power to render a verdict of life solely on any such feelings of sympathy. Similarly, the jury was not provided any instruction that would have informed them that a mitigating factor need not be proven beyond a reasonable doubt. Appellant's requested instruction would have resolved both of these deficiencies. The trial court's refusal to give the instruction deprived appellant of his right to an individualized and reliable sentencing determination as provided by the Eighth Amendment. (AOB, 330-332; ARB 230-234.)

In addition to violating the Eighth Amendment, the trial court's refusal to give appellant's instruction on the scope and proof of mitigating evidence violated appellant's constitutional rights to due process and fundamentally fair trial by jury, present a defense, instructions which are not confusing or misleading, adequate instructions on the theory of the defense and a determination based on consideration of all relevant aspects of appellant's character and record under the Fifth, Sixth, and Fourteenth Amendments. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 316; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *Jackson v. Edwards* (2nd Cir. 2005) 404 F. 3d 612, 624; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438; *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304-305.)

XX

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS PROVIDED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO INSTRUCT THE JURY THAT A SINGLE MITIGATING FACTOR, INCLUDING ONE NOT LISTED BY THE COURT COULD SUPPORT A PENALTY LESS THAN DEATH

In his opening brief, appellant argued that the trial court violated his constitutional rights a reliable, fair and individualized penalty determination and to due process by refusing to provide appellant's special instruction on mitigating circumstances. This instruction would have informed the jury that a single mitigating circumstance, even one not listed by the court, may be sufficient to support a penalty less than death. The failure to give the requested instruction left the jury without the guidance necessary for it to make its penalty assessment, which denied appellant of his Eighth Amendment right under the United States Constitution to right to be free from arbitrary and capricious imposition of the death penalty as well as his right to heightened protections of due process that are required in the penalty phase of a capital case. (AOB 332-334.)

That the requested instruction was especially critical in this case is evidenced by the fact that the jury requested guidance from the court as to

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how to continue penalty deliberations in light of their deadlock and where the holdout juror's vote was allegedly "based on the children." (See XV CT 3881.)[31] Coupled with the constitutionally improper instruction the trial court provided the jury in response to that note (see Supplemental Arg. XXX, *infra*), the trial court's failure to give the requested instruction at issue prevented the jury from considering and giving full and proper effect to the mitigating evidence offered by appellant regarding his character as it related to family relationships.

In addition to the constitutional bases alleged in his opening brief, appellant now contends that the trial court's refusal to give appellant's requested instruction violated appellant's constitutional rights to due process and fundamentally fair trial by jury, present a defense, instructions which are not confusing or misleading, adequate instructions on the theory of the defense and a determination based on consideration of all relevant aspects of appellant's character and record under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 316; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *Jackson v. Edwards* (2nd Cir. 2005) 404 F. 3d 612, 624; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438; *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304-305.)

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[31] During the penalty deliberations the jury sent the following note to the court:

> "We have a split eleven to one + [sic] the holdout will not listen to any reason. Please let us know how to continue. The holdout is based on the children."

XXIII

THE TRIAL COURT IMPROPERLY READ AND CONSIDERED APPELLANT'S PROBATION REPORT PRIOR TO DENYING THE MOTION TO REDUCE THE SENTENCE

In his opening brief, appellant argued that the trial court improperly read and considered the probation report prior to denying appellant's automatic motion to reduce his sentence in violation of section 190.4, subdivision(e). The probation report contained prejudicial and extraneous information which had not been presented to the jury. The trial court violated its statutory charge under section 190.4, subdivision (e) when it relied on matters that the jury could only have considered improperly and which would not have otherwise been known to the court when it made its determination regarding appellant's modification motion. Appellant was entitled to a ruling untainted by this extraneous and damaging evidence. The trial court's improper consideration of the probation report violated appellant's right to have a reliable and individualized penalty determination under the Eighth and Fourteenth Amendments to the United States Constitution and art. I, section 17 to the California Constitution.

In addition to those constitutional bases, appellant now contends that court's failure to perform its statutory charge with respect to appellant's modification motion deprived appellant of his due process rights. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 5th & 14th Amends.) In addition, the court's consideration of and reliance on matters not presented at appellant's penalty trial, including hearsay evidence that appellant had no opportunity to rebut, violated due process, the confrontation clause and the Eighth Amendment. (*Gardner v. Florida* (1977) 430 U.S. 291, 336; U.S. Const., 5th, 6th, 8th and 14th Amends.)

XXV

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AS WELL AS FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND-DEGREE MALICE-MURDER UNDER 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; XV CT 3956-3957; 65 RT 7467-7469) or killed during the commission or attempted commission of robbery (CALJIC No. 8.21; XV CT 3959; 65 RT 7470), the jury found appellant guilty of murder in the first degree (XIV CT 3588; 69 RT 7640). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the indictment did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[32]

The amended information alleged that "on or about June 4, 1980, ANDRE ALEXANDER, in violation of PENAL CODE SECTION 187(A), a Felony, did willfully and unlawfully and with malice aforethought murder AGENT JULIE CROSS, a human being." (III CT 589.) Both the statutory reference ("Section 187(A) of the Penal Code") and the description of the

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[32] 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.

crime ("did willfully and unlawfully and with malice aforethought 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.[33]

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.)[34] "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

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[33] The information also alleged three special circumstances – murder of a federal law enforcement officer, murder in the commission or attempted commission of a robbery, and prior murder. (II CT 590.) 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).

[34] 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."

felonies. . . ." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[35]

Because the indictment 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

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[35] In 1991, 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, kidnapping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

defined by section 187, so that an accusation in the language of that statute 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.[36] 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*,

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[36] 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.

170 Cal. 104, that an accusatory pleading charging a defendant with murder 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. (*People v. Dillon*, *supra*, 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 indictment 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].)[37]

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 Penal Code sections 187 and 189 (*id.* at pp. 185-186,

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[37] 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.)

fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a 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.])[38]

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 indictment. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

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[38] 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.]"

Permitting the jury to convict appellant of an uncharged crime 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 indictment. (U.S. Const., 6th and 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 and 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.

XXVI

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 XXV, *supra* , the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; XV CT 3956-3957; 65 RT 7467-7469) and on first degree felony-murder predicated on robbery/attempted robbery (CALJIC No. 8.21; XV CT 3959; 65 RT 7470). 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 and 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 *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.)[39]

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 same" (original emphasis). Similarly, this Court has declared that "the

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[39] "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.)

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).[40]

"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. 81, at p. 250, *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

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[40] In *People v. Seel* (2004) 34 Cal.4th 535, 549, this Court relied upon *Apprendi v. New Jersey* (2000) 530 U.S. 466, 496, in acknowledging that the "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'"

> 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.);[41] 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

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[41] "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.)

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 listed in Penal Code section 189 and the specific intent to commit that felony; malice-murder does not. (§§ 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*, *supra*,447 U.S. at p. 38). 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.)[42]

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[42] 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

(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

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[42] (...continued)
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; citations and internal quotation marks omitted.)

that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice 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.)

XXVII
THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to CALJIC No. 8.85, 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 (XV CT 3892-3893; 74 RT 8296-8299) and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (XV CT 3902-3903; 74 RT 8306-8309). These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional.

Appellant has argued that the application of section 190.3, subdivision (a), which directs the jury to consider in aggravation the "circumstances of the crime," resulted in arbitrary and capricious imposition of the death penalty on him. (AOB, Arg. XXIV, § B.) Appellant has also argued that the failure to instruct on the requirement of jury unanimity with regard to aggravating factors and that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable and evenhanded administration of the death penalty. (AOB, Arg. XXIV, §§ E, G.) The introduction of evidence of unadjudicated acts under section 190.3, subdivision (b), however, similarly violated appellant's federal constitutional rights to due process, equal protection, and a reliable penalty determination. The failure to delete inapplicable sentencing factors likewise violated appellant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and the restrictive adjectives used in the list of

potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Moreover, 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. Finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, the death judgment must be reversed.

A. The Instruction on Penal Code Section 190.3, Subdivision (b) and Application of That Sentencing Factor Violated Appellant's Constitutional Rights to Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination

1. Introduction

At the penalty phase of appellant's trial, the prosecution introduced in aggravation evidence of six incidents of prior criminality under factor (b) of section 190.3: interference with police officers (Griffith Park incident) in 1977; resisting arrest/assault of a police officer (traffic stop incident) in 1970; residential burglary/robbery (Dorothy Tyre incident) in 1972; assault with a firearm (James Williams shooting incident) in 1984; triple homicide (prior murder incident) in 1978 and battery of peace officer (jail incident) in 1988. (See XV CT 3897.) Two of the alleged instances of criminal activity, the 1977 "Griffith Park incident" and the 1988 "jail incident," were unadjudicated acts.

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed.

(XV CT 3902-3903; 74 RT 8306-8309.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that appellant did in fact commit the criminal acts alleged. (XV CT 3897; 74 RT 8301-8302.) Although the jurors were told that all 12 must agree on the penalty determination (XV CT 3903; 74 RT 8309), they were not told that during the weighing process, before they could rely on the alleged criminal activity as an aggravating factor, they had to unanimously agree that, in fact, appellant committed those crimes. (XV CT 3897; 74 RT 8302.) On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> "It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation."

(*Ibid.*) The sentencing instructions at issue contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide (if any), and the special circumstance allegation. (XV CT 3963, 3909; 65 RT 7472; 70 RT 7744.) Accordingly, the aspect of section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously, violates both the Sixth Amendment right to a fair jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. The Use of Unadjudicated Criminal Activity as Aggravation Renders Appellant's Death Sentence Unconstitutional

The instruction on factor (b) aggravation was upheld against an Eighth Amendment vagueness challenge in *Tuilaepa v. California* (1994) 512 U.S. 967, 977. However, because the jury was permitted to consider

unreliable evidence of alleged unadjudicated criminal conduct by appellant, the instruction as well as evidence of such acts violated the Eighth Amendment.

Admitting evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fifth and Fourteenth Amendments, trial by an impartial jury under the Sixth Amendment, and a reliable determination of penalty under the Eighth Amendment. (*State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 7 and 15.)

3. The Failure to Require a Unanimous Jury Finding on the Alleged Acts of Criminal Activity Denied Appellant's Sixth Amendment Right to a Jury Trial and Requires Reversal of His Death Sentence

The failure of the instructions pursuant to Penal Code section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant

committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[43]

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[43] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the state seeks to impose a death (continued...)

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to this date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Hines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent, supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona, supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s]"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section

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[43] (...continued)
sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged act of violence, there is no need to reach this question here.

violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to tell if all 12 jurors would have agreed that appellant committed the contested alleged prior criminal acts. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question].)[44]

4. Absent a Requirement of Jury Unanimity on the Alleged Acts of Violence, the Instructions on Penal Code Section 190.3, Subdivision (b) Allowed Jurors to Impose the Death Penalty on Appellant Based on Unreliable Factual Findings That Were Never Deliberated, Debated, or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at

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[44] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California*, *supra*, 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (§ 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (XV CT 3897; 74 RT 8302)

Thus, as noted above, members of the jury may individually rely on this – and any other – aggravating factor each of the jurors deems proper as long as the jurors all agree on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364. a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a

conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas).)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves"].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the

California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have neither debated, deliberated nor even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

B. The Failure to Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case.[45] However, the trial court did not delete those

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[45] Those inapplicable factors included: factor (d) ("Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"); factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"); factor (f) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a morale [*sic*] justification or extenuation for his conduct"); factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"); factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of

(continued...)

inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth, and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand, and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for "only" two or three factors, whereas there was

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[45] (...continued)
law was impaired as a result of mental disease or defect of the effects of intoxication"); and factor (j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"). (See XV CT 3892-3893.)

either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of Appellant's death judgment is required.

C. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); XV CT 3892), and "substantial" (see factor (g); XV CT 3893), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

D. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury 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* (1994) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (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." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170(c).) Under the Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written

findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[46] California's failure to require such findings renders its death penalty procedures unconstitutional.

E. Even If the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants like Appellant Violates Equal Protection

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-

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[46] See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Crim. Law art 27 § 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).

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.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights ... It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) ...." (*Commonwealth v. O'Neal* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 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.

In AOB, Argument XXIV, section F, appellant explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment as well as a reliable determination of penalty under the Eighth Amendment. He reasserts that argument here with regard to the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on violent criminal acts under section 190.3, subdivision (b), and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in his Argument XXIV, and this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

F. Conclusion

For all the reasons set forth above, appellant's death sentence must be reversed.

XXVIII

THE JUDGMENT AND SENTENCE MUST BE REVERSED AND THE CASE DISMISSED BECAUSE THE PROSECUTION IMPERMISSIBLY INTERCEPTED CONFIDENTIAL PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS RELATING TO DEFENSE TRIAL STRATEGY

A. Factual Introduction

Prior to trial, the prosecution obtained an order authorizing the interception of wire communications between appellant and certain members of his family. (See XIV CT 3738; 3793.) However, after jury selection had begun, but before the presentation of guilt phase evidence, the prosecution intercepted and recorded phone communications to which defense investigator Don Ingwerson was a party. One of the intercepted calls was a conversation between appellant and Ingwerson. Although appellant's mother was a third party to that conversation, the discussion constituted defense trial strategy and was thus within the attorney-client privilege. In particular, appellant and Ingwerson discussed the identification, location and importance of potential defense witnesses as well as trial counsel's strategic decisions concerning information sought from witnesses and numerous statements made in confidence by appellant. (XIV CT 3741-3770.)

After defense counsel learned that communications between Ingwerson and appellant and his family had been intercepted, appellant filed a motion to dismiss the information due to prosecution interference with appellant's constitutional right to counsel as well as his attorney-client

privilege. (XIV CT 3731-3783.)[47] Following an evidentiary hearing on the circumstances of the interception of communications that appellant and his family had with investigator Ingwerson (78 RT 8456-8531), the trial court determined that the presence of appellant's mother during a conversation between appellant and Ingwerson was to further the interest of appellant.[48] As such, the court correctly held that there was no waiver of the attorney-client privilege because a third party had been present during the call. (78 RT 8513). The trial court also properly found that appellant had made a prima facie case for prejudice because confidential communications were conveyed to the prosecution as a result of the impermissible intrusion. (78 RT 8514.) The trial court's ruling denying the motion based on the fact that appellant had not suffered actual prejudice from the interception of that conversation, however, was erroneous. (78 RT 8527-8531.)

As appellant will demonstrate, the prosecution's interception of privileged and confidential information relating to defense strategy from appellant's phone conversation violated appellant's federal and state constitutional right to counsel (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., Art. I, §§ 1, 7, 15) as well as his attorney-client privilege. (*Morrow v. Superior Court* (1995) 30 Cal.App.4th 1252, 1259.) Because appellant's

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[47] The prosecution filed an opposition to appellant's motion (XIV CT 3802-3810) and appellant filed a reply to the opposition (XIV CT 3819-3823).

[48] In his motion to dismiss appellant argued that the prosecution impermissibly interfered with his right to counsel by the interception of three phone conversations to which Ingwerson was a party. Two of the conversations were between Ingwerson and appellant's mother and concerned defense strategy (78 RT 8472-8473); the third is the conversation between appellant and Ingwerson which is discussed here.

absolute and fundamental right to counsel was violated, which necessarily affected his right to due process and a fair adversary proceeding, prejudice is presumed and reversal of the conviction and sentence is required. (*Shillinger v. Haworth* (10th Cir. 1996) 70 F.3d 1132, 1142; *United States v. Levy* (3rd Cir. 1978) 577 F.2d 200, 210; *Caldwell v. United States* (D.C. Cir 1953) 205 F. 2d 879, 881; *Coplon v. United States* (D.C. Cir.1951) 191 F.2d 749, 759-760; *United States v. Peters* (D.C. Fla. 1979) 468 F.Supp. 364, 367-368; *United States v. Orman* (D.C. Colo. 1976) 417 F.Supp. 1126, 1136; see *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 757.[49]) Moreover, dismissal of the case is required because there is no way to isolate the prejudice resulting from the interception of the confidential attorney-client information between the proceedings below and a subsequent retrial. (*United States v. Levy*, *supra*, 577 F.2d at p. 210; *United States v. Orman*, *supra*, 417 F.Supp. at p. 1137; see *People v. Zapien* (1993) 4 Cal.4th 929, 1015 (dis. opn of Kennard, J.) [unlawful access to attorney-client privileged information results in a structural defect justifying dismissal of charges].)

In addition to violating appellant's right to counsel, the improper interception violated his rights to due process, a fundamentally fair trial, privacy, and against self-incrimination (U.S. Const., 5th and 14th Amends.; Cal. Const., Art. I, §§ 1, 7, 15) as well as his rights to reliable determinations of guilt, death-eligibility and penalty (U.S. Const., 8th Amend.). (See *Shillinger v. Haworth*, *supra*, 70 F.3d at pp. 1141-1142; *Coplon v. United States*, *supra*, 191 F.2d at p. 757; *Morrow v. Superior*

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[49] Although *Barber v. Municipal Court*, *supra*, was decided on state constitutional grounds, it is nonetheless instructive.

Court, supra, 30 Cal.App.4th at p. 1259; *Beck v. Alabama, supra,* 447 U.S. at p. 638; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

Even assuming, arguendo, that prejudice is not presumed, the prosecution still did not meet its burden that appellant was not prejudiced by the improper interception of confidential attorney-client privileged information which was in violation of his right to counsel. (*Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1258; compare, *United States v. Danielson* (9th Cir. 2003) 325 F.3d 1054.) For this reason, reversal of the judgment and sentence is still required as well as dismissal of the case.

B. The Confidential and Privileged Character of the Communications Between Appellant and Defense Investigator Ingwerson Was Not Waived Because Appellant's Mother Was Present

Under Evidence Code section 917, a communication is presumed to be confidential whenever a claim of attorney-client privilege regarding such communication is made.[50] The opponent of the claim bears the burden of proof to establish that the communication was not confidential. (*Rockwell International Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255, 1261.) The presence of a third party does not destroy the confidentiality of a communication between an attorney and his/her client if such party is present to further the interest of the client or when reasonably necessary to accomplish the purpose of the consultation. (*Insurance Company of North*

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[50] Evidence Code section 917 provides in relevant part that,

"(a) Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence over the course of the lawyer-client . . . relationship, the communication IS presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

America v. Superior Court (1980) 108 Cal.App.3d 758, 771.) Waiver has been found, however, in instances where an "unnecessary" third person, such as a stranger, or someone whose interests are adverse to the client, is involved in attorney-client communications. (*Id.*, at pp. 765-766.) Where, as here, a parent's presence during attorney-client communications is necessary to further the interest of the client and/or to legitimately be kept informed of the progress of the case, there is no waiver of the privilege. (*Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588; *United States v. Bigos* (1st Cir. 1972) 459 F.2d 639, 643.)

The presence of appellant's mother, Emma Alexander, during the phone conversation between appellant and defense investigator Ingwerson did not defeat the confidential and privileged character of the communication. The record shows that Mrs. Alexander's presence and participation in the phone conversation was not only to facilitate the call between appellant and Ingwerson, but also to assist with locating identified witnesses who would potentially be beneficial to appellant's case. (78 RT 8464, 8466, 8475-8476.) Moreover, it was apparent that her presence was to be informed of the progress of the case.

C. Interception of Confidential Information Regarding Defense Trial Strategy Violated Appellant's Fundamental Constitutional Right to Counsel and His Attorney Client Privilege

The right to assistance of counsel is guaranteed to a defendant in a criminal case by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (*Shillinger v. Haworth*, *supra*, 70 F.3d at pp. 1141-1142; *Coplon v. United States*, *supra*, 191 F.2d at p. 757). This right is also guaranteed by Article I, sections 1, 7, 15 of the California Constitution. (*Barber v. Municipal Court*, *supra*, 24 Cal.3d at p.750; *Morrow v. Superior*

Court, *supra*, 30 Cal.App.4th at p.1259.)

"It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." (*United States v. Coplon*, *supra*, 191 F.2d at p. 757; see *Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1010 [federal and state constitutional rights to assistance of counsel include the right "to confer with counsel in absolute privacy"].) "Free two-way communication between client and attorney is essential if the professional assistance guaranteed by sixth amendment is to be meaningful." (*United States v. Levy*, *supra*, 577 F.2d at p. 209.) If a defendant knows that damaging information could be readily obtained from counsel following disclosure, then the defendant would be reluctant to confide in his lawyer, thus making it difficult to obtain fully informed legal advice. (*Fisher v. United States* (1976) 425 U.S. 391, 403.) Moreover, an attorney cannot make a complete investigation of the facts and the law unless he/she has the full confidence of his client. (*United States v. Orman*, *supra*, 417 F.Supp. at p. 1136, citing *State v. Cory* (1963) 62 Wash.3d 371, 373-375.) Therefore, "if an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney." (*Barber v. Municipal Court*, *supra*, 24 Cal.3d at p. 751.) The right of an accused to private consultations with his/her attorney applies both before and during trial. (*Coplon v. United States*, *supra*, 191 F.2d at p. 758.)

Proper functioning of the adversary system requires that any advice received as the result of a defendant's disclosure be insulated from government enforcement agencies responsible for investigating and prosecuting the case. (*United States v. Levy*, *supra*, 577 F.2d at p. 209.) Just as the prosecution is not entitled to hear the conversations between an

accused and his/her attorney, the accused has a right to converse by phone without being monitored by the prosecution through a secret mechanical device. The impermissible interception of private phone conversations between a defendant and his/her counsel constitutes a deprivation of the right to counsel, as well as the concommitant right to a fair adversarial trial as provided by the Fifth, Sixth and Fourteenth Amendments. (*Shillinger v. Haworth*, *supra*, 70 F.3d at p.1142; *Caldwell v. United States*, *supra*, 205 F.2d at p. 881; *Coplon v. United States*, *supra*, 191 F.2d at p. 759;.)

In *Caldwell v. United States*, *supra*, 205 F.2d at p. 882, the Court of Appeals held that the right to counsel is violated even if the intrusion into attorney-client communications was intended to detect future crimes rather than defense strategy. There, an informant was solicited to negotiate the theft of certain files, including the entire case file from the United States Attorney's office. In order to obtain a conviction of the people involved in the conspiracy to steal the files, the informant in his dual capacity as defense assistant/government informant gained access to the planning of the defense. Although the Court of Appeals did not question the prosecution's duty to investigate and prosecute individuals for the theft of case files, it reversed the defendant's conviction without requiring actual prejudice. In so doing, it determined that "high motives and zeal for the law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of a crime and his counsel." (*Caldwell v. United States*, *supra*, 205 F.2d at p. 357.)

The record in this case shows that the interception of appellant's privileged January 9, 1996, phone conversation with defense investigator Ingwerson and the consequential disclosure of the defense strategy contained therein to government agents responsible for investigating the

case deprived appellant of his right to privileged communication with his attorney as well as his constitutional right to counsel. Here, both Los Angeles County District Attorney investigator Gene Salvino and Los Angeles Police Detective Buck Henry gained access to confidential privileged defense trial strategy information. Henry was the lead investigator on the case and key member of the prosecution team.

At the time of the phone conversation between Ingwerson and appellant, Henry was well aware that Ingwerson was the defense investigator. In spite of this fact, as well as his apparent concerns about the propriety of monitoring the conversation, Henry ordered it recorded. (78 RT 8479, 8490-8491.)[51] The record shows that District Attorney investigator Salvino, the official monitor of the call, listened to the entire January 9th conversation between Ingwerson and appellant and/or the tape recording of it. (78 RT 8490, 8522-8523.) Even though Henry did not monitor the entire conversation between Ingwerson and appellant, he

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[51] The genuineness of Henry's assertion that he believed appellant's attorney-client privilege was waived because of the presence of appellant's mother during the conversation is called into question by Henry's actions and inquiries with regard to the propriety of monitoring, recording it and ultimately reading the monitor log and/or listening to the tape recording. Not only did Henry seek advice on the issue from prosecutors during the conversation, but he also sought advice after the conversation had been recorded. More important, however, is the fact that Henry was apparently not satisfied with advice he had received from prosecutors working on the case that a waiver had in fact occurred. Henry's dissatisfaction that the monitoring/recording of the conversation was appropriate was evidenced by his subsequent request made after the recording for advice from the Superior Court judge who had authorized the wiretap. This judge confirmed Henry's "suspicion" that any conversation between appellant and his defense investigator or counsel, and especially one involving trial strategy, was attorney-client privileged. (See 78 RT 8490-8493.)

admitted to listening to portions of it as it transpired. Moreover, he admitted that while he was listening to the conversation he was aware it concerned defense strategy. (78 RT 8482, 8490-8491, 8515.) Although Henry could not recall whether he later listened to the recording of the conversation (78 RT 8482-8483), he was certain he had read the monitor log prepared by Salvino which summarized the whole conversation (78 RT 8483, 8516). Henry reviewed the monitor log of the conversation sometime before January 18, 1996, but after it had been confirmed by the Superior Court judge who had authorized the wiretap that conversations between appellant and Ingwerson were attorney-client privileged. (See 78 RT 8483, 8492-8493, 8523.) The monitor log of the conversation contained the same substantive confidential privileged information as the tape recording. (People's Exhibit 1 [for the opposition to appellant's motion to dismiss]; XIV CT 3741-3771.)

Based on these facts, it cannot be said that confidential attorney-client privileged information had not been disclosed to the prosecution. "When, as here, the prosecution has unlawfully gained access to confidential defense strategy materials, the prosecution has thereby unreasonably interfered with the defendant's right to assistance of counsel." (*People v. Zapien*, *supra*, 4 Cal.4th at p.1012 (dis. opn., Kennard, J.); accord, *Shillinger v. Haworth*, *supra*, 70 F.3d at p. 1142; *United States v. Levy*, *supra*, 577 F.2d at p. 209; *United States v. Peters*, *supra*, 468 F.Supp. at p. 366.)

D. Interception of Confidential Attorney-client Privileged Information in Violation of the Sixth Amendment Right to Counsel Is per Se Prejudicial and Requires Dismissal of the Charges

Because the right to counsel is the "very premise" of the adversary

system of criminal justice, whenever this right is violated, "a serious risk of injustice infects the trial itself." (*United States v. Cronic* (1984) 466 U.S. 648, 656, quoting *Cuyler v. Sullivan* (1980) 446 U.S. 335, 343.) The United States Supreme Court has long recognized that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of the prejudice arising from its denial." (*Glasser v. United States* (1942) 315 U.S. 60, 76.) Accordingly, a denial of that right has been held to invalidate the trial at which the deprivation occurred, thus requiring the setting aside of a guilty verdict regardless of whether prejudice from the denial has been shown. (*Ibid.*)

When, as here, the prosecution has become "privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed. . . . [and] no other standard can adequately deter this sort of misconduct." (*Shillinger v. Haworth*, *supra*, 70 F. 3d at p. 1142; accord, *United States v. Levy*, *supra*, 577 F. 2d at p. 209; *Coplon v. United States*, *supra*, 191 F.2d at p. 759; see *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1261; see also *Barber v. Municipal Court*, *supra*, 24 Cal.3d at pp. 756-758.)

In *Coplon v. United States*, *supra*, 191 F.2d 749, a case similar to the case at hand, federal agents intercepted the defendant's telephone conversations with her attorney through wiretapping conducted both before and during trial. The trial court denied a motion for new trial on the ground the defendant had not shown the agents procured evidence by this means which was used to obtain her conviction. The Court of Appeals held, however, there was presumed prejudice from the intrusion on the

defendant's right to counsel which required a reversal. In so doing, the District Court stated that the Fifth and Sixth Amendments "unqualifiedly guard the right to assistance of counsel, without making the vindication of the right depend upon whether its denial resulted in demonstrable prejudice." (*Id.*, at p. 759.)

Where, as here, actual disclosure of defense strategy has occurred and prejudice is thus presumed, the only appropriate remedy is dismissal of the charges. This is because there is no way to isolate the prejudice that resulted from the unconstitutional violation of appellant's right to counsel. Confidential privileged information gained by the government which was of assistance to preparation of its case below would be just as available in a retrial. Moreover, "if investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of [appellant], is that they will have to try the case twice, it can hardly be supposed they will be serioiusly deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of [appellant's] trial strategy." (*United States v. Orman*, *supra*, 417 F.Supp. 1126, 1137; accord, *United States v. Levy*, *supra*, 577 F.2d at p. 210.)

As Justice Kennard has recognized, "[w]hen the prosecution unlawfully gains access to defense trial strategy, that violation of the defendant's rights is not curable by an exclusionary remedy, because the harm of the violation is not that it produced evidence that was unlawfully obtained, and there is nothing to exclude. Nor is it susceptible to a harmless error analysis, because the constitutional violation did not occur 'during the presentation of the case to the jury' and therefore may not be 'quantatively assessed in the context of other evidence presented in order to determine

whether its admission was harmless beyond a reasonable doubt.' . . . In other words, such a violation of the attorney-client privilege and the Sixth Amendment right to counsel is more akin to a 'structural defect' than to a 'trial error' . . . ." (*People v. Zapien, supra,* 4 Cal. 4th at p. 1015 (dis. opn., Kennard, J.), quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308.)

Even when confidential privileged information is not passed from the person(s) who obtained it to the attorneys prosecuting the case, the only effective remedy is dismissal of the underlying charges. (*United States v. Orman, supra,* 417 F. Supp. at p. 1136; see also *Barber v. Municipal Court, supra,* 24 Cal.3d at pp. 756-759.[52]) As the Court of Appeals in *Orman* stated, "there need not be disclosure to the prosecution to taint the proceedings." This is because there are subtle ways in which the information can be useful to the govenment's investigation and presentation of their case, or be otherwise harmful to the defense. (*United States v. Levy, supra,* 577 F.2d at p. 208.) In addition, there are practical problems with showing actual prejudice when the prosecution has invaded the defense camp and gained access to attorney-client privileged trial strategy information. (*United States v. Danielson, supra,* 325 F.3d at p. 1070.) As has been recognized by Justice Kennard,

> "'It would be virtually impossible for an appellant or court to sort out how any particular piece of information in the possession of the prosecution was consciously or unconsciously factored into each of those [prosecutorial]

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[52] In *Barber v. Municipal Court, supra,* 24 Cal. 3d at pp. 757-759, the exclusionary rule was found to be inadequate because the government intrusion prevented defense counsel from adequately preparing for trial, enforcement would involve difficult problems of proof, and exclusion would provide no incentive for government agents to refrain from impermissible violations of the right to counsel.

> decisions. *Mere possession by the prosecution of otherwise confidential knowledge of the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is "inherently detrimental, . . . unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice."'"*

(*People v. Zapien*, *supra*, 4 Cal.4th at p.1013 (dis. opn., Kennard, J.), quoting *Briggs v. Goodwin* (D.C. Cir. 1983) 698 F.2d 486, 494-495, emphasis added.)

Where, as here, a government agent responsible for investigating and/or prosecuting the case is in possession private attorney-client communications, disclosure of information is in fact within the public domain. As noted above, even if the information is not actually transmitted to attorneys prosecuting the case, the interference to the defendant's right to counsel is presumptively prejudicial. This is because the agent is in a position to formulate in advance answers to anticipated questions or shade his/her testimony to meet expected defenses. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 566 (dis. opn., Marshall, J.); accord, *United States v. Orman*, *supra*, 417 F.Supp. 1126, 1136.) Advance knowledge of defense strategy and/or witnesses the defense potentially may call provides those charged with investigating the case with an unfair advantage they would not otherwise have. Moreover, possession of defense strategy information by the government renders any effort to cure the violation ineffective. Thus, even if new investigators or case agents were to be substituted in, speculation as to the effects of the former case agents' discussion with key government witnesses is inevitable. (*United States v. Levy*, *supra*, 577 F.2d 200, 210.)

E. Even If the Impermissible Interception of Attorney-Client Privileged Defense Strategy Information Is Not Per Se Prejudicial, the Prosecution Did Not Meet its Burden of Proof

The impermissible interception of confidential attorney-client information in this case was per se prejudicial and dismissal of the charges below was justified. Even if the interference with appellant's constitutional right to counsel and due process of law is not per se prejudicial, the prosecution did not meet its heavy burden of showing that appellant was not prejudiced by the government intrusion in his relationship with counsel. (See *People v. Zapien, supra*, 4 Cal.4th at p. 967; *United States v. Danielson, supra,* 325 F.3d at p.1072; *United States v. Mastroianni* (1st Cir. 1984) 749 F.2d 900.)

Government intrusion into the defense camp prejudices the defendant when: (1) evidence gained through the intrusion is used against the defendant at trial; (2) the prosecution is able to use confidential information pertaining to defense plans and strategy, (3) the defendant's confidence in his attorney is adversely affected, or (4) the prosecution otherwise gains an unfair advantage at trial. (*United States v. Irwin* (9th Cir. 1980) 612 F.2d 1182, 1187.) Moreover, "mere assertion by the government of the integrity and good faith of the prosecuting authorities is not enough." (*United States v. Danielson, supra*, 325 F.3d at p. 1072, citing *Kastigar v. United States* (1972) 406 U.S. 441, 460.) Absent a showing by the prosecution that all of the evidence it used as well as all of its trial strategy were derived from independent sources, the defendant was prejudiced. (*Id.*)

Following the breach of appellant's confidential communications with defense investigator Ingwerson during jury selection, appellant's

ability to assist in his own defense was significantly impaired. As this Court has recognized, such intrusions are inherently prejudicial because they have a "chilling effect on full and free disclosure by a client." (*Barber v. Municipal Court*, *supra*, 24 Cal.3d at p. 753.) Once appellant was "[a]ware of the possibility" of such intrusions, he was "constrained in discussing his case freely with his attorney." (*Ibid.*) The effect of the breach on appellant's subsequent communications with his attorney was prejudicial.

Appellant was further prejudiced by the prosecution's probable use of the privileged defense strategy information revealed during appellant's conversation with Ingwerson. Even though the prosecution averred that neither the attorneys nor the law clerks assigned to this case read the transcript of the intercepted phone call at issue (XV CT 4010-4013), the record shows that at least two members of the prosecution team were privy to that which was discussed during the conversation. As set forth above, District Attorney investigator Gene Salvino listened to the conversation as it occurred; later, he listened to the tape recording of the conversation to complete the relevant monitoring log. Moreover, lead investigator Detective Henry listened to portions of the conversation as it transpired and may have later listened to the tape recording that was made. Henry also read the monitor log(s) pertaining to the conversation, which summarized the substance of what was said. (See Sec. B, *supra*.) Although there was a stipulation that Deputy District Attorney Peterson did not read the monitor log of the conversation (78 RT 8525), no such stipulation was entered as to lead prosecutor Kuriyama. There was no evidence presented as to where the tape recording of the conversation or the monitoring log regarding it were maintained prior to or during the trial.

Even assuming, arguendo, that none of the attorneys and law clerks prosecuting the case learned of the contents of the privileged conversation, it cannot be disputed that Detective Henry and District Attorney investigator Salvino did learn of the contents. The record is not clear as to the full extent of Salvino's role in this case. The record shows, however, that Henry was the lead investigator as well as a significant member of the prosecution team. (See *Danielson v. United States*, *supra*, 325 F.3d at pp.1068-1069 [inherent unfairness of police investigator gaining access to defense strategy even where prosecutor never has direct access].) Henry was also a key prosecution witness at trial and, and as such, his advance knowledge of defense strategy was highly prejudicial. Consciously or not, Henry may have "formulate[d] in advance answers to anticipated questions or "shade[d] [his] testimony to meet expected defenses." (*Barber v. Municipal Court*, *supra*, 24 Cal.3d at p. 757, quoting *Weatherford v. Bursey*, *supra*, 429 U.S. at p. 564 (dis. opn. of Marshall, J.).) Moreover, as lead investigator he undoubtedly had significant contact with witnesses and was influential in steering the course of the investigation to support the prosecution case.

To the extent that the prosecutor attempted to elicit testimony from Henry that he did not "use" any of the information gathered from the privileged phone conversation between appellant and Ingwerson, this attempt failed. (78 RT 8518.) Not only was Henry's answer non-responsive, but it did not prove by a preponderance of evidence that the prosecution trial strategy derived from a source independent from the confidential conversation. Accordingly, there is no weight to any assertion that he did not profit from or exploit the confidential attorney-client information contained in People's Exhibit A.

In this case, the trial court correctly determined that the prosecution intercerpted privileged defense strategy information, thus placing the burden on the prosecution to prove by the preponderance of evidence that appellant was not prejudiced by the intrusion. Contrary to the court's finding, however, review of the record establishes that the prosecution did not show that it did not use the privileged evidence and that all of the evidence it used or that its trial strategy were derived from legitimate independent sources.

F. Conclusion

The prosecution's unlawful interception of attorney-client privileged defense strategy information violated appellant's state and federal constitutional right to counsel as well as his rights to due process of law and a fair trial. The violation of these rights was per se prejudicial, which warrants reversal of the judgment and conviction as well as dismissal of the charges. To the extent that prejudice from the violation of appellant's rights is not presumed, appellant was substantially prejudiced and the prosecution did not meet its burden to show otherwise. For this reason reversal of the judgment and conviction as well as dismissal of the case is still mandated.

XXIX

THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY IMPERMISSIBLY INTRUDING INTO THE JURY'S DELIBERATIVE PROCESS AND BY COERCING THE GUILT VERDICT

A. Introduction

During the guilt deliberations, the foreperson solicited help from the trial court to resolve a "problem" involving a single juror who, apparently unlike the rest of the jurors, was unable to convict. In a private inquiry of the foreperson, held in the presence of defense counsel and the prosecution, the court elicited information concerning the content of deliberations, including the mental processes of the minority juror. In response to the mental process information it received, the court gave the jury certain supplemental instructions. The inquiry conducted by the court and these instructions impermissibly intruded in the jury's deliberative process. In addition, the supplemental instructions, combined with the manner in which they were delivered, amounted to a defacto *Allen* charge[53] which coerced the jury to reach an unanimous guilt verdict.

As appellant will show, the court's intrusion into the secrecy of the jury deliberations, as well as its coercive actions and supplemental instructions in response to the foreperson's report, violated appellant's state and federal constitutional rights to jury trial, due process, a fair adversary proceeding, an individual determination of each juror, and reliable determinations of guilt, death-eligibility and penalty. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16.) The court's inquiry and supplemental instructions also violated appellant's state

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[53] *Allen v. United States* (1896) 164 U.S. 492

constitutional right to a unanimous verdict, including the right to an independent and impartial decision of each juror. (Cal. Const., art. I, § 16.) Because the court's inquiry and instructions deprived appellant of his state-created liberty interest, appellant's due process rights under the Fifth and Fourteenth Amendments were similarly violated. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346.)

B. Factual Background

On the second day of deliberations, the jury requested the read back of testimony of key prosecution witnesses Jessica Brock ("Jessica") and Lloyd Bulman ("Bulman"). (XIV CT 3854.)[54] Following an inquiry by the court, the jury clarified that they had wanted testimony by Jessica concerning the night she said appellant had gone over to her house, and testimony by Bulman regarding identification he had made of appellant from photographs (People's Exhibits 19 and 20) or from the composite drawings. The court reporter read back Jessica's testimony in its entirety. The court reporter read back limited portions of Bulman's testimony relating only to whether he had specifically identified appellant from People's Exhibits 19 and 20 and/or from the composite drawings. (See 66 RT 7524, 7536-7539, 7544; 67 RT 7552.)

The following day, after conclusion of the read back of Jessica's testimony, the court apprised counsel of a second note which had been submitted by the foreperson, Juror No. 106. Juror No. 106 had written the note at home the night before, and had given it to the bailiff in the morning when he arrived at court for the scheduled read back. (67 RT 7553, 7558.)

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[54] The first note from the jury stated: "(1) The transcript of Jessica Brock in court. (2) Bulman transcript." (XIV CT 3854.)

The note as submitted stated:

> "Your honor:
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> As a first time juror, I find myself foreman of a jury on a major crime case & in need of your help on a jury room problem. We have one juror that will not listen to reason regarding circumstantial evidence & has stated from the start of deliberations that since we have no ID of the killer & their [sic] is no proof the glasses are defendants [sic], he is not guilty. I feel very strong about our obligation & responsibility, but feel our efforts are in vain. The other eleven jurors are willing to openly discuss the case & try to reach a unanimous decision. How can we convince the juror that this case depends on circumstantial evidence. I will formally poll the jury this morning & am prepared to stay with it as long as the discussions are productive."

(XIV CT 3582.)

Based on the note, the prosecutor moved to excuse the minority juror on the grounds he/she was refusing to deliberate. Defense counsel objected to any removal of the juror. Defense counsel stated that a reasonable interpretation of the note was that the juror did not believe appellant was guilty because the prosecution had not met their burden of proof and that the note indicated the juror was deliberating. Defense counsel suggested that the court voir dire all jurors individually, repeat instructions on circumstantial evidence and deliberations, and ask the jury if they were able to continue deliberations. (67 RT 7553-7555.) Rather than acting on the suggestions by counsel, the trial court elected to question the foreperson about the jury's deliberations. The court noted that defense counsel had made a good point that there was no misconduct by the minority juror and that the juror likely had a different view on the sufficiency of the evidence. (67 RT 7556.)

During the private conference with the court and counsel, the

foreperson revealed that he had taken it upon himself to advise the court of the "situation" that arose on the first day of deliberations and continued through the read back of requested testimony. Although the foreperson described the minority juror's attitude as "uncooperative," he clarified that the juror's disagreement with the others had to do with the circumstantial evidence and the fact that there was no positive identification. The foreperson reported that the there appeared to be no inability to understand the court's instructions by the minority juror. According to the foreperson, the juror was "hung up" on the lack of a positive identification and whether Jessica's earlier or later testimony was correct. (67 RT 7559-7563.) When pressed by the court for any statement made by the minority juror which demonstrated that he could not convict because there was no positive identification, the foreperson reported the juror had said, "If we could positively identify him, I would fry his ass like the rest of you." (67 RT 7563-7564.) Although it appeared that the minority juror had made up his mind after listening to the testimony on read back, the foreperson stated that this was not the case at the outset of deliberations. The foreperson also reported that the juror contributed to the jury's discussions during deliberations. (67 RT 7565-7569.)

Even with the additional information, the prosecutor urged the court to excuse the minority juror because he/she was not following the court's instructions. The prosecutor also requested an instruction that an eyewitness identification is not required to convict. (67 RT 7571, 7573.) Defense counsel stated that the record demonstrated the juror was not refusing to deliberate. Counsel also pointed out that the foreperson's note showed that a juror could reasonably conclude that the lack of positive identification, combined with the nature of the other circumstantial

evidence, did not constitute proof of guilt beyond a reasonable doubt. Defense counsel suggested that the court re-read instructions on circumstantial evidence and deliberating; he also objected to any instruction being given that an eyewitness identification is not required for a conviction. (67 RT 7572-7573.)

The trial court correctly determined that there was no demonstrable reality that the minority juror was not deliberating, and that excusing him/her was not warranted. (67 RT 7575.) Observing that the jury was apparently eleven to one for guilt, however, the court articulated its concern not to do anything which would be interpreted as an order or coercion to resolve the case. The court also agreed with defense counsel that information it had received on the minority juror was "ambiguous." The court noted that the disagreement between the jurors could be over "what quantum of evidence in this particular case rises to the level of proof beyond a reasonable doubt" or whether there was a misunderstanding by the minority juror that direct evidence of identification is necessary to convict. (67 RT 7574-7576, 7580.)

In an apparent attempt to resolve the "situation" that had arisen in deliberations, the trial court indicated it would re-read instructions on circumstantial evidence. (67 RT 7576.) The court said it would also inform the jury that: (1) they should not go into deliberations with a fixed opinion, (2) they should not change an opinion simply to do so but only if it is wrong and, (3) further instructions by the court are directed to the jury as a whole and applicable to each juror. The court stated it would give CALJIC No. 2.92, an instruction on the factors to consider regarding an eyewitness identification. The court's rationale for giving CALJIC 2.92 was mainly based on its interpretation of information provided by the foreperson that

the identification issue for the minority juror was "sort of black or white," and because No. 2.92 provided a way for the jury to weigh the photographic evidence. Finally, the trial court said it would instruct the jury that there is no requirement that there be an eyewitness identification, a confession or fingerprints in order to convict. (67 RT 7577-7586.)[55]

After re-reading instructions on circumstantial evidence, the trial court provided the aforementioned additional instructions. The court twice emphasized that there is no requirement under the law that there be evidence of an eyewitness identification, a confession or fingerprints in order to convict:

> ". . . as I have just indicated that there is no preference for direct evidence or no preference for circumstantial evidence, there is a special rule, 2.01, that applies when the case is based on circumstantial evidence. . . . [¶] Additionally, in terms of the forms or sorts of evidence that you might see in the homicide case or in other case, you might see fingerprints. You might see confessions. *You might see eyewitness identification in court.* [¶] *There is no requirement under the*

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[55] There was no waiver by appellant to the impropriety of giving an instruction relating to eyewitness identification. Defense counsel only requested that CALJIC Nos. 2.91 and 2.92 be given when the court indicated it was contemplating giving an instruction on eyewitness identification. (67 RT 7579, 7581.) Similarly, defense counsel repeatedly objected to any instruction that eyewitness identification is not required for a conviction. (See, 67 RT 7578 ["court is directing a comment towards a particular juror to tell him that he has to view the evidence in a certain way"]; 67 RT 7583 ["if the court makes any statement about one piece of evidence, it should make it about all pieces of evidence than just one – rather than highlighting you do not have to have an eyewitness"].) It was only when the court said it would give such an instruction that defense counsel requested that the court also instruct the jury that a confession or fingerprints are not required as well in order to convict. (67 RT 7585-7586.)

law that there is any – that there be fingerprints or a confession or be someone who comes into court and identifies a defendant as the perpetrator of the crime. [¶] The issue is this. It is stated quite simply. [¶] Given the evidence presented by the people and their witnesses and their items of evidence, and given the evidence presented by the defense and their witnesses and items of evidence, you take that mound, that group of facts as you determine from the evidence, and you ask yourself are the proven facts sufficient to convince me beyond a reasonable doubt that the defendant is guilty or not? [¶] If the sum total of that evidence is not of the type and nature that convinces you beyond a reasonable doubt that the defendant is guilty, you vote not guilty. [¶] *There is no legal requirement, as I have set forth, for a particular sort of thing, fingerprint evidence, or eyewitness evidence, confession evidence or anything like that. . . .*"

(67 RT 7591-7592, emphasis added.)

The court followed with CALJIC No. 2.92, which set forth factors to consider with regard to eyewitness identification. (67 RT 7593-7595.)[56]

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[56] The eyewitness identification instruction given by the court is as follows:

"Here is a new one. 2.92. This has to do with some factors that you might consider when you are determining what weight to assign to any sort of identification evidence whether it is photo identification evidence or in court, I.D. or anything relating to that subject matter. [¶] Here you have evidence that you asked for reread on, I believe yesterday, that had to do with a couple of People's exhibits. [¶] I want to say 18 and 19. I may be wrong but those photographs. [¶] I would suggest that 2.92 should be considered as well. [¶] 'Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which

(continued...)

The court also re-read an instruction on deliberating, CALJIC 17.40. In so doing, the court emphasized, by again twice reading, the portion of the instruction which told the jurors: "Do not hesitate to change an opinion if

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[56] (...continued)
bear upon the accuracy of the witness' identification of the defendant, including but not limited to, any of the following: [¶] The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; [¶] The stress, if any, to which the person was subjected at the time of the observation; [¶] The witness' ability following the observation to provide a description of the perpetrator of the act; [¶] The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; [¶] The cross-racial or ethnic nature of the identification; [¶] The witness' capacity to make an identification; [¶] Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act; [¶] Whether the witness was able to identify the alleged perpetrator in a photograph or physical lineup; [¶] The period of time between the alleged criminal act and the witness' identification; [¶] Whether the witness had prior contacts with the alleged perpetrator; [¶] The extent to which the witness is either is [sic] certain or uncertain of the identification; [¶] Whether the witness' identification is in fact a product of his own recollection; [¶] And any other evidence relating to the witness' ability to make an identification. [¶] And, as I say, I would suggest that you consider 2.92, that instruction which I will give you in writing as it might fit into your deliberations and into the evidence that you have heard in this case."

(67 RT 7593-7595.)

you are convinced that it is wrong." (RT 7596.)[57] This instruction was followed up by CALJIC No. 17.41, which admonished the jurors that it was "rarely helpful" at the beginning of deliberations to express an emphatic opinion or announce a determination for a certain verdict because an individual who does so may "hesitate to change a position even if it is shown it is *wrong*." (67 RT 7597, emphasis added.)[58]

Additionally, the court told the jury that there is a requirement that

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[57] CALJIC 17.40, as provided by the court, is as follows:

> "'The people and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with other jurors. [¶] *Do not hesitate to change an opinion if you are convinced it is wrong.*' [¶] This goes for everyone. This is not singling out any juror or group of jurors or anybody else. This is as to everyone. [¶] *I will read it again. 'Do not hesitate to change an opinion if you are convinced it is wrong.* However, do not decide any question in a particular way because the majority of jurors, or any of them, favor such a decision.'"

(67 RT 7676, emphasis added.)

[58] CALJIC 17.41, as provided by the court, is as follows:

> "'The attitude and conduct of jurors at all times are very important. It is *rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict.* When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position *even if shown it is wrong*. Remember you are not partisans or advocates in this matter. You are the impartial judges of the facts.'"

(67 RT 7597-7598, emphasis added.)

appellant be proven guilty beyond a reasonable doubt, and reminded them yet again that such requirement "need not be met by any particular type of evidence." According to the court, regardless of whether there were "100 eyewitnesses or no eyewitnesses," the jury was to ask whether the evidence established that appellant was guilty beyond a reasonable doubt. (67 RT 7598.)[59]

The court concluded by giving CALJIC No. 17.42, which admonished the jury not to consider or discuss the subject of penalty or punishment. The court gave this instruction specifically because of the foreperson's report of the reference to punishment supposedly made by the minority juror. (67 RT 7659-7660.) The jury then continued their deliberations for the rest of the day. (67 RT 7599, 7601.)

The following morning, March 1, 1996, the court informed counsel that it had received another note, which had been submitted by Juror No. 192 after deliberations had concluded the night before. (68 RT 7603.) The

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[59] The admonition given by the court is as follows:

> "There is a requirement, and I stress it again, that the defendant in this case or any criminal case be proven guilty beyond a reasonable doubt. In other words, the prosecution has the burden here of proving beyond a reasonable doubt that Mr. Alexander was involved in those events and is guilty under the law before a jury could return a verdict of guilt. [¶] However, that requirement need not be met by any particular type of evidence. [¶] The question is, again, I stress to you, given the totality of the evidence in the case, whatever it is, whether it is 100 eyewitnesses or no eyewitnesses, you look at all the evidence and you ask yourself does that evidence equal proof beyond a reasonable doubt under the instructions given by the court as a whole."

(67 RT 7598.)

note requested clarification on the law of circumstantial evidence:

> "I (#192) believe that I need help with the interpretation of the law as it applies to the acceptance of circumstantial evidence, reasonable doubt, evaluating each fact, etc. Section 2.01."

(XIV CT 3853, 68 RT 7603.) Following discussion with counsel and clarification from Juror No. 192 as to the meaning of his request (68 RT 7603-7626), the court provided an explanation of CALJIC No. 2.01. (68 RT 7627-7632.) The jury continued deliberating for an hour before being excused for the weekend. (68 RT 7633; XIV CT 3850.) On Monday, March 4, 1996, the jury deliberated for approximately two and a half hours. Before going home for the evening, the jury informed the court it had reached a verdict. (69 RT 7636; XIV CT 3851.) The jury's verdict, finding appellant guilty of first degree murder and the special allegations true, was read the following morning, March 5, 1996. (69 RT 7640-7641; XIV CT 3857.)

C. Relevant Law

The deliberative process of the jury is a right guaranteed under the Sixth Amendment to the Constitution and article I, section 16 of the California Constitution. (*People v. Collins* (1976) 17 Cal.3d 687, 693; *People v. Oliver* (1987) 196 Cal.App.3d 423, 429.) Trial courts must have paramount concern for "protecting and preserving the integrity of our jury system." (*Remmer v. United States* (1956) 350 U.S. 377, 381.) A jury's proper functioning depends on the secrecy of its deliberations. (*United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 618; accord, *People v. Cleveland* (2001) 25 Cal.4th 466, 481-482.) "Secrecy affords jurors the freedom to engage in frank discussions, free from fear of exposure to the parties, to other participants in the trial and to the public." (*People v.*

Engleman (2002) 28 Cal.4th 436, 442, citing *People v. Cleveland*, *supra*, 25 Cal.4th at pp. 475-476 and 481-482, and *United States v. Thomas*, *supra*, 116 F.3d at pp. 618-619.) Not only does the disclosure of the substance of jury deliberations undermine confidence in the jury system, but such disclosure can have a detrimental impact on the operation of the deliberative process itself. (*United States v. Thomas*, *supra*, 116 F.3d at p. 618.)

Because jurors may be reluctant to freely express themselves if their mental processes are subject to immediate judicial scrutiny, protection of the mental processes of deliberating jurors is necessary. (*People v. Engleman*, *supra*, 28 Cal.4th at p. 442.) "Protecting the deliberative process requires not only a vigilant watch against external threats to juror secrecy, but also strict limitations on intrusions from those who participate in the trial process itself, including . . . the presiding judge." (*United States v. Thomas*, *supra*, 116 F.3d at p. 620.) Indeed, "[t]he very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*People v. Cleveland*, *supra*, at p. 476; *United States v. Thomas*, *supra*, 116 F.3d at p. 620 ["very act of judicial investigation can at times be expected to foment discord among jurors"].)

"Any jury which has been out for a number of days or perhaps even a number of hours debating whether the government has established guilt beyond a reasonable doubt is going to be a jury within which strong differences have developed, and it is not for us, the judge or the lawyers, to inquire into chapter and verse of those differences, absent very compelling reasons." (*United States v. Calbas* (2nd Cir. 1987) 821 F.2d 887, 896.) When a member of the deliberating jury informs the court that a member of the jury "refuses to obey the court's instructions on the law, the court faces

a delicate and difficult task, because its 'duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important – safeguarding the secrecy of jury deliberations.'" (*People v. Williams* (2001) 25 Cal.4th 441, 463 (con. opn., Kennard, J.), quoting *United States v. Thomas*, *supra*, 116 F.3d at p. 618.)

In *People v. Cleveland*, *supra*, 25 Cal.4th 466, this Court has made clear that it sanctions intrusions into the deliberative process only when such intrusion is necessary to address allegations of misconduct. Therefore, if the trial court is put on notice that a juror is not participating in deliberations, or has engaged in other misconduct during deliberations, the court may only conduct "'whatever inquiry is reasonably necessary.'" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 484, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 520.) The inquiry should be limited in scope to "avoid intruding unnecessarily upon the sanctity of the jury's deliberations." (*People v. Cleveland*, *supra,* at p. 485; *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596 [judge limited in extent to which he may investigate reasons underlying juror's position on merits of the case].)

When conducting an inquiry to determine whether misconduct has occurred it is especially important that the trial court not delve too deeply into or probe the motivations of a deliberating juror. (*United States v. Brown*, *supra*, 823 F.2d at p. 596.) "The mental processes of a deliberating jury with respect to the merits of the case must remain largely beyond examination," and intrusive inquiries and extensive findings of fact concerning the reasoning behind a juror's assessment of the case and/or a juror's understanding and interpretation of the law not only breach the secrecy of deliberations, but also allow judges to second-guess and

impermissibly influence the jury. (*United States v. Thomas*, *supra*, 116 F. at p. 620.) Therefore, any inquiry by the court "should focus upon the conduct of the jurors rather than upon the content of the deliberations." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485)[60] Morever, any inquiry should cease once it is determined that the juror is deliberating, has not expressed an intention to disregard the instructions by the court, or has not committed any other misconduct. (*Ibid.*)

Mindful that in capital cases "the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'" (*Lowenfield v. Phelps* (1988) 484 U.S. 231,

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[60] In her concurring opinion in *People v. Williams*, *supra*, 25 Cal.4th 441, Justice Kennard set forth a suggested procedure for the trial court to follow when conducting an inquiry to determine whether a deliberating juror is refusing to follow instructions on the law: (1) "the trial court should caution the juror that it does not want to know whether the juror is voting to convict or acquit the defendant, or the reasons for that vote;" (2) "[t]he court should then state that it wants to know only whether the juror is willing to abide by the juror's oath to decide the case 'according only to the evidence presented . . . and . . . the instructions of the court' (Code Civ. Proc., §232, subd.(b)), to which the juror is to respond only with either 'yes' or 'no.'" (3) "If the juror's answer is 'yes,' the trial court should simply order the entire jury to resume deliberations." (4) " If the answer is 'no,' the court should discharge the juror in question." (5) "If the juror's answer is equivocal, the trial court may have to inquire further. In so doing, however, the court should be mindful of these words of warning: 'Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils – protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.' (*U.S. v. Thomas*, *supra*, 116 F. 3d at p. 623.)" (*People v. Williams, supra*, 25 Cal. 4th at p. 464 (conc. opn., Kennard, J.); see also *People v. Bradford* (1997) 15 Cal.4th 1229 [court conducted only limited inquiry when faced with request to discharge jurors].)

238-239, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604), the United States Supreme Court has stated that a capital defendant tried by a jury is "especially entitled to the uncoerced verdict of that body." (*Id.* at p. 241.) Whether a trial court's conduct and comments have coerced a verdict must be judged in their "context and under all the circumstances." (*Id.* at p. 237; *Early v. Packer* (2002) 537 U.S. 3, 9 [under the Fourteenth Amendment, state appellate courts must apply the *Lowenfield* totality of the circumstances test]; *Locks v. Sumner* (9th Cir. 1983) 703 F.2d 403, 406-407 ["inquiry by judge must be viewed in light of the context in which it was made, not in isolation"].)

Supplemental instructions to a divided jury must not be coercive. (*Jenkins v. United States* (1965) 380 U.S. 445, 446.) Improper coercion can be explicit in the form of the jury instruction itself or implicit under the circumstances. (*Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 365; *Jimenez v. Myers* (9th Cir. 1994) 40 F.3d 976, 980 [court's comments and conduct following jury deadlock amounted to "defacto" *Allen* charge].) "The general test of whether a supplemental jury instruction is in error is to consider all the circumstances to determine if the instruction was coercive." (*Jiminez v. Myers*, *supra*, 40 F.3d at p. 980.) Circumstances manifesting coercion occur when: (1) the trial court inquires into the jury's numerical division, (2) the court directs its comments towards the minority jurors, (3) the court effectively tells the jurors that they have to reach a decision, and (4) the jurors reach a verdict shortly thereafter. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 238-241; *Weaver v. Thompson*, *supra*, 197 F.3d at p.

366.)[61]

California courts are even stricter than their federal counterparts in protecting jurors from coercion. (*Early v. Packer*, *supra*, 537 U.S. at p. 8 ["decisions from the California Supreme Court . . . impose even greater restrictions for the avoidance of potentially coercive jury instructions"].)

Penal Code section 1140 provides that:

> "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable possibility that the jury can agree."

If the jury appears to be deadlocked, in order to determine whether there is a reasonable probability that the jury may yet agree on a verdict, the trial court may make reasonable attempts to obtain the jury's unanimity, including requesting that the jury attempt to reach a verdict, as long as the language to do so does not contain any sort of encouragement or coercion to reach unanimity. (*People v. Tarantino* (1955) 45 Cal.2d 590.) In doing so, "[t]he court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Rodriguez* (1986) 42 Cal. 3d 730, 775, quoting *People v. Carter* (1968) 68 Cal.2d 810, 817.) The goal of reaching a unanimous verdict does not lessen the principle that all parties are entitled to the individual judgment of each

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[61] In *Weaver v. Thompson*, *supra*, 197 F.3d at p. 366, the court set out similar factors to consider in determining whether a supplemental jury instruction is coercive: "(1) the form of the jury charge, (2) the amount of time of deliberation following the charge, (3) the total time of deliberation and (4) other indicia of coerciveness or pressure."

juror. (*People v. Gainer* (1977) 19 Cal.3d 835, 848.)

In *People v. Gainer, supra*, 19 Cal.3d 835, this Court held that an *Allen* instruction "carries a potentially coercive impact," and is prohibited in California. (*Id.* at p. 842, citing *Allen v. United States, supra,* 164 U.S. 492.) Giving an *Allen* instruction to a potentially deadlocked jury is erroneous because it impairs a defendant's right to the independent judgment of each juror and a unanimous verdict. Moreover, it improperly exerts undue pressure on a dissenting juror to acquiesce with the majority in order to reach a verdict. (*People v. Gainer, supra*, 19 Cal.3d at pp. 848-849, 850.) The possibility of prejudicial effect from an *Allen* instruction is magnified by the nature and timing of the admonition when it is used to undermine a division in the jury. This is especially so when the admonition is introduced at a critical stage of the proceedings when the jury looks to the court for guidance and resolution as to differences in deliberations. (*Id.*, at pp. 854-855.) As this Court aptly noted, "[w]hen the erroneous admonition to minority jurors is given or repeated to a criminal jury which have indicated they are divided, it is difficult, if not impossible to ascertain if in fact prejudice occurred, yet it is very likely it did." (*Id.* at p. 855.)

"In the archetypal *Allen* charge context, the judge instructs a deadlocked jury to strive for a unanimous verdict." (*Weaver v. Thompson, supra*, 197 F.3d at p. 365.)[62] However, there is "nothing talismanic" about any single factor which renders a judge's charge to the jury valid or invalid.

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[62] The "*Allen* charge" is known as the "dynamite charge" because it is intended to "blast" a unanimous verdict out of the a deadlocked jury. (*United States v. Clinton* (6th Cir. 2003) 338 F.3d 483, 487.) The term "*Allen* charge" is used generically to describe a class of supplemental jury instructions given when a jury is apparently deadlocked. (*United States v. Mason* (9th Cir. 1981) 658 F.2d. 1263, 1264, fn.1.)

The fundamental question is whether the jury was "improperly coerced, thus infringing the defendant's due process rights." (*Ibid.*; *Jimenez v. Myers*, *supra*, 40 F.3d at p. 979.) Thus, where improper coercion is implicit in the particular circumstances of the case, rather than explicit in the formal instruction, a defacto *Allen* charge may be found to exist. (*Jimenez v. Myers*, *supra*, 40 F.3d at p. 980.) Moreover, when any instruction resembling an *Allen* charge has been given, the trial court's failure to give a cautionary instruction to jurors that they should not surrender conscientiously held beliefs simply to secure a verdict strongly supports the conclusion that the jury has been impermissibly coerced to render a unanimous verdict. (*Jimenez v. Myers*, *supra*, 40 F. 3d at p. 981; see *People v. Sheldon* (1989) 48 Cal.3d 935, 958-959.)

D. The Trial Court's Actions in Response to the Foreperson's Note Constituted an Impermissible Intrusion into the Jury's Deliberations Which Coerced a Unanimous Guilty Verdict

The record shows that the trial court impermissibly intruded into the jury's deliberative process, and in so doing also coerced a unanimous verdict for guilt. Because of the foreperson's note, it was arguably proper for the court to conduct a limited inquiry with regard to whether the minority juror was refusing to follow the law, including his duty to deliberate. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 477; compare *People v. Johnson* (1992) 3 Cal.4th 1183, 1255 [inquiry whether holdout juror should be discharged not required].) Under the circumstances of this case, however, the trial court did much more than what was constitutionally permissible.

First, the trial court engaged in an inquiry of the foreperson which cannot be characterized as a neutral and limited objective assessment

whether the minority juror was able to follow his/her oath and perform the duties required. Nor did it properly "focus upon the conduct of the jurors rather than on the content of the deliberations." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) Instead, the inquiry delved well into the mental processes by which, according to the foreperson, the minority juror had concluded he/she should not vote for guilt. Although the foreperson had provided some information of this sort in the note he submitted to the court, the court asked probing questions during its inquiry which were designed to, and did in fact, elicit details of the thought processes of the minority juror surrounding his/her views on the merits of the case. (67 RT 7558-7568.)[63] By so doing, the trial court impermissibly trespassed into the

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[63] For example, the following colloquy between the foreperson (Juror No. 106) and the court occurred:

> "The Court: All right. When you say 'not respond' again, do you mean that he does not agree or that he does not understand or he will not talk about it?
>
> "Juror No. 106: I can't speak for what he understands. He does not agree. That is cut out. The impression is that it is black and white and this case is not black and white.
>
> "The Court: Has that juror indicated any inability to understand the court's instructions or any of the court's instructions?
>
> "Juror No. 106: No.
>
> "The Court: Is there a dispute between that juror and others regarding the meaning or interpretation of any of the court's instructions?
>
> "Juror No. 106: Not basically other than the interpretation of circumstantial evidence. [¶] As I say leans to cut and dry. It either is or is not.

(continued...)

forbidden territory of the mental processes of a deliberating jury and obtained information it was not entitled to have. (See *People v. Cleveland*, *supra*, 25 Cal.4th at pp. 484-485; *United States v. Thomas*, *supra*, 116 F.3d at p. 620; *United States v. Brown*, *supra*, 823 F.2d at p. 596.)

During the course of its inquiry, the trial court correctly determined that the information provided by the foreperson relating to the minority juror was ambiguous – either it was representative of the juror's views on the sufficiency of the prosecution's evidence and his/her honest disagreement with the majority on this point, or it was representative that the juror was unwilling to follow the law with regard to circumstantial

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[63] (...continued)
"The Court: Is or is not?

"Juror No. 106: Like a positive identification of an individual, whether Jessica Brock's earlier testimony or later testimony is correct. [¶] Those are the two hang ups that the individual has. [¶] But it is primarily a positive I.D. [¶] This individual is totally hung up on positive I.D.

"The Court: Has there been a statement, for example, and I don't want to put words in your mouth, but has there been any statement, for example, by any juror that without a positive I.D. it is impossible to convict a person of such an offense?

"Juror No. 106: Yes.

"The Court: Would you relate to me any statement or statements along those lines.

"Juror No. 106: He said – this individual said 'If we could positively identify him, I would fry his ass just like the rest of you. But without a positive I.D., I cannot see' or I don't know his exact words but to the extent that 'I cannot vote for guilty.'"

(67 RT 7562-7564.)

evidence. (67 RT 7574.) It was because of this ambiguity that the trial court appropriately found there was no cause to excuse the juror. (67 RT 7575-7576.) Notwithstanding this determination, however, the trial court compounded its initial intrusion into the jury's deliberations. Having just obtained details relating to the mental processes of the minority juror, the court first second-guessed the motivations of that juror based on what had been revealed by the foreperson or, worse, ignored the fact that the juror's strong disagreement with the majority was not a refusal to deliberate. (See *People v. Engleman*, *supra*, 28 Cal.4th at p. 446; *United States v. Thomas*, *supra*, 116 F.3d at p. 620.) Next, the court acted on the information it was not entitled to have by providing supplemental instructions which interfered with, and ultimately impermissibly directed, the work of the jurors.

As set forth above, the trial court did not merely give the jury supplemental instructions on circumstantial evidence. Instead, it also provided instructions which: (1) placed undue emphasis on eyewitness identification, which the foreperson reported was one of the motivating factors for the minority juror's reluctance to convict; (2) highlighted that there was no requirement of eyewitness identification in order to convict; (3) told the jury that it was *improper* to have an emphatic view early in the deliberations; (4) emphasized that a juror *should not hesitate* to change a vote if it is *wrong*; (5) could be read as telling the lone minority juror to reconsider his or her views and vote; (6) did not include a caution that the jurors need not give up their conscientiously held beliefs; and (7) did not inform the jury that they were not required to agree. The trial court's conduct and supplemental instructions likewise demonstrate that the court presumed the minority juror was refusing to follow the law rather than simply disagreeing with the majority on the sufficiency of evidence, thus

effectively taking sides with the prosecution. The court also impermissibly acted on the thought processes of the minority juror as relayed by the foreperson, which was an intrusion in and of itself. The court was not permitted to do either of these things. (*People v. Engleman*, *supra*, 28 Cal.4th at p. 446; *United States v. Thomas*, *supra*, 116 F.3d at pp. 620-622.)

More important, however, is that the totality of the circumstances, surrounding the foreperson's note, including the nature and timing of the court's supplemental instructions, establishes the court impaired the free and private exchange of views of the jury as well as impermissibly coerced a unanimous guilty verdict. Accordingly, the court's related conduct and supplemental instructions amounted to a defacto *Allen* charge which directed the jurors to work toward unanimity and coerced the minority juror to change his/her view of the evidence. (*Jimenez v. Myers*, *supra*, 40 F.3d at p. 981; see *People v. Gainer*, *supra*, 19 Cal.3d at pp. 854-855.)

The record shows that the foreperson sent his unsolicited note informing the court that the jury was split eleven to one in their deliberations and that the juror who did not believe appellant was guilty would "not listen to reason." The note essentially implored the court to help convince the juror that the jury could convict appellant on the circumstantial evidence in this case. Determining that there was no justification to excuse the minority juror, and that all but one of the jurors was ready to convict, the court embarked on a course intended, consciously or not, to resolve the "problem" as requested by the foreperson.

"[B]ecause the vote was 11 to 1, and the focus was on the defense holdout juror, 'the most extreme care and caution were necessary'" in order to preserve the legal rights of appellant. (*People v. Barber* (2002) 102 Cal.App.4th 145, 152, quoting *Burton v. United States* (1905) 196 U.S. 283,

307; see *People v. Sheldon*, *supra*, 48 Cal.3d at pp. 959 ["There is always the potential for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror favoring acquittal."] The tenor of the court's supplemental instructions in this case, as well as its conduct with regard to them, did not meet this standard.

The fact that the instructions highlighted the topic of eyewitness identification multiple times in multiple ways, and that it was not required for a conviction, was not likely lost on the minority juror.[64] Assuming the foreperson accurately recounted the thought processes of the minority juror, the nature of the identification, or lack thereof, was a key factor of the juror's inability to convict. According to the foreperson, no one else on the jury felt this way. The trial court's emphasis on eyewitness identification, therefore, improperly singled out the minority juror, and could be read as telling the juror to reconsider his/her views on this point. (*Lowenfield, v. Phelps*, *supra*, 484 U.S. at pp. 237-238.)

The court's repeated admonition that jurors not hesitate to change their vote if they were wrong, as well as its admonition that was improper to form an emphatic view of the evidence early in the deliberative process, also singled out the minority juror. Both admonitions could only be read by the minority juror as being leveled at him/her. (*United States v. Sae-Chua*

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[64] Even though the trial court attempted to minimize undue focus on the issue of eyewitness identification, the fact remains that neither a confession or fingerprints were at issue in this case. Instead, as the jury noted by its request for read back, key factors potentially linking appellant to the crime were the highly unreliable eleventh hour identification of appellant's photographs by Lloyd Bulman and the unreliable and suspect testimony of Jessica Brock. (See, e.g., AOB, Arg. I, § C.)

(9th Cir. 1984) 725 F.2d 530, 532.) Based on these admonitions, the minority juror would have understood the court to be of the belief that he/she was wrong and that it was improper to have formed a definite view of the evidence early in the deliberative process.[65] Because of the admonitions it cannot be said that the minority juror would not have felt pressure from the court to give up his/her truly-held beliefs in favor of the majority.

It did not matter that the court did not know the identity of the minority juror. That the other eleven jurors knew the juror's identity was sufficient to compound the inevitable pressure to agree brought to bear upon the lone dissenter by the court's actions and comments. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 380, citing *People v. Smith* (1974) 38 Cal.App.3d 401, 406.) It was apparent from the foreperson's note that he was intent on fulfilling his duty by rendering a unanimous verdict in this case. It is therefore likely that he, along with any of the other ten jurors who shared this view, would have interpreted the court's admonitions as validation that the minority juror was not only being unreasonable, but that he/she was also wrong and that his/her strongly held view of the evidence was improper. This additional pressure on the minority juror would have inevitably disrupted the natural deliberative process of the jury. (*People v.*

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[65] Even assuming the foreperson was correct when he reported that the minority juror had formed an opinion as to guilt in the first 30 minutes of deliberations, the court correctly recognized that the short period of time within which to formulate a tentative decision was not improper. (67 RT 7566; *People v. Barber* (2002) 102 Cal.App.4th 145, 153, citing *People v. Bowers* (2001) 87 Cal.App.4th 722, 726.) More importantly, based on the inquiry of the foreperson the trial court concluded that the minority juror had been deliberating.

Engleman, *supra*, 28 Cal.4th at p. 446 ["juror could . . . place undue pressure on another juror by threatening to accuse that juror in open court of reasoning improperly or of not following court's instructions in his or her decisionmaking process"].)

The coercive nature of the court's supplemental instructions and conduct was enhanced by the fact that the court did not caution the jury that they need not give up their conscientiously-held beliefs simply to secure a verdict. "A trial court's failure to give such a cautionary instruction weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated." (*Jimenez v. Myers*, *supra*, 40 F.3d at p. 981, fn. 5.) Here, after delivering the coercive supplemental instructions, the court merely told the jury to continue its deliberations and, accordingly, there was nothing to counter-balance the pressure put on the jury to render a unanimous verdict and for the minority juror to acquiesce to the majority. (*Weaver v. Thompson*, *supra* 197 F.3d at p. 366; *Jimenez v. Myers*, *supra*, 40 F.3d at p. 981.) Moreover, the absence of cautionary language not to surrender his/her conscientiously-held beliefs "may well have left the minority juror with the belief that he or she had no other choice but to convince or surrender." (*Smalls v. Bautista* (2nd Cir. 1999) 191 F.3d 272, 280.) Where, as here, a single vote stood between a defendant and a conviction, the lack of a cautionary instruction was particularly egregious. (*Jimenez v. Myers*, *supra*, 40 F.3d at p. 981.)

Similarly, the jury was not reminded that it could remain deadlocked or that it had the right not to agree. (*Jenkins v. United States*, *supra*, 380 U.S. at p. 446 (per curiam); *United States v. Hernandez-Albino* (1st Cir. 1999) 177 F.3d 33, 36-39 [erroneous *Allen* charge failed to acknowledge the jury had right not to agree and failed to remind jury of government's

burden].) If anything, the record reveals that the trial court urged just the opposite in its supplemental instruction when it stated: "You must do your very best conscientiously and under the law to arrive at a verdict based on these instructions and the evidence." (67 RT 7578.) The omission of an admonition that the jury did not have to agree only compounded the coercive impact of the supplemental instructions and the pressure on the jury to render a unanimous guilty verdict.

This is a situation where the jury returned its guilty verdict after only a total of approximately 16 ½ hours of deliberations over the course of five days, where the jury sent one request for read back of testimony and two additional requests for assistance from the court following a trial that lasted approximately two months. Prior to receiving the foreperson's note regarding the deadlock, the jury had revealed a concern regarding the sufficiency of the prosecution's case as demonstrated by their request for read back of the testimony of prosecution witness Jessica Brock on when appellant supposedly had gone over to her house the night of the Cross murder as well as the testimony of prosecution witness Lloyd Bulman as to his identification of appellant's photographs and/or the composite sketches. Moreover, after receiving the supplemental instructions at issue, the jury sent another note requesting clarification on the law regarding circumstantial evidence. (See XIV CT 3847-3851; 3853-3854; 3857.)

The fact that the jury ultimately submitted another note after receiving the supplemental instructions requesting clarification of CALJIC 2.01, the circumstantial evidence instruction, and continued to deliberate for almost a day after receiving clarification does not take away from presumption of prejudice that was created when the divided jury was subjected to the coercive comments and conduct by the court with respect to

its supplemental charge. (See *People v. Barraza* (1979) 23 Cal.3d 675, 684-685.) Indeed, the request for further clarification underscores that the jury was focused on, as well as struggling with, the sufficiency of the circumstantial evidence of guilt, which was undoubtedly the basis for the disagreement between the jurors.

Under the totality of the circumstances, it can only be concluded that the discriminatory admonitions contained in the defacto *Allen* charge by the court were directed to the minority juror to make that juror rethink his/her position in light of the majority's views and had an impermissibly intrusive as well as coercive effect on the jury's deliberations. As such, appellant was deprived of his constitutional rights, including the right to due process and a fair trial by jury. (*Weaver v. Thompson*, *supra*, 197 F.3d at p. 366; *Jimenez v. Myers*, *supra*, 40 F. 3d at p. 981.)

E. Reversal of the Judgment Is Required

By intruding first into the jury's deliberations by the impermissible scope of its inquiry of the foreperson, and then by its coercive conduct and comments which resulted from the information it had obtained, the court subverted the basic guarantees of trial by jury. (See *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.) Both the inquiry and the defacto *Allen* charge by the court interfered with, if not usurped, the fact-finding role of the jury. (See *United States v. Thomas*, *supra*, 116 F.3d at p. 622.) The inquiry and charge also undermined the jury's independent judgment and effectively inserted the judge as a highly influential thirteenth juror. (See *People v. Gainer*, *supra*, 19 Cal.3d 835, 848-849.) Most importantly, the intrusions by the court skewed the deliberative process towards the result favored by the majority at a crucial stage not only when the jury was deadlocked eleven to one for guilt, but at a time when the jury had made it

known that there was concern regarding the credibility of key prosecution witnesses as well as concern by at least the minority juror, to whom the admonitions were directed, regarding the sufficiency of the prosecution's case and when they had requested guidance from the court to resolve their differing views. (See *People v. Gainer*, *supra*, 19 Cal.3d at pp. 854-855.) Thus, the error was so inherently prejudicial that it constitutes per se reversible error. (See *id.*, pp. 854-855; *Jimenez v. Myers*, *supra*, 40 F.3d at p. 981; *Smalls v. Bautista*, *supra*, 6 F.Supp.2d at pp. 222-223 [coercive *Allen* charge is akin to improper reasonable doubt instruction, impartial judge or deprivation of right to counsel and is a structural error for which harmless error analysis is inapplicable]; *Turner v. Louisiana*, *supra*, 379 U.S. at p. 474.)

Because the court's intrusive inquiry and its consequential, also-intrusive defacto *Allen* charge impermissibly interfered with the jury's deliberative process, thus violating appellant's federal constitutional rights, the error is reversible even under the *Chapman* harmless beyond-a-reasonable-doubt standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

As has been set forth in appellant's opening and reply briefs, the prosecution's case that appellant was one of the perpetrators was weak and based on highly unreliable, if not irrelevant, circumstantial evidence. (See ARB, Arg. I., § C.) In light of the weakness of this case alone, it cannot be said that the court's actions did not result in undue pressure on the jury to agree, and especially for the minority juror to relinquish his/her view of the evidence in deference to the majority. As noted above, however, the timing of the court's interference – both in making the inquiry and the charge itself – was when the jury was especially susceptible to improper influence from

the person uniquely influential over the jury, and from whom the jury sought guidance. In addition, the court's inquiry and its supplemental instructions occurred at a time when the vote was eleven to one for conviction, and on the facts of this case, it is likely they caused the sole holdout to capitulate to the majority. The improper inquiry and the consequential defacto *Allen* charge by the court, therefore, cannot be said to be harmless beyond a reasonable doubt. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 486; *People v. Barraza*, *supra*, 23 Cal.3d at pp. 684-685.)

Because this is a capital case, there is a heightened scrutiny for potential errors in the oversight of the deliberative process of the jury. "[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." (See *Zant v. Stephens* (1983) 462 U.S. 862, 885.)

Accordingly, reversal of the judgment of conviction and sentence is required.

XXX

THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY ITS RESPONSE TO THE JURY'S DEADLOCK DURING THE PENALTY DELIBERATIONS

A. Introduction

During the penalty deliberations, the jury sent the trial court a note notifying it of an eleven to one deadlock. Not only did the note solicit guidance from the court as to how to continue, but it also included the purported mental thought processes of the holdout juror. As it had done in the guilt phase, the court acted on that thought process information and delivered a supplemental instruction which amounted to a defacto *Allen* charge. (See Arg. XXIX, *supra.*). In addition, the supplemental instruction effectively guided the jury to disregard powerful mitigation evidence presented by the defense which they were entitled to consider in making their penalty determination.

The actions of the trial court with regard to the deadlock, and in particular the delivery of the coercive supplemental instruction, violated appellant's state and federal constitutional rights, including his rights to due process, jury trial, a fair adversarial proceeding, present a defense, an individual determination of the existence and weight of mitigating circumstances by each juror and a reliable determination of penalty. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal.Const., art. I, §§ 1, 7, 15, 16.) The court's conduct and instruction in response to the jury's note were also violative of appellant's state constitutional right to a unanimous verdict, including the right to an independent and impartial decision of each juror. (Cal. Const., art. I § 16.) Because the court's actions and instruction deprived appellant of his state-created liberty interest, appellant's due

process rights under the Fifth and Fourteenth Amendments were similarly violated. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Reversal of the penalty judgment is therefore required.

B. Factual Background

On the afternoon of the second day of penalty deliberations, March 14, 1996, the jury sent its first note during this phase of the case to the trial court requesting to leave early. (75 RT 8407; XIV CT 3880.) This note strongly suggested that the deliberations were not going smoothly and that the discussions between the jurors on the issue of penalty were contentious:

> "We would like to take the balance of the day off to allow feelings to cool down. We feel this time off will be well spent. Tomorrow should be a much better day."

(XIV CT 3880.) The court excused the jury for the day around 3:30 p.m. (75 RT 8407; XIV CT 3877-3878.)

The jury resumed its deliberations the following morning, March 15, 1996, at approximately 10:30 a.m. (75 RT 8407; XIV CT 3878.) Just after the lunch recess, however, the court informed counsel that the jury had sent a second note announcing an eleven to one deadlock. (75 RT 8383.) The note stated that the holdout would not listen to reason and requested guidance on how the jury was to continue deliberations. The note also provided details of the holdout juror's thought processes relating to his/her penalty determination. The second note the jury sent is as follows:

> "We have a split eleven to one + [sic] the holdout will not listen to any reason. Please let us know how to continue. The holdout is based on the children."

(*Id.*; XIV CT 3881.)

Without speaking to the foreperson or to any of the other jurors about the note, the trial court discussed with counsel an appropriate

response. The trial court correctly noted that the jury could properly consider evidence presented relating to appellant's family as circumstantial evidence of appellant's character as mitigation under factor (k) of section 190.3. However, like the prosecution, the court expressed concern that the jurors might improperly base his/her penalty decision on sympathy for a third party rather than for appellant. (75 RT 8386-8387.)

Over appellant's objections, the court elected to respond to the jury's second note by giving a special supplemental instruction.[66] This instruction not only attempted to address the substance of what the court perceived to be the reason the holdout juror could not vote for death – "based on the children" – but also included a number of specific admonitions on deliberating, including one which paraphrased former CALJIC No. 17.41.1.

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[66] Defense counsel made a number of objections to giving the jury the supplemental instruction in response to their note about the deadlock, including: (1) the court would be invading the juror's thought processes as to the reason for his/her decision (75 RT 8385-8386); (2) the proposed instruction by the court told the jurors it was inappropriate to consider the victim impact evidence [re: defendant's family] (75 RT 8390); (3) the proposed instruction did not correctly state the law and over-simplified the issue of the jury's consideration of the impact of appellant's relationship with his children as it related to his character (75 RT 8393); (4) the proposed instruction singled out a juror for his/her consideration of mitigation evidence it could properly use to determine penalty; (5) the proposed instruction told the jury it could not consider mitigation evidence which they were allowed under the law to consider (75 RT 8393-8394); (6) the proposed instruction was an attempt by the court to read the mind of the holdout juror based on information provided by the foreperson (75 RT 8394); (7) the proposed instruction improperly characterized the holdout's disagreement with the majority as an "unguided arbitrary exercise in raw emotion" (75 RT 8404); (8) the proposed instruction was improperly directed to the holdout juror (75 RT 8405); and (9) the proposed instruction did not tell the jury that after weighing mitigating and aggravating factors the jury could vote for life if a mitigating factor so warranted (75 RT 8408).

This particular admonition was similar to No. 17.41.1 in that it informed jurors of their obligation to advise the court if a juror "refuses or fails to follow the law."[67] The supplemental instruction as provided by the court in its entirety is as follows:

> "By these instructions the court is not suggesting what result would be proper, or that I have or am expressing any opinion on the eventual penalty phase determination.
>
> The following provisions are, however, the law:
>
> It would be inappropriate for any juror, whether one favoring a sentence of death or one favoring a sentence of life without parole, to single out one piece of evidence or one instruction and ignore the others. This case must be decided -- the case must be decided based on a totality of all the evidence and law that applies. It would be improper for any juror, whether favoring a sentence of death or a sentence of life without parole, to single out one aggravating or mitigating factor, and refuse or fail to weigh it against all of the other aggravating and mitigating factors shown by the evidence.
>
> The facts and the law are there to guide you to a decision. The facts and the law are not there to justify any preformed or preexisting determination to stand for a certain verdict, whether it be for the death penalty or for a sentence of life without parole.
>
> In terms of the evidence relating to the defendant's family, such evidence was received as it may bear upon that portion of factor (k) relating to 'any sympathetic or other aspect of the defendant's character or record'. Bear in mind that this 'sympathy' related to sympathy for the defendant, not solely for any other person or persons. And bear in mind that the 'character' in issue is a character of the defendant. Insofar as

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[67] See *People v. Engleman, supra*, 28 Cal.4th at p. 440, where this Court expressly disapproved of CALJIC No. 17.41.1 because of its "potential to intrude unnecessarily on the deliberative process and affect it adversely."

this evidence evinces sympathy for the defendant or is seen as being evidence relating to the character or record of the defendant, the jury may consider it under factor (k), assign it whatever weight you believe is appropriate, and then weigh it along with all other aggravating and mitigating evidence and factors. Insofar as this evidence raises sympathy only for third parties, it is not appropriate factor (k) evidence. The focus, in other words, is on the defendant's personal moral culpability, and it is the defendant's character and background that is the focus of the inquiry, not the effect that your verdict will or may have on any third party or parties.

Do not hesitate to change your position if you are convinced that it is wrong. Do not change your position simply because a majority of the jurors, or any of them, favor such a change.

It is important that all jurors both understand as well as follow the law. If a juror or jurors do not understand the law, the court will continue to attempt to clarify it. If a juror or jurors refuses or fails to follow the law, the court should be notified of that fact. If any juror, whether they are in the majority or minority, cannot, in good conscience, follow the law, it is the duty of that juror or jurors to notify the court of that fact.

Each juror should recognize a penalty phase determination is not an unguided arbitrary exercise in raw emotion whether the juror favors one penalty or the other. This decision must be based on a calm, rational assessment of the evidence and a weighing of aggravating and mitigating factors set forth in the law, and shown by the evidence. This requires that each juror render an honest, unbiased assessment of these factors without bias, without fear and without a desire to favor one side over the other. Jurors are not advocates for either side, but must be impartial judges of penalty.

All of these additional instructions are directed at all twelve trial jurors, not those favoring one verdict or the other. Further, please keep in mind as I instructed you at the outset of these instructions, these latest instructions, that these instructions are not to be interpreted by the jury as suggesting an outcome, or as suggesting that the court is expressing an opinion as to the propriety of one outcome or the other."

(XIV CT 3884; 75 RT 8410-8417.)

Following the court's delivery of the supplemental instruction, the jury briefly resumed deliberations before being excused for the weekend. (75 RT 8419; XIV CT 3878.)[68] At 9:15 a.m. on Monday morning, March 18, 1996, the jury resumed their deliberations; just ten minutes later it was announced they had reached a penalty verdict. (76 RT 8420; XV CT 3985.) The jury's verdict of death was subsequently read in open court. (76 RT 8421-8422; XV CT 3985.)

C. The Trial Court Impermissibly Intruded upon the Jury's Deliberative Process When it Acted upon Mental Process Information Relating to the Holdout Juror and in So Doing Improperly Coerced an Unanimous Death Verdict

In Argument XXIX, § C, *supra*, appellant has set forth relevant law applicable to impermissible intrusion into the secret deliberative process of the jury as well as the improper coercion of jury deliberations. (See pp. 134-141, *supra*.) Those authorities are applicable to the present argument, and will not be repeated here except as appropriate to the specific facts of this claim.

The trial court here did not conduct an inquiry of the foreperson or of any other member of the jury with respect to the jury's note advising of the deadlock. By virtue of the note's content, however, the court learned of the mental processes of the holdout juror regarding the merits of the case.[69]

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[68] The jury resumed its deliberations for about 25 minutes following the delivery of the supplemental instructions before they were excused for the weekend. (75 RT 8419; XIV CT 3878.)

[69] "[W]hen a juror in the course of deliberations gives reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes." (*People v. Cleveland, supra*, 25 Cal.4th at pp. 484-485.)

Although the court was not entitled to have such mental process information (see *People v. Engleman*, *supra*, 28 Cal.4th at p. 443; *United States v. Symington*, *supra*, 195 F.3d at pp. 1086-1087; *United States v. Thomas*, *supra*, 116 F.3d at pp. 618-619), the court nonetheless acted on it and prepared a supplemental instruction which it subsequently delivered to the jury.

As with the note from the foreperson regarding the deadlock in the guilt phase, the note announcing the eleven to one division during the penalty deliberations constituted a request by the majority jurors for assistance from the court to compel the lone holdout juror to "listen to reason" and change his/her view of the evidence. The totality of the circumstances surrounding the jury's note, however, show that the court's response not only impaired the free exchange of views of the jury during their deliberations, but that it also impermissibly coerced the death verdict. (*Jimenez v. Myers*, *supra*, 40 F.3d at p. 981.)

The content of the supplemental instruction reveals that the court improperly singled out the holdout juror and effectively directed him/her to capitulate to the majority. The instruction also shows that the court improperly second-guessed both what the jury wanted when it sent the note as well as the motivations of the holdout. This second-guessing by the court led to its impermissible and adverse influence of the jury's deliberative process. (See *United States v. Thomas*, *supra*, 116 F.3d at p. 620.)

Apart from the fact that the jury sought guidance on how they were to continue deliberations in light of the deadlock and a holdout juror who reportedly would not listen to reason, the jury did not make any other request for assistance from the court. Even though the note stated that the

"holdout was based on the children," the comment did not indicate any misconduct, such as a failure to deliberate or a refusal to follow the law by the holdout juror. To the extent that the report of the holdout "not listening to reason" could be construed as a possible failure to deliberate or to follow the law, the court was permitted to conduct a very limited inquiry for misconduct by this or any other juror. (*People v. Cleveland, supra*, 25 Cal.4th at pp. 484-485; see Arg. XXIX, *supra*.) However, just as the trial court should not have made any inquiry of the foreperson or of the jurors as to the *content* of their deliberations (see *People v. Cleveland, supra*, 25 Cal.4th at p. 485), the court should not have assumed without more information than what was contained in the note that the jury, and particularly the holdout juror, required additional guidance on the topic of mitigation evidence of appellant's character as it related to his family. (*People v. Johnson, supra*, 3 Cal.4th 1255.)[70]

The fact that the court placed special emphasis on mitigating evidence of appellant's character as it related to his relationship with his family in the supplemental instruction was inherently coercive because in doing so the court singled out the holdout juror's alleged difference of

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[70] In *People v. Johnson, supra*, 3 Cal.4th 1183, 1255, this Court determined that inquiry into whether a holdout juror should be discharged was not required. In *Johnson*, a juror sent a note to the court during the penalty deliberations advising that eleven jurors had reached a decision and expressed the belief that the holdout juror does not believe or ever did believe in the death penalty. The trial court declined to discuss the allegation and instructed the juror who had written the note not to discuss the case with the other jurors. On appeal, this Court held that to probe the jury in absence of more cogent evidence of coercion would deprive the jury room of free expression and that such inquiry would have risked pressuring the dissenting juror to conform her vote to the majority.

opinion from the majority and was a means to induce the holdout to reconsider his/her vote. (See *People v. Gainer*, *supra*, 19 Cal.3d at p. 850, quoting *United States v. Bailey* (5th Cir. 1972) 468 F.2d 652, 662 ["charge 'places sanction of the court behind the views of the majority . . . and tempts the minority juror to relinquish his position simply because he has been the subject of a particular instruction'"]; *United States v. Sae Chua*, *supra*, 725 F.2d at p. 532.) This in turn sent the message to the holdout, as well to the rest of the jury, that any strongly held belief relating to this type of mitigating evidence was of special concern to the court. Indeed, the court's focus on this particular topic would have been reasonably construed as a signal that the holdout juror's disagreement with the other jurors meant that the holdout was deciding the case on an improper basis or otherwise constituted misconduct (*People v. Engleman*, *supra*, 28 Cal.4th at p. 47 ["jurors should not be led to believe that disagreement during deliberations constitutes misconduct;" see *People v. Cleveland*, *supra*, 25 Cal.4th at p. 485), or at the very least, that the court disapproved of the holdout's position. This was especially so since this portion of the instruction stressed what was "appropriate"evidence of appellant's relationship with his family which the jury could properly consider as factor (k) mitigation. This portion of the instruction also admonished the jurors as to what category of family relationship evidence the jury should not consider.[71]

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[71] The relevant portion of the supplemental instruction regarding this particular admonition is as follows: "Insofar as this evidence evinces sympathy for the defendant or is seen as being evidence relating to the character or record of the defendant, the jury may consider it under factor (k), assign it whatever weight you believe is appropriate, and then weigh it along with all other aggravating and mitigating evidence and factors.

(continued...)

Accordingly, the likely impact of the court's admonition was that the holdout's consideration of this evidence was *not* appropriate even if it properly evinced sympathy for *both* appellant and his children.

Notwithstanding the fact that the supplemental instruction focused on the very topic that was allegedly a sticking point for the holdout juror, the instruction consisted of multiple other admonitions which also improperly singled out the holdout juror. These admonitions were likewise directed to the holdout in such a way as to coerce him/her to give up his/her view of the evidence in favor of the majority. (See *Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 237-238 [*Allen* charge is less likely to have prejudicial effect if it is not addressed specifically to the minority jurors]; *United States v. Sae-Chua*, *supra*, 725 F.2d at p. 532.) Besides inferring that the holdout's reliance "on the children" was *not* appropriate factor (k) mitigation evidence, and that the juror was thus deciding the case on an improper basis, the additional admonitions contained in the instruction told the jury that: (1) it was *inappropriate* to single out one piece of mitigating evidence; (2) a juror should not hesitate to change a vote if it is *wrong*; (3) jurors should notify the court *if a juror refuses or fails to follow the law*; and, (4) the penalty determination is not an *unguided, arbitrary exercise in raw emotion*. (XV CT 3884; 75 RT 8410-8417.)

In giving these particular admonitions the court improperly second-guessed the motivations of the holdout juror. (*United States v. Thomas*, *supra*, 116 F.3d at p. 620.) For example, the supplemental instruction admonished that it was "inappropriate [or "improper"] for any juror,

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[71] (...continued)
Insofar as this evidence raises sympathy only for third parties, it is *not* appropriate factor (k) evidence."

whether one favoring a sentence of death or one favoring a sentence of life without parole, to single out one piece of evidence or one instruction and ignore the others." The jury's note did not substantiate that the holdout had *only* considered the mitigation evidence of appellant's relationship with his children in making his/her penalty determination. Even assuming, however, that the holdout had based his/her vote resulting in the deadlock on this single piece of mitigation, there is nothing on this record to conclude that juror had improperly failed to consider the totality of the mitigating and aggravating factors before doing so. To the extent that the holdout had properly relied on this single piece of mitigation *after* properly considering all of the mitigating and aggravating factors (see *People v. Sanders* (1995) 11 Cal. 4th 475, 557), the admonition by the court contained in the supplemental instruction would have likely led the holdout and the majority jurors to believe that it was inappropriate to do so.

Because the supplemental instruction focused on the subject for which there was likely disagreement between the holdout and the majority jurors, the portion that admonished that jurors "should not hesitate to change" their position if they are "convinced it is *wrong*" would have been read by the holdout as being leveled at him/her. (*United States v. Sae-Chua*, *supra*, 725 F.2d at p. 532.) The admonition would have likely served to underscore that the holdout was wrong to maintain his/her differing view of the evidence. Indeed, it is very likely that the rest of the jurors thought so as well, and in turn relied upon the admonition to convince the holdout that he/she was wrong which ultimately resulted in the holdout changing his/her vote.

Similarly, the admonition paraphrasing former CALJIC No. 17.41.1 would have likely been used by the majority as a lever to cause the holdout

to relinquish his/her views in favor of the majority. The relevant portion of the supplemental instruction in this regard admonished the jurors that:

> "It is important that all jurors both understand as well as follow the law. If a juror or jurors do not understand the law, the court will continue to attempt to clarify it. *If a juror or jurors refuses or fails to follow the law, the court should be notified of that fact. If any juror, whether in the majority or the minority, cannot, in good conscience, follow the law, it is the duty of the juror or jurors to notify the court of that fact.*"

(XIV CT 3884, 75 RT 8414-8415, emphasis added.)[72] As this Court aptly noted, such an instruction would be misunderstood or used by a juror as a "tool for browbeating other jurors." (*People v. Engleman*, *supra*, 28 Cal.3d at p. 445.) The adverse impact of this admonition was twofold: it likely led the majority jurors to believe that mere disagreement during deliberations constituted misconduct and it provided the majority jurors with a means to cut short discussion by threatening to call upon the court yet again to resolve normal disagreements. (*People v. Engleman*, *supra*, 28 Cal.4th at p. 447.) This particular admonition would have validated the act of notifying the court about the holdout juror's difference of opinion. More importantly, the admonition would have been read by the holdout and the other jurors as a message from the court that the holdout was in fact refusing or failing to follow the law.

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[72] As set forth in *People v. Engleman*, *supra*, 28 Cal.4th at p. 441-442, former CALJIC No. 17.41.1 stated in full: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

It is notable that the admonition similar to CALJIC No. 17.41.1 was given only after the jury had informed the court they were deadlocked eleven to one. It therefore cannot be said that the risk of intrusion on the jury's deliberations presented by the admonition was not realized. (See *People v. Engleman*, *supra*, 28 Cal.4th at pp. 440, 447.) The admonition, along with the supplemental instruction as a whole, must have had an adverse impact on the course of the jury's deliberations. (*Jimenez v. Myers*, *supra*, 116 F.3d at pp. 980-981.) Indeed, the fact that the jury understood it was required to report any juror who was refusing or failing to follow the law was likely incentive enough for the holdout to relinquish his/her honestly held view of the evidence.

The holdout must have felt undue pressure by the multiple admonitions contained in the supplemental instruction set forth above. However, that pressure likely increased when the court included the admonishment that a "penalty phase determination is not an unguided, arbitrary exercise in raw emotion" and that the "decision must be based on a calm, rational assessment of the evidence." As noted above, the day before the deadlock as to penalty was announced the jurors requested to be excused from their deliberations early to allow "feelings to calm down." (XIV CT 3880; 75 RT 8407.) It is likely the contentious deliberations were centered around the holdout's disagreement with the majority. Because the jury had notified the court that they were eleven to one, this subsequent admonition by the court would have been read as being directed at the lone juror who was holding up the penalty determination. It would not have been lost on the holdout that the court was likely of the belief that the holdout's honest determination of penalty constituted an "unguided, arbitrary exercise in raw emotion" rather than based a "calm" or "rational

assessment of the evidence." This particular admonition was also undoubtedly used as ammunition by the majority jurors to pressure the holdout to capitulate.

The trial court also failed to take appropriate steps to ameliorate the coercive impact of its supplemental instruction. Although the instruction informed the jurors that it was not intended to suggest an outcome, or that the court was expressing an opinion as to the appropriate outcome, it did not properly caution the jurors to not give up their conscientiously held beliefs simply to return a verdict. (*Jimenez v. Myers*, *supra*, 40 F.3d at p. 981, fn. 5.) Nor did it inform the jurors that no verdict was required and that they had the right not to agree. (*Jenkins v. United States*, *supra*, 380 U.S. at p. 446; *United States v. Hernandez-Albino*, *supra*, 177 F.3d at pp. 36-39.) Where, as here, the jury was divided eleven to one for death, the trial court's failure to counter-balance the adverse impact of the supplemental instruction strongly suggests that the jury was impermissibly coerced to render a unanimous verdict. (*Jimenez v. Myers*, *supra*, 40 F.3d at p. 981.)

As this Court has repeatedly stressed, "[c]ourts must exercise care in responding to an allegation from a deliberating jury that one of their number is refusing to follow the court's instructions or is refusing to deliberate." (*People v. Engleman*, *supra*, 28 Cal.3d at p. 445; *United States v. Symington*, *supra*, 195 F.3d at pp. 1086-1087.) Although the foreperson did not expressly state that the holdout was refusing to follow the court's instructions or to deliberate, the trial court here apparently adopted that interpretation with regard to the deadlock.

In this case, the totality of the circumstances show that the supplemental instruction by the court constituted a defacto *Allen* charge which unduly interfered with and coerced the jury's unanimous verdict of

death. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 238-241; *Weaver v. Thompson*, *supra*, 197 F.3d at p. 366.) Prior to giving the instruction, the court was well aware of the numerical division of the jury and that only one of the jurors was of the view death should not be imposed. Notwithstanding that knowledge, the court acted upon what it believed to be mental processes of the holdout juror and gave the jury a supplemental charge which effectively coerced the holdout to acquiesce to the majority and the jury to render a unanimous penalty verdict. The admonitions themselves, as well as the failure of the court to give cautionary instructions to the jury that they should not give up their conscientiously held beliefs in favor of a verdict and that they had a right to disagree, effectively told the jurors they had to reach a verdict. Finally, the penalty verdict was issued by the jury shortly after the supplemental charge was given. (See 75 RT 8419-8420; XIV CT 3878, XV CT 3985.)

The trial court did not exercise the care required of it in responding to the foreperson's note. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1255 [court inquiry of coercion between jurors would deprive jury room of free expression and pressure dissenting juror to conform vote to majority].) Instead, the court merely assumed what certain jurors wanted in sending their note and that the motivations of the holdout juror were premised on improper considerations. As noted above, it also acted on those assumptions, which was largely based on facts it was not entitled to have, and delivered a supplemental instruction that was designed to coerce the holdout juror to relinquish his/her honest belief as to which penalty was appropriate given the facts in this case. These acts constituted an impermissible intrusion into the secrecy of the jury's deliberations. (*United States v. Thomas*, *supra*, 116 F.3d at pp. 620-622.) Moreover, the court's

actions and the supplemental instruction had a coercive and adverse impact the course of the jury's deliberations. (*People v. Gainer, supra*, 19 Cal.3d at p. 997; *Weaver v. Thompson, supra*, 197 F.3d at pp. 365-366.)

D. The Supplemental Instruction Effectively Told the Jurors, and Particularly the Holdout Juror, That Evidence of Appellant's Relationship with His Family Could Not Be Considered in Their Penalty Determination

A fundamental aspect of death penalty jurisprudence is that a fair, reliable, non-arbitrary and individualized sentencing determination requires that the jury be permitted to consider all relevant mitigating evidence proffered by the defendant. As the United States Supreme Court has stated, "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; accord, *Penry v. Johnson* (2001) 532 U.S. 782, 797 [Eighth Amendment requires capital jury consider any relevant mitigating circumstance defendant offers as basis for sentence less than death]; *Skipper v. South Carolina* (1986) 476 U.S. 1; *People v. Harris* (2005) 37 Cal.4th 310.) To pass constitutional muster, the trial court's instructions must convey to the jury that "factor (k)" compels it to consider all relevant mitigating evidence proffered by the defense as a basis for a sentence less than death. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) "When any barrier, whether statutory, instructional, evidentiary, or otherwise (see *Mills v. Maryland* (1988) 486 U.S. 367, 374-375) precludes a jury or any of its members (*McKoy v. North Carolina* [(1990)] 494 U.S. [433,] 438-443) from considering relevant mitigating

evidence, there occurs federal constitutional error . . . ." (*People v. Mickey* (1991) 54 Cal.3d 612, 693.)

In *Eddings v. Oklahoma* (1982) 455 U.S. 104, the United States Supreme Court held that a trial court's refusal to consider the defendant's family history and mental and emotional disturbance in mitigation violated the Eighth and Fourteenth Amendments. (*Id.*, at pp. 113-117.) There, the court stated in relevant part:

> "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer . . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

(*Id.*, at pp. 113-114.)

In this case, the defense presented substantial evidence that family members and those close to him loved him and wanted him to live. This evidence, which could be classified as one type of mitigation under Penal Code section 190.3, subdivision (k), was presented through the testimony of appellant's mother, father, sister, brother, four of his children and two of the mothers of his children. (See 72 RT 7969-7991; 7994-8003; 8003-8007; 8007-8011; 8029-8035; 8076-8078; 8086-8088; 8088-8091; 8091-8094; 8094-8096.) This evidence constituted relevant mitigating evidence which the jury was entitled to consider in making their penalty determination. (*People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

Any significance the jury could have given to the mitigating effect of this evidence was eviscerated by the supplemental instruction provided by

the court in response to the jury's note about the deadlock and the holdout juror's reluctance to impose a death verdict. As noted above, the court assumed that the holdout juror's motivations for his/her reliance on the evidence of appellant's relationship with his children were premised on improper reasons. This being the case, the court's supplemental instructions insured that if the holdout believed the evidence was relevant for the proper reasons – that the evidence evinced sympathy for appellant *as well as* for his children – the court's instruction had the effect of convincing the juror otherwise. Moreover, to the extent that the holdout had any chance to convince other jurors to adopt his/her view of the mitigating and aggravating evidence based on the character of appellant as it related to his family, that chance was virtually eliminated by the supplemental instruction. (See *Weaver v. Thompson, supra*, 197 F.3d at p. 366 ["In effect the minority jurors were told they had two choices: give in to the majority position, or manage the same coup pulled off by Juror #8 in *Twelve Angry Men*."].)

As noted above, the primary focus of the supplemental instruction was mitigating evidence of appellant's character as established by his relationship with his family. The admonition on this subject given by the court was arguably a correct statement of law. However, the court's special emphasis on that evidence alone, would have caused the holdout, as well as the majority jurors, to believe that the court believed that he/she was not properly performing his/her duty. This was especially so given the context within which the admonition on this mitigating evidence was given.

The trial court's instructions must convey "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." (*Buchanan v. Angelone* (1998) 522 U.S. 268, 276, citing *Penry v. Lynaugh, supra*, 492 U.S. at pp.

317-318; *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 113-114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Prior to the specific portion of the instruction relating to evidence of appellant's relationship with his family, however, the jury was twice warned that it was "inappropriate" and "improper" for any juror to "single out" "one piece" of evidence or "one" aggravating or mitigating factor in making their penalty determination. Regardless of the subsequent qualification relating to the circumstances under which a penalty determination could be based on family relationship mitigation evidence, it could be reasonably construed by the jurors that holdout was doing exactly what the jurors were expressly told not to do. Indeed, the holdout would have interpreted the court's admonition to mean that he/she could not base the penalty determination on the weight of the single mitigating factor of appellant's relationship with his family under *any* circumstances. (See Argument XXX, where appellant argues that the court's failure to give his instruction that a single mitigating factor could support a penalty less than death violated appellant's constitutional rights.)

The jury only deliberated for a very short time after receiving the supplemental instruction – approximately 25 minutes before being excused for the weekend on Friday and 10 minutes on Monday. (See XIV CT 3878; XV CT 3985.) This supports the conclusion that the court's admonitions regarding the family relationship mitigating evidence and its additional admonitions on deliberating were not only unduly coercive, as noted above, but also had a chilling effect on the discussions which followed with regard to consideration of that mitigating factor by the jury, and in particular the holdout. This was especially so because the supplemental instruction included the admonition paraphrasing former CALJIC No. 17.41.1, which effectively validated the majority for reporting the holdout to the court and

reinforced a view that the holdout was either refusing or failing to follow the law.

Under section 190.3, subdivision (k), the jury must consider any "'aspect of [the] defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.' " (*People v. Easley* (1983) 34 Cal.3d 858, 878-879, fn. 10, quoting *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant presented compelling and significant evidence of his character as it related to his positive relationships with his family, and in particular, with his children. Under the circumstances of this case, it is reasonable to conclude court's admonition regarding the mitigating evidence of appellant's character based on his relationship with his family effectively precluded consideration of the evidence by the jurors. Based on the jury's note announcing the deadlock, it is reasonable to conclude that the mitigating evidence of appellant's character as it related to his children was a compelling factor for the holdout juror prior to the delivery of the supplemental instruction. The court's supplemental instruction, however, deprived appellant of his constitutional right to have the jury consider any relevant factor of mitigation with regard to the determination of penalty. (*Skipper v. South Carolina*, *supra*, 476 U.S. 1.)

E. Reversal of the Penalty Verdict Is Required

The trial court's actions and supplemental instruction with regard to the jury's note about the deadlock constituted an impermissible intrusion into the jury's penalty deliberations, were unduly coercive and improperly served to preclude the jury's consider of compelling defense mitigation. In so doing, the trial court subverted the basic guarantees of trial by jury (see *Turner v. Louisiana*, *supra*, 379 U.S. at pp. 472-473) and interfered with the fact-finding role of the jury (*United States v. Thomas*, *supra*, 116 F. 3d at p.

622). The timing and nature of the court's supplemental instruction, and particularly because it was focused on the very issue which it was led to believe was the reason the lone holdout juror could not vote for death, undermined the jury's independent judgment and coerced the unanimous verdict. (*People v. Gainer*, *supra*, 19 Cal.3d at pp. 848-849.) As such, the court's actions and instruction were inherently prejudicial, and constitutes reversible per se error. (*Id.*, at pp. 854-855; *Jimenez v. Myers*, *supra*, 40 F.3d at p. 981; *Turner v. Louisiana*, *supra*, 379 U.S. at p. 474; see *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 307-308.)

Even assuming that the error is not found to be per se reversible, it cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) As set forth above, the court's actions and instruction were in response to the jury's notification that they were deadlocked eleven to one and that the lone holdout juror's inability to impose the penalty of death was "based on the children." Rather than merely instruct the jury to continue to deliberate, the trial court here pressured the dissenting juror to conform his/her vote to the majority. (Compare *People v. Johnson*, *supra*, 3 Cal.4th at p. 1255.) This was especially so given that the instruction given by the court was directed at the very reason it was led to believe the lone holdout was unable to vote for death – "based on the children." Not only did the instruction place undue emphasis on what was presumably the central issue of dissension between the jurors, but it was structured in such a way so as to strongly infer that the holdout was improperly relying on that single factor of mitigation and refusing or failing to follow the law because of it.

Under the totality of the circumstances, the court's actions and instructions amounted to a defacto *Allen* charge which not only instructed

the jurors to work towards unanimity but also coerced the lone holdout juror to reexamine his/her views in favor of the majority. (*Jimenez v. Myers*, *supra*, 40 F.3d at pp. 980-981; see *Weaver v. Thompson*, *supra*, 197 F.3d at pp. 365-366.) Moreover, as set forth above, the multiple admonitions contained in the instruction could only be construed as applying to any strongly held view of the mitigating evidence of appellant's character and his relationship with his family and effectively precluded the jury from considering and giving effect to appellant's most important mitigation evidence. It is therefore reasonably probable that the jury applied the trial court's coercive instruction in such a way that prevented the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 377-380.) Because the mitigation evidence of appellant's character as it related to his relationship with his family was significant in this case, it cannot be said that the court's actions and instruction was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Accordingly, reversal of the penalty determination is required.

XXXI

THE INSTRUCTIONS 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 as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the 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."

(XV CT 3902-3903; see 74 RT 8306-8309.)

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 and 14th Amends.), and to a reliable penalty determination (U.S. Const., 8th and 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." (XV CT 3903; 74 RT 8308-8309.) Thus, the decision whether to impose death hinged 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, and 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.)[73]

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 this instruction, like the one in *Breaux*, uses that

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[73] 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.)

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.)[74]

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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[74] 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 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 and 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. (Penal Code Section 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.)[75]

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-

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[75] 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 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.

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 Penal Code 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*, (1980) 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*, *supra*, 508 U.S. at p. 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.)[76] 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

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[76] 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* (1985) 40 Cal.3d 512, 544, fn. 17.)

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 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 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 and 14th Amends.; Cal. Const., art. I, § 17; *Furman v. Georgia* (1972) 408 U.S. 238). The death judgment must therefore be reversed.

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.)[77] 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

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[77] This argument alleges that the instruction was deficient under the rules of law currently applied by this Court. In AOB, Argument XXIV, § D, 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.

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 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 and 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.

XXXII

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.[78] 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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[78] 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. Daye* (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 June, 2006) at <http://www.amnesty.org>.)[79]

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*

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[79] Many other countries including the Philippines, almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes.

(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"].)

Even 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.

CONCLUSION

For all of the reasons stated in appellant's Opening Brief, his Reply Brief, and this Supplemental Brief, appellant's convictions and death judgment must be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Susan Ten Kwan, am the Deputy State Public Defender assigned to represent appellant, Andre Alexander, 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 supplemental opening brief is 53.710 words in length excluding the tables and certificates.

Dated: September 17, 2006

Susan Ten Kwan

SUSAN TEN KWAN

DECLARATION OF SERVICE

Re: *People v. Alexander* No. S053228

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 true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Richard Breen, D.A.G.
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Each said envelope was then, on September 18, 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.

Executed on September 18, 2006, at San Francisco, California.

_____
DECLARANT