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SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff/Respondent,)
)
v.)
)
NATHAN VERDUGO,)
)
Defendant/Appellant.)
)

No. S083904

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY
SUPERIOR COURT CASE NO. BA105622-01

THE HONORABLE CURTIS B. RAPPE, JUDGE

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VerdugoReplyBrief

DEATH PENALTY

SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S083904
	)	
Plaintiff/Respondent,	)	
	)	APPELLANT'S
v.	)	REPLY BRIEF
	)	
NATHAN VERDUGO,	)	
	)	
Defendant/Appellant.	)	
___________________________________	)	

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Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (Revised Edition, February 2003).
Guideline 4.1, section A.1. 2

I. INTRODUCTION

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

II. ARGUMENT: PRE-TRIAL ISSUES

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR OF CONSTITUTIONAL MAGNITUDE WHEN IT DENIED APPELLANT'S APPLICATION FOR SECOND COUNSEL.

In the opening brief, appellant demonstrated that the trial court committed prejudicial error of constitutional magnitude when it denied his well-founded request for

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

representation by a second counsel. (AOB 82-100.) Respondent's contrary argument (RB 77-80) is not meritorious.

The need for second counsel in a capital case cannot be overstated. The American Bar Association has adopted guidelines for the representation of defendants in capital cases. "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (Revised Edition, February 2003), Guideline 4.1, section A.1., states that, "The defense team should consist of no fewer than two [qualified] attorneys..." (Id., p.952.) "The defense team should include at least two attorneys..." There should be a "lead counsel" and "one or more associate counsel." (Guidelines, 10.4, "Commentary," p.1002, 1003.) And, "In most cases, at least as trial approaches, the provision of high quality representation will require at least some contributions by additional lawyers -- for example, a specialist to assist with motions practice and record preservation, or an attorney who is particularly knowledgeable about an area of scientific evidence." (Id., p.1003-1004.) These guidelines have been cited with approval in numerous cases.[2] Thus,

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[2] As stated, the A.B.A.'s death penalty representation guidelines have been cited with approval by the courts. In *In re Lucas* (2004) 33 Cal.4th 682, 723, 16 Cal.Rptr.3d 331, 362, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 524, 123 S.Ct. 2527, 2536-2537, this Court noted that, "the standards for capital defense work articulated by the American Bar Association...[are] standards to which we long have referred as "guides to determining what is reasonable."'"" (Accord, *Strickland v. Washington* (1984) 466 U.S. 668, 688, 104 S.Ct. 2052, 2065; *Hamblin v. Mitchell* (6th Cir.2003) 354 F.3d 482, 486.)

The 1989 Guidelines state, "In cases where the death penalty is sought, two qualified attorneys should be assigned to represent the defendant." (Guideline 2.1.) The 1989 Guidelines reflected the "'prevailing norms'" and the 2003 Guidelines merely

under the ABA guidelines, the request for second counsel, which was eminently reasonable and necessary, should have been granted.

Regarding appointment of a second counsel in a capital case, the Court stated in *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 253, 180 Cal.Rptr.489, 495, "[i]f it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request." (Accord, *People v. Roldan* (2005) 35 Cal.4th 646, 686, 27 Cal.Rptr.3d 360, 391-392.) "The right of a capital defendant to the resources necessary for a full defense must be carefully considered, and the demands of pretrial preparation in a complex case weigh in favor of appointing an additional attorney." (*People v. Lancaster* (2007) 41 Cal.4th 50, 71, 58 Cal.Rptr.3d 608, 626.) Indeed, capital cases necessarily "raise complex additional legal and factual issues beyond those raised in an ordinary felony trial" and "the difficulty of preparing for trial '[is] compounded...by the inherent problem...of simultaneous preparation for a guilt and a penalty phase of the trial.'" (*People v. Bigelow* (1984) 37 Cal.3d 731, 743, 209 Cal.Rptr. 328, 334.) Here, appellant's counsel made more than a sufficient showing for appointment of a second counsel.

In his declaration in support of the application, defense counsel declared that a second attorney was required because, "[t]he facts and issues involved in this case are sufficiently complex to necessitate the appointment of second counsel in order to

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explained those norms in "greater detail." (*Hamblin v. Mitchell, supra*, 354 F.3d at 487.)

facilitate the preparation required for a timely trial." (12CT 3067.) Second counsel was required to assist trial counsel in developing "the numerous viable defense issues." (12CT 3075.) Lead counsel could not do so on his own. Second counsel was necessary to interview witnesses, assist with motions, and investigate guilt phase evidence. In order to "...maintain the requisite client rapport throughout the guilt phase, second counsel was needed to collect penalty phase information and mitigating evidence. Trial counsel conceded that he had "weaknesses" that would be compensated for by appointment of Mr. Beswick, the suggested second counsel. (12CT 3075-3077.) While counsel did not specify those weaknesses (which certainly became apparent at trial (see RT 1377, 1379, 1925, 1983-1989, 2031-2032, 2109, 2200, 2814, 3932-3935, 5977-5986)), the trial court should have accepted this admission at face value, without further elaboration. The case involved numerous witnesses. Appellant's account of the facts conflicted with that of other witnesses. Issues regarding Donna Tucker's credibility were present. Numerous witnesses -- obviously the individuals included in the police reports and other discovery -- had to be interviewed. Experts needed to be obtained in a timely manner and their opinions had to be carefully analyzed. Penalty phase mitigation evidence had to be collected. In contrast to *Lancaster,* "a review of the entire record" demonstrates that the instant case was extremely complex. (41 Cal.4th at 173, 72-73, 58 Cal.Rptr.3d at 627.)

In further contrast to *Lancaster*, the attorney (Mr. Artan) in that case who had requested appointment of second counsel was allowed to withdraw from representation

prior to the start of trial and did not represent the defendant at the trial. (41 Cal.4th at 65, 58 Cal.Rptr.3d at 622.) Thus, whether that attorney required second counsel is irrelevant. The attorney who eventually represented the defendant (Mr. Rothman) did not require second counsel. Also, assuming Artan's need for second counsel is somehow relevant, he brought that need upon himself by agreeing to represent the defendant pro bono and by thereafter taking other cases which impaired his ability to effectively represent the defendant. (41 Cal.4th at 61-66, 58 Cal.Rptr.3d at 618-622.)

In arguing that appellant did not make the necessary showing for appointment of *Keenan* counsel, respondent relies on *People v. Staten* (2000) 24 Cal.4th 434, 446-447, 101 Cal.Rptr.2d 213, 220-222. Respondent claims that appellant's counsel "presented no specific, compelling reasons for such appointment" and only made "'abstract assertion[s]'" of need for second counsel. But, counsel's request for *Keenan* counsel was supported by a detailed, particular explanation as to why such counsel was required: there were complex issues; counsel had weaknesses; investigation and interviewing witnesses had to be accomplished; penalty phase investigation was necessary; motions needed to be drafted. Second counsel was "necessary in order to adequately assist in supervising and assimilating information and facts developed by investigators, both law enforcement and defense, from witnesses involved herein, and from experts, as well as to adequately interview witnesses and prepare the necessary motions and the subsequent hearing." Counsel anticipated "many lengthy pre-trial motions, hearings and writs...[and] [s]econd

counsel is necessary to assist in the preparation of these motions and related documents."

(CT12: 3067.)

Counsel declared,

> "[T]his particular case involves issues of such legal complexity, that adequate representation will require extensive research and motion practice preceding trial. The time constraints will mandate that both first and second counsel be thoroughly experienced in capital defense and have access to extensive motion files directed to issues concerning cases involving special circumstances. ROBERT H. BESWICK more than meets this requirement based upon his prior experience. ROBERT H. BESWICK's experience, in capital cases, also includes post conviction remedies, appeals, writs and habeas corpus petitions. The legal issues with which the defense will be confronted in the instant case, lend great importance to ROBERT H. BESWICK's prior experience pursuing pre-trial writs." (12CT 3068.)

Defense counsel also declared:

> "Preparation for the guilt phase will involve not only an investigation of the conduct and acts of the various parties on the date of the crime but also over an extensive period extending both before and after the date of the crime. This will require the accumulation of information from a wider range of sources and will necessitate both conducting interviews of numerous witnesses whose whereabouts may be difficult to trace and locating and organizing records from numerous agencies. These interviews must be conducted by an attorney familiar with all the facts of the case.
>
> In addition to the numerous viable defense issues which should be thoroughly prepared prior to the guilt phase, there exist penalty phase mitigating factors and issues which are highly involved and complex. The investigation and preparation for the penalty phase should be commenced without delay. It will be necessary to conduct prolonged

> interviews with the defendant on issues relating solely to the penalty phase. The defendant needs to be assured that he has an attorney who is actively pursuing the guilt phase, thereby necessitating the appointment of a second counsel to conduct the penalty phase interviews while enabling lead counsel to maintain the requisite client rapport throughout the guilt phase.
>
> Based upon the foregoing, it is submitted that second counsel will lend necessary assistance, both in the preparation and in the presentation of this matter for motions and trial including guilt and penalty phase. Therefore, counsel requests that second counsel be appointed for legal research, motion preparation, assisting in the direction of the investigation and presentation of motions and evidence, consultations with the defendant and witnesses and courtroom assistance." (12CT 3067-3068.)

Here, counsel fully satisfied *Staten*'s requirement of specific assertions of need.

Appellant explained that the fact counsel had been retained was not a proper factor upon which to base the denial of a request for *Keenan* counsel. (AOB 92-98.) Respondent claims this fact was "relevant" because, since counsel had been retained, "there was no need to consider whether second counsel should be appointed to perform representation for which trial counsel was retained." (RB 80.) But, as the authorities cited by appellant make clear (AOB 92-98), appellant is entitled to a fair trial even where he has retained counsel. He was "constitutionally entitled to those defense services for which he demonstrate[d] a need" (*People v. Worthy* (1980) 109 Cal.App.3d 514, 520, 167 Cal.Rptr.402, 406) regardless of whether he has retained counsel. Here, appellant demonstrated a dire need for the appointment of second counsel.

In denying the request for second counsel, the trial court stated: "There is nothing presented to this Court that would indicate the agreement between defendant and counsel was for anything less than full representation of the defendant during all proceedings." (12CT 3029.) Respondent baldly states that counsel was retained for the entire representation. (RB 80.) However, counsel's request for and declaration of need for second counsel, coupled with appellant's declaration of indigency, provided more than sufficient and proper grounds for the appointment of second counsel and in essence was a statement that the retainer in no way precluded the need for additional assistance. Where counsel requires assistance in order to provide effective representation in a capital case, it should make no difference whether counsel is retained or appointed. The Constitution makes no such distinction.

The trial court prejudicially denied appellant's application for second counsel. As a result, his rights to due process, a fair trial, effective assistance of counsel, reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15 and 17 were violated. Reversal is required.

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III. ARGUMENT: GUILT PHASE ISSUES

A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT EXCLUDED EVIDENCE THAT THE INVESTIGATING OFFICERS HAD BEEN SUSPECTED OF FABRICATING EVIDENCE; REVERSAL IS REQUIRED.

Appellant established that the trial court prejudicially erred and violated his constitutional rights when it denied his request to introduce probative evidence as to why he had the eyeglasses (Def. Ex. B) fabricated, i.e., as a misguided attempt to counter (1) what he believed was evidence fabricated by the police, and (2) Donna Tucker's lying. (AOB 100-108.) Respondent claims there was no error and no prejudice. (RB 80-87.) The claims are not well-taken.

A defendant in a criminal case has the fundamental constitutional right to due process and a fair trial. (*Chambers v. Florida* (1940) 309 U.S. 227, 236-237, 60 S.Ct. 472, 477.) A critical component of due process is the right to present a defense. (*People v. Jones* (1990) 51 Cal.3d 294, 320-321, 270 Cal.Rptr.611, 658; *Washington v. Texas* (1967) 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 ["...the right to present a defense, the right to present the defendant's version of the acts as well as the prosecution's to the jury so it may decide where the truth lies."])

In conjunction with presenting a defense, "a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor..." (*People v. Marshall* (1996) 13 Cal.4th 799, 836, 55 Cal.Rptr.2d 347, 366; accord, *United States v. Scheffer* (1998) 523 U.S. 303, 308, 118 S.Ct. 1261, 1264 ["a defendant's right to present relevant evidence..."]; *United States v. Janis* (8th Cir.2004) 387 F.3d 682, 688

[same.]; Evidence Code secs.210, 351.) Here, evidence that the detectives were under investigation for fabricating evidence (see CT 2372) was relevant to appellant's state of mind when he "had them [the glasses] purchased." (RT 3563, 4568-4569.)

The trial court improperly and erroneously determined that the evidence the detectives were under investigation was not probative of appellant's state of mind. The trial court so ruled because *it*, not the jury, believed appellant's response was unreasonable. However, the propriety of appellant's actions is a question of fact for the jury. Because the trial court improperly decided the question as if it were one of law, it failed to exercise its discretion under Evidence Code section 352 regarding whether to admit the evidence. This action violated appellant's right to due process. (*People v. Downey* (2000) 82 Cal.App. 4th 899, 912, 98 Cal.Rptr.2d 627, 637 ["'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal.'"])

Respondent makes the same mistake as the trial court, arguing that "[a] reasonable response" to police fabrication of evidence would not include the creation and presentation of manufactured evidence. But, the reasonableness of appellant's conduct goes to the weight of the evidence, not its admissibility. The fact is that he had the glasses fabricated. The evidence was relevant and probative of appellant's state of mind and he should have been permitted to inform the jury regarding the reasons for their creation. Also, whether appellant's conduct was reasonable was a question of fact for the

jury, not respondent.

Respondent argues presentation of the evidence would have shown that the detectives had been exonerated regarding fabrication claims, "further showing the unreasonableness of appellant's panic and response." But, although panic may be unreasonable in hindsight, it is a natural human reaction. Appellant should have been allowed to present to the jury the reason for that panic.

Respondent claims presentation of the evidence would have entailed "undue amounts of time." However, "the right of a defendant to present evidence in his defense is so fundamental that consumption of time is irrelevant where the evidence is not cumulative." (*People v. Taylor* (1980) 112 Cal.App.3d 348, 365, 169 Cal.Rptr.290, 300.) Nor may relevant defense evidence be excluded "because the trial would be simpler without it." (*People v. McDonald* (1984) 37 Cal.3d 351, 372, 208 Cal.Rptr.236, 250.) Here, the proffered evidence was not cumulative nor was "the main thrust" of appellant's reason for having the glasses manufactured communicated to the jury, as respondent claims. If the presentation of the evidence, which was so critical to appellant's defense, somehow became unduly time consuming, the trial court readily could have stepped in to expedite presentation of the evidence.

Respondent argues that, "[a]pplication of ordinary rules of evidence such as Evidence Code section 352 does not implicate the federal Constitution." (RB 84.) This, however, is not necessarily so. As stated in *People v. Cunningham* (2001) 25 Cal.4th

926, 998-999, 108 Cal.Rptr.2d 291, 347-348, "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense." (Emphasis original; accord, *People v. Babbitt* (1988) 45 Cal.3d 660, 684, 248 Cal.Rptr.69, 81.) Indeed, rules regarding the exclusion of probative evidence "'should be used only sparingly[,] and the balance 'should be struck in favor of admissibility.'" (*United States v. Edouard* (11th Cir.2007) 485 F.3d 1324, 1344, fn.8.) Section 352 may not be relied upon to insulate a prejudicial denial of due process.

Contrary to respondent's claim (RB 84-87), the trial court's exclusion of the evidence was extremely prejudicial to appellant. The prosecutor used the absence of an explanation for appellant's conduct against him. (29 RT 5402-5411, 5420-5422, 5554-5557.) Without the evidence, the jury had no factual basis for appellant's belief that he was being set up or framed by the police. In the absence of appellant's explanation for creation of the glasses, the jury would certainly find him to be untruthful, would thus ignore his exculpatory testimony, and would draw inferences of consciousness of guilt. Evidence of appellant's reason for having the glasses manufactured would have dispelled the inference that they were made in an effort to cover up guilt.

Respondent also states there was no prejudice because, or so respondent claims, the evidence of appellant's identity was "overwhelming." (RB 84.) Not so. Fireman Quintana testified that the suspect was wearing a "copper-colored shirt and black pants."

(12RT 2083-2086, 2094-2099.) The night of the incident, appellant was wearing a blue shirt and white shorts. (7-9RT: 1253, 1259, 1380-1281, 1287-1288, 1393-1394, 1485, 1517, 1531, 1549.) Quintana said the suspect was dark skinned; appellant is "fairly light-skinned." (12RT 2098-2099, 2115-2118.) The evidence was not overwhelming.

The exclusion of the evidence that the detectives were being investigated, which was the reason for appellant's creation of the glasses, was severely prejudicial and violated appellant's constitutional rights. Reversal is required.

B. THE PROSECUTOR COMMITTED PREJUDICIAL *BRADY* AND STATUTORY DISCOVERY ERROR; REVERSAL IS NECESSARY.

1. Introduction

As stated in *People v. Bell* (2004) 118 Cal.App.4th 249, 256, 12 Cal.Rptr.3d 808, 813:

> "It is axiomatic that a trial is a search for the truth. [Citation.] Procedural rules, including those of discovery, are designed to ensure that the search is fair, reasonably pursued, and based on reliable information. The rationale behind California's discovery statute is that neither side should be allowed to engage in, or be subjected to, a trial by ambush."

Appellant demonstrated these fundamental principles of fairness were violated and that he was prejudiced as a result of the prosecutor's numerous *Brady*[3] and statute-mandated discovery violations. (AOB 108-125.) As a result of these numerous violations, and the trial court's failure to take appropriate remedial action, defense

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[3] *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194.)

counsel was forced to defend the charges on the fly and in a piecemeal manner. As the trial court stated to the prosecutor, "It seems like every expert you're putting on is expressing an opinion that he [defense counsel] hasn't been provided before and it really puts him in a difficult position." (14RT 3625.) Respondent claims there were no *Brady* discovery violations. (RB 87-121.) The claim is not well-taken.

2. <u>The prosecution's discovery responsibility</u>

Under *Brady v. Maryland, supra,* 373 U.S. 83, 83 S.Ct. 1194, the prosecution is required to disclose to the defense any evidence exculpatory of or favorable to the defendant. Evidence is material for *Brady* purposes "'...if there is a reasonable probability that, had [it] been disclosed to the defense, the result...would have been different.'" (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1212, 60 Cal.Rptr.3d 624, 629.) Under the California discovery statutes (Penal Code sec.1054, et seq.), the prosecution must disclose both inculpatory and exculpatory evidence. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-376, 285 Cal.Rptr.231, 242-244.) Here, these fundamental principles of fairness and due process were violated by the prosecution's failure to provide timely discovery.

3. The prosecution violated its constitutional *Brady* obligation and <u>the trial court failed to properly remedy these violations.</u>

In this case, the *Brady* and discovery violations were numerous and egregious. Because of those violations, trial counsel faced a vastly different prosecution case at trial than the one he had attempted to prepare to defend against. "Ambush" is an under-

statement. These violations included:

- the failure to provide to the defense notes of witness Muro's interview in which he stated that he overheard appellant make an inculpatory statement;
- the failure to disclose Detective Walton's opinion that the white markings on the victim's car could, in fact, have come from appellant's dark-colored car;
- the failure to disclose the Detective Teague's opinion that, when the shots were fired, the shooter was facing the fire station, thus bolstering the firemen's questionable claim that they saw and could describe the suspect;
- the failure to disclose that witness J.P. Hernandez had suffered a felony arrest, that the prosecution had "some notes" on him, including indications that Hernandez had stated that "licensed professionals" were "liars" or something similar;
- the failure to disclose witness Donna Tucker's claims that she was threatened by members of the Verdugo family;
- the failure to turn over notes of Donna Tucker's statements, including that appellant had worked on two different automobiles, which supported the prosecution's theory that appellant had altered the appearance of his vehicle and that appellant's car had had louvers on it, as the fireman had testified the perpetrator's car had had; and

- the failure to disclose that the prosecution had paid to relocate Donna Tucker and had provided her with rent and expense money.

These violations related to key witnesses against appellant, and in many cases the information was only revealed by the witness's testimony on the stand, or even after the testimony was concluded. Trial counsel strenuously protested these violations, including repeatedly requesting a mistrial (14RT 3622-3634, 21RT 3980-3992), arguing that appellant was suffering "a complete denial of due process," asking that testimony be stricken (17RT 3148-3150), and raising such issues in his motion for a new trial (10RT 2728-2739.) The remedies offered by the trial court, in most instances a continuance or a deferral of cross-examination of the witness to whom the violation pertained, were wholly inadequate. The Court's statement, for example, that in the middle of trial, trial counsel could "go out and get [an expert]..." to counter the opinion of Detective Teague, revealed for the first time on the stand, that the shooter had been facing the fire station (15RT 2787) was ludicrous.

Respondent continually complains, e.g., that "[a]ppellant has failed to identify how any error by the prosecution could not have been cured by a continuance." (RB 93.) But, any supposed "failure to identify" was the result of the prosecution's repeated violation of the discovery rules by providing discovery at the last minute. Thus, the rule stated in *Patterson v. Coughlin* (2nd Cir.1990) 905 F.2d 564, 570 is particularly apt: "[E]ven as to an issue on which the plaintiff normally has the burden of proof, it would be inappropriate

to rule that the defendant's should prevail where they have made proof impossible."

Furthermore, as appellant argued in his opening brief, an attorney in a capital case cannot be expected to prepare the case on the fly, or effectively respond to surprise evidence in a limited amount of time. Respondent would have counsel in a capital case, *in the middle of trial*, after opening statements were made and witnesses had been presented, scramble to find an expert in eyewitness identification, prepare materials for that witness to review, and potentially prepare that witness to testify. Respondent would have counsel similarly scramble to find an expert in paint transfer, prepare materials for the witness to review, etc. In addition, given the fact that many of these violations were made evident through a prosecution witness's direct testimony, it would be virtually impossible to keep from the jury the fact that the delay was being "caused" by the defense which would make the defense appear to the jury to be obstreperous and a cause of numerous delays.

a. The prosecutor's notes regarding Ray Muro

Penal Code section 1054.1, subdivision (f) requires the prosecutor to provide the defense with relevant statements of witnesses it intends to call at trial. The prosecutor interviewed Ray Muro on February 3, 1997. During the interview, Muro made his "situation is resolved" statement, referring to a comment supposedly made by appellant to Arevalo when they met after the party at Arevalo's house. Although the prosecutor may have told defense counsel orally of this statement, he conceded that he had not given

counsel a copy of his notes. A defendant is entitled to prompt discovery of such notes. (*San Diego Police Officers Ass'n. v. City of San Diego* (2002) 98 Cal.App.4th 779, 784, 120 Cal.Rptr.2d 609, 612.) To properly prepare his defense and to preclude being taken by surprise, appellant had the right to receive the prosecutor's notes regarding this supposed statement as soon as the notes were made, not months later. Merely being informed orally was not sufficient. The only appropriate sanction would have been to strike the statement, as appellant requested. Simply giving appellant "additional time before you cross this witness" (10RT 1927-1932) was not a sufficient remedy. By allowing the statement to remain, the trial court adversely affected appellant's right to defend himself and perpetuated the great prejudice caused by the statement.

Respondent argues that "[a]ppellant has failed to identify how any error by the prosecution could not have been cured by a continuance." (RB 93.) But, the trial court never stated it would grant a continuance. It merely said it would give appellant an unspecified amount of "additional time" before cross-examination. A continuance would, in any event, have been a wholly inadequate remedy. Trial counsel cannot be expected to prepare a capital case in a piecemeal, witness-by-witness, seat-of-the-pants manner. The only viable sanction for the prosecution's discovery violation was to strike Muro's "the situation is resolved" statement, as appellant requested.

b. Detective Walton's opinion regarding "paint transfer"

Appellant's car was dark-colored. The victims' car had white markings on it. From this evidence, the jury could readily infer that a car other than appellant's had collided with the victims' car, thus providing powerful evidence that appellant did not commit the charged offenses. But, as explained in the opening brief (AOB 120-121), at trial, for the fist time outside the presence of the jury, Detective Walton opined that the white, paint-like markings on the victim's red car might not be paint. (RT 13: 2446-2447.) This opinion had never been disclosed to the defense. Defense counsel was taken by surprise by this newly-disclosed opinion. Although Detective Walton was not a paint expert and did not present this opinion to the jury, had it been revealed in a timely manner, counsel may have been able to obtain an expert to testify that the white markings were, indeed, white paint from a white car. Also, aside from counsel's concern that he needed to consult an expert, and equally important, was his inability to rely upon arguments he intended to make as part of his defense, i.e., the marks were white and appellant's car was dark-colored.

Respondent again implies that the error could have been cured by a continuance. But, counsel cannot be expected to find and retain an expert in the middle of trial. And, having the expert study the evidence and render a report would be exceedingly time consuming. The trial court would not have granted a sufficiently long continuance to have enabled appellant to properly engage an expert.

c. Detective Teague's opinion regarding the direction of the <u>shots</u>

It was Detective Teague's opinion that, when the shots were fired, the shooter was facing the fire station. However, this critical opinion was never memorialized in a report and was stated for the first time at trial. (See AOB 111.) This is the type of discovery "gamesmanship" condemned by this Court in *In re Littlefield* (1993) 5 Cal.4th 122, 133, 19 Cal.Rptr.2d 248, 256: "[S]uch gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery." (Accord, *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165, 21 Cal.Rptr.3d 151, 157.) Teague's opinion should have been disclosed in a timely manner, regardless of the prosecution's failure to write a report.

Appellant was prejudiced by the prosecution's failure to disclose Teague's opinion, which was critical to the prosecution's case. The opinion bolstered the firemen's claim that they saw, and thus could describe, the suspect. Had counsel been informed in a timely manner before trial about this opinion, he would have consulted an expert and thus would have been prepared to effectively deal with Teague's damaging conclusion. The trial court's remedy -- "go out and get [an expert]" -- was no solution at all because, as this Court well knows, no expert could be retained and prepared on such short notice. Respondent's claim that "[a]ppellant...has failed to explain whether any expert would have provided an opinion contrary to that given by Detective Teague" is a specious argument. (RB 101.) The issue is not whether an expert would have rendered a different opinion; it is whether the prosecution failed to abide by its constitutional and statutory obligations, thus interfering with appellant's ability to defend himself at trial. Equally

specious is respondent's argument that it was incumbent upon defense counsel to ask the detective's opinion during conversation with him. (RB 100.) The "failure" was caused by the prosecution's discovery violation, not by appellant. Appellant should not be required to bear the burden of the prosecution's wrongdoing.

d. **Nondisclosure of the measurements of Escoto's car**

In an effort to disprove appellant's theory that Escoto and/or Muro were the shooters, the prosecution introduced evidence regarding measurements of Escoto's car and evidence of acceleration marks left at the scene by the suspect's car, which supposedly demonstrated that Escoto's car could not have been that of the perpetrator. But, the prosecution failed to disclose this critical evidence to the defense in a timely manner. This unjustified failure and gamesmanship resulted in counsel being taken by surprise. He was unable to effectively counter this newly disclosed evidence. As counsel stated, the discovery violated resulted in "a complete denial of due process." (17RT 3148-3150.) A continuance would not have been an effective remedy. Once again, counsel cannot be expected to try a capital case on the fly, while being ambushed with new, undisclosed, damaging information. Appellant's mistrial motion should have been granted.

e. **Notes re J.P. Hernandez**

The trial court found a discovery violation regarding the prosecution's notes about J.P. Hernandez. Respondent tacitly concedes a discovery violation occurred. These

notes, inter alia, disclosed a prior felony arrest suffered by Hernandez. Had counsel received the information in a timely manner, he would have been able to effectively impeach the witness. Under section 1054.1, the prosecution must disclose a witness's felony convictions. (*People v. Martinez* (2002) 103 Cal.App.4th 1071, 1079, 127 Cal.Rptr.2d 305, 310; *People v. Little* (1997) 59 Cal.App.4th 426, 433, 68 Cal.Rptr.2d 907, 911.) Simply ordering the witness back was not an effective remedy for what was yet another discovery violation by the prosecution.

f. Failure to disclose expert opinions about various aspects of the alleged collision between the suspect's and the victims' vehicles

The trial court found that the prosecution had committed a discovery violation by failing to disclose in a timely manner Detective Walton's expert opinions regarding various aspects of the collision between the victims' and the suspect's vehicles. Based on this violation, appellant moved for a mistrial, which was denied. (19RT 3602-3634.) This was error. Had expert Walton's opinions been disclosed in a timely manner, counsel could have consulted an expert and would have been able to effectively cross-examine Walton and cast doubt on his opinions. As a result of the withholding of Walton's opinion, counsel could not effectively prepare his defense. Appellant's mistrial motion should have been granted.

g. Failure to disclose Donna Tucker's oral statements regarding being threatened

Donna Tucker, a critical prosecution witness, made various statements about purportedly having been threatened by the Verdugo family. (AOB 113, 122-127.) Respondent concedes that the evidence of these statements was not disclosed to appellant by the prosecution. (RB 110-112.) Respondent also concedes that there is "some authority" requiring the prosecution to disclose "unrecorded oral statements." (RB 112.)[4] There was a discovery violation. This violation was prejudicial to appellant because it prevented him from effectively preparing his cross-examination of Tucker. Had appellant's counsel had the necessary time to prepare, he could have effectively impeached her testimony.

h. Failure to turn over notes regarding Donna Tucker's statements

After the shooting, work was done on the CRX. Donna Tucker testified that appellant had previously worked on a Scout and a Volkswagen bug. (RT21: 3972-3976.) She also testified that the CRX had louvers on the back window. (RT21: 3980.) Fireman Jones had testified that the suspect's car had louvers. (RT12: 2202-2203, 2208-2210.) Defense counsel objected to this out-of-the-blue testimony and moved for a mistrial on the ground that he had never been provided with any discovery regarding the "Baja bug" or louvers. He stated he had information someone else had repaired the

[4] Penal Code section 1054.1, subdivision (f) provides that "written or recorded statements of witnesses" must be disclosed. But, in *People v. Roland* (2004) 124 Cal.App.4th 154, 165, 21 Cal.Rptr.3d 151, 157, the Court held that "witnesses' oral statements" to counsel must be disclosed under section 1054.1.

Scout. The prosecutor admitted that he had made notes regarding these points over a week earlier, yet had only just given them to counsel that day.

Respondent argues that there was no *Brady* violation because Tucker's testimony was not material because it "tended to harm the defense." (RB 116.) However, a prosecutor is not entitled to hide inculpatory evidence. Such evidence must be disclosed pursuant to the California discovery statutes. (Penal Code sec.1054 et seq.)

Respondent tacitly agrees that the prosecution's withholding of its notes regarding Tucker constituted a discovery violation, but claims the error was harmless. (RB 116-117.) Not so. As explained in the opening brief (AOB 120), prompt and timely disclose of the notes and surprise testimony regarding Tucker's claim that appellant had previously worked on cars and that the CRX had louvers on the back window would have provided defense counsel an opportunity to effectively counter her similar trial testimony. The previously undisclosed claim that appellant had worked on cars permitted the jury to infer that he had repaired his damaged CRX, which would show a consciousness of guilt. If the notes and information had been timely disclosed, counsel would have sufficient opportunity to fully and carefully investigate her allegations in order to prepare for cross-examination and to possibly lead him to call favorable witnesses. Any impeachment of Tucker, a critical prosecution witness, would have been of great benefit to appellant's case. Fireman Jones testified that the suspect's car had louvers. Knowing in advance that Donna was going to say the CRX had louvers would have allowed defense counsel to

effectively cross-examine her and to counter her claim that the CRX had louvers, which was made for the first time at trial. Such evidence would have shown that the Verdugo's CRX was not the suspect's car. The withholding of this critical, prejudicial evidence warranted a mistrial, as counsel requested, not just an admonition to "get your investigator." (21RT 3980-3992.)

i. Failure to disclose relocation of Donna Tucker

The prosecution paid to relocate Donna Tucker and provided her with rent and expense money.[5] Tucker was a pivotal witness against appellant. The relocation and payment evidence tended to impugn her credibility and show bias in favor of the

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[5] Respondent claims appellant has not shown any evidence that the prosecution provided Tucker with relocation funds or paid her rent. However, defense counsel stated, "...this wasn't given to me through discovery -- apparently Donna Verdugo was relocated prior to the time of trial. I think this information relates that she was given first and last months' rent and moving expenses..." (35 RT 6429.) The prosecutor agreed that this was the standard practice:

> "Mr. Duarte: Your Honor, as far as I know, our office authorizes these relocations. They go through district attorney investigators. And it's the same thing we do for all the witnesses whenever the witnesses have been threatened, we relocate them, give them first and last month's rent, moving expenses.
>
> I personally did not know that she had been relocated, but she had been relocated, and our office had, in fact, through the investigating officers, caused her to be relocated prior to trial." (35RT 6430.)

Clearly, there is evidence that the prosecution relocated Tucker, gave her money, and paid her rent.

prosecution. But, the prosecutor failed to disclose this evidence in a proper, timely manner. As defense counsel declared, "I was called after the trial by District Attorney Michael Duarte and I was told that Donna Verdugo was relocated at county expense." (10CT 2739.) For discovery purposes, the evidence was exculpatory and material. Thus, the prosecution was required under *Brady* and section 1054.1 to disclose to the defense that it had assisted in relocating Tucker and had paid for her rent and expenses. (*In re Pratt* (1999) 69 Cal.App.4th 1284, 1312, 82 Cal.Rptr.2d 260, 271; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380-1384, 66 Cal.Rptr.2d 494, 507-509.) When, after trial, defense counsel informed the trial court of the prosecution's failure to disclose this critical evidence, the trial court merely told the prosecution to produce it. (RT 35 6429-6431.) This was a woefully inadequate remedy for such an egregious, prejudicial discovery violation, which kept probative impeaching evidence from the jury. Appellant's new trial motion should have been granted.

3. The cumulative prejudice from the prosecution's numerous discovery violations requires reversal.

It is well-settled that "[a] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error..." (*People v. Hill* (1998) 17 Cal.4th 800, 844, 72 Cal.Rptr.2d 656, 681; accord, *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469 ["The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."]) Here, the cumulative prejudicial effect of the

prosecution's numerous discovery violations rises to the level of prejudicial, reversible error.

4. **Conclusion**

The prosecutor's repeated violations of his discovery obligations resulted in a verdict that is not worthy of confidence. (*United States v. Bagley* (1985) 433 U.S. 667, 678, 105 S.Ct. 3375, 3381.) Obviously, the *Brady* error constitutes federal constitutional error. And, pursuant to *Hicks v. Oklahoma* (1980) 447 U.S. 343, 100 S.Ct. 2227, so does the prosecutor's failure to comply with his statutory duties under section 1054.1. As a result of the prosecutor's failure to timely disclose material evidence, appellant's rights to due process, a fair trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16 and 17 were prejudicially violated. Reversal is required.

C. THE TRIAL COURT COMMITTED ERROR OF CONSTITUTIONAL MAGNITUDE WHEN IT RULED THAT APPELLANT COULD NOT PRESENT EVIDENCE OF DONNA TUCKER'S PSYCHIATRIC PROBLEMS AND TREATMENT; REVERSAL IS REQUIRED.

In the opening brief, appellant demonstrated that the trial court committed prejudicial, constitutional error when it denied his request to question Mary Alice Baldwin, appellant's sister, about Donna Tucker's psychiatric problems and treatment. (AOB 126-130.) Respondent's contrary claims (RB 121-127) are not meritorious.

Respondent agrees that "[a] defendant has a constitutional right to present a defense." (*Washington v. Texas, supra,* 388 U.S. at 19, 87 S.Ct. at 1923.) Respondent does not disagree that a witness's mental illness or emotional instability may be relevant to the witness's credibility. (See, *United States v. Lindstrom* (11th Cir.1983) 698 F.2d 1154, 1160; *People v. Gurule* (2002) 28 Cal.4th 557, 592, 123 Cal.Rptr.2d 345, 374.) Respondent, however, is wrong in contending that Baldwin's proffered testimony about Tucker's mental state was irrelevant. (Evidence Code sec.210 ["'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness..."]; *Granville v. Parsons* (1968) 259 Cal.App.2d 298, 304, 66 Cal.Rptr.149, 153 ["Relevant evidence includes evidence relevant to the credibility of a witness."]) The fact that Tucker had mental or emotional problems was clearly relevant to her credibility. From the evidence, the jurors could reasonably infer that Tucker's believability had been compromised.[6]

Respondent argues that, at trial, appellant's counsel did not attempt to lay a foundation that Baldwin could testify as an expert. (RB 125.) The argument is a red herring; of course Baldwin was not an expert, nor did counsel ever so contend, nor did he attempt to have her testify as an expert.

Respondent argues that, even if evidence of Tucker's mental and emotional problems had been admitted, no opinion testimony as to her truthfulness would have been admissible. (RB 125.) However, a percipient nonexpert witness could properly testify to

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[6] The trial court did not rule that the proffered evidence was irrelevant. (28RT 5222-5227.)

observations he or she made of Tucker and opine as to her mental and/or emotional stability. (Evid. Code sec.800; *People v. Medina* (1990) 51 Cal.3d 870, 886-887, 274 Cal.Rptr.849, 859-860.) For this reason also, the trial court should have allowed counsel to question Detective Stephens about Tucker's psychiatric hospitalization. (RT 6694-6695.)

Further, because Tucker's testimony was central to the prosecution's case, the trial court should have allowed appellant to recall her and question her about her psychiatric problems. (Evidence Code sec.778; *People v. Raven* (1955) 44 Cal.2d 523, 525-526, 282 P.2d 866, 867-868 [error to refuse defense request to recall a prosecution witness in order to lay a foundation for impeachment.])

Although there may have been other evidence tending to show appellant's guilt, the testimony of Tucker was vital to the prosecution's case. If the jury had known of her psychiatric problems, it would "have received a significantly different impression of [her] credibility." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, 106 S.Ct. 1431, 1436.) This Court cannot say beyond a reasonable doubt that a more favorable outcome would not have resulted had appellant been permitted to present the relevant, probative evidence of Tucker's mental and emotional problems. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824.) Reversal is required.

D. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT WITHDREW FROM THE JURY THE OPTION OF FINDING

APPELLANT GUILTY OF VOLUNTARY MANSLAUGHTER VIS-A-VIS RODRIGUEZ; REVERSAL IS REQUIRED.

1. Introduction

In the opening brief, appellant demonstrated that the trial court committed prejudicial error when it withdrew from the jury the option of finding appellant guilty of the lesser included offense of voluntary manslaughter as to Rodriguez. (AOB 131-141.) Respondent's argument that there was no error and no prejudice is meritless. (RB 127-133.)

2. The trial court erred by not instructing the jury with second degree murder

As explained in the opening brief, for voluntary manslaughter, "no specific type of provocation is required... Generally, it is a question of fact for the jury whether the circumstances were sufficient to arouse the passions of the ordinarily reasonable person." (*People v. Fenenbock* (1996) 47 Cal.App.4th 1167C, 1704-1705, 54 Cal.Rptr.2d 608, 617.) And, "...provocation can arise as a result of a series of events over time..." (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1245, 7 Cal.Rptr.3d 401, 410.)

The evidence in this case showed that appellant was extremely upset and angry over the injuries caused by a woman to his friend. Rodriguez was assisting Navarro, who respondent states was "the woman appellant believed personally responsible for the attack on Mike Arevalo." (RB 133.) In such a case, the assistance given by Rodriguez to the person whom appellant believed to be responsible *can* provide sufficient provocation for

voluntary manslaughter. As stated in *People v. Spurlin* (1984) 156 Cal.App.3d 119, 126, 202 Cal.Rptr.663, 667 "'[t]he provocation must have been given by the person who was killed, except in those cases in which the wrong person was killed by accident or mistake, or deceased was present aiding and abetting the person causing the provocation." Although the general rule, stated by respondent, may be that the provocation must come from the victim, the exception discussed in *Spurlin* applies here.

Further, it is clear that Rodriguez was driving his car and it was the prosecution's theory that his car collided with appellant's. There was evidence that appellant had a great deal of pride regarding his CRX. From this evidence, and the fact Rodriguez was assisting the supposed attacker, had it been instructed on manslaughter, the jury readily could have found sufficient provocation to reduce murder to voluntary manslaughter.

Respondent argues that a car accident "is insufficient to cause an ordinary reasonable person to act rashly and without reflection." (RB 131.) However, the issue of sufficient provocation is a question of fact for the jury. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 589, 112 Cal.Rptr.2d 401, 418-419.) Further, merely because the extreme "road rage"-type facts in *People v. Barton* (1995) 12 Cal.4th 186, 47 Cal.Rptr.2d 569 (relied on by respondent) may have provided sufficient evidence of provocation to warrant a voluntary manslaughter instruction in that case, does not mean that a different or less extreme fact pattern does not also require such instruction.

Here, the trial court was required to instruct the jury regarding the lesser included

offense of voluntary manslaughter. *Only* where the evidence points *undisputedly* to the greater offense is a trial court justified in not giving the jury the option of a lesser verdict. (*People v. Turner* (1984) 37 Cal.3d 302, 327, 208 Cal. Rptr.196, 211; accord, *People v. Wade* (1971) 15 Cal.App. 3d 16, 25, 92 Cal.Rptr.750, 755.) Here, the evidence does *not* undisputedly point to murder.

3. <u>Appellant was denied due process under *Beck v. Alabama*</u>

Beck v. Alabama (1980) 447 U.S. 625, 636-637, 100 S.Ct. 2382, 2389 holds that, "...when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." When a lesser included offense instruction is not given where justified by the evidence, the defendant has been denied due process. (*Hopper v. Evans* (1982) 456 U.S. 605, 609, 102 S.Ct. 2049, 2052; *People v. Avena* (1996) 13 Cal.4th 394, 424, 53 Cal.Rptr.2d 301, 317-318.) Respondent does not disagree with the above-stated well-settled law.

Instead, relying on *Beck, supra,* 447 U.S. at 627, 100 S.Ct. at 2384-2385, respondent claims that, as long as the jury is instructed with one noncapital offense (here, the jury was instructed regarding second degree murder as to Rodriguez), due process has been satisfied; the jury need not be instructed with all applicable offenses. (RB 132-133.)

The rule is not as limited as respondent states. As the Court stated in *Hopkins v. Reeves* (1998) 524 U.S. 88, 97-98, 118 S.Ct. 1895, 1901, the "rule" of *Beck* is "that a State may not erect a capital-specific, artificial barrier to the provisions of instruction on offenses that actually are lesser included offenses under state law." (Accord, *People v. Breverman* (1998) 19 Cal.4th 142, 168, 77 Cal.Rptr.2d 870, 886.) And, as the Court in *Hooks v. Ward* (10th Cir.1999) 184 F.3d 1206, 1228 stated, "because lesser included instruction [are] required by due process '*only* when the evidence warrants such an instruction, [t]he jury's discretion is...channelled so that it may *convict* a defendant of <u>any crime fairly supported by the evidence</u>.'" (Italics original; underline added.) Further, regarding the limited *Beck*-based "single third option" idea espoused by respondent, California has "never adopted such a restrictive analysis." (*People v. Breverman, supra,* 19 Cal.4th at 161, fn.8, 77 Cal.Rptr.2d at 881, fn.8.) To enable the jury to convict a defendant of "any crime fairly supported by the evidence," the jury must be instructed with all applicable lesser included offenses.

4. <u>Conclusion</u>

As explained above and in the opening brief (AOB 140-141), appellant was prejudiced and was denied due process as a result of the trial court's failure to instruct the jury sua sponte with the lesser included offense of voluntary manslaughter. Reversal is required.

E. <u>THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY SUA SPONTE REGARDING INTOXICATION.</u>

Appellant argued that the trial court committed prejudicial error by not instructing the jury sua sponte regarding the effect of intoxication on specific intent. (AOB 142-145.) Respondent contends there was no error. (RB 133-135.) The contention is unavailing.

Substantial evidence showed that, when appellant perpetrated the offenses, he was under the influence of alcohol. He had consumed over two beers at the party. (9RT 1640; 26RT 4910.) Respondent concedes that evidence of voluntary intoxication "...is relevant and may be considered in determining whether express malice existed, and on the issue of premeditation and deliberation." (RB 134.) Thus, a voluntary intoxication instruction was warranted, and should have been given sua sponte by the trial court in this specific intent case.

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

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

F. THE CONSTITUTIONAL REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT WAS UNDERMINED BY THE

MISLEADING CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS; REVERSAL IS REQUIRED.

Appellant demonstrated that the circumstantial evidence instructions undermined and weakened the constitutional requirement that the jury determine guilt beyond a reasonable doubt. (AOB 146-151.) Respondent argues that the instructions were proper. (RB 135-138.) Respondent is wrong.

The jurors were instructed that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (9, 10CT 2432, 2485, 2553, 2606; 29RT 5591-5592, 5629-5630.) These instructions effectively told the jurors that, if there was an interpretation of the evidence that "appear[ed]" to be "reasonable" and that pointed to appellant's guilt, but no "reasonable" interpretation that pointed to appellant's innocence, it was the jurors "duty" to convict appellant. These instructions thereby created a substantial risk that appellant would be convicted based upon less than the constitutionally-required standard of proof beyond a reasonable doubt and based upon the juror's view of what was reasonable rather than upon the facts. Thus the jurors were instructed to convict appellant if they merely concluded that the evidence could "reasonably" be interpreted to show that defendant was guilty and no other "reasonable" interpretation of the evidence had been offered. The effect of these instructions was particularly prejudicial in appellant's case, where he did not testify at the guilt phase.

Respondent relies on *People v. Wilson* (1992) 3 Cal.4th 926, 942-943, 13 Cal.Rptr.

2d 259, 268-269 (RB 137) in support of the contention that the instructions were proper. However, this decision, which held that the instructions do not impermissibly create a mandatory conclusive presumption of guilt, should be reconsidered. The concept of "proof beyond a reasonable doubt" is an elusive and difficult one, and it may often be confusing to jurors. Moreover, as the United States Supreme Court has recognized, detailed instructions concerning circumstantial evidence (such as those given in appellant's case) are confusing to the jury. (*Holland v. United States* (1954) 348 U.S. 121, 139-140, 75 S.Ct. 127, 137-138; see *People v. Magana*, (1990) 218 Cal.App.3d 951, 955 n.2, 267 Cal.Rptr. 414, 416, n.2.)

Here, the jurors were told that "proof beyond a reasonable doubt" meant that they must have "an abiding conviction of the truth of the charge." (9CT 2459.) Unless someone had served as a juror in a criminal case before, it is unlikely that he or she had ever heard that phrase before or had any clear understanding of what it meant. On the other hand, each of the jurors likely had used the word "reasonable" regularly, and had a relatively settled understanding of what that word meant. In any event, they certainly understood that "reasonable" means something quite different from what "an abiding conviction" (with which they were instructed) is intended to convey in criminal jury instructions.

A reasonable juror, uncertain about what "an abiding conviction" means, would rely upon the simpler, more familiar language of the challenged instructions for direction

about how to resolve the State's circumstantial case. The prejudicial, misleading impact of the instruction was compounded by reiteration of the instruction. Having repeatedly heard this instruction, a reasonable juror would conclude that, if a "reasonable" interpretation of the evidence that suggested appellant's guilt and no "reasonable" interpretation demonstrated his innocence, the jury had no choice but to convict appellant or sentence him to death, notwithstanding the explicit commands of the reasonable doubt instruction.

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

Confused by the concept of "an abiding conviction," a juror could easily conclude from the circumstantial evidence instructions that "beyond a reasonable doubt" means "the lack of any reasonable interpretation of the evidence showing the defendant's innocence." Indeed, given the circumstantial character of the State's case, the erroneous

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

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

The circumstantial evidence and reasonable doubt instructions served to confuse and mislead the jurors regarding the burden of proof. As a result, appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and

being released." (10CT 2537; 35RT 6338.) The trial court responded, "You were instructed on the applicable law and should not consider or speculate about matters of law on which you were not instructed in arriving at a verdict of death or life in prison without the possibility of parole." (35RT 6341-6342.) Clearly, the trial court did not respond in a direct, clear, concise, or accurate manner to the jury's question. The trial court should have told the jury the truth, i.e., that "life without possibility of parole means life without the possibility of parole," as defense counsel urged. (35RT 6339-6341.)

Further, the jury was instructed regarding life without possibility of parole as an alternative sentence and their question related directly to such a sentence. The jury was not speculating about something as to which they had not been instructed. They were entitled to know the truth so that they could properly and knowledgeably deliberate as to the appropriate punishment. By not answering the jury's reasonable question in a clear, direct, and accurate manner, the jury would reasonably infer that the trial court was being evasive and hiding something, and that appellant could be released on parole if given a life without possibility of parole sentence. "[E]vasive answers to...questions which call[ ] for a direct answer" tend to confirm the fact posited in the question. (*People v. Hudson* (1958) 160 Cal.App.2d 850, 854, 326 P.2d 10, 13, and see *People v. Silva* (1988) 45 Cal.3d 604, 624, 247 Cal.Rptr.573, 582 ["With knowledge of the accusation, the defendant's...words in the nature of evasive or equivocal replies lead reasonably to the inference that he believes the accusatory statement to be true.'"]) By not directly

answering the question, the jury would naturally think, "If the defendant can't be released on parole, why won't the judge tell us. Must be because he can be released. Better not give LWOP."

In the opening brief, appellant cited *Simmons v. South Carolina* (1994) 512 U.S. 154, 162, 114 S.Ct. 2187, 2193 as holding that the trial court must "provide the jury with accurate information regarding [a capital defendant's] parole eligibility." While the court's initial instruction was that life without possibility of parole was an alternative to death, from the jury's question it was clear that they did not understand that it meant no parole ever. The jurors obviously knew that, in many case, a defendant is given a sentence yet is released on parole before his full term is served. Not ever being instructed to the contrary, the jurors had no reason to believe that this general rule was not also applicable in special circumstance cases. As respondent concedes, the jury "appeared to be focused on the possibility of release from prison even if a sentence of 'life without the possibility of parole' was to be imposed." (RB 14.) And, as the jury's question establishes, regardless of the correctness of the initial instruction, it did not convey to the jury that appellant was absolutely ineligible for parole. The jury did not understand the law it was being asked to apply. A direct answer to the jury's question would have provided the much-needed guidance, clarity and understanding.

Relying on *People v. Snow* (2003) 30 Cal.4th 43, 123-124, 132 Cal.Rptr.2d 271, 329-330, respondent claims, "it is well-settled that the common meaning of '"life without

the possibility of parole"' is that the defendant will be imprisoned for the rest of his life, without any possibility of release on parole.''" As this case aptly demonstrates, this is not so; it is clear that the jury in this case did not grasp the meaning, otherwise it would never had asked for guidance and clarification. Unlike in *Snow,* the jury in the instant matter was never instructed to apply this "common" meaning.

Also, in *Snow*, the trial court, in response to the jury's question whether it could "be assured he will never be[ ] released from prison," told the jury to apply the "common meaning to the two possible verdicts." (30 Cal.4th at 123, 132 Cal.Rptr.2d at 329.) This Court approved this response, thus acknowledging that a jury could readily understand that the legal meaning and implications of words can be very different from the common or accepted meaning of those words. By telling the jury to apply the "common" meaning, the judge in *Snow* was telling the jury that life without possibility of parole means just that -- life without possibility of parole. This did not occur in the instant case.

By focusing on the "common meaning" language, respondent is attempting to divert attention from the fact that the trial court's response was not similar to that of the court in *Snow*. Under *Snow*, where a jury expresses a misunderstanding of the law it is being called upon to apply, the trial court must clarify the law in a manner "sufficient to inform the jury that defendant would not be eligible for parole." (30 Cal.4th at 124, 132 Cal.Rptr.2d at 330.) Here, the trial court failed to clear up the jury's confusion and misunderstanding.

Respondent also contends (RB 140) that "'when the jury expresses a concern regarding the effect of a life without parole sentence, the court should instruct the jury 'to *assume* that whatever penalty it selects will be carried out' or give 'a comparable instruction.'" (*People v. Snow, supra,* 30 Cal4th at 123, 132 Cal.Rptr. at 329, citing *People v. Kipp, supra,* 18 Cal.4th at 378-379, 75 Cal.Rptr.2d at 734.) However, the jury in this case was never given the "to assume" instruction, which itself is a wishy-washy, evasive answer, nor was the trial court's hedging answer in any way comparable to the "to assume" instruction. As the *Kipp* Court made clear regarding the "assume" instruction, "an instruction phrased in this qualified language may unreasonably raise questions in the jurors' minds." (18 Cal.4th at 378-379, 75 Cal.Rptr.2d at 734.) Here, "[b]ecause the record...demonstrate[s] a plausible basis to infer jury misunderstanding...the trial court was...required to instruct the jury...to assume when deliberating on and selecting the penalty verdict that a verdict of..." life imprisonment meant the defendant would never be released from parole. (Id.)

3. Conclusion

In *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251, 240 Cal.Rptr.516, 519, the Court stated:

> "To perform their job properly and fairly, jurors must *understand* the legal principles they are charged with applying. It is the trial judge's function to facilitate such an understanding by any available means. The mere recitation of technically correct but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of

> facts. A jury's request for reinstruction or clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration. Why has the jury focused on this issue? Does it indicate the jurors by-and-large understand the applicable law or perhaps it suggests a source of confusion? If confusion is indicated, is it simply unfamiliarity with legal terms or is it more basically a misunderstanding of an important legal concept?"

Here, the jury's question indicated that it did not understand that life without possibility of parole meant that appellant would never be released on parole. The trial court's arcane answer did nothing to alleviate or clear up the jury's misunderstanding. Thus, believing that appellant could someday be granted parole even if a life without possibility of parole sentence was appropriate -- after all, the jury was never directly or concisely told that appellant could never be paroled -- the jury readily imposed a sentence of death. The trial court's erroneous, misleading answer was extremely prejudicial to appellant. As a result, his constitutional rights were violated. Reversal of the death sentence is required.

B. THE TRIAL COURT PREJUDICIALLY FAILED TO LIMIT THE VICTIM IMPACT EVIDENCE.

Appellant demonstrated that the trial court prejudicially and unconstitutionally failed to limit the victim impact evidence introduced by the prosecution. (AOB 163-174.) Respondent claims there was no error. (RB 143-146.) Respondent is mistaken.

Although a certain amount of victim impact evidence is admissible during the penalty phase, where such evidence "is introduced that is so unduly prejudicial that it

renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825, 111 S.Ct. 2597, 2608; accord, *United States v. Barnette* (4th Cir.2004) 390 F.3d 775, 799 ["victim impact evidence is subject to the constraints of the Due Process Clause of the Fourteenth Amendment and evidence that 'is so unduly prejudicial that it renders the trial fundamentally unfair' is inadmissible."])

This Court has acknowledged that """the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.""" (*People v. Robinson* (2005) 37 Cal.4th 592, 651, 36 Cal.Rptr.3d 760, 807.) "The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of due process." (*Cargle v. State* (Okla.1995) 909 P.2d 806, 830.) Respondent agrees with the above-stated principles.

Nevertheless, by minimizing the enormous amount of emotion-laden victim impact evidence, respondent blithely contends the evidence "was with the scope of California and federal law." (RB 145.) Yet respondent fails to cite any authority holding that the huge quantity of such evidence introduced in this matter passes constitutional muster. The evidence went far beyond a "description of the circumstances" or what was necessary "to explain why [the survivors] continued to be affected by [the] loss." (*People v. Brown* (2004) 33 Cal.4th 382, 397-298, 15 Cal.Rptr.3d 624, 636.) Thus, it is readily inferred that

the prosecutor intended to appeal to the juror's emotions and sympathies.

The vast amount of victim impact evidence in this case was outside the limits of California and federal law because it prevented the jury's penalty verdict from being "a 'reasoned moral response'" to appellant's offenses. (*People v. Robinson, supra,* 37 Cal.4th at 651, 36 Cal.Rptr.3d at 807.) Understandably, based on the extremely sad, painful, and heartwrenching victim impact evidence, the jurors could not prevent their ""'"emotion[s] [from] reign[ing] over reasons."'"" (Id.)[8]

The trial court committed error by allowing the prosecutor to introduce the cumulative, unduly prejudicial, unnecessarily protracted victim impact evidence. This overwhelming, sympathy-and-pity-inducing evidence was overly inflammatory. As a result of the inflammatory nature of the victim impact evidence, the jury's attention was diverted from the critical task at hand -- whether appellant deserved to live or be put to death. As a result, appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16 and 17 were

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[8] *Salazar v. State* (Tex.2002) 90 S.W. 3d 330, 335-336, 337 contained a relevant, on-point discussion regarding why an inordinate amount of victim impact evidence can result in unfair prejudice to the defendant. (AOB 165-166, 173.) Respondent claims that appellant has argued that the tape Yolanda made, a portion of which was played for the jury, "was similar' to the "video montage" condemned in *Salazar*. But, as is clear from the opening brief, appellant never sought to equate the two tapes. As appellant argued, "[p]laying a portion of the tape of songs Yolanda had made for her father on the day she died provided an overly-dramatic backdrop to the evidence." (AOB 173.) Respondent does not take issue with this statement.

prejudicially violated. Reversal is required.

C. THE ADMISSION OF VICTIM IMPACT EVIDENCE WAS IMPROPER IN OTHER ASPECTS.

In the opening brief, appellant demonstrated that the victim impact evidence introduced in this case was improper because (1) it was not limited to the facts or circumstances known to appellant when the crime was committed; and (2) judicial enlargement of section 190.3, subdivision (a) to allow such extensive evidence is impermissible and unconstitutional. (AOB 175-184.) In its brief (RB 146-147), respondent states that this Court has rejected arguments similar to appellant's in its prior cases and that appellant "has offered no new or persuasive explanation for revisiting or overturning" those earlier decisions. Appellant, in fact, is urging this Court to do precisely that -- to reconsider its earlier decisions and to limit the scope and narrow the definition of what constitutes admissible victim impact evidence. "Victim impact" evidence is admitted in nearly every, if not all, capital cases, virtually unfettered. It is time for this Court to define the limits of such evidence to bring it in line with both the federal and state constitutions.

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D. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DEFENSE CHARACTER WITNESS WRIGHT REGARDING A SUPPOSED PRIOR BAD ACT.

1. Introduction

In the opening brief, appellant showed that the trial court committed prejudicial error when, over appellant's objection, it allowed the prosecutor to cross-examine defense character witness Wright about a purported bad act involving appellant and his sister Pauline. Error was committed because the prosecutor did not have a good faith belief that the incident ever happened. (AOB 184-193.) Appellant was severely prejudiced and his rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, and 17 were violated. Respondent claims there was no error and, that if there was error, it was harmless. (RB 148-152.) Respondent is mistaken as to both claims.

2. Factual and procedural background

It is useful to reiterate some of the facts regarding the issue. As noted in the opening brief, William Wright provided favorable testimony as to appellant's good character. (RT33 6061-6066, 6079.) The prosecutor indicated in a bench conference that he wanted to ask penalty phase witnesses whether they had heard that, "[o]ne of the reasons why Pauline...left was because Nathan had put a gun to her head and threatened to blow her brains out." (RT33 6067. The prosecutor claimed the evidence of this

alleged incident was "in the taped interview of Donna." (*Id.*) Defense counsel objected, stating, "[T]his is completely a surprise to the defendant, number one. Number two, you can't hear that tape..." The prosecutor stated the tape was not clear, but claimed it could be heard. (RT33 6066-6070.)

The trial court listened to the tape (court exhibit no. 4), but did not make any statement regarding whether it could be understood. (RT33 6072.) Defense counsel stated the prosecution "[has] never spoken to Pauline to verify this information." (RT33: 6076.) The prosecutor did not disagree. Defense counsel again objected and stated the claimed incident has "never been proven..." (RT33 6077.) Again, the prosecutor did not disagree. Indeed, the trial court stated regarding the alleged incident, "he [the prosecutor] can't prove it up," but allowed the prosecutor to question the witnesses "because that's the whole nature of character evidence." (RT33 6078-6079.) The prosecutor proceeded to ask Wright the prejudicial, insinuating questions regarding whether Wright had ever heard of the wholly unproven incident. (33RT 6080-6081.)

3. <u>The trial court prejudicially erred</u>

Respondent cites no evidence showing that the purported violent acts involving appellant and Pauline ever happened. Although the trial court listened to the taped interview of Donna Tucker, wherein the purported incident is supposedly mentioned, it did not make any comment regarding whether or not it was able to hear and understand what was being said. In light of defense counsel's statement that "you can't hear the

tape" and the prosecutor's concession that the tape was not clear, one would have expected a contrary statement from the trial court if it had been able to understand what was being said on the tape. But, no such observation was forthcoming.

Respondent claims it would have been "inexplicable" for the trial court to have permitted the object-to cross-examination "had it been confirmed that the bad acts were not mentioned on the tape." (RB 151.) But, this turns the question on its head. The issue was whether listening to the tape confirmed that the purported statement *was* mentioned on the tape. The trial court made no such finding. Further, the trial court's final statement -- "he can't prove it up" and "that's the whole nature of character evidence" -- implicitly confirms the fact that the trial court could not discern any statements on the tape relevant to the issue.

Respondent argues the prosecutor's insinuating questions could not have led the jurors to believe that the prosecutor had evidence of the purported violent bad acts. (RB 151.) But, this is precisely the inference the prosecutor wanted the jury to draw. As stated in *People v. Wagner* (1975) 13 Cal.3d 612, 619-620, 119 Cal.Rptr.457, 461, "By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question... [T]he jurors were led to believe that, in fact, defendant had engaged in...prior [bad acts]."

As explained in the opening brief, the prosecutor's unjustified questioning of Wright was prejudicial to appellant. The questions implied that appellant had, indeed,

committed the acts against Pauline, which were exceedingly heartless and violent. The "blow her brains out" question conveniently meshed with the facts of the case. From the question, the jury would readily infer that appellant was predisposed to shooting people in the head, and thus would never find life without parole to be the appropriate sentence. The questions reinforced the image of appellant as an incorrigibly violent individual who did not deserve to remain among the living, even in prison. The questions showed that appellant was violent long before the commission of the instant offenses; the jury would infer that this pattern of behavior would continue in the future unless death were imposed. Because the questions involved conduct with his sister, they implied that appellant was an unusually hard-hearted person. The trial court told the jury that the factually unsupported inferences from the questions involving Pauline could be used to counter appellant's mitigating evidence. (CT10 2546; RT35 6334.) The trial court thus approved the jury's use of the prosecution's insinuations, innuendo and speculation to impose death.

4. Conclusion

The prosecutor's unsupported, insinuating questions to character witness Wright were extremely prejudicial to appellant and violative of his constitutional rights. Reversal of the penalty judgement is required.

E. APPELLANT'S YOUNG AGE WAS A MITIGATING FACTOR; THE TRIAL COURT PREJUDICIALLY ERRED BY NOT SO INSTRUCTING THE JURY.

Appellant was only 22 years old when the victims were killed. Incredibly, the

prosecutor argued that appellant's age "would be an aggravating factor." (34 RT 6237-6238.) But, appellant's young age could only be a mitigating factor. The trial court prejudicially erred by not sua sponte so instructing the jury. (AOB 193-200.) Respondent's contrary contention (RB 152-157) is not meritorious.

In *People v. Viscoitti* (1992) 2 Cal.4th 1, 76, 5 Cal.Rptr.2d 495, 540, this Court stated that "chronological age alone may not be deemed aggravating" and that a prosecutor may not "in argument...suggest[ ] that age is to be considered aggravation." (Compare, *People v. Livaditis* (1992) 2 Cal.4th 759, 785, 9 Cal.Rptr.2d 72, 87 ["The district attorney did not improperly argue that 'chronological age alone' was aggravating."]) Given appellant's young age and the prosecutor's erroneous, prejudicial argument, the trial court's "duty to ensure fairness" (*People v. McKenzie* (1983) 34 Cal.3d 616, 630, 194 Cal.Rptr.462, 471) mandated that it instruct the jury, at least in the present case, that age could only be a mitigating factor.

Appellant recognizes that cases such as *People v. Lucky* (1988) 45 Cal.3d 259, 302, 247 Cal.Rptr.1, 28, *People v. Hawthorne* (1992) 4 Cal.4th 43, 14 Cal.Rptr.2d 133, and *People v. Cook* (2006) 39 Cal.4th 566, 618, 47 Cal.Rptr.3d 22, 66 have held that young age itself may not be deemed to be a mitigating factor and that age may be either mitigating or aggravating. But, this rule should be reconsidered in light of *Roper v. Simmons* (2005) 543 U.S. 551, 569-570, 125 S.Ct. 1183, 1195-1196:

> "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with

reliability be classified among the worst offenders. First, ... '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.' ...

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

Although the issue in *Roper* was whether young people between 15 and 18 could be executed, the observations of the *Roper* Court persuasively demonstrate that a defendant's young age, even if a few years older than 18, should only be considered mitigating. While the *Roper* Court may have "draw[n] the line" of execution at 18 (543 U.S. at 574, 125 S.Ct. at 1197-1198) it did not, as respondent states, hold that 18 is also the upper limit for age to be considered a mitigating factor.

When the prosecutor erroneously and prejudicially argued that appellant's age was an aggravating factor, the trial court was obligated to step in sua sponte and tell the jury that, at least in this case, that appellant's young age was a mitigating factor. It did not do so. Reversal is therefore required.

F. THE PROSECUTION COMMITTED PREJUDICIAL *GRIFFIN* ERROR.

1. Introduction

As demonstrated in the opening brief, the prosecutor committed prejudicial *Griffin*[9] error by telling the jury, inter alia, that appellant "can't even face you." (34RT 6246.) Respondent's argument that no *Griffin* error occurred (RB 157-163) should be rejected.

2. The issue was not waived

Respondent argues the *Griffin* error issue has been waived because appellant did not expressly object to the "can't even face you" statement. However, appellant moved

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[9] *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229.

for a mistrial based on the prosecutor's overall argument -- of which the "can't even face you" comment was an integral part -- which implicitly referred to appellant's election not to testify at the penalty phase. (34 RT 6260-6263.)

As respondent concedes, counsel moved for a mistrial because the prosecutor "commented on appellant's failure to testify at the penalty phase of the trial." (RB 169.) After appellant's motion, the prosecutor, in an attempt to cure his error, told the jury, "I was not commenting at all on his not testifying in the penalty phase." (39 RT 6267.) The trial court stated a curative instruction would be given. (34RT 6263.) Given the motion, the ensuing discussion, the prosecutor's allegedly remedial statement, and the purported curative instruction, there is no waiver. The parties "met the issue and the court decided the motion on the merits." (*Wysock v. Borchers Bros.* (1951) 104 Cal.App.2d 571, 581, 232 P.2d 531, 537.) Further, appellant's objection "point[ed] out clearly the error complained of" and "fairly direct[ed] the attention of the court to the claimed error." (*Allin v. Int'l. Alliance, Etc.* (1952) 113 Cal.App.2d 135, 137, 247 P.2d 857, 858.) There has been no waiver.

Respondent also tacitly argues that the error and prejudice could have been alleviated by a "curative instruction." (RB 161.) But any such instruction would have been a "'futile attempt to "unring the bell."'" (*Edwards v. Centex Real Est. Corp.* (1997) 53 Cal.App.4th 15, 26, 61 Cal.Rptr.2d 518, 524.) Once the jury hears the improper argument, it is impossible "to unring the bell that...cannot be unrung." (*People v.*

Jennings (2003) 112 Cal.App.4th 459, 474, 5 Cal.Rptr.3d 243, 254.) No instruction would have cured the prejudicial error.

3. Prejudicial *Griffin* error occurred

As explained in the opening brief, the prosecutor's improper argument referred to appellant's decision not to take the stand and testify. The prosecutor's argument was a misguided attempt to convince the jury to impose a death sentence as a result of appellant's decision to stand on his constitutional right. The prosecutor wanted the jury to infer from his election not to take the stand and provide an explanation that appellant was unworthy of a less than death sentence. The prosecutor wanted the jury to infer that a person deserving of life would not remain silent and hide behind his constitutional rights and that because appellant did not testify, he should receive death.

Respondent claims the prosecutor's "overall argument" was intended to paint the defense penalty case as "arrogant." (RB 161.) Even if, arguendo, this was the prosecutor's intent, it does not excuse his reference to appellant's decision to remain silent. This reference was *not* "merely a comment on appellant's lack of remorse," as respondent argues. (RB 162.)

4. Conclusion

The prosecutor's *Griffin* error was prejudicial to appellant. Therefore, reversal is required.

G. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT PERMITTING DEFENSE COUNSEL TO PROMPTLY COUNTER THE PROSECUTOR'S CLOSING ARGUMENT TO THE GUILT PHASE JURY.

1. The trial court committed prejudicial error

The trial court committed prejudicial error by failing to permit defense counsel to promptly counter the prosecutor's closing argument before the guilt phase jury adjourned for the night. Appellant was severely prejudiced by the court's ruling. (AOB 204-208.) Respondent argues that the trial court acted properly. (RB 163-168.) This argument, however, is not well-taken.

In *Herring v. New York* (1975) 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, the Court stated that, "...for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be a reasonable doubt of the defendant's guilt." Here, the trial court failed to effectively afford appellant this chance when it postponed the defense closing argument until the next day. It was not until the next morning that defense counsel commenced his rebuttal argument. Thus, the jury had only the prosecutor's scathing closing argument to reflect upon over the evening.

No trial court should ever allow the jurors to adjourn for he evening with only the prosecutor's pro-death argument to contemplate for such an extended period without some defense argument in response, at least briefly. The realities of courtroom advocacy demand no less. No proper reason exists for allowing the jury to consider such a damning argument, unrebutted for over an entire evening. As respondent tacitly agrees, there was

ample time immediately after the prosecutor's argument for defense counsel to make a short, pro-life introductory argument.

Appellant's trial counsel easily could have made an abbreviated but effective partial argument in the time remaining after the prosecutor's argument, thereby blunting the sting of the prosecutor's argument. The next morning the argument would have been expanded and completed. The trial court's ruling firmly fixed the prosecutor's version of the case in the jurors' minds over the evening and made it extremely difficult, if not impossible, for counsel later to effectively argue that appellant should receive life without the possibility of parole. As a result, appellant's state and federal constitutional rights were violated. If counsel had been permitted to timely respond to the prosecutor's argument before the weekend recess, it is reasonably probable a result more favorable to appellant would have occurred.[10]

2. <u>The issue has not been waived</u>

Respondent argues that the issue has been waived because defense counsel never objected to the postponement of his closing argument. (RB 166.) However, from the

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[10] Respondent relies on *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 968-969, 98 Cal.Rptr.2d 677, 688-689 in arguing that there was no error. (RB 166-167.) *Stroud,* however, did not involve delay of defense closing argument in a capital case. It involved a one-day continuance of an ongoing preliminary examination because of the judge's schedule conflict. Because of the disparate facts in *Stroud,* it is inapposite here. (*Chevron U.S.A. v. W.C.A.B.* (1999) 19 Cal.4th 1182, 1195, 81 Cal.Rptr.2d 521, 528 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."])

discussion regarding closing argument, it appears that the trial court was set on postponing the defense argument because the jury wanted to "break right now." (34RT 6305-6306.) Thus, any objection would have been futile. (*People v. Hill, supra,* 17 Cal.4th at 820, 72 Cal.Rptr. at 665 ["A defendant will be excused from the necessity of...a timely objection...if [it] would be futile."]) Also, objecting and insisting on arguing, in the face of the jury's desire to "break right now," would have alienated and upset the jury, to appellant's detriment. The issue has not been waived.

V. ARGUMENT: POST-TRIAL ISSUES

A. THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DENIED APPELLANT'S MOTION FOR NEW TRIAL.

1. Introduction

In the opening brief, appellant demonstrated that the trial court prejudicially denied his motion for new trial, thereby violating his constitutional rights. (AOB 208-223.) Respondent claims there was no error or prejudice. (RB 168-176.) The claim is not meritorious.

2. The law

A defendant has the fundamental constitutional right to a fair and impartial trial. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266, 137 Cal.Rptr.476, 483.) He has the right to confront and cross-examine the witnesses against him (*Maryland v. Craig* (1990) 497 U.S. 836, 845-846, 110 S.Ct. 3157, 3163-3164) and to present evidence on his own behalf. (*Washington v. Texas, supra,* 388 U.S. at 19, 87 S.Ct. at 1923.) A

new trial should be granted where a defendant "has...not had a fair trial on the merits." (*People v. Drake* (1992) 6 Cal.App.4th 92, 98, 7 Cal.Rptr.2d 790, 793.)

3. **Evidence pertaining to Donna Tucker warranted a new trial.**

Tucker's psychiatric problems and her relocation by and receipt of money from the prosecution was powerful evidence demonstrating that she had reasons to fabricate her testimony to fit the prosecution's theory of the case. This evidence would have seriously impeached her testimony. Had the jury known of this evidence, a different result in the guilt and/or penalty phases was probable.

Regarding the newly discovered evidence that Tucker had amorous feelings toward Detective Markel and that she had been promised reward money, respondent concedes that "the defense was unable to impeach Donna at trial." (RB 170.) Respondent claims a new trial was not required as a result of the nondisclosure of this evidence because there was no evidence Tucker and Detective Markel actually "engaged in inappropriate behavior before trial" and there was no evidence corroborating Tucker's claim "that she had been promised reward money." (RB 174.) However, it was undisputed that Tucker had an amatory interest in Markel, believed he was reciprocating, and believed she was going to receive reward money. These factors would cause her to alter or fabricate her testimony and curry favor with the prosecution. Appellant had the right to have the jury informed of and weigh this impeaching evidence.

Tucker was a pivotal witness against appellant. Despite the evidence against him,

the case was not open and shut and there was room for considerable doubt. Had the jury known of Tucker's bias and self-interest, it is reasonably likely a result more favorable to appellant would have occurred at the guilt and/or penalty phases.

Further, appellant denied that he was the perpetrator. Neither fireman could positively identify appellant as the shooter. They said the shooter was about 5', 9" to 5', 10", significantly shorter than appellant, who is about 6', 4". Two men, Paul Escoto and Ray Muro had a motive to commit the crimes, i.e., to avenge the assault on their friend, Mike Arevalo. Muro was about the same height as the shooter. (RT 8 1457.) Fireman Quintana testified the shooter was wearing a copper-colored shirt and black pants. These were *not* the clothes appellant was wearing. Fireman Jones testified that the shooter wore a blue shirt and white pants; although appellant was wearing similar clothes that night, so was one of the victims. Escoto was also wearing white shorts. (9RT1563-1564.) The murder weapon was never found. There was no direct proof that appellant's car ever collided with the victim's car. Clearly, there were enough doubts in the case that, when coupled with Tucker's psychiatric problems and incentive to lie or to tailor her testimony, it is reasonably likely a result more favorable to appellant regarding guilt would have occurred had the jury considered the evidence.

4. <u>Fabrication of eyeglasses</u>

As shown (AOB 100-108; Reply B., sec. III, A., *supra*), the trial court refused to allow appellant to explain why he had the eyeglasses (Defense Ex. B) fabricated. Had he

been permitted to do so, he would have testified that the eyeglasses were made not to cover up a crime, but because he believed the police were fabricating evidence against him. Such an explanation would have countered the consciousness of guilt inference the jury was instructed it could draw from fabrication of evidence. (29RT 5593.) Had the jury known there was an exculpatory reason for having the glasses made, appellant's overall credibility would have been enhanced and a more favorable outcome would have resulted. A new trial should have been granted as a result of the improper, prejudicial exclusion of the evidence.

5. Conclusion

The trial court prejudicially erred by denying appellant's motion for new trial. Reversal is required.

B. THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR WHEN IT IMPROPERLY DENIED APPELLANT'S REQUEST TO DISCHARGE RETAINED COUNSEL.

Appellant demonstrated that the trial court committed reversible constitutional error when, after the guilt and penalty phases, it denied his request to discharge his retained counsel. (AOB 223-228.) Respondent's contrary argument is not well-taken. (RB 176-182.)

Appellant sought to discharge his retained counsel because of "a conflict of interest," and because counsel had not contacted appellant. (36RT 6738, 6745-6748; 11CT 2784.) Defense counsel did not disagree with appellant's assertions. And, there

was no evidence that there was no conflict of interest. "[T]he right to effective representation by counsel embraces the right to be represented by conflict-free counsel." (*People v. Castillo* (1991) 233 Cal.App.3d 36, 58, 284 Cal.Rptr.832, 394; accord, *Wood v. Georgia* (1981) 450 U.S. 261, 271, 101 S.Ct. 1097, 1103 ["Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."]) Regardless of when a request to discharge retained counsel is made, and where, as here, a conflict exists, the request should be granted. Defendant should not be forced to proceed with "a legal representative serving conflicting interests." (Id, 450 U.S. at 274, 101 S.Ct. at 1104); and see, *Wheat v. United States* (1988) 486 U.S. 153, 157, 108 S.Ct. 1692, 1698-1699 ["where a court justifiably finds a conflict of interest, [it]...should not be required to tolerate an inadequate representation of a defendant."])

Respondent spills considerable ink discussing the veiled threat defense counsel received from appellant's father. Although this threat may have affected counsel's performance, it was not one of appellant's stated reasons for wanting conflict-free counsel.

Respondent claims that discharging counsel and permitting appellant to obtain new counsel "would have greatly and unreasonably disrupted the proceedings." (RB 181.) However, the request to relieve counsel was made on November 20, 1998. (36 RT 6738, 6745-6748.) The new trial motion was not ruled on and denied until June 18, 1999. (39 RT 7181-7243.) Final sentencing did not occur until November 19, 1999. Thus, new

counsel would have had more than enough time to get up to speed on the case.

By erroneously denying appellant's request to discharge retained counsel, the trial court violated appellant's constitutional rights. Reversal is required.

VI. <u>ARGUMENT: OTHER ISSUES</u>

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

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

Appellant demonstrated that the entirety of Penal Code section 190.3 was unconstitutionally vague because the statute, as a whole and each of its separate sub-sections individually, fails to provide sufficiently specific aggravating factors so as to preclude the trier of fact from considering facts not relevant to the penalty determination. (AOB 228-232.) Citing *People v. Cook, supra*, 39 Cal.4th at 617-618, 47 Cal.Rptr. at 66, respondent claims that section 190.3 is not impermissibly vague. (RB 182.) This appears to be the holding of *Cook*. However, regarding the choice of penalty, this Court acknowledged that the aggravating factors relied on by the trier of fact in determining penalty:

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

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

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

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

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

who is exposed to the death penalty and who receives it."
(512 U.S. at 995, 114 S.Ct. at 2647.)[11]

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

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

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

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

As shown in the opening brief (AOB 232-236), factor (a) of Penal Code section 190.3 is unconstitutional because it is vague, standardless, subjective as to the trier of fact, arbitrary and weighted heavily toward imposition of the death penalty. In *Tuilaepa v. California, supra,* 512 U.S. at 975, 114 S.Ct. at 2637, the Court found that factor (a) was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence." Relying on *Tuilaepa,* this Court has ruled that factors (a), (b) and (I) are constitutional. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 187-190, 51 Cal.Rptr.2d 770, 831-883.)

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

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

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

Respondent appears to be correct that this issue has been decided against appellant. (RB 182.) However, for the reasons stated herein and in the opening brief, appellant respectfully contends that these cases were wrongly decided and should be reconsidered.

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

Penal Code section 190.3 allowed the trial court to engage in an undefined, open-ended consideration of non-statutory factors and permitted the prosecutor to claim mitigating factors were really aggravating, thereby violating appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 236-237.) Respondent's contrary contentions (RB 183) should be rejected.

Penal Code section 190.3 does not properly guide the trier of fact's sentencing discretion nor does it tell the trier of fact which factors are aggravating and which are mitigating.[12] In the instant case, this deficiency, coupled with the prosecutor's closing arguments implicitly urging the trier of fact to consider mitigating evidence as

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

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

The failure of section 190.3 to guide the trial court's sentencing discretion is exemplified by factor (I) regarding age. (See AOB 262-263.) As Justice Blackmun stated in *Tuilaepa*:

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

The vague nature of the sentencing factors permits the factor to be used either way, thereby undermining the guided discretion which capital jurisprudence requires. Thus, under California's arbitrary sentencing scheme, "age" is generally considered "...one of the individualized *mitigation factors* that sentencers must be permitted to consider..." (*Stanford v. Kentucky* (1989) 492 U.S. 361, 375, 109 S.Ct. 2969, 2978; emphasis added.)

The vague, rudderless nature of the factors to be considered by the trier of fact is also illustrated by factors (d) and (h) regarding "extreme mental or emotional disturbance: or impairment due to mental disease, deficit or intoxication. (AOB 240-244.) Regarding factor (d)'s use of the word "extreme," the trier of fact is effectively precluded from finding mitigating anything but "*extreme*" disturbance. Indeed, the absence of "extreme"

but still severe disturbance could be viewed as aggravating. This, however, is error since factors (d) and (h) "can only be mitigating." (*People v. Montiel* (1993) 5 Cal.4th 877, 944, 21 Cal.Rptr.2d 705, 745.)

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

Appellant argued that the vague, imprecise nature of section 190.3 allowed the prosecutor to argue that mitigating factors are actually aggravating. (AOB 237.) In *Zant v. Stephens* (1983) 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, the Court held that due process is violated when an aggravating label is attached to mitigating evidence. In such a case, *Tuilaepa* is not controlling even if the statutory factors are not "propositional." As stated in *People v. Williams* (1997) 16 Cal.4th 153, 272, 66 Cal.Rptr.2d 123, 202:

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

The gist of appellant's claim is that the unitary list of aggravating and mitigating factors, with no explanation or means to discern which were aggravating and which were mitigation, leads to precisely the kind of arbitrary, unguided discretion prohibited by *Zant, Lockett* and *Woodson.* To the extent that state law professes to provide the necessary guidance to ensure that the death penalty is not freakishly or wantonly imposed (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726), the statute's failure to properly guide the trier of fact with respect to mitigating and aggravating factors is tantamount to depriving appellant of his rights under state law. This amounts to a violation of federal due process under *Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.

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

Appellant demonstrated that *all* the enumerated factors of section 190.3 are vague, arbitrary and misleading to the jury so as to result in an unreliable penalty determination in violation of the Eighth and Fourteenth Amendments. (AOB 237-245.) Citing *People v. Farnam* (2002) 28 Cal.4th 107, 191, 121 Cal.Rptr.2d 106, 177-178, respondent claims that this issue has been decided against appellant. Respondent appears to be correct. (RB 167.) Nevertheless, appellant requests this Court to reconsider that decision in light of the arguments made herein and in the opening brief.

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

In the opening brief, appellant demonstrated that California's death penalty scheme

is unconstitutional in that it fails to require that the trier of fact find (1) the existence of the individual aggravating factors beyond a reasonable doubt; (2) that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt; and (3) that death be found to be the appropriate penalty beyond a reasonable doubt. (AOB 245-248.) Respondent's contrary argument (RB 184) is not well-taken.

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

However, even if it were not constitutionally necessary to place a heightened burden of persuasion on the prosecution, some consistent burden of proof at the penalty phase would need to be established to ensure that the trier of fact, be it a jury or the judge, faced with similar evidence, would return similar verdicts, that the death penalty would be evenhandedly applied, and that capital defendants would be treated equally from case to case. "Capital punishment [must] be imposed fairly, *and with reasonable consistency,* or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, 102 S.Ct. 869 (Emphasis

added.) In cases in which the aggravating and mitigating evidence is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one defendant should live and another die simply because one trier of fact assigns the ultimate burden of persuasion to the state, and another assigns it to the defendant. (*O'Neal v. McAninch* (1995) 513 U.S. 432, 443, 115 S.Ct. 992.)

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

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

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

In the opening brief, appellant contended that the trial court must be required to render written findings regarding the applicable aggravating factors, and that the failure to

do so violated his fundamental rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 249-250.) Based on those contentions, the authorities cited by respondent (RB 184-185), stating that written findings are not required, are wrongly decided and should be reconsidered.

7. **California's death penalty scheme is unconstitutional because it <u>fails to provide for intercase proportionality</u>.**

Where a state's capital punishment scheme "operate[s] in an arbitrary and capricious manner," the fact that, as here, a defendant is sentenced to death whereas others similarly situated receive life without possibility of parole establishes "disproportionality violative of constitutional principles." (*People v. McLain* (1988) 46 Cal.3d 97, 121, 249 Cal.Rptr.630, 644; accord, *McCleskey v. Kemp* (1987) 481 U.S. 279, 306-307, 107 S.Ct. 1756, 1775.) As shown in the opening brief (AOB 250-252), this state's entire capital punishment system is arbitrary and capricious in its operation; as such, it is unconstitutional because of disproportionate imposition of the death penalty. In addition, the lack of proportionality review violates the requirement that all potential mitigating factors be considered by the sentencer, deprives the death-sentenced defendant of meaningful appellate review, and results in an unreliable, arbitrary and capricious application of the death penalty. Accordingly, the lack of review offends the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment and deprivation of due process. (*Gregg v. Georgia, supra,* 428 U.S. 153, 193-195; see also *Parker v. Dugger* (1991) 498 U.S. 308, 314-315, 321, 111 S.Ct. 731.)

In *Pulley v. Harris* (1984) 465 U.S. 37, 104 S.Ct. 871, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." As Justice Blackmun subsequently observed, however, that ruling was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thus "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.' As litigation exposes the failure of these factors to guide the [trier of fact] in making principled distinctions, the court will be well advised to reevaluate its decision in *Pulley v. Harris.*" (*Tuilaepa v. California, supra,* 512 U.S. at 995, 114 S.Ct at 2647.) (Blackmun, J., dissenting.))

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

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

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

In the opening brief, appellant argued that California's death penalty scheme is unconstitutional because it fails to provide numerous safeguards against the arbitrary, unwarranted, unreliable imposition of the death penalty. These safeguards include (1) written findings as to the aggravating factors found by the jury; (2) proof beyond a reasonable doubt of the aggravating factors; (3) jury unanimity on the aggravating factors; (4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; (5) a finding that death is the appropriate punishment beyond a reasonable doubt; (6) a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision; and (7) a definition of which specified relevant factors are aggravating, and which are mitigating thereby greatly lessening the chance of an arbitrary or capricious death judgment. (AOB 252-253.) As respondent points out, this Court has ruled such safeguards unnecessary. (RB 185.) Nevertheless, appellant requests that this Court reconsider its position.

9. **California's capital sentencing scheme fails to perform its <u>constitutionally mandated narrowing function</u>.**

a. **Penal Code section 190.2's special circumstances are <u>overly broad</u>.**

Penal Code section 190.2 contains 22 special circumstances which qualify a defendant for the death penalty. These numerous circumstances encompass virtually all first degree murders. As explained in the opening brief (AOB 254-263), section 190.2 is so overbroad that it fails to "circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. 862, 878, 103 S.Ct. 2733, 2743.) Respondent claims section 190.2 sufficiently narrows the class of defendants eligible for the death penalty. (RB 185.) Respondent, however, is wrong.

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

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

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

Section 190.2 fails to accomplish a constitutionally acceptable narrowing function because it does not limit or confine the class of offenders eligible to receive the death penalty. Virtually every first degree murder comes within its coverage. Rather than limiting the class of offenders to whom the death penalty is an option, section 190.2, in reality, circumscribes and limits the class to whom the death penalty is *not* applicable. Section 190.2 therefore improperly effects a *reverse* of the type of narrowing required by the Constitution.

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

First, because relative culpability should be determined by consideration of *mens rea* as well as *actus reus,* the narrowing factor must focus upon the defendant's mental

state, not just the act which was committed. (See *Enmund v. Florida* (1982) 458 U.S. 782, 800, 102 S.Ct. 3368 [appropriateness of death depends on the accused's culpability and "American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical" to the degree of culpability]; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 108 S.Ct. 546 [court clearly and explicitly relied upon the heightened intent standard in the Louisiana statutory scheme's definition of first degree murder in concluding that the state had sufficiently narrowed the class of death-eligible from those cases in which he or she is not.] See *Furman v. Georgia, supra,* 408 U.S. 238; *United States v. Cheely* (9th Cir.1994) 36 F.3d 1439, 1445.)

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

The potential for intolerable arbitrariness exists under the California felony-murder special circumstance. A jury could sentence to death someone who committed a murder in the course of a burglary or robbery, while another could reject the death penalty for someone who committed ten deliberate, premeditated first degree murders. This special circumstance thus encompasses a broad class of death eligible defendants without

providing guidance to the sentencer as to how to distinguish among them, creating the potential for impermissibly disparate and irrational sentencing in violation of *Furman.*

Relying on *Pulley v. Harris, supra,* 465 U.S. at 41, 104 S.Ct. at 879-880 (RB 171), respondent claims section 190.3 strictly confines the class of offenders eligible for the death penalty. But, as Justice Blackmun stated in *Tuilaepa*:

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

The virtually all-inclusive provisions of section 190.2 fail to properly limit the class of defendants eligible for the death penalty; thus, California's death penalty scheme is unconstitutional.[13]

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

In the opening brief, relying mainly on *State v. Middlebrooks, supra,* 840 S.W.2d 317 and *State v. Cherry* (N.C.1979) 257 S.E.2d 551, appellant demonstrated that the use

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

of a special circumstance to render a defendant death-eligible under Penal Code section 190.2 and also as an aggravating factor pursuant to Penal Code section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments by granting the trier of fact virtually unbridled discretion in imposing the death penalty and in rendering California's death penalty scheme unconstitutionally weighted in favor of death. This is because a defendant (such as appellant) found guilty under a felony-murder theory is automatically eligible for the death penalty whereas a defendant who kills with premeditation and deliberation is not automatically eligible. (AOB 259-261.) Respondent's claims to the contrary (RB 185-186) are not meritorious.

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

> "...[W]hen the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance...[based on felony murder]...does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution and...because it duplicates the elements of the offense. As a result, we conclude the... [Tennessee statutory aggravating factor]...is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution... [F]elony murder continues to be a death eligible offense. However, a finding of an aggravating circumstance other than...[the Tennessee felony murder statutory aggravating factor]...is necessary to support death as a penalty for the crime." (*State v. Middlebrooks, supra,* 840 S.W. 2d at 346; emphasis added.)

Significantly, respondent does not address the dispositive holdings of

Middlebrooks or *Cherry*. Nevertheless, even if the sentencing schemes at issue in *Middlebrooks*, *Cherry* and *Collins v. Lockhart* (8th Cir.1985) 754 F.2d 258 are somewhat different, they are sufficiently similar to California's to render the courts' analyses and holdings authoritative and persuasive guidance on the issue.

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

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

Appellant demonstrated that, in violation of the Eighth and Fourteenth Amendments, Penal Code sections 190 through 190.5 give the prosecutor unbridled discretion in determining whether a penalty hearing will occur. This complete discretion results in wholly arbitrary imposition of the death penalty. (AOB 259-263.)

Under California law, when a defendant is statutorily death-eligible, the individual prosecutor has complete discretion to determine whether a penalty hearing will be held. As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, 253 Cal.Rptr.55, 96, this creates a substantial risk of county-by-county arbitrariness. There can be no doubt that under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders

with factually similar offenses in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status.

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

Respondent correctly notes that this issue has been decided against. (RB 186.) However, for the reasons stated above and in the opening brief, appellant requests this Court to reconsider this issue.

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

The cumulative (and individual) effect of the errors made in connection with appellant's penalty phase hearing regarding sections 190.2 and 190.3 violated his rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and their California analogues. (AOB 263.) (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100

S.Ct. at 2229.) Respondent is wrong in arguing otherwise. (RB 186.) The serious deficiencies in California's death penalty scheme result in "random" imposition of the death penalty and "bias in favor of the death penalty." (*Stringer v. Black* (1992) 503 U.S. 222, 235-236, 112 S.Ct. 1130, 1139.) California's scheme is *not* "...neutral and principled so as to guard against bias or caprice in the sentencing decision," as required by *Tuilaepa v. California, supra,* 512 U.S. at 973, 114 S.Ct. at 2635. As a result, reversal is required. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341, 105 S.Ct. 2633, 2646; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, 107 S.Ct. 1821, 1824.)

e. Conclusion

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

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

In the opening brief, appellant established that the numerous violations of State and Federal law in his case also constitute violations of international law, which, for this reason, require reversal. (AOB 263-280.) Respondent does not respond to this argument, other than to say, "This claim has recently been rejected by this Court in *People v.*

Ramirez (2006) 39 Cal.4th 398, 479." (RB 187.) But, for the reasons stated in the opening brief, *Ramirez* was wrongly decided on this point and should be reconsidered.

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

It is well-settled that the cumulative effect of seemingly independently harmless errors may render a trial inherently unfair. (*People v. Hill, supra,* 17 Cal.4th at 844-847, 72 Cal.Rptr.2d at 681-682; *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469.) As shown in this brief and the opening brief, numerous prejudicial errors occurred at the guilt and penalty phases of appellant's trial. If, *arguendo,* none standing alone requires reversal, when the cumulative prejudicial impact of all the errors is considered, it is clear that appellant's rights to due process, a fair trial, to a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and their California analogues were prejudicially violated. Respondent's contrary claim (RB 187) is meritless. Reversal of the entire judgment is therefore required.

Here, numerous prejudicial errors occurred. The prosecution inexcusably withheld critical evidence and committed *Griffin* error. The trial court committed instructional error and should have appointed second counsel to assist appellant's retained attorney. The trial court prejudicially excluded critical defense evidence and failed to correctly and accurately answer the jury's question regarding appellant's possible release if sentenced

to life without possibility of parole. Errors were made in the penalty phase. All the errors in this case combined in an exceedingly prejudicial manner to render appellant's trial fundamentally unfair.

Without a reasoned analysis, respondent simply argues that "no prejudicial error occurred at trial." (RB 187.) Not so. Here, as in *People v. Hill, supra,* 17 Cal.4th at 847, 72 Cal.Rptr.2d at 683, the manifold errors in this case "...created a negative synergistic effect, rendering the degree of overall unfairness to the defendant more than that flowing from the sum of the individual errors." As in *Hill,* appellant "...was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial." (*Id.*) (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.)

VII. CONCLUSION

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

Dated: February 4, 2008

Respectfully submitted,

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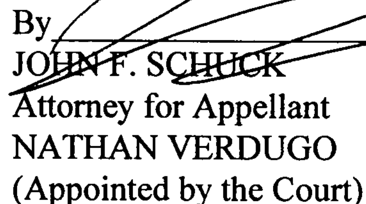

By ____________________
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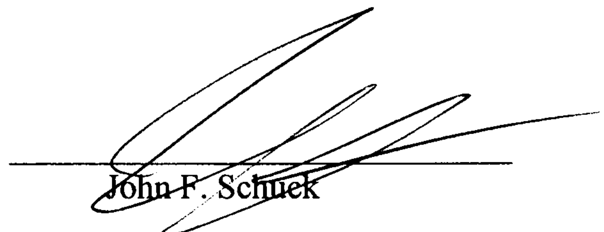
Attorney for Appellant
NATHAN VERDUGO
(Appointed by the Court)

CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Reply Brief contains 21,913 words.

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

Dated: February 4, 2008



John F. Schuck

PROOF OF SERVICE

I, John Schuck, declare:

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

On February 5, 2008 I served the within:

APPELLANT'S REPLY BRIEF

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

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

Executed at Palo Alto, California on February 5, 2008.

John F. Schuck