IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DARRELL LEE LOMAX, Defendant and Appellant.	CRIM. S057321 Los Angeles County Superior Court No. NA023819

APPELLANT'S OPENING BRIEF

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

The Honorable Judge Margaret Hay

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Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DARRELL LEE LOMAX, Defendant and Appellant.	)	CRIM. S057321 Los Angeles County Superior Court No. NA023819

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal pursuant to Penal Code section 1239, subd. (b), from a conviction and judgment of death entered against Darrell Lee Lomax ("appellant") in the Los Angeles County Superior Court on October 16, 1996 (CT 699-703.)[1] The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

This is an automatic appeal from a judgment of death entered by the Los Angeles County Superior Court on October 16, 1996. (CT 699-703.)

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[1] "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript.

On September 1, 1994, a criminal complaint was filed in the Los Angeles Municipal Court, charging appellant Darrell Lee Lomax with one count of murder, in violation of Penal Code section 187, and two counts of robbery, in violation of penal code section 211. (CT Supp.III 8.) Appellant was arraigned on this complaint on September 8, 1994, and entered not guilty pleas to all charges. He was represented by Deputy Public Defender Marvin Isaacson. (CT Supp.III14.)

On September 16, 1994, the public defender was relieved and appellant was granted pro per status. (CT Supp.III 20.) A preliminary hearing was held on November 18, 1994, and appellant was held to answer. (CT Supp.III 92-125.)

An Information was filed in Los Angeles Superior Court on December 2, 1995, charging appellant Darrell Lee Lomax with two felonies alleged to have been committed on August 29, 1994, and a third felony alleged to have been committed on August 25, 1994. (CT 47-49.) Count I charged appellant with the murder of Nasser Akbar on August 29, 1994, in violation of Penal Code section 187. Count I also alleged the special circumstance, pursuant to Penal Code section 190.2, subd. (a)(17), that appellant was engaged in the commission of a robbery. (CT Supp.III 130.)

Count II charged appellant with the robbery of Nasser Akbar on August 29, 1994, in violation of Penal Code section 211, and also alleged the use of a firearm within the meaning of Penal Code section 12022.5. (CT SuppIII 130-131.)

Count III charged appellant with the robbery of James Robert Edge on August 25, 1994, in violation of Penal Code section 211, and also alleged the use of a firearm, to wit, a handgun, within the meaning of Penal Code sections 1203.06, subd. (a)(1) and 12022.5. (CT

Supp.III 131.) As to all three charged offenses appellant was further alleged to have been released from custody in the County of Multnomah in the State of Oregon on bail or his own recognizance within the meaning of Penal Code section 12022.1. (CT 130-132.)

Appellant's pro per status was revoked by the superior court on December 2, 1994. (CT Supp.III 133.) On December 5, 1994, appellant was arraigned in Superior Court on the Information and entered a plea of not guilty. Appellant was represented by Deputy Public Defender Marvin Isaacson. (CT Supp.III 148.)

Appellant filed a Motion to Dismiss pursuant to Penal Code section 859, subd. (b) on December 20, 1994, which was denied on January 12, 1995. (CT Supp.III 157.) Appellant's Motion to Dismiss pursuant to Penal Code section 995, subd. (2) (A), filed January 13, 1995, was denied on January 24, 1995 (CT Supp.III 197, 201.) Appellant's Motion for Lineup, filed February 3, 1995 (CT Supp.III 203), and Motion for Pretrial Discovery, filed February 7, 1995 (CT Supp.III 208), were heard and granted on February 17, 1995. (RT, Proceedings Beginning 12/2/94 and Ending 3/13/95, 52; CT 224-225.)

On February 27, 1995, appellant filed a Petition for Writ of Prohibition in the Court of Appeal for the Second Appellate District. (CT Supp.III 227.) The Court of Appeal issued an Alternative Writ of Mandate directing the superior court to vacate its orders denying appellant's motions to dismiss pursuant, respectively, to Penal Code sections 859b and 995. (CT Supp.III 247.)

On March 13, 2005, the superior court set aside its previous orders and dismissed the case. (CT Supp.III 250, 253.) The charges were refiled against appellant the same day (RT, Proceedings Beginning 12/2/94 and Ending 3/13/95, 57), and appellant was

arraigned in municipal court. (RT, Proceedings 3/13, 4/3, 5/2, 5/8, 5/10, 5/11 1995, 3.) A preliminary hearing was held on May 12, 1995 (CT 1-45), at the conclusion of which appellant was held to answer. (CT 45.)

On May 26, 1995, a new Information was filed in the Los Angeles Superior Court, charging appellant Darrell Lee Lomax with two felonies alleged to have been committed on August 29, 1994, and a third felony alleged to have been committed on August 25, 1994. (CT 47-49.) Count I charged appellant with the murder of Nasser Akbar on August 29, 1994, in violation of Penal Code section 187. Count I also alleged the special circumstance, pursuant to Penal Code section 190.2, subd. (a)(17), that appellant was engaged in the commission of a robbery. (CT 47.)

Count II charged appellant with the robbery of Nasser Akbar on August 29, 1994, in violation of Penal Code section 211, and also alleged the use of a firearm within the meaning of Penal Code section 12022.5. (CT 48.)

Count III charged appellant with the robbery of James Robert Edge on August 25, 1994, in violation of Penal Code section 211, and also alleged the use of a firearm, to wit, a handgun, within the meaning of Penal Code sections 1203.06(a)(1) and 12022.5. (*Ibid.*)

As to all three charged offenses appellant was further alleged to have been released from custody in the County of Multnomah in the State of Oregon on bail or his own recognizance within the meaning of Penal Code section 12022.1. (CT 48-49.)

On May 30, 1995, appellant was arraigned in the Los Angeles County Superior Court and entered a plea of not guilty to the charges and denied the special allegations, including the special circumstance allegation. Appellant was represented by Deputy Public Defender

Marvin Isaacson (CT 73, 75), but subsequently was granted pro per status. (CT 74.)

On July 5, 1995, appellant's pro per status was revoked by the superior court. (RT A-1.) On July 31, 1995, defense counsel filed motions to set aside the information under section 995 (CT 84-88), and for pretrial discovery. (CT 89-98.) On August 28, 1995, appellant's motion to dismiss the information pursuant to section 995 was denied. (CT 107; RT A-27.) The same day, the court heard and denied appellant's *Marsden*[2] motion (CT 107; RT A-38), and granted appellant's request to represent himself. (CT 107, RT-A42.) Appellant's requests for the appointment of an investigator and for indigent funding were also granted the same day. (CT 100, RT 23-24.)

On September 27, 1995, the court heard and denied appellant's requests for co-counsel (CT119, RT A-62) and advisory counsel. (CT 119, RT A-63.) Appellant thereafter requested to have counsel reappointed to represent him (CT 119; RT A-70, 71), and the court reappointed the public defender. (CT 119; RT A-71.)

On November 21, 1995, the prosecutor advised the court that he would be seeking the death penalty against appellant. (RT 1.)

On December 18, 1995, appellant objected to the court's continuance of his trial beyond the statutory speedy trial period and refused to waive time. The court nevertheless found "good cause" to continue the trial over appellant's objection. (CT 130; RT 38-41.) The same day, the court appointed independent counsel, Theodore P. Veganes to advise the court whether the public defender had a conflict

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

of interest due to its prior representation of Cleavon Knott, a prosecution witness. (CT 129, RT 41-43.)

On February 5, 1996, the court found that the public defender had a conflict of interest, and appointed new counsel, Randolph Short, to represent appellant. (CT 142; RT-44.) On the same date, the court issued an order compelling appellant to wear a stun belt during court appearances. (RT 48.) Defense counsel sought reconsideration of this order on March 8, 1996, which the court denied. (RT 51-52.)

On March 21, 1996, defense counsel filed a motion pursuant to Code of Civil Procedure section 170.1, subd.(a) (6) (C), for disqualification of Judge Margaret Hay. (CT 147.) Judge Hay filed a verified answer on March 21, 1996. (CT 156-163.) The motion was summarily denied without hearing by Judge Hay on March 28, 1996. (CT 156; RT 64, 68-69.)

On April 24, 1996, defense counsel filed a Motion to Dismiss (CT 166.) The motion was heard and denied on May 3, 2006. (CT 206, RT 96-100:20). Appellant thereafter on May 22, 1996, filed a petition for writ of mandate in the Court of Appeal for the Second Appellate District (CT 262-299), which was summarily denied on May 23, 1996. (CT 356, 358.) On June 1, 1996, appellant filed a Petition for Review in this Court (CT 339-356) , which was also denied. (RT 155.)

Appellant's Motion for Continuance, pursuant to Penal Code section 1050, filed June 17, 1996, was granted on June 19, 1996. (CT 359.) Trial was continued to August 21, 1996. (CT 390, RT139).

On June 18, 1996, appellant file a Motion to Suppress Pursuant To Penal Code section 1538.5, and the Fourth and Fourteenth Amendments of (sic) the U.S. Constitution. (CT 363-377.) An

evidentiary hearing on the motion was held on August 20, 1996, at the conclusion of which the motion was denied. (CT 480; RT206-292.)

Defense counsel filed a discovery motion on August 2, 1996 (CT 444), which was granted in part on August 13, 1996. (CT 444; RT 153.) On August 13, 1996, defense counsel also filed a Declaration under Code of Civil Procedure section 170.6, to disqualify Judge Hay. This was denied by the court on the same day, as untimely. (CT 468, RT 154-155.) The court ordered that appellant wear the "RE-ACT Belt" during trial. (CT 468; RT173.)

On August 20, 1996, the Information was amended by interlineation to add the allegation of personal use of a firearm pursuant to section 12022.5 to Count I. (CT 480, RT 297.) Appellant was arraigned and denied the allegation. (*Ibid.*) A defense motion to bifurcate the Penal Code section 12022.1 allegation was granted. (CT 481, RT 296.)

Jury selection began August 21, 1996 (CT 489), and was completed on September 3, 1996, whereupon the jury was sworn. (CT 517, RT 1135.) Six alternate jurors were selected and sworn. (CT 517, RT 1140.) Before the jury was sworn, appellant made an oral "*Wheeler* motion" to dismiss the venire, which was heard and denied. (RT 1122-1129.)

On September 5, 1996, both counsel gave their opening statements (CT 518, RT 1160-1186.) On September 6, 1996, a defense motion for mistrial based on newspaper articles, was heard and denied (CT 526, RT 1284-1285.)

The prosecution rested its case on September 10, 1996, and the defense case commenced the same day. (CT 530; RT 1666.) The defense rested on September 11, 1996. (CT 538; RT 1739.)

Thereafter, defense counsel made a motion for acquittal under Penal Code section 1118.1 which was denied. (CT538; RT 1771.)

The court instructed the jury on September 11, 1996 (CT 539; RT 1772-1799), and closing arguments were presented by both sides on September 12, 1996. (CT 552; RT 1801-1911.) The jury received its final instructions and began deliberations at 3:50 p.m. on September 12, 1996. (CT 552; RT 1911-1916.)

On Friday, September 13, 1996, the jury requested a read-back of the testimony of prosecution witnesses Toler, Knott, Collette and Wren (CT 553; RT 1918.) The jurors returned to the courtroom for a rereading of the requested testimony. (CT 555; RT 1920.) Subsequently, the jury notified the court that they wished to cancel the rereading of the testimony of detectives Wren and Collette and wanted only a portion of witness Knott's testimony reread. (CT 554; RT 1920.)

The reading of the requested testimony resumed and was completed on Monday September 16, 1996. (CT 636; RT 1927.) At 11:45 a.m. the same day, the jury notified the court that they had reached a verdict. (CT 636; RT 1928.)

The jury found appellant guilty of murder in the first degree of Nasser Akbar, as alleged in Count I of the Information, and found to be true the robbery-murder special circumstance and the allegation that appellant personally used a firearm in the commission of this offense. (CT 637; RT 1931-1935.)

The jury also found appellant guilty of second degree robbery of Nasser Akbar, as alleged in Count II of the Information. The jury found true that appellant personally used a firearm during the commission of this offense. (CT 637; RT 1934.)

The jury further found appellant guilty of second degree robbery of James Edge, as alleged in Count III of the information. The jury found true the allegation that appellant personally used a firearm during the commission of this offense. (CT 637; RT 1934-1935.)

The penalty phase of the trial commenced on September 16, 1996, immediately following receipt of the guilt phase verdicts. (CT 637, RT 1937.) Prior to the parties' opening statements, the court informed the jury that it would have to decide the truth of an additional allegation charged against appellant with respect to Counts I,II, and III; to wit, whether at the time of the offenses, he was on bail or his own recognizance in the County of Multnomah, in the State of Oregon within the meaning of Penal Code section 12022.1. (RT 1937-1938.) The prosecutor presented his opening statement. (CT 637; RT 1938-1942.) Defense counsel reserved his opening statement to the beginning of the defense case. (RT 1942). The prosecution thereupon began presenting evidence and rested its case on the morning September 18, 1996. (RT CT 641; 2115.) The defense waived its opening statement and commenced presentation of its case that afternoon. (RT 2124.) The defense rested the same day. (CT 642; RT 2188.) The prosecution presented no rebuttal evidence. (*Ibid.*) The court dismissed the Penal Code section 12022.1 allegation on motion of the prosecution. (RT 2190.)

On September 19, 1996, prior to instructions and closing arguments, the court took a personal waiver of appellant's right to testify in his own defense. (CT 643; RT 2207.) Immediately thereafter, the court instructed the jury. (CT 643; RT 2208-2217.) The prosecution presented its opening argument. (CT 643, RT 2217-2245.) Thereafter, defense counsel gave his summation. (RT 2246-2268.)

Rebuttal arguments, first by the prosecution and then the defense followed. (RT 2270-2281, 2281-2285.) The jury received its final instructions and began deliberations at 2:10 p.m. (CT 643, RT 2285-2286.)

On September 20, 1996, the court found that Juror No. 5 "has a conscientious objection to the death penalty that makes him unable to deliberate." The court discharged Juror No. 5 and replaced him with Alternate No. 5 . (RT 2329-2331.) The newly constituted jury began deliberating anew. (CT 646; RT 2332.) Defense counsel moved for mistrial based upon the removal of Juror No. Five, which was denied. (RT 2332, 2337.)

On September 23, 1996, the jury returned a verdict of death. (CT 674; RT 2339-2341.) Appellant's Motion for New Trial (CT 647A-647B), was heard and denied on October 16, 1996. (RT 2345-2347.) On the same date, the court denied the mandatory motion for modification of the death sentence, pursuant to Penal Code section 190.4, subd.(e) (CT 688-689; RT 2347-2351), and sentenced appellant to death on Count I. The Court also sentenced appellant on Counts II and III as follows: Count II – sentenced barred pursuant to Penal Code section 654 ; and Count III – a total of 10 years in prison (five years for the conviction of robbery, plus five years for the personal use of a firearm). Appellant received credit for actual time served of 779 days and 388 statutory credits, for a total of 1,167 days. (CT 691-694; RT 2355-2356.)

Judgment of Death was entered by the court on October 16, 1996. (CT 699-703.) This appeal is automatic.

* * * * *

STATEMENT OF FACTS

A. Overview Of Evidence Presented At Trial

In the guilt phase of the instant case, the prosecution presented evidence of two crimes: the robbery-murder on August 29, 1994, of Nasser Akbar, a clerk at the P&B Liquor Market located at 4th and Cherry in Long Beach, and the robbery on August 25, 1994, of James Edge, outside of his 4th Street laundromat in Long Beach. The prosecution's case with respect to the Akbar robbery-murder (the capital crime), centered around the testimony of two witnesses: (1) appellant's alleged accomplice, Angela Toler, who was allowed to plead guilty to a robbery charge with the promise of a 10-year prison sentence, in exchange for her testimony against appellant; and (2) an off-duty security guard, Cleavon Knott, who claimed to have witnessed the crime from his parked car. When Knott was initially interviewed by the police on the night of the crime, he described the suspects as two black males, and their getaway car as a white Oldsmobile Cutlass. However, he later changed his story and identified appellant and Toler as the suspects, claiming that he had initially lied to the police out of fear, because he knew Toler was affiliated with a local gang known as the Insane Crips. Knott admitted that after he began cooperating with the police, he received assistance from them in obtaining dismissal of numerous traffic fines and warrants. Knott also admitted that he was carrying a concealed weapon in his car on the night of the crime, but was not prosecuted for this offense. Knott claimed to have watched appellant shoot Nasser Akbar, although defense witness, Tena Delaguerra, testified that she saw Knott pull up in front of the liquor store after the shots had already been fired. Two guns, one identified by prosecution witnesses as the murder weapon, were retrieved from

the car in which appellant and Toler were riding at the time of their arrest, approximately an hour and a half after the crime occurred. However, a gunshot residue test performed on appellant at the scene of his arrest yielded negative results, and fingerprints lifted from both the guns and from the liquor store did not match appellant's. The record below establishes that there was a second clerk in the liquor store at the time of the crime, Somphop Jardensiri, who identified Angela Toler, *but not appellant*, as one of the two perpetrators, and that Jardensiri told the police that he saw Toler shoot Akbar. However, Jardensiri was not called as a witness because he had left the jurisdiction and was thought to be living in Thailand. Appellant was thus precluded from presenting any of this exculpatory evidence.

The prosecution's case as to the robbery of James Edge consisted entirely of the testimony of Mr. Edge, who stated he had been robbed at gunpoint by a man who emerged from a green Ford. When shown a photographic line-up shortly after the incident and appellant's arrest for the Akbar incident, Edge was only able to say that appellant "looked like" the robber. Edge also told the police that the robber had been clean-shaven, and appellant was wearing a mustache at the time of his arrest four days after this incident. Approximately seven months after the incident, Edge identified appellant in a live lineup.

In the penalty phase, the prosecution's case in aggravation consisted of (1) documentary evidence establishing that in 1987, appellant had been convicted in Oregon, pursuant to a guilty plea, of attempted robbery and attempted murder; (2) testimony by the victims of that incident; (3) testimony by the alleged victims of an unadjudicated robbery and shooting allegedly committed by appellant during a drug deal in Portland in April 1994; (4) testimony by a Long Beach Superior

Court bailiff alleging that appellant had assaulted him in the courthouse lockup on September 27, 1995; (5) testimony by courtroom spectators that appellant had flashed a handwritten note to prosecution witnesses in the instant case who were sitting in the courtroom following their testimony, with the words," I will be out;" and (6) "victim impact" testimonyby family members and friends of murder-victim Nasser Akbar. The defense case in mitigation consisted of testimony by appellant's mother, stepfather, uncle and girlfriend regarding appellant's positive qualities and good character. The defense also presented the testimony of a former jail inmate to refute the bailiff's account of the alleged assault on September 27, 1995.

B. Guilt Phase

1. Robbery Of The P&B Market And Murder Of Nasser Akbar

According to Angela Toler, she and appellant robbed the P & B Market, a liquor store, on August 29, 1994 at approximately 11:00 p.m. (RT 1221.) Toler testified that she had met appellant through her friend, Ihesia Sullivan, about a week prior to the robbery (RT 1221-1222), and had only seen him on two occasions prior to August 29th. (RT 1223.) Despite her limited acquaintance with appellant (whom she knew only by the nickname "D-Mac"(RT 1254-155)), Toler claimed that appellant had asked her to "hook him up with a lick." (RT 1225.) This, Toler explained, meant showing appellant a place he could rob. (*Ibid.*) Toler claimed that the initial plan was for Toler, Sullivan and appellant to do the robbery together, but that Sullivan decided she could not leave her children, so Toler and appellant left without her. (RT 1226.)

Toler acknowledged her testimony was given as part of a conditional plea agreement. In exchange for not being prosecuted for

murder, she entered a plea of guilty to armed robbery with the understanding she would receive no more than a ten year prison sentence. The deal was supposedly conditioned on Toler testifying "truthfully" against appellant (RT 1221), however, Toler was already serving her prison sentence when she testified at appellant's trial. (CT 471, 471A.)

Toler testified that she and appellant drove off from Sullivan's apartment in a Ford Taurus rental car. (*Ibid.*) They first drove to a liquor store on 4th Street, but there were too many people, so they left and drove instead to the P&B Market at 4th and Cherry. (RT 1227-1228.) Toler stated that she parked around the corner from the store on Cherry, and she and appellant then walked from the car to the store. (RT 1228.) Both of them were armed with guns. (RT 1230.) Toler claimed that she was carrying a chrome-plated, pink-handled semiautomatic, and that the gun was loaded. (RT 1231.)

According to Toler, after she and appellant entered the store, they both announced to the clerk that this was a robbery. (RT 1231.) The clerk gave money from the cash register to appellant and money from a paper bag to Toler. (RT 1231-1232.)

Toler claimed that after the clerk gave them the money, appellant, who was standing on the opposite side of the counter from the clerk, shot the clerk four times -- twice while the clerk was standing and twice after he fell to the ground -- and then shot the security camera. (RT 1234.) Toler stated that during the course of the robbery, another clerk emerged from the rear of the store. (RT 1233-1234.) She claimed that she pointed her gun at the second clerk, but never fired it. (RT 1236-1237.)

Toler testified that she and appellant then ran out of the store to the car and drove to Toler's residence, and that when they arrived, appellant went directly across the street to Sullivan's apartment. (RT 1236-1237.) Toler stated that she stopped off at her own apartment only long enough to drop off her gun and the loot money, and then rejoined appellant and Sullivan at Sullivan's apartment. Toler estimated that this all took place within a five-minute time frame. (RT 1237-1238.) Toler claimed that when she arrived at Sullivan's residence, appellant was in the bathroom. After some prompting from the prosecutor, she testified that appellant changed from a black T-shirt into a white one. (RT 1238.)

Toler stated that the three of them left Sullivan's apartment about 10 minutes after Toler had arrived there. Toler went back to her own place to retrieve her gun, and the three of them got in the car and started driving towards the beach. (RT 1238-1240.) They were stopped by the police sometime after midnight, and were told to exit the car. Toler testified that her gun was "under the seat," but when asked by the prosecutor whether "it was stuck in the seat between the two seats," she answered "yes." (RT 1241.)

Toler was arrested and taken to the police station, where she was interrogated by Homicide Detectives Wren and Collette. (RT 1241-1242.) At first she lied about her name and her involvement in the crime, but after being informed that she had been identified as a suspect, she revealed her true name and acknowledged her involvement in the crime. (RT 1242.) Toler denied that she had been either threatened or offered any favors by the detectives to induce her cooperation (*ibid*), but later, on cross-examination, acknowledged that the detectives told her a couple of times that she could spend the rest

of her life in prison or could possibly get the death penalty. (RT 1274.) Toler admitted that she had used PCP about six hours prior to the robbery, but denied that she was still under the influence of the drug at the time of the robbery, or at the time of the interrogation. (RT 1243.) She indicated that she entered into her plea agreement "a couple days" after this initial interrogation, but did not actually enter her guilty plea for several months. (RT 1244.)

On cross-examination, Toler stated that she was interrogated for about an hour before confessing to the crime. (RT 1249.) She denied that the detectives told her she had been "identified as someone *who had shot the victim*" (RT 1250, emphasis added), at which point the court sustained the prosecutor's objection to this line of questioning, and threatened defense counsel with contempt if he continued to pursue it. (RT 1250-1252.)[3]

Toler also denied on cross-examination that during the presentence investigation in her case, she had disclosed to a probation officer the fact that she was drinking about a fifth of bourbon daily (RT

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[3] The court asked defense counsel what the surviving store clerk, Jardensiri, would testify to if he were present. (RT 1250-1251.) Counsel made the following offer of proof:

> Mr. Jardensiri told the police that he came out from the back room, that he saw Ms. Toler with a gun. That he saw a male black leaning on the counter, did not see a gun in his hand. That Ms. Toler shot a bullet at him, striking the camera, I believe, and that he took cover and heard Ms. Toler demand money from the victim and followed directly by shots fired. And he went out to view Ms. Toler and said that is the person that shot at me and shot Nasser.

(RT 1251.)

1259), and had been drinking the day of the crime, in addition to smoking PCP. (RT 1259-1260.) This testimony was later contradicted by the probation officer, Leo Hurd, who testified that he interviewed Toler in November 1994, at which time she had admitted using PCP the day of the P&B robbery and also admitted to drinking a fifth of bourbon a day, five days a week. (RT 1679-1681.)

Toler took Dilantin to control a seizure disorder (RT 1260), and admitted that she knew she was not supposed to drink alcohol when taking that medication. (RT 1261.) She further admitted to having smoked, on the day of the crime, a "dime bag" of marijuana – the equivalent of two joints –. (RT 1262.) Toler acknowledged that PCP made her "meaner." (RT 1311, 1325.) Detective Wayne Watson, a certified drug-recognition expert (RT 1480), who examined Toler on August 30, 1994, determined that she was not then under the influence of PCP, but still demonstrated some of the "lingering effects" of the drug. (RT 1485.) Toler told Watson that she had smoked PCP at about 6 p.m. Monday. (RT 1484 .) Dr. Watson evaluation took place at 2:30 on Tuesday afternoon. (RT 1491.) Toler told Watson that she last slept on Saturday morning. (*Ibid.*)

Toler testified that she had recently encountered appellant in the courthouse, and when he saw her, he placed a finger over his mouth. Toler interpreted this gesture to mean that appellant was telling her "not to say anything." (RT 1322.)

Cleavon Knott, an off-duty security guard (RT 1327), claimed that he saw appellant shoot Nasser Akbar. (RT 1338.) Knott's testimony was that he went to the store every night to help Akbar close (RT 1327, 1352), because he had an arrangement with the owner of the store that

in exchange for providing security at closing time, he could receive free beverages. (RT 1373.)

Knott testified that he was coming home from work, and was armed with a .38 caliber handgun, which he used in his employment. (RT 1352.) The gun was concealed in a "stash box" in his car. Knott admitted that he was not licensed to carry a firearm. (RT 1354.)

According to Knott, before entering the liquor store parking lot, he stopped off at an adjacent phone booth to make a call, and parked briefly in front of the phone booth. (RT 1328.) After completing his call, he backed up and turned into the parking lot with only his parking lights on. (RT 1328-1329.) At that point he noticed "an altercation in the store." (RT 1329.) Knott said he stopped his car as it was facing toward the entry of the store, but he did not pull into a parking place. (RT 1331.) He saw two people with guns pointed at Nasser Akbar. (*Ibid.*) Knott claimed that appellant was standing about five feet from the entry (RT 1332), although Knott admitted he could not see clearly enough at the time to make an identification. (RT 1333.) Nevertheless, Knott testified that appellant was holding a black, semi-automatic handgun. (RT 1334.) Knott also saw a woman standing further inside the store holding a chrome gun. (*Ibid.*) Akbar was standing behind the counter between the two cash registers. (RT 1335.) A second clerk was standing to the far side of the second cash register (RT 1336.)

According to Knott, appellant fire three shots in rapid succession and then a fourth shot as he was leaving the store. (RT 1338.) Akbar fell to the ground after the first shots, and appellant reached over the counter and shot him again. (RT 1339.) Knott claimed that appellant also fired a shot towards the second clerk before leaving the store. (RT

1339-1340.) Knott stated that he saw the woman's hand – the one holding the gun – flinch about the time he heard the gunfire. (RT 1385.)

Knott claimed that he was approximately 16 feet from appellant and the woman when they came out the door of the liquor store (RT 1341), and that he recognized Toler, whom he knew by the nickname "Chocolate," because she lived near Knott's sister. (RT 1341, 1364.) He also stated that he recognized appellant as someone whom he had seen with Toler in front of Ihesia Sullivan's house earlier that day. (RT 1364-1365.) Knott further claimed he had previously seen appellant in front of Sullivan's house that week, getting into a small, black hatchback car with tinted windows. (RT 1364-1366.) Knott testified that he had seen Toler and Sullivan driving the car for about a month before he first set eyes upon appellant, and that he never saw appellant actually drive the car. (RT 1366-1367.)

Knott testified that he started to drive towards the suspects as they exited the store, but instead decided to retrieve his gun from the stash box in his car. He considered shooting the suspects, but then changed his mind. After the suspects had fled, he backed his car towards the store, and went inside to check on Akbar. While he was in the store, he "drew down" on a shoplifter inside the store who was hiding a bottle of brandy under his shirt, because Knott thought the bottle was a weapon. Knott then ordered the man to leave the store. (RT 1381.)

Despite testifying that he recognized the suspects, Knott stated that he falsely informed the police officers who arrived at the scene, that the suspects had fled in a white Oldsmobile Cutlass. (RT 1359-1360.) He stated that he lied to the police about this, because he did not "want any involvement" and the police were pushing him for a

description of the getaway car. (RT 1361.)[4] Knott claimed that he lied to the police about what he observed, out of fear for the safety of his family. For the same reason, he did not identify Toler and appellant at the field show-up conducted by the police later that night. (RT 1346-1348.) Knott initially denied that he feared Toler due to her affiliation with the local Insane Crips gang, but upon prompting by the prosecutor, Knott agreed that Toler's gang affiliation was a significant factor in his decision to lie to the police. (RT 1348-1349.)

On cross-examination, Knott denied that he told the policeman who took his statement that the suspects he had seen running from the store were two black males. (RT 1361, 1377.) He also denied that he had heard the shots before entering the parking lot and had hesitated before actually driving into the lot. (RT 1378.) This testimony was contradicted by the subsequent testimony of Long Beach Police Officer Brad Scavone, the officer who conducted the initial interview of Knott. According to Scavone, Knott told him that he was just beginning to pull into the East-side drive way of the liquor store parking lot when he thought he heard gunshots, and that he hesitated for a moment in the driveway. Knott told Scavone that he then saw two young, black males run across the walkway in front of the store, heading Eastbound, and then run North to a white Oldsmobile. (RT 1417-1418.) That Knott was not yet in the parking lot at the time the shots were fired, was corroborated by defense witness Tena Delaguerra who testified that she saw Knott's car pull into the driveway of the parking lot as the

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[4] Knott testified that he never saw the getaway car; that the suspects fled on foot towards Cherry and he did not see them get into a car. (RT 1344.)

suspects had already left the store and were running up Cherry Street. (RT 1688, 1670.)

Shortly after appellant and Toler were arrested, Knott decided to cooperate with the homicide detectives, Detectives Wren and Collette. (RT 1350 1369.) He later attended a live line-up at the county jail, during which he identified appellant as the man he saw commit the P&B robbery-murder. (RT 1397.)

Knott acknowledged that the detectives assisted him in obtaining dismissal of "a number of traffic tickets that had gone to warrant," so that he "wouldn't go to jail." (RT 1351.) Knott denied that he had received such assistance in exchange for his testimony (RT 1351, 1392.) Knott had three outstanding warrants (RT 1385), and owed substantial fines that he could not afford to pay. (RT 1386.) He claimed that he had not asked for assistance with these matters until he was stopped by the highway patrol on his way to work, "a year" after the P&B Liquor Market incident. (RT 1386.) He stated that the police had provided such assistance so that he "would be able to make it back and forth to work with no confrontations [by the highway patrol]," and also to prevent him from going to jail where he might encounter appellant. (RT 1392.) On cross-examination, Knott subsequently conceded that his tickets had actually been "fixed" in January 1995, four months after the P&B robbery. (RT 1395.)

Detective Collette testified that he went to Cleavon Knott's home the day after the robbery to interview him. (RT 1538.) Collette stated he told Knott that he had been informed that Knott was present and could identify the perpetrators of the crime. According to Collette, Knott reacted fearfully to this information, and told Collette that he did not want to get involved. (RT 1538-1539.) Nevertheless, Knott stated that

he had witnessed the incident and knew who was involved; that the people involved were from his neighborhood and he could identify them. (RT 1539.) Knott knew Toler as "Chocolate". (RT 1540.) Knott told Collette these were two of the three people he had seen in the field show-up the night before. (*Ibid.*)

Collette claimed that Knott was frightened by the fact that "these people" were involved in gangs and drugs and would retaliate against him if he cooperated with police. (RT 1541.) Knott told Collette his sister lived near Toler. (*Ibid.*) Collette testified that he spoke to Knott again two days later on September 1, 1994. Knott had left a message on Collette's answering machine that he wanted to talk to the detectives. (RT 1541-1542.) According to Collette, Knott indicated that he was willing to testify about what he observed during the robbery. Collette claimed that Knott was still afraid, but felt it was "the right thing to do." (RT 1542.) Collette denied that any discussion concerning. Knott's outstanding warrants or any other possible benefits incurred during either of these two interviews. (*Ibid.*) He testified that a number of months after the crime, Knott identified appellant in a live lineup. (RT 1548.)

Detective Collette further testified that he interrogated Angela Toler in the early morning hours of August 30, 1994, in his office at the police department. Collette's partner, Logan Wren, was present during the interview. (RT 1543.) Angela Toler initially denied involvement in the robbery of the P & B Market, but changed her story after they informed her she had been identified as "the girl in the store with the chrome handgun." (*Ibid.*)

According to Collette, Toler told the detectives they had gone out to do a 'lick." (RT 1544.) She told them she was driving appellant's

car, but did not know his name at the time. After considering another store, they stopped at 4th and Cherry Streets. They entered P&B Market with guns drawn. Appellant told the clerk it was a robbery and demanded money. He fired several rounds striking the victim. They left and divided the money equally. Toler said she received $36. (*Ibid.*)

Collette acknowledged that they did not tape-record the entire interrogation, but afterwards obtained permission from Toler to make a tape-recording of her statement. (RT 1544.) He denied threatening Toler, or promising her any benefits to induce her to make her statement. (RT 1545.) Collette admitted that he was aware, at the time he interrogated Toler, that the victim, Nasser Akbar, had died and the case was a robbery-murder, and was therefore aware that the case was a possible special circumstance death penalty case. (RT 1545-1546.) However, he denied that either he or Wren had threatened Toler with the death penalty. He testified that, if it was discussed at all, it would have been so as part of "an overall discussion about the consequences of the case." (RT 1546.) Collette testified that, as far as the detectives were concerned, the death penalty "wasn't applicable" to Toler based upon the information they had at the time of the interview. He claimed that it was his belief that Toler was not the shooter, so the death penalty would not apply to her. (*Ibid.*) Collette denied that Toler ever asked about the punishment she was facing or that she asked for any kind of benefit or assistance before changing her statement. (RT 1547.)

Detective Wren also denied that Cleavon Knott had asked for, or been offered, any benefit in exchange for his testimony (RT 1607-1608), but acknowledged that Knott had later sought Wren's assistance in getting some traffic warrants dismissed. (RT 1608.) Wren claimed

that he had helped Knott with these matters, because he "didn't want him to end up getting arrested and . . . run the risk of being incarcerated with a person he was eventually going to have to testify against." (*Ibid.*) Wren admitted to having the "paperwork processed that dismissed the tickets and warrants against him." (RT 1646.) Wren also admitted that he was aware that Knott was in illegal possession of a firearm (RT 1641), and that he was illegally carrying a concealed weapon. (RT 1642.) However, Wren did not even ask Knott to turn over his gun. (RT 1644.) Wren testified that when Knott was interviewed on August 30, 1994, he said that he had watched the shooting from the liquor store parking lot and that he recognized the perpetrators. He identified appellant as the shooter of the clerk. (RT 1609.)

According to Wren, the interrogation of Angela Toler took place between 5:00 a.m. and 6:45 a.m. Only the part taking place between 6:28 and 6:46 a.m. was tape-recorded. (RT 1625.) Wren stated that he took notes during the interrogation, but destroyed them after preparing his typed report, which was two pages in length. (RT 1624-1625.) Wren denied that Toler said she did not know appellant's name or that she had referred to him as "D-Mac." According to Wren, Toler referred to appellant as "Malik" during the interrogation. (RT 1627-1629.) Wren also denied that the death penalty was mentioned or that any discussion of penalty took place during the interrogation. (RT 1633-1634.) Wren claimed that the question of a plea bargain with Toler first came up after charges had been filed. (RT 1639.)

Sullivan, Toler and Appellant were driving on 2nd Street when they were stopped by Patrol Officer Timothy Everts and his partner Officer Moss at approximately 12:20 a.m. on August 30, 1994. (RT

1432-1434.) Appellant was sitting in the backseat on the passenger side of the car. (RT 1434.)

Everts testified that he noticed appellant's shoulders move, and as he approached the car, observed that appellant was sitting with his hands between his legs. (RT 1435.) He subsequently determined that appellant had his right hand tucked under his right leg and his left hand on top of his left knee. (RT 1437.) Everts stated that he ordered the occupants out of the vehicle (RT 1436), and then returned to the car, at which time he noticed a gun in the map holder directly behind the front passenger seat, in front of where appellant's knees had been. (RT 1437.) According to Everts, the gun was loaded and the handle was sticking out of the map holder in the direction of the car door. (RT 1438.) Appellant was then arrested (*ibid*), and a subsequent booking search revealed that he had $43.57 in cash. (RT 1438-1439.) A search of the car revealed a loaded, small-caliber automatic handgun stashed between the two front seats. (RT 1458-1459.)

A crime scene investigation disclosed a shell casing and bullet fragments (1474, 1524) that, according to the prosecution's ballistics expert, had been fired from the gun seized from the map holder, a .9 millimeter Glock pistol. (RT 1579, 1581.) However, a gunshot residue test performed on appellant at the scene of the traffic stop was negative (RT 1559), and there were no fingerprints that matched appellant's at the crime scene or on either of the guns. (RT 1560-1561.)

Dr. Eugene Carpenter, the pathologist who performed the autopsy of the victim determined the cause of death to be "multiple gunshot wounds." (RT 1509.) Dr. Carpenter identified five wounds, but noted that two of them – identified, respectively, as "Wound Number III" and "Wound Number V" – had come from the same bullet. (RT 1501.)

He also stated that Wound Numbers I and II were "non-fatal" wounds. (RT 1503.) Dr. Carpenter was of the opinion that the trajectory of Wound Number III was "consistent with a shooter standing on his feet firing downward into a prone victim laying on his side." (RT 1504.)

2. Robbery of James Edge

James Edge testified on August 25, 1994, at about 12:30 a.m., he was leaving the laundromat he owned on East 4th Street in Long Beach, when he noticed a green Ford near his parking lot. A man and a woman were sitting in the car. (RT 1187-1188.) The man asked Edge whether the laundromat was open, and Edge told him it would reopen at 6 a.m. (RT 1188.) After Edge entered his own car, the man suddenly got out of the Ford, came up to Edge's car, and stuck a large black gun in Edge's ribs. The man said, "Give me all your money. Give me everything you got." Edge gave the man $200 in cash, his daily planner, some envelopes and all of his keys. The man then walked back to his car and the couple took off in the Ford. Edge was able to identify the license plate number, which he gave to the police. (RT 1189.) Edge noted that the gun used by the robber was a dark gun and that it was an automatic. (RT 1191.) Edge said he had gotten a good look of the face of the man who robbed him, and was certain that the man was clean-shaven. (RT 1200-1201.) While on the witness stand Edge was shown a photograph of appellant taken August 30th, and conceded that appellant was wearing a mustache. (RT 1201.)[5] He acknowledged that on August 30, 1994, he was shown this photo as part of a photo-lineup, and was only able to determine that the man

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[5] Angela Toler testified that appellant had worn a mustache and braids around the time of the offense. (RT 1246.)

depicted in the photo "looked like" the person who had robbed him. (RT 1192, 1202-1203.) In March 1995, he attended a live line-up at the county jail and identified appellant as the man who robbed him. (RT 1193.)

C. Penalty Phase

1. Evidence In Aggravation

a. 1987 Attempted Robbery/Attempted Murder

Evidence was presented establishing that appellant had been convicted of attempted robbery and attempted murder in Portland, Oregon in 1987. (RT 2087, 2113.) In addition Donna Annas, Ronald Mitchum and Dennis Bryant testified to the underlying facts of that offense. (RT 1943-1986.)

Annas testified that on June 24, 1987, she had just gotten into her car after leaving a pizza restaurant in Portland, and was about to leave, when a man asked her for the time. The next thing she knew, the man had a gun pointed at her face. (RT 1983.) The man ordered her to get out of the car, but instead she stuck her finger inside the barrel of the gun, honked her horn and started to back the car out. (RT 1984.) The man ultimately gave up and walked away. (RT 1984.)

Bryant testified that he was a security guard working for a private company. He noticed Annas' car honking and saw appellant walking away from the car. Bryant followed appellant and informed he that he could identify him. Appellant then began shooting at Bryant. Bryant hid behind a telephone pole, and was not hit by any of the shots. Eventually appellant gave up and ran away. (RT 1954-1961.) Ronald Mitchum corroborated Bryant's testimony. (RT 1943-947.)

b. 1994 Robbery/Shooting (Unajudicated)

Brian Bachelor testified that on April 27, 1994, three men came to the house he shared with Keith Jacobs and Mark Ball to purchase marijuana from Bachelor. Bachelor claimed that appellant was one of the three men. When Bachelor produced the marijuana, appellant pulled out a gun and forced the Bachelor, Jacobs and a man named Brian Widmer into the bathroom, turned out the lights and started shooting. Widmer was shot in the back and shoulder and Jacobs was shot in the head. (RT 1988-2000.) Bachelor's testimony was corroborated by Keith Jacobs, who testified that appellant and the two other men who had accompanied him to the house tied Jacobs, Bachelor and Widmer up before shooting them. Jacobs was shot below the ear and the bullet came out his above right eye, causing him to lose his right eye. His jaw was also fracture and his sinuses were destroyed. (RT 2092-2103.) Jacobs conceded that he had initially not been able to positively identify appellant from photographs. (RT 2104.)

c. Assault of Bailiff (Unadjudicated)

Sheriff's deputy Joseph McCaleb testified that on September 27, 1995, he had been a bailiff assigned to the courtroom in which the instant case was being tried. He claimed that while he was escorting appellant to the courthouse lockup after the day's proceedings had concluded, appellant became belligerent when told to enter a particular cell. According to McCaleb, appellant wanted to be placed in the "Four Cell" because his belongings were there, but McCaleb only had the keys for the "Five Cell." McCaleb claimed that he placed his hand on appellant's shoulder to get him into the cell, whereupon appellant began to punch McCaleb repeatedly in the head. McCaleb called for help and appellant was subdued, but McCaleb stated that he sustained

injuries, including a concussion. On cross-examination, McCaleb acknowledged that he was six feet four inches tall and weighed 220 pounds. (RT 2048-266.)

Defense witness Roman Cooper testified that he was a prisoner in the holding tank at the time Deputy McCaleb escorted appellant from the courtroom. According to Cooper, McCaleb initiated the altercation by grabbing appellant's shoulder. Appellant then grabbed McCaleb's hand, and the bailiff once again grabbed appellant's shoulder, and the two started fighting. Roman observed "scars" on appellant's face after the fight and noted that he was bleeding. During the fight, Cooper saw both men throw punches at each other. (RT 2126-2138.)

d. "Threatening" Note (Unajudicated)

Dennis Bryant and Tom Duker, the husband of Donna Annas, both testified that earlier that same day, appellant had flashed a pad of paper at them with the words, "I will be out," in large letters. Bryant also observed appellant mouth the words "mother fucker" as he was holding up the pad. Both witnesses watched appellant then tear the pad into small pieces. According to Bryant, the incident occurred while the judge and jury were out of the courtroom. (RT 2026-2030.) Ernest Armond, a Long Beach police officer and prosecution penalty phase witness corroborated Bryant and Duker's testimony. (RT 2033-2035.)

e. Victim Impact Evidence

The prosecution presented three victim impact witnesses. These included Nasser Akbar's wife, Mardemomen Razeih, and two of Akbar's friends, Ernest Armond, a Long Beach patrol officer, who had responded to the crime scene when Akbar was killed, and Hilda Kelly, the owner of an antique store located near the P & B Market.

Razeih testified that she had been married to Akbar for 17 years and had two daughters with him. They had immigrated from Persia to the U.S. in 1977. Razeih described Akbar as a good husband and father, and stated that his death had been very hard on the family. (RT 2069-2073.)

Armond testified that he had known Nasser Akbar since January 1993, and considered Akbar his good friend. He had been introduced to Akbar by his training officer at the police academy, who told Armond to take good care of Akbar because he was a good guy. Akbar was kind to Armond. Following the robbery and shooting on August 29, 1994, Armond arrived at the store and found Akbar lying in a pool of blood, but still alive. Akbar died in front of him. Armond stated that he was deeply affected by this. (RT 2035-2037.)

Kelly called Akbar the "loveliest person I had ever met." She noted that he had an even temperament and was helpful to others. He was also witty and kind. Kelly was extremely shocked by Akbar's murder and ultimately closed her antique shop. Kelly claimed that she recognized appellant from having seen him in the vicinity of the liquor store the evening of the crime. She further testified that she had seen appellant and Toler on occasions prior to the date of the crime. (RT 2038-2046.)

2. Evidence in Mitigation

The defense case in mitigation consisted of the testimony of only four witnesses: appellant's stepfather, Alvin Carney; his uncle, Abdul Hasan; his girlfriend, Angela McCall, and his mother, Saundra Carney.

Alvin Carney testified that he had lived with appellant for 14 years and helped raise him. The two of them had shared activities, such as playing basketball and riding around in the car together. Carney took

appellant to the shipyard where he worked. Carney described appellant as having been a "good kid." Carney was happy to be appellant's stepfather. Appellant obeyed him and treated him as though he were appellant's "real father." They had a lot of fun together. According to Carney, appellant was nice to others and had a job taking care of little kids. Carney had never known appellant to be violent or to use drugs and alcohol. Carney stated that he did not believe in the death penalty and that he thought appellant could help others in prison if his life were spared. Carney denied that appellant had been abused or mistreated as a child; that he had been provided with a good home and with enough food to eat and clothes to wear. He had attended school regularly. Carney acknowledged that appellant had served time for robbery. He was unaware of other crimes appellant might have committed, but would still consider appellant a "good kid." (RT 2142-2150.)

Abdul Hasan explained that appellant had taken the name Malik Hasan upon becoming a Muslim. Appellant had been influenced by Hasan, who was a follower of Elijah Muhammad. Hasan described appellant as having been a "joyous person, very compassionate, fun loving, just a wonderful child." Hasan never saw appellant be violent or steal anything, and denied that he was ever hostile toward anyone. Hasan stated that he was "fairly sure" his nephew had not committed the crimes he was convicted of. Hasan confirmed that appellant had had a good upbringing and had never been abused or neglected. (RT 2151-2160.)

Angela McCall stated that she had known appellant since 1994, and that they had a child together, a one-and-a-half-year-old son named Malik. McCall denied ever having seen appellant use drugs or

alcohol , engage in criminal activity or use a weapon. She described appellant as a person who liked to eat and laugh, and denied that he was ever abusive to her or to her other children. McCall asked the jury to spare appellant's life because he was "not a vicious person and he has a son to help raise." On cross-examination, McCall acknowledged that appellant left town before Malik was born. She found out that he had gone to Mississippi. She knew he had previously been incarcerated, but did not know the reason. She also did not know whether appellant was employed, or whether he was meeting with his parole officers. (RT 2160-2167.)

Saundra Carney explained that Lomax was her maiden name. Appellant's father abandoned her while she was pregnant with appellant. Alvin Carney came into their lives when appellant was six or seven years old. When appellant was born, Carney already had two children. She had difficulty raising three children on her own. She finally got a job when appellant was five. Appellant was a slow learner at first, but later did pretty well in school. Carney described him as a fairly good child, who occasionally got into trouble, but never for anything serious. He never engaged in criminal behavior as a child, and was good-mannered and respectful to adults and other children. When appellant was six years old he had a tracheotomy and almost died. He had to be hospitalized for a while. At the age of 12 or 13, appellant went to live with his biological father, after which he became involved with the "wrong crowd." However, he was still well-behaved at home. Carney claimed she was shocked by appellant's criminal convictions and had a hard time imagining her son doing the things he had been accused and convicted of. Like her husband, Carney felt appellant could be productive in prison. On cross-examination, Carney

stated that she believed that appellant was wrongly convicted of having murdered Akbar. She felt at most he was an accessory, but that he would not be one to inform on an accomplice. (RT 2169-2188.)

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I.

THE STATE'S FAILURE TO COMPLY WITH ITS STATUTORY AND CONSTITUTIONAL OBLIGATIONS TO PROVIDE DISCOVERY CAUSED APPELLANT TO SUFFER A VIOLATION OF HIS STATE AND FEDERAL RIGHTS TO A SPEEDY TRIAL AND TO DUE PROCESS OF LAW

A. The Record Establishes That Appellant Asserted His Rights To A Speedy Trial, But The Prosecution's Unjustified Delay In Both Reaching a Decision As To Whether To Seek a Death Sentence and In Providing Discovery To The Defense Placed Appellant In The Untenable And Unfair Position Of Having To Relinquish His Right To A Speedy Trial In Order To Receive Effective Representation

1. The Pertinent Historical Facts

At his initial arraignment in municipal court on September 8, 1994, appellant told his attorney to inform the court that as to the setting of a date for the preliminary hearing, "he does not wish to waive time." (RT, 1994 proceedings, [6] 7.) The preliminary hearing was set for September 28, 1994. (RT, 1994 proceedings, 18.) On that date, appellant, who at that point was representing himself (RT, 1994 proceedings, 20), filed a discovery motion and agreed to waive time to October 26, 1994, as "7 of 10."[7] (RT, 1994 proceedings, 27-28.)

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[6] The proceedings transcribed in this volume were conducted in Los Angeles Municipal Court Case No. NA021332, and cover the period beginning 9/1/94, and ending 10/26/94.

[7] Pursuant to Penal Code section 859b, in a felony case, a preliminary examination must be held within 10 court days of the date upon which the defendant is arraigned on the complaint, unless

Meanwhile, on October 11, 1994, the court held a hearing on appellant's discovery motion. (RT, 1994 proceedings, 33.) At the hearing, appellant acknowledged that he had received police reports, but argued that he needed the names, addresses and phone numbers of witnesses, information that had been redacted from the copies he was given. The prosecutor stated that the redacted information would be provided to the investigator appointed to assist appellant, who was in pro per. (RT, 1994 proceedings, 33-35.)

On October 26, 1994, when the case was called for preliminary hearing, appellant announced he was "ready" and wanted to proceed. (RT,1994 proceedings, 41-42.) However, based upon a request for continuance by the lawyer of then co-defendant Angela Toler (RT, 1994 proceedings, 43), the court continued the preliminary hearing to November 18, 1994, finding "good cause" to do so (RT, 1994 proceedings, 46), over appellant's objection and despite his refusal to waive his speedy trial rights. (RT, 1994 proceedings, RT 48-49.)

The preliminary hearing was held on November 18, 1994, at the conclusion of which appellant was held to answer. (CT Supp.III 123.) Angela Toler testified against appellant at this hearing. (CT Supp.III 114.) She further testified that she had entered into an agreement with the prosecution that she would plead guilty to a robbery charge (Penal code section 211), in exchange for a sentence of 10 years in prison, and that the prosecution would dismiss the murder charge against her in exchange for her "truthful" testimony in any future proceeding." (CT Supp.III 120.) Appellant complained to the court that he had not been

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the defendant waives time or "good cause" for a continuance is established by the prosecution.

provided with discovery regarding the agreement between Toler and the prosecution.[8] (*Ibid.*) Appellant's pro per status was revoked on December 2, 1994, and the public defender was reappointed. (RT, 1994-1995 proceedings,[9] 16.) Appellant was arraigned in superior court on December 12, 1994. (RT, 1994-1995 proceedings, 24-27.) On January 12, 1995, the court heard and denied appellant's motion to dismiss, arguing that the municipal court's continuance of the preliminary hearing over appellant's objection violated appellant's speedy trial rights under Penal Code section 859b. (RT, 1994-1995 proceedings,31-34; CT Supp.III 184.)

Appellant's motions for a lineup and for discovery, were heard on February 17, 2005. (RT, 1994-1995 proceedings, 51.) At that hearing, the prosecutor stated that he had no opposition to either motion. Regarding the discovery motion, the prosecutor stated that:

> Mr. Isaacson [the public defender] is going to be sitting down with the detectives and essentially getting everything we're [sic] asking for . . . The only remaining issue being one of the witnesses. We do not want to turn over an address. It would be a situation where we arrange for haperson [sic] to be made available to Mr. Isaacson. But I think that is essentially understood and worked out . . .

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[8] Disclosure of impeachment evidence, including evidence of agreements between the government and testifying witnesses, is constitutionally compelled. (*Giglio v. United States* (1972) 405 U.S. 150, 154; *Bagley v. United States* (1985) 473 U.S. 667, 682.)

[9] The proceedings transcribed in this volume were conducted in Los Angeles Superior Court, Case No. NA021332, and cover the period beginning 2/12/94, and ending 3/13/95.

(RT, 1994-1995 proceedings, 52.) The court indicated that it would sign the proposed order, with the exception of the address of the witness referred to by the prosecutor. (*Ibid.*) The prosecutor then added that "[o]ne of the witnesses may have returned to Cambodia," but that they would "get everyone we can." (*Ibid.*)

On February 27, 1995, appellant filed a petition for writ of mandate in the Court of Appeal, challenging the superior court's denial of his motion to dismiss for violation of Penal Code section 859b. (CT Supp.III 227-246.) An alternative writ of mandate was granted by the appellate court on March 9, 1995 (CT Supp.III 247-248), subsequent to which, on March 13, 1995, the case was dismissed. (RT, 1994-1995 proceedings, 56.) A new complaint was filed that same day, and appellant was arraigned in municipal court that afternoon. (RT, 1995 proceedings,[10] 1.) The preliminary hearing was held on May 12, 1995, at the conclusion of which appellant was again held to answer. (CT 45.) He was arraigned in superior court on May 30, 1995. (CT 73.)

On June 21, 1995, appellant's public defender reported to the court that he had informed the prosecutor (who was not present in court that day), that he was "obviously not ready for trial at this time," because the District Attorney's Office had not yet decided whether or not it was going to seek the death penalty. (RT A-8.) The public defender asked to trail the case to July 14, 1995, which would be 49 of 60.[11] The public defender further noted:

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[10] The proceedings transcribed in this volume were conducted in Los Angeles Municipal Court, Case No. NA023819-01, and cover the period beginning 3/13/95, and ending 3/11/95.

[11] By statute, appellant's case had to be brought to trial within 60 days of the filing of the information, although he could consent to

> We have a number of problems not only with the investigation on the penalty phase but also in locating the witness in the guilt phase.

(RT A-9.) Because of these problems, the public defender stated that he would be "very, very likely to seek a continuance on the next court date." (*Ibid.*)

The court subsequently advised the deputy district attorney standing in for the prosecutor:

> I would like to convey to Mr. Schreiner that I hope on this date, July 14, we will know for certain . . . whether it's death, we'll need to know that.

(*Ibid.*) When the stand-in deputy tried to suggest that the delay by his office in deciding whether to seek a death sentence was related to the fact that they had not yet decided whether to consolidate the two cases against appellant,[12] the court responded:

> Probably so. But the case was here before so there was an opportunity for the information to be taken up to the head of the office earlier. Although that case was dismissed it's the same case, same information, so I really don't want a whole lot of delays, if you could convey that information to him.

(RT A-10.)

On July 14, 1995, the prosecutor was not present in court and a stand-in deputy requested a continuance to August 10, 1995, as 0 of 30. (RT A-14.) The court stated:

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a setting of the trial date beyond the 60-day period. (Penal Code § 1382 (a) (2).) the witnesses in the guilt phase.

[12] The other case referred to in this discussion was the August 25, 1994, robbery of James Edge.

> Now I am disturbed that this is still not ready for trial. I understand that the reason is that the sentence has not been determined by the downtown D.A.'s committee and also the discovery has not been completed, is that correct?

(RT A-15.) The public defender responded as follows:

> Yes, your honor. And in fact some of the discovery regarding the penalty phase we haven't even received the addresses of witnesses, also as to the case in chief. It's made . . . preparation very, very difficult for the guilt phase and for the possible penalty phase. We are kind of at an end right now because we don't have it. I talked to Mr. Schreiner today. He assured me again he is willing to get the information from the police. I went to the police directly, but they refused to give it to me. They said they won't give it without a court order. So we are kind of stuck at this point.

(RT A-15.)

The court suggested to the public defender that he move for an order preventing the district attorney from seeking the death penalty due to its dilatory conduct. The public defender responded that he would consider such an option if the defense were given insufficient time to prepare for trial. (*Ibid.*) The court observed:

> This is the second time the matter has been before the court. This is the second filing. There is nothing new to the downtown committee and I don't want cases in this court just kept dangling because some committee can't get itself together to make a decision. So I would think you have grounds for such a motion.

(RT A-16.) The court thereupon continued the case to August 10, 1995, as 0 of 30. Appellant agreed to waive time. (*Ibid.*)

On August 10, 1995, the prosecutor was in trial in another court. (RT A-21.) The public defender reported that the prosecutor had informed him that he was not ready to proceed on the discovery motion, and that he was trying to get together with the detectives to discuss the discovery problems. The public defender stated that he would be unavailable until August 28th and requested that the case be put over until that date, as 0 of 60. The public defender explained that he would not be ready for trial for "several months," because the D.A.'s death penalty committee had not even received the memo regarding the penalty yet. (RT A-21-A-22.) The court agreed to put the matter over to August 28th as 0 of 60, and appellant agreed to waive time. (RT A-22.)

On August 28th, the discovery motion was finally heard. The public defender requested an order directing the police to turn over the addresses of witnesses that were blacked out in the murder book, both the Los Angeles witnesses and the Oregon witnesses. The public defender noted that on the Oregon incidents, the defense had been given police reports regarding possible penalty phase evidence, but that all of the witnesses' addresses had been blacked out. (RT A-27.) These witnesses were not only potential prosecution witnesses, but also witnesses who gave exculpatory statements. (RT A-28.)

The court asked the prosecutor why the addresses had not been given to the defense, and the excuse he offered in response was that the witnesses were "terrified" of the defendant. The court remarked that this was "the first time this has been brought to the attention of the court." (*Ibid.*)

The prosecutor further claimed that he had not been aware until now that the names of the Oregon witnesses were also blacked out, and stated that he wanted to confer with his investigating officers about that. At this point, the prosecutor offered to provide a list of witnesses who would be made available for interview at his office in lieu of providing their addresses. (RT A-29.)

The public defender noted that some of the witnesses's *statements* in the reports he was given were also blacked out. He further stated that while he had no objection to conducting an interview of prosecution witness Cleavon Knott in the D.A.'s office, and that he knew where to find prosecution witness Angela Toler, the majority of the witnesses had given exculpatory statements that were inconsistent with the prosecution's case. The public defender argued that there was no reason for the prosecutor to withhold the addresses of these witnesses, and that he had not been able to locate and contact them because of the prosecutor's failure to turn over such information. In particular, the public defender noted that he needed to find "the other liquor store clerk who made statements inconsistent" with Angela Toler's. He further noted that the man had apparently left the jurisdiction, and he could not even determine the man's whereabouts because he was not given the addresses of his employers who might know where he had gone. (RT A-30- A-31.)

The public defender recited the names of specific witnesses for whom he needed addresses.[13] The prosecutor responded that he did

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[13] These witnesses were: Eric Berman, Georgine Hightower, Somphop Jardensiri, Nathan Apley, James Edge, Tanya Marie Delaguerra and Donna Seipp. (RT A-34 - A-35.) The public defender also asked for contact information on Somphop Mannil,

not want to release that information to the defense, because it had been the "impression" of the investigating officers that these witnesses were all fearful of appellant. (RT A-35.) The court ordered the prosecutor to contact each of the enumerated witnesses and find out whether they were willing to have their respective addresses and phone numbers released to the public defender. (RT A-36.) The public defender agreed to a continuance of the discovery hearing to September 27, 1995, to give the prosecutor a chance to comply with his discovery obligations, but stated that the defense would otherwise be seeking a compliance order from the court. (RT A-36- A-37.) The public defender reiterated that the prosecution had not been cooperative in giving the defense information necessary to locate exculpatory witnesses. (RT A-37.)

Immediately following the discovery hearing, appellant sought to relieve the public defender and have new counsel appointed, under *People v. Marsden* (1970) 2 Cal.3d 118, and when the court denied that request, appellant moved to represent himself. (RT A-38.) The court granted appellant pro per status (A-42), following which the public defender represented that he would turn over two boxes of discovery material to appellant. (RT A-43.) The court continued the case to September 27, 1995, as 30 of 60. (*Ibid.*)

When appellant appeared before the court on September 27, 1995, he was handed a letter from the District Attorney's office informing him that the death penalty committee would be meeting on his case on October 5, 1995, and that he should submit all mitigating

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who was either a co-worker or employer of Somphop Jardensiri's, and might know the latter's whereabouts. (RT A-36.)

evidence to them by October 3, 2005. (RT A-47-A-48.) Appellant informed the court that he had not yet received the two boxes of discovery material that the public defender had been directed to turn over to him. (RT-A-48.) Therefore, appellant did not think he could be ready for trial within the 60-day period. (RT A-61.) Appellant decided he no longer wished to represent himself, so the court reappointed the public defender, over appellant's objection. (RT A-70-A-72.[14]) The case was continued to October 4, 1995, as 37 of 60. (RT A-72.)

On October 4, 1995, the public defender appeared, but the prosecutor was not present. (RT A-74.) The public defender reported that the prosecutor:

> has now conceded he will give me all of the names and addresses of all of the witnesses in the police reports and their present whereabouts, but he has to get them from the police department.

(RT A-74- A-75.) In requesting a compliance order from the court, the public defender emphasized that he had been seeking the discovery at issue since January 1995, and reminded the court that a discovery motion was pending when the original case was dismissed pursuant to the court of appeal's writ of mandate. When the case was refiled he was told he would get the requested information from the detectives, but he could not get it from them, and consequently filed the pending motion. (RT A-75.) The public defender noted that he had been informed of the existence of new reports that were prepared regarding an incident to be offered in aggravation in the penalty phase, but he

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[14] Appellant asserted that he had a conflict of interest with the public defender, and requested another *Marsden* hearing. (RT A-72.) The court indicated that appellant would get such a hearing, but did not say exactly when that would be. (RT A-73.)

asserted that apart from these new reports, he had been asking ***over and over again for the same information***, and was therefore seeking a compliance date within three weeks. (*Ibid*, emphasis added.)

As to the incidents in Oregon that the prosecutor intended to introduce in the penalty phase, the public defender reported that the prosecutor had told him that he needed to confer with the detectives before he could give the public defender the names and addresses of the Oregon witnesses. The public defender stated:

> I told him [the prosecutor] we have pretty much been stalled in this case because we cannot send somebody up to Oregon and do half of the investigation and then seek money from the county and the state to send them back up to Oregon to complete the investigation. So at this point all of our efforts have been stalled in terms of any penalty phase investigation, And I don't know how long it's going to take once we get the information.

(RT A-75-A-76.)

The public defender also pointed out that a decision regarding whether the District Attorney was going to seek a death sentence still had not been made, but noted that the committee was meeting the next day and that he expected to have a decision from them by the following week. (RT A-76.) The public defender added that he was also still seeking disclosure of information as to the whereabouts of people who had given statements to the police indicating that appellant was not the one who had committed the crime. He stated: "There are a number of witnesses we are trying to find and can't find." (RT A-77.)

The court ruled as follows:

> It appears to me at this stage to be appropriate because of the ***continued failure of the district attorney's office to provide discovery***, to set one final compliance date and to state on the record that if compliance is not made by that date sanctions will be set against the district attorney's office and they will be forbidden to use whatever is in that material sought to be discovered . . . At defense request, I set compliance in this matter for October 25th with a warning to the district attorney's office that I shall impose sanctions on that day if . . . compliance . . . has not been made or I don't get an extremely good excuse why it has not been made. . . ***he [the prosecutor] should be warned that discovery should have been made long before now***. He should have been here today at the latest to make whatever argument he has. He didn't even honor the court with a phone call or a word as to his non-appearance and ***the defense has a right to know exactly where it stands. And they have been deprived of that right for far too long***.

(RT A-77- A-78, emphasis added.)

The court initially selected October 19th as the date for discovery compliance, and when the public defender questioned whether that might not be enough time because it would only give the prosecutor two weeks within which to comply, the court remarked: "The number of weeks in the year is 52, so he has had about 40 weeks." (RT A-79.) Nevertheless, the court continued the discovery compliance hearing to November 6, 1995, as 0 of 60, and appellant agreed to waive time.

However, when the case was called on November 6, 1995, neither the prosecutor, the public defender nor appellant was present. A stand-in attorney from the public defender's office represented that the public defender was trying to resolve the outstanding discovery

issues with the prosecutor and asked that the case be put over until November 21, 1995. The court acceded to this request, and set further hearing on discovery compliance for that date, as 15 of 60. (RT A-81.)

On November 21st, the prosecutor was present, but the public defender and appellant were not. (RT 1.) The prosecutor told the court that the discovery issues had essentially been resolved, but since the committee had come back with a decision to seek death, the public defender wanted a statement on the record regarding which Oregon incidents the prosecutor intended to put on in the penalty phase. He added that public defender had indicated he would be asking for a considerable amount of time to prepare. (RT 1-2.) At the prosecutor's request, the matter was continued to November 30, 1995, as 24 of 60. (RT 2.)

Everyone was present in court on November 30th. The public defender informed the court that although they had finally been given contact information for all witnesses except for Cleavon Knott and James Edge, the information provided to them was stale. (RT 3-4.) The public defender explained:

> We have been attempting to use the information that we received to find the witnesses. I have been in contact with my investigator almost every day. He has not been able to contact any of the witnesses. *He believes that most of the addresses he received are no good.* He's attempting to try and use his investigative skills to track them down, but he has not found any of them.

(RT 4, emphasis added.)

The public defender also stated that he had been given police reports from Oregon, prepared in May 1994, and that he had been able

to determine that there were further developments as to other suspects named in those cases, but he had not been given any subsequently-prepared reports. He expressed his belief that there was " a lot more information that should be forthcoming" regarding the Oregon incidents. (RT 4.) As to his independent efforts to obtain information, the public defender explained, as follows:

> We have been attempting to get information through the attorneys who are representing suspects in the case. However, they are not willing to give us information because of possibility of conflicts of interest since Mr. Hasan has been named as a suspect in the case, at least one of them.

(RT 4-5.)

The prosecutor responded that he had turned over everything he had, and that they would make an effort to locate "the people we need to locate" when they got closer to trial. (RT 5.) He further stated:

> I can't tell you the detectives are out working on this now. We see this as a January or later trial date because I'm assuming counsel is going to be asking for more time since it's the death penalty issue now. And I certainly don't have the luxury of just spending my time on this one case and not on others. What I'm saying is I have given everything I have to the defense and I fully intend to continue to comply with discovery and if I get any new addresses to turn those over. But I can't represent to counsel or the court that I'm going to devote my time and resources to going out and finding these people right now.

(RT 6.)

The public defender responded:

> My main concern are the witnesses that [the] People will probably never use. People who at the field show up immediately after the crime indicated that my client was not the person involved. ***The clerk who was inside the store when Mr. Akbar was killed whose statement to the police directly contradicted the co-defendant who testified against Mr. Hasan***. . .I want the locations of these people. I want to find these people.

(RT 7, emphasis added.)

The public defender maintained that the prosecution had been dilatory in complying with its discovery obligations, and therefore had a duty to go out and relocate these witnesses. The public defender argued:

> [T]his is a case that started in August of 1994. Mr. Hasan was pro per for a few months. After we got the case we filed motions for discovery. The case was eventually dismissed because of the writ. ***The discovery was never complied with while that case was in existence.*** After that I tried to get informal discovery under this new case number. I kept – I was told they would be given to me, that they would have no problem giving me the information. We got down to filing motions for formal discovery, having the order signedor having the court agree that discovery should be made. Mr. Hasan went pro per again. ***That compliance date went by the board without any compliance.*** And so the passage of time has made all the information that we have received stale. All the information we have received is from August of 1994 . We don't – we don't have any of the recent information at all. Yet I know that the police were able to contact

several witnesses in March of 1995 to bring them to a lineup. Those witnesses, several of the witnesses were there at the lineup. So I know that they must have information that's better than the information that we have. ***We need to find Mr. Somphop Jardensiri . . . the clerk that was inside the store. We know from looking at the court files that the probation officer was able to talk to him when they compiled the information for the Angela Toler probation report in January of 1994 . . . We know that somehow they were able to talk to him in January. I assume that if we had the information where he would be in January we would have been able to get to him and talk to him as well and maybe made arrangements to have his testimony preserved if he was planning to leave the Country. All I have been told is that the police think he left the Country. We don't know where. We have been trying to find him through the other address that was provided to us of . . . Somphop Minnill – who was his employer, and apparently lived with him. He is not – he is not providing us any information. We have been sending him letters at that address. We don't know if he is receiving the letters. My investigator has been over there, believes the person doesn't want to talk to us.*** Well, his information isn't that necessary. He wasn't present at the time of the murder, but certainly Mr. Jardensiri is. ***And even if it takes going to Cambodia to obtain his presence I feel in a death penalty case it is necessary. And that's where we are right now in terms of Mr. Jardensiri.***

(RT 8-9, emphasis added.)

Accordingly, the public defender asked the court to order the prosecutor to

> take affirmative steps to find [Jardensiri] so we can locate him . He is ***the most important witness in this case as far as I'm concerned***.

(RT 15, emphasis added.) The court thereupon issued the following order:

> The D.A. must make inquiries of the police to see what the latest source of information was and get that and if it is different from what the People have already given to the defense it must be turned over.

(RT 16.) The court also ordered the D.A. to get from the police, information on the whereabouts of the witnesses at the time of the lineup in March 1995, with the exception of Cleavon Knott and James Edge, whom the public defender could interview in the D.A.'s office. (RT 10-11.)[15]

During this hearing, the public defender also indicated that the prosecutor had failed to provide the defense with discovery regarding "assistance given to potential witnesses by law enforcement," noting that he had *informally* learned, through a conversation with Detective Wren that the latter "did, in fact, do something for Cleavon Knott." (RT 11.) By searching the files of his own office, the public defender

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[15] Later in the hearing, the public defender started to bring up the fact that there were a number of witnesses listed in the order for the lineup that were never brought forward at the lineup, presumably for the purpose of clarifying that the defense also needed more current information about the location of these witnesses. However, before he could finish, the court cut him off by saying that they were getting close to Noon and they would have to recess and continue the hearing at a later time. (RT 16.)

discovered that Knott had been charged in Compton with the misdemeanor offense of driving on a suspended license (Vehicle Code section 14601.1), and that the case had been "advanced and dismissed." However there was no information in the file disclosing why that had occurred. (RT 12.)

The prosecutor did not dispute the fact that the defense had not received discovery regarding the "assistance" provided to key prosecution witness Knott. All he could say was:

> I thought that we had a discussion that there were some traffic tickets or tickets that had gone to warrant and that Mr. Knott had been given assistance on. Now counsel asked me today about this 14601.1 and I do intend to look into that. I'm more than happy to check that out and see what assistance he may have gotten there.

(RT 12-13.) The court ordered the prosecutor to investigate and determine what had happened with Knott's case. (RT 13.) The public defender argued that Knott should be brought into court and questioned about it, noting that the public defender's office could potentially have a conflict of interest, since Knott's public defender file contained an interview sheet that said "try and get this case dismissed because he is a witness in a murder case in Long Beach." (*Ibid.*)

The court declined to make such an order at that point, suggesting that they first look at the municipal court file. (RT 14.) However, the public defender responded that they had already tried to do that, to no avail:

> We have gone to the clerk's office. We have even attempted to informally obtain the district attorney's file in Compton and I was told that they don't have a file in this case even though it was obviously the district attorney who was prosecuting the

> case by one of the minute orders that I have copies of.

(RT 14.)

The prosecutor interjected at this point that "if there was some assistance, it's going to have been through Detective William Collette, the investigating officers. They did give Mr. Knott some assistance." The prosecutor suggested that he bring the officers to court to explain what occurred. (RT 14.)

However, the public defender related that he had already spoken with Detective Wren and "Detective Collette had nothing to do with it." He added that Detective Wren told him that "he does remember making some calls" and that "something was done for Mr. Knott in Compton." The public defender then reiterated his earlier request to have Knott brought into court to answer questions about this." (RT 15.) The prosecutor asked for an opportunity to "find out if we have any documentation on this before we start dragging Mr. Knott back and forth," and the court agreed to put the matter over to the next hearing. (*Ibid.*)

The public defender further requested that the prosecutor be required to state on the record what he was planning to present in the penalty phase as aggravating evidence under Penal Code section 190.3. (RT 16-17.) He explained:

> I'm getting a little concerned. Time is running. Although I have told Mr. Schreiner the state of the evidence at this point with the amount of work that we would have to do trying to defend a murder case in Oregon, three counts of attempted – three counts of residential robbery with 245's, assault with a deadly weapon on each of the three victims, a possible case that was pending in 1994 involving a weapon, 19 – I think 1988 attempted murder case,

> you know, we are at the beginning of investigating these items. And before we can even judge when we are going to be ready for trial we have to know what it is we have to do.

(RT 17.) The public defender further advised the court that appellant was very unhappy with the situation. He stated:

> ***Mr. Hasan is requesting that because of the delays in the discovery compliance that the matter be dismissed . . . he feels the undue delay of obtaining the information has prejudiced him and wants a dismissal at this point.***

(RT 18, emphasis added.)

The court ordered the prosecutor to submit in writing by the next hearing date the evidence they intended to introduce in the penalty phase. (RT 19.) She also admonished him:

> Mr. Schreiner be sure you are here, please, and the orders I have given today complied with by that date.

(RT 21.)

The court continued the hearing to December 12, 1995, at the public defender's request. He indicated that this was the earliest date he could appear, due to his other cases and trial schedule. (RT 18.) The court noted that they were 24 of 60, and the public defender requested that the December 12th date be counted as 0 of 60. (RT 91.) However, after conferring with appellant, he changed the request to

make December 12th 0 of 30, and appellant thereupon agreed to waive time.[16] (RT 21.)

When the case was called on December 12, 1995, neither the prosecutor, the public defender, nor appellant was present, and the case was continued to December 18, 1995, as 6 of 30. (RT 24.)

At the outset of the proceedings on December 18, 1995, the public defender announced that he had just been handed a written notice of guilt phase evidence, which included a list of 24 witnesses the prosecutor expected to call, and a list of "five incidents" he intended to present in the penalty phase, but **"not the specific witnesses."** (RT 25, emphasis added.) The public defender stated:

> We are requesting additional discovery on those cases. And without any additional discovery it will be impossible to defend them at the penalty phase.

(RT 26.) The prosecutor's response was:

> I have turned over everything we have in terms of reports of the 1994 incidents and the 1995 incident regarding Deputy McCaleb. In terms of the '87 and '93 convictions we are both in the same position in terms of knowing about the convictions but not having reports above and beyond that . . . I think we all understand that the likelihood that in the penalty phase, if we ever reach it, is sometime well down the road, and I would intend before that to determine who the

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[16] This would have made January 11, 1996, the 30th day, requiring the trial to commence no later than Monday, January 22, 1996, pursuant to Penal Code section 1382, subd. (a) (2) (B). That section provides that where a defendant consents to a date beyond the 60-day period within which trial is to begin, trial must commence within 10 days of that date.

> people are that are involved in those two '87 and '93 convictions and attempt to locate them, bring them.

(RT 26-27.) The prosecutor added that he had also turned over additional discovery, including the most recent addresses possessed by the detectives for the lineup witnesses, and an address for Somphap Jardensiri. He added that he had received a "fax notice" from Detective Collette indicating that Jardensiri had "fled to Taiwan." However, the prosecutor expressed his belief that the correct country was Thailand. (RT 28.) The prosecutor further reported that after speaking with Detective Wren, he learned that the detective had "helped [Cleavon Knott] on three or four traffic matters." Referring to Detective Wren, the prosecutor stated:

> He wasn't certain as to whether or not it was a 14601 but that he did go to Compton and speak to someone in dismissing a case. And that is something I discussed with counsel.

(*Ibid.*)

The public defender acknowledged that the information he was given that day did contain additional addresses for witnesses, but added that he could not yet state whether or not "that is going to provide me with enough information to get these witnesses into court." (RT 28-29.) Expressing his obvious concern and frustration, the public defender stated:

> A lot of the problems we are having is because we are receiving discovery information very late in the game and it's very difficult for us to find witnesses especially regarding the cases in Oregon from 1994 and 1987 and 1993. We have to . . . continue with the penalty phase investigation regarding those

> cases and attempt to try them here in Long Beach because I believe that it's going to be an important part of the penalty phase. ***We are at a big disadvantage because of the lateness and Mr. Hasan has made motions to dismiss and he would like to have the case dismissed at this point because of that feeling he has been prejudiced. Obviously, for us to properly prepare the case we are going to have to spend a lot more time trying to work up this case at this point, and it is a year and three months since the incidents and his incarceration.***

(RT 32-33, emphasis added.)

After ruling that an independent attorney would be appointed to investigate the potential conflict of interest caused by the public defender's office's representation of Cleavon Knott (RT 33-34), the court admonished the prosecutor as follows:

> As far as witnesses [the] People expect to use, you say you will contact these people in Oregon when you get around to it. That must be done or the attempts must be made promptly so that the defense has time to pursue its inquiries once you have given them the information you wish to use at trial. So when is it that you will be initiating those efforts, or have you already done so?

(RT 34.) The prosecutor responded that it would first have to get the court's authorization for funds to allow the detectives to travel to Oregon to conduct investigation there, but that he hoped to be able to "send them up there . . .within a month." (RT 34-35.)

The public defender requested a "firm date of either January 31st or February 1st that we can come back and get the discovery from the prosecution so that we can get our investigation done as well." (RT

35.) While the court felt that the prosecution could not be expected to drop everything to go, it asked for assurance that the investigation was actually going to be carried out, and admonished the prosecutor, I want to be sure of that. Don't delay it anymore." (RT 35.) The court also directed the public defender to continue pursuing his own investigation with the information he had thus far been given, and the public defender assured the court he had not been dilatory, but had been stymied in his efforts to investigate the Oregon incidents, by the dearth of discovery provided by the prosecution. The public defender explained:

> As I indicated last time, we have been investigating these cases in Oregon. Our problem is that the attorneys involved in the co-arrestees' [case] in Oregon will not give us information because of possible conflicts . . .There are other people involved in these cases. There were other arrestees in Oregon. Because we are representing somebody who is being charged with the offense in Oregon. Mr. Hasan has been charged with one of these cases in Oregon and he is a potential defendant and therefore the attorneys who are involved in the cases in Oregon view any requests that we get information as being possible conflicts and they will not provide information for us. The detectives in Oregon are not willing to work with somebody from Los Angeles when we are not appointed to the case in Oregon . . So we have been having a lot of problems getting the information. ***That is why I am coming to court trying to get the prosecution to agree to provide this***

> ***information for us. It is an unusual situation.***

(RT 36-37, emphasis added.)

The court stated:

> Well, certainly the People are under orders and have made perfectly plain they intend to and know it is their responsibility to cooperate.

(RT 37.) To this, the public defender (who was obviously skeptical based on the prosecution's record of non-compliance or delayed compliance) responded: "That is why I want another date." (*Ibid.*) The court selected February 5th, which the public defender requested be counted as 0 of 60, stating that "[t]here is absolutely no way I can present this case within now and the last date of this case." (RT 37-38.)

However, when the court asked appellant whether he would waive his right to a speedy trial, his answer was "no" (RT 38), and from there the following colloquy ensued:

> The Court: What do you want to do, Mr. Hasan?
>
> The Defendant: I'm not waiving any time. ***I shouldn't be compelled to give up my constitutional rights because the prosecutor hasn't done his duty in disclosing the discovery to my attorney.*** I am not waiving any time.
>
> The Court: I am asking what do you wish then to do?

The Defendant: I'm saying no.

The Court: I beg your pardon?

The Defendant: I'm proceeding with whatever the trial date set. That is what it is set. ***I would like to move for dismissal for the simple fact that we are prejudiced because my attorney cannot preside with this matter and investigate effectively and prepare a proper defense for me. Because of the prosecutor we have been completely patience (sic) over and over again in the request for discovery.***

The Court: I'm not asking for a sermon. I'm asking what you wish to do in the present situation. Your choices are as follows: you stick with Mr. . . . Isaacson, or you don't proceed with Mr. Isaacson. Which of those two do you wish to do?

The Defendant: What do you mean don't proceed with him? Are you suggesting - -

The Court: If he is going to stay on the case he will only do so if he can represent you properly. In order to represent you properly he needs the time he has just stated. He needs February the 5th as 0 of 60.

The Defendant: And the alternative is to what, go pro per or get another attorney?

The Court: If I appoint another attorney, there is no attorney who will be the least bit competent who would be ready in less than probably 6 months.

The Defendant: Well, ***since I have a constitutional right to have a competent attorney and that the prosecutor has***

prejudiced our defense team so far, this right here, the only remedy is dismissal.

The Court: Well, that's what you think. Just answer my question. What do you want to do?

The Defendant: I'm not waiving no time.

The Court: I beg your pardon?

The Defendant: I'm not waiving any time. It's not up to me for to relieve Mr. Isaacson from the case.

The Court: Mr. Hasan, keep quiet for a minute and listen to what I am saying. I am asking you one simple question, do you wish to stay with Mr. Isaacson as your attorney or do you wish to not have Mr. Isaacson as your attorney?

The Defendant: Okay, before I answer that question –

The Court: I don't want anything else.

The Defendant: I'm misunderstanding your question. What I'm getting is that if I proceed with him am I agreeing to have 0 of 60 February 5th, if that is not the case I am staying with him. Because I am not waiving any time. Before I answer the question I am trying to understand the question.

The Court: Let me tell you this, ***if you stay with Mr. Isaacson, I shall find good cause to delay the trial over your own personal objections***. So it will go until February the 5th as 0 of 60?

The Defendant: I am not waiving no time.

The Court: I'm not asking about waiving.

The Defendant: ***I shouldn't be compelled to choose whether – you know what I'm saying, if this will be a conflict or any answer to you as far as relieving him, or you know what I'm saying, you finding good cause to go over my constitutional rights. I'm just basically saying that I'm not going to waive no time. So this, you know, I feel the dismissal is the only remedy.***

The Court: The record speaks for itself as to the defendant's refusal to answer the court's clear question. ***He has not invoked his right to represent himself; therefore, Mr. Isaacson remains the attorney. Mr. Issacson has made an argument based on which I find good cause to delay this matter. It is delayed until February the 5th as 0 of 60.***

(RT 38-41, emphasis added.)

On February 5, 1996, the court found the public defender's office had a conflict of interest based upon its representation of Cleavon Knott in the case that was dismissed in exchange for his cooperation in the instant case. (RT 44.) Randy Short was appointed to represent appellant on February 16, 1996. (RT 71.) On April 24, 1996, appellant filed a motion to dismiss on the grounds that his statutory and constitutional rights to due process and a speedy trial had been violated. (CT 166-205.) The motion was originally noticed for April 30, 1996, but was continued at the prosecutor's request to May 3, 1996,

over appellant's objections (RT 74-76.) The motion was heard and denied on May 3rd. (RT 78-100.) In arguing in opposition to the motion, the prosecutor stated, "It is our position [the] defense was supplied with complete discovery from the outset." (RT 79.) In response, defense counsel stated:

> I don't know how he can say discovery has been completed when I have received no discovery since I have been on the case and Mr. Isaacson clearly stated he was missing discovery.

(RT 82-83.) Defense counsel noted that the defense still had not received any of the discovery relating to the Oregon cases that the prosecution was ordered by the court to provide to the defense by February 5th. (RT 87-88.)

Appellant filed a petition for writ of mandate on May 22, 1996, challenging the trial court's denial of his motion to dismiss for violation of his speedy trial rights (CT 262-299), which was summarily denied one day later on May 23, 1996. (CT 356.) He filed a petition for review in this Court on June 1, 1996 (CT 339-355), which was summarily denied on August 12, 1996. (CT 404.)

2. Analysis

As the above-described events reflect, appellant made it clear from the very outset of the proceedings that he wished to invoke his statutory and constitutional rights to a speedy trial, and he never wavered from that position. The record further reveals that both the prosecution's inexplicable and unjustified delay in deciding to seek a death sentence, and its persistent failure for well over a year to comply with its discovery obligations, substantially thwarted appellant's ability to adequately prepare for trial, thus unfairly and unconstitutionally

placing him in a position of having to choose between his rights to effective representation and to a speedy trial.

The state's unjustified delay in turning over contact information for witnesses who gave exculpatory statements, substantially impeded the defense in its efforts to locate and interview these witnesses, and in the case of Somphop Jardenisiri, the liquor store clerk who provided information directly inconsistent with the incriminating testimony of the alleged co-perpetrator, Angela Toler, such delay actually precluded the defense from having an opportunity to interview this obviously critical, material witness before he left the Country, and to take steps to prevent Jardensiri from leaving the jurisdiction.

In addition, the state's unjustified 14-month delay in announcing a decision whether or not to seek the death penalty against appellant, coupled with its unjustified delay in providing discovery related to incidents of both adjudicated and unadjudicated criminal conduct to be introduced as aggravating evidence in the penalty phase, substantially impeded appellant's ability to prepare a penalty phase defense.

Finally, the prosecution's unjustified delay in revealing that in exchange for his testimony, the police had assisted key prosecution witness Cleavon Knott obtain removal of outstanding warrants and dismissal of misdemeanor charges, impeded disclosure of the public defender's conflict of interest, as a consequence of which the start of the trial was further delayed.

As will be discussed in depth below, because the delay in this case was engendered by "either the wilfull oppression or neglect of the state or its officers" (*Jones v. Superior Court* (1970) 3 Cal.3d 734, 738), dismissal was the only appropriate remedy, and the trial court erred when it denied appellant's motion to dismiss the charges against him

due to the violation of his statutory and state and federal constitutional speedy trial rights, and his right to due process of law. As will also be discussed below, the court's erroneous denial of that motion was prejudicial and requires reversal of appellant's conviction and death sentence.

B. The Prosecution Shirked Its Statutory And Constitutional Discovery Obligations By Failing For Over A Year To (1) Furnish The Defense With The Addresses And Phone Numbers Of Guilt Phase Witnesses, And (2) Disclose Information Regarding Assistance Provided To Key Prosecution Witness Cleavon Knott By Law Enforcement In Exchange For His Cooperation; And By Failing To Provide Discovery Of Evidence In Aggravation It Intended To Introduce In The Penalty Phase

Penal Code section 1054.1 provides that the prosecution shall disclose to the defendant or his attorney:

> (a) The names and addresses of persons the prosecutor Intends to call as witnesses at trial.
>
> (b) Statements of all defendants.
>
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> (e) Any exculpatory evidence.
>
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to

> call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

In addition to its statutory obligations, the State has a constitutional duty, grounded in the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, to disclose favorable evidence to criminal defendant's where such evidence is material to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) Not only does this duty apply to exculpatory evidence, it also includes information that could be used to impeach an important prosecution witness. (*Giglio v. United States*, *supra* 405 U.S. at p. 154.) This duty of disclosure applies irrespective of the good faith or bad faith of the prosecution. (*Brady v. Maryland*, *supra*, 373 U.S. at p.87.) Thus, a prosecutor can violate his *Brady/Giglio* obligations even if he has acted in good faith and even if the evidence is "known only to police investigators and not to the prosecutor." (*Kyles v. Whitley* (1995) 514 U.S. 419, 438.)

This court has held that the duty to disclose exculpatory evidence includes the obligation to provide not just the identity of a material witness who might potentially supply exculpatory information, but also information as to the *whereabouts* of such witness. (*Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851; see also *In re Wilbur Littlefield* (1993) 5 Cal.4th. 122, 132 ["disclosure of only the name of the witness whose identity must be divulged prior to trial, unaccompanied by information regarding the whereabouts of that witness, generally would

not fulfill the purpose of the disclosure requirement"].) Moreover, this Court has made it clear that the prosecution cannot deliberately fail to learn the whereabouts of a material witness to avoid having to disclose his or her whereabouts. As the Court stated in *Eleazer*, a case in which the prosecution and police claimed ignorance as to the whereabouts of an informant who was a material witness:

> We cannot accept the suggestion . . . that the prosecution automatically fulfills its obligation of disclosure when it reveals all that it knows, despite the inadequacy of such data to locate the informer. . . Due process requires . . . that the police and the district attorney undertake *reasonable efforts* in good faith to *locate* the informer so that either party or the court itself . . . could, if it so desired, subpena him as a witness.

(1 Cal.3d at pp. 851-853, emphasis in original.)

In the instant case, notwithstanding the trial court's repeated orders to comply with its discovery obligations, the prosecution, either deliberately or due to indifference and neglect, failed for well over a year to provide information sought by the defense regarding the whereabouts of numerous witnesses, in particular Somphop Jardensiri, the liquor store clerk who was an eyewitness to the crime, and thus indisputably a material witness. Jardensiri's statements to the police and, later to the probation department, implicated Angela Toler as the shooter and contradicted much of her testimony incriminating appellant. (RT 12.) As a result of the prosecution's dilatory disclosure, the defense did not even have an opportunity to interview Mr. Jardensiri

before he left the United States,[17] let alone to take steps to prevent him from leaving the jurisdiction,[18] and to subpoena him as a witness at trial. The defense was thus left with the task of trying to find a crucial witness in a foreign country without any means of being able to compel the witness's testimony, assuming they were even able to locate him. The record reflects that the defense was ultimately unsuccessful in its attempts to locate Jardensiri and present his testimony. (RT 136-137, 142, 297-298, 1169-1170, 1175.)

Under the authority cited above, the prosecution also had a clear duty to furnish the defense with discovery regarding benefits provided to prosecution witness in exchange for their testimony. (*Giglio v. United States*, *supra* 405 U.S. at p. 154; *Bagley v. United States*, *supra*, 473 U.S. at p. 682) This, of course, included information concerning the assistance provided by the investigating detectives in obtaining removal of warrants and dismissal of charges pending against Cleavon Knott. As set forth above, the prosecution failed to turn over any of this discovery until December 12, 1995 (RT 28), and only did so after the public defender stated at the November 30th discovery hearing that he

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[17] The record reflects that Jardensiri was still in the area and the prosecution knew his whereabouts in January 1995, when he was interviewed by the probation department for purposes of the presentence report on Angela Toler. (RT 8-9.) However, at the hearing on February 17, 1995, the prosecutor referred to a witness having left the country. (RT 52.) Although he did not mention him by name, it is apparent that the prosecutor was referring to Jardensiri.

[18] Pursuant to Penal Code section 1332, the court may compel a material witness to post security subject to forfeiture, and may alternatively commit such witness into custody in order to ensure the witness's appearance.

had learned through an *informal* conversation with Detective Wren that he "did, in fact, do something for Cleavon Knott." (RT 11.)

Finally, under the authority cited above, the prosecution had a duty to disclose the names and addresses of witnesses it planned to call in the penalty phase, as well as the statement of such witnesses, and any exculpatory evidence relating to the incidents of criminal conduct that the prosecution planned to introduce as evidence in aggravation under Penal Code section 190.3. As the record establishes, the prosecution's unjustified delay in providing this discovery substantially impeded defense counsel's progress in preparing for trial, and in turn placed appellant in the untenable position of having to choose between his speedy trial rights and his right to effective representation.

C. Appellant's Case Should Have Been Dismissed Under Penal Code Section 1382, Subd. (a) Because The Delay Was Attributable To The Fault Or Neglect Of The State And Was Therefore Unjustified

"An unexcused delay beyond the time fixed in section 1382 of the Penal Code without the defendant's consent entitles the defendant to a dismissal." (*People v. Martinez* (2002) 22 Cal.4th 750, 766, quoting *People v. Godlewski* (1943) 22 Cal.2d 677, 682.) At the time appellant's case was pending before the superior court, Penal Code section 1382, subd. (a) provided that absent a showing of good cause, a defendant accused of a felony was entitled to a dismissal of the

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charges against him if he was not brought to trial within 60 days of the filing of the indictment or information.[19]

As set forth above, on November 30, 1995, appellant indicated that he was willing to waive his rights under the statute, as long as trial would commence within 30 days after December 12, 1995, which would have been January 11, 1996.[20] (RT 21.) But when, on December 18, 1995, the court wanted to continue the trial to begin 60 days after February 5, 1996, appellant objected and refused to waive his rights under the statute. (RT 38-40.) The trial court granted the continuance over appellant's objection, finding that there was "good cause" to do so based on the public defender's representation that he could not complete his investigation and trial preparation "within now and the last date set for this case." (RT 40-41.)

In *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 780, this Court held that defense counsel may waive a client's statutory right to a speedy trial without the client's concurrence, but stated that:

> [c]ounsel's power in this regard is not unlimited. '***A criminal defendant may not be deprived of a speedy trial because the prosecution*** – or the defense – ***is lazy or indifferent, or because the prosecution seeks to harass the defendant rather than bring him fairly to justice*** . . ..' [citation omitted].

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[19] In 1998, that provision was amended to require dismissal if the defendant was not brought to trial within 60 days of *arraignment* on the indictment or information.

[20] As noted in footnote 16, above, the last date upon which trial could begin, based upon appellant's time waiver, would actually have been January 22, 1996.

(*Id.* at p. 784, emphasis added.) In that case, the Court found that all requests for continuance were reasonably justified, and that defense counsel was "pursuing his client's best interests in a competent manner." (*Ibid.*)

Subsequently, however, in *People v. Johnson* (1980) 26 Cal.3d 557, 567, this Court held that a that counsel's request to postpone trial beyond the statutory period, if based solely upon a calendering conflict, and not to promote the best interests of his or her client, cannot stand unless it is supported by the express or implied consent of the client him or herself. In that case, this Court found that counsel, in seeking delay was *"not* pursuing his client's best interests in a competent manner" (*Id.* at p. 568, emphasis added), and that such a reason for the delay would not constitute "good cause" within the meaning of the statute. (*Id.* at p. 572.) In listing reasons for delay that would or would not constitute "good cause," the Court stated:

> [D]elay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for the defendant's benefit also constitutes good cause. Finally delay arising from unforeseen circumstances, such as the unexpected illness or unavailablity of counsel or witnesses constitutes good cause to avoid dismisal. ***Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause.*** Neither does delay caused by improper court administration.[21]

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[21] The Court referred to its earlier decision in *People v. Floyd* (1970) 1 Cal.3d 694, 707, wherein it held that "a criminal defendant may not juggle his constitutional rights in an attempt to evade prosecution. He may not demand a speedy trial and demand adequate representation, and by the simple expedient of refusing to

(*Id.* at p. 570, emphasis added.) This Court further held that in cases where the trial court continues a trial over the defendant's objection beyond the statutory period, upon a subsequent motion to dismiss, "***the court must inquire into whether the delay is attributable to the fault or neglect of the state; if the court finds so, the court must dismiss***." (*Id.* at pp. 572-573, emphasis added.) The burden of showing "good cause" lies with the prosecution. (*Id.* at p. 569.)[22]

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cooperate with his attorney, force a trial court to choose between the two demands, in the hope that a reviewing court will find that the trial court has made the wrong choice. We cannot tolerate such bad faith and we are not constitutionally required to do so." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 570, fn. 13.) By invoking his speedy trial rights, appellant herein was not refusing to cooperate with his attorney or acting in bad faith. The delay in the instant case was caused by the ***prosecution's dereliction of its duty to provide discovery***, and appellant had a legitimate, compelling claim that his rights to a speedy trial and competent representation were being unfairly compromised by the ***prosecution's dilatory conduct***. (RT 38.)

[22] Dismissal is required even where the "fault or neglect of the state" consists of a mere inadvertent clerical error. See *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 94-95, wherein this Court held that the state's procrastination in retrying the petitioner following issuance of a writ of habeas corpus vacating his conviction, violated the petitioner's rights under Penal Code section 1332, subd. (a), and mandated dismissal of the charges against him. In that case, due to the Attorney General's failure to notify the District Attorney of the granting of the writ, proceedings were not reinstituted against the defendant for over eight months. (*Id.* at pp. 86-88.) This Court observed that a defendant's rights to a speedy trial should not be "stifled" by the procrastination or neglect of officials, and declared that "[t]he risk of clerical error or neglect on the part of those charged with official action must rest with the People, not the defendant in a criminal action." (*Id.* at p. 94; see also *People v. Hill* (1985) 37 Cal.3d 491, 497 ["Negligent delay in bringing a defendant to trial, while not deemed as onerous as deliberate delay, is still weighed

The trial court herein erred in continuing the trial beyond January 22, 1996, over appellant's objection. While under different circumstances, defense counsel's request for postponement of trial in order to complete his or her investigation might be deemed a justifiable grounds for delay (see *People v. Superior Court (Alexander)* (1995) 31 Cal.App.4th 1119, 1131 [delay requested because defense counsel needs additional time to prepare case or secure witnesses considered of benefit to defendant]), in the instant case, defense counsel made a clear record that his inability to complete his investigation and be ready for trial within the statutory period, was directly attributable to the fault of the prosecution in withholding critical discovery.[23] Although it obviously would not have been in appellant's best interests to have his attorney proceed to trial unprepared, the trial court failed to conduct the proper analysis when it found there was "good cause" to continue the trial over appellant's objections. The court's finding was based on the fact that counsel needed more time to prepare (RT 39, 40), but the court erroneously failed to consider the *reason why* counsel was unprepared, which was the prosecution's inexcusable delay in complying with its discovery obligations. Later, in ruling on appellant's motion to dismiss, the court again focused strictly upon the fact that defense counsel needed additional time to prepare, and did not

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against the People because it is the duty of the state to bring a defendant promptly to trial"].)

[23] Compare *Harris v. Superior Court* (1980) 100 Cal.App. 3d 762, in which the court of appeal held that newly-appointed trial counsel was justified in seeking a brief continuance of the trial over his client's objection, in order for counsel to obtain and read the transcript of his client's previous trial, which was necessary in order to be adequately prepared to represent the client on retrial.

consider whether the delay was "attributable to the fault or neglect of the state:"

> Defendant had the choices at that time. He deliberately did not choose to represent himself. He did not ask to have Mr. Isaacson relieved, therefore, I found good cause. I was not going to insist on some attorney who announced he was not ready to try a death penalty case to try a death penalty case. So that's the court's response to the claim about December 18th.

(RT 97-98.)

As detailed above in section A. 1. of this argument, the court more than once acknowledged the fact that the prosecution had been dilatory in complying with its discovery obligations. (RT A-15, A-77- A-79, 21, 34-35, 37.) Nevertheless, the court declined to address appellant's argument -- either on December 18, 1995, when it granted the continuance, or on May 3, 1996, when it ruled on appellant's motion to dismiss -- that dismissal was mandated because the delay was attributable to the fault or neglect of the prosecution.[24] The court thus

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[24] The trial court also bears at least some responsibility for the delay, by virtue of its failure to exercise sufficient control over the proceedings to ensure prompt discovery compliance by the prosecution. A court has the power to enforce order in the proceedings before it, to provide for the orderly conduct of proceedings before it, and to compel obedience to its orders. (Code of Civil Procedure § 128 (a) (2), (3) and (4).) Moreover, pursuant to Government Code section 68607, judges "have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document

abused its discretion in finding "good cause" for the delay when it failed to apply the legal standards enunciated by this Court in *People v. Johnson*, *supra*, 26 Cal.3d at pp. 570, 572-573. (*Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1136 [application of incorrect legal standards to issue at hand constitutes an abuse of discretion].)

Without "good cause" for the delay, the court had no choice but to dismiss the case. (*People v. Wilson* (1963) 60 Cal.2d 139, 151 [Penal Code section 1382, subd. (a) is mandatory].) Its failure to do so was error.

D. Appellant's State Constitutional Right To A Speedy Trial Was Violated When His Trial Was Continued Beyond The 60-day Period, Over His Objection, Without Good Cause

The right to a speedy trial is guaranteed under article I, section 15, cl. 1 of the California Constitution, and is one of the fundamental rights possessed by a defendant in a criminal action. (Penal Code

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invoking court jurisdiction to final disposition of the action." (See also *Fuller v. Superior Court* (2001) 87 Cal. App.4th 299, 306-307 ["[C] courts are guided by the strong principle that any elapsed time other than that reasonably required for pleadings and discovery 'is unacceptable and should be eliminated.' [citation omitted.] Courts must control the pace of litigation, reduce delay . . . so as to enable the just, expeditious and efficient resolution of cases."] Given defense counsel's repeated complaints concerning the prosecution's inadequate discovery compliance, and how it was impeding counsel's trial preparation, the trial court had ample notice of the fact that the prosecution was causing a delay of the trial. The court had a variety of options available to it under Penal Code section 1054.5, subd. (b) for enforcing discovery compliance on the part of the prosecution, and for imposing sanctions for non-compliance, yet it unjustifiably failed to exercise any of these options.

§686 (1); *Sykes v. Superior Court*, *supra*, 9 Cal.3d at p.88.) In *Sykes*, this Court stated as follows:

> In our view [Penal Code] section 1382 constitutes a legislative endorsement of dismissal as the proper judicial sanction for violation of the constitutional guarantee of a speedy trial and as a legislative determination that ***a trial delayed more than 60 days is prima facie in violation of the defendant's constitutional right***. The legislature 'by necessary inference had said that a trial delayed more than 60 days without good cause is not a speedy trial, and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision.' [Citation omitted.].

(*Id.* at p. 89, emphasis added; see also *People v. Martinez*, *supra*, 22 Cal.4th at p. 766 [constitutional speedy trial right is construed and implemented by Penal Code section 1382].)

Accordingly, appellant was deprived of his fundamental right to a speedy trial under the California Constitution when the trial court continued his trial beyond the statutory period over his objection, without good cause.

E. Appellant Was Prejudiced By The Trial Court's Erroneous Denial Of His Motion To Dismiss For Violation Of His State Statutory And Constitutional Speedy Trial Rights

Although a defendant seeking pretrial review of post-indictment or post-information delay is not required to affirmatively show that he has been prejudiced by a violation of his right to a speedy trial under Penal Code section 1382, subd. (a) and art. I, section 15, cl. 1 of the California Constitution, this Court has held that upon appellate review, following conviction, a defendant who seeks to predicate reversal of his conviction upon denial of his right to a speedy trial must show that the

delay caused prejudice. The appellate court must "weigh the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself." (*People v. Wilson*, *supra*, 60 Cal.2d at p. 151; accord *People v. Johnson*, *supra* , 26 Cal.3d at p.575.) [25]

1. Had Appellant's Motion To Dismiss Been Granted The State Would Have Been Barred By Penal Code Section 1387 From Refiling The Charges Against Him

In *People v. Wilson*, this Court observed that a defendant could establish that violation of his rights under Penal Code section 1382, subd. (a) and art. I, section 15, cl. 1, had a prejudicial effect, if the state would be barred upon dismissal from refiling the charges, either because the statute of limitations had expired or because dismissal of the charges would bar refiling under Penal Code section 1387. (60 Cal.2d at pp. 152-153, fn. 5; see also *People v. Escarega* (1986) 186 Cal.App.3d 379, 387 [finding no prejudicial effect of delay since it was "not a case in which the statute of limitations would have been a bar to new charges, or one in which a dismissal would itself have barred refiling"].)

In the instant case, because the charges against appellant had already been dismissed for violation of appellant's rights under Penal Code section 859b, and refiled once, the state was barred under Penal Code section 1387, subd. (a) from refiling them a second time.[26]

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[25] As indicated above, appellant did in fact seek pretrial review, both in the Court of Appeal and in this Court, but received summary denials in both instances. (CT 262-299, 356, 339-355, 404.)

[26] Penal Code section 1387, subd. (a) provides, in pertinent part:

Consequently, appellant has suffered the precise prejudice identified by this Court in *Wilson*, *supra*.

2. The Prosecution's Delay In Complying With It's Discovery Obligations Resulted In The Loss Of Exculpatory Evidence

A speedy trial violation is also prejudicial if the delay in bringing the defendant to trial results in a loss of evidence that might be helpful to the defendant. (*People v. Hill*, *supra*, 37 Cal.3d at p. 498 [delay in bringing defendant to trial was prejudicial where eyewitnesses' memory had faded, thus removing possibility that witnesses might exonerate

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> An order terminating an action pursuant to this chapter or Section 859b . . . is a bar to prosecution for the same offense if it is a felony . . ..

Appellant is aware that Penal Code section 1387.1 establishes an exception to this rule where the offense is a violent felony, allowing one additional refiling where either of the prior dismissals was due solely to "excusable neglect" on the part of the court, prosecution, law enforcement agency or witness. "Excusable neglect" has been defined as "neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1149.) However, in the instant case, because the first dismissal was the result of an erroneous application of law, and the second was mandated by delay resulting from the prosecution's dereliction of its duty to provide discovery, a court could not reasonably find that either dismissal was (or would have been) caused by "excusable neglect, and thus the exception would not apply to appellant's case. (Compare, e.g., *People v. Massey* (2000) 79 Cal.App.4th 204, 211 [absence of witness requiring dismissal of case constituted "excusable neglect" because reasonable efforts had been made by the prosecution to secure the witness's attendance and thus there had been no failure on the prosecution's part to perform].)

defendant as their attacker].) Indeed, in *Barker v. Wingo* (1972) 407 U.S. 514, 532, the U.S. Supreme Court observed that "***[i]f witnesses die or disappear during a delay, the prejudice [resulting from a violation of the defendant's Sixth Amendment right to a speedy trial] is obvious***." (Emphasis added.)

In the instant case, as set forth above, Somphop Jardensiri, a potentially critical exculpatory witness disappeared during the delay, and despite efforts by the defense to locate him overseas, was never found. (RT 136-137, 142, 297-298,1169-1170,1175.) The loss of this witness indisputably undermined the fairness of appellant's trial and was patently prejudicial.

When the prejudicial effect of the delay upon appellant is weighed against any justification for the delay (*People v. Jones*, *supra*, 3 Cal.3d at p.740), the balance tips sharply in favor of appellant. Not only was the delay -- caused by the prosecution's withholding of discovery – unreasonable, but the prejudice to appellant's defense resulting from the prosecution's dilatory conduct, was also substantial. Accordingly, appellant's conviction and sentence must be reversed.

F. Appellant Is Also Entitled To Reversal Because His Right To A Speedy Trial Under The Sixth And Fourteenth Amendments To The United States Constitution Was Violated

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .." The right to a speedy trial is a fundamental right secured by the Sixth Amendment and is made applicable to the states by the Fourteenth Amendment. (*Klopfer v. North Carolina* (1966) 386 U.S. 312, 323.) The right attaches either

when a defendant is charged by "a formal indictment or information" or when the defendant is subjected to "the actual restraints imposed by arrest and holding to answer a criminal charge." (*People v. Martinez*, *supra*, 22 Cal.4th at p 761, quoting *United States v. Marion* (1971) 404 U.S. 307, 320.)

In *Barker v. Wingo*, *supra*, the United States Supreme Court enunciated the test to be employed by a court in deciding whether to dismiss a criminal action for violation the speedy trial clause. The Court stated as follows:

> The approach we accept is a balancing test in which the conduct of both the prosecution and the defense are weighed. A balancing test compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: ***Length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant.***

(407 U.S. at p. 530, emphasis added.)[27]

In *Barker*, the Supreme Court defined delay that would trigger a speedy trial claim, as "some delay which is presumptively prejudicial," and stated that the "length of the delay that will provoke such an inquiry

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[27] In *Doggett v. United States* (1992) 506 U.S. 647, 651, the Court described the test enunciated in *Barker* as "four separate enquiries: whether the delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as a result of that delay."

is necessarily dependent on the peculiar circumstances of the case." (407 U.S. at pp. 530-531.) The Court noted that "[t]o take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." (*Id.* at p. 531.) The Court also noted, with apparent approval, a First Circuit opinion in which the court had found "a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony." (*Id.* at p. 531, fn.31.) In *Doggett v. United States, supra*, 506 U.S. at p. 652, fn. 1, the Court observed that "[d]epending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." As discussed above, under California law in effect at the time of appellant's trial, a delay of more than 60 days from the filing of the indictment or information, without good cause shown, was deemed presumptively prejudicial. (*People v. Martinez*, *supra*, 22 Cal.4th at p. 766; *People v. Wilson*, *supra*, 60 Cal.2d at p. 139.)

In the instant case, which involved "ordinary street crime," proof of which "depended on eyewitness testimony," appellant first sought dismissal of his case for violation of his speedy trial rights on December 18, 1995, approximately 16 months after his arrest and detention, 13 months after he had initially been held to answer, and approximately 12 months after the initial felony information was filed against him. As indicated above, the charges had already once been dismissed due to the court's continuance of the preliminary hearing over appellant's objection, but were immediately refiled. By the time the court ruled on appellant's motion to dismiss on May 3, 1996, appellant had been in custody for over 20 months. Under the circumstances, appellant was

subjected to inordinate delay sufficient to trigger the speedy trial analysis set forth in *Barker*, *supra*.

In weighing the "reason for the delay," the Supreme Court instructed that:

> different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

(*Barker v. Wingo*, *supra*, 407 U.S. at p. 531.) As argued at length above, the reason for the delay in the case at bar, was that the prosecution's unjustified procrastination in complying with its discovery obligations left the defense without the information it needed to locate witnesses and prepare its case for trial. Whether this was deliberate conduct intended for the purpose of gaining "some tactical advantage over [appellant]" (*Id.* at p. 531, fn. 32), or was merely a function of laziness and neglect on the part of the prosecutor and/or police, it was inexcusable and unreasonable under either circumstances, and should be weighted heavily against the prosecution.

Regarding the third factor, *Barker* declared that "[t]he defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." (*Id.* at pp. 531-532.) It is indisputable that appellant herein asserted his speedy trial rights. (RT 38-40.)

With regard to the final factor – prejudice to the defendant – the Supreme Court stated as follows:

> Prejudice, of course should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. ***If witnesses die or disappear during a delay, the prejudice is obvious.*** There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however is not always reflected in the record because what has been forgotten can rarely be shown.

(*Id.* at p. 532, emphasis added.) The record in the instant case establishes the very prejudice identified by the Supreme Court in the above-quoted passage from *Barker*: a material witness who offered exculpatory information disappeared during the delay and the defense was never able to find him.

When the facts of the instant case are applied to each of the four factors identified in *Barker*, it is readily apparent that appellant suffered inordinate delay, the blame for which fell squarely upon the prosecution; that he asserted his right to a speedy trial and that the fairness of his trial was substantially undermined as a result of such delay due to the disappearance of a critical witness. Thus, under the standards established by the Supreme Court in *Barker v. Wingo, supra*,

and its progeny, appellant is entitled to reversal of his conviction and death sentence due to the violation of his fundamental right to a speedy trial under the Sixth and Fourteenth Amendments.

G. Appellant's Right To Due Process Of Law Under Both The State And Federal Constitutions Was Violated As A Result Of The Delay Engendered By The Prosecution's Dilatory Compliance With Its Discovery Obligations

In *Barker v. Wingo*, *supra*, the Supreme Court observed that delay which results in disappearance of witnesses and thus renders the defendant unable to adequately prepare his case "skews the fairness of the entire system." (407 U.S. at p. 532.) This Court has similarly acknowledged that "the right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence." (*People v. Martinez*, *supra*, 22 Cal. 4th at p. 767.) To determine whether the defendant's due process rights have been violated as a result of delay, a court must balance the effect of the delay on the defendant against any justification for the delay. (*Jones v. Superior Court*, *supra*, 3 Cal.3d at p. 741, fn.1.) In the instant case, not only were appellant's speedy trial rights violated, but he was also denied due process as a consequence of the prosecution's dilatory conduct.

As shown above, appellant was deprived of the opportunity to present crucial exculpatory evidence as a result of the prosecution's delay in providing information as to the whereabouts of material witness Somphop Jardensiri. Despite repeated orders by the trial court to comply with its discovery obligations, the prosecution, either

deliberately or due to indifference and neglect, failed for over 15 months to provide information sought by the defense regarding the whereabouts of numerous witnesses, including Jardensiri, whose statements to the police and, later to the probation department, implicated Angela Toler as the shooter and contradicted much of her testimony incriminating appellant. Due to the prosecution's dilatory compliance, the defense did not even have an opportunity to interview Mr. Jardensiri before he left the United States, let alone to take steps to prevent him from leaving the jurisdiction, and to subpoena him as a witness at trial. The defense was thus left with the task of trying to find a crucial witness in a foreign country without any means of being able to compel the witness's testimony, assuming they were even able to locate him. As noted above, the defense was ultimately unsuccessful in its attempts to secure Jardensiri as a witness and present his testimony. (RT 136-137 142,297-298,1169-1170,1175.)

Under the circumstances, the prejudicial "effect of the delay" in this case far outweighed any "justification" for its occurrence. Because the state cannot establish that this constitutional deprivation was harmless beyond a reasonable doubt, appellant's conviction and death sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.

H. Conclusion

For all of the foregoing reasons, appellant was prejudicially deprived of his right to a speedy trial under article I, section 15, cl. 1 of the California Constitution, and Penal Code sections 686 and 1382, subd. (a). He was further deprived of his right to a speedy trial under the Sixth Amendment to the United States Constitution, and his right to due process of law guaranteed by the Fifth and Fourteenth

Amendments. His conviction and death sentence must therefore be reversed.

* * * * *

II.

THE TRIAL COURT IMPROPERLY FORCED APPELLANT TO WEAR A STUN BELT DURING THE TRIAL WITHOUT A SHOWING OF MANIFEST NEED, WITHOUT EXAMINING LESS RESTRICTIVE ALTERNATIVES, AND WITHOUT ASSESSING THE HARM TO APPELLANT, INFRINGING UPON APPELLANT'S ABILITY TO PARTICIPATE IN HIS OWN DEFENSE IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Proceedings Below

On November 30, 1995, approximately nine months prior to trial, the court stated that it had a matter it wanted to put on the record. The court stated:

> [O]n September 27th when the hearing in this court was concluded, ***I was told that the following occurred***: The defendant was taken from this courtroom by the regular bailiff in this courtroom. He was taken down to lock-up and told to go into a side cell. The defendant objected and pointed out that his belongings were in another cell. Deputy McCaleb explained that he had no key to the other cell. That he had to put the defendant in the side cell, go and get the key and then would move the defendant into the same cell as the one containing his belongings. Deputy McCaleb had taken the handcuffs off the defendant at that point in order to be able to put him into the side cell unmanacled. The defendant then struck my bailiff four or five times. All blows were to the head. My bailiff was calling out for another who eventually reached the defendant and my bailiff. The moment that other deputy appeared and was close enough to use pepper spray, the defendant stopped his attack and walked into

> the cell. The deputy hit suffered a slight concussion and was off work for nearly three weeks and was on light duty for some period of time.

(RT 20-21, emphasis added.) The court did not reveal either when it had been informed of the above-described incident or from whom it had received such information. The court also did not indicate that it was taking any particular action in response to the information it had received.

Appellant appeared before the court again on December 18, 1995. At no time during the proceedings held on that date did the court mention the alleged incident of September 27th, nor did it appear that the court had required appellant to be placed in any type of physical restraint while present in court. (RT 25-41.) However, at appellant's next appearance on February 5, 1996, the court elicited from the bailiff that he had sought to put a "REACT belt" on appellant in the courthouse lock-up, and that appellant had refused to wear the belt.[28] (RT 47.) The court clarified that the REACT belt is "the belt whereby he would be given an electric shock if he tried to escape or to engage in violent conduct," and the bailiff added that the electric shock would be "50,000 volts."[29] (*Ibid.*) Appellant was eventually brought to court

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[28] The bailiff in court that day was Michael English, a deputy sheriff. (RT 46.) The bailiff allegedly assaulted was Deputy McCaleb. (RT 20.)

[29] Other than the 50,000-volt shock, the physical attributes of the stun belt are not described on the record. However, as described in *People v. Mar* (2002) 28 Cal.4th 1201, 1214-1215, " '[t]he type of stun belt which is used while a prisoner is in the courtroom consists of a four-inch-wide elastic band, which is worn underneath the prisoner's clothing. This band wraps around the

without the belt, but the court stated, "I want it on him. This record should reflect that I want it on him because of his previous attack on my bailiff." (RT 48.)

On March 8, 1996, defense counsel, Randy Short, appeared before the court, without appellant present. (RT 51.) Counsel addressed the court as follows:

> I have interviewed Mr. Hasan, and one of his requests that we will be making this morning is that the electric restraint belt not be placed on him during trial or court proceedings. I understand there was an alleged altercation with the bailiff, that the facts of that have to be litigated at some point and have not yet at this time. It's my basic understanding, however, that he's not caused any violent problems in the courtroom itself or created any disturbances of any major type in the courtroom. I think Mr. Hasan's attitude is changing with new counsel and I would like to get off to a fresh start by not having the restraint belt on him until it seems necessary if any problems occur in the future. If the

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prisoner's waist and is secured by a Velcro fastener. The belt is powered by two 9 - volt batteries connected to prongs which are attached to the wearer over the left kidney region.... [citations omitted.] [¶] The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures. [citations omitted.]' "

> court does not wish to grant that request, I do request alternatively that the belt not be used until we have a medical examination. He has been documented with high blood pressure. It is a 50,000 volt belt and I would like a doctor's approval before it is used. He believes, but I'm not sure, that's regulation that should have been done in the first place, but I don't know the regulations regarding that.

(RT 51-52.)

The court responded as follows:

> This man assaulted my bailiff without the least provocation at all. As you say it hasn't been litigated and inmates are aware of all their litigation rights which they use to the enth degree. It is also noteworthy in that assault the moment the second deputy was within range of Mr. Hasan, as he insists on calling himself, and ran the risk of having one finger laid on him, he stopped at that instant. So it was obviously highly calculated and he knew when to stop so that he didn't suffer any adverse consequences. I will not have my staff subject to that risk. And as much as it might be good for you that you start off on a different foot, I understand your position in that. Unfortunately, it's not you that we are dealing with. It is not you that the bailiff's are dealing with. It is Hasan and he has demonstrated his attitude very fully. And you – so your request that he be without the belt is denied.

(RT 52.) The court stated that it would sign an order for a medical examination, "but he will have the belt on this morning because the belt does absolutely nothing to anybody if that person does what he is told. And an inmate is required to do what he is told. So he runs not the slightest risk." (RT 52-53.) The court decided not to have appellant

brought into court that day, finding that it was not necessary for him to be present because no time waiver was required at that point. (RT 53.)

On March 21, 1996, the court announced that it had been told by the bailiff that appellant refused to come out because the court had required him to wear the REACT belt as a condition to being in the courtroom. (RT 58.) The court proceeded in appellant's absence, but continued for one week the hearing on the defense's motion for judicial disqualification for cause pursuant to Civil Code of Procedure section 170.1.[30] Defense counsel indicated that he would be requesting a hearing regarding the REACT belt. (RT 59.)

Appellant was present in court on March 28, 1996 (RT 63), wearing waist and ankle chains. (RT 66.) The bailiff indicated that he had used such restraints in lieu of the REACT belt at the suggestion of his supervisor. (*Ibid.*) The Court stated:

> So I acceded to that request, Mr. Short, with grave misgivings. And I am not in the least conceding the issue of the REACT belt at all. And almost certainly the REACT belt will in future be in use. But for your sake I wished to get him up today. It's easier for you I think. Don't take that as a practice from now on.

(RT 66.) Defense counsel responded:

> I don't. And I think at some point there may need to be a hearing on the issue regarding who is the instigator of the attack. And the

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[30] The motion asserted that the court could not be fair and impartial towards appellant because of his alleged assault upon the court's bailiff. (CT 150-151 ; RT 65.)

> court is in the position of knowing the victim in that situation.

(*Ibid.*) The court agreed:

> The record is clear there has not been a hearing on that issue. I know that. And that is raised and certainly will be dealt with. And maybe another court will be hearing that.

(*Ibid.*)

The court never did hold a hearing on this issue, and no further discussion concerning the REACT belt occurred, until a pretrial conference on August 13, 1996, when the court announced that it was going to require appellant to wear the REACT belt during trial. (RT 169.) The bailiff confirmed that appellant was not wearing the belt that day, and the court noted that there were four sheriff's deputies present in the courtroom. (*Ibid.*) At this point, the following discussion took place:

> Mr. Short: I would like to have a hearing regarding that, your honor. I don't know exactly how to propose to do it. I know there probably would be some inmates we could bring in to testify on his behalf regarding the incident with the bailiff and perhaps convince the court he is not a danger and does not need the REACT belt.
>
> The Court: His record, other than any incidents in this courtroom, includes an escape, does it not?
>
> Mr. Schreiner: ***I don't have that, your honor.***

The Court: ***I'm sorry. That's somebody else. Somebody else. Okay***.

Mr. Schreiner: What I have is an extensive history of violence in terms of both convictions and in terms of other evidence that we intend to present at penalty phase. We, of course, have the information regarding the incidents with Deputy McCaleb. The Court's going to make the determination obviously about security here, but I would support any measure that the court would choose to present. Now, counsel has to be concerned, of course, about the appearance before the jury, but my understanding of the REACT belt, is that that is something worn under the clothing that is not visible to the jury. So if he refuses to do that, for whatever reason, he has to appear in chains. The jury is not going to be aware of that unless an incident is created by the defendant. So I don't see there's any real objection to it. It's not going to be any hindrance to it (sic) unless there's an incident.

The Court: Tell me what is your objection to the REACT belt?

Mr. Short: Basically Mr. Hasan's objection. ***He feels it's a dangerous apparatus***, that he has a heart problem which even though we have had medical orders signed I'm not sure that has been resolved as to what his physical state is. ***And he feels uncomfortable because he doesn't believe*** the way counsel puts it ***that it's only going to be because he acts badly that the REACT belt will be used. He thinks someone can misuse judgment when he's not acting badly***.

> The Court: The Court's order is that he will be on the REACT belt. It has been developed as the best security device so far introduced. ***The REACT belt is not visible. Therefore, from the point of view of appearance it is the best. The REACT belt is the safest from the point of view of the defendant.*** If he conducts himself in the proper manner for a courtroom appearance, he has absolutely nothing to fear from the belt whatsoever. It will only be activated if he is either attempting to escape or is using some violence on somebody in the courtroom. I don't want any gunfire in this courtroom. ***The is an extremely serious case. The security of this building is deplorable. There are doors right, left and center. And I don't want any escape and I don't want any incident at all. The REACT belt in this case is the ideal solution and is ordered for this defendant.***

(RT 169-171, emphasis added.)

Appellant requested permission to address the court, and the court agreed to let him speak. (RT 171.) The following exchange between appellant and the court took place:

> The Defendant: Yes. ***As far as the allegations as far as assault taking place at lock-up***, you know what I mean, ***I had 14 witnesses that says***, you know what I am saying, ***this individual attacked me and I was protecting myself. I feel if it was that serious***, you know what I am saying, ***I should have been charged with it. Therefore, I can go ahead and litigate the issue, prove my innocence, then I won't have to be subject to***, know what I'm saying, ***having this REACT belt on***. As far

as any other, you know, allegations outside of this state, you know what I'm saying, those are all allegations which have not been proven, know what I'm saying, will just be brought up for aggravating factors . . . I don't think the REACT belt is even necessary. I haven't had any problems, know what I'm saying, at least 10 months before the incidents even took place. . . I'm not a hostile individual. ***I don't have any long history of violence in the county jail.*** They can subpoena my records there to see if I have any altercations, any type of disputes there. ***There's no reason for the REACT belt whatsoever***, you know as far as this –

The Court: Okay. Thank you. The problem is I have to have some security. I assume that Mr. Short is not suggesting that you just sit there in civilian clothes and that's an end to it as if it were a civil case. I know he's not suggesting that. ***I think he's suggesting one, perhaps two bailiffs in the courtroom is sufficient. There was an incident within the last week, I think within this County, where a defendant, being dressed in street clothes, just walked out through the courtroom, through the corridor and out through the building. The fact of being in street clothes makes an escape more attractive. I have to take some security measures.*** Would you rather be shackled with leg irons and waist irons?

The Defendant: I don't think I need --

The Court: I know that. I'm asking you. Inasmuch as I'm going to take –

The Defendant: Iwould rather not have any restraints.

The Court: I know that. Inasmuch as you are going to have something, would you rather have waist chains and leg shackles rather than the belt?

The Defendant: I'm not going to agree to any kind of shackles. You are going –

Mr. Short: As his counsel I would rather have the REACT belt on him, but I really wish he would be examined by a doctor and make sure he is safe.

The Court: I will sign the order definitely. I will sign it that I want to have the results.[31] That has helped in the past. And can require that somebody inform me why he has not been examined if he has not. The REACT belt is ordered. The Court has the

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[31] Included in the Clerk's Transcript is a letter to the court dated August 19, 1996, from John H. Clark, M.D. chief physician at the Los Angeles County jail. The letter states that appellant "has a current diagnosis of Hypertension, which is controlled by medication," and that "[t]here is no contraindication to use of the re-act belt based on a review of the medical record." (CT 475.) This unsupported, conclusory statement, without more, was insufficient to support a determination that the REACT belt would not pose any danger to appellant. There is nothing in the record establishing that Dr. Clark had any knowledge whatsoever of how the belt operates, or of the known medical risks involved with its use. (See *People v. Mar*, *supra* 28 Cal.4th at p. 1229 [describing known medical risks].) His cursory "report," moreover, offers no indication that appellant's blood pressure was monitored while he was wearing the belt, and no discussion of how activation of the belt might affect appellant's blood pressure.

responsibility as to the security of court, staff and jurors.

(RT 171-173, emphasis added.)

The trial court's order to restrain appellant with the stun belt was made without good cause and without consideration of less prejudicial measures, depriving appellant of his rights to due process, equal protection, a fair and impartial trial, to testify in his own defense, and freedom from cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and corresponding state constitutional rights under article I, sections 7 and 15.

B. A Trial Court Must Make A Finding Of Manifest Need On The Record, Consider Less Drastic Alternatives, And Consider The Personal Risk Of A Stun Belt To The Defendant

A defendant should attend his trial free of restraints except where the court makes a finding of "manifest need," such as threats of escape or disruption of court proceedings. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1215; *People v. Duran* (1976) 16 Cal.3d 282, 291; *People v. Harrington* (1871) 42 Cal. 165, 168; 5 Witkin, Cal. Crim. Law 3d (2004 supp.) Crim. Trial, § 15, p. 9.) And, "'*[t]he showing of nonconforming behavior* in support of the court's determination to impose physical restraints *must appear as a matter of record*. . .[citation omitted.]'" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, emphasis in original.) Moreover, the court should only authorize "the least obtrusive or restrictive restraint" to provide the necessary security. (*Id.* at p. 1226; see also Pen.Code § 688, requiring that any person charged with a public offense not be subjected "to any more restraint than is necessary

for his detention . ..") Once the court has determined a stun belt is warranted, it must then consider the distinct features or risks of a stun belt to the defendant before compelling its use, including, inter alia, the potential adverse psychological consequences and health risks. (*Id.* at pp. 1225-1226.) As will be shown below, the trial court abused its discretion by failing to meet any of the threshold requirements before forcing appellant to wear a stun belt restraint.

1. No Manifest Need For Restraints Was Established

This Court held in *Mar* that the principles enunciated in *Duran* require a showing of manifest need before the court may order a defendant restrained with conventional shackles or require that he wear a stun belt in court. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1219, relying upon *People v. Duran*, *supra*, 16 Cal.3d 282, 293.) A manifest need arises only upon a showing of nonconforming conduct or threat of escape by the defendant. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1215; Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 7th ed. 2004) § 31.28, pp. 874-876.) The Ninth Circuit's physical restraint doctrine is analogous to California's, requiring "compelling circumstances" as opposed to "manifest need," an adequate record, and consideration of less restrictive alternatives. (*Gonzalez v. Pliler* (9th Circ. 2003) 341 F.3d 897, 901-902; *Castillo v. Stainer* (9th Cir. 1992) 983 F.2d 145, 147-148.)

In the instant case, no manifest need existed for the trial court's imposition of a stun belt restraint. Although the court initially cited appellant's alleged assault upon the bailiff in the courthouse lock-up as grounds for ordering such a restraint (RT 52), the court's ultimate ruling on that issue was that restraints were necessary to prevent appellant from attempting to escape during the trial. (RT 171, 172-173.)

However, there was no basis in the record for the court to conclude that appellant was an escape risk. Indeed, the reasons cited by the court for why a stun belt was needed -- (1) this is "an extremely serious case" (RT 171); (2) "the security of this building is deplorable . . .[t]here are doors right, left and center" (*Ibid.*); and (3) "the fact of being in street clothes makes an escape more attractive" (RT 172) -- were all generic concerns not specifically related to appellant or his history, and therefore were insufficient to justify use of the stun belt or any other restraint. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1212 [improper to shackle defendant at penalty phase of capital trial based on mere assessment that defendant had "nothing to lose by attempting to escape"]; see also *People v. Cox* (1991) 53 Cal.3d 618, 650-651[rumor floating through jail of possible escape attempt did not demonstrate requisite manifest need to compel shackling of defendant].)

There was also no manifest need for use of a stun belt or other physical restraint to maintain security of the courtroom. Appellant had never acted out or threatened violence during court proceedings,[32] and as he himself pointed out, he also did not have a history of violent behavior in the county jail.[33] (RT 171.) As to the alleged incident in the

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[32] That appellant may have been outspoken, demanding, unpleasant and rude, did not make him a security risk. In *Gonzalez v. Pliler*, *supra*, 341 F.3d at p. 902, the court held that the fact that the defendant in that case had shown "a little attitude" and "a little lack of cooperation," failed to provide "an adequate basis for depriving a defendant of his constitutional right to attend trial free of physical restraints."

[33] The prosecutor noted that appellant had a history of convictions for violent offenses and that the prosecution was also

courthouse lock-up, the court's description of what occurred (RT 20-21), and its characterization of the incident as an unprovoked assault upon the bailiff (RT 52), was not only unsubstantiated, it was, in fact, disputed. (RT 169, 171.) For the court to require appellant to wear a stun belt – or any type of physical restraint – under these circumstances, was an abuse of discretion.

2. No Evidence Was Presented On The Record To Support The Trial Court's Determination

In *People v. Mar*, *supra*, this Court held that:

> [W]hen the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient evidence of that conduct must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; *the court may not simply rely upon* the judgment of law enforcement or court security officers or *the unsubstantiated comments of others*.

(28 Cal.4th at p. 1221, emphasis added; accord *Gonzalez v. Pliler*, *supra*, 341 F.3d at p. 902.) As noted above, the trial court in the instant

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planning to introduce evidence of other violent conduct during the penalty phase. (RT 170.) However, this Court has made it clear that the fact that a defendant has previously been convicted of and/or is currently charged with a violent crime, does not, without more, justify the use of restraints. (*People v. Mar*, supra, 28 Cal.4th at p. 1218, relying upon *People v. Duran*, *supra*, 16 Cal.3d at p. 293; *People v. Seaton* (2001) 26 Cal.4th 598, 651 ["[t]he circumstance that defendant was charged with a violent crime . . . does not establish a sufficient threat of violence or disruption to justify physical restraints during trial"].)

case decided to compel appellant to wear the REACT belt based upon unsubstantiated, disputed allegations regarding an incident that had occurred outside its presence. Although appellant sought a hearing on the issue, during which he could present evidence to refute the allegations (RT 51, 66, 169, 172), no such hearing was ever held. The court simply accepted as true the hearsay statements of an unidentified source or sources.[34] Under the standard enunciated in *People v. Mar*, this was an abuse of discretion. (See also *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1307 [trial court failed make required factual findings where it made decision to use stun belt on basis of unsworn statements of deputy marshal].)

3. The Trial Court Failed To Consider Either The Physical Dangers Inherent In Wearing A Stun Belt Or The Psychological Impact Of Such Device Upon Appellant, And Improperly Rejected Alternative Means Of Securing The Courtroom And Ensuring The Safety Of The Court, Staff, And Jurors

Even assuming that there was a valid security concern in this case, due process also requires "that restraints be imposed only 'as a last resort.'" (*Illinois v. Allen* (1969) 397 U.S. 337, 344; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 721.) The "judge must consider the benefits and burdens associated with imposing physical restraints in the particular case" and "[i]f the alternatives are less onerous yet no less beneficial, due process demands that the trial judge opt for one of the alternatives." (*Id.* at p. 728; see also *Gonzalez v. Pliler*, *supra*, 341

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[34] The court never identified the source of the information it had received concerning the incident, whether it was the bailiff involved in the incident, a third party witness (or witnesses) or both.

F.3d at p. 900, citing *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748 [before a court orders the use of physical restraints on a defendant at trial, it "'must be persuaded by compelling circumstances . . .[and] . . . must pursue less restrictive alternatives . . .'"]; *Rhoden v. Rowland* (9th Cir. 1999 172 F.3d 633, 636 ["due process requires the trial court to engage in an analysis of the security risks posed by the defendant and to consider less restrictive alternatives before permitting a defendant to be restrained"]; *People v. Jackson*, *supra*, 14 Cal.App.4th at p. 1826 [abuse of discretion to leave shackling decision to security personnel and failure to consider less restrictive alternatives].) In *Mar*, this Court went one step further and required that:

> [a] trial court must take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and should give considerable weight to the defendant's perspective in determining whether traditional security measures - such as chains or leg braces - or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard.

(*People v. Mar*, *supra*, 28 Cal.4th at p. 1228.)

In the instant case, appellant was clear very upset by the court's decree that he wear the REACT belt, as evidenced not only by his objections, but also by his refusal on repeated occasions to come into the courtroom if required to don the belt as a condition of his presence. (RT 47, 51, 66.) As explained by defense counsel, appellant (in

addition to his general objection to the use of restraints) specifically objected to use of the REACT belt because:

> ***[h]e feels it's a dangerous apparatus***, that he has a heart problem which even though we have had medical orders signed I'm not sure that has been resolved as to what his physical state is. ***And he feels uncomfortable because he doesn't believe*** the way counsel puts it ***that it's only going to be because he acts badly that the REACT belt will be used. He thinks***
>
> ***someone can misuse judgment when he's not acting badly***.

(RT 170-171, emphasis added.) The trial court, however, ignored appellant's concerns, finding instead that:

> [the REACT belt] has been developed as the best security device so far introduced. ***The REACT belt is not visible. Therefore, from the point of view of appearance it is the best. The REACT belt is the safest from the point of view of the defendant.*** If he conducts himself in the proper manner for a courtroom appearance, he has absolutely nothing to fear from the belt whatsoever. It will only be activated if he is either attempting to escape or is using some violence on somebody in the courtroom.

(RT 171.)

The trial court's rejection of appellant's subjective concerns, and its failure to consider the potential psychological impact and physical harm to him from the stun belt, flies in the face of *Mar*. As to the

psychological effect of the device and its impact on a defendant's ability to receive a fair trial, the Court stated in *Mar* :

> [A]lthough the use of a stun belt may diminish the likelihood that the jury will be aware that the defendant is under special restraint, it is by no means clear that the use of a stun belt upon any particular defendant will, as a general matter, be less debilitating or detrimental to the defendant's ability to fully participate in his or her defense than would be the use of more traditional devices such as shackles or chains. The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (either intentionally or accidently), and that will result in a severe electric shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury.

(28 Cal. 4th at p 1226.) Accordingly, the Court held that:

> In view of the potentially significant psychological effects of the use of a stun belt, we believe that any presumption that the use of a stun belt is always, or even generally, less onerous or less restrictive than the use of more traditional security measures is unwarranted.

(*Id.* at p. 1228.)

The Court in *Mar* further held that:

> In light of the substantial physical harm that may result when the device is activated, any significant doubt as to the reliability of the stun belt renders even more suspect the general assumption that a stun belt is a less onerous or restrictive alternative to traditional security measures. ***Certainly the risk of accidental activation is one that should be considered by the trial court, and should be brought to the attention of any defendant who is asked to express a preference regarding the use of such a stun belt over a more traditional security restraint.***

(*Id.* at p. 1229, emphasis added.)

The Court also observed that "the stun belt poses special danger when utilized on persons with particular medical conditions, such as serious heart problems." (*Ibid.*) While the trial court in the instant case indicated that it would be willing to consider a medical evaluation of appellant to determine whether use of the REACT belt on appellant would be medically contraindicated (RT 52, 173), it did not consider any of the other factors listed in the *Mar* opinion,[35] and also never brought to appellant's attention the risk of accidental activation.

Although the court herein did ultimately offer appellant the option of being "shackled with leg irons and waist irons," which he rejected, objecting to the use of *any* physical restraints (RT 173), the court did not give adequate consideration to less draconian security measures;

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[35] The trial court was also impervious to trial counsel's concern that forcing appellant to wear the REACT belt was having a deleterious effect upon the attorney-client relationship. (RT 51-52.)

i.e., ones that would not require use of physical restraints, such as bringing in additional security personnel. (See *Holbrook v. Flynn* (1986) 475 U.S. 560, 565-566 [presence of armed guards in courtroom not "inherently prejudicial."])[36] Indeed, "there was no evidence that the trial court considered [either the stun belt or shackling] to be a last resort, rather than a first resort." (*People v. Jackson*, *supra*, 14 Cal.App.4th at p. 1826.)

The trial court lacked a manifest need for forcing appellant to wear a stun belt. It further failed to establish a record to support such order, failed to consider less obtrusive or restrictive restraints, and failed to assess the risks and the potential for harm in using the stun belt on this particular defendant. Any one of these failures standing alone would signal an abuse of discretion; all of them combined leads to an inescapable conclusion of abuse. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1215-1226.)

C. Appellant Was Prejudiced By The Court's Order

The harmful psychological impact from wearing a stun belt is well documented and acknowledged by many jurisdictions, including this Court:

> After all, if you were wearing a contraption around your waist that by the mere push of a button in someone else's hand could make

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[36] It is noteworthy that on that particular day, the court allowed appellant to appear without the belt or any other restraints, noting that there were four sheriff's deputies present in the courtroom. (RT 169.) However, the court offered no rationale for why increasing the number of bailiffs would not provide adequate security during the trial.

> you defecate or urinate yourself, what would that do to you from the psychological standpoint?

(*People v. Mar*, *supra*, 28 Cal.4th at p. 1227, fn. 8 [citation omitted.])

Amnesty International explains that:

> [t]o be effective, [the stun belt] relies on the wearer's fear of the severe pain and humiliation that could follow activation. Such fear is a leading component of the mental suffering of a victim of torture or cruel, inhuman or degrading treatment which is banned under international law.[37]

(U.S.A.: The Stun Belt - Cranking Up the Cruelty," (4/6/1999), Amnesty International website, [www.amnestyusa.org].) This same "mental suffering," the constant fear of a severe shock being administered at any time, is also banned by the prohibition against cruel and unusual punishment under the Eighth Amendment.

The stun belt has an undisputed harmful psychological impact on the wearer, notwithstanding its lack of visibility to jurors. This Court has recognized that stun belts "may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury" noting that the

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[37] The international law includes, *inter alia*, the United Nations Minimum Rules for the Treatment of Prisoners and the International Covenant on Civil and Political Rights to which this country is a party. (See, U.S.A.: Use of Electro-Shock Stun Belts (6/12/96) and "U.S.A.: Cruelty in Control? The Stun Belt and Other Electro-Shock Equipment in Law Enforcement" (as of 11/9/04), [www.amnestyusa.org]; see also, Russev, "Restraining U.S. Violations of International Law: An Attempt to Curtail Stun Belt Use and Manufacture in the United States Under the United Nations Convention Against Torture" (2002) 19 Ga.St.U.L.Rev. 603.)

Supreme Court of Indiana has banned the use of stun belts in courtrooms altogether because other forms of restraint "can do the job without inflicting the mental anguish . . ." (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1226-1227.) Other courts have similarly found that "[w]earing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case." (*United States v. Durham*, *supra*, 287 F.3d at p. 1306; see also *Illinois v. Allen*, *supra*, 397 U.S. at p. 344 [restraints may impede a defendant's ability to communicate with his counsel and participate in his defense.]) A defendant's ability to follow the events at trial would be seriously compromised. He would be "occupied by anxiety over the possible triggering of the belt" and " likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial." (*United States v. Durham*, *supra*, 287 F.3d at p. 1306.) The restraint also creates "a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles." (*Gonzalez v. Pliler*, *supra*, 341 F.3d at p. 900.) A primary advantage to a defendant's presence at trial is his ability to communicate with his counsel and "[s]tun belts may directly derogate this 'primary advantage.'" (*Gonzalez v. Plilier*, *supra*, 341 F.3d at p. 900, relying upon *Spain v. Rushen*, *supra*, 883 F.2d at p. 720.)

> The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely "hinders a defendant's participation in defense of the case," chill[ing] [that] defendant's inclination to make any movements during trial--including those

> movements necessary for effective communication with counsel.

(*Gonzalez v. Plilier*, *supra*, 341 F.3d at p. 900 [citation omitted].)

Appellant herein expressed fear that the REACT belt was "a dangerous apparatus" and that it would be activated against him irrespective of whether he behaved violently or actually attempted to escape. (RT 170-171.) Trial counsel also objected that it's use would interfere with the attorney-client relationship. (RT 51-52.) Knowing that any second appellant could be hit with an electric shock powerful enough to cause, *inter alia*, self-urination or defecation, confusion, the cessation of breathing, severe burning, paralysis, or heart irregularities, was tantamount to psychological torture. (See Dahlberg, "The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use is Permissible Under the United States and Texas Constitutions" (1988) 30 St. Mary's L.J., 239, 249-252.) As discussed above, the trial court's determination that the device was harmless because it could not be seen by jurors is therefore wholly unfounded. (RT 171; *People v. Mar*, *supra*, 28 Cal.4th at p. 1219; *Gonzalez v. Pliler*, *supra*, 341 F.3d at pp. 900-901 [reversal where state court improperly forced defendant to wear stun belt after observing that "the belt is not visible to anyone"]; *United States v. Zygadlo* (11th Cir. 1983) 720 F2d 1221,1223 [even leg shackles which are not visible to jury "may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow"].)

Because the restraint would have affected appellant psychologically, it is also difficult to conceive how the forced wearing of the stun belt could not have adversely affected appellant's demeanor;

he had to worry about an intentional or accidental 50,000 volt charge piercing his body like the sword of Damocles.[38]

> At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall expression on the trier of fact, an expression that can have a powerful influence on the outcome of the trial.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 142; see also Dahlberg, *supra*, 30 St. Mary's L.R. at pp. 289-290 [an accused's fear of the stun belt's painful physical consequences would affect his outward physical demeanor].) "Alternatively, a juror may simply notice that the defendant is watching whomever is holding the monitor," or "form the belief that the defendant's nervous guise is a result of guilt, therefore destroying the impartiality of the jury." (*Id.* at p. 290.)

Compelled use of the stun belt thus substantially interfered with appellant's constitutional right to be present at his trial and to participate in his defense. To the extent that it adversely affected his demeanor during the trial, it further compromised his right to a fair trial. A conscientious reviewing court consequently cannot determine beyond a reasonable doubt that the stun belt had no effect on the jury's impression of his guilt, and reversal is therefore required. (*Chapman v. California*, *supra* 386 U.S. at p. 24; *United States v. Durham*, *supra*,

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[38] The sword of Damocles is from Greek mythology. Damocles had a sharp sword hung over his head, tethered only by a single horsehair, putting him in danger every moment and causing him much angst. (Webster's New World Dict. (3d college ed. 1991) p. 349.)

287 F.3d at p. 1297 [finding the error of federal constitutional dimension]; *Gonzalez v. Pliler*, *supra*, 341 F.3d at p. 902.)

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III.

APPELLANT WAS ILLEGALLY DETAINED BY THE POLICE IN VIOLATION OF THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEIZURES, HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION, AND HIS RIGHT NOT TO BE DETAINED BASED UPON HIS RACE AS PROSCRIBED BY PENAL CODE SECTION 13519.4, SUBDS. (D) AND (E)

A. Introduction

Prior to trial, appellant filed a motion under Penal Code section 1538.5, contending that he was illegally detained, and that all evidence seized as a result of the illegal detention and subsequent arrest and search of the vehicle he was riding in at the time of the detention, should be suppressed.[39] (CT 363-377.) The court held an evidentiary hearing, at the conclusion of which the motion was denied. (RT 291-292.) As will be discussed in more detail below, the evidence before the court revealed that the police stopped the car in which appellant was riding for a purported minor traffic violation, but instead of citing the driver for this alleged infraction, they approached the car with their guns drawn, removed all three occupants of the car at gunpoint, subjected them to a pat-down search and detained them while one of the two officers looked in the car for weapons, all based upon a hunch that the three might be suspects in the P & B Liquor store robbery/homicide. The officers claimed that their belief that these people were potential

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[39] Based upon evidence presented at the suppression hearing that the car at issue had been loaned to appellant for use while visiting Southern California by a third party unrelated to these proceedings, the prosecution conceded that appellant had standing to challenge the detention and subsequent search of the vehicle. (RT 236.)

suspects, was based upon similarities between the car and its occupants, and the description of the suspects and their vehicle broadcast over the police radio a short time before the stop. However, the only similar characteristic between the suspects and car described, and the car and occupants the police stopped, was the race of the occupants, all three of whom were African-American. Appellant submits that the police did not have sufficient facts upon which to form a reasonable suspicion that appellant had any involvement in the liquor store crime, or any other crime, and that he was removed from the car at gunpoint, patted down and detained strictly due to his race and the race of his companions. Not only was the detention an unreasonable seizure, in violation of the Fourth Amendment, necessitating suppression of all evidence resulting therefrom, but, because it constituted discriminatory "racial profiling,"it also violated appellant's rights under the Equal Protection Clause of the Fourteenth Amendment, and his statutory rights under Penal Code section 13519.4 subds. (d) and (e).[40] Having been obtained as a result of an illegal seizure and racially discriminatory law enforcement practices, appellant's conviction and death sentence must be reversed.

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[40] This provision explicitly proscribes "racial profiling, which is defined as "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped." (Penal Code §13519.4 (d) and (e).)

B. The Record Before The Trial Court Did Not Support Its Finding That Officers Everts And Moss Had A Reasonable Suspicion That Appellant And His Companions Had Either Committed A Crime Or Were Engaged In Criminal Activity

A temporary detention of individuals during the stop of an automobile by the police, even for only a brief period and for a limited purpose, constitutes a "seizure" of persons within the meaning of the Fourth Amendment, and is subject to the constitutional imperative that it not be "unreasonable," under the particular circumstances of the case. (*Whren v. United* States (1996) 517 U.S. 806, 809-810; *United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 878.)[41] An investigative detention must "last no longer than is necessary to effectuate the purpose of the stop" (*Florida v. Royer* (1983) 460 U.S. 491, 500), and will only be deemed "reasonable" if there are articulable facts giving rise to a reasonable suspicion that the driver and/or passenger(s) have committed or are about to commit a crime. (*People v. Souza* (1994) 9 Cal.4th 224,231.) The reasonableness of official suspicion is measured by what the officers knew before they acted. (*Florida v. J.L.* (2000) 529 U.S. 266,271.)

In the instant case, the evidence presented at the suppression hearing established that shortly after midnight on August 30, 1994, Long Beach Patrol Officers Everets and Moss stopped a green Ford Taurus, after the car made an illegal right turn from a left-turn lane.[42]

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[41] Appellant also has a corresponding right under the California Constitution to be free from unreasonable searches and seizures. (Cal. Const., art. I, §13.)

[42] While defense counsel argued that the stop itself was pretextual, he did not challenge the officers' claim of a traffic

(RT 240-241.) After noting that the driver was an African-American woman, and that there was a second African-American woman riding in the front passenger seat, and an African-American man with "corn-rows" riding in the back seat, the officers decided that the occupants of the car might be suspects in the P & B Liquor Market robbery/homicide that had occurred earlier that evening. (RT 241, 242-243.) Based on this belief the officers proceeded "to investigate." (RT 279.)

The officers approached the car with their guns drawn, removed the occupants from the car at gun point, frisked them for weapons, brought them around to the hood of the police car, where Officer Moss detained them, while Officer Everets went back to the Taurus to see if there were any weapons, whereupon he noticed a gun sticking out from the "map holder pocket." (RT 243-244, 258, 281-281-282.) Appellant and his companions were then arrested and the car was searched. (RT 245, 284-285.)

This was the second vehicle stop related to this crime that Officers Everets and Moss had participated in that night. The first had been of a white Oldsmobile Cutlass, occupied by a man and a woman, both African-American, shortly after 11 p.m. (RT 247-248.) That stop had been made pursuant to an earlier description of the car and suspects as, respectively, a white Oldsmobile Cutlass and two African-American male youths. (RT 247.) However, while the police officers were questioning the occupants of the Cutlass, an entirely different

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violation. However, he maintained that the "real purpose of the stop was to investigate the homicide [of Nasser Akbar], " and that, for this reason, the detention of appellant following the initial stop was an unreasonable seizure in violation of appellant's Fourth Amendment rights. (RT 239.)

description of the suspects and suspect vehicle was broadcast over the police radio, and the occupants of the Cutlass were released. (CT 366.) Approximately 25 minutes later, Officers Everets and Moss stopped the green Ford Taurus in which appellant was riding. (RT 251.)

Both Everts and Moss conceded that the Taurus did not match the revised description of the suspect vehicle: a "dark blue or black" compact. (RT 252-253. 278.) They also acknowledged that the description of the suspects did not match the people in the Taurus. (RT 248-251, 277-278, 280.) The description was of *two* people, a man and a woman, both African-American. (RT 251.) In the Taurus were *three* people, two women and a man, all African-American. The female suspect was described as wearing white shorts and a white t-shirt. (RT 248.) The two women in the car were wearing black sweatshirts and dark pants, one gray the other black. (RT 249-250.) The male suspect was described as having "dredlocks." (RT 250.) The man in the car (appellant) wore his hair in corn-row braids. (RT 251.) Despite the fact that nothing about the car or occupants (*other than their race*) matched any aspect of the radio description, Officers Everets and Moss testified that they thought appellant and his two female companions might be the suspects in the P&B Market robbery/homicide. (RT 251, 254, 279, 281.) Appellant submits that such suspicion was not reasonable, and could only have been based upon the race of the three people in the car, not upon any "articulable facts" indicating that any of these particular people had committed a crime. Detaining an individual based upon their racial status is not only legally impermissible (Penal Code section 13519.4 subds. (d) and (e)), but this Court has further recognized that racial status is not an "unusual circumstance" which may be used to suggest that someone has committed a crime. (*People*

v. Bower (1979) 24 Cal.3d 638, 644; see also *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at pp. 885-886 [fact that occupants of car appeared to be of Mexican ancestry did not furnish reasonable grounds for Border Patrol agents to believe that they were illegal aliens].)

Indeed, there were no particular facts that would have made it objectively reasonable for the officers to suspect that the occupants of the Taurus had anything to do with the P&B crime, or were otherwise involved in criminal activity. This was not a situation where the stop occurred within minutes of the crime or within the immediate vicinity of the crime, (Compare *United States v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1174 [detention upheld where criminal conduct occurred minutes before at that very intersection where police found suspect]), or where the individuals detained behaved in a manner that suggested they were engaged in criminal conduct. (Compare *People v. Souza* (1994) 9 Cal.4th 224, 242 [investigative detention held objectively reasonable where defendant was talking to occupants of a car parked in total darkness in high crime area at 3 a.m., and then ran away from police when patrol car spotlight was turned on].) Nor were there other significant facts from which a police officer could reasonably have suspected that the car contained the perpetrators of the robbery/homicide. Not only did appellant's hairstyle *not* match the description of the suspect's hairstyle, but it was also far from distinctive; as trial counsel pointed out, "[h]undreds and hundreds of male blacks are walking around with braids in their hair." (RT 290.) Furthermore, the fact that a man and a woman were both riding in the car was also not a compelling factor, since this was an urban area in which there were virtually hundreds of cars in which an African-American couple might be riding at any given time.

Thus, even if the officers may have had a legitimate basis to stop the car and cite the driver for a traffic violation, the record reflects that at most, Officers Everts and Moss were acting on speculation, or a mere hunch, when they subsequently decided to detain appellant and his companions to "investigate" whether they might be the robbery/homicide suspects.[43] An investigative detention predicated merely upon a hunch, is unlawful, even though the officer may be acting in good faith. (*People v. Durazo* (2004) 124 Cal. App.4th 728, 735-736 [investigative stop and detention was based on mere hunch and therefore violated Fourth Amendment, where police had received complaint of threats by Mexican gang members, and patrol officers subsequently stopped car and detained Hispanic male driver and

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[43] In the instant case, the specific conduct of the police officers in detaining appellant and his companions in the immediate aftermath of their initial stop of the vehicle, clearly distinguishes the situation from that before the U.S. Supreme Court in *Whren v. United States*, *supra* 517 U.S. at pp. 808-809. In that case, the police stopped a truck after it made a turn without signaling and then sped off at an unreasonable speed. As he approached the driver's window, one of the police officers saw the passenger, Whren, holding two large bags of crack cocaine. The driver and passenger were then arrested. Whren argued that the stop was pretextual; that the officers true motivation was to stop the truck to investigate possible illegal drug activity. The Supreme Court held that the officers subjective motivation in stopping the truck was irrelevant; that as long as there was probable cause to believe a traffic violation had occurred, the police could stop and temporarily detain the vehicle and its occupants. However, in contrast to the facts of *Whren*, where the police actually observed an occupant of the truck engaged in criminal activity, the police in the instant case had no objectively reasonable basis upon which to detain the occupants of the Taurus for any other purpose, and for any period of time longer than was necessary to issue a traffic citation, something they actually never made any effort to do.

passenger because they had driven by, and possibly turned and looked at, the complainant's apartment building] ; *People v. Hester* (2004) 119 Cal.App.4th 376, 391[police officers improperly acted on hunch or intuition, when they stopped and detained car based upon their recognition of one of its passengers as a member of East Side Crips gang, and their assumption that the all of the other passengers were also gang members who would be armed due to the threat of retaliation for a recent gang-related shooting] ; In *re Tony C* (1978) 21 Cal.3d 888,893 [fact that African-American minor and his companion were walking down the street during school hours, in an area where burglaries allegedly committed by "three male blacks" had previously occurred, did not support reasonable suspicion that the two were involved in criminal activity].)[44]

Moreover, the officers' additional purported justification, that they acted as they did out of concern for "officer safety" (RT 243, 254), merely underscores the fact that these two policemen made improper assumptions about the potential dangerousness of the car's occupants based upon their race. Appellant submits that had he and his companions been Caucasian, and had been stopped for a minor traffic

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[44] Despite the multiple, significant discrepancies between the description provided and the car and its occupants, Officer Everets attempted to rationalize his "suspicions," by testifying (1) that the presence of a third person suggested the *possibility* that the driver of the Taurus might have been the getaway driver (RT 270-271); (2) that eyewitnesses who described the car *might* have mistaken it's color for dark blue or black, due to the lighting conditions at the scene of the crime (RT 253, 269-270); and (3) that eyewitnesses *might* also have mistaken appellant's corn-row braids for dredlocks. (RT 243, 269.) However, all of these assumptions were based entirely upon speculation and were not reasonable under the particular circumstances of the situation.

violation, the officers would not have approached the car with their weapons drawn, would not have pointed the guns at their heads, and would not have removed them from the car and frisked them for weapons. He further submits that the officers would not have assumed that he was concealing a weapon, simply because he was sitting in the car with his hands in his lap. (RT 256-257.)[45] Officer Everets' revelation that he would routinely draw his weapon when stopping cars for traffic violations in that neighborhood, because "people don't like the police" and might shoot him (RT 254-255), illustrates the policeman's assumption that black people riding in cars in that neighborhood were likely to be armed and dangerous. Although, when directly confronted on cross-examination, Officer Everts denied that it was his practice to draw his gun when stopping cars occupied by black males (RT 254), this was nevertheless the clear implication of his testimony.

In any event, because Officers Everets and Moss lacked sufficient facts to form a reasonable suspicion that appellant and his

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[45] Officer Everts also testified that as he was approaching the car, he observed appellant's shoulders move, which suggested appellant might be making a furtive gesture. (RT 242.) However, in *People v. McGaughran* (1979) 25 Cal.3d 577,590, this Court held that an investigatory detention following a stop for a traffic violation could not be justified upon the basis of "furtive gesture." Citing its previous decision in *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 818-819, the Court observed that: "[S]uch a gesture cam be deemed suspicious only when there are additional facts known to the officer that reasonably give it a guilty connotation, such as 'prior reliable information or . . . the officer's personal observation of contraband or a deliberate act of concealment under otherwise suspicious circumstances." (*People v. McGaughran, supra*, at p. 590.) In the instant case, there were no additional facts known to Officers Everets and Moss that could legitimately give a suspicious connotation to any gesture or hand-placement by appellant.

companions had either committed or were about to commit a crime, their detention of appellant was an unreasonable seizure in violation of the Fourth Amendment and of article I, section 13 of the California Constitution. Accordingly, the trial court erred when it failed to rule appellant's detention and subsequent arrest invalid, and to suppress all evidence obtained as a result of that arrest and subsequent search of the Taurus.

C. Officer Everets and Moss's Selective Enforcement Of The Law Based On Race Violated Appellant's Right To Equal Protection And Violated California Penal Code Section 13519.4, Subds. (d) And (e), Which Prohibits Racial Profiling

In *Whren v. United States* , *supra*, 517 U.S. at p. 813, the U.S. Supreme Court acknowledged that "the Constitution prohibits selective enforcement of the law based on considerations such as race," and further recognized that someone who has been a victim of intentionally discriminatory application of laws has a claim under the Equal Protection Clause of the Fourteenth Amendment. (See also *People v. McKay* (2002) 27 Cal.4th 601, 622 [a police officer's discretionary enforcement decision may be challenged as having been based on invalid criteria, such as race, religion or other arbitrary classification].) Moreover, as noted previously, Penal Code section 13519.4, subds. (d) and (e) specifically proscribes detention of an individual based upon race (i.e., "racial profiling).

As discussed above, the police officers in the instant case lacked specific facts to support a reasonable suspicion that appellant and his companions had engaged, or were about to engage in any criminal activity (other than the minor traffic infraction for which they were stopped), and instead made assumptions about these individuals'

potential culpability and dangerousness based strictly upon their racial status. The situation presented herein is thus analogous to that in *People v. Hester*, *supra*, in which the police were found to have made improper assumptions about potential culpability based upon racial factors in conducting an investigatory detention. (119 Cal.App.4th at p.388.) In that case, the police recognized a known member of a Bakersfield, California street gang, the East Side Crips, as he was riding in a car, and stopped and detained the car in which he was riding based on an inference that the car was filled with armed gang members on their way to retaliate for a recent gang-related shooting. The Court of Appeal observed that the police officer's belief that the occupants of the car were all gang members, was based on an assumption that all black males between 15 and 25 in that section of Bakersfield, who are riding in a car with an East Side Crip, also have to be East Side Crips, and found that "[t]hese conclusions are far too consistent with racial profiling to be constitutionally permissible." (*Ibid.*, citing *Whren v. U.S.*, *supra*, 517 U.S. at p. 813 and *U.S. v. Brignoni-Ponce*, *supra*, 422 U.S. at 885-886; see also *People v. Durazo*, *supra*, 124 Cal.App. 4th at p. 735 [Police officers' reliance on fact that driver and passenger were Hispanic amounted to impermissible racial profiling in violation of Penal Code section 13519.4, subds. (d), (e).].)

Because appellant's detention constituted racial profiling in violation of both his state and federal rights to equal protection of the law and his state statutory rights, it should not have been upheld.

D. Conclusion

For all of the reasons stated above, the trial court erred in denying appellant's motion pursuant to Penal Code section 1538.5. As a result of such error, the prosecution was able to introduce highly

prejudicial evidence against appellant, including the murder weapon, without which it would likely never have been able to obtain a conviction. Accordingly, because the State cannot prove beyond a reasonable doubt that the constitutional error was harmless, appellant's conviction and death sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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IV.

APPELLANT'S CONVICTION AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY GRANTED THE PROSECUTION'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR JELENIC

A. Introduction

The trial court erroneously excluded prospective juror Robert Jelenic for cause on the grounds that he was "unable to understand or use the English language" (CT Supp.I 967), and also found that he was unable to "accept his duties as a juror." (CT Supp.I 966.) As will be shown below, the court's findings are not supported by the record.

The court's erroneous exclusion for cause of a qualified juror deprived appellant of his Sixth and Fourteenth Amendment right to an impartial jury, and constituted per se reversible error.

B. The Proceedings Below

Question No. 39 in the questionnaire given to the prospective jurors asked, "Do you feel the testimony of law enforcement personnel will be more accurate than civilian testimony?" (CT Supp. I 2317.) Prospective juror Robert Jelenic answered "No" and explained that the reason for his answer was that, "They [police officers] lie too much." (*Ibid.*)

During *Hovey* voir dire, the court questioned Mr. Jelenic about his answer to Question No. 39. When asked if it was his opinion that the officers who testified in this case would be lying, he responded:

> No. I mean I just know that what I'm – what I wrote on that paper is that from personal experience I know they lie.

(RT 964.) The trial court then asked Mr. Jelenic, "How does that play into your evaluating credibility of witnesses here?" However, Mr. Jelenic was not permitted to answer that question. Each time he tried, the court cut him off:

> Mr. Jelenic: You have to look at the - -
>
> Trial Court: Don't tell me what I have to look at.
>
> Mr. Jelenic: I'm saying the person who is, like - -
>
> Trial Court: You.
>
> Mr. Jelenic: Myself - - have to look around what everybody is saying, not just one person. Because a person is an officer that doesn't mean they are the actual person telling the truth, the whole truth and nothing but he truth.
>
> Trial Court: You are not answering my question. What effect will your thinking that police officers lie a great deal have on the way you decide if police officers here are telling you the truth?

(RT 964-965.) Mr. Jelenic responded that his opinion *would not affect this case*:

> It won't have no affect as far as the case goes. It won't have no affect (sic) because - - .

Again the trial court interrupted Mr. Jelenic's answer:

> Why did you put here 'they lie too much' when you are actually answering the question having to do with this case?

(RT 965.)[46]

Mr. Jelenic then described an incident in which he called 911 for assistance. The police came and told him to walk away from the problem, but when he did what they told him, the police arrested him, even though he had been the one to call for help. According to Mr. Jelenic, the police officers falsely claimed that they had watched Mr. Jelenic beat up two security guards and break down a door. (*Ibid.*)

The trial court asked Mr. Jelenic:

> Are you telling me that you will credit police officers with being truthful unless the particular individual witnesses in front of you show to you that they are lying?

To this Mr. Jelenic responded, "I believe everybody's voice, whatever they are saying, is equal to me. In a way." (*Ibid.*)

The court stated that it did not understand what that meant. Mr. Jelenic explained: "Everybody can lie. Not just one person. So what I 'm trying to say is you have to look at the roundabout part of

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[46] It is not clear what the court's purpose was in asking Mr. Jelenic this question other than to be argumentative and to suggest that it was personally offended by Mr. Jelenic's views. As indicated above, the question to which Mr. Jelenick responded in the questionnaire, question 39, asked whether he would credit law enforcement witnesses over civilian witnesses, and then asked him to explain the reasons for his answer. (CT Supp. I, 2317.) It was thus perfectly legitimate and appropriate for him to offer an explanation based upon his own personal experience.

everybody." The court said, "The roundabout part?" Mr. Jelenic explained, "As far as the whole situation. If you go as far as listening to one person there's really no case." (RT 965-966.)

The trial court continued its examination:

> Trial Court: Are you going to judge the credibility of all witnesses by the same standard or not?
>
> Mr. Jelenic: Everybody - - my personal opinion, everybody that I listen to will be - - have the same - - same effect on my own mind.
>
> Trial Court: *You are not answering my question.*
>
> Mr. Jelenic: Believing them.
>
> Trial Court: *You are not answering my question.* Don't you understand my question?
>
> Mr. Jelenic: Are you saying - -
>
> Trial Court: I'm asking a question. . . . Are you going to judge the credibility of all the witnesses by one standard or by more than one?
>
> Mr. Jelenic: Everybody that testifies or says anything about the case, I'll put them all together in one. There won't be nobody like picked out saying in my own mind like, I believe you more than you. Everybody will be believed in the same way.

(RT 965-966.) To this statement the court responded, "All right. *That appears to be an inability to accept the duties of a juror.*" (RT 966, emphasis added.)

The prosecutor challenged Mr. Jelenic for cause, "based on competence." (RT 966-967.) Defense counsel opposed the challenge, arguing as follows:

> I believe this person has answered the court's question. He should just say yes or no, but he has answered the court's question that he will use the same standard for everybody. Even his personal opinion about police officers will be put aside and every witness will be judged according to the same standard. It is clear to me that he is saying that. He may not be saying it in the exact same words that court and counsel would like, but that's what he is saying.

(RT 967.) Nevertheless, the court granted the challenge for cause, citing as grounds its "opinion that Mr. Jelenic is incompetent to act as a juror based on his inability to understand or to use the English language." The court indicated that its ruling was based both upon Mr. Jelenic's written answers in the questionnaire and his oral statements in court. (*Ibid.*)

C. The Trial Court Abused Its Discretion In Finding That Mr. Jelenic Was Incompetent To Serve As A Juror Because He Was Unable To Understand Or Speak English; That Finding Is Not Supported By Substantial Evidence And Is Therefore Not Entitled To Any Deference On Appeal

A trial court's determination regarding a prospective juror's competency or state of mind is reviewed for abuse of discretion, and is subject to reversal if not supported by substantial evidence. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488; *People v. Waidla* (2000) 22 Cal.4th 690, 715; see also *People v. Heard* (2003) 31 Cal.4th 946, 964-966 [court erred in excluding prospective juror for cause where record

of voir dire did not support trial court's finding that juror would automatically vote against death penalty].) In the instant case, the record does not support the trial court's determination that prospective juror Jelenic lacked sufficient command of the English language to be qualified to serve as a juror.[47] Although Mr. Jelenic stated in his questionnaire that he was born in Croatia (CT Supp. I 2309), it is readily apparent from Mr. Jelenic's questionnaire responses that he could comprehend and communicate in English sufficiently to understand the questions and complete the questionnaire. (See CT Supp.I 2309-2323.)[48] It is also clear from the record that on voir dire, Mr. Jelenic both understood the court's questions and provided answers that were comprehensible and responsive. (RT 964-967.)

In filling out his questionnaire, Mr. Jelenic provided the requested introductory biographical information,[49] as well as information concerning his residence, education, employment and activities. (CT Supp.I 2309-2313.) In the section requesting information regarding his experiences with, and attitudes towards, the court system, his answers

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[47] Code of Civil Procedure section 203, subd. (a) (5) provides, in pertinent part, that "[a]ll persons are eligible and qualified to be prospective trial jurors, except . . . [p]ersons who are not possessed of sufficient knowledge of the English language. . .."

[48] A copy of prospective juror Jelenic's jury questionnaire is appended hereto as "Exhibit A," for this Court's convenience.

[49] The only answer that was not directly responsive to the question was to question 1 (E), asking: "What is your race or ethnic background." Mr. Jelenic wrote: "Human." (CT Supp.I 2309.) Mr. Jelenic was not asked on voir dire about this response, but given his responses to the other questions in this section, it is more likely than not that his response reflected his disapproval of being asked for such information, rather than his failure to understand what he was being asked.

also generally reflect that he understood what he was being asked.[50] In the remaining sections, those dealing with Mr. Jelenic's attitudes towards accomplice testimony, the time lapse between the crimes and trial, narcotics and drugs, law enforcement and capital punishment (a total of 27 questions, some with several subparts), a few responses suggested some possible confusion about the questions, but because Mr. Jelenic was asked no follow-up questions on voir dire to clarify these responses, the court had insufficient information to make a determination whether he was simply unsure of his views, or was in fact confused about what he was being asked, and if so, whether his confusion was related to a lack of proficiency in English.[51] (See *People v. Stewart* (2004) 33 Cal.4th 425, 451-452 [reversible error for court to grant challenge for cause strictly on basis of juror's abbreviated answers on jury questionnaire without conducting follow-up voir dire to determine juror's state of mind].) In any event, the questionnaire completed by Mr. Jelenic, viewed in its entirety, simply does not support

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[50] Of these 18 questions, some of them with several subparts, only one question, Question 31(A), drew a response from Mr. Jelenic that suggested some possible misunderstanding of what exactly was being asked. This question asked whether Mr. Jelenic had any training or education in psychology, psychiatry or medicine, to which he wrote check mark next to the word "Yes." When asked for an explanation, he stated: "lived with them for a while." (CT Supp.I 2316.) However, no follow-up voir dire of Mr. Jelenic regarding this answer was conducted, so the record is unclear as to his state of mind in answering the question.

[51] For example, to Question 45, "Will you be an impartial juror," Mr. Jelenic wrote, "Don't know what asked?" (CT Supp.I 2318.) Mr. Jelenic also put question marks after Question 52, Question 54, and Question 57. As to Question 57, asking whether he would base his guilt determination solely upon the evidence and instructions, he wrote, "Look at it all in different ways." (CT Supp.I 2320.)

the trial court's ruling that he was unable to understand or communicate in English sufficiently to be qualified to serve as a juror.

Mr. Jelenic's voir dire responses also fail to support the trial court's ruling. Not only was he able to explain his answer to Question 39 (i.e., why he would not automatically assume that the testimony of law enforcement personnel would be more truthful than civilian testimony), but when he was asked by the court whether he would automatically discredit police witnesses based upon his prior experience, he expressed that as a juror he would be not biased in favor or against any particular witness, and would make credibility determinations based on all of the evidence presented. (RT 956-966.) Although, as defense counsel pointed out, Mr. Jelenic's verbal responses were not particularly articulate, they nevertheless were sufficiently unambiguous and responsive to the questions being asked of him, to refute the trial court's finding that Mr. Jelenic was "incompetent to act as a juror based on his inability to understand or to use the English language." (RT 967.)[52] The trial court therefore abused its discretion in excusing Mr. Jelenic for cause on the grounds of "incompetence." (See *People v. Elam* (2001) 91 Cal.App.4th 298, 318 [trial court abused its discretion in discharging juror on grounds that he was unable to perform his duty as a juror due to inadequate

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[52] (Compare *People v. Symanski* (2003) 109 Cal. App.4th 1126, 1131-1132 [record established that prospective juror had insufficient command of English language where juror did not understand many commonly understood terms such as "law enforcement" and "police department," and told court she did not think it would be fair for her to serve because she did not believe she would be able to understand what was being said].)

comprehension of English, where record failed to support such finding].)

D. The Record Of Voir Dire Also Fails To Support Excusal For Cause On The Grounds That Mr. Jelenic Was Either Unable Or Unwilling To "Accept The Duties Of A Juror," Or That He Had An Actual Bias

Although the trial court ultimately cited Mr. Jelenic's lack of proficiency in English as the basis for its ruling (RT 967), right before the prosecutor moved to excuse Mr. Jelenic for cause, the court stated in reference to Mr. Jelenic's explanation of his position on judging witness credibility, that "There appears to be an inability to accept the duties of a juror." (RT 966.) While this statement is somewhat ambiguous, it appears from the context in which it was made, that the court was making a finding that Mr. Jelenic could not grasp or accept the fact that, as a juror, he would have to be fair and impartial in judging the credibility of witnesses.

A juror has the duty to weigh the evidence and credibility of witnesses with impartiality, and to reach a fair and unbiased verdict. (*People v. Compton* (1971) 6 Cal.3d 55, 59-60.) In *People v. Nessler* (1997) 16 Cal.4th 561, 580-581, this Court stated that in order to satisfy the requirement of impartiality, "'[i]t is sufficient if the juror can lay aside his impression or opinion and *render a verdict based on the evidence presented in court.*'" (Emphasis in original, quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 723.) [53]

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[53] This Court has also observed that a prospective juror "who candidly states his preconceptions . . . but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488.)

As discussed above, a careful review of Mr. Jelenic's responses to the court's voir dire questions, reveals his unambiguous expression that, despite his own negative experience with the police, he could be fair and impartial in judging the credibility of all of the witnesses, and would not automatically assume that a civilian witness was telling the truth and a law enforcement witness was lying. (RT 965-966.) Significantly, the trial court herein did *not* find that Mr. Jelenic was being disingenuous in making such claim,[54] or that he had an "actual bias."[55]

Accordingly, to the extent that the court's statement that Mr. Jelenic was unable to "accept the duties of a juror," is deemed to be a finding justifying its excusal of Mr. Jelenic for cause, it is not fairly supported by the record, and exclusion of Mr. Jelenic on the basis of such finding constituted an abuse of the court's discretion.[56]

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[54] (Compare *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1485 [removal of juror was upheld where court explicitly discredited juror's claim that she was not biased against the police].)

[55] Pursuant to Code of Civil Procedure section 225, subd. (b) (1) (C) a juror can be challenged for cause on the grounds of "actual bias," which is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

[56] The court's impatience with Mr. Jelenic is evident from even a cold record. As noted above, the court repeatedly interrupted Mr. Jelenic

E. The Trial Court's Erroneous Exclusion For Cause Of A Qualified Juror Deprived Appellant Of His Constitutional Right To An Impartial Jury And Requires Reversal

The erroneous exclusion for cause of a qualified juror violates a defendant's Sixth and Fourteenth Amendment rights to an impartial jury and constitutes reversible error which cannot be subjected to harmless error analysis. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660; see also *People v. Cleveland* (2001) 25 Cal.4th 466, 486 and *People v. Elam*, *supra*, 91 Cal.App.4th 298, 318 [erroneous discharge of qualified juror requires reversal of conviction]; *People v. Batson* (1986) 476 U.S. 79, 100 [unconstitutional exclusion of qualified juror requires reversal of conviction].) The trial court's erroneous exclusion of Mr. Jelenic, a qualified and impartial juror, for cause, thus requires reversal of appellant's conviction and death sentence.

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when he was attempting to answer the court's questions. (RT 964-965.) When he tried to explain one of his answers, starting off with, "You have to look at . . .," the court snapped at him: "Don't tell me what I have to look at." (RT 964.) It is unclear whether the court's almost palpable hostility towards Mr. Jelenic was due to the fact that it was offended by his suggestion that police officers might lie, or whether the court was simply annoyed by Mr. Jelenic's inarticulate manner of expressing himself. While it is likely that he spoke with a foreign accent, he obviously was not so difficult to understand that the court reporter was unable to record what he said. And while his manner of expressing himself was awkward, it was far from being incomprehensible.

V.

THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN PROSPECTIVE JURORS FROM THE JURY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND TO A JURY FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

A. Introduction

Appellant is African-American. (RT 896.) During jury selection, the prosecutor exercised five of his first 14 peremptory challenges against African-Americans (RT 1109, 1114, 1117, 1119, 1122), whereupon defense counsel objected on the grounds of "systematic exclusion of minorities." (RT 1122.)[57] The court found a prima facie case of such exclusion,"based on the numbers." (RT 1124.) The prosecutor, in turn, offered explanations for the strikes that were facially race-neutral. (RT 1124-1128.) The trial court found these explanations to be credible and valid (RT 1128-1129), and thereupon denied the defense's "*Wheeler*" motion. (RT 1129.) Subsequently, the prosecutor struck a sixth African-American. (RT 1132.)[58] Thus, out of a total of 19

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[57] Defense counsel stated he was making a "*Wheeler* motion," which was an abbreviated way of saying that he was moving for dismissal of the venire due to the prosecution's systematic exclusion of African-Americans, which is prohibited under *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79.

[58] In the course of explaining his reasons for excluding the prospective jurors who were the subject of the defense's motion, the prosecutor noted that he also planned to strike this additional African-American prospective juror. Anticipating that he would be required to justify his exclusion of yet another African-American from

peremptory challenges actually exercised by the prosecutor, six were against African-Americans.[59]

As noted above, the trial court found that a prima facie case of racial discrimination had been established, thus shifting the burden to the prosecution to provide a race-neutral explanation for each of the suspect challenges. (*Batson v. Kentuncky*, *supra*, 476 U.S. at p. 97.) Although the prosecutor offered what appeared, on their face, to be non-discriminatory reasons for his peremptory challenges, appellant will show that the purported justifications were pretextual, and that the trial erroneously found that the prosecution had sustained his burden of justification, without conducting a constitutionally adequate evaluation of the prosecutor's proffered explanation. Under the circumstances, appellant's conviction and death sentence were obtained in violation of his state and federal constitutional rights to equal protection and to a jury drawn from a representative cross-section of the community, and must therefore be reversed.

B. Under The Federal And State Constitutions, The Prosecution Cannot Exclude A Prospective Juror On Account Of Race

In *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 86-89, the United States Supreme Court held that the Equal Protection Clause of the United States Constitution guarantees a defendant that the state will

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the jury, the prosecutor proffered facially race-neutral reasons for his intended challenge of this prospective juror. (RT 1127, 1128.)

[59] During the subsequent selection of the six alternate jurors, the prosecutor exercised only one peremptory challenge, and used it to strike Kym Walker, who was also African-American. (RT 1140; CT Supp.I 366.)

not exclude members of his race from the jury venire on account of race.[60] *Batson* recognized that denying a person participation in jury service on account of race not only harms the accused but also undermines public confidence in the fairness of our system of justice by unconstitutionally discriminating against the excluded juror(s). (*Id.* at p. 87.)

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the Constitution. First, the defendant must make a prima facie showing that the prosecution has exercised a peremptory challenge on the basis of race. (See *Batson*, *supra*, 476 U.S. at pp. 96-97.) That is, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded venire members from the petit jury on account of their race. (*Id.* at p. 96.) If a defendant makes this showing, the burden then shifts to the prosecution to provide a race-neutral explanation for its challenge. (*Id.* at p. 97.) The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. (*Id.* at p. 98.)

In *People v. Wheeler*, *supra*, 22 Cal.3d 258, decided eight years before *Batson*, this Court presaged *Batson* by holding that a defendant's right to a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. (22 Cal.3d at pp.

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[60]In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the Supreme Court eliminated the requirement that the defendant and the stricken juror share the same race.

276-277.) Group bias was defined as "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215 and *People v. Wheeler*, *supra*, 22 Cal.3d at p. 276.) *Wheeler* set forth procedures similar to those later adopted in *Batson*: One who believes his opponent is using peremptory challenges for improper discrimination must object in timely fashion and make a prima facie showing of a "strong likelihood" that prospective jurors are being excluded because of race or group association. (22 Cal.3d at p. 280; see, e.g., *People v. Davenport* (1995) 11 Cal.4th 1171; *People v. Crittenden* (1994) 9 Cal.4th 83, 115; *People v. Garceau* (1993) 6 Cal.4th 140, 170.) Most recently, this Court ruled that *Wheeler*'s standard means that "to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1318.)[61] If the trial court finds a prima facie case, the burden shifts, and the party whose peremptory exclusions are under attack must then provide a race or group-neutral explanation, related to the particular case, for each suspect excusal. (See, e.g., *People v. Turner* (1994) 8 Cal.4th

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[61] This case is presently pending before the United States Supreme Court. Certiorari was granted on January 7, 2005. (*Johnson v. California* (2005) __ U.S. __, 125 S.Ct. 824.) The question presented upon which certiorari was granted was: "Whether to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?" (Petitioner's Brief on the Merits, filed 2/2/05, 2005 WL 282136.)

137, 164-165; *People v. Fuentes* (II) (1991) 54 Cal.3d 707, 714.) Once the burden has shifted and the prosecution has stated its reasons for the excusal, the trial court has an obligation to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]" in light of all the circumstances. (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; accord *Batson*, *supra*, 476 U.S. at p. 98.)

In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge, and thus an objection on the basis of *Wheeler* is sufficient to preserve both state and federal constitutional claims. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d. 1073, 1075; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 987 (citing *People v. Jackson* (1992) 10 Cal.App.4th 13, 21 n. 5; *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

If the trial court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted and the trial court must dismiss the venire and begin jury selection anew unless the complaining party waives its right to such remedy or consents to an alternative remedy. (*Wheeler*, supra, 22 Cal.3d at p. 282; *People v. Willis* (2002) 27 Cal.4th 811, 823-824.) Similarly, the exclusion by peremptory challenge of a single juror on the basis of race or ethnicity violates both the state and federal Constitutions and requires reversal. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386, citing *People v. Montiel*, *supra*, 5 Cal.4th 877, 909; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 715 and 716, fn. 4; see *People v. Howard*, *supra*, 1 Cal.4th at p. 1158; *United States v. Vasquez- Lopez* (9th Cir. 1994) 22 F.3d 900, 902 ["the Constitution

forbids striking even a single prospective juror for a discriminatory purpose"].)

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing to *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].)

C. The Six African-American Prospective Jurors Were Improperly Struck

Three African-American prospective jurors were seated in the original petit jury in this case. (RT 1105.)[62] The prosecution used its first peremptory challenge against one of the three (Gloria Young) and struck the other two after that (Robbie Washington and Darnell Fizer). (RT 1109, 1114, 1117.) As the parties exercised their respective challenges, six additional African-American prospective jurors were seated in the jury box. (RT 1114, 1115, 1118, 1121, 1133.)[63] Of these six, the prosecutor struck three (Ricky Wasp, Jonathan Seales and Stephanie Maston-Hunter). (RT 1119, 1122, 1132.)

In addition to their shared characteristics of being African-American, all of the excluded jurors shared the demographic characteristics of being long-time residents of Los Angeles County, who

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[62] These prospective jurors were Gloria Young, Robbie Washington and Darnell Fizer.

[63] These prospective jurors were Ricky Wasp, Jonathan Seales, and Stephanie Maston-Hunter, as well as "H.W.", "A.L." and "R.R."

were all either gainfully employed or had retired after lengthy employment. All of them had at least completed high school and most had some college education or post-high school training.

Gloria Young was 56 years old and had lived in Long Beach for 29 years. (CT Supp.I 291-292.) She had completed high school and attended Long Beach City College. (CT Supp.I 292.) Ms. Young had worked for the U.S. Postal Service since November 1967, and was a supervisor. (CT Supp.I 293.)

Jonathan Seales was 61 years old and had lived in Long Beach for 11 years. (CT Supp.I 351-352.) He had completed high school and attended La Boca Jr. College. (CT Supp.I 352.) Mr. Seales was retired, but prior to his retirement had worked as a supervisory computer operator for a shipping business. Before that he had worked as a security guard for Sentry. (CT Supp.I 353.)

Robbie Washington was 24 years old and had lived in Long Beach all of his life. (CT Supp.I 306-307.) He was a high school graduate and had an A.A. degree from Cerritos college, where he had majored in paralegal studies with a specialization in litigation. (CT Supp.I 307.) He was a certified paralegal and hoped to become an attorney. (*Ibid.*) He was currently employed as a clerk for the Los Angeles County Department of Social Services. He had previously worked as a paralegal for McDonnell Douglas Corporation. (CT Supp.I 308.)

Darnell Fizer was 25 years old and a native of Los Angeles County. (CT Supp.I 336.) He, too, was a high school graduate (CT Supp.I 337), and was employed as a warehouseman. (CT Supp.I 338.)

Ricky Wasp was 41 years old (CT Supp.I 321) and had grown up in Los Angeles. (CT Supp.I 327.) He was a high school graduate (CT

Supp.I 322), and had been employed by Ralph's Market as a forklift operator-warehouseman since 1985. (CT Supp.I 323.)

Stephanie Maston-Hunter was 25 years old and a Los Angeles native. (CT Supp.I 2685.) She had completed high school and had studied business administration at El Camino College. (CT Supp.I 2686.) She had been employed as a directory assistance operator with the phone company since 1990. (CT Supp.I 2687.)

By any objective standard, these six people were responsible citizens who would ordinarily be welcomed on any jury. Each and every one of them indicated that they could be fair and impartial jurors. Nevertheless, all of these people were purportedly undesirable to the prosecution because they all had indicated that they were philosophically "neutral" on the issue of the death penalty. (RT 1124, 1125, 1126, 1127, 1128.) The prosecutor stated:

> [W]hat I'm trying to do is find people who are going to be stronger in their convictions. Obviously, I want jurors who are going to support my position in terms of convicting, but I want people who are going to be able to work together and people who are going to take a strong enough position with regard to the death penalty. If it's something they either don't believe in or [are] very weak in their feelings, I think we are going to have a real difficult time when it comes to penalty phase. And I'm looking to get the strongest 12 that I can. That's essentially what I'm trying to do.

(RT 1127-1128.)

Declaring a juror unacceptable on the basis of his or her assertion of neutrality is tantamount to finding a juror unacceptable because he or she is unbiased. Since jurors are required to be fair and

impartial (*Irvin v. Dowd* (1961) 366 U.S. 717, 722; *People v. Nessler* (1997) 16 Cal.4th 561, 578; Penal Code section 225, subd. (b) (1) (C)), the notion that a juror would be *unacceptable* to the prosecution because he or she is *unbiased* is preposterous, if not shocking and offensive, and cannot ever be considered a "legitimate" reason for striking that juror. (*Batson, supra*, 476 U.S. at p. 98, fn. 20 [to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his '*legitimate reasons*' for exercising the challenges"], emphasis added.) Contrary to the prosecutor's implication, the fact that these prospective jurors indicated that they were philosophically "neutral" with regard to the death penalty could not fairly be construed to mean that they would be more inclined to vote against a death sentence in this case than to vote for one. Because the prosecution's stated rationale for challenging the six African-American jurors was inherently untenable, it fairly reeked of pretext and utterly failed to rebut the prima facie case that the peremptory challenges were race-based.

Furthermore, even assuming the prosecutor's stated rationale were deemed reasonable and legitimate, the record casts serious doubt as to whether the prosecutor's exclusion of these African-American jurors was actually based on such rationale. Significantly, of the five jurors he struck prior to the defense's *Wheeler/Batson* motion, the prosecutor had voir dire questions for only one of them (Mr. Seales) regarding his views on the death penalty. (RT 1020.)[64] Had the

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[64] In response to these questions Mr. Seales reiterated that he was "neutral" in his views regarding the death penalty, and stated that he had no preconceived notions as to when he would or would

prosecutor truly been concerned about whether these other "neutral" jurors would be willing to impose a death sentence, he would undoubtedly have made some effort to question them further during voir dire regarding their views. His utter failure to do so therefore undercuts the sincerity of his claim. (See *People v. Turner*, *supra*, 42 Cal.3d at p.727 [prosecutor's failure to engage African-American prospective jurors in more than desultory voir dire or to ask them any questions at all before striking them peremptorily, is one factor supporting inference that challenge is in fact based on group bias].)

The fact that the prosecutor did not exercise peremptory challenges against other "neutral" prospective jurors who were not African-American, is further evidence of the pretextual nature of his explanation. Seated Jurors No. 9 and No. 11[65] each indicated in their respective questionnaires that their opinion regarding the death penalty could be most accurately described as "neutral" (CT Supp.I 135, 165), yet the prosecutor apparently deemed them suitable to serve as jurors. (See *Miller-El v. Cockrell* (2003) 537 U.S. 322, 343-344 [state proffered rationales for striking African-American jurors that also pertain to Caucasian jurors who are seated constitute evidence of purposeful discrimination].)[66]

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not vote for a death sentence; that it would depend entirely on the circumstances presented. (*Ibid.*)

[65] Juror No. 9 was Ms. S.G., and Juror No. 11 was Mr. D.S. (CT Supp.1 2884.) Ms. S.G. described herself as "Mexican American" (CT Supp.I 125), and Mr. D.S. described himself as "Caucasian." (CT Supp.155.)

[66] See Sections E and F., *infra*.

As to some of the African-American prospective jurors he struck, the prosecutor offered additional reasons for seeking to exclude them. However, several of these reasons revealed unfounded concerns or assumptions that smacked of racism. For example, the prosecutor claimed that he was "troubled" by the fact that Mr. Fizer had previously testified on behalf of a "relative"[67] as an alibi witness, because the fact that there was a conviction in that case suggested Mr. Fizer had perjured himself. (RT 1126.) The prosecutor further questioned Ms. Young's suitability, because she had a nephew who was convicted of murder, although the prosecutor expressly conceded that "in and of itself" that would not be an adequate justification for her exclusion. (RT 1124.)[68] Thus, if anything, these additional justifications proffered by the prosecution, provide further evidence of his discriminatory purpose.[69]

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[67] This "relative" was Mr. Fizer's brother. (CT Supp.I 342; RT 554.)

[68] Notably, the prosecutor did not reject seated Hispanic juror C.G, whose cousin had been convicted of aggravated assault (RT 840-841), or seated Hispanic juror F.N. whose grown son had been a gang member since the age of 16, and had been convicted of burglary. (RT 626-627.)

[69] The prosecutor stated that he had rejected Mr. Washington for the additional reason that he was "a 24 year old . . . who came into court wearing a T-shirt and [was] somewhat sloppily attired." (RT 1126.) Rejection of a juror based on his or her appearance has been held to be a facially race-neutral reason that is not inherently pretextual. (*Purkett v. Elem* (1995) 514 U.S. 765, 769.) However, given the totality of the circumstances herein, this additional justification cited by the prosecutor does not overcome the compelling evidence of pretext. Neither does the prosecutor's additional justification for excluding Mr. Wasp (i.e., that Mr. Wasp had friends who had been arrested and had himself suffered a prior

D. The Trial Court's Failure To Conduct A Sincere And Reasoned Evaluation Of The Prosecution's Reasons for Exercising Its Peremptory Challenges Requires Reversal Of Appellant's Convictions And Judgment Of Death

The United States Supreme Court has emphasized that the trial court has a duty to proceed to step three to answer the "critical question" of whether the prosecution's justifications for peremptory strikes are persuasive. (*Miller-El v. Cockrell* , *supra*, 537 U.S. at p. 338]; accord *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 967-969; *Lewis v. Lewis*, *supra* 321 F.3d at p. 834 ["In order for *Batson* to have any meaning [. . .] a court faced with a *Batson* challenge must, at a minimum, fulfill its duty to determine whether the defendant has established purposeful discrimination"].) "The trial court has a duty to proceed to step three, even absent further request from counsel, because it is not until step three that the court rules on 'the ultimate question of intentional discrimination.'" (*United States v. Alanis*, *supra*, 335 F.3d at p. 968, citing *Hernandez v. New York* (1991) 500 U.S. 352, 363.)

Under *Batson* it is not sufficient for equal protection purposes that a trial court deem the prosecution's facially-neutral explanations "plausible." (*United States v. Alanis*, *supra*, 335 F.3d at p. 969, fn. 3; see also *Lewis v. Lewis*, *supra*, 321 F.3d at p. 832 [holding that a trial court did not fulfill its step three duty by concluding that the

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misdemeanor conviction for receiving stolen property). (RT 1126.) "The proffer of various faulty reasons and only one or two otherwise adequate reasons may undermine the prosecution's credibility to such an extent that a court should sustain a Batson challenge." (*Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 831.)

prosecution's stated race neutral reason for striking a potential African-American juror was "probably . . . reasonable"]; *Galarza v. Keane* (2nd Cir. 2001) 252 F.3d 630 [trial court failed to discharge its duties, under *Batson*, when it did not adjudicate whether it credited the prosecution's proffered race-neutral explanations for striking three prospective jurors with Hispanic names before denying petitioner's challenges].) Rather, in determining whether the challenger has met his or her burden of showing intentional discrimination, the court must conduct a "sensitive inquiry" into such circumstantial and direct evidence of intent as may be available. (*United States v. Alanis*, *supra*, 335 F.3d at p. 969, fn. 3, citing *Batson*, 476 U.S. at p. 93.)

Similarly, this Court has held that in the third step of a *Wheeler/Batson* challenge, the trial court has an obligation to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168) and to clearly express its findings. (*People v. Fuentes*, *supra*, 54 Cal.3d at pp. 716-720; *People v. Silva*, *supra*, 25 Cal.4th at p. 386.) If the trial court makes a sincere and reasoned effort to evaluate the justifications offered, its conclusions are entitled to deference on appeal. (*People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Arias* (1996) 13 Cal.4th 92, 136.) Where no inquiry is made, however, and the prosecution's reasons for exercising his peremptory challenge(s) are either unsupported by the record or are inherently implausible or illegitimate, more is required of the trial court than a global finding that the reasons appear sufficient; in such cases, the trial court's unexplained acceptance of the prosecution's reasons is not entitled to deference. (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386; see *People v. Montiel*, *supra*, 5 Cal.4th at p. 909.) Justifications for a particular peremptory challenge

remain a question of law and thus are properly subject to appellate review. (*People v. Turner* (1986) 42 Cal.3d 711, 720, fn. 6; *People v. Granillo* (1987) 197 Cal.App.3d 110, 120.) A trial court's failure to engage in such a careful assessment of the prosecution's stated reasons is itself reversible error. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 721; see *Purkett v. Elem*, *supra* 514 U.S. at p. 768 [third step in *Batson* process requires trial court to determine whether facially non-discriminatory reasons are implausible or pretextual]; *United States v. Alcantar* (9th Cir. 1996) 897 F.2d 436, 438.)

In this case, the trial court clearly failed to fulfill its constitutional obligation to make a sincere and reasoned evaluation of the prosecutor's proffered "racially neutral" explanation of why it exercised six of its 19 peremptory challenges against African-American prospective jurors. The trial court never even questioned the legitimacy of the prosecutor's proffered explanation that he did not want jurors whose feelings about the death penalty were "neutral." As argued above, this was tantamount to saying that the prosecutor did not want unbiased jurors, yet the court entirely failed to evaluate the substance of the prosecutor's statements. The court also made no effort to evaluate the genuineness of the prosecutor's stated rationale for excluding the six African-American prospective jurors, by considering the extent to which he sought to explore the views of these prospective jurors on voir dire or whether he had allowed non-African-American jurors with identical views to remain on the jury. Instead, the court made the following ruling:

> I have evaluated these reasons. I do not have the individual questionnaires in front of

> me, but I have had each one as his name or her name has been called and excused and I have had notes on those. In each case I have myself seen reasons why there might be an excusal or a challenge rather and I agree with counsel's statement on demeanor. ¶ There was a recent case in which body language was held not to be a good reason for a challenge and that case has been depublished. We are back in the position where counsel's own reading of a person's demeanor and apparent attitude is exactly the kind of thing that he can consider in a peremptory challenge. ¶ I find that there has been no systematic exclusion of jurors based on race [and] accept counsel's explanation. Challenge is denied.

(RT 1128-1129.)

That the court itself might have exercised peremptory challenges against certain jurors for one reason or another, was not the appropriate standard for the court to apply, since the *prosecutor's* motives, not the court's were at issue. Moreover, the primary reason advanced by the prosecutor for striking the six African-American prospective jurors was their stated neutrality regarding the death penalty, not their respective demeanor or manner of answering questions during voir. The only time the prosecutor referred to a juror's demeanor (other than his reference to Mr. Washington's "sloppy" attire, noted in footnote 69, above), was to explain why he had decided not to strike "Mr. L.," another African-American prospective juror, in spite of having given Mr. L. a low "grade." The prosecutor explained that he had given Mr. L. a low grade based on his questionnaire responses, but decided to keep him notwithstanding that fact, because Mr. L.'s

"demeanor, the way he conducts himself, the way he expresses himself" had given the prosecutor "a better feeling than his grade in this case." The prosecutor's remarks with respect to Mr. L. could not reasonably be construed to imply that he struck the six prospective jurors at issue on the basis of their "demeanor and apparent attitude" during voir dire. Under the circumstances, the court's finding that the prosecution's challenges were properly based on "demeanor and apparent attitude" is not supported by the record.

It is thus apparent from the trial court's ruling that it made "*no* serious attempt to evaluate the bona fides of the prosecutor's explanations" (*People v. Fuentes*, *supra*, 54 Cal.3d at p. 718, citing *People v. Hall*, *supra*, 35 Cal.3d at p. 168 [original emphasis]; rather, it merely accepted at face value the prosecution's stated justifications. The trial court's failure to properly evaluate the prosecution's stated reasons is patently insufficient to comply with the trial court's obligation under *Wheeler* and *Batson* to determine the genuineness of those reasons. (*Ibid.*) "[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [citation] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes*, *supra*, 54 Cal.3d at p. 720.)

E. Comparative Analysis Of The Answers Given by Prospective Jurors Must Be Used In Evaluating Whether The Prosecution's Reasons Were Pretextual

Although this Court recently reaffirmed in *People v. Johnson*, *supra*, 30 Cal.4th at p. 1325, its understanding that a reviewing court

should not attempt its own comparative juror analysis[70] for the first time on appeal, comparative analysis is required under the federal Constitution.

In *Miller-El v. Cockrell, supra*, 537 U.S. at p. 343, the United States Supreme Court established that comparative juror analysis is a constitutionally required technique to be employed by courts in evaluating whether the prosecution's stated reasons for use of the peremptory violated *Batson*'s proscription against race-based peremptory challenges. The issue before the Court was whether Miller-El had shown "a substantial showing of the denial of a constitutional right," thus warranting the issuance of a certificate of appealability ("COA"), relating to the third prong of his *Batson* claim: that is, whether he had carried his burden of proving purposeful racial discrimination. (*Miller-El*, *supra*, 537 U.S. 322.) The Court explained that while a COA ruling was not the occasion for ruling on the merits of Miller-El's claim, the COA determination required an overview of the claims and a general assessment of their merits. (*Id.* at p. 336.) Miller-El contended that the prosecution's stated race-neutral reasons for use of peremptories were pretextual;[71] the Court in *Miller-El* reaffirmed its holding in *Purkett v. Elem*, *supra*, 514 U.S. at p. 768, that the critical question in determining whether a defendant has proven

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[70] "Comparative analysis" refers to the comparison between the answers given on voir dire or in questionnaires by prospective minority jurors who were challenged and those who were not.

[71] The State conceded the existence of a prima facie case, and Miller-El conceded that the prosecution had offered facially race-neutral reasons for the three strikes subject to defense objection. (*Miller-El*, *supra*, 537 U.S. at p. 338.)

purposeful discrimination at step three is the persuasiveness of the prosecution's justification for the peremptory strike. *(Ibid.)* "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Ibid.*) The Court held that, while such a finding is an issue of fact normally accorded deference, such deference does not amount to abandonment of judicial review. (*Id.* at p. 340.)

In its analysis in determining whether a defendant's claim that peremptory strikes were race-based, the Court considered the facts and circumstances that were adduced in support of a prima facie case, including statistical evidence supporting the claim that the strikes were more than happenstance; it also conducted a comparative analysis of whether the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some Caucasian jurors who were not challenged and who did serve on the jury. (*Miller-El*, *supra*, 537 U.S. at pp. 342-343.) Even the lone dissenter endorsed a comparative analysis, although he disagreed with the majority's conclusion. (*Id.* at pp. 361-363 (dis. opn. of Thomas, J.).) The Court thus left no doubt but that comparative analysis was a factor to be considered on review of a claim of purposeful discrimination under *Batson*.

An examination of other federal and state courts, as well as an opinion previously issued by this Court, demonstrates that use of comparative analysis is a necessary analytical tool in determining whether a party is engaging in discrimination. (See, e.g., *Lewis v. Lewis, supra*, 321 F.3d at pp. 830-831; *McClain v. Prunty, supra*, 217 F.3d at pp. 1220-1221, citing *Turner v. Marshall, supra*, 121 F.3d at p.

1251 (overruled on other grounds in *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (en banc)) ["A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."]; *People v. Hall, supra*, 35 Cal.3d at p. 168 ["Such disparate treatment is strongly suggestive of bias, and could in itself have warranted the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons."].)[72]

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[72] The use of comparative analysis is certainly the rule rather than the exception. (See, e.g., *Jordan v. Lefevre* (2nd Cir. 2000) 206 F.3d 196, 201 ["Support for the notion that there was purposeful discrimination in the peremptory challenge may lie in the similarity between the characteristics of jurors struck and accepted."]; *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 653 ["[A]s a general matter, comparisons between challenged jurors and similarly situated, unchallenged jurors of a different race or gender can be probative of whether a peremptory challenge is racially motivated"]; *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, 204, quoting *Doss v. Frontenac* (8th Cir. 1994) 14 F.3d 1313, 1316-17 ["It is well-established that peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged."]; *Hollingsworth v. Burton* (11th Cir. 1994) 30 F.3d 109, 112 ["While a comparison of stricken Whites with stricken African-Americans is relevant to a *Batson* claim, a comparison of stricken African-Americans to seated Whites also is appropriate."]; *Splunge v. Clark* (7th Cir. 1992) 960 F.2d 705, 709 ["non-Black potential jurors who answered the question identically were deemed fit for jury service"]; *People v. Randall* (Ill.App. 1996) 671 N.E.2d 60 [prosecution's peremptory challenge of African-American prospective juror was racially discriminatory since prosecution did not strike similarly situated Caucasian juror]; *Mattison v. State* (Ga. 1994) 451 S.E.2d 807 [prosecution's use of peremptory challenges to excuse African-American jurors was discriminatory where prosecution did not excuse Caucasian jurors with same characteristics as excused African-American jurors]; *Holmes v. Great Atl. & Pac. Tea Co.*

As these courts have recognized, the inconsistent use of peremptory challenges to excuse some jurors but retain others who share the same ostensibly objectionable characteristic can raise an inference of purposeful discrimination. In the *Batson* context, reviewing courts from many jurisdictions have employed comparative analysis to determine whether a prima facie case of discrimination has been established[73] as well as to assess whether a party's proffered race-neutral reasons for a challenged strike are in fact pretextual.[74]

(La.App. 1993) 622 So.2d 748 [peremptory challenges were racially based where five Caucasian members of panel were challenged for reasons that African-American members could have been, but were not, challenged]; *State v. Reliford* (Mo.App. 1988) 753 S.W.2d 9 [prosecution misused peremptory strikes where African-American prospective juror who knew defendant from church was excused while Caucasian prospective juror who knew defendant from work was not].)

[73] See, e.g., *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 486 ["If an excused African-American juror had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference, at least prior to the articulation of a race-neutral explanation for the strike, would be that the strike was racially-motivated. As far as the voir dire record would reveal, the stricken juror's race would be the only characteristic distinguishing the African-American from the juror who was retained."]; *Bennett v. Collins* (E.D. Tex. 1994) 852 F.Supp. 570 [finding prima facie case where, inter alia, several African-American jurors were peremptorily challenged even though they responded to questions similarly to Caucasians who were eventually seated on the jury].)

[74] See, e.g., *McClain v. Prunty*, *supra*, 217 F.3d at p. 1220 ["A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge"]; *Coulter v. Gilmore* (7th Cir.) 155 F.3d 912, 921 ["A facially neutral reason for striking a juror may show discrimination if that reason is invoked only

Moreover, comparative analysis is employed by state and federal appellate courts to review, for the first time on appeal, the grounds upon which a trial court has based a ruling pursuant to *Batson*.[75] As Justice Kennard noted in her dissenting opinion in *People v. Johnson*, *supra*, 30 Cal. 4th at p.1332:

> The United States Supreme Court ruling in *Miller-El*, *supra*, [citation omitted] was made on what could be termed a "chilly" if not a "cold," record. When the jury was selected, the defendant objected to its composition but did not use comparative jury analysis. Two

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to eliminate African-American prospective jurors and not others who also have that characteristic"; *Jones v. Ryan* (3rd Cir. 1993) 987 F.2d 960, 972-975 [rejecting the prosecution's race-neutral explanation for striking African-American jurors where the prosecution did not apply the same rationale to similarly-situated Caucasian jurors]; *State v. Belnavis* (Kan. 1990) 787 P.2d 1172, 1174-1175 [prosecution's reasons for challenging African-American jurors were not racially neutral where characteristics he identified in those jurors were present in Caucasian panel members who were not struck]; *Gamble v. State* (Ga. 1987) 357 S.E.2d 792, 795-796 [prosecutor who used peremptory challenges to strike all African-Americans from venire failed to rebut prima facie case of discrimination where similarly situated Caucasian jurors were not challenged].)

[75] See, e.g., *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 273-294 [conducting comparative analysis of struck African-American jurors with unstruck Caucasian jurors for first time on appeal]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698-699 [appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were struck and those who were not fatally undermines the prosecution's credibility]; *Young v. State* (Tex.Crim.App. 1992) 826 S.W.2d 141, 146 ["this type of analysis is significant, maybe even more so, on appeal when the appellate court is reviewing the trial judge's findings as to purposeful discrimination"].)

> years later, after the high court's intervening decision in *Batson*, *supra*, [citation omitted], the case was remanded to the trial court. The original prospective jurors were not present, and it is open to question how much the trial court could recall of the demeanor and body language of the prospective jurors or the circumstances of the challenges. The trial court's ruling on remand was based on a cold record – the written questionnaires and the transcript of the voir dire – plus new testimony offered by the prosecutors to explain their challenges. Yet the United States Supreme Court noted no difficulty in using comparative juror analysis under those circumstances. . . . *Miller-El* shows that comparative juror analysis is very much on point when the trial court or the appellate court analyzes the prosecution's explanations for its peremptory challenges.

F. A Comparative Analysis Of The Answers Given By Prospective Jurors In This Case Reveals The Prosecution's Reasons For Striking African-American Jurors Were Pretextual

As argued above, a comparative analysis of the answers given by prospective jurors in this case reveals that two of the seated jurors, Juror No. 11 (who was Caucasian) and Juror No. 9 (who was Hispanic), stated they were "neutral" regarding the death penalty (CT Supp.I 135, 165), thus undercutting the credibility of the prosecutor's assertion that he struck the six African-American prospective jurors because they were "neutral" in their views regarding the death penalty.

The prosecutor cited as an additional reason for striking Gloria Young, the fact that she had a nephew who had been convicted of murder. (RT 1124.) However, two seated jurors, Juror No. 12 and

Juror No. 8 (both Hispanic), also had relatives who had been convicted of crimes; Juror No. 12, a nephew who was convicted of aggravated assault (RT 840-841), and Juror No. 8., a son who was a gang member and had been convicted of burglary. (RT 626-627.) This disparate treatment also strongly suggests that the prosecutor's stated reasons for striking Ms. Young were pretextual.

The prosecutor additionally cited the fact that he disfavored "young" jurors as a reason for excluding Robbie Washington, who was 24 years old. (RT 1126.) Nevertheless, he allowed Juror No. 12, who was also in her twenties (CT Supp.I 171), to remain on the jury. This fact further undermines the prosecutor's credibility.

In sum, the prosecution's failure to excuse Caucasian and Hispanic jurors who shared similar views and traits as the excluded African-American jurors "fatally undermines the prosecutor's credibility." (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427, citing *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695; accord, e.g., *Davidson v. Harris* (8th Cir. 1994) 30 F.3d 963, 965; *Bennett v. Collins* (E.D. Tex 1994) 852 F.Supp. 570, 577.)

G. Conclusion

The trial court's erroneous denial of appellant's *Wheeler/Batson* motion deprived appellant of his rights under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky*, *supra*, 476 U.S. 79), as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community (*People v. Wheeler*, *supra*, 22 Cal.3d 258.)

The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386, citing

People v. Montiel, *supra*, 5 Cal.4th at p. 909; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 715 and 716, fn. 4; see *People v. Howard*, *supra*, 1 Cal.4th at p. 1158; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1255, fn. 4; *United States v. David* (11th Cir. 1986) 803 F.2d 1567, 1571.) In this case, not one but *six* African-American prospective jurors were excluded for race-based reasons. "As to all [six] of the challenges the inadequacy of the prosecutor's reasons was compounded by the court's apparent acceptance of those reasons at face value." (*People v. Turner*, *supra*, 42 Cal.3d at p. 727; see also *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 514 ["The trial court's immediate acceptance of [the prosecutor's] explanation at face value compounds our concern about the adequacy of the genuineness of the proffered explanation."].) As in *Turner*, not only did the prosecution fail "to sustain its burden of showing that the challenged prospective jurors were not excluded because of group bias," but also "the court failed to discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor." (*People v. Turner*, *supra*, 42 Cal.3d at p. 728; see also *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386.) The error is prejudicial per se and requires reversal of appellant's death judgment. (*Ibid.*; *People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 721; *People v. Gonzalez*, *supra*, 211 Cal. App. 3d at p. 1193; *People v. Granillo*, *supra*, 197 Cal.App.3d at p. 116, *Batson v. Kentucky*, *supra*, 476 U.S. at p. 100.)

Further, the unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 310, citing *Vasquez v. Hillery*

(1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].)

Under any analysis, however, reversal is required because the record clearly reveals that the prosecution's purported race-neutral explanations were pretexts for purposeful discrimination.

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VI.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO CONFRONT ADVERSE WITNESSES AND TO A FAIR TRIAL BY THE TRIAL COURT'S ERRONEOUS LIMITATION OF DEFENSE COUNSEL'S CROSS-EXAMINATION OF ALLEGED ACCOMPLICE ANGELA TOLER

A. Summary Of Argument

The trial court improperly precluded defense counsel from cross-examining alleged accomplice and key prosecution witness Angela Toler regarding matters establishing that she had a motive to lie. As will be discussed below, the court erroneously ruled that counsel was attempting to elicit inadmissible hearsay when he asked Toler whether the police informed her that she had been identified by a liquor store employee as the shooter. The testimony counsel sought to elicit was not offered for the truth of the matter asserted, but was instead offered to show Toler's bias in order to impeach her credibility as a witness. The court's erroneous evidentiary ruling prevented appellant from being able to establish that when Toler gave her statement to the police, she believed the police had evidence that she was the shooter, and that as a result of such belief, she sought to shift the blame for the murder to appellant in order to save herself from the death penalty or life imprisonment. Because appellant's defense was that Toler was lying, proving this fact was critical to place Toler's testimony in its proper context and show her motive to lie. The court's erroneous ruling denied appellant the opportunity to do this. Appellant was thus deprived of his Sixth Amendment right to confront witnesses against him and present a defense, and to his Fourteenth Amendment right to due process of

law, as well as his Eighth and Fourteenth Amendment rights to a reliable death verdict, Accordingly, appellant's conviction and death sentence must be reversed.

B. Summary Of Relevant Facts

In his guilt phase opening statement, the prosecutor noted the presence of a second employee at the P & B Liquor Market at the time of the crime (RT 1162), who identified Angela Toler as the female perpetrator. (RT 1164.) The prosecutor also noted that the surviving employee could not identify the male perpetrator. (*Ibid.*)

During the defense opening statement, counsel began to discuss this employee, Somphop Jardensiri, and the prosecutor immediately objected, arguing that it was improper for defense counsel "to make representations about evidence or witnesses that he doesn't have."[76] (RT 1169.) The trial court sustained the prosecutor's objection and told defense counsel he could not mention Jardensiri in his opening statement if he was not able to call Jardensiri as a witness.[77] (RT 1170.) Later on in his opening statement, defense counsel told the jury that the evidence would show that alleged accomplice -- and chief prosecution witness -- Angela Toler was lying to protect herself and a third party. (RT 1174.) Counsel stated that the evidence would show that the police told Toler that she was facing death or life without

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[76] The record establishes that Jardensiri left the country sometime after giving his statement to the police but prior to trial. (RT A-31, 8-9.) Although attempts were made by the defense to locate Jardensiri in Thailand (RT 142, 297-298), the defense was ultimately not able to do so.

[77] The trial court did not articulate any legal grounds for its ruling, but presumably the ruling was based on the court's previous determination that unless Jardensiri testified, his statements would be inadmissible hearsay.

parole, or at a minimum 25 to life, and that she had been identified by the surviving store clerk, who said she had shot at him, demanded money and also shot the murder victim, Nasser Akbar.[78] (*Ibid.*) The prosecutor objected again, and the court accused defense counsel of being in contempt of its prior ruling. (RT 1175.) Defense counsel argued that the ruling did not bar him from discussing what the police told Toler to pressure her into giving a statement implicating appellant as her accomplice and the killer of Nasser Akbar. (*Ibid.*)

The prosecutor countered that without a police report specifically stating that Toler had been informed that Jardensiri had identified her as the *shooter*, defense counsel had no basis for, and thus should not be permitted to make, these assertions in his opening statement. (RT 1176.) The trial court agreed, and informed defense counsel that he was in contempt of the court's earlier ruling. (RT 1178.) The court stated that it would terminate counsel's opening statement if there was another violation. (RT 1179.) Subsequently, on direct examination during the prosecution's case in chief, Angela Toler testified that she

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[78] Defense counsel described Jardensiri's statement to the police as follows:

> Mr. Jardensiri told the police that he came out from the back room, that he saw Ms. Toler with a gun. That he saw a male Black leaning on the counter, did not see a gun in his hand. That Ms. Toler shot a bullet at him, striking the camera, I believe, and that he took cover and heard Ms. Toler demand money from the victim and followed directly by shots fired. And he went out to view Ms. Toler and said that this is the person that shot me and shot Nasser.

(RT 1251.) The prosecutor did not dispute that Jardensiri had made these statements to the police.

and Lomax together robbed the P & B Liquor Market, and that Lomax shot the clerk, Nasser Akbar. (RT 1225-233.) She stated that during the course of the robbery, another man emerged from the rear of the store near the location of the security camera. (RT 1233-1234, 1236.) She admitted pointing her gun at this man, but denied shooting at him. (RT 1236.) Toler acknowledged that during the police interrogation following her arrest, she initially denied any involvement in the robbery, but ultimately confessed after the police told her that she had been identified. (RT 1242.)

On cross-examination, defense counsel sought to establish that Toler had a motive to lie about appellant having been the shooter; specifically, that she had been cornered by the police and was therefore trying to shift responsibility for the murder away from herself and minimize her own role in the offense. Counsel asked Toler whether the police had informed her that another clerk in the store had witnessed the shooting of Akbar, and had identified Toler as the shooter. (RT 1249.)

The prosecutor objected, citing the trial court's prior ruling that the statements of the other clerk were inadmissible. (RT 1250.) The trial court sustained the objection, and scolded defense counsel for attempting to introduce evidence the court had previously ruled inadmissible. (RT 1251.) Defense counsel argued that he was not introducing the clerk's statements for the truth of the matter asserted (i.e., that Toler had been the shooter), but was merely trying to show Toler's state of mind -- her belief that she was in big trouble because

she had been identified by an eyewitness as the shooter – in order to establish her motive to lie:

> I am not trying to say that it is true that she shot at Mr. Jardensiri with this line of questioning. I am trying to show that she was led to believe that there was evidence against her putting a great deal of pressure on her to make her make the statement that they are trying to use to convict my client and put him in the death chair.

(RT 1252.) The court responded:

> You may put to her questions which you believe in good faith she may answer. You may not put questions to her which are purely speculative and which are trying to put before the jury matters which you know do not properly go to the jury through this witness.

(*Ibid.*)

C. The Evidence Counsel Sought To Elicit Was Not Hearsay

"Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evidence Code § 1200(a).) As trial counsel explained, he was not offering Somphop Jarensiri's statement for it's truth; to wit: that Angela Toler was the shooter. Instead he was trying to establish that Toler had been informed of Jardensiri's statement to induce her to confess, and that the information imparted to her had, in turn, inspired Toler to falsely implicate appellant as the murderer. (RT 1252.) In other words, counsel was seeking to introduce the Jardensiri statement as circumstantial evidence establishing that Toler had a motive to lie. Evidence of motive is

admissible under Evidence Code section 780, subd. (f),[79](*People v. Johnson* (1984) 159 Cal.App.3d 163,168), and is *not* hearsay. (*People v. Bolden* (1996) 44 Cal. App. 4th 707-714-715 [evidence offered to show motive is not hearsay]; see also *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [evidence of declarant's statement is not hearsay when offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief].) Exclusion on hearsay grounds of what Angela Toler had been told about Jardensiri's statement was therefore erroneous. (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1392 (court erred in excluding as hearsay evidence that was offered for limited purposes of impeachment).)

D. Defense Counsel Had A Sufficient Factual Basis To Explore Whether Toler Had Been Told About Jardensiri's Statement Identifying Her As The Shooter

As noted above, the trial court further ruled that because there was no police report specifically stating that Toler had been informed that Jardensiri had identified her as the shooter, defense counsel could not ask Toler about whether she had been so informed. This was error, because counsel had a sufficient factual basis to form a good faith belief that Toler was aware that Jardensiri had identified her as the shooter. (See *People v. Steele* (2000) 83 Cal.App.4th 212, 222-223

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[79] Section 780 of the Evidence Code provides, in pertinent part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] (f) The existence or nonexistence of a bias, interest, or other motive.

[error to preclude defense counsel from asking prosecution witness about prior conviction where, based on information provided by prosecution, defense had good faith belief of conviction's existence, even though counsel did not have evidence to controvert witness's denial]; See also *People v. Mickle* (1991) 54 Cal.3d 140, 191 [requisite "good faith" inferred from the record where it appeared that questions asked during cross-examination of defendant were based on information extrapolated from hospital records turned over by defense in discovery].)

As discussed above, Toler admitted having changed her story after the police told her she had been identified. (RT 1242.) In addition, the discovery provided by the prosecution disclosed that Jardensiri not only had identified Toler, but had also implicated her as the shooter. (RT 1251.) Counsel pointed out that the police interrogated Toler for at least two hours, and yet the report of that interrogation was very brief and cursory. This created a reasonable inference that much of what was discussed during the interrogation had not been included in the report. Given the fact that Toler admitted seeing the second store clerk during the robbery, and further admitted having been told that she had been identified, it was highly probable that she was also told she had been implicated as the shooter, and would have known – either because she was told or because she figured it out on her own -- that the second clerk was the one who had done so.

Under the circumstances, the fact that there was no police report specifically stating that Toler had been informed of Jardensiri's statement, did not render counsel's questioning of Toler "purely speculative," as the court stated. However, even if counsel's questions

were based upon conjecture, he should have been permitted to ask them. As the United States Supreme Court observed in *Alford v. United States* (1931) 282 U.S. 687, 692:

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.

The court's refusal to permit counsel to cross-examine Toler about whether she knew Jardensiri had identified her as the shooter, was therefore erroneous.

E. Appellant Was Deprived Of His Right Under The Sixth And Fourteenth Amendments To Cross-examine Key Prosecution Witness and Accomplice Toler To Show Her Bias And Self-Interest In Testifying

The trial court's restriction of defense counsel's cross-examination of Toler violated *Davis v. Alaska* (1974) 415 U.S. 308, in which the Supreme Court held that the right to confrontation guaranteed by the Sixth and Fourteenth Amendments, includes the right to cross-examine witnesses to show their possible bias or self-interest in testifying.

In *Davis*, the prosecution had moved for a protective order restricting the defense from making any reference to the juvenile record of the prosecution's key witness, Green, during the course of cross-examination. Green, like Angela Toler in the instant case, was a crucial witness for the prosecution. In opposing the protective order, Davis' counsel argued that he was trying to establish – or at least argue – that Green had acted out of fear or concern of possible jeopardy to his

probation. Not only might Green have made a hasty and faulty identification of Davis in order to shift suspicion away from himself as the robber, but he might have been subject to undue pressure from the police, and made his identification under fear of possible probation revocation. (415 U.S. at pp. 310-311.) The trial court granted the protective order, and the Supreme Court ruled that such restriction of Davis' cross-examination of Green was a violation of Davis' right of confrontation; that Davis was entitled to show Green's susceptibility to undue pressure. The Court declared:

> The partiality of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence §940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Green v. McElroy*, 360 U.S. 474, 496 . . . (1959) . . . ***(T)he jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.'*** *Douglas v. Alabama*, 380 U.S. at 419 . . . The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. ***The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer***, cf. *Alford v. United States*, 282 U.S. 687 . . . (1931), ***as well as Green's***

concern that he might be a suspect in the investigation.

(415 U.S. at pp. 316-318, emphasis added.)

The situation presented in the instant case is materially indistinguishable from that in *Davis*. In both cases, defense counsel were seeking to discredit testimony of the main prosecution witness, the accuracy and truthfulness of which were key elements of the prosecution's case. In both cases, defense counsel were seeking to create an inference that the witness was giving false testimony as a result of undue pressure. As in *Davis,* the trial court's restriction of defense counsel's cross-examination of Toler, violated appellant's right of confrontation guaranteed by the Sixth and Fourteenth Amendments. (*DePetris v. Kuykendal* (9th Cir.2001) 239 F.3d 1057,1062 [where defendant's guilt hinges largely on testimony of prosecution witness, erroneous exclusion of evidence critical to assessing witness' credibility violates the Constitution].)

While a trial court retains discretion to impose reasonable limits on cross-examination to prevent "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679), it is has nevertheless been emphasized that where the prosecution's case turns on the credibility of an informant, defense counsel must be given a maximum opportunity to test the credibility of that witness. (*Banks v. Dretke* (2004) __ U.S. __, 124 S.Ct. 1256, 1277; *Murdoch v. Castro* (9th Cir. 2004) 365 F.3d 699, 704.) Such wide latitude is especially appropriate when, as in the instant case, the key witness is also an accomplice of the accused. (*Ibid; United States v.*

Chandler (3rd Cir. 2003) 326 F.3d 210, 221; *United States v. Tracey* (1st Cir. 1982) 675 F.2d 433, 438; *Burr v. Sullivan* (9th Cir. 1980) 618 F.2d 583, 587.) Appellant was denied an opportunity to effectively test Toler's credibility by virtue of the trial court's improper restriction on the scope of defense counsel's cross-examination.

F. The Testimony Counsel Sought To Elicit Was Not Cumulative Of Other Evidence; By Restricting Counsel's Cross-Examination, The Court's Erroneous Ruling Prevented Appellant From Pursuing Critical Impeachment And Was Therefore Highly Prejudicial

Although the jury was informed that Toler changed her story after the police told her she had been identified as one of the robbers, an admission by her that she knew she had been identified as the *shooter* would have demonstrated Toler's particular susceptibility to pressure and explain why she cooperated with the police to incriminate appellant.

The fact that Toler undoubtedly saw herself facing a murder conviction, made her highly susceptible to pressure by the police to cooperate. If Toler believed the police had evidence implicating her as the shooter based upon which they were prepared to prosecute her for murder, this obviously would have given her a tremendous incentive to testify that it was appellant, not she, who was the actual killer. Toler's exposure to prosecution for murder thus made her every bit as susceptible to undue pressure as the juvenile witness, Green, in *Davis v. Alaska*, *supra*.

However, without being able to fully cross-examine Toler about the details of her interrogation, the defense was left without any basis to argue that Toler had succumbed, out of fear, to police pressure. This evidence was critical to support the defense's theory that Toler was lying to protect herself. With Toler discredited, the jury would have

been left with only the testimony of Cleavon Knott, the off-duty security guard who claimed to have witnessed the crime while sitting in his car outside the liquor store. However, Knott was impeached by the fact that he had initially denied that appellant was one of the perpetrators, and then subsequently changed his story. (RT 1349-1350.) Knott admitted that after he agreed to cooperate and testify against appellant, the police had arranged for the dismissal of Knott's various traffic violations and for the recall of outstanding warrants for his arrest. (RT 1351.) He further acknowledged that the police had declined to prosecute him for possession of the concealed weapon he had in his car on the night of the crime. (RT 1354.) Under the circumstances, it cannot be shown beyond a reasonable doubt that the court's error in limiting defense counsel's cross-examination of Angela Toler was harmless under Chapman v. California, supra, 386 U.S. at p. 24.

G. Appellant Was Also Deprived Of His Right To Due Process Of Law, His Right To Present A Defense, And His Right To A Reliable Penalty Determination, Due To The Trial Court's Improper Restriction Of Defense Counsel's Cross-examination Of Toler

A state court cannot arbitrarily reject a defendant's evidence or impede his right to present a defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284; *Green v. Georgia* (1979) 422 U.S. 95.) In *Chambers*, the Supreme Court declared that "[t]he right of an accused to due process is, in essence, the right to a fair opportunity to defend against the State's accusations," and further observed that the right to confront and cross-examine witnesses has long been recognized as essential to due process. (410 U.S. at p. 294.) The Court explained that:

> The right of cross-examination is more than desirable rule of trial procedure. It is implicit

> in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' [Citations omitted.] It is indeed 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. [Citations omitted.] Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases bow to accommodate other legitimate interests in the criminal trial process. [Citation omitted.] But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interests be closely examined. [Citation omitted.]

(*Id.* at pp. 294-295.)

In the instant case, the trial court's evidentiary ruling was legally erroneous and therefore arbitrary. Indeed, as has been shown above, the court had no "legitimate interest" in precluding cross-examination of Toler about whether, at the time she incriminated appellant, she was aware of what Jardensiri had told the police. Furthermore, proving that Toler knew she had been identified by Jardensiri as the shooter was necessary to place her testimony in its proper context, and was therefore critical to appellant's defense that Toler was lying. The court's erroneous ruling denied appellant the opportunity to establish this critical fact. Appellant was thus deprived of his right to a fair trial under the Due Process Clause of the Fifth and Fourteenth Amendments, and his right to present a defense guaranteed by the Sixth Amendment. (*DePetris v. Kuykendal*, *supra*, 239 at p. 1062 [erroneous exclusion of critical corroborative defense evidence violates both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense].

In addition, to the extent that the jury convicted appellant of special circumstance murder on the basis of Angela Toler's testimony, the reliability of such conviction and subsequent death sentence are substantially undermined by the fact that appellant was improperly precluded from subjecting Angela Toler's credibility to meaningful testing, in violation of appellant's right to a reliable penalty determination guaranteed by the Cruel and Unusual Punishment Clause of the Eighth Amendment. (*U.S. v. Cronic* (1984) 466 U.S. 648, 656 (without an opportunity to subject the prosecution's case to the "crucible of meaningful adversarial testing," there can be no guarantee that the adversarial system will function properly to produce just and reliable results); *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed); *Beck v. Alabama* (1980) 447 U.S. 625, 638 (Eighth Amendment mandates invalidation of rules that diminish reliability of guilt determination in capital case).)

Accordingly, for all of the foregoing reasons, appellant's conviction and death sentence must be reversed.

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VII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING APPELLANT'S MOTION TO RECALL DETECTIVE COLLETTE TO ASK HIM WHETHER, AT THE TIME HE AND DETECTIVE WREN INTERROGATED ANGELA TOLER, THEY WERE AWARE OF SOMPHOP JARDENSIRI'S STATEMENT IDENTIFYING ANGELA TOLER AS THE SHOOTER, AND IF SO, WHETHER THEY INFORMED TOLER THAT SHE HAD BEEN SO IDENTIFIED

A. Introduction

On direct examination, Detective Collette, one of the two investigating homicide detectives in the case, testified that Angela Toler had initially denied any involvement in, or knowledge of, the P & B Liquor Market crime, but changed her story after Collette or his partner (Detective Wren) informed her that she had been identified as one of the perpetrators. (RT 1543.) When asked whether Toler was "threatened in any way" before she changed her position, Collette responded, "Absolutely not." (RT 1545.) Collette conceded he knew this was a potential special circumstance or death penalty case, but denied telling Toler she had better cooperate or she would be facing the death penalty. (RT 1546.) Collette stated that he did not think that the death penalty would be "applicable" to Toler, because the information he had was that she was not the shooter. (*Ibid.*)

Defense counsel initially declined cross-examination of Detective Collette (RT 1552), but subsequently moved to recall the detective to cross-examine him about whether, at the time he and his partner obtained Toler's statement, Collette was aware that the surviving liquor store clerk (Somphop Jardensiri) had identified Toler as the shooter,

and if so, whether this information was imparted to Toler. (RT 1591.)[80] The Court denied defense counsel's request to recall Collette to cross-examine him on those points, finding them "irrelevant." (RT 1592-1593.)[81] Just as the trial court erred in preventing the defense from attempting to impeach Angela Toler on cross-examination by asking her whether she had been informed by Detective Collette and/or Detective Wren, prior to making her statement, that she had been identified as the shooter (see Argument VI, *supra*), the trial court also erred in refusing to allow defense counsel to cross-examine Detective Collette as to these points, particularly in light of Collette's testimony on direct examination that the information he had at the time of Toler's interrogation was that she was a participant in the crime, but not a shooter. (RT 1546.) Contrary to the trial court's finding, the fact that Collette was privy to an eyewitness statement identifying Toler as the

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[80] In presenting his argument, defense counsel pointed out not only that Collette's "belief" that Toler would be ineligible to receive the death penalty if a non-shooter was legally erroneous, but that his characterization of Toler as a non-shooter was "nonsensical" in light of Jardensiri's statement identifying her as the shooter. (RT 1591.)

[81] The trial court explained its ruling as follows:

> [T]he essential thing about Collette is what he said [to Angela Toler]. He has already testified as to what he said, and [the prosecutor] I believe is correct if there is some speculation as to something else, that is irrelevant [to] his testimony about what he said.

(RT 1592.)

shooter was highly relevant to impeach the credibility of Collette's testimony that he did not (and would not have) confronted Toler with her exposure to a death sentence, and it was also relevant to impeach the credibility of Toler's testimony by establishing her motive to lie. (See Argument VI, *supra*.) The court's denial of counsel's request to recall Collette for purposes of cross-examination thus deprived appellant of his Sixth Amendment right to confront witnesses against him and to present a defense and to his Fifth and Fourteenth Amendment rights to due process of law, as well as his Eighth and Fourteenth Amendment rights to a reliable death verdict, Accordingly, appellant's conviction and death sentence must be reversed.

B. Appellant Was Deprived Of His Right Under The Sixth And Fourteenth Amendments To Cross-examine Detective Collette Regarding Matters Relevant To Impeach Both Collette's Credibility And The Credibility Of Key Prosecution Witness/Accomplice Angela Toler

The United States Supreme Court has emphasized that:

> 'a primary interest secured by [the Confrontation Clause] is the right of cross-examination. *Douglas v. Alabama*, 380 U.S. 415, 418 [parallel citations omitted] (1965). The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 [parallel citations omitted] (1974). Indeed, the Court has recognized that cross-examination is the ' "greatest legal engine ever invented for the discovery of the truth." ' *California v. Green*, 399 U.S. 149, 158

> [parallel citations omitted] (1970), quoting 5 J. Wigmore, Evidence §1367, p.29 (3d ed. 1940).

(*Kentucky v. Stincer* (1987) 482 U.S. 730, 736.) A defendant's right of cross-examination encompasses the right to ask questions aimed at impeaching the credibility of the witnesses against him. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 316 ["the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross examiner has traditionally been allowed to impeach; i.e. discredit the witness"].) Accordingly, a defendant must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, [can] appropriately draw inferences relating to the reliability of the witness" (*Id.* at p. 318), and it is thus an abuse of a court's discretion to categorically prevent inquiry into an area bearing on a witness' credibility. (*District of Columbia v. Clawans* (1937) 300 U.S. 617, 632.) This is true, irrespective of whether a defendant can show that "the cross-examination, if pursued, would have brought out facts tending to discredit the testimony in chief." (*Alford v. United States*, *supra* 282 U.S. at p. 692.) Prohibiting a defendant from conducting such appropriate cross-examination not only violates his or her right of confrontation (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680), it also violates his or her right to a fair trial. (*Alford v. United States*, *supra*, at p. 692; *Smith v. Illinois* (1968) 390 U.S. 129, 132; see also *DePetris v. Kuykendal*, *supra*, 239 F.3d at p.1062 [where defendant's guilt hinges largely on testimony of prosecution witness, erroneous exclusion of evidence critical to assessing witness' credibility violates the Constitution].)

In the instant case, appellant should have been permitted to cross-examine Detective Collette about Jardensiri's statement implicating Angela Toler as the shooter. As discussed above, Collette's testimony on direct examination was that Toler had been identified as a participant in the crime prior to her interrogation. Appellant was entitled to ask Collette to name the eyewitness who had identified Toler and to disclose the substance of that witness' statement to the police. Such information was directly relevant to impeach the credibility of Collette's claim that he did not suspect Toler of having been the shooter and therefore would not have threatened her with the death penalty in order to coerce her into making a statement. It was also relevant to impeach Toler's testimony incriminating appellant, and to support the defense theory that Toler was lying to avoid exposure to a death sentence or sentence of life in prison without the possibility of parole. (See Argument VI, *supra*.) The court therefore abused its discretion when it found this line of questioning to be "irrelevant." (RT 1592. See footnote 81, *supra*.)

Given the obvious relevance of the prohibited cross-examination and the fact that the evidence it was designed to elicit was essential to impeach both Collette's and Toler's credibility and establish Toler's motive to falsely implicate appellant as the shooter, the trial court's arbitrary ruling not only violated appellant's confrontation rights, it also deprived him of his right to a fair trial and to present his defense. The United States Supreme Court has made it clear that arbitrary restriction of a defendant's right of cross-examination violates his right to a fair trial and to present a defense. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294-295; see also *DePetris v. Kuykendal, supra*, 239 F.3d at p.1062 [erroneous exclusion of critical defense evidence violates

both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense].)

C. The Testimony Counsel Sought To Elicit Was Not Cumulative Of Other Evidence; By Precluding the Above-described Cross-Examination, The Court's Erroneous Ruling Prevented Appellant From Pursuing Critical Impeachment and Was Therefore Highly Prejudicial

To the extent the Jardensiri evidence would have shown that Collette had not been truthful in testifying about the information he had at the time of Angela Toler's interrogation, it would have undermined the credibility of all of his testimony, including his claim that he did not threaten Toler with the death penalty to coerce her statement. The evidence would similarly have undermined the credibility of the testimony of Collette's partner, Detective Wren. Detective Wren also claimed that he and Collette never told Toler she was facing a sentence of death or life in prison without possibility of parole. (RT 1601-1603, 1633.) Thus, when the court precluded appellant from cross-examining Collette about the Jardensiri statement, it prevented the jury from hearing facts that would have left them with serious doubts regarding both Collette and Wren's veracity.[82]

As discussed more fully in Argument VI, *supra*, evidence tending to show that Toler knew not only that she had been identified as one of the robbers, but also had been identified as the *shooter*, was essential to appellant's defense that Toler falsely implicated appellant in order to

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[82] The jury would also have been likely to discredit Collette's and Wren's testimony that Cleavon Knott had not asked for assistance in obtaining dismissal of various traffic violation charges and outstanding warrants in exchange for his testimony. (RT 1542, 1607-1608.)

protect herself from harsh punishment. Although the jury was informed that Toler changed her story after the police told her she had been identified as one of the robbers, they did not hear that she had been identified as the *shooter*. Evidence that Collette and Wren knew at the time they interrogated Toler, that Jardensiri had identified her – and not appellant -- as the shooter, would thus not only have completely discredited Collette's testimony that he did not believe her to have been the shooter based on the information he had received, but it would also have rendered highly unbelievable any claim that he and Wren never *informed* Toler during the interrogation that the witness had identified her as the shooter.

Without a doubt, Toler's testimony was essential to appellant's conviction, and the court's erroneous ruling deprived appellant of the opportunity to establish Toler's motive to lie. With Toler discredited, the jury would have been left with only the testimony of Cleavon Knott, the off-duty security guard who claimed to have witnessed the crime while sitting in his car outside the liquor store. However, Knott was impeached by the fact that he had initially denied that appellant was one of the perpetrators, and then subsequently changed his story. (RT 3149.) Knott admitted that after he agreed to cooperate and testify against appellant, the police had arranged for the dismissal of Knott's various traffic violations and for the recall of outstanding warrants for his arrest. (RT 1351.) He further acknowledged that the police had declined to prosecute him for possession of the concealed weapon he had in his car on the night of the crime. (RT 1354.) Under the circumstances, it cannot be shown beyond a reasonable doubt that the court's error in disallowing the proffered cross-examination of Detective

Collette was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

D. The Court's Erroneous Ruling Undermined The Reliability Of The Jury's Guilt And Penalty Verdicts In Violation Of Appellant's Eighth And Fourteenth Amendment Rights

To the extent that the jury convicted appellant of special circumstance murder on the basis of Angela Toler's testimony, the reliability of such conviction and subsequent death sentence are substantially undermined by the fact that appellant was improperly precluded from subjecting Angela Toler's credibility to meaningful testing, in violation of appellant's right to a reliable penalty determination guaranteed by the Cruel and Unusual Punishment Clause of the Eighth Amendment. (*U.S. v. Cronic* (1984) 466 U.S. 648, 656 (without an opportunity to subject the prosecution's case to the "crucible of meaningful adversarial testing," there can be no guarantee that the adversarial system will function properly to produce just and reliable results); *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (qualitative difference between death and other penalties calls for greater reliability when death sentence is imposed); *Beck v. Alabama* (1980) 447 U.S. 625, 638 (Eighth Amendment mandates invalidation of rules that diminish reliability of guilt determination in capital case).)

E. Conclusion

For all of the foregoing reasons, appellant's conviction and sentence must be reversed.

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VIII.

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRIAL WHEN IT ALLOWED THE PROSECUTION TO PRESENT IRRELEVANT EVIDENCE THAT A SKI MASK AND BLACK JACKET WERE FOUND IN THE TRUNK OF THE CAR IN WHICH APPELLANT WAS RIDING AT THE TIME OF HIS ARREST, AND TO ARGUE THAT THIS EVIDENCE WAS PROOF OF APPELLANT'S GUILT

A. Introduction

The prosecution sought to introduce evidence of a ski mask and black corduroy jacket allegedly removed from the trunk of the Ford Taurus in which appellant had been riding at the time of his arrest on August 30, 1994, arguing that the fact that these items were found together in a shopping bag in the trunk gave rise to an inference of criminal use.[83] (RT 1427-1428.) Defense counsel made an oral motion *in limine* to exclude the evidence arguing that it was irrelevant and highly prejudicial to appellant. Counsel pointed out that there was no evidence either that these items belonged to appellant or that the perpetrators had been wearing such clothing at the time of the crimes.[84] (RT 1426.) The trial court ruled that the prosecutor could introduce these items of clothing, along with the testimony of the police officer

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[83]The prosecutor conceded that other items, including diapers, fruit punch, baby clothing and a screw driver were also in the trunk, but noted that he was not seeking to introduce any of these other items because they "don't have great significance." (RT 1427.)

[84] Although the prosecutor claimed that there was testimony by Cleavon Knott that the male robber (identified by Knott as appellant) was wearing a black jacket (RT 1426), a careful review of the record reveals that neither Knott nor any other witness so testified.

who searched the trunk of the Taurus as to the fact that he found them located in the trunk together in a bag. (RT 1428-1429.) Officer John Bruce subsequently testified that he found a plastic shopping bag containing a black ski mask and a black corduroy jacket, size extra-large, with the letter "F" on the front in the trunk of the car. (RT 1464.)

In his guilt phase closing argument, after noting that the murder weapon and another gun were found by the police in the car in which appellant was riding at the time of his arrest, the prosecutor added:

> We hear from Officer Bruce about finding the black jacket that is packaged together with the ski mask in the trunk. And that is of some significance too. Why are they in that bag together? Are those items that the defendant is readying to dispose of at that point? They are there together in the trunk.

(RT 1811.)

As will be discussed in detail below, because there was (1) no evidence that the ski mask or jacket belonged to appellant and (2) no evidence that the perpetrators of the crimes at issue had worn such clothing, the ski mask and jacket had ***no*** relevance to show that appellant had committed these crimes, and should have been excluded. If the evidence was offered to show that appellant had committed some *other* crime, then it was further inadmissible under Evidence Code section 1101(b). Because this irrelevant evidence was highly inflammatory, its improper admission was egregiously prejudicial and violated appellant's right to a fair trial under the Due Process Clauses of the Fifth and Fourteenth Amendments. The trial court's error in admitting this evidence, and in allowing the prosecutor to argue that the presence of the evidence in the trunk of the car constituted

proof of appellant's guilt, thus mandates reversal of both appellant's conviction and death sentence.

B. The Evidence Was Irrelevant To Prove Appellant's Identity As The Perpetrator Of The Robbery-Murder

It is extremely well-settled that only relevant evidence is admissible. (Evidence Code § 350; *People v. Heard* (2003) 31 Cal.4th 946, 972; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) A trial court lacks discretion to admit irrelevant evidence. (*People v. Heard*, supra, 31 Cal.4th at p. 973; *People v. Crittenden*, supra 9 Cal.4th at p. 132.) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally and by reasonable inference' to establish material facts such as identity, intent or motive." (*People v. Heard*, supra, 31 Cal.4th at p. 973, citation omitted.)

Had there been eyewitness testimony in the instant case that the perpetrator was wearing a either a ski mask or black jacket, the discovery of such items of clothing in the trunk of the car in which appellant was riding at the time of his arrest would conceivably have been relevant to prove appellant's identity as the perpetrator. (Compare, e.g., *United States v. Towns* (7th Cir. 1990) 913 F.2d 434, 446 [ski mask and gun found in third party's motel room after robbery were relevant evidence because both items appeared in bank's surveillance photos and were identified by eyewitnesses as being similar to those possessed by robbers]; *State v. Greene* (Conn. 1988) 551 A.2d 1231,1241-1242 [ski mask and sneakers found near robbery

scene were relevant to prove identity because of testimony by witnesses that these items of clothing looked like ones worn by robber]; and *State v. Monk* (La. 1975) 315 So.2d 727, 740 [items of clothing seized at time of arrest, including two ski masks, two motorcycle helmets, two pairs of gloves and two pairs of coveralls, were relevant to prove identity in case where victim had described her assailants as having worn such clothing].) However, there was ***no*** such testimony in the instant case. Contrary to the prosecutor's representation to the court, Cleavon Knott did not offer *any* description of the male robber's clothing in his testimony. He only described Angela Toler's attire.[85] Angela Toler testified that appellant was wearing a black *t-shirt* at the time of the robbery, and subsequently changed to a white t-shirt. (RT 1239.) No other witness provided a description of either perpetrator's clothing, or suggested that either had concealed his or her face with a ski mask.[86]

Neither was there any evidence establishing that the ski mask and gun even belonged to appellant. Although there was some testimony suggesting that the Ford Taurus might be appellant's,[87]

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[85] According to Cleavon Knott, Toler was wearing "a long T-shirt, striped shoes and stretch pants," that were "more like jogging pants or the leotards."

[86] James Edge testified only that the man who robbed him on August 25, 1994, wore "dark clothes." Edge claimed that he got a "good look" at the man's face and noted that the man was clean shaven; i.e. that he had no beard or mustache. (RT 1200-1201.)

[87] Angela Toler testified that believed the Ford Taurus was a rental car. (RT 1226.) Detective Collette testified that during the police interrogation of Toler, she stated that the car belonged to appellant. (RT 1544.)

appellant was riding in the back seat at the time of his arrest. (RT 1436.) Furthermore, the diapers, fruit juice and baby clothing found along with the ski mask and jacket (RT 1427), strongly suggested that someone other than appellant had been using the car. Indeed, Angela Toler testified that she and Sullivan had driven the car earlier that day to go to a swap meet. (RT 1264.)

Because there was no evidence that the black jacket and ski mask belonged to appellant or had been worn by either of the perpetrators, the fact that these items were found in a bag in the trunk of the car did not have "any tendency in reason" to prove appellant's identity as the robber or any other disputed fact, and was therefore irrelevant and inadmissible. The trial court consequently erred in admitting this evidence and allowing the prosecutor to argue that it was proof of appellant's guilt. (See *People v. Slone* (1978) 76 Cal.App.3d 611, 631-632 [trial court committed prejudicial error in admitting testimony of criminalist that blood stain was found on seat of defendant's car, where there was no evidence that blood was victim's or even came from a human, but prosecution was allowed to argue that blood belonged to victim].)

Although it is not entirely clear what the prosecutor's theory of relevance was (other than his apparently mistaken belief that Cleavon Knott testified that the perpetrator was wearing a black jacket), the prosecutor's statements at least imply that he may have been offering the ski mask and jacket to suggest that they had been used by appellant to commit some *other* robbery, in order to create the inference that appellant was guilty of the crimes charged in the instant

case.[88] However, use of other crimes evidence to prove disposition to commit a crime is specifically proscribed by Evidence Code section 1101, subd. (b), which provides in pertinent part as follows:

> Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act **when relevant to prove some fact . . . other than his or her disposition to commit such an act**.

(Emphasis added.) Because other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact" (*People v. Thompson* (1980) 27 Cal.3d 303, 314, citation omitted), such evidence can only "be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, citation omitted; see *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.)

Because ski masks are often used to conceal identity in the perpetration of crimes, admission of the ski mask in the instant case – despite the lack of any evidence to show that it belonged to appellant or that it had been used in the commission of the offenses charged – was clearly inflammatory and thus highly prejudicial. Because the evidence created an improper inference of appellant's propensity to commit crimes, admission of this evidence, coupled with the prosecutor's argument to the jury suggesting that appellant had used these items for a criminal purpose, rendered appellant's trial

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[88] The prosecutor explained that he was seeking to introduce the ski mask and jacket to "create a suggestion of other possible use." (RT 1427.)

fundamentally unfair, in violation of his Fifth and Fourteenth Amendment rights. (*McKinney v. Rees* (9th Cir. 1993) 993 F.3d 1378, 1385-1386 [admission of "propensity evidence" violated defendant's right to fair trial not only because it was irrelevant, but also because it was "just the sort of evidence to have a strong impact on the minds of the jurors"].) Finally, because the State cannot establish beyond a reasonable doubt that the court's egregious violation of appellant's federal constitutional right to fundamental fairness was harmless, appellant's conviction and death sentence must be reversed. (*Chapman v. California, supra*, 386 U.S. at p. 24.

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IX.

THE TRIAL COURT'S IMPROPER EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR BELL REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. Introduction

The trial court violated appellant's Sixth and Fourteenth Amendment rights to and impartial jury and his Eighth and Fourteenth Amendment rights to a reliable penalty determination by improperly granting the prosecution's challenge for cause of prospective juror Joyce Bell. Ms. Bell, who initially described her feelings about the death penalty, as "neutral," later indicated that she was "against it." However, Ms. Bell denied that she would automatically vote against a death sentence, and stated that her penalty decision would "depend on what [she] heard in the courtroom." As will be demonstrated below, the trial court's excusal for cause of Ms. Bell constitutes constitutional error, mandating reversal of appellant's death sentence.

B. Proceedings Below

Question 49 of the jury questionnaire asked the prospective jurors, "What is your general opinion or feeling regarding the death penalty?" Prospective juror Bell wrote in response: "neither for nor against it just exists." Ms. Bell further checked off a box indicating that her philosophical opinion regarding the death penalty was "neutral." (CT Supp.I 2211.)[89]

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[89] The choices from which the prospective jurors had to choose in answering this question were: "Strongly in favor; Strongly against; Moderately in favor; Moderately against; Neutral." *(Ibid.)*

The trial court began its voir dire of Ms. Bell by asking her response to Question 49. (RT 889.) When asked if she understood that she might have to personally confront the death penalty issue if the case proceeded to the penalty phase, Ms. Bell said she understood. Asked whether she had "any more to say" about her feelings regarding the death penalty, she said she did not. (*Ibid.*)

The court then proceeded to ask four questions that were designed to determine whether prospective jurors would vote automatically for life or death, without considering the evidence. The parties referred to these questions as the four "*Hovey* questions,"[90] although the last two questions did not follow the language or the intent of the *Hovey* decision. Even though the prosecutor had drafted them, he ultimately realized, as the defense had previously pointed out, that the third and fourth questions were bordering on nonsensical (an "oxymoron" in defense counsel's words), since they essentially asked jurors if they would find it "appropriate" to do something they had already decided was "inappropriate." (See prosecutor's comments at

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[90]*Hovey v. Superior Court* (1980) 28 Cal.3d 1. The four questions asked by the court were: (1) Do you have such a conscientious objection to the death penalty that, even if the People prove beyond a reasonable doubt the defendant is guilty of first degree murder, you would vote not guilty just to avoid reaching the death penalty question? (2) Do you have such a conscientious objection to the death penalty that, even if the People prove beyond a reasonable doubt the special circumstances are true, you would vote not true just to avoid reaching the death penalty question? (3) Do you have such a conscientious objection to the death penalty that you would automatically vote against death even if you actually felt that death was the appropriate decision based on the facts and the law? (4) Do you have such a conscientious opinion in favor of the death penalty that you would automatically vote for death even if you actually felt that death was not the appropriate decision based on the facts and the law? (RT 889-890.)

RT 574-575 and defense objections at RT 536-537.) Despite the glaring flaws in these critical questions, Ms. Bell answered all four questions, "No," as had nearly all of the other prospective jurors. (RT 889-890.)

Having passed the *"Hovey* voir dire," the trial court asked the prosecutor if there was "anything further." (RT 890.) The prosecutor stated:

> [I]t's very difficult for me to accept that Ms. Bell has no feeling one way or other about the death penalty. I would like some direct inquire (sic) as to whether or not she's philosophically opposed or supports the death penalty.

(RT 890.) Although the trial court had already obtained answers from Ms. Bell that she "did not have such a conscientious objection to the death penalty that she would automatically vote against death" and that she did not have such a conscientious opinion in favor of the death penalty that she would automatically vote for death," the court questioned Ms. Bell further as follows:

> What is your own *philosophy*? What is it that you can see yourself doing if the evidence calls for it? *I mean do you have any opinion as being in favor for [sic] the death penalty or opposed to it*?

(RT 890-891, emphasis added.)

Ms. Bell replied that she supposed that if she were forced to say, to vote one way or the other, that she would vote against it. The court explained that Ms. Bell's job as a juror would be to vote for the penalty which she thought was appropriate. Nevertheless, the court pressed her to predict ahead of time what her choice would be, by asking her if

she would "definitely vote against death." Ms. Bell appropriately replied that "***it would depend on what I heard in the courtroom. It's hard to say that yes or no when I don't know.***" (RT 891, emphasis added.)

Rather than accept Ms. Bell's answer that she would want to hear the evidence before committing to a particular penalty, the court further challenged Ms. Bell's response: "Okay. A moment ago you said if I were forced to vote I would vote against it." Ms. Bell attempted to explain, but was interrupted by the court who told her there were no right or wrong answers, "but I'm required to find out your particular views." (RT 891.)

At that point, defense counsel objected to further questioning of Ms. Bell about her opinion on the death penalty, because she had made it clear that she was philosophically neutral:

> She marked the box neutral. She said she's neutral. Lots of jurors have said neutral. I don't know why counsel seems [to think] she has to be forced to come up with an explanation about why she is neutral.

(RT 891.) The court responded that Ms. Bell had first said she would vote against the death penalty and then that she would "listen to the evidence," and that her written comment, "it just exists," was "puzzling." (RT 891-892.)

The court asked Ms. Bell if she was "able to give us any more information," to which Ms. Bell responded, "I guess I'm against it." Apparently finally satisfied that this answer had disqualified Ms. Bell, the court asked the prosecutor, "Anything further People?"

The prosecutor expressed doubt that Ms. Bell would ever vote to impose the death penalty, but the trial court apparently believed that

Ms. Bell's last response resolved the matter. When the trial court said, "I think her last answer is I'm against it," the prosecutor challenged Ms. Bell for cause. The defense argued that there had been lots of people who had said they were against the death penalty, but *that* was not the issue. "The issue is, will they follow the law?"

> Will they put their philosophical beliefs aside and follow the law and vote for death if it's according to the law and she indicated she would do that. I don't know why she is being singled out because her philosophical position is that she is against it.

(RT 892-893.) The trial court responded that Ms. Bell was not being singled out, but that her answers had "cried out for some examination," and that in light of her answers, the challenge would be granted. The court then excused Ms. Bell. (RT 893.)

C. Under The *Adams-Witt* Standard The State Failed To Meet Its Burden of Demonstrating That Prospective Juror Bell Would Not Follow The Court's Instructions Or Her Oath

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the Supreme Court held that prospective jurors in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty. A capital defendant's Sixth and Fourteenth Amendment right to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522.) Instead, the state could properly excuse only those jurors "who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment *without regard* to any evidence that might be developed at the trial of the case before them,

or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 522-523, fn. 21, emphasis omitted.)

Later, in *Adams v. Texas* (1980) 448 U.S. 38, the Supreme Court clarified that *Witherspoon*, rather than being a ground for challenging a prospective juror, was actually just a limitation on the power of the State to exclude a juror for cause:

> [I]f prospective jurors are barred from jury service because of their views about capital punishment on "*any broader basis*" *than inability to follow the law or abide by their oaths, the death sentence cannot be carried out.*

(*Adams v. Texas*, *supra*, 448 U.S. at p. 48, emphasis added.) Thus, under *Adams,* a juror's views about the death penalty can only be the basis of a challenge for cause if those views would "prevent or substantially impair" the juror's ability to carry out those duties required by the court's instructions and the juror's oath. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45; *People v. Stewart* (2004) 33 Cal.4th 425, 440-441.) Moreover, as the Supreme Court later made plain in specifically re-affirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for exclusion. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.)

In the present case, the prosecution failed to prove that Ms. Bell met the criteria for exclusion. Nothing Ms. Bell said established that she would be unable to carry out those duties required by the court's instructions and her oath as a juror. Ms. Bell did not say that she would

automatically vote for life without parole irrespective of the evidence. Indeed, when asked whether she would "definitely vote against the death penalty," her response was: "It would depend on what I heard in the courtroom. It's hard to say that yes or no when I don't know." (RT 891.) At most, Ms. Bell's responses demonstrated that "if forced" to take a *philosophical* position on the death penalty, she disfavored it, but that she was not sure how she would vote in *this case* without having heard the evidence. In responding to the court's standard four *Hovey* questions, Ms. Bell indicated that she did not harbor such a conscientious objection to the death penalty that she would automatically vote against it regardless of the facts and the law. Although she subsequently stated that she was "against" the death penalty, she was *not* asked by the court whether she would be able to put her philosophical beliefs aside and follow the law and vote for death if she felt that the evidence warranted it. Defense counsel argued that this was the correct legal standard, and that Ms. Bell had satisfied it. (RT 892-893.) The court nevertheless imprudently chose to ignore him, and erroneously excused Ms. Bell for cause without proper grounds to do so.

Under California law, there is never a situation where a juror must impose the death penalty; it is only an option which may be exercised when the juror determines that the aggravating circumstances substantially outweigh mitigating circumstances. (CALJIC No. 8.88.) Moreover, each juror is free to assign whatever weight he or she deems appropriate to the various factors being

considered. (*Ibid.*) As this Court observed in the *Stewart* case, even people who

> firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 446, quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

In reversing the trial court's disqualification of five jurors in *Stewart*, this Court recognized that the trial court had confused reluctance to impose death, or opposition to the death penalty, with inability to follow the law:

> [T]he trial court erroneously equated (i) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty, and failed to recognize that question No. 35(1)(c), standing alone, did not elicit sufficient information from which the court properly could determine whether a particular prospective juror suffered from a disqualifying bias under *Witt*, *supra*, 469 U.S. 412, 424, 105 S.Ct. 844.

(33 Cal.4th at p. 447.)

Although a juror may have reservations about having to impose the death penalty, such feelings are appropriate in a case where a fellow citizen's life hangs in the balance.

> But neither nervousness, emotional involvement, nor inability to deny of confirm any effect whatsoever *is equivalent to an unwillingness or an inability on the part of the*

> *jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty.*

(*Adams v. Texas*, *supra*, 448 U.S. at p. 49, emphasis added.) The Supreme Court in *Adams* emphasized that the State may not constitutionally exclude jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." (*Id.* at p. 50.)

In *Adams*, the Court concluded that the essence of the juror's oath, to fairly decide the facts and follow the court's instructions, *is all that may be required of a juror.*[91] In the Court's words, the State may only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Thus, a prospective juror can be discharged for cause only where the record demonstrates that her views prevent her from being able to follow the law as set forth by the court, and as required by the oath. (448 U.S. at p. 48.)

This Court has held that a trial court may not disqualify juror based on her feelings about the death penalty without conducting a sufficient inquiry to determine whether the juror's predilection would

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[91] California Code of Civil Procedure section 232, subsection (b), sets out the oath which each seated juror is asked to affirm:

> Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?

Each juror must acknowledge their agreement by saying, "I do." (Code of Civ.Pro. §232(b).)

preclude her from engaging in the weighing process and returning a capital verdict. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 446-447.) This Court has further required that the trial court's determination be fairly supported by the record. (*People v. Heard* (2003) 31 Cal.4th 946, 964-966 [trial court committed reversible error in excluding juror whose voir dire answers failed to establish that this views regarding death penalty would "prevent or substantially impair the performance of his duties as a juror"].)[92]

As shown above, the record herein does not establish that prospective juror Bell's views regarding the death penalty would have prevented or substantially impaired the performance of her duties as a juror. Accordingly, under the precedent of both the U.S. Supreme Court and this Court, the trial court's excusal of Ms. Bell for cause was constitutional error.

The error committed by the trial court is not subject to the harmless-error rule, and requires automatic reversal of appellant's death sentence. (*Gray v. Mississippi, supra*, 481 U.S. at p. 660; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454; *People v. Heard, supra*, at pp. 950, 966.)

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[92] As the *Heard* opinion points out, any uncertainty concerning whether a prospective juror's views would impair her ability to follow the law or otherwise perform her duties as a juror could be resolved through follow-up questions. (*Id.* at p. 965.) To the extent that the court herein was uncertain about this with respect to Ms. Bell, it could have, but did not, ask her any pertinent follow-up questions.

X.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT IMPROPERLY DISMISSED AND REPLACED A JUROR DURING PENALTY PHASE DELIBERATIONS

A. Introduction

The trial court improperly discharged a holdout juror during penalty phase deliberations, in violation of appellant's right to trial by jury, guaranteed by the Sixth Amendment to the United States Constitution and by article I, Section 16 of the California Constitution, his right to due process of law, and his right to be free from cruel and unusual punishment guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. As will be established below, the trial court abused its discretion when, over strenuous defense objection, it properly discharged the juror without evidence establishing a demonstrable reality that the juror had either refused to deliberate, to abide by the court's instructions, or had otherwise committed misconduct. Pursuant to this Court's decision in *People v. Cleveland* (2001) 25 Cal.4th 466, appellant's death sentence must be vacated and his case remanded to the trial court for a new penalty trial.

B. The Record Below

The jury began penalty phase deliberations on Thursday, September 19, 1996, at 2:10 p.m., and deliberated until 4 p.m. (RT 2288.) They continued deliberating Friday, September 20, 1996, at 8:30 a.m. and deliberated until Noon. (RT 2289.) At the start of the afternoon session on Friday, the court informed appellant and counsel that it had received a note from the jury. (CT 632; RT 2290.) The note read as follows:

that it had received a note from the jury. (CT 632; RT 2290.) The note read as follows:

> It has come to our attention that one juror has reevaluated his/her personal feelings regarding the application of the death penalty. His/her conscientious objection causes him/her to be unable to ***continue*** to deliberate.

(CT 645; RT 2323, emphasis added.)

The court proposed that the foreperson be asked to identify the juror who was the subject of the above note, and that the court would then question that juror. (RT 2290.) The prosecutor asserted that if the juror disputed that he had a "conscientious objection," they would need to conduct further inquiry of the other jurors, or at least the foreperson. (*Ibid.*) The court agreed that it was required to inquire whether the juror was unable to perform his or her duties and whether he was failing to deliberate. (RT 2291.) Defense counsel requested the court to order the jury to continue deliberating and make no inquiries. The court disagreed, stating that there was a possibility the juror was not qualified to serve "because of a preconceived idea or issue which is preventing that person from having an open mind." (*Ibid.*)

The foreperson identified the juror in question as "Juror 5" ("JN5"). (RT 2292.) JN5 was questioned by the court as follows:

> The Court: What I need to find out is whether you have found that you do in fact have a conscientious objection to the death penalty such that you will not impose it no matter what evidence or information you are given?
>
> Juror No. 5: ***No. No. No.***
>
> The Court: ***That is not your position?***

Juror No. 5: ***No, it is not.***

The Court: Are you saying that if you had – that you can conceive of a situation where you would have evidence and you would vote for the death penalty?

Juror No. 5: Yes. Can I say something?

The Court: Yes. I don't want you to tell me at the moment – Well, let's see what you have to say. Yes.

Juror No. 5: ***Well, in this particular case, I thought there was a choice of death or life without possibility of parole...and I tried to make an evaluation from the evidence that was presented and that is what I came up with the life position without possibility of parole.***

The Court: But is it the case that if the evidence were different that there could be a case in which you would come back with a death verdict?

Juror No. 5: In this particular situation?

The Court: No. ***Could there be a situation which you would come back with death?***

Juror No. 5: ***Yes.***

(RT 2292-2293, emphasis added.)

On the questionnaire completed by JN5 during jury selection, he indicated that he was "moderately in favor" of the death penalty, and wrote: "I believe in capital punishment if warranted." (CT Supp. I, 74.) During voir dire, the court asked JN5 (as it asked all of the other prospective jurors) whether he had "such a conscientious objection to the death penalty that you would automatically vote against death even if you actually felt death was the appropriate decision based on all the

facts and the law," and JN5 answered, "No." (RT 764.) After hearing from JN5, the court had the foreperson ("JN2") to return to the courtroom and asked him, "What is it about Juror No. 5's conduct that led you to say he is not deliberating as opposed to that he is disagreeing with others?" (RT 2294.) JN2 offered the following response:

> We had extensive conversation about his reasoning behind his decision, and everyone in the room gave extensive reasons for their decision, and his decision was not backed up by anything. It was more of a feeling that he said he had in spite of all evidence and facts that were presented. We tried asking him why, what would make him consider an alternative to his decision, and he couldn't or wouldn't come up with any reasonable foundation for – well for his decision. He is not cooperating with us. He doesn't feel like he wants to be in that room . . . We attempted with every means that I can reasonably describe here to get him to communicate with us, and to describe to us how he is evaluating the facts in the case, the law as presented in the instructions, and we basically tried to pin him down, if you will, on his feelings about the death penalty and what it means. He's basically completely uncooperative as if he is really the only person in the room. There was no input, just a hard and fast opinion that really was not founded in any manner to us. We, on many occasions, tried to get him to talk to us and in fact we asked him to state his opinion and to reverse – and reverse to convince us, and he would just basically sit there and do nothing. Just, 'I don't know.'

(RT 2294-2295.) JN2 then stated that it was his belief, as well as that of other jurors, that JN5

> has a basic underlying philosophical conscientious objection that really probably was not apparent even to him when he was filling out the interview forms based on the lack of foundation of any kind that he would provide to us for his reasoning.

(RT 2295-2296.) JN2 claimed that when the note sent to the court was being drafted and discussed, JN5 agreed that the note accurately represented his feelings. (RT 2296.) The court inquired of JN2 if he asked JN5 whether there was any set of facts or circumstances under which he would vote for death, and JN2 replied that he and other jurors had questioned JN5 about various hypothetical situations, but he felt that JN5's answers were "evasive." (RT 2296.) JN2 stated:

> Verbally he would say to a nonspecific scenario in general as a blanket statement, 'Yes. I would consider it,' but when approached with specifics, even scripted specifics, just examples of possibilities, he would not commit even to the most grosses (sic) set of circumstances as yes, hard and fast I will agree. I asked him if he would please make up a set of circumstances just to find out if there was a limit to this, if there was some level at which he would consider death penalty and he could not come up with anything, with any set of circumstances that he would raise his hand and vote for the death penalty.

(RT 2297.) The court attempted to clarify whether JN5 had actually participated in the deliberations. (RT 2300-2301.) While not directly answering that question, JN2 responded as follows:

> From the very beginning of the penalty phase Juror Number 5 has stood out in the group, has continually attempting (sic) to discuss facts not in evidence. He is hunting in areas that we have no understanding or knowledge of, trying to bring things in that really are not there, what-ifs, histories, potential circumstances. And whenever that is done, someone will mention that this is not available to us and not for our consideration. I believe he is allowing his projections of those facts that are not in evidence to form a picture of him that is not anywhere – is not necessarily reality.

(RT 2301.) Thereupon, the court decided to bring out the other jurors for questioning. (*Ibid.*) At defense counsel's request, the jurors were questioned individually and not as a group. (RT 2302.)

Juror Number One ("JN1") stated that the jurors had all agreed on the wording of the note. As to JN5, JN1 felt "he was confused, but I'm pretty sure he agreed. .. He agreed at the very end." When asked whether JN5 was participating in the deliberations, JN1 replied, "Yes, he is. A little bit he is." The court asked, "Is he expressing opinions that are based on the instructions of law and the evidence?" JN1 responded, "He seems a little confused on that also." (RT 2304.) JN1 was of the opinion that JN5 had a "conscientious objection" to the death penalty. (RT 2304-2305.)

Juror Number Three ("JN3") also thought JN5 had agreed with the statement contained in the note. JN3 was not asked by the court whether JN5 had participated in the deliberations. JN3 felt that JN5 had a conscientious objection to the death penalty, "because of the way that he speaks." (RT 2306.) When asked by the court, JN3 agreed that JN5 had not offered any examples of situations in which he might

vote for death. JN3 felt that JN5 would never vote for the death penalty under any circumstances, even the most extreme. (RT 2307.)

Juror Number Four ("JN4") believed that the note accurately reflected the consensus view. JN4 was of the opinion that JN5 had a conscientious objection to the death penalty. The court asked JN4, "Is he giving you any reasons for his position?" JN4 replied, "No." (RT 2308.) JN4 was not asked whether JN5 had participated in the deliberations. Juror Number Six ("JN6") thought the wording of the note had been agreed upon by all of the jurors, including JN5.

JN6 confirmed that JN5 had tried to explain the reasons for his position, and in doing so had used the words "conscience" and conscientious objection. (RT 2309.) Defense counsel requested that the court clarify "whether it is a conscientious objection to this case and the facts of this case?" (*Ibid.*) The court thereupon engaged in the following colloquy:

> The Court: The original question was as to whether any potential juror has a conscientious objection to the death penalty. That means across the board. Is Number 5 expressing to you that kind of conscientious objection to the death penalty or just his disagreement with his application in this case?
>
> Juror No. 6: It seems to me that he is expressing this to the death penalty. He does not approve of the death penalty.
>
> The Court: Has he used that word or those words?
>
> Juror No. 6: He said, 'I cannot in all conscience vote for the death penalty.'

> The Court: And did he mean – did it appear to you to mean I can't do it in any situation?
>
> Juror No. 6: Well, we asked him in what case could he, and his only – the only thing that he said was perhaps the murder of a child would be the only thing he could vote for the death penalty vote (sic).

(RT 2310.)

Juror Number 7 ("JN7") confirmed that everyone, including JN5, had agreed with the wording of the note, and also felt that JN5 had a conscientious objection to the death penalty, because JN5 had said "conscientiously he couldn't go along with it." JN7 was not asked to clarify whether JN5 had spoken generally or in specific reference to the instant case. (RT 2311.)

Juror Number 8 ("JN8") said that JN5 did not agree with the other jurors regarding the penalty, but that he agreed with the wording of the note. It appeared to JN8 that JN5 had a conscientious objection to the death penalty, but she did not specify whether such objection was in general or as applied specifically to the instant case. (RT 2312-2313.) JN8 was also not asked whether JN5 had deliberated.

At this point, defense counsel reminded the court that it was going to ask whether the conscientious objection was in general or as applied to the instant case. (RT 2313.) The prosecutor objected, arguing that such a question was improper inquiry into the substance of the deliberations and that it was sufficient for the court to inquire whether or not the jurors, including JN5, had agreed that the note was an accurate representation of JN5's position. (*Ibid.*) The court

responded, "You may be right, but I will put this question." The following ensued:

> The Court: Did Juror No. 5 say or indicate that he has a conscientious objection against the death penalty or just against the death penalty in this particular case?
>
> Juror No. 8: I have to answer that?
>
> The Court: Only if you can answer it with one word.
>
> Juror No. 8: Yes.
>
> The Court: Is that possible? Did I have an 'or' in there. That is ridiculous. I am sorry. I like language to be clear. I made that as unclear as it could possibly be.
>
> Juror No. 8: I am kind of nervous about it. I did my job.
>
> The Court: We are all nervous. Let me assure you. I am going to accept the People's objection to this because this is getting on very delicate ground. The writing here is clear. The statements that I am receiving are clear. I have pursued the question with one person. One more thing. Has Juror No. 5 made plain to you that he has a conscientious objection against the death penalty?
>
> Juror No. 8: Yes.

(RT 2314.)

Juror Number 9 ("JN9") concurred that all of the jurors, including JN5, had agreed to the wording of the note. (RT 2314.) JN9 responded affirmatively when asked whether it appeared that JN5 had a conscientious objection in general to the death penalty. (RT 2315.)

Although Juror Number 10 ("JN10") agreed that there was a consensus as to the wording of the note, when asked whether it seemed that JN5 had a conscientious objection the death penalty in general, JN10 reported that JN5 "stated that he was conscientiously objecting to the death penalty ***in this case***." (RT 2315-2316, emphasis added.) When asked whether what he was saying was that JN5 "has a conscientious objection to the death penalty so therefore he can't vote for it in this case," JN10 replied:

> Well, no, not exactly. He did apply it to this case. He stated – he said he believed in the death penalty and that – he said he believed in the death penalty but he couldn't apply it in this case. In other words, he couldn't consider any of the information we had before us, any of the evidence that has been presented, any of our deliberation for against the death penalty because he was conscientiously opposed to the death penalty in this case.

(RT 2317.)

Juror Number 11 ("JN11") concurred that all the jurors, including JN5, had agreed with the phrasing of the note. JN11 was of the opinion, based on JN5's statements during deliberations, that JN5 had a conscientious objection to imposition the death penalty in any case. JN11 felt that JN5 did not want to talk about the death penalty with the other jurors. (RT 2318.)

Juror Number 12 ("JN12") also agreed that there had been a consensus regarding the wording of the note. JN12 was also of the opinion that JN5 was opposed to the death penalty in general. (RT 2319.)

The prosecutor argued (1) that JN5 had perjured himself on the jury questionnaire, when he indicated that he was moderately in favor of the death penalty; (2) that JN5 was not qualified to serve because of his conscientious objection to the death penalty; (3) that JN5 had refused to deliberate; and (4) that JN5 was improperly considering extraneous material ("facts and issues that were not argued"). (RT 2320-2321.) The prosecutor maintained that JN5 should be dismissed without any further inquiry by the court. (RT 2321.)

Defense counsel argued JN5 had in fact participated in the deliberations, but after explaining why he was voting for life without parole, JN5 had been put under pressure and browbeaten by the rest of the jury because he disagreed with them about whether death was the appropriate sentence in this case. (RT 2322.) Counsel pointed out that the jury instructions made it clear that the sentencing determination was not a "quantitative analysis." (RT 2322-2323.)

Counsel argued:

> If [JN5] gives all of his weight to life just in general as a mitigating actor, to the mitigating factors of Mr. Hasan specifically in this case, that he has every right to do so. Because he cannot express himself perfectly in the way these 11 jurors want to hear it, I don't think this disqualifies him as a juror. He is voting his conscience. That is what he is telling people over and over. In this case, I am voting my conscience. Because they draw their opinion that this means he is generally against the death penalty, even though he says he would apply it in some cases, I don't think that makes him a disqualified juror.

(RT 2323.)

Defense counsel further argued that JN5 "should have an opportunity to respond to these accusations." (*Ibid.*) The trial court agreed, stating that JN5 needed to be confronted about the following "points:"

> What I have in front of me at the moment, statements that he is using outside information, that which is not in evidence. He is refusing to discuss and deliberate on the evidence in this case. He stated that he is a conscientious objector. One person said that he would apply the death penalty only in the case of a child, which again would be juror misconduct to refuse to consider it for the case in which he is sitting where he knew obviously there is not child here. He has said that he will not consider it in this case. And apparently his statement on the questionnaire is false.

(RT 2324.)

Defense counsel objected to the court's suggestion that JN5 had committed misconduct by considering extraneous factors:

> The point of looking at outside factors. Counsel invited these people not to leave their common sense at the door. So if he is in there saying what his common sense is and what his life experience is, that is not wrong.

(*Ibid.*)

When JN5 returned to the courtroom, the court conducted the following interrogation:

> The Court: . . .Did you say at some point in the jury room that you would consider the death penalty if a child had been murdered?
>
> Juror No. 5: Yes.

The Court: And did you say that this is the only circumstance in which you would consider it, if it had been a child?

Juror No. 5: No.

The Court: When the foreman put up on the board the wording that is on this question form, did you agree with it?

Juror No. 5: I didn't sign it, but they wrote it on the board, and it was my understanding that they were all in favor of the death penalty and that they couldn't understand why I thought or I voted the way I voted.

The Court: Okay. What I am asking you is did you agree that this is the wording that should be on this paper?

Juror No. 5: ***Not entirely because they were kind of leaning on the fact that I was a conscientious objector and I am not.***

The Court: But the wording here is conscientious objection causes him to be unable to deliberate, and I understood you agreed that that was the correct wording?

Juror No. 5: ***At that time I just didn't want to fight with 11 jurors because they were all – I felt pressured and I wanted to just not feel that way. So –***

The Court: ***So you told them you agreed with it?***

Juror No. 5: ***Yes, that is correct.***

The Court: Okay. On your questionnaire form, you have said that you were – you believe in the death penalty and you are

moderately in favor of it. But apparently you said to the other jurors that you would only consider it in the death of a child; is that the case?

Juror No. 5: Well, they were trying to come up with examples of when I would consider it. That was just one of the things that I mentioned, that, you know, I would consider. ***They were basically trying to fish for the reasons why I didn't agree with 11 jurors.***

The Court: ***Okay. Have you discussed the evidence with the other jurors, what it has or has not shown?***

Juror No. 5: ***To the best of my ability, yes.***

The Court: ***An so you have been verbalizing what you think about the evidence?***

Juror No. 5: ***Yes.***

The Court: Have you been discussing situations which don't exist in this case, just saying well what if such and such, and what if something else? Have you been doing that in there?

Juror No. 5: That was mentioned not in the deliberations, but after the fact that they basically thought I was going to be dismissed, I mentioned some of those things, yes.

(RT 2325-2327, emphasis added.)

At that point, the court sent JN5 back to the jury room. Defense counsel wanted the court to inquire further about the other jurors telling JN5 he would be dismissed, but the court declined. (RT 2327.) The

prosecutor argued that JN5 had been contradicted in significant aspects by the other jurors and that the court should find that he had failed to deliberate, had refused to consider the penalty phase evidence and that he possessed a conscientious objection to the death penalty. (RT 2327-2328.)

Defense counsel argued:

> Your honor, it is clear to me that Juror Number 5 has now substantiated that he is being browbeat back there, being threaten (sic) with dismissal from this jury. It is the most sanctified part of the whole proceeding, 12 jurors are allowed to deliberate. He deliberated. He made his decision. Those 11 people can't accept it. The People can't accept it. It would be absolutely wrong and unjust to dismiss this juror.

(RT 2328, emphasis added.)

The court ruled as follows:

> The record should reflect that juror no. 5, the first time he came out, could scarcely be heard. He was whispering his responses and his voice has been much stronger in the second time he has come out. The court's decision or the court's findings is that this is a juror who is failing to deliberate. There is considerable support for the idea that he is actually unqualified and therefore should be dismissed for that reason in that he does have a conscientious objection against the death penalty. There is a slight ambiguity in that; in that one said he would apply it for a child. Everybody else said the opinion that he wouldn't apply it at all. His limiting it to that one situation would be reason to excuse him for cause. It appears even if he were not to be excused for his conscientious view, that

> he is failing to deliberate. All 11 agree that he is not using the evidence, that he has given no explanation at all for his views. I am aware of the fact that he does not have to give a dissertation on his views. However, that is not the extreme that is being sought. The foreman, who certainly is articulate, stated that juror no. 5 would give no information at all, would not discuss the case or anything about it. Number 5 agreed with this wording that he has a conscientious objection that makes him unable to deliberate. My opinion in seeing juror no. 5 is that he does not like to be confronted with this. I understand his discomfort, but according to all 11 he did agree with this as an accurate statement of his position. I am therefore excusing juror no. 5 and put (*sic*) in an alternate.

(RT 2328 -2329.) The court then excused JN5, and replaced him with Alternate Number 5. (RT 2330-2331.) Defense counsel moved for a mistrial, citing juror misconduct in threatening JN5 with dismissal. (RT2332) The newly constituted jury began deliberations, but adjourned after an hour. (RT 2332). They resumed deliberations at 8:45 the next morning and returned with a death verdict after approximately an hour and a half of deliberations. (CT 673; RT 2333, 2339.) Prior to receiving the verdict, the court elaborated on its ruling of the previous afternoon:

> There is word that we have a verdict. Before the jury comes in, I wish to make a further statement. My decision to remove juror number 5 last Friday was a discretionary call and, as such, it will be and should be subject to review. The reviewing court should have as much information as possible on my reasoning and, therefore, I wish to clarify the

record. I started my evaluation with the statement written by the foreman that one juror was conscientiously opposed to the death penalty. Questioning of all twelve jurors clarified that juror number 5 approved of that language and knew, of course, that he was the one spoken of. The court was at that time confronted with Mr. L.'s unequivocal statement on the jury questionnaire, given under penalty of perjury, and with his later unequivocal admission to the other jurors that he did, in fact, have conscientious objection to it. At no time in the voir dire process or in last Friday's questioning did Mr. L express any difficulty in understanding the phrase "conscientious objection." His written statement in the questionnaire was thus shown to be perjurious. Such perjury was cause for dismissal. Further questioning elicited his statement that he could vote for death if a child were the victim of a murder. He knew that there was no issue of a child's murder in this case and so this equivocation does not change the fact that he would automatically refuse to vote for death in every case regardless of what the evidence showed, unless a child were the murder victim. The entire death qualification part of the voir dire process was aimed at ensuring that no one sat on this jury who would automatically vote for death regardless of the evidence, nor anyone who would automatically refuse to vote for death regardless of the evidence. Mr. L. was clearly in this latter category. To have left Mr. L. on the jury would have made a mockery of the whole process of questioning potential jurors under oath as to their impartiality. Moreover, the questioning of other jurors revealed that Mr. L refused to deliberate in the penalty phase by refusing to consider the

> evidence presented. The questioning revealed no pressure being put by others on Mr. L. The manner of each juror questioned was calm and pleasant, no anger or impatience was shown, and no lack of respect for Mr. L. was apparent. If Mr. L felt pressure, that does not establish that others were applying pressure. He could well have felt pressure from his having concealed his true views in voir dire.

(RT 2334-2335.) Defense counsel again moved for a mistrial, which was denied. (RT 2337.) Counsel stated:

> . . . . I would like to move for a mistrial one more time based on the excusal of Mr. L. and I would like to specifically state that that's based on fundamental constitutional grounds, both federal and state, and specifically the 14th Amendment, Equal Protect (sic) and Due Process Clauses.

(*Ibid.*)

C. Reversal Is Required Because There Is Insufficient Evidence To Establish That JN5 Either Failed To Deliberate Or Was Unable To Perform His Duties As A Juror, Or That He Had Otherwise Committed Misconduct

The power of a trial court to discharge a juror emanates from Penal Code section 1089, which provides, in pertinent part, as follows:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate who shall then take his place in the

> jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

Pursuant to this provision, a juror who refuses to deliberate may be removed on the theory that such a juror is "unable to perform his duty." (*People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333.) Similarly, a juror who refuses to follow the court's instructions may also be removed. (*People v. Williams* (2001) 25 Cal.4th 441, 448.)

This Court, in *People v. Cleveland* (2001) 25 Cal.4th 466, 484, held that a trial court may remove a seated juror if "it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate."[93] As the Court explained:

> A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. ***The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated***

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[93] In setting forth the standard of review, the Court in *Cleveland* stated that a trial court's ruling will be upheld if there is any substantial evidence to support it, but added that the juror's inability to perform must appear in the record as a demonstrable reality, citing *People v. Marshall* (1966) 13 Cal.4th 799, 843. (*Id.* at p. 474.)

> ***in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.***

(*Id.* at p. 485, emphasis added.)

In *Cleveland*, this Court concluded that the trial court had abused its discretion in excusing a juror during deliberations, finding that the record did not establish "as a demonstrable reality" that the juror had refused to deliberate. (*Ibid.*) Although the initial jury note received by the court had asserted that "Juror No. 1 does not show a willingness to apply the law," it became apparent under questioning that the juror simply viewed the evidence differently from the way the rest of the jury viewed it. As this Court observed, "[Juror No. 1's] methods of analysis differed from those of his fellow jurors, and his approach to deliberations apparently frustrated his other colleagues." (*Id.* at p. 486.)

As in *Cleveland*, *supra*, the record in the instant case does not support the trial court's finding that JN5 had failed to deliberate. At most, it reflects that JN5 listened to the opinions of the other jurors, and then shared his own opinion regarding what he felt to be the appropriate penalty. But when all of his fellow jurors disagreed with him and collectively pressed him to justify his position,[94] he felt, if not intimidated, at least overwhelmed and out-numbered. Consequently, instead of trying to argue his position, JN5 retreated into his shell. As

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[94] As quoted above, the foreperson (JN2) described how the jurors repeatedly pressed JN5 to explain why he was not willing to sentence appellant to death, and when he did not offer what they considered to be an acceptable explanation, they began interrogating him about his feelings regarding the death penalty. (RT 2294-2295.)

JN5 stated when he was explaining to the court why he had acquiesced in the wording of the note, even though it did not accurately reflect his position:

> At that time I just didn't want to fight with 11 jurors because they were all – I felt pressured and I wanted to just not feel that way.

(RT 2326.)

Although they all complained about JN5's intransigence, nothing in the statements by the other jurors established that JN5 had actually refused to speak to them or listen to their views. (Compare *People v. Thomas*, *supra*, 26 Cal.App.4th at p.1333 [juror refused to sit at same table or communicate with other jurors and acted as if he had made up his mind before hearing whole case].) Indeed, the jurors who were asked, all indicated that JN5 had participated in the deliberations. (RT 2294, 2301, 2304, 2309, 2317, 2318.) The fact that JN5 could not offer a well-reasoned explanation justifying his vote for a sentence of life without parole does not establish, as a "demonstrable reality," that JN5 was unwilling to deliberate or that he refused to consider the evidence, as found by the trial court. (RT 2329, 2335.)

Nor does the record establish, as a demonstrable reality, that JN5 committed misconduct by basing his decision on extraneous information, as the trial court suggested. (RT 2324.) At most, the record herein reflects a scenario remarkably similar to that presented in the *Cleveland* case. In that case, one juror complained "Juror No. 1 would discuss 'elements . . . that had nothing to do with the facts at hand or the case.'" Another juror told the court that Juror No. 1 had "'absolutely no interest in the law, your instructions, what we are supposed to consider, and is making judgments and speculations

based on his personal feelings.'" A third juror reported that Juror No. 1 brought up "'things like police cars come and remind him of Rodney King and all that stuff and I told him that had nothing to do with this.'" A fourth juror felt that Juror No. 1 was "'disregarding the facts altogether,'" and when asked questions by other jurors concerning the elements of the crime, would not answer their questions. (*Cleveland*, *supra*, 25 Cal.4th at pp. 471-472.) In the instant case, the jury foreperson (JN2) complained that JN5 was "continually attempting to discuss facts not in evidence," and was "hunting in areas that we have no understanding or knowledge of, trying to bring things out that are not there, what-ifs, histories, potential circumstances." (RT 2301.)[95] As in

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[95] Not only is there insufficient evidence that JN5 actually based his decision on extraneous information, but also, as this Court recently observed in *People v. Danks* (2004) 32 Cal.4th 269,302 (a case in which two jurors in a capital trial had reviewed biblical passages during penalty deliberations proclaiming that one who murders should be put to death):

> The introduction of what might strictly be labeled 'extraneous' law cannot be deemed misconduct. The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of the weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a

Cleveland, the fact that JN5 might have discussed matters the other jurors considered "irrelevant" and adopted an "unreasonable interpretation" based upon his "own personal opinion," and refused to "respond to specific questions" posed by the other jurors, was not misconduct.

This Court has recognized that

> [I]t is not always easy for a juror to articulate the exact basis for disagreement after a complicated trial, nor is it necessary that a juror do so. . . [I]t is not required that jurors deliberate well or skillfully.

(*People v. Engleman* (2002) 28 Cal.4th 436, 446.) This Court has also observed that jurors will sometimes make the mistake of concluding that a juror's strong disagreement with the majority is equivalent to a refusal to deliberate. (*Ibid.* See also *People v. Barber* (2002) 102 Cal.App.4th 145, 152-153.)

Due to a concern that it would encourage the very type of mischief that occurred herein, this Court in *Engleman* disapproved CALJIC 17.41.1, which imposed a duty upon jurors to "immediately advise the Court" if any juror "refuses to deliberate or expresses an intention to disregard the law or to decide the case based on . . . any improper basis." (24 Cal.4th at p. 440.) The Court recognized that directing jurors "to police the reasoning and arguments of their fellow jurors during deliberation, and immediately advise the court if it appears

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> weakness, however, must be tolerated. It is an impossible standard to require ...[the jury] to be a laboratory, completely sterilized and freed from any external factors.

that a fellow juror is deciding a case upon an 'improper basis,' may curtail or distort deliberations." (*Ibid.*) The Court further observed:

> It is difficult enough for a trial court to determine whether a juror actually is refusing to deliberate or instead simply disagrees with the majority view. (See *People v. Cleveland*, *supra*, 25 Cal.4th at pp. 475-476, 106 Cal.Rptr.2d 313, 21 P.3d 1225; see also *People v. Bowers* (2001) 87 Cal.App.4th 722, 728, 104 Cal.Rptr.2d 726 [trial court erred in excusing a juror for alleged refusal to deliberate].) Drawing this distinction may be even more difficult for jurors who, confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those individuals who steadfastly disagree with them are refusing to deliberate or are intentionally disregarding the law. Jurors, of course, do not always know what constitutes misconduct. They may be tempted to relinquish the secrecy of deliberations unnecessarily, simply because of fierce disagreement among the jurors.

(*Id.* at p. 446.) Although CALJIC 17.41.1 was not given in the instant case, at least one juror was told during voir dire that he was "required" to inform on jurors who would not deliberate. (RT 624.) In addition, Question No. 17 on the jury questionnaire stated that "If a juror refuses to discuss the case, this is a failure to deliberate," and then asked the prospective jurors whether they would be willing to so inform the court. (CT Supp.I 22.) It is therefore likely that the improprieties the Court sought to avoid in disapproving CALJIC 17.41.1, occurred in appellant's case.

The fact that JN5 had reached his decision early on in the deliberations and could not thereafter be persuaded to change his vote,

also cannot be properly be characterized as a refusal to deliberate or as proof that JN5 refused to consider the evidence. For example, in *People v. Bowers* (2001) 87 Cal.App.4th 722, 733, the court examined the jury's claim that a juror (Juror 4) was unwilling to change his mind and that the juror had made up his mind either in the courtroom or almost immediately after deliberations started. (*Id.* at p. 733.) When questioned, Juror 4 stated that he had listened to other jurors and had given his opinion that he did not believe the testimony of certain witnesses. The court of appeal concluded that the record did not reflect a demonstrable reality that Juror 4 was unwilling to deliberate. The court observed that:

> It is not uncommon for a juror (or jurors) in a trial to come to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors. The record suggests that, after listening to all the evidence in court and observing the witnesses, Juror No. 4 determined they lacked credibility and were lying. . . . Here, all the jurors had the opportunity to participate in the jury's discussions. The record reflects Juror No. 4 took part in those discussions to some extent. . . . Individuals acquire different methods of processing information and decisionmaking based on their background and experiences. It is unrealistic to expect each person or each jury to deliberate and come to a conclusion in the same fashion. Here, the method of deliberation varied from juror to juror. For example, Juror No. 9 testified: 'There was one [juror] that didn't seem to participate at all. There's [sic] a couple of jurors who are the kind of people that [sic] will just sit back and listen and think

> about it a little, kind of come to a conclusion and then speak. There are others of our group that - - they're talkers.' Clearly Juror No. 4 was a person whose manner of deliberating was more understated than the rest of the jury. However, this does not demonstrate Juror No. 4 either refused to deliberate or was unable to perform his functions as a juror. ¶ It cannot be said a juror has refused to deliberate so long as a juror is willing and able to listen to the evidence presented in court, to consider the evidence and the judge's instructions, and to finally come to a conclusion and vote, which is precisely what Juror No. 4 did. If the jury hangs because one juror has persistent doubts about the sufficiency of evidence against defendant despite deliberating without bias, a mistrial should result.

(*Id.* at pp. 734-735.)

In the instant case, the record reflects that JN5 properly exercised his moral judgment in making an individualized sentencing determination. What he actually said to the other jurors, was that his conscience would not allow him to vote for the death penalty "***in this case***." (RT 2309, 2310, 2316.)

As defense counsel correctly argued, the sentencing determination in a capital case is not a quantitative analysis. (RT 2322.) JN5 was properly instructed that he was "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (CALJIC No. 8.88; *People v. Osband* (1996) 13 Cal.4th 622, 672 [sentencing function in capital case is inherently moral and normative; therefore weight or importance to be assigned any particular factor or item of

evidence involves a moral judgment to be made by each jury individually]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037 ["the jury exercises an essentially normative task, acting as the community's representative, that it may apply its own moral standards to the aggravating and mitigating evidence presented, and that it has ultimate responsibility for determining if death is the appropriate penalty for the particular offense and offender"].) Thus, under California law, no one is to be sentenced to die unless the jury ultimately decides that death is the appropriate penalty. This is true whether or not the aggravating circumstances are weightier than the mitigating circumstances, even in a case where virtually no mitigating evidence was presented. As this Court observed in *People v. Duncan* (1991) 53 Cal.3d 955, 979:

> [O]ur statute . . . give[s] the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. ***The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.***

(Emphasis added.)

Neither does the record support the trial court's findings that JN5 was unqualified to serve due to a generalized "conscientious objection" against the death penalty, and that he had perjured himself on his jury questionnaire in stating that he believed in capital punishment. (RT 2329, 2334-2335.)

There is ***no*** evidence that JN5 ever stated to anyone that he had a *per se* conscientious objection to the death penalty and/or that he was categorically unwilling to ***consider*** the death penalty as a sentencing option. Indeed, as JN10 explained to the court, JN5 told the

other jurors that "he believed in the death penalty but he couldn't *apply it in this case*." (RT 2317.) This is entirely consistent with what JN5 told the court when it questioned him. (RT 2292-2293, 2325.) [96]

Moreover, even assuming that JN5 had a conscientious objection to the death penalty, this by itself would not have been a sufficient reason to exclude him from the jury. A juror cannot properly be excused for cause unless his views on the death penalty "would prevent or substantially impair" his ability to carry out those duties required by the court's instructions and the juror's oath. (*Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Stewart* (2004) 33 Cal.4th 425, 440-441.) In *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court as explicitly recognized that:

> A juror whose personal opposition towards the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict.

The Court reaffirmed this principle in *People v. Stewart*, *supra*, 44 Cal.3d at p. 447:

> [A] prospective juror may not be excluded simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the

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[96] JN5 also denied saying that he would only consider voting for death if the victim were a child. (RT 2325.)

> California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his duties as a juror' under *Witt* [*v. Wainwright,* citation omitted.]

In any event, all that the record in this case actually reflects, is that the other jurors: (1) disagreed with JN5's opinion as to the appropriate sentence in this case; (2) felt that JN5 had not articulated a sufficient rationale for his position, and (3) on this basis, collectively decided that JN5 must be unwilling to consider death as a sentencing option because of a conscientious objection to the death penalty. However, despite the fact that the other jurors were merely stating their ***opinions***, the trial court erroneously adopted those opinions as fact. Although the prosecutor and the court made much of the fact that JN5 had acquiesced in the wording of the note, which stated that JN5 had a "conscientious objection" to the death penalty, JN5 denied that the note accurately reflected his views regarding the death penalty (RT 2292, 2325), and explained to the court that he had given in on the wording because he "felt pressured" and "just didn't want to fight with 11 jurors." (RT 2326.)[97]

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[97] That JN5, feeling pressured, acquiesced to avoid further confrontation, was corroborated by JN1, who told the court that JN5 only "agreed at the very end." (RT 2304.)

The trial court abused its discretion, both when it endorsed the jurors' interrogation of JN5 regarding his feelings about the death penalty, and when it adopted as its own findings, the opinions and conclusions drawn by the jurors from such improper interrogation. Whether a potential juror has a disqualifying bias either against or in favor of the death penalty is a matter to be determined and resolved by the court during individual, sequestered voir dire (*Hovey v. Superior Court* (1980) 28 Cal.3d 1,80), and is certainly not within the province of the jury during deliberations. Even if the court had a legitimate doubt as to whether JN5 had been forthright on his questionnaire or during voir dire, it could not properly find that the juror had "perjured himself" based on improper "voir dire" conducted by the other jurors. At a minimum, the court would have to question JN5 regarding these matters itself.

D. The Trial Court's Removal Of JN5 Violated The State And Federal Constitutions

The trial court's discharge of JN5 deprived appellant of his right to have his trial completed by a particular tribunal, his Sixth and Fourteen Amendment rights to a full and fair trial by an impartial jury, his due process rights grounded in the entitlement to procedures mandated by state law, and his Eighth Amendment right to a reliable sentencing determination in a capital case.

A state defendant has a federal constitutional right to an impartial jury. (See *Duncan v. Louisiana* (1968) 391 U.S. 145 [Sixth Amendment right to jury trial]; *Irvin v. Dowd* (1961) U.S. 717, 722 [due process right to trial by impartial jury]; see also *Ross v. Oklahoma* (1988) 487 U.S. 81, 85 ["It is well settled that the Sixth and Fourteen Amendments guarantee a defendant on trial for his life the right to an impartial jury"].)

In addition to this broad guarantee, the United States Supreme Court has recognized in the context of the Fifth Amendment that a defendant has a "valued right to have his trial completed by a particular tribunal." (*Wade v. Hunter* (1949) 366 U.S. 684, 689.)

Justice Werdegar stated in her concurring opinion in *People v. Cleveland* that substitution of a juror after the jury has retired to deliberate may infringe on a defendant's right to a trial by jury. (*People v. Cleveland*, supra, 25 Cal.4th at 487 (conc. opn. of Werdegar, J.) citing *People v. Collins* (1976) 17 Cal.3d 687, 692.) Thus "discharge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 487 (conc. opn. of Werdegar, J.); see also *Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, 944 ["Removal of a holdout juror is the ultimate form of coercion"].)

In addition, under the state Constitution, "[e]very criminal defendant is entitled to a unanimous verdict," *People v. Wheeler* (1978) 22 Cal.3d 258, 265, and "to be valid a criminal verdict must express the independent judgment of each juror." (*People v. Karapetyan* (2003) 106 Cal.App.4th 609, 621 (citing *People v. Gainer* (1977) 19 Cal.3d, 835, 848-849.) The improper removal of a deliberating juror thus violated appellant's state constitutional right to a unanimous jury verdict, including the right to the independent and impartial decision of each juror. (Cal.Const. art. I, § 16.)

Appellant's Sixth and Fourteen Amendment rights are also implicated by the trial judge's misapplication of Penal Code section 1089. The purpose behind the substitution procedure set forth by that statute is to preserve "the 'essential feature' of the jury required by the

Sixth and Fourteenth Amendments." (*Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995; see *People v. Bowers*, *supra*, 87 Cal.App.4th at p. 729 ["The California process for substitution of jurors under Penal Code section 1089, and Code of Civil Procedure section 233, preserves the essential features of the jury trial required by the Sixth Amendment and Due Process clause of the Fourteenth Amendment"]. The trial court's gross misapplication of section 1089 infringed upon appellant's Sixth and Fourteen Amendment rights to an impartial jury and arbitrarily deprived him of a state-created liberty interest guaranteed by the Due Process Clause. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

Finally, the trial judge's actions in dismissing JN5 strongly signaled to the jury that its deliberations would be subject to scrutiny. As they recommenced their penalty deliberations, they knew their individual views might be the subject of another court hearing to discharge one of them, and that any individual juror's failure to agree with the majority would likely result in that juror's removal. Under the circumstances, the court's erroneous actions undermined the reliability of the sentencing process by discouraging the jurors from exercising individual moral judgment in determining the appropriate penalty. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319; *California v. Brown* (1987) 479 U.S. 538, 545 [Eighth Amendment requires a reasoned moral judgment as to whether death should be imposed]; See also *Mills v. Maryland* (1988) 486 U.S. 367 [Reliability of capital sentencing determination undermined where jurors led to believe that they must unanimously agree on existence of mitigating factors].) As the United States Supreme Court has made clear, "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel

and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280 305.)

E. Removal Of JN5 Was Prejudicial

The dismissal of a deliberating juror is the type of error which warrants automatic reversal. It cannot reasonably be assessed by resort to harmless error analysis. (See *Sullivan v. Louisiana* (1993) 509 U.S. 275, 280-282 [harmless error analysis inappropriate where jury given deficient reasonable doubt instruction].) For example, in *United States v. Harbin* (7th Cir. 2001) 250 F.3d 352, the Seventh Circuit found the prosecutor's mid-trial exercise of a peremptory challenge against a seated juror required automatic reversal. The court observed that there was no way to "assess how the makeup of the jury may have impacted the decision making process." (*Id.* at p. 545.) As the court stated, "[n]o one argues that the alternate who replaced Juror M was somehow biased, and it is impossible to determine what impact, if any, the substitution had on the jury's ultimate decision." (*Ibid.*)

That is precisely the problem this Court faces in determining the effect of the improper removal of the juror in appellant's case. Trying to evaluate the prejudice created by the trial judge's improper discharge of a juror would amount to "speculation run riot." (*People v. Bigelow* (1984) 37 Cal3d 731, 745-745, [impossible to assess prejudice from denial of advisory counsel].)

If this Court declines to apply the automatic reversal rule in this instance, reversal is still required under the test used in *Cleveland*, *supra*, 25 Cal.4th at p. 486. In *Cleveland*, this Court relied on *People v. Hamilton* (1963) 60 Cal.2d 105, 128, overruled on other grounds in

People v. Morse (1964) 60 Cal.2d 631, in holding that the trial court's erroneous excusal of a deliberating juror was prejudicial and required reversal. In *Hamilton*, this Court stated that "if the record shows . . . that [the discharged] juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side." The Court in that case found that the improper removal of a juror who had stated her opposition to a death verdict was "tantamount to 'loading' the jury with those who might favor the death penalty. Such, obviously, was prejudicial to appellant." (*Ibid.*) In the instant case, the record plainly shows that the improperly discharged juror favored a sentence of life without possibility of parole and that his removal resulted in "loading" the jury with those who not only favored sentencing appellant to death, but who did actually vote to do so after approximately two-and-a-half hours of deliberation. Under these circumstances, the trial court's errors require reversal of appellant's death sentence.

F. The Trial Court Abused Its Discretion In Questioning The Jurors Once It Became Apparent That There Was No Juror Misconduct

It is well established that the "sanctity of jury deliberations" must be protected. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 475 (citing *People v. McIntyre* (1990) 222 Cal.App.3d 229, 232; *People v. Talkington* (1935) 8 Cal.App.2d 75, 85-86; *People v. Friend* (1958) 50 Cal.2d 570, 578; *People v. Hutchinson* (1969) 71 Cal.2d 342 350.) This includes "'assur[ing] the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of the jurors' thought processes.'" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 475 (quoting *In re Hamilton* (1999) 20 Cal.4th 273, 294 n. 17.) Indeed, "'[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities

or personalities of individual jurors would deprive the jury room of its inherent quality of free expression.'" (*Id.*, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 541.)

As this Court noted in *Cleveland*, "[m]any of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes apply even more strongly when such inquiries are conducted during deliberations." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 476.) The Court explained that, "Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of deliberations could affect those deliberations." (*Ibid.*)

This Court recently reaffirmed that "[c]ourts must exercise care in responding to an allegation from a deliberating jury that one of their number is refusing to follow the court's instructions or is refusing to deliberate ...." (*People v. Engelman*, *supra*, 28 Cal.4th at p. 445, citing *People v. Cleveland*, *supra*, 25 Cal.4th at p. 475 and *People v. Williams*, *supra*, 25 Cal.4th at p. 464-465 (conc. opn. by Kennard, J.)). In *Cleveland*, this Court, citing three federal cases, *United States v. Brown* (D.C.Cir. 1987) 823 F.2d 591, *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, and *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, noted that "a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence," (25 Cal.4th at p. 483), and that "a court must take care in inquiring into the circumstances that give rise to a request that a juror be discharged, or an allegation that a juror is refusing to deliberate, lest the sanctity of jury deliberations too readily be undermined." (*Id.* at p. 484; see also *Sanders v. Lamarque*, supra,

357 F.3d at p. 945 [citing with approval *Brown*, *Symington*, and *Thomas*].)

Accordingly, any inquiry into allegations of jury misconduct during deliberations

> should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise commit
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> misconduct, and no other proper ground for discharge exists.

(*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.)

Here, the trial court improperly delved into the jury's deliberative process after its initial inquiry made clear that there was no jury misconduct and thus no basis for further questioning of the jurors. As set forth above, the note sent by the jury indicated that a juror's personal feelings regarding "the application of the death penalty" caused that juror "to be unable to ***continue*** to deliberate." (CT 645; RT 2323.) Thus, implicit in the note was the fact that the juror in question (JN5) had, in fact, participated in the deliberations.

The court nevertheless decided, over defense objection, to interrogate JN5 to determine whether he was unwilling or unable to "perform his duties as a juror." (RT 2291.) JN5 confirmed that he was *not* categorically unwilling to consider imposing a death sentence, and that he "tried to make an evaluation from the evidence that was presented and . . .came up with the life position of without possibility of parole." (RT 2292-2293.)

Despite the clear indication that JN5 was indeed deliberating and following his oath and the court's instructions, the court persisted in interrogating all of the other jurors. However, instead of simply asking the jurors (1) whether JN5 had participated in deliberations, and (2) whether he had expressly stated that he would not follow the law, the court improperly asked questions designed to elicit information about the deliberative process. For example, instead of asking the foreperson whether JN5 had "participat[ed] in discussions with fellow jurors by listening to their views and by expressing his . . . own views" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485), the court instead asked him, "What is it about Juror No. 5's conduct that led you to say he is not deliberating as opposed to that he is disagreeing with you and others?" (RT 2294.) The foreperson responded with a lengthy critique of JN5's reasoning process (RT 2294-2295; 2301), although it was clear from his answers that JN5 had indeed participated in discussions with fellow jurors. (See section B., *supra*.)

After obtaining confirmation from another juror, JN1, that JN5 was participating in the deliberations, the court asked JN1 whether JN5 was "expressing opinions that are based on the instructions of law and the evidence." (RT 2304.) This too, was an improper question, as it was not specifically focused to determine whether or not JN5 had "expressed an intention to disregard the court's instructions or otherwise commit misconduct." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) In addition, instead of asking whether JN5 had actually stated that he was opposed to the death penalty and would never vote for it in any case or under circumstances, the court improperly elicited information from the jurors about their discussions with JN5 regarding particular scenarios in which he would or would not vote for death. (RT

2296-2297; 2306-2307; 2310.) The court also improperly questioned JN5 as to statements he had made during deliberations, asking him whether he had stated that he would vote for death if a child had been the victim, and asking him whether he had "been discussing situations which don't exist in this case." (RT 2325, 2326.) This was clearly the type of intrusive inquiry in to the deliberative process that has been denounced by this Court. (See *People v. Williams*, *supra*, 25 Cal.4th at p. 464 (conc. opn. by J. Kennard) [to permit intrusive inquiries into juror's reasoning would violate secrecy of jury deliberations and invite trial judges to second-guess and influence the work of the jury] and *People v. Engelman*, *supra*, 28 Cal.4th at p.443 [no one, including trial judge has right to know how individual juror has deliberated].)

There may be legitimate reasons for a trial court to make a reasonable inquiry into allegations of juror misconduct. (See, e.g., *People v. McNeal* (1979) 90 Cal.App.3d 830 [where one of the jurors possessed personal knowledge concerning the testimony of a defense witness]; *People v. Burgener* (1986) 41 Cal.3d 505, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753 [where juror was reportedly intoxicated from drugs]. Certainly, when a trial court is "on notice that a juror is not participating in deliberations," California law authorizes the court to conduct "'whatever inquiry is necessary to determine' whether such grounds exist (*People v. Burgener, supra*, 41 Cal.3d at p. 520), and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate [citations omitted] ." (*People v. Cleveland*, *supra*, 25 Cal.4th at 484.)

Such an inquiry, however, must be made with great care, and with the recognition that "not every incident involving a juror's conduct requires or warrants further investigation." (*People v. Cleveland*, *supra*,

25 Cal.4th at p. 478.) As this Court cautioned, "[d]etermining whether to discharge a juror because of the juror's conduct during deliberations is a delicate matter, especially when the alleged misconduct consists of statements made during deliberations." (*Id.* at p. 484.) Thus, "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations" (*Id.* at p. 485), and, as noted above, should cease once the court determines "that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*Ibid.*)

The trial court in appellant's case violated these fundamental principles by recklessly making inquiries about the jury's deliberations after it became clear that the juror in question had been participating in deliberations, but simply had a view regarding the appropriate sentence which differed from the other jurors. The court's aggressive intrusion into the jury's deliberative process must have made it abundantly clear that the court was displeased with any jurors who were inclined to vote for a sentence of Life Without Possibility of Parole. The court's focus and ultimate dismissal of JN5, who held views favorable to the defense, signaled to the other jurors how they should approach the case.

In addition, the manner in which the trial court questioned all of the jurors about the content of their deliberations demonstrated that whatever any of the jurors would say during the course of deliberations was open to scrutiny. This undoubtedly had a chilling effect on the process, impairing the free and private exchange of views that is an essential feature of the constitutional right to a jury trial.

The trial court's questioning of the entire jury panel is in stark contrast with the approach taken in *People v. Johnson* (1992) 3 Cal.4th 1183, where the trial court declined to make an inquiry into whether a holdout juror should be discharged. In Johnson, a juror sent a note to the judge indicating that eleven of the jurors had come to a decision, but the twelfth had not, and it was believed that the holdout juror did not believe in the death penalty. (*Id.* at p. 1253.) This Court held that the trial court properly declined to inquire into whether some jurors were coercing the dissenting juror, and that any such inquiry posed the risk of pressuring the dissenting juror to conform her vote to the majority. (Id. at p. 1255.) Similarly, in *People v. Bradford* (1997) 15 Cal.4th 1229, the trial court was found to have appropriately conducted only a limited inquiry when faced with a request to discharge jurors who allegedly had fixed views of the case before all the evidence had been reviewed. Rather than question the jurors, the trial court reread the relevant jury instructions, and permitted the jury to resume deliberations. (*Id.* at p. 1352.)

In appellant's case, the trial court violated the sanctity of the jury deliberations by delving into the jurors' thought processes after deliberations had begun. This violated appellant's Sixth Amendment right to an impartial jury, Fourteenth Amendment right to due process, and his Eighth Amendment right to a reliable sentencing determination. Such questioning not only led to the erroneous dismissal of a juror, but made it impossible for the remaining jurors to deliberate impartially at either the guilt phase or penalty phase. Apart from the erroneous dismissal of a deliberating juror, the court's conduct was prejudicial and requires reversal.

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XI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (*See Cooper v. Fitzharris*, *supra*, 586 F.2d at p. 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the Chapman standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Appellant has shown that a number of serious constitutional errors occurred in his case. Appellant was deprived of his federal and state constitutional rights to a speedy trial due to the State's unjustified delay in providing crucial discovery, which resulted in appellant's loss of a crucial exculpatory witness. In addition, the court, without good cause, compelled appellant to wear a stun belt during trial in violation

of his rights to due process, equal protection, a fair and impartial trial and freedom from cruel and unusual punishment. Appellant's rights to equal protection and a jury drawn from a fair cross-section if the community were violated by the prosecution's use of discriminatory challenges to strike African-Americans from his jury. He was further deprived of his right to an impartial jury and to a reliable penalty determination, both by the court's improper exclusion for cause of qualified jurors, and by its improper removal and replacement during penalty deliberations of a qualified, hold-out juror. In addition to these errors, the court deprived appellant of his confrontation rights, his right to due process of law, and his right to a reliable penalty determination, by improperly restricting appellant's cross examination of two critical prosecution witnesses, thus substantially impairing appellant's ability to impeach these witnesses. This error was compounded by the court's improper admission, over strenuous defense objection, of irrelevant and highly prejudicial evidence.

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643. Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error];

People v. Hill, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (*See People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Aside from the erroneous exclusion of prospective jurors, which is reversible per se if, the errors committed at the penalty phase of appellant's trial include numerous instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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XII.

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

The jury was instructed on Penal Code section 190.3 pursuant to CALJIC No. 8.85 [Penalty Trial - Factors For Consideration], the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (RT 2209-2211), and pursuant to CALJIC No. 8.88 [Penalty Trial - Concluding Instruction], the standard instruction regarding the weighing of these aggravating and mitigating factors. (RT 2216-2217, 2285.) These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional. First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the introduction of evidence under Penal Code section 190.3, subdivision (b) violated appellant's federal constitutional rights to due process, equal protection and a reliable penalty determination. Even if this evidence were permissible, the failure to instruct on the requirement of jury unanimity with regard to such evidence denied appellant his federal constitutional rights to a jury trial and to a reliable penalty determination. Third, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Fourth, the failure to instruct that statutory mitigating

factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fifth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Sixth, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Seventh, and finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

A. The Instruction On Penal Code Section 190.3, Subdivision (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Penal Code section 190.3, subdivision (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (RT 18426; CT 15820.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California, supra,* 512 U.S. at p. 975.) However, an analysis of how prosecutors actually

use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright, supra,* 486 U.S. at p. 362.)

As applied in California, however, section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that – from case to case – reflect starkly opposite circumstances. Thus, prosecutors have argued that "circumstances of

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the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[98] or because the defendant killed with a single execution-style wound;[99]

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[100] or because the defendant killed the victim without any motive at all;[101]

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[98] See, e.g., *People v. Morales*, Cal.Sup.Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera,* No. S004569, RT 160-161 (same).

[99] See, e.g., *People v. Freeman,* No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson,* No. S004761, RT 3026-3027 (same).

[100] See, e.g., *People v. Howard,* No. S004452, RT 6772 (money); *People v. Allison,* No. S004649, RT 968-969 (same); *People v. Belmontes,* No. S004467, RT 2466 (eliminate a witness); *People v. Coddington,* No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent,* No. S004309, RT 2553-2555 (same); *People v. Brown,* No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain,* No. S004370, RT 31 (revenge).

[101] See, e.g., *People v. Edwards,* No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband,* No. S005233, RT 3650 (same); *People v. Hawkins,* No. S014199, RT 6801 (same).

- because the defendant killed the victim in cold blood,[102] or because the defendant killed the victim during a savage frenzy;[103]

- because the defendant engaged in a cover-up to conceal his crime,[104] or because the defendant did not engage in a cover-up and so must have been proud of it;[105]

- because the defendant made the victim endure the terror of anticipating a violent death,[106] or because the defendant killed instantly without any warning;[107]

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[102] See, e.g., *People v. Visciotti,* No. S004597, RT 3296-3297 (defendant killed in cold blood).

[103] See, e.g., *People v. Jennings,* No. S004754, RT 6755 (defendant killed victim in savage frenzy).

[104] See, e.g., *People v. Stewart,* No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson,* No. S004763, RT 1141 (defendant lied to police); *People v. Miranda,* No. S004464, RT 4192 (defendant did not seek aid for victim).

[105] See, e.g., *People v. Adcox,* No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams,* No. S004365, RT 3030-3031 (same); *People v. Morales,* No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[106] See, e.g., *People v. Webb,* No. S006938, RT 5302; *People v. Davis,* No. S14636, RT 11, 125; *People v. Hamilton,* No. S004363, RT 4623.

[107] See, e.g., *People v. Freeman,* No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis,* No. S004767, RT 2959 (same).

- because the victim had children,[108] or because the victim had not yet had a chance to have children;[109]

- because the victim struggled prior to death,[110] or because the victim did not struggle;[111]

- because the defendant had a prior relationship with the victim,[112] or because the victim was a complete stranger to the defendant.[113]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

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[108] See, e.g., *People v. Zapien,* No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[109] ee, e.g., *People v. Carpenter,* No. S004654, RT 16,752 (victim had not yet had children).

[110] See, e.g., *People v. Dunkle,* No. S014200, RT 3812 (victim struggled); *People v. Webb,* No. S006938, RT 5302 (same); *People v. Lucas,* No. S004788, RT 2998 (same).

[111] See, e.g., *People v. Fauber,* No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera,* No. S004569, RT 160 (same).

[112] See, e.g., *People v. Padilla,* No. S014496, RT 4604 (prior relationship); *People v. Waidla,* No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[113] See, e.g., *People v. Anderson,* No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters,* No. S004712, RT 4264 (same).

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a death sentence is the use of the circumstances-of-the-crime aggravating factor to embrace facts which cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[114]

- **The method of killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[115]

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[114] See, e.g., *People v. Deere,* No. S004722, RT 155-156 (victims were young, ages 2 and 6); *People v. Bonin,* No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp,* No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter,* No. S004654, RT 16,752 (victim was 20), *People v. Phillips, supra,* 41 Cal.3d at p. 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa,* No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble,* No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton,* No. S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-4716 (victim was "elderly").

[115] See, e.g., *People v. Clair,* No. S004789, RT 2474-2475 (strangulation); *People v. Kipp,* No. S004784, RT 2246 (same); *People v. Fauber,* No. S005868, RT 5546 (use of an axe); *People v. Benson,* No. S004763, RT 1149 (use of a hammer); *People v. Cain,* No. S006544, RT 6786-6787 (use of a club); *People v. Jackson,* No. S010723, RT 8075-8076 (use of a gun); People v. Reilly, No. S004607, RT 14,040 (stabbing); *People v. Scott,* No. S010334, RT 847 (fire).

- **The motive for the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;

- **The time of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[116]

- **The location of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[117]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

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[116] See, e.g., *People v. Fauber,* No. S005868, RT 5777 (early morning); *People v. Bean,* No. S004387, RT 4715 (middle of the night); *People v. Avena,* No. S004422, RT 2603-2604 (late at night); *People v. Lucero,* No. S012568, RT 4125-4126 (middle of the day).

[117] See, e.g., *People v. Anderson,* No. S004385, RT 3167-3168 (victim's home); *People v. Cain,* No. S006544, RT 6787 (same); *People v. Freeman,* No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus,* No. S004723, RT 7340-7341 (city park); *People v. Carpenter,* No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois,* No. S017116, RT 2970 (remote, isolated location).

The circumstances-of-the-crime aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

B. The Instruction On Penal Code Section 190.3, Subdivision (b) And Application Of That Sentencing Factor Violated Appellant's Constitutional Rights To Due Process, Equal Protection, Trial by Jury And A Reliable Penalty Determination

1. Introduction

Factor (b), which tracks Penal Code Section 190.3(b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." Pursuant to that factor, the prosecution in this case presented evidence of four prior acts of alleged violence. (RT 1943-1961,1981-1987, 1988-2001, 2026-2034, 2048-2058, 2092-2103.) The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed. (RT 2213-2214.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable

doubt that appellant did in fact commit the criminal acts alleged. (RT 2214.) Although the jurors were told that all 12 must agree on the final sentence (RT2285), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

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

(RT 2214.) Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide, if any, and the special circumstance allegations.

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally permissible, the aspect of Penal Code section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. The Use Of Unadjudicated Criminal Activity As Aggravation Renders Appellant's Death Sentence Unconstitutional

The admission of evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth

Amendment. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

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

3. The Failure To Require A Unanimous Jury Finding On The Unadjudicated Acts Of Violence Denied Appellant's Sixth Amendment Right To A Jury Trial And Requires Reversal Of His Death Sentence

Even assuming, arguendo, that the evidence of the prior unadjudicated offenses was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to Penal Code section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury

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

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia, supra,* 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana, supra,* 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[118]

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[118] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama, supra,* 447 U.S. 625; *Gardner v. Florida, supra,* 430 U.S. at p. 357.) It is arguable, therefore, that where the State seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant

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

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

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committed the alleged act of violence, there is no need to reach this question here.

Here, the error cannot be deemed harmless because, on this record, there is no way to determine if all 12 jurors would have agreed that appellant committed the alleged prior offenses. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Decliner* (1985) 163 Cal.App.3d 284, 302 [same].)[119]

4. Absent A Requirement Of Jury Unanimity On The Unadjudicated Acts Of Violence, The Instructions On Penal Code Section 190.3, Subdivision (b) Allowed Jurors To Impose The Death Penalty On Appellant Based On Unreliable Factual Findings That Were Never Deliberated, Debated Or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida, supra,* 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi,* (1985) 472 U.S. 320, 328-330; *Green v. Georgia, supra,* 442 U.S. 95; *Lockett v. Ohio, supra,* 438 U.S. at pp. 605-606; *Gardner v. Florida, supra,* 430

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

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

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the State has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (RT 2213-2214.)

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

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

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

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

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

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

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi, supra,* 486 U.S. at p. 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

C. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter, supra,* 21 Cal.4th at p. 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

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

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

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and

violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama, supra,* 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

D. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable and Evenhanded Application Of The Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – in this case factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; Zant v. Stephens, *supra*, 462 U.S. at p. 879.) Failing to provide appellant's jury with guidance on this point was reversible error.

E. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded The Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); RT 18427), and "substantial" (see factor (g); Ibid.), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

F. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

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

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber, supra,* 2 Cal.4th at p. 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the State's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection

to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra,* 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes, supra,* 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne, supra,* 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[120] California's failure to

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[120] See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code, art. 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat., § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., §

require such findings renders its death penalty procedures unconstitutional.

G. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Them To Capital Defendants Like Appellant Violates Equal Protection

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California, supra,* 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

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

39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (Westbrook v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument XXV, *ante,* appellant explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such the requirement of written jury findings, unanimous agreement on violent criminal acts under Penal Code section 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants as set forth in this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California, supra,* 524

U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

H. Conclusion

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

* * * * *

XIII.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS AR UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument XVI.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Cal. Penal Code § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown, supra*, 40 Cal.3d at p. 541, rev'd on other grounds, *California v. Brown, supra*, 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[121]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...."

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[121] There are two exceptions to this lack of a burden of proof. The special circumstances (Cal. Penal Code § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Cal. Penal Code § 190.3(b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3(b), post.

(*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent, supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) ___ U.S. ___ [124 S. Ct. 2531].

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 471-472.) The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (Id. at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are

also submitted to the jury and proved beyond a reasonable doubt. (Id. at pp. 478.) In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.* While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)[122] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id.*) In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range

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[122]Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[123]

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[123]See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons.

Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter. California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne, supra*, 4 Cal.4th at p. 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one

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Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[124] As set forth in California's "principal sentencing instruction" (*People v. Farnam, supra*, 28 Cal.4th at p. 177), which was read to appellant's jury, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (RT 18444; CT 15846; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[125]

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[124] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

[125] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that

In *People v. Anderson, supra*, 25 Cal.4th at p. 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Penal Code 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2551, (dis. opn. of Breyer, J.), original italics.)

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aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen, supra,* 42 Cal.3d at pp. 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Cal. Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona, supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.)].) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona, supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494).) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of Blakely-Ring-Apprendi that the jury be instructed

to find the factors and determine their weight beyond a reasonable doubt. This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered.[126] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow, supra,* 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California.

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[126]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto, supra*, 30 Cal.4th at p. 263, emphasis added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan, supra*, 53 Cal.3d at pp. 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore

subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[127]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In Blakely itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the

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[127]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

finding is a prerequisite to an elevated sentence. (*Blakely, supra*, 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[128]

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[128] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin, supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to Apprendi, Ring and Blakely are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto, supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state

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substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

> legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(Ring v. Arizona, supra, 536 U.S. at p. 606, quoting with approval Apprendi v. New Jersey, supra, 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in Ring:

> Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

Ring v. Arizona, *supra*, 536 U.S. at (p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not

only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence Of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.) The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship*, *supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual

determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be

extinguished. (See *In re Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley*, *supra*, 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Ca1.3d 306 [same]; *People v. Thomas* (1977) 19 Ca1.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that

> those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra,* 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In Monge, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]*n a capital sentencing proceeding*,

as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra,* 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [emphasis added].) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See e.g., *People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt

> standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any

burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the

aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida*, *supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Cal. Penal Code §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the

aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[129]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Cal. Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due

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[129] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing to Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may

have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[130]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered.

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[130] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[131]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana*, *surpa*, 447 U.S. at p. 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, 524 U.S. at p. 732; *accord Johnson v. Mississippi*, *surpa*, 486 U.S. at p. 584; *Gardner v. Florida*, *supra*, 430

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[131] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

U.S. at p. 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler*, *supra*, 22 Cal.3d at p. 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[132] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate,

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[132] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k). In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).

unanimous verdict on the truth of such allegations. (See, e.g., Cal. Penal Code § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Y1st*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these

> considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.) These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more

aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof (see Argument XIII) was the trial court's rejection of the defense's requested instructions. This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving

a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8th Cir. 1992) 957 F.2d 1495, 1501, *rev'd on other grounds* (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion*: *Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. The failure of the California death penalty scheme to require instruction on unanimity and the

standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment
and the equal protection and due process clauses of the Fourteenth Amendment. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life*: *A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. Delo v. Lashley (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. XIV; Cal. Const., art. I, §§ 7 & 15), his right

to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. VIII & XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (Id. at p. 190.) However, as the other subsections of this argument demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XIV.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, CALJIC No. 8.88 [Penalty Trial – Concluding Instruction], read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant for each count of first degree murder.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. To return a judgment of death, each of you must

> be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You will soon retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(RT 216-217, 2285.) This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. The flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., Amend. XIV), to a fair trial by jury (U.S. Const., Amends. VI and XIV), and to a reliable penalty determination (U.S. Const., Amends. VI, VIII and XIV) and require reversal of his sentence. (See e.g., *Mills v. Maryland, supra*, 486 U.S. at pp. 383-384.)

A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so

substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . " (Id. at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here

> concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[133]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux, supra,* 1 Cal.4th at p. 316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold's* analysis. While *Breaux, Arnold,* and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra,* 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux,* uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to

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[133] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 202.)

control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII and XIV), the death judgment must be reversed.

B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether The Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty, For Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d

at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion, supra,* 9 Cal.4th at p. 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia,* "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment,

not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (RT 18444.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death

judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346) and must be reversed.

C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[134] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra,* 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the

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[134] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates all the jury's findings," can never be harmless. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See e.g., *People v. Moore, supra,* 43 Cal.2d at pp. 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata, supra,* 133 Cal.App.2d 18, 21; see also People v. Rice,

supra, 59 Cal.App.3d at p. 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States, supra,* 157 U.S. at p. 310.)[135]

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions,

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[135] There are due process underpinnings to these holdings. In *Wardius v. Oregon, supra,* 412 U.S. at p. 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas, supra*, 388 U.S. at p. 22; *Gideon v. Wainwright, supra,* 372 U.S. at p. 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra,* 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

> including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan,* the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection.

(See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instructions Failed To Inform The Jurors That Appellant Did Not Have to Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes, supra,* 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, did not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to appraise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XV.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original) (quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 [opinion of Stewart, Powell, and Stevens, JJ.]).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme

Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (*See Gregg v. Georgia, supra*, 428 U.S. at p. 198; *Proffitt v. Florida, supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (Id. at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (*See People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris,* 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's

> discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for Pulley v. Harris, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia, supra*, 408 U.S. at p. 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[136]

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[136]See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2)

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris, supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments following this one. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase

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(Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. *See State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973); *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *People v. Brownell*, 404 N.E.2d 181, 197 (Ill. 1980); *Brewer v. State*, 417 NE.2d 889, 899 (Ind. 1980); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants*, 250 N.W.2d 881, 890 (Neb. 1977)(comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State*, 548 S.W.2d 106, 121 (Ark. 1977).

proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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XVI.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

The United States is one of the few nations that regularly uses the death penalty as a form of punishment. *(See Ring v. Arizona, supra,* 536 U.S. at p. 618 (*conc. opn. of Breyer, J.); People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.).) And, as the Supreme Court of Canada recently explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(Minister of Justice v. Burns (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (*See Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. U.S. Const. art. VI, § 1, cl. 2. Consequently, this Court is bound by the ICCPR.[137] The United States Court of Appeals for

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[137] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and

the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284 ; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent, supra*, 43 Cal.3d at pp. 778-779; see also id. at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*See United States v. Duarte-Acero*, *supra*, 208 F.3d at p.1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487, dis. opn. of Norris, J.) Thus, appellant requests that the Court reconsider and, in the context of this case, find his death sentence violates international law.

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purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot (1991) *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties*, 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty. (See *Quigley, Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582.)

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky, supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830.) Indeed, all nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.) [quoting I Kent's Commentaries 1]; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here.

(*Miller v. United States, supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia, supra*, 536 U.S. at p, 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma, supra*, 487 U.S. at pp. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit

jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot, supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence must be set aside.

* * * * *

Conclusion

For the reasons stated above, appellant's conviction and death sentence must be reversed.

Dated: May 13, 2005

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

JESSICA K. McGUIRE
Supervising Deputy State Public Defender

Attorneys for Appellant

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

I am the Supervising Deputy State Public Defender assigned to represent appellant, Darrell Lee Lomax, in the automatic appeal. I conducted a word count of this brief using our officer's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, contains approximately 89,245 words.

Dated: May 13, 2005

JESSICA K. McGUIRE

EXHIBIT "A"

AUG 29 1995

002308

ROBERT JELENIC 1:00 P.M.
PRINT NAME

People vs. Lomax
Case No. NA023819

INSTRUCTION FOR JUROR QUESTIONNAIRE

You have been sworn as a prospective juror in this case and instructed by the Court to answer this questionnaire, you must fill out the questionnaire without assistance from any other person.

You must sign your questionnaire, and your answers will have the weight of a statement given to the Court under oath.

If you feel you need assistance to fill out this questionnaire, due to reading and/or writing abilities, please contact the court clerk or bailiff to arrange for official assistance.

The major purpose of the questionnaire is to enable the Prosecutor and the Defendant to select a fair and impartial jury to try the issues of the case. If this highly important objective of selecting a fair and impartial jury is not achieved, the rest of the proceedings are meaningless. Your full cooperation is of vital importance.

Please answer each question which follows as completely and as accurately as you can. This questionnaire is designed to obtain information about your background as it relates to your possible service as a fair and impartial juror in this case. Your best effort will save a great deal of time for the Court and everyone else involved, thereby shortening the time it will take to select a jury to hear this case. This questionnaire will largely replace long and tedious questioning in the courtroom.

The completed questionnaire will become part of the public record in this case. Some of these questions may call for information of a personal nature that you may not want to discuss in public. You may so indicate by writing "Confidential" in the left margin next to the question you would like to discuss outside the presence of other jurors. The Court will then give you an opportunity to explain your request for confidentiality and will make every effort legally possible to protect your privacy.

If you find that you do not have enough room in the allotted space for your answers, please use the margin to the right of each question.

YOU MUST NOT WRITE ON THE BACK OF THE QUESTIONNAIRE.

Thank you for your cooperation.

Margaret M. Hay
Judge of the Superior Court

PLEASE PRINT LEGIBLY

Please use Black Pen

INTRODUCTION

1. Please state:

   A. Your full name: ROBERT JELENIC

   B. Male or female: MALE

   C. Your age: 28 Place of birth: ZADAR, CROATIA

   D. Present marital status; check all that apply:

   - [X] Single and never married
   - [ ] Divorced and was married for ____ years*
   - [ ] Separated and was married for ____ years
   - [ ] Widowed and was married for ____ years
   - [ ] Married currently for ____ years
   - [ ] Living with another for ____ years
   - [ ] Engaged to be married

   *If you have been divorced more than once, use this line for additional space:_____

   _____

   E. What is your race or ethnic background? HUMAN

2. If you have children or step-children, please list:

AGE	SEX	LEVEL OF EDUCATION	OCCUPATION IF ADULTS

RESIDENCE

002310

3. The city of your present residence: RANCHO PALOS VERDES

A. In what general area of the city do you reside?

FEW MILES FROM OCEAN

B. Length of residence in city: THREE YEARS

C. Do you rent_____ or own X or live with family_____.

EDUCATION

4. Your education:

A. Completed high school: Yes X No____
If not, state last grade completed: _____

B. Attended trade, technical, or business school: Yes X No____
If so, state school attended, type of study, and certificates received, if any:

LOS ANGELES TRADE TECH. COLLEGE, ELECTRICAL CONST., ELECTRICAL CERT.

C. Attended college or graduate school: Yes X No____
If so, state institution attended, area of concentration, and degree received if any:

SAME AS LETTER "B" ABOVE

D. If you have taken courses or had training in any of the legal fields (for example, law, administration of justice, corrections, law enforcement academy) please identify such courses or training by title and subject matter, as well as when and where your training was received:

—NO—

E. Educational goals for the future, if any: LEARN TO HAVE FUN

EMPLOYMENT

002311

5. Please state your present and past occupations beginning with the most current. If you are retired, indicate your occupations before your retirement. Briefly describe functions as to each employment.

Type of Business / City of Business / Dates of Employ — Title — Duties & Responsibilities

(1) - LADWP- POWER COMPANY IN L.A. FROM 6-90 TO PRESENT. WORK ON POWER POLES. MAINTENANCE & REPAIR

(2) - ACTION CRANE - CRANE TECH. FROM (6-89) - (6-90) REPAIR AND CHECK CRANES FOR SAFETY.

6. Please state the present and past occupations of your spouse beginning with the most current. If he or she is retired, indicate his or her occupations before retirement. Briefly describe functions as to each employment. If you are living with someone or are engaged to someone, as opposed to being married, please give the same information about that person.

Type of Business / City of Business / Dates of Employ — Title — Duties & Responsibilities

A. What is the level of education of your spouse/fiance/person with whom you are living?

— NOBODY THERE —

7. Have you ever served in the Military? Yes____ No X

If so, give details of branch, dates served, highest rank and class of discharge.

A. Were you ever involved in any way with military law enforcement, courts martial,

or investigations? Yes_____ No X 002312

If so, please give details:

8. Do you own a gun? If so, please state why.

YES – PROTECTION – FUN – (SKILLS: SPORT)

9. Does anyone in your home, other than yourself, own a gun. If so, please state why.

– NO –

A. Do you belong to any organization that has as its main or primary goal the advocacy of the right to own and possess weapons? If so, please state:

– No –

B. Do you belong to any organization that has as its main goal the prohibition of the right to possess or own weapons? If so, please state:

– NO –

10. Except for a firing range, military use, or whilst hunting, have you ever fired a gun or been present when a gun was fired? If so, please give details.

YES – EVERYBODY ALMOST HAS GUNS.

ACTIVITIES

11. What clubs or organizations do you belong to or have you belonged to in the past?

– NONE –

12. What supervisory experience have you had outside work; please include informal situations as well as offices held in organization:

RANDOM DAILY THINGS

13. Do you belong to, or associate with, or donate to any group that has as its goal the prevention of crime or the enforcement of the law? Yes_____ No_X_
If so, please give details. _____

_____

COURT SYSTEM

14. Do you have any relatives or close friends who are judges, lawyers, bailiffs, clerks or reporters? Yes____ No_X_

If "Yes", state:
Your relationship to that person and the type of work that person does:_____

_____

15. Have you ever had a bad experience with any type of attorney (for example, subjected to a law suit, contracted for services not satisfactory, felt justice not served)?

Yes_____ No_X_ Please explain _____

_____

16. Until the first phase of this case is submitted to you for deliberation, you must keep an open mind, must not form any opinion and must not discuss anything concerning the case with anyone, not even with fellow jurors. Will you have any difficulty with any of these requirements? Yes_____ No_X_

17. During deliberations you must discuss the case with fellow jurors, but must do so only in the jury room and only when all twelve jurors are present. Will you obey this order?
Yes_X_ No_____

If a juror refuses to discuss the case, this is a failure to deliberate. Will you so info the the Court? Yes_____ No_____ DO WHAT NEEDED A TIME

18. During the course of the trial, you must not conduct your own investigation or consult any reference works or persons for additional information. Any such action would be grounds for a mistrial. Will you have any problem refraining from such activities?
Yes_____ No_X_

Will you have any problem informing the court of such actions by a fellow juror if you learn of any? Yes_____ No_X_

19. Do you have any religious or philosophical beliefs which make you not want to sit judgment of another person? If so, please explain.

- NO -

20. If you have ever been a juror before, please state, for each case:

DO NOT DISCLOSE WHAT THE VERDICT WAS IF ONE WAS REACHED

Municipal Superior Federal Coroner's Grand	Year	Civil or Criminal	Nature of Case	Submitted to Jury	Verdict Reached Yes or No
		— NO —			

21. Have you, or has any friend or relative ever been arrested for, charged with, or convicted of a crime? Yes_X_ No_____

A. If "Yes", please explain; state relationship of person to you; state if you attended any court proceedings; state if you thought the person was fairly dealt with by police and the court system.

I HAVE FOR LOADED FIREARMS & TRESSPASING.
AUNT FOR MURDER 1ST. DEGREE - ALL OK

22. Have you, or has any friend or relative ever been a victim of a violent or serious crime, for example, assault, murder, robbery, burglary, rape, domestic violence? Yes_X_ No_____

A. If "Yes", give details of each incident; state relationship of person to you; state whether anyone was caught and punished for the crime; if not, state whether you hold that against law enforcement; state whether or not you were satisfied with the outcome.

UNCLE WAS MURDERED

B. If the crime was an assault of any sort, reported or unreported, was there anything at all about that experience and its aftermath that will cause you to feel that you may not be an impartial juror on a case where violence is alleged?
Yes____ No X Unsure____

Please explain: TOMMOROW IS ANOTHER DAY

23. Have you, or has any friend or relative ever testified in any proceeding?
Yes X No____

If "Yes", please explain: FROM UNCLE'S MURDER TRIAL

A. Please state the outcome of that proceeding, if you know:
?

24. Have you ever been a witness to a crime, or has a relative or close friend?
Yes X No____

If so, please give details: TOO MANY

25. If you know any of the following people involved in this case, please so state: defendant, prosecutor, witnesses, other jurors.
DEFENDANT'S, WITNESSES

26. Do you understand that in every criminal case the defendant is presumed to be innocent, and can only be found guilty if the People prove guilt beyond a reasonable doubt?
Yes X No____

27. This presumption means that the People are required to prove guilt beyond a reasonable doubt.. The defense is not required to do anything or put on any case. The defense is entitled to claim that the People have failed in their proof. If the defense decides to put on no case, will you hold this against the defendant himself? Yes____ No X

28. The defense is also entitled to put on evidence but choose not to have the defendant himself testify. If that happens will you hold that against the defendant?
Yes X No____

29. When a defendant is charged with several crimes, will you consider each crime separately? Yes X No_____

30. When a defendant is charged with several crimes, would you assume that if he were guilty of one crime, then he would be guilty of all the crimes charged? Yes_____ No X

31. A. Have you received any training or education in psychology, psychiatry or medicine? Yes X No_____

If so, please give details: LIVED WITH THEM FOR A WHILE

B. Have you received any psychological or psychiatric treatment, or has a family member? Yes_____ No X

If so, were you satisfied with the treatment? Yes_____ No_____

ACCOMPLICE TESTIMONY

32. An accomplice is a person who was subject to prosecution for the same offense as the defendant. If an accomplice testifies, will you automatically disbelieve such a person? Yes_____ No X

33. Will you automatically believe an accomplice? Yes_____ No X

34. Will you evaluate the testimony of an accomplice by what you see and hear in court, and by reference to the court's instructions? Yes X No X

TIME LAPSE BETWEEN CRIMES AND TRIAL

35. The crimes against Nasser Akbar and James Edge occurred on August 25 & 29, 1994. The reason for such a delay is not relevant in this trial and will not be explained. Will you evaluate the evidence in the trial in a different way from the evidence in a trial of recent crimes? Yes X No _____

NARCOTICS AND DRUGS

36. A. Do you belong to any group which advocates changes to federal or state laws concerning drugs? Yes_____ No X

B. Have you belonged to any such group in the past? Yes_____ No X

If so, please give details:_____

37. Do you know anyone who has used or is presently using drugs? Yes X No____

LAW ENFORCEMENT

38. Do you, any close friends or any relatives have law enforcement experience of any kind (such as police, sheriff, government investigator, district or city attorney, or any other type)? Yes X No____

If yes, please give details:

MY RELATIVE IS AN OFFICER

A. Have you ever applied to work in any law enforcement field? If so, give details.

— NO —

39. Do you feel that the testimony of law enforcement personnel will be more truthful or accurate than civilian testimony? Yes____ No XXX

Please explain: THEY LIE TOO MUCH

40. Do you feel that the testimony of law enforcement personnel will be less truthful or accurate than civilian testimony? Yes X No____

Please explain: DEPENDS ON SITUATION

DEFENDANTS, RACIAL/ETHNIC ISSUES, GENERAL BIASES, MISCELLANEOUS

41. Will you judge the credibility of all witnesses by what you see and hear of them in court? Yes X No____

42. A party, attorney or witness may come from a particular national, racial or religious group, or have a life style different from your own. Would that fact affect your judgment

or the weight or credibility you would give to his or her testimony? Yes_____ No X

43. Are you biased or prejudiced either for, or against, any people because of their race or because of any other group association? Yes_____ No X

44. Did you know anything about this case before you came into the courtroom? Yes_____ No X

If so, please give details: _____

45. Will you be an impartial juror? Yes_____ No_____ DONT KNOW WHAT ASKED?

A. During the brief opportunity you have had in court to see the defendant, is there anything about his appearance that has caused you to have questions or opinions? Yes_____ No X

Please explain: EVERYBODY IS DIFFERENT

46. If there is any reason why you do not want to sit on this case please so state and give the reason.

— NONE —

47. Given what you know about the nature of this case, please list any biases you have which could interfere with your ability to be an impartial juror, if selected to sit on this case:

NO

48. Do you have any type of physical disability, handicap, or any other reason that will make it difficult for you to sit through this trial and give it your full and complete attention? Yes_____ No X

If "Yes", please describe: _____

A. Do you have any difficulty communicating in or understanding the English

language? Yes____ No X

B. You may have to view crime scene and/or coroner's photographs. Is there any reason you would not be able to? NO

ATTITUDES TOWARD CAPITAL PUNISHMENT

49. What is your general opinion or feeling regarding the death penalty? ANOTHER LAW

50. Questions concerning your views on the death penalty are required by law. Please understand that asking the questions does not imply that the defendant is guilty; the jury may not, in fact, even have to decide penalty in this case. However, as there is a possibility of reaching the point where the jury would determine penalty, we have to find out now your views on the death penalty.

If the jury finds the defendant not guilty, the trial will end. If the jury finds the defendant guilty but finds the special circumstances not true, the trial will end. If the jury finds the defendant guilty and the special circumstances true, then there will be a second phase of the trial to determine whether the penalty will be death or life in prison without the possibility of parole. These will be the only two choices of penalty. Because death is one of the choices, the Court must know whether you will be fair to both the prosecution and the defense on the issue of punishment if reached.

Which would you say most accurately states your philosophical **opinion** regarding the death penalty?

_____ strongly in favor _____ moderately in favor
_____ strongly against _____ moderately against
X neutral

51. Do you belong to any group(s) which advocate the increased use or the abolition of the death penalty? Yes____ No X

52. If the prosecution produces evidence beyond a reasonable doubt of the defendant's guilt of first degree murder, would you **refuse to vote for guilt** as to first degree murder or refuse to find the special circumstances true in order to keep the case from going to the penalty phase, where death or life in prison without the possibility of parole is decided?

Yes_____ No_____

53. No matter what the evidence shows, would you **always vote guilty** as to first degree murder and true as to the special circumstances in order to get the case to the penalty phase, where death or life in prison without the possibility of parole is decided? Yes_____ No_____

54. If the jury found the defendant guilty of first degree murder and found a special circumstance to be true and, therefore, reached the penalty phase, would you **always vote against death,** no matter what other evidence might be presented at the penalty hearing in this case? Yes _____ No_____

55. If the jury found the defendant guilty of first degree murder and found a special circumstance to be true and, therefore, reached the penalty phase, would you **always vote for death**, no matter what other evidence might be presented at the penalty hearing in this case? Yes_____ No_____

56. Having answered the above questions regarding your views on the sentences or death and life in prison without the possibility of parole, and if you are selected to sit as a juror on this case, do you feel you are able and willing to put aside completely any thought or concern relating to penalty issues while you deliberate guilt or innocence on these charges? Yes_____ No_____

Please explain: _____

_____

57. If you are selected as a juror in this case, will you base your decision on the defendant's innocence or guilt solely on the evidence and instructions presented to you during trial? Yes_____ No_____

Please explain: LOOK AT IT ALL IN DIFFERENT WAYS

_____

_____

_____

58. Is there any matter you would prefer to discuss privately? Yes_____ No_____

002321

Name_____

EXPLANATION SHEET

If you feel that in the spaces provided, you were unable to answer any particular question fully, please use this area to provide that information. Thank you very much for your cooperation.

I certify, under the penalty of perjury, that the foregoing is true and correct, and that I have received no assistance from any other person in completing this questionnaire.

Executed in the County of Los Angeles 8-21-96.
Date

Robert Jeffries
Signature

PEOPLE v. LOMAX NA 023819

002323

NAME ROBERT JELENIC

NATURE OF CLAIMED HARDSHIP PERSONAL X FINANCIAL

IF PERSONAL GIVE DETAILS NEED ONLY ONE DAY OFF AT LABOR DAY WEKEND

IF YOU SERVE ON THIS JURY WILL YOU SUFFER SEVERE PERSONAL HARDSHIP?

NO

IF HARDSHIP GIVE THE FOLLOWING INFORMATION

NAME OF EMPLOYER _____

NUMBER OF DAYS FOR WHICH EMPLOYER PAYS ALL

IF YOU SERVE ON THIS JURY WILL YOU SUFFER SEVERE ECONOMIC HARDSHIP?

NOT AT ALL

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Darrel Lee Lomax** Crim. No. **S057321**
Superior Court No. **NA023819**

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814.

I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on **May 13, 2005,** as follows:

Mr. Darrel L. Lomax
Post Office Box K-27400
San Quentin State Prison
San Quentin, CA 94974

Ms. Addie Lovelace
Capital Appeal Coordinator
Los Angeles Superior Court
210 West Temple Street, Room M-3
Los Angeles, CA 90012

David Voet
Deputy Attorney General
300 South Spring Street,
S. 5000, N. Tower
Los Angeles, CA 90013

Steven Schreiner
Deputy District Attorney
825 South Maple Street, Room 190
Torrance, CA 90503

Randy Short, Esq.
1611 Crenshaw Blvd.
Los Angeles, CA 90501

Clerk of the Supreme Court
Mary Jameson
350 McAllister Street, Room 1295
San Francisco, CA 94102

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

Executed on **May 13, 2005**, at Sacramento, California.

Saundra Alvarez