ORIGINAL

No. S058537

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

SCOTT FORREST COLLINS

Defendant and Appellant.

Los Angeles County
Superior Court No. LA009810

APPELLANT'S OPENING BRIEF

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

HONORABLE LEON KAPLAN, JUDGE
HONORABLE HOWARD SCHWAB, JUDGE

LYNNE S. COFFIN
California State Public Defender

KENT BARKHURST
Deputy State Public Defender
California Bar No. 87832

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

DEATH PENALTY

STATE OF CALIFORNIA ARNOLD SCHWARZNEGGER, *Governor*

OFFICE OF THE STATE PUBLIC DEFENDER
221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600
FAX: (415) 904-5635

January 23, 2004

Honorable Frederick K. Ohlrich
Clerk, Supreme Court of California
350 McAllister Street, 1st Floor
San Francisco, California 94102

Attn: Mary Jameson, Automatic Appeals Unit Supervisor

Re: *People v. Scott Forrest Collins, No. S058537*

Dear Ms. Jameson:

Accompanying this letter is the opening brief in the above-referenced automatic appeal. The brief was due to be filed yesterday, January 22, 2004. We encountered production delays yesterday, including a substantial office-wide computer network crash, that made filing then impossible.

I apologize to the Court for any inconvenience caused by this delay.

Respectfully submitted,

KENT BARKHURST
Deputy State Public Defender

Attorney for Appellant

cc: Theresa Cochrane, Deputy Attorney General

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

CONSTITUTIONS

TABLE OF AUTHORITIES

Page(s)

STATE STATUTES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

COURT RULES

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

STATEMENT OF FACTS

On Thursday, January 23, 1992, Fred Rose left his office in Lancaster at about 1 or 1:30 p.m. to get lunch. He never returned. Rose was found that evening near some railroad tracks in North Hollywood with a single gunshot wound to the head. People living in that area had heard two gunshots sometime between 6 and 6:30 p.m. Rose died the next morning, January 24, 1992.

Appellant, Scott Collins, was arrested on Friday night, January 24, 1992, in Bakersfield. He was the passenger in a car with five other people that crashed after a short chase by the police. The car that crashed belonged to Fred Rose. Appellant was 21 years old at the time of his arrest.

Appellant ultimately admitted stealing Rose's car, but denied kidnaping, robbing and murdering him; he found Rose's car unlocked with the keys in it and Rose's wallet. Appellant also had an alibi for the evening on which Rose was shot: he was at the home of Sylvia Gomez, which was over 14 miles from where Rose was found.

At the penalty phase, the prosecutor presented evidence of various acts of juvenile misconduct by appellant, two adult convictions and prison term for armed robbery. She also presented evidence of several acts of misconduct by appellant in the county jail while awaiting trial on this case. Appellant's mitigation case was based on the failure of the authorities and appellant's mother to respond appropriately to signs that appellant needed help as a juvenile. Additionally, appellant presented evidence that appellant would adjust well to prison if given a sentence of life without the possibility of parole.

THE PROSECUTION GUILT PHASE CASE

A. Fred Rose Fails to Return from Lunch

Fred Rose worked for Marriot Diversified Services, a construction company in Lancaster, which built and maintained service stations. (RT 2455, 2485.) He sometimes drove to job sites in his company car, a silver 1983 Oldsmobile Cutlass. (RT 2457.) On January 22, 1992, Rose was on a job in Fontana which required him to spend the night. (RT 2456.) He returned to the office the next day, January 23, around 1 p.m., stayed for about and hour and then went to lunch. (RT 2456.)[1] He said he was going to get a burger. (RT 2487.) Rose usually ate lunch somewhere on Avenue I in Lancaster, within a mile and a half of the office, where there are numerous fast food restaurants. (RT 2463, 2473-2475.) Rose did not return to the office after leaving for lunch. (RT 2467, 2488-2489.)

B. Fred Rose Is Found Shot

Rose was found around 8:45 p.m. on January 23, 1992, near some railroad tracks around the intersection of Chandler and Clybourne in North Hollywood. He was still alive, with a single bullet wound to the head.

Three nearby residents heard shots that evening. John Kirby lived in the vicinity of Chandler and Clybourne in North Hollywood in 1992. (RT 2498.) On January 23, between 6 and 6:30 p.m. Kirby heard two shots from a large-caliber gun about three to five seconds apart. (RT 2498.) He walked outside to see what was going on. (RT 2499.) While he was standing at the corner of Chandler and Clybourne, he saw a car pull away

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[1] Barbara Cobb, another employee at Marriott, testified at the preliminary hearing that Rose went to lunch at 3:15 p.m., but at trial said that testimony was incorrect. She said Rose went to lunch at 2:15 p.m. (RT 2490.)

from the curb and drive westbound on Chandler with no lights on. (RT 2501-2502.) It was getting dark and he did not see the car's license plate number. (RT 2502, 2504.) He could not see anyone in the car. (RT 2509.) At the time, Kirby did not associate the car with the shots he had heard. (RT 2502.) Kirby thought the car in People's Exhibits 1 and 14, which was Rose's Cutlass, looked like the car he saw driving away, but he could not be sure. (RT 2504.) When he first talked to the police, he told them the car he saw was likely a Buick Riviera; his brother-in-law used to own a Riviera and it looked like that car. (RT 2505.)

Another resident in the Chandler-Clybourne neighborhood, Robert Chandler, also heard two shots between 6 and 6:30 p.m. on January 23. (RT 2518.) He went outside to look, and as he turned to go back inside he saw a car on Chandler going west toward Cahuenga with its lights off and driving very slowly. (RT 2518-2519.) The taillight configuration and certain features on the bumper looked like those of the Cutlass in People's Exhibits 1 and 14. (RT 2520-2521.) But when Chandler talked to the police about a week after the incident he said that the car was white, tan or beige and reminded him of his cousin's Pontiac Grand Prix. (RT 2524.) He saw only the silhouette of a driver. (RT 2522.)

A third resident of the same neighborhood, Linda Ryan, heard the two shots between 6:20 and 6:30 p.m. (RT 2544.) She looked out her window and saw a car driving west on Chandler with its lights off. (RT 2545.) She initially told the police that the car had two long rectangular taillights and a small "blip" on the bumper that looked like it could be a

decal.[2] (RT 2546.)

Richard Hamar was the first to find Fred Rose. Hamar was jogging east along the railroad tracks near Chandler Street toward Hollywood Avenue around 8:45 p.m. on January 23 when he saw a man, subsequently identified as Rose, laying on the ground with his arms up and sounding "like he was drunk." (RT 2568-2569, 2576; Peo. Exh. 5.) Hamar kept jogging, but when he returned the same way 20 minutes later and found the man still there he decided something was wrong. (RT 2570.) He ran to call 911 and the emergency personnel arrived about 15 to 20 minutes later. (RT 2572.)

Numerous shoe prints were found around the crime scene. Ron Raquel, a Los Angeles Police Department criminalist with some expertise in shoe prints, looked at approximately 45 photographs of the crime scene which contained shoeprints. (RT 3793.) He compared them to a pair of size 13 Nike Driving Force shoes taken from appellant. Raquel believed that the images in some of the photographs showed the same model of Nikes which were size 12-½ to 13-½. (RT 3835.) Raquel could not conclude that appellant's shoes made the prints left at the crime scene, and acknowledged that appellant's shoes had individual characteristics, such as imbedded stones, which did not appear in the photographs from the crime scene. (RT 3832.) Moreover, none of the photographs showed a complete heel to toe print. (RT 3836.) Nevertheless, Raquel believed appellant's shoes could have made the shoe impressions depicted on the crime scene pictures. (RT 3857.)

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[2] There was no such decal on the bumper of Rose's car. (See Peo. Exhs. 1, 14.) When Ryan looked at photos of Rose's car, she claimed a small white light on the bumper was the "blip" she saw. (RT 2547, 2553.)

Raquel had no opinion as to how long the shoeprints in question had existed. (RT 3844.) No casts were made of any shoe prints at the crime scene.

According to Detective Jesse Castillo, these Nike shoeprints in two separate places were "a few feet" from the pool of blood around Fred Rose's body. (RT 3981-3982; Peo. Exh. 51.) During the proceedings pursuant to appellant's new trial motion, however, Castillo acknowledged his testimony contained an error and that, in fact, the closest Nike shoeprints found were approximately 15 feet away. (CT 1241; see RT 4081-4082.)

Rose was transported, still alive, by ambulance and helicopter to Northridge Hospital. (RT 2615, 2626.) He was brain dead when life support was turned off the next day at 11 a.m. (RT 2993.) The cause of death was a gunshot wound to the head. (RT 3873.)

According to forensic pathologist William Sherry, who conducted the autopsy of Rose, small lead fragments left in Rose's skull indicated that the bullet had some area of exposed lead. (RT 3875.) These fragments, combined with the fact that no jacket fragments were found, caused Sherry to favor a theory that the weapon used was a revolver rather than an automatic. (RT 3876.) Sherry also believed, based on the nature of the injury he observed, that the bullet was of a medium caliber (RT 3876), meaning the weapon firing it was between .32- and a .41-caliber (RT 3889).

The bullet entered the upper right-rear portion of the head and exited through the forehead on the right side. (RT 3873.) In Sherry's opinion, the wound was "back to front, slightly left to right and slightly downward." (RT 3878.) It would be consistent with the shooter being a little taller than the victim or holding the gun a little over his head. (RT 3878.) It would

also be consistent with the victim kneeling. (RT 3878.) Such a downward track could also have occurred if Rose's head had been tilted backwards when the bullet struck. (RT 3880.) The absence of stippling, tattooing and searing indicated that the gun was at least 18 inches away from Rose's head when it was fired, and taking into account the effect the bullet had, could have been as much as 100 feet away. (RT 3887.) It was less likely, but possible, that the bullet was fired from a .357 Magnum or a 9-millimeter revolver or automatic. (RT 3891.)

During the autopsy, Sherry noted several other minor injuries to Rose. There were small abrasions to the proximal knuckle of the index finger on the left hand, to the knee and just below the knee, and a bruise on the left elbow. (RT 3877.) Sherry did not indicate when Rose sustained these injuries except that they occurred some time before his death. (RT 3879.)

C. Appellant is Identified Using Fred Rose's Bank Cards

Mary Collins is appellant's mother. (RT 2676.) On January 23, 1992, Collins dropped appellant off in Lancaster on 10th Street West between I and J Streets at about 11 a.m. (RT 2677.) Collins lived in Palmdale, but in 1986 had lived with her son at 4847 Cahuenga Boulevard in North Hollywood. (RT 2678.)

At 4:05 p.m. on January 23, Fred Rose's First Interstate Bank ATM card was used to withdraw $200 from the Northridge Branch. (RT 2684.) There was an unsuccessful attempt to make another $200 withdrawal at 4:06 p.m. at the same ATM with the same card. (RT 2707.) Carolyn LeBlanc identified appellant as looking like the young man she saw around 4 p.m. on January 23 using the ATM at that bank. (RT 2684.)

Another $200 withdrawal was made from Rose's account the next

day at 11:22 a.m. at an ATM in Bakersfield. (RT 2708.)

Rezaul Kahn was an attendant at the 24 Hour Le Mans Chevron gas station on Moorpark in North Hollywood on January 23, 1992. (RT 2731, 2734.) He was on duty about 9:30 p.m. that night when someone looking like appellant came into the station to buy gas and beer. (RT 2731.) That person used Fred Rose's Chevron credit card to buy gas (RT 2734; Peo. Exh. 21) and attempted to buy beer, but did not do so after Kahn attempted to write down the identification information the man presented (RT 2732-2733). An examiner of questioned documents found that although there were strong indications that appellant had signed the credit card slip used in this transaction, she could not conclude that he had done so. (RT 3742-3745.)

There was no evidence that suggested a person or body had been held or hidden in the trunk of Rose's car. (RT 3782.)

D. Appellant Visits His Girlfriend In Bakersfield

Maria Salome Gutierrez, known as Salo, lived in Bakersfield and was appellant's girlfriend in 1992. (RT 2858.) On January 23, 1992, appellant visited Salo unexpectedly, arriving at her home around 10:30 or 11 p.m. (RT 2860.) The next morning they bought beer at the Tecate Market and went to the nearby home of Salo's cousin, Dagoberto Amaya, also known as Junior or Drifter. (RT 2863-2865.) Starting in the afternoon, there was a party at Drifter's house. Appellant and Salo joined Drifter, Larry "Soldier Boy" Castro, and "Sad Boy" whose given name is Rudy. (RT 2902.) Arriving later were Salo's brother Mario, Mario's friend Eddie and Salo's cousin, Arturo "Turo" Amaya. (RT 2903.)

Still later, Sergio Zamora, "Jokey Boy" and "Lazy Boy" showed up. (RT 2871, 2904.) Then others showed up who Salo did not know. (RT

2904.) A bonfire was started in the back yard. (RT 2871.) The drinking lasted all day and all night; everyone was getting drunk. (RT 2873, 2904.) While they were partying, there was a time when Drifter was there with his girlfriend, Debbie Jiminez. Debbie was mad because Drifter had started drinking without her. (RT 2907.) At one point when they were arguing, Drifter pulled a gun out of his pocket and put it to his head, saying he was going to shoot himself. (RT 2912.) Salo had never seen the gun before and did not know where it came from. (RT 2913, 2914.) To her knowledge, Drifter didn't own a gun. (RT 2893.) Appellant jumped on Drifter and took the gun away. (RT 2894, 2912.)

The rest of the prosecution's case pertaining to this party, and the events which devolved from it and led up to appellant's arrest, were recounted primarily through the testimony of various juveniles who were members or associates of a Bakersfield gang known as Varrio Bakers or Varrio Baker. Appellant's only connection with this gang was through Gutierrez. The Varrio Bakers cast of characters included the following:

– Michael "Jokey Boy" Hernandez, who was 18 years old at the time of trial and incarcerated at the California Youth Authority for second degree burglary. (RT 3496.) Hernandez was a member of the Varrio Bakers gang and had prior arrests for assault with a deadly weapon, and for public intoxication two or three times. (RT 3496-3497.)

– Sergio "Lonely Boy" Zamora[3], a 17-year-old member of Varrio Bakers gang who was on probation for breaking and entering into a school. (RT 3298-3299.) Zamora had also been arrested for two instances of driving under the influence, and approximately five times for being

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[3] Zamora was also known as "Javier."

intoxicated. (RT 3300.)

– Lorenzo "Grande" Santana was a member of Varrio Bakers. He was 14 years old at the time of the events of this case. (RT 3379.) At the time of trial he was 16 years old and incarcerated at CYA for committing a hit and run. (RT 3379.) He had other encounters with law enforcement, including shoplifting and possessing a knife at school. (RT 3380.)

– David Camacho, who was 15 years old at the time of arrest in this case (RT 3048), claimed he was not a member of the Varrio Bakers gang (RT 3075). At the time of his testimony, he was on probation for joyriding and admitted to previously being arrested for not going to school. (RT 3061.) He had also been arrested for "some other things" but was unsure of the reasons for those other arrests. (RT 3061.)

– Dagoberto "Drifter" Amaya, also known as Junior, was a member of Varrio Bakers at the time of these events, but testified that he did not "go out gang banging" any more. (RT 2951.) He had previously told the police that he had been "jumped out" of Varrio Bakers – meaning that he had formally quit the gang – but that was not true. (RT 3011.) He was 20 years old at the time of trial and was on probation for grand theft auto. (RT 2952.) He also had previous arrests for possession of a weapon – a knife with brass knuckles – in 1992. (RT 2952-2953.) He served time in jail for both these crimes. (RT 2953.)

These juveniles, in telling the story of an evening of heavy drinking, a robbery of purported drug dealers, and a drive-by shooting in the territory of a rival gang, produced a raft of contradictory statements which over time became more self-serving and generally more inculpatory as to appellant. None of these juveniles suffered any adverse legal consequences from their activities that night – neither juvenile or adult criminal charges were

brought, nor any actions to revoke probation. Yet each of the juveniles claimed no promises or favors were provided to them by the prosecution.

"Lonely Boy" Zamora's story. Zamora had about 10 to 15 beers while at Drifter's house that day. (RT 3306.) According to Zamora, Hernandez was driving and appellant was in the passenger seat when they did the drive-by shooting. They drove to the Colonias, an area of town which was the turf of a rival gang of the same name. When they arrived, someone threw a brick at them and hit the car. (RT 3310.) They drove away and parked in a field. Appellant then got the gun and "he had a little nail on the bottom" that helped the gun work. (RT 3310, 3314.) He put one bullet in and fired the gun. Then he got another nail from the back of the car, put it in the gun and they drove back to the Colonias. (RT 3310.) At the Colonias, appellant fired two shots. (RT 3310.)

After they drove off, the police started chasing them. (RT 3311.) During the chase appellant started throwing things out of the car, including the gun, bullets, credit cards and possibly a black watch, although at most Zamora had seen only the wristband of the watch. (RT 3312-3313.)

Zamora claimed that during the chase appellant "said he had kidnaped a guy and took him to the bank and got some money and he killed him . . . he shot him." (RT 3315.) At the preliminary hearing Zamora had testified that appellant said the shooting was in "L.A." and that appellant had shot the person "in the head." (RT 3317, PXRT 278.) But at trial he acknowledged the statement about shooting someone in the head was a lie. (RT 3317.) He also acknowledged that prior to the preliminary hearing he had never told anyone about appellant saying he shot someone in the head. (RT 3318.) Zamora also claimed he lied to the police when he first talked to them because he was afraid of appellant. (RT 3319.) At that time he had

told Detective Castillo that "a homeboy" committed the crime. (RT 3320.)

It was only a few days before testifying at trial that for the first time Zamora told the prosecutor and the police that he remembered appellant saying he had taken the man while the man was going to get something to eat and that he took the man to the bank and got $100 or $200 dollars. (RT 3322-3323.) Zamora claimed he had been too frightened before to tell these things. (RT 3323.)

Zamora explained that during his testimony his nervousness was the reason he said that he kept forgetting what it was he was supposed to say. (RT 3325-3326.) Zamora became recalcitrant during cross-examination, indicating at one point that he spent the three hours between 1 p.m. and 4 p.m. on January 24 "ironing my pants." (RT 3335.) He also apparently called defense counsel an "asshole" sotto voce. (RT 3337-3338.) He answered numerous question with a claim of not being able to remember. He hit his head on the dashboard when the car crashed, and told the police that he could not remember anything because of that injury. (RT 3342-3343.) At trial, he said his claimed lack of memory was actually a lie. (RT 3349.)

"Jokey Boy" Hernandez's story. Michael Hernandez was driving the car when it crashed. His memory of the evening was so poor he could not even be certain whether or not he had been driving the car during part of the trip to the Colonias. When defense counsel questioned him at trial, Hernandez responded over 50 times with claims that he did not remember. (RT 3547-3581, 3642-3651.)

Hernandez arrived at Drifter's party at about 5 or 6 p.m. (RT 3500.) He had already been drinking Cisco, a fortified wine, when he arrived. (RT 3554-3556.) Not long after arriving at the party, Hernandez, Santana, the

unnamed "veterano" and Soldier Boy left with the stolen car and the gun to go rob a drug dealer. (RT 3502.) By this point, Hernandez had consumed two Ciscos and seven or eight beers. (RT 3558.) They returned from the robbery with a VCR. (RT 3508.) The gun they used was the only one that was around – the .38 caliber gun that appellant was showing around. (RT 3505.) Hernandez had originally told the police that appellant would not let anyone else touch the gun, but that was not true. (RT 3542.) Hernandez testified that appellant told him during the evening that the gun had a murder rap on it. (RT 3505.) He had previously stated that he only overheard this statement. (RT 3560.) Hernandez was aware as they were passing the gun around that it did not work properly and needed a nail to fire. (RT 3508-3509.)

Hernandez and appellant had met a week earlier when appellant was with "two other guys" who "were from the Loma," another Bakersfield gang. (RT 3511.) He had told the police that "Drifter" had introduced appellant to him, but that was not true. (RT 3525.) Hernandez said that he and appellant "had some business to take care of" with the Colonias. (RT 3510-3511.)

Contrary to what most of the other gang members said, Hernandez claimed he was driving the car when they went to the Colonias. (RT 3511.) Hernandez said he was driving when the drive-by shooting happened and never switched places with appellant (RT 3566, 3574) although he expressed some uncertainty on this latter point (RT 3511-3512). Hernandez had originally told the police that on the way to the Colonias they stopped at the Tip Top Market, which was consistent with appellant's later testimony, but Hernandez at trial claimed he had made this up. (RT 3566.) He did not remember if there was another car of gang member driving to the Colonias.

(RT 3572.)

Hernandez claimed appellant did the shooting during the drive-by, but that he provide appellant with the bullets – hollow point bullets which Hernandez brought from his house. (RT 3513-3515.) Appellant fired only one shot. (RT 3647-3648.) When they saw the police after the drive-by, Hernandez panicked and sped up to get away. (RT 3515.) He did not remember appellant saying anything at that time. (RT 3516.)

Hernandez did not see appellant throw anything out of the car; he was busy driving. (RT 3517.) He did not remember if he was the one who told appellant to throw the gun out the window. (RT 3579.)

Hernandez said that when the car crashed he heard appellant say the car had a murder rap on it. (RT 3517.) At juvenile hall, where he was taken after the arrest, Hernandez was drunk and remembered little or nothing about his conversations with the police there. He did not remember telling the police that appellant put a gun to his head and told him to keep driving during the chase. (RT 3516.)

"Grande" Santana's story. Santana first met appellant when he arrived at Drifter's house around 4 p.m. on January 24. (RT 3381.) During the course of the evening, Santana drank about 20 beers. (RT 3451.) His memory of the events that evening seem to have been significantly compromised as evidenced not only by the inconsistency in his responses, but by his claims of not remembering, particularly to questions posed by defense counsel.[4]

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[4] Santana's memory failed him on over forty questions asked by the defense. To numerous *other* questions Santana said he could not remember, but had his recollection refreshed by defense counsel using Santana's

(continued...)

Santana did remember going out in the stolen car that evening with three other gang members and committing a robbery. (RT 3384-3385.) They returned with a VCR, a wallet, a credit card and some money as their loot, which they put back in the car. (RT 3387.) Prior to this adventure, Santana claimed to have overheard a conversation between appellant and Larry "Soldier Boy" Castro in which appellant was "talking about the gun and the murder on it." (RT 3383.) When he was first interviewed by the police, he did not tell them much. (RT 3397.) When he talked to Sergeant Coffey later, he told Coffey appellant threw the gun out the window, and that appellant, when he was talking to Soldier Boy, mentioned that he "got" the guy he killed at a liquor store. (RT 3399.) But Santana quickly changed his mind about what appellant said; after Santana spoke to Coffey, he told another officer that appellant had only said that a friend of appellant's had told appellant something about a murder and the gun. (RT 3401.) Santana had told police officers in an interview on January 30, 1992, that appellant said nothing about being involved in a murder until they were in the car. (RT 3409-3410.) On cross-examination, Santana agreed that statement was true and that appellant could not have made the statement about murdering someone to Castro earlier. (RT 3410.) Santana apparently did not see any discrepancy between this statement and his earlier testimony. (RT 3410.)

The first time Santana saw the gun was at "Drifter" Amaya's house. It was under some boards laying in the backyard. (RT 3415.) Amaya lifted up the boards and picked up the gun and showed it to appellant. (RT 3415-3416.) Appellant looked at the gun and said something about it being

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[4](...continued)
previous testimony or statements.

"messed up." (RT 3417.) After Amaya showed the gun to Santana, he put it back in his pocket and then back under the boards. (RT 3418.) This was about half an hour before Santana went with Castro and Hernandez to commit the robbery. Castro had the gun after the robbery. (RT 3424.) Some time after they returned from the robbery was when Amaya put the gun to his head. (RT 3425.) Santana did not see what happened to the gun after appellant took it away from Amaya. (RT 3428.)

When Santana left Amaya's again, it was to go cruising around the Colonias. (RT 3389.) It was Hernandez's idea to go there. (RT 3425.) He remembered the rival gang throwing rocks at the car and appellant stopping and shooting back at them one with the .38 caliber gun that was being shown around at Amaya's house. (RT 3389-3390.)

After leaving the Colonias, the police started chasing the car. (RT 3394.) Santana remembered appellant telling Hernandez to drive faster. (RT 3395.) The chase ended with the car crashing. (RT 3394.) As soon as they crashed, appellant said that there as a murder rap on the car. (RT 3394.) But on cross-examination, Santana said that after the crash, in the couple of minutes before the police got them out of the car, appellant passed out cigarettes but did not say anything. (RT 3449.) He re-affirmed this on redirect examination, (RT 3473), but then contradicted himself again and said appellant said the car had a murder rap on it. (RT 3474.) He acknowledged that he did not have a good memory of these events because he was drunk. (RT 3485.)

Santana did not see the appellant throw a gun out the car window. (RT 3395.)

Drifter Amaya's story. The party on Friday was at Drifter's house. They were drinking a lot – Drifter had 10 to 20 beers. (RT 2959, 2969.)

During the evening, a gun was passed around. (RT 3016.) Drifter had been fighting with his girlfriend, and when he got the gun, he pointed it at his own head. (RT 2963.) Everybody grabbed him and took the gun away. (RT 2963.) Drifter was not sure who passed the gun to him, although he had previously stated that appellant passed it to him. (RT 3016.)

During the evening Drifter saw that appellant had two credit cards with him – a bank card and a Chevron card – with a name on them which he told the police was something like Fred Jose. (RT 2962.) At trial, Drifter testified that he found the Chevron card on the ground the next day and tossed it in the trashcan where the bonfire from the previous night was still burning. (RT 2964.) Debbie was not present when he burned the card. (RT 2965.) But Drifter told a number of different stories about this credit card. He first told the police that he had burned the card on Friday night. (RT 3013.) Then he changed his trial testimony to acknowledge that in fact his little brother Arturo was the person who had burned the credit card. (RT 3006.) He had lied because he did not want Arturo to get into trouble. (RT 3007.) He had Arturo burn the card because he, Drifter, was on probation at the time and was worried about being caught violating his probation by associating with gang members. (RT 3008.)

In talking to appellant during the evening, appellant never said anything to Drifter about killing anyone. (RT 3030.)

David Camacho's story. Camacho's involvement in this case started around 7 p.m. on January 24, when "Jokey Boy" and "Grande" picked him up. (RT 3049.) Camacho met appellant for the first time that night, either at the cemetery near Drifter's house where part of the party occurred, or at Fremont High School. (RT 3048.) Later they went cruising in the gray Oldsmobile appellant had. (RT 3052.) Camacho was in the car when the

trip was made to the Colonias, which was followed by the crash and arrests. The key portions of Camacho's testimony from the prosecutor's perspective were those regarding two statements purportedly made by appellant in the car prior to the arrest. But Camacho, like the other juveniles, gave such conflicting reports of appellant's purported statements that he was not credible. Camacho claimed that in his first interview with the police he lied (RT 3078), but that when he spoke to Detective Castillo later, he told the truth (RT 3202). Furthermore, he said he told the truth at the preliminary hearing as well. (RT 3085.) Yet the jumble of irreconcilable inconsistencies between the interview statements, preliminary hearing and trial belied Camacho's overall truthfulness and credibility.

When the police first interviewed Camacho, they asked him for a statement confirming that appellant had said something about making a murder in Los Angeles. (RT 3079, 3204.) Camacho told the police he heard no such statement. (RT 3206.) When the police returned later, however, Camacho changed his statement and agreed that after the car crashed appellant said "he's going to the county because he had the murder up in L.A." (RT 3056.) Camacho then offered the police the additional detail that appellant said that the gun used in the drive-by was the same gun used in the Los Angeles murder. (RT 3081.) But at the preliminary hearing Camacho denied appellant said this about the gun. (RT 3089, 3218-3219; CT Supp.III 225.) At trial, Camacho initially continued to deny appellant said anything about using the same gun, but after the prosecutor showed him his statement to the police to the contrary, he again claimed appellant said he used the same gun in both incidents. (RT 3079, 3081, 3089.) He explained his testimony at the preliminary hearing as being because "the other attorney got me too mixed up." (RT 3090.)

The other statement Camacho attributed to appellant was that the gas can in the back seat of the car was to be used to burn the car. (RT 3082.) This statement was purportedly made in the car while they "were cruising around" before getting to the Colonias. (RT 3082.) At trial, Camacho initially said that he was not sure why appellant wanted to burn the car. (RT 3082.) But the prosecutor pointed out that Camacho had told Castillo in his January 25 interview that appellant had said he wanted to burn the car because he had made a murder in Los Angeles. (RT 3083.) Of course, that conflicted with Camacho's other statements that the first time appellant mentioned the murder in Los Angeles was after the car crashed. It also conflicted with his preliminary hearing testimony that the reason given for burning the car was that it was stolen, and he did not know who made that statement. (RT 3087, CT Supp.III 224-25.) On redirect examination at trial, Camacho gave yet another version, saying they were going to burn the car "because of the drive-by." (RT 3249.) When it was pointed out that this was before the drive-by occurred, Camacho had no answer other than to say he was confused. (RT 3250.)

E. The Crash and Arrests

Kern County Sheriff Deputy Francis Moore began following the Cutlass around Lakeview Avenue and East California Avenue. (RT 2755.) When the driver noticed Moore, he sped up, and Moore pursued. (RT 2757.) The chase lasted about four minutes. (RT 3656.) Moore was the first officer at the scene where the car crashed. (RT 2759.) He got out of his car and ordered the passengers to remain in the crashed car while he waited for back-up officers. (RT 2759.) There were six people in the car; Moore believed appellant was sitting in the right front passenger seat. (RT 2761.) While waiting for back-up, Moore received a broadcast on his

portable radio that the car was wanted in connection with a homicide in Los Angeles. (RT 2784.)

The juveniles and appellant were taken into custody. Deputy Moore searched the car after all the occupants had been removed. He found a knife on the front floorboard; a partially-filled red gas can in the backseat; and a wallet, subsequently identified as belonging to Fred Rose, in the glove compartment. (RT 2763-2765.) He also found a plastic bag containing broken pieces of ceramic spark plug insulation. (RT 2770.) Outside the car the police found the keys to the car, and Fred Rose's First Interstate Bank Card. (RT 2767.) Nearby were a round of live ammunition and an empty shell casing. (RT 2768-2770.)

Deputy Sheriff David Lostaunau interviewed each of the juveniles after they had been taken into custody. All the juveniles had been drinking alcohol. (RT 3670.) Sergio Zamora told Lostaunau that someone had discarded the gun used in the drive-by out the window during the chase. (RT 2772, 2833, 3668.) Searching the chase route, the police found a .38-caliber RG brand revolver with the hammer broken off located near some housing projects on Robinson Street between East 11th and East 10th Streets. (RT 2773.) The gun contained two casings that had fired and two that had misfired. (RT 2774.)

Forensic fingerprint experts found no prints usable for identification on the gun, several bullets and spent casing which were tested, the First Interstate Bank card, two recovered knives, or Fred Rose's wallet. (RT 3721-3726, 3730-3734.)

At the time of his arrest, appellant appeared to have been drinking as his face was flushed and his speech was thick. (RT 3171.) He was wearing a dark-colored coat, blue pants, Nike tennis shoes and a Los Angeles Lakers

baseball-style cap. (RT 3158.)

During the booking search, the police found three live rounds of .38 caliber ammunition in appellant's pockets. (RT 3160-3162.) When the deputy who found the ammunition began discussing it with another deputy, appellant stated, "You ain't going to pin no shooting on me." (RT 3167.)

Appellant was interviewed by Los Angeles Police Detective Jesse Castillo at around 4:40 a.m. (RT 3997.) Appellant told Castillo he had just been picked up in the car at 3rd Street and Whitlock Street in Bakersfield and that the only person he knew in the car was Javier, referring to Sergio Javier Zamora. (RT 3998-3999.) Appellant told Castillo that he had been drinking with his girlfriend, Salome Gutierrez, at the house of her cousin. (RT 3999.) Asked by Castillo about a drive-by shooting, appellant said he did not know about a drive-by and was not there if one occurred. (RT 4000.) Appellant said he believed the police pulled them over because the driver of the car was drunk; that he was not present for any drive-by shooting and did not know what Castillo was talking about. (RT 4000.)

F. Other Prosecution Evidence

A letter written by appellant while awaiting trial in county jail on this case was intercepted by the sheriff's department and introduced as evidence of consciousness of guilt. The letter, which was intercepted by the jail and never delivered, identified several of the Varrio Bakers juveniles as "ratas" and asked a "Mr. Woody" to "put palabra to the calles" to put the juveniles "in check." (Peo, Exh. 55, RT 4195.) Los Angeles Sheriff Deputy Louis Alain, who had taken a course in gang terminology (RT 4184-4185), testified that "ratas" meant "snitches." In Alain's opinion, appellant's request to put the juveniles "in check" meant to intimidate, using means which could range from a verbal warning, to a beating, or even killing. (RT

4188.) Appellant subsequently explained that the letter was not a contract at all. (RT 4533.) He wanted someone to get in touch with the juveniles to tell them to stop lying; that they were "being foxed" by the prosecution. (RT 4533.)

THE DEFENSE GUILT PHASE CASE

A. Appellant's Testimony

Appellant testified on his own behalf. He admitted taking Fred Rose's car, but denied kidnaping, robbing or killing Fred Rose. He found the car with the keys in it and Rose's wallet. He did not commit the drive-by shooting in Bakersfield, and he did not provide or use the gun found near the crash of Rose's car.

1. Appellant's Unsuccessful Search for Work

Appellant went to Lancaster on January 23, 1992, around 10:30 to 11:00 a.m. to look for work, including checking at businesses where he had previously filled out job applications. (RT 4410.) His mother dropped him off around 10th Street a couple blocks from Avenue I. (RT 4411.) He walked down Avenue I, toward the unemployment office, inquiring at McDonald's and Burger King. (RT 4411.) He looked for two to three hours, but the job situation in the region was "real bad" so he started heading home to Palmdale around 1:30 or 2:00 p.m. (RT 4412.)

While trying to hitchhike a ride home, he saw a car parked near the intersection of Avenue I and the Sierra Highway with its keys in it. (RT 4413-4416.) This was Fred Rose's Cutlass. (RT 4414.) Frustrated that things were not working out, appellant wanted to get away, so he decided to take the car "for a cruise" to Los Angeles. (RT 4417.) Although the doors were locked, the passenger side window was slightly open, allowing appellant to bend the window enough to unlock the door. (RT 4419.)

Appellant took the car and headed for Reseda. (RT 4422.) He stopped for gas and searched the car, finding Rose's wallet in the glove compartment. (RT 4421, 4423.) In the wallet appellant found various cards, including a First Interstate Bank card and a cream-colored card with what appeared to be an ATM PIN number written on it. (RT 4424, 4426; Peo. Exh. 4-A.)

In Reseda, appellant stopped at the First Interstate Bank at Tampa and Nordhoff and withdrew $200 using the ATM card. He wore a hard hat while making the withdrawal in hopes of hiding his face. (RT 4430.)

2. Appellant Visits Sylvia Gomez

After getting money from the ATM, appellant went looking for his friend Javier in Reseda, but was unable to find him. (RT 4432.) Next, he decided to visit his friend Sylvia Gomez and headed for Sylvia's mother's home in East Los Angeles. (RT 4433-4434.) He arrived there at 5:30 or 6:00 PM. (RT 4434-4435.) Sylvia was there with her three kids and her boyfriend, Joe Valle. (RT 4436.) He stayed about one-and-a-half to two hours, leaving for Bakersfield around 8 p.m. (RT 4436-4437.)

3. Appellant Goes to Bakersfield

Appellant did not go directly onto the freeway because he "wanted to see the city." (RT 4438.) He went through downtown, past MacArthur Park, and into Hollywood. (RT 4438.) He stopped at a McDonald's near the freeway on-ramp at Highland Avenue. (RT 4439.) There he ran into an old acquaintance, Ron Delgado, to whom he talked for a few minutes. (RT 4439.)

After eating, appellant headed for Bakersfield. He stopped for gas on the way at the Chevron station where Rezaul Khan was the attendant. (RT 4440.) Appellant used Fred Rose's credit card and tried also to buy some beer, but left when Khan asked for identification. (RT 4440-4441.)

Appellant arrived in Bakersfield about 11 p.m. (RT 4441.) He spent the night with his girlfriend Salo Gutierrez at the home of Olga and Tony Munoz. (RT 4447.)

4. Events of January 24

The next morning appellant went to the bank and used the ATM card again to get another $200. He still had almost all of the money from $200 he had obtained the night before. (RT 4453-4454.) Around noon, he bought two quarts of malt liquor at the nearby Tecate Market and started drinking with Sergio Zamora at Olga and Tony's house. (RT 4456-4457.)

Around 1 p.m. he returned to Salo's house and called his mother. He told her he would return home that Monday. He told her he got to Bakersfield hitchhiking and had earned some money doing odd jobs at construction sites. (RT 4460-4461.) Next, appellant went back to the store and bought four more quarts of beer. (RT 4462.) He went to Drifter's house and began drinking with Salo and Drifter. Sergio Zamora soon showed up and joined the drinking. (RT 4463-4464.) They soon ran out of beer, so appellant and Salo went to get more around 3 or 3:30 p.m. (RT 4465.) There had not been a plan to have a party, but Drifter's "homeboys" kept coming and going, so appellant decided they could join in. (RT 4465.)

When they returned with the beer around 3:30 or 4 p.m., Soldier Boy and a "veterano" – a gang member from an older generation – were there. (RT 4466-4468.) More people showed up and the beer was almost gone, so appellant went to the store again. He returned with about five cases of beer, and food for the next day. (RT 4470-4472, 4497.) This was about 5 pm. (RT 4472.) Upon returning this time, appellant learned that many of the group had gone to the nearby cemetery to celebrate the release from jail of a homeboy known as "Negro." (RT 4473.) At Drifter's house, people were

getting tattoos and had built a fire in a trash can. This was about 6 p.m. (RT 4474-4475.)

Appellant first saw the .38-caliber gun which was later thrown from the car around 6 p.m. (RT 4496.) Soldier Boy indicated he had a gun and wanted to go for a ride in the car. (RT 4496.) It was Drifter, however, who retrieved the gun from behind some boards and showed the gun to appellant and the others who were there. (RT 4496.) There was some discussion at the time that the gun was "messed up." (RT 4496-4497.) Appellant told Soldier Boy that he had been looking to buy a gun. Soldier Boy sold the gun to him for $60. (RT 4497.) Soldier Boy took the gun back briefly because he "wanted to take off in the car with his home boys and go do some stuff." (RT 4498.) Appellant gave Soldier Boy the keys to the car. Soldier Boy then drove off with the veterano and some of the other Varrio Bakers members. (RT 4499.) Appellant did not want to go with them. He had "already screwed up stealing the car" and did not want to get in additional trouble. (RT 4500.)

The group taking the car returned in about an hour. Some of the group then threw things like wallets into the fire. (RT 4502.) About this time Drifter, who had been arguing with his girlfriend Debbie, took the gun and pointed it at his own head and began "talking crazy." (RT 4502-4503.) Salo screamed for someone to stop Drifter. (RT 4502.) Appellant tackled Drifter, took the gun away, and put the bullets in his pocket. (RT 4503.) Debbie ran down the street with Drifter and Salo going after her. (RT 4503.) Appellant followed after giving the gun to one of the other youngsters. (RT 4503.) He caught up with them in two or three blocks, at Fremont High School. (RT 4504.)

Shortly thereafter, the stolen car pulled up with six or seven people

in it. (RT 4504-4505.) Soldier Boy was there and had a stereo or VCR with him. (RT 4505.) Appellant got in the car; he wanted to go buy some more beer. (RT 4505.) They went to the Tecate Market but it was closed, so they went to another store, the Tiptop. (RT 4505.) There they met some others from Varrio Bakers in a blue car who were partying. (RT 4505.) After about 15 minutes there was a decision made to go fight the Colonias. (RT 4506.)

Appellant left the market in the Olds Cutlass. Michael Hernandez was driving and Sergio Zamora was in the front with appellant. An older guy and two others were in the back. (RT 4507.) When the arrived in Colonia territory, the blue car was in front. People came out and threw bricks at the two cars. (RT 4508.) They drove off to a nearby field, where Michael Hernandez gave appellant the gun and three bullets. (RT 4508.) Appellant and "this black cholo" from the other car tried to get the gun working. (RT 4509.) It was appellant who ultimately test-fired the gun. (RT 4509.) The black cholo and appellant loaded another bullet into the gun. Appellant gave him the gun and told him, "It's not my enemies. If you want to shoot them, go for it." (RT 4511.) Appellant got in the blue car this time and they returned to Colonia territory. (RT 4511.) The person with the gun was in the gray car, which was now in front. (RT 4512.) When the Colonias started throwing bricks again the person with the gun leaned out the window and fired the gun twice. (RT 4512.) They drove off and stopped a few blocks away in an alley to see if everything was alright from the bricks being thrown. (RT 4513.) They stayed about five minutes and when they left, appellant was again in the gray car. (RT 4513.)

The pursuit by the police that ended in the crash lasted only about three or four minutes over the course of a mile. (RT 4514.) Appellant was

riding in the front passenger seat during the pursuit. (RT 4514.) Appellant had the gun again; he got it back when they stopped in the alley. (RT 4515.) When the police started chasing them, the driver panicked. Appellant told him to keep going because he was on parole and wanted to get rid of the gun. (RT 4515.) Appellant also threw out some bullets because he did not want to be caught with either the gun or the bullets. (RT 4515.) Appellant did not say to anyone in the car that there was a murder-rap on the car. (RT 4516.) Appellant did not know anything about a murder rap at that time. (RT 4516.)

After the crash, appellant tried to get out of the car but was unable to do so. (RT 4516.) A police officer was right behind them and told them that if they moved he would shoot them. (RT 4516-4517.) After two or three minutes, they started ordering people out of the car. (RT 4517.) This occurred after other officers appeared at the scene. (RT 4517.) They put people in separate cars. Appellant heard the officers yelling to each other, "Be careful. This car is hot. It's got a murder. They want it in L.A." (RT 4518.)

Appellant was approached by Detective Castillo for a statement early the next morning, January 25. (RT 4518.) Castillo told appellant that a man was shot and robbed for his car and that the authorities believed appellant did it. (RT 4519.) Appellant indicated a willingness to talk. (RT 4519.) Castillo took some personal information from appellant, including information about Salo. Appellant understood that Castillo was interested in arresting Salo as an accomplice and bringing her to Los Angeles. (RT 4519-4520.)

Castillo then turned on a tape recorder and read appellant his rights. (RT 4519-4520.) Appellant "denied everything" (RT 4522) and told

Castillo he had only been in the car for about 10 minutes (RT 4521).

Appellant was interviewed by Castillo a second time several days later. (RT 4522.) This time he told them the truth about how he found the car and how he had obtained the gun in Bakersfield. (RT 4524.) Castillo also asked for some handwriting samples in this interview. (RT 4525.) Appellant gave him one sample he asked for but refused to sign the name "Rose" for another. (RT 4525.)

While in jail, appellant made contact by telephone with various possible witnesses. Appellant called Lonely Boy (Sergio Zamora) after Castillo told him that the juveniles had made statements against him. (RT 4526.) Appellant wanted to find out what was happening and to tell them to tell the truth. (RT 4526.) He called Salo to warn her to stay away from the police for 10 to 15 days because the police were looking for her as an accomplice. (RT 4527.) He contacted Sylvia to tell her he might need her help as a witness. (RT 4528.) He told Sylvia to tell the truth. (RT 4528.) He called Joe Valle several times and left messages for him, but never instructed him about what he should say in his testimony. (RT 4529.)

The letter appellant addressed to "Mr. Woody" was for a friend, Danny Graciano. (RT 4531-4532.) Appellant wanted Graciano to get in touch with anybody from Varrio Baker to have them get in touch with the juveniles and tell them to stop lying. (RT 4533.) The letter was not a contract to injure or hurt anyone. (RT 4533.)

B. Sylvia Gomez, Joe Valle and Ron Delgado

Appellant presented alibi witnesses to confirm his whereabouts on the evening of January 23.

Silvia Gomez had known appellant since 1985. She was "just a friend" of appellant's and never romantically involved with him. (RT 4218-

4219.) Appellant visited Silvia at her mother's home on Boyle Street in East Los Angeles on Thursday, January 23, 1992, the Thursday before the Super Bowl. (RT 4219, 4228.) He arrived around 5 or 5:30 p.m. and stayed about two hours. (RT 4219, 4223.)[5] She was not expecting to see appellant; he said he was just in the neighborhood. (RT 4221.)

Silvia was fixing dinner. Her kids and her boyfriend at the time, Joe Valle, were there. (RT 4220.) Silvia and Joe left around 8:45 or 9 pm to go to a party. Appellant left a few minutes before them. (RT 4226.) Silvia acknowledged having had numerous telephone conversations with inmates at the county jail facility at Wayside where appellant was incarcerated pending trial. (RT 4259.) Only some of the conversations were with appellant (RT 4249); many were to other inmates, including her fiancé (RT 4264, 4311).

Joe Valle remembered appellant arriving around twilight that day, around 6:00 to 7:00 p.m. (RT 4342, 4356.) The kids were eating dinner at the time, and appellant stayed for about an hour. (RT 4342.) Appellant left driving a car that appeared to be similar to a Buick Regal or a Pontiac Grand Prix. (RT 4343.) Valle remembered the visit was January 23 because the Super Bowl was on that weekend. (RT 4342.) Valle was impeached with his admission that he had been convicted of several felonies involving drugs when he was 17 or 18 years old. He was 24 at the time he testified. (RT 4349.)

Ron Delgado was acquainted with appellant through appellant's half-brother, Thomas Miller. (RT 4316.) Delgado and his son ran into

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[5] When she was interviewed by the district attorney and investigating officer, she estimated appellant stayed between two and three hours after arriving around 5 p.m. (RT 4241, 4242.)

appellant in a McDonald's restaurant at Hollywood Boulevard and Highland Avenue around 8:30 p.m. on January 23. (RT 4322-4323.) Delgado was certain of the date because he kept a log of his visitations with his son due to problems with his ex-wife. (RT 4320.)

C. Other Defense Evidence

Jessica Cepeda lived at 401 Quantico Street in Bakersfield, the site of the drive-by shooting, with her husband and four grandchildren. (RT 4282-4283.) She was standing in the doorway at home on the evening of January 24, 1993 when the shooting occurred. Cepeda's grandson, Jaime Garcia, was also there, in the back garage, with his cousin, Gabriel Cabrera, and two friends.

Two cars were involved in the drive-by shooting, and they came by the house twice. (RT 4385.) The first time they did not do anything. About ten minutes later they returned, and this time a male in the front passenger seat put his body halfway out of the first car with a gun, shouted "Varrio Bakers" and shot three times. (RT 4385, 4394.) The first car was gray and looked like a Buick Regal; the second car was a blue Chevy Nova. (RT 4385-4386.) The shooter wore something dark on his head. (RT 4392.) Cepeda believed the shooter might be a person called "Spooky" who was a Spanish-speaking black man raised in the barrio who had caused trouble for her family in the past, but she otherwise could not identify the shooter. (RT 4392-4393.) She had never seen appellant before, and could not say one way or the other if he was the shooter. (RT 4393.)

Mat Falkenberg was the Kern County Deputy Sheriff who investigated the drive-by shooting. (RT 4771.) Falkenberg spoke to both Jaime Garcia and Gabriel Cabrera on January 24, 1992, about that shooting. (RT 4771.) Garcia told Falkenberg that he and Cabrera were on the front

lawn at 401 Quantico Street when two cars drove up with it occupants flashing gang signs. (RT 4772.) The first car was a four-door blue 1979 Chevrolet, possibly a Nova. The second car was a brown 1979 Buick Regal spotted with gray primer. (RT 4772.) An Hispanic male handed a gun to a black male, who leaned out of the Nova and fired shots. (RT 4773.) Garcia believed the shooter was possibly a black male he knew by the name of Spooky. (RT 4773.)

PROSECUTION REBUTTAL CASE

Los Angeles Police Detective Gary Arnold interviewed Mary Collins on January 27, 1992. (RT 4782.) Collins told Arnold that she dropped appellant off in Lancaster on Thursday, January 23 at about 11:30 a.m. (RT 4783.) She said she had given appellant $50 for clothes on Wednesday but did not know if he had spent it.

Detective Castillo attempted to investigate appellant's alibis and certain other defense evidence. When Castillo contacted Joe Valle, Valle told him that he did not have anything to say to the police. (RT 4792.) A month previous to this statement, an officer had arranged to meet with Valle, but Valle did not appear for the meeting. (RT 4793.)

Castillo called Sylvia Gomez back several times in an effort to secure her appointment book for 1992 in which she made notes of her meeting appellant, but was unsuccessful. (RT 4793.)

Castillo sent a team of detectives to canvass the fast food restaurants in Lancaster for job applications made out by appellant. Of the 15-20 such restaurants, they found appellant's applications at two. (RT 4795-4796.)

Castillo drove the distance between the spot where Fred Rose's body was discovered and Sylvia Gomez's home and found that it was 14.2 miles. (RT 4796.) It took Castillo 18 minutes to make the trip. (RT 4796.) He

also drove down Western Avenue to the McDonald's at Highland and Hollywood. (RT 4796.) There were three highly visible Chevron stations along this route, including one right after leaving the McDonald's appellant testified going to. (RT 4797.)

PROSECUTION PENALTY PHASE CASE

The prosecution's penalty phase case was based on evidence of other crimes of violence committed by appellant, one robbery conviction, and the circumstances of the crime, including victim-impact evidence.

A. Other Crimes

1. The Liquor Store Parking Lot Incident

Fred Joseph operated a liquor store in North Hollywood. On April 20, 1986, Joseph was working outside around 9 p.m. in the area of the trash can when two carloads of young males pulled up and got out of their cars. (RT 5337.) Joseph ran inside and upstairs because he was afraid the youths were going to attack him. (RT 5337.)

Joseph assumed appellant was one of the youths getting out of the cars, but did not see him. (RT 5338.) According to Joseph, about three weeks earlier appellant had been at the back door of the store "kind of intimidating customers." (RT 5338.) Joseph's brother was going to throw appellant off the parking lot when Joseph came out, and appellant "started getting wise" with Joseph. (RT 5338.) After Joseph went back inside, appellant told Joseph's brother that he was going to kill Joseph. (RT 5338.)

In the April 20th incident, after Joseph had run inside and upstairs, he heard some people talking about a fire outside in the parking lot. (RT 5339.) When Joseph went downstairs later to talk to the police, he saw that there was "a huge area" in the parking lot that had been burned. (RT 5340.) Joseph also saw a broken glass bottle and a stain where it had been burned.

(RT 5340.) The area that was burned was about 150 feet from the store. (RT 5359.)

Lisa Nevolo was at the laundromat that was in the same strip mall as Fred Joseph's liquor store at around 9 p.m. on April 20, 1986. (RT 5658-5660.) She was sitting in her car listening to the radio outside the laundromat when she saw a group of kids arrive, including a person she subsequently identified as appellant. (RT 5659-5660.) Appellant and one other person went into the laundromat. When they came out, Nevolo saw appellant standing near her car with a tire iron in one hand and a Molotov cocktail in the other. (RT 5660.) Appellant was by Nevolo's car for about 15 minutes. (RT 5667.) Then he and possibly one other person ran along the strip mall and out of sight. (RT 5661.) About two or three minutes later Nevolo saw a flash of light that looked like a nearby apartment building had caught fire. (RT 5662.) Then she saw appellant and another kid come past her car without the bottle in his hand, get into a car and leave. (RT 5662.) When Nevolo had seen the bottle in appellant's hand, the rag was not lit. (RT 5670.) She did not know who threw the bottle. (RT 5670.)

John Mosley was a Los Angeles police officer who interviewed Fred Joseph on April 20, 1986. (RT 5674.) Mosley observed that a portion of the parking lot had burned, but no portion of any building had burned. (RT 5677.)

2. The Canoga Park Incident

On June 9, 1988, John Hall was sitting in his pickup, parked in the middle of Independence Avenue in Canoga Park talking to a friend when he noticed two people "playing around with a van" that belonged to a friend of his. (RT 5644-5645.) He asked them what they were doing and they left. (RT 5645.) A few moments later Hall saw the same two individuals

running from the nearby convenience store. (RT 5645.) He identified appellant as one of these individuals. (RT 5646.) Hall jumped out to stop them, grabbing both appellant's arms and struggling with him briefly. (RT 5646-5647.) Then Hall felt something go into his back and he realized appellant "probably had a weapon of some sort." (RT 5647.) He let appellant go, and appellant ran away. (RT 5648.) Hall bled a little from the wound (RT 5647) but did not seek medical attention (RT 5655).

Wiliam Martin was the police officer responding to the report of Hall assault. (RT 5406-5407.) While he was interviewing Hall, Martin received a report of a robbery at a nearby AM/PM mini-mart. (RT 5409.) The description of the perpetrator in the robbery was similar to the description of Hall's assailant. (RT 5410, 5416.) Martin identified appellant as the person the police found about 150 yards away from Hall. (RT 5411.) The clerk from the market was unable to identify appellant as the robber of the market. (RT 5414.) There was $117 taken in the robbery which was never recovered (RT 5417-5418), and no knife was recovered from appellant (RT 5413).

3. The South Gate High School Incident

David Dattola was a South Gate police officer in 1989. (RT 5390.) On January 13, 1989, Dattola was dressed as a civilian and assigned to a narcotics unit "helping out with our crime impact gang team." (RT 5391.) A school security police officer at South Gate High School flagged Dattola down and told the officer that there was a possible gang fight on the school grounds. (RT 5391-5392.) Dattola and his partner, an Officer Sekiya (RT 5392), went on campus and observed approximately ten individuals including one shirtless person with a purple bandana who was yelling and screaming, and who appeared, in Dattola's opinion, "to be challenging

another subject to fight." (RT 5392, 5399.) Dattola identified appellant as the person who was wearing the purple bandana that day. (RT 5393.) Dattola did not see appellant make any offensive movement to strike the other person. (RT 541-5402.)

When the officers pulled up, the individuals in the fight separated. (RT 5394.) Dattola began to follow appellant. (RT 5394.) When Dattola asked appellant to stop and put his hands up, appellant said, "Fuck you" and indicated that he did not have to stop. (RT 5394.) Dattola was in civilian dress which resembled that of the school police. (RT 5394-5395.) After a second failed attempt to stop appellant, Dattola radioed Sekiya for assistance. Sekiya grabbed appellant and placed him under arrest. (RT 5396.) At no time did appellant make any aggressive movement towards the officers. (RT 5402.) Appellant then told Dattola that he believed the officer was the school security police and did not know that he was a regular officer. (RT 5396.)

Appellant was neither a student at the school, nor from the area. He indicated he was a member of the Grape Street Watts gang. (RT 5397.) Grape Street Watts and another gang, the Garden View Locals, were rivals. Dattola had recognized some of the individuals in the group at the high school as members of the Garden View Locals. (RT 5400.) He did not observe any other Grape Street Watts gang member in the group, although he could not say that none were there. (RT 5401.)

4. The 7-Eleven Incident

Will Taylor was a 15-year-old student in 1989. (RT 5425.) On the afternoon of April 6, 1989, he left Cleveland High School in Los Angeles with his friend James Richardson, and went to the bus stop. (RT 5425.) Richardson went to the nearby 7-Eleven. (RT 5425.)

When Richardson came out of the 7-Eleven, Taylor saw that there was another guy with him. Taylor could not make an in-court identification of the person with Richardson. (RT 5426.) Richardson was talking with the other person and "had his hands up like 'What's up'." (RT 5427.) The person was coming at Richardson with a knife in his hand. (RT 5427.) Taylor saw Richardson throw a "slurpy" on the person with the knife, who then fell down. (RT 5427.) Richardson indicated that the person seemed drunk, based on the way he was talking and the way he jumped up "like real hyper" after he fell. (RT 5435.) Richardson then joined Taylor at the bus stop. (RT 5427.)

The person with the knife got up, took his shirt off, said something about Watts, and then came at Richardson and Taylor with the knife. (RT 5427.) Taylor picked up a rock. (RT 5427.) The person then directed a racial slur at Taylor and Richardson, who were both African-American. (RT 5428.) William Tatum, an off-duty Los Angeles police officer, came by about this time. He had seen someone try to stab Taylor and Richardson. (RT 5440-5441.) Tatum identified appellant as the person with the knife. (RT 5442.) Tatum told appellant to stop. (RT 5443.) An Hispanic male then joined appellant and they ran away. (RT 5444.) Appellant was arrested after a short chase. (RT 5450.)

5. The Wayside Jail Incidents

Armando Gonzalez was an inmate at the Wayside facility of the Los Angeles County Jail in May, 1992, because of a conviction for drunk driving. (RT 5465.) Another inmate's family bought that inmate a new pair of shoes, but he was afraid to wear them for fear that Gonzalez would steal them from him. (RT 5466.) Instead, the inmate sold them to Gonzalez. (RT 5466.) The night Gonzalez bought the shoes, they were stolen from

him by someone who he believed to be appellant's partner. (Rt 5466-5467, 5474.) He heard appellant say, "Get the shoes." (RT 5475.) Less than five minutes later, appellant then pushed Gonzalez and took money from his pocket. (RT 5466-5467, 5475.) Appellant told Gonzalez not to tell anyone or he would get his "butt kicked." (RT 5467.) These incidents occurred in the jail dormitory. (RT 5475.) According to Gonzalez, this kinds of theft "happens to everybody." (RT 5482.)

Gonzalez claimed that the next day appellant told him he would have to pay appellant rent. (RT 5470.) Gonzalez lied and told appellant he did not have any money, but agreed to begin paying appellant the next week. (RT 5470.) Appellant told Gonzalez that, "I ought to shank you." (RT 5470.)

Robert Peacock was a Los Angeles Sheriff Deputy assigned to the county jail at Wayside in 1993. (RT 5525.) On April 18, 1993, Peacock interviewed appellant in the yard regarding an incident in the dormitory involving another inmate. (RT 5525-5526, 5532.) When Peacock determined he was not accomplishing anything in the interview, he decided to handcuff appellant and placed him against the wall until he could be taken to a new housing situation. (RT 5526.) Appellant offered no physical resistance while he was being interviewed and did not subsequently resist being handcuffed. (RT 5531-5533.)

Peacock went into the office area and when he came out appellant was yelling to other inmates. (RT 5527.) Peacock told appellant not to yell, and appellant "kind of complied" but soon began yelling again. (RT 5527.) Peacock told appellant to quiet down and to face the wall. (RT 5527.) Appellant turned and suggested that if Peacock took the handcuffs off, appellant would show him "who the tough guy is." (RT 5527-5528.) When

Peacock then tried to physically force appellant to the wall, appellant began turning and twisting. (RT 5528.) Peacock tried to get appellant in a wrist lock. (RT 5528.) Appellant then turned and kicked Peacock in the shins. (RT 5529.) Another deputy helped place appellant on the floor. (RT 5529.) Appellant continued yelling and kicking with one leg for ten to fifteen seconds. (RT 5530.) Peacock suffered a bump on the shin. (RT 5531.)

6. The Trujillo Robbery

On the evening of December 30, 1988, Sandra Trujillo was driving in the alley behind the Odyssey Video store in North Hollywood. (RT 5607.) She was looking for parking to return some videos. (RT 5607.) A man approached her car and tapped on the window, making a gesture as if he wanted to know what time it was. (RT 5608.) Then he pointed a gun at her and told her to get out of the car. (RT 5608.) Trujillo identified appellant as the man with the gun. (RT 5609.) After the man got Trujillo out of the car, he got in and drove away. Trujillo saw him stop and two other people get into the car.

Trujillo got her wallet back in the mail with about $110 missing. (RT 5611.) The police returned her car to her. (RT 5611.)

B. Victim Impact Evidence

Doris Baker was Fred Rose's mother. (RT 5684.) Rose was one of three kids. Rose had stayed close to his mother; he was everything a mother could wish for. (RT 5684.) Baker felt that Fred was a wonderful parent who loved his family and had lots of friends. (RT 5684.) For Baker, the pain of her son's death was still with her at the time of trial. (RT 5685.) Her other children were in therapy and one suffered a "thyroid storm," a medical condition in which the thyroid attacks the heart. (RT 5685.) Baker herself was still in therapy. (RT 5685.)

Sharon and Fred Rose had been married 21 years and had three children. (RT 5687.) Sharon Rose and her kids moved out of California after the crime to get away from where it happened. (RT 5688.) According to Rose, her husband was a very wonderful person who loved his family. (RT 5688.) She still felt the pain from losing her husband; the pain was ongoing and was not getting better. (RT 5690.) The family had joined bereavement support groups. (RT 5690.) Her children had encountered difficulties in school after the loss of their father. Sharon Rose was very lonely for her husband; their dreams had been shattered. (RT 5691.)

Amy Rose was Fred Rose's eldest daughter. She was 15 years old when her father died. (RT 5692.) Amy did not get to say goodbye to her father; she remembered him as a good father. (RT 5692-5693.) Fred took Amy places, including horseback riding. (RT 5693.) Amy missed her father a lot and wished things could be back the way they were. (RT 5693.)

Justin Rose was Fred Rose's third child. He was 10 or 11 years old when his father died. (RT 5694.) Justin recalled Fred Rose as a nice man and a good dad. (RT 5695.) He remembered flying airplanes and shooting targets with guns with his father. (RT 5695.) They went camping and did lots of things together. Justin missed his father a lot. (RT 5695.)

Heather Rose was Fred Rose's second child. She was 12 years old when her father died. (RT 5696.) Heather Rose remembered her father as "just the nicest man you could ever meet." (RT 5697.) She felt he was a good dad and she missed him a lot. (RT 5697.)

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DEFENSE PENALTY CASE

Joe Kraics was a supervisor case work specialist for the California Youth Authority (CYA). (RT 5567.) In 1986 and 1987 he was a CYA case worker specialist who prepared a 90-day diagnostic evaluation on appellant for the juvenile court to make an assessment as to the appropriate level of treatment for appellant at that time. (RT 5568.) Kraics found appellant at that time to be an immature 16 year old who was starting to get into gangs and drugs. (RT 5571-5572.) Kraics did not believe that the Mexican gangs fully accepted appellant. (RT 5572.) Appellant's impulse control was less than would be expected of someone his age, and he would act out without thinking what he wanted to do. (RT 5573.) At age 16 appellant had the impulse control of a 13-year-old. (RT 5573.) Appellant's mother was overly protective and did not recognize appellant's delinquency. (RT 5574.) Because appellant had some aggressiveness and little impulse control, he had no problem quickly escalating arguments into fighting. (RT 5577.) Kraics determined that whatever placement appellant received, he would need intensive follow-up supervision. (RT 5582.)

Susan Fukushima was a psychiatrist who had examined appellant in her capacity as a contract psychiatrist for the state in 1986. (RT 5701-5702.) Using the Diagnostic and Statistical Manual, Third Edition (DSM III), Fukushima determined appellant fit the Axis I criteria for conduct disorder of adolescence. (RT 5704.) She also diagnosed appellant as having an attention deficit disorder and a mixed personality disorder under Axis II of the DSM III. (RT 5704.) A history of attention deficit disorder can predispose an individual to a conduct disorder. (RT 5706.)

Fukushima found that appellant had a very close and symbiotic relationship with his mother. (RT 5710.) Appellant's father had died when

appellant was very young and, consequently, there was an absence of a male figure in the household. This caused appellant to have more difficulties getting through adolescence and establishing a male identity. (RT 5710.) According to Fukushima, appellant's involvement in the gang lifestyle was an attempt to make the separation from his mother; the gang gave him peer support. (RT 5712.) Fukushima had recommended in 1986 that appellant would benefit by a structured long-term treatment program where he could have consistent limit setting and structure that would allow him to continue with his education. (RT 5713.)

James Park was a prison consultant who had worked in prisons for 41 years, including 31 for the California Department of Corrections (CDC). During his career, which began as a clinical psychologist in the prison at Chino, he made classification decisions on some 15,000 inmates. (RT 5753.) He spent eight years as the associate warden at San Quentin in charge of Death Row and later was promoted to being a planner for new prisons. (RT 5751.) He retired in 1983 as an assistant director for policy at CDC. (RT 5751.)

California prisons have varying levels of security with the maximum security prisons being level four. (RT 5752.) A prisoner with a sentence of life without the possibility of parole would start out as a level four inmate. (RT 5756.) It was possible for such a prisoner to work themselves down to level three. (RT 5757.) In Park's opinion, after reviewing appellant's prison and jail records, nothing there indicated that appellant would constitute a threat to society, to prison employees or other inmates at a level four prison. (RT 5779.) Park also noted the phenomenon of prisoners with heavy sentences starting to "mellow out" at age 25. (RT 5801-5803.)

Mary Ann Collins is appellant's mother. (RT 5877.) Appellant was

the child of Mary Ann Collins' second marriage. She and her husband had two children, ages 17 and 18, from previous marriages when appellant was born. (RT 5878.) Appellant's father, who was a vice-president of a computer and software company, was very ill during appellant's early childhood and died of heart disease when appellant was 2-½ years old. (RT 5879.) Mrs. Collins' oldest son moved out of their house when appellant was about five or six years old, causing appellant to feel "very lost." (RT 5894.)

Mrs. Collins first became aware appellant had some problems when he started school. (RT 5880.) The problem was mainly hyperactivity. (RT 5881.) Appellant was diagnosed as having a borderline hyperkinetic condition. (RT 5882.) He received medication – probably Ritalin – but did not adjust well to it. (RT 5883.) According to Mrs. Collins, the hyperactivity problem resolved itself when she put appellant on a natural foods diet called the Feingold diet. (RT 5884-5885.) Appellant subsequently did not pose any disciplinary problems until junior high school where he became involved with the wrong kids. (RT 5887-5888.)

At Walter Reed Junior High School appellant became friends with a boy who was "quite knowledgeable on how to break into houses[,]" which led to appellant's first contact with the juvenile justice system for burglarizing an elementary school. (RT 5889-5890.) Mrs. Collins counseled appellant that this was inappropriate behavior and that he was associating with the wrong kind of people, but did nothing else at this point. (RT 5891.)

In Mrs. Collins' view, however, appellant's behavior did not change for the better. Instead it got worse. (RT 5891.) After appellant was involved with the stealing of a television set, Mrs. Collins got counseling

for him. (RT 5893.) Appellant became rebellious in his teen years. (RT 5898.) He told his mother he did not want to be controlled and started getting involved in gangs. (RT 5898.) Mrs. Collins was protective of her son but does not recall specifically what actions she took to stop his gang associations. (RT 5899.)

Appellant's behavior problems continued. He was involved in a juvenile burglary with a friend, Larry Hoffman. (RT 5900.) Mrs. Collins knew this incident was drug-related. (RT 5900.) She believed at the time that appellant was unjustly accused, but in retrospect she may have been overprotective. (RT 5902.) About this time the incident involving the Molotov cocktail occurred. (RT 5902.) Appellant was 15 or 16 at the time. (RT 5902.) There were other episodes around this time according to Mrs. Collins. She did not know what was happening with her son and she knew very little about drugs and gangs. (RT 5904-5905.)

At the point where appellant faced being sent to the California Youth Authority, Mrs. Collins contacted the De Sisto School in Florida, which worked with children that were troubled, into gangs and into drug abuse. (RT 5905-5906.) Mrs. Collins wrote to the juvenile court judge handling appellant's case and asked him to consider the De Sisto School as an alternative to CYA. (RT 5909-5911.) Mrs. Collins was concerned that the psychologists and psychiatrists at CYA were inadequate to the task of developing an appropriate plan for appellant. (RT 5910-5911.) Appellant was released to Mrs. Collins as a result of her intercession. (RT 5911.) Prior to going to the De Sisto School, appellant had surgery to remove an injured testicle. (RT 5911-5912.)

Mrs. Collins planned to keep appellant at the De Sisto School for at least six months. (RT 5912.) In fact, appellant stayed there only three or

four months. (RT 5912.) Mrs. Collins brought appellant home at that point because "they were keeping him under nothing but antidepressants." (RT 5912.) According to Mrs. Collins, appellant was allergic to the antidepressants, which make him "very rebellious." (RT 5913.) When appellant returned from the DeSisto School his behavior had worsened, and he was rebellious and defiant "toward everything and everybody." (RT 5925.) Mrs. Collins believed appellant was involved with drugs at this time. (RT 5926.) She tried getting appellant counselors and programs, but "no one knows what it is to deal with a child that is on drugs." (RT 5927.)

In 1988, "things seemed to get better for awhile." (RT 5927.) This was after appellant spent some time at the Mira Loma Camp. (RT 5928.) He seemed determined to get straightened out. (RT 5928.) Appellant got his driver's license and was going to dances and church functions. (RT 5928.) He was fine until he got back in with gangs and drugs again. (RT 5928.)

Mrs. Collins believed appellant's involvement with gangs may have dated from an incident when she was attacked one night at Ralph's Market in Burbank. (RT 5923.) Appellant was a teenager at the time. (RT 5923.) According to Mrs. Collins, there was "a big black man that jumped out from behind some cars." (RT 5923.) The man grabbed her, pulled her behind a wall and tried to rape her. (RT 5923.) As the police arrived, the man picked her up and threw her against the wall and then ran. (RT 5923.) Mrs. Collins suffered a broken nose and her whole face was black. (RT 5923.) When appellant found this out, he was enraged. He "said something to the effect that there's got to be some protection. And that's when I think he jumped into the gangs." (RT 5924.)

Around October 31, 1988, appellant suffered a serious head injury.

He had been attending a party with a young girl when he was attacked by a gang member who struck him on the head with beer bottles or other objects. (RT 5931.) Mrs. Collins took appellant to the emergency ward with his scalp almost completely off his head. (RT 5931.) Two days earlier Mrs. Collins had taken appellant to the hospital with a drug overdose. (RT 5940-5942.)

With regard to the incident in which appellant was accused of throwing a Molotov cocktail, Mrs. Collins told the probation officer that appellant was in Lancaster with his older half-brother when that incident took place. (RT 5924.)

Regarding the incident with John Hall, Mrs. Collins contacted Mr. Hall to determine whether he was going to press charges, so she in turn could decide whether to hire counsel for appellant. (RT 5932.)

Regarding the robbery of Sandra Trujillo, Mrs. Collins remembered that only a few hours after appellant had been arrested for the robbery, he was also been arrested for possession of PCP. (RT 5934.) Mrs. Collins arranged bail for appellant and obtained his release. (RT 5934.)

PROSECUTION PENALTY REBUTTAL EVIDENCE

The prosecution presented John Iniguez, the acting chief of classification at CDC, to rebut the testimony of James Park. According to Iniguez, a prisoner with a sentence of LWOP will not get a job in prison for over a year. (RT 6034.) With regard to Park's testimony that inmates start settling down around age 25, Iniguez believed that in the past 10 to 12 years there have been younger and more violent inmates that start settling down later. (RT 6037.)

Iniguez noted that on October 5, 1993, there had been an escape by an LWOP prisoner at Lancaster, which is a new level four prison. (RT

6038-6039.) The inmate was apprehended five hours after the escape. (RT 6039.) It was the only escape by an LWOP prisoner from one of the new level four prisons. (RT 6045.)

Iniguez did not agree with Park's analysis that nothing in appellant's records made him look like a potential serious problem. (RT 6041.) In the opinion of Iniguez, appellant posed a threat to both staff and other inmates. (RT 6041.)

NEW TRIAL MOTION

Appellant moved for a new penalty trial because of jury misconduct and prosecutorial misconduct. In her penalty phase closing argument, and over appellant's objection that she was misstating the evidence, the prosecutor described to the jury how appellant killed the victim "execution-style" with the victim on his knees, "begging for mercy." (RT 6237.) The issue of whether the killing was execution-style became an issue for the jury during deliberations. Juror Greg Beckman believed the killing was execution-style – it was his "big point" (RT 6507) – and decided to experiment at home to test his belief. Using his home computer one evening, Beckman created a simulation of what he believed happened, based on the evidence as he recalled it. (RT 6744.) This simulation strengthened his belief that the killing was execution-style. The next day during deliberations Beckman orchestrated a re-creation of his simulation, using a protractor and string as aids, with himself and another juror playing the roles of the shooter and victim. (RT 6744.) This re-creation again supported Beckman's conclusion that appellant had shot Rose execution-style from about six feet away with Rose on his knees.

The court heard testimony from three of the jurors. After lengthy proceedings subsequent to the jurors' testimony, the trial court granted the

new trial motion as to penalty based on the juror misconduct in this incident. The court also granted the motion on two separate claims of prosecutorial misconduct – the prosecutor's improper argument calling for vengeance for Rose's family, as well as on the ground that prosecution witness Fred Joseph had provided inflammatory aggravating evidence beyond what had been noticed to the defense and which was based on inadmissible hearsay statements. (RT 6750-6755.)

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INTRODUCTION TO ARGUMENTS

Appellant's capital murder trial was remarkable for several reasons. First, appellant was granted a new penalty trial on multiple grounds, including jury misconduct, prosecutorial misconduct, and evidentiary error at the penalty phase. The People successfully appealed that order; this Court denied review but without prejudice to subsequent consideration on appeal after judgment. Arguments 1, 2 and 3 of Appellant's Opening Brief concern issues relating to the order granting a new penalty trial. Second, the trial was marred by relentless prosecutorial misconduct by Deputy District Attorney Lea Purwin D'Agostino. Besides committing numerous acts of prosecutorial misconduct during both phases of the trial, Mrs. D'Agostino accused the trial judge of bias towards the defense and directed other personal attacks toward him. After granting appellant a new penalty trial, the judge recused himself from any new penalty trial due to the personal attacks of the prosecutor. As a fitting coda to this unusual case, Mrs. D'Agostino lent her assistance to an unsuccessful effort to recall the trial judge which was initiated because of the judge's order granting a new penalty trial.

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THE TRIAL COURT CORRECTLY ORDERED A NEW TRIAL BASED ON JURY MISCONDUCT

A. Introduction

Appellant's penalty trial was contaminated by prejudicial jury misconduct. Juror Greg Beckman conducted an experiment on his home computer one evening during deliberations to test his theory that the victim had been shot execution-style. The results of his experiment confirmed his belief, and he used the result the next day during deliberations to convince other jurors his theory was correct by conducting a re-enactment of his experiment using other jurors to play the role of the shooter and the victim. Beckman's experiment however, was premised on his own mistaken understanding of the evidence, a mistake which was incorporated into the re-enactment in the jury room. The experiment and the re-enactment were prejudicial misconduct which violated appellant's rights to a trial by jury, to confront witnesses, to due process and to a reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.) The trial court ordered a new penalty trial based in part on the jury misconduct. The prosecution appealed, and the Court of Appeal reversed the new trial order. This Court denied appellant's petition for review but without prejudice to subsequent consideration on appeal after judgment.

1. Procedural History

The jury reached a verdict of death on November 2, 1993. (RT 6449-6450.) The court set December 2, 1993, for sentencing and judgment. (CT 1118; RT 6552.) Almost immediately after the jury was excused, the defense discovered evidence of jury misconduct. Defense counsel joined a conversation between some of the jurors and the district attorney in the

courthouse cafeteria after the verdict, and learned that the jury had conducted an experiment during deliberations, using a protractor and string brought from outside the jury room, regarding the circumstances of the shooting of Fred Rose. (CT 1122-1123, 1143-1144.) An article in the Los Angeles Times the next day corroborated this information. (CT 1147.)

At a brief appearance on November 5, 1993, appellant informed the court it intended to file a new trial motion based on jury misconduct; the court indicated it had begun its independent review (see § 190.4, subd. (e)) of the case. (RT 6456-6457.)

Appellant filed a motion for a new penalty trial on November 23, 1993, alleging that the jury committed misconduct by conducting the experiment of which defense counsel had learned on November 2. The same day, the court and parties determined to proceed initially with testimony from three of the jurors on January 14, 1994, with the possibility that other jurors could be examined later if necessary. (RT 6464-6465.)

On January 14, 1994, the court took testimony of jurors Greg Beckman, Charles Collingwood and William Barickman. The testimony of the jurors confirmed appellant's allegation that the jury had conducted an experiment and developed additional information that the experiment had been based on another experiment done by juror Beckman at home. The defense requested time for filing additional motions. (RT 6511.) The court indicated that appellant should have the opportunity to plead its motion in light of the new evidence that developed as a result of the jurors' testimony, and set February 18 for the filing of all appellant's motions. (RT 6512-6513.) Respondent noted that she had not yet filed a responsive pleading. (RT 6512.)

On February 17, 1994, appellant filed his new motion for a new trial,

alleging both jury misconduct and prosecutorial misconduct. On February 18, 1994, the trial court set March 18 for the hearing on appellant's new trial motion, with respondent's responsive pleading due 10 days prior to that date. (RT 6516-6518.)

On March 9, 1994, the parties appeared for record correction proceedings. At the beginning of the afternoon session, the court asked the parties to clarify their positions regarding the significance of the footprint evidence as it related to juror Beckman's use of a six-foot distance between the shooter and the victim in the experiment or simulation that he created on his home computer. (RT 6534-6543.)

On March 14, during further record correction proceedings, the court indicated it would not be available on March 18, the date set for the hearing on the new trial motion. (RT 6640.) The court was interested in completing correction of the record that day as to the testimony of the prosecution shoeprint expert Ron Raquel and Detective Castillo because the evidence they gave was important to the new trial motion. (RT 6641.) The court again asked the parties questions seeking clarification of the shoeprint evidence relevant to the motion, and asked both counsel to file additional written argument on the point or be prepared to argue it orally. (RT 6641-6644.)

The court also noted that appellant had alleged in his prosecutorial misconduct claim that the prosecutor may have contributed to the jury misconduct by evoking a strong emotional response with her comments. (RT 6692.) The court indicated that "[i]n that category are some additional areas which were touched on by the prosecution and, again, I would invite you to please give me authorities to help me in evaluating them." (RT 6692.) These additional areas included the prosecutor's call for vengeance

at Reporter's Transcript pages 6282 through 6286; the prosecutor's reference to executions being painless and non-intrusive; and how the court should evaluate victim-impact evidence as a circumstance of the crime under section 190.3, factor (a).[6] (RT 6693.) The court then set March 30 for further hearing on the new trial motion.

On March 30 and April 7, 1994, the motion was argued. Neither party had filed additional authorities. The court granted appellant's motion for a new penalty trial on three grounds: jury misconduct, prosecutorial misconduct and the erroneous admission of certain penalty phase evidence.

The prosecution appealed the trial court's order under section 1238, subdivision (a)(3) (CT 1539.)[7] The Court of Appeal reversed, finding the trial court abused its discretion in granting a new penalty trial. As to the jury misconduct, the Court found that the demonstration in the jury room was proper and that Beckman's experiment at home was not prejudicial under the substantial likelihood test of *In re Carpenter* (1995) 9 Cal.4th 634.

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[6] At the March 30, 1994, proceeding the court elaborated that part of its concern with the victim-impact evidence was that, in addition to the family members testifying at the penalty phase, there had been highly-emotional testimony by the victim's wife at the guilt phase, and there was no limiting instruction on how to use victim-impact evidence. (RT 6728-6731.)

[7] The record on appeal in this automatic appeal contains a portion of the record of that appeal (*People v. Collins*, No. B084184): the People's Reply Brief (CT 1505) and the Opinion of the Court of Appeal (CT 1538). Appellant is filing with his Opening Brief a Motion for Augmentation to the Record of (A) the People's Opening Brief, (B) Respondent's Opening Brief, (C) Respondent's Petition for Review, and (D) this Court's Order of November 13, 1996, which denied review without prejudice to subsequent consideration after judgment.

The prosecution had raised additional claims of error, assuming that the trial court had also based its ruling on, inter alia, prosecutorial misconduct and an erroneous evidentiary ruling. The Court of Appeal opinion stated, however, that "The trial court did not rely on those grounds in granting Collins a new penalty trial." (CT 1543.)

On August 27, 1996, appellant petitioned this Court for review. On November 13, 1996, this Court denied review "without prejudice to subsequent consideration after judgment. (11/13/96 Order Denying Review.)

2. The Testimony of Three Jurors

The prosecutor based part of her case for death on the manner in which the victim, Fred Rose, was killed, claiming appellant "executed" Rose. (RT 6237.) She embellished on any scant evidence of an execution-style killing by telling the jury that "Mr. Rose was either on his knees pleading for mercy or running away in fear from [appellant]." (RT 6237.) The possibility that the homicide was an execution-style killing became a point of contention during jury deliberations. (RT 6486.) Juror Beckman, based partly on his experiences in the Vietnam War, believed that Rose had been killed execution-style, and argued so to the other jurors. (RT 6486.) Other jurors questioned Beckman's position and at least one juror became upset by it. (RT 6480, 6486, 6494.)

Beckman decided to answer the other jurors questions by taking matters into his own hands. At home one night during deliberations, Beckman conducted an experiment on his computer to determine that for the fatal shot to achieve the downward trajectory testified to by Dr. Sherry, the perpetrator six feet away "would have to just about be standing on a stool two and a half feet high." (RT 6480.) Beckman then used that

determination "to back up the statements that were made in the deliberation room about an execution instead of a murder." (RT 6481.) Specifically, he arranged for a re-enactment of the shooting during deliberations the next day based on his calculations at home.

The re-enactment was described by three jurors: Beckman, Collingwood and Barickman. Each noted that the re-enactment involved a protractor and a length of string. According to Beckman, the centerpoint of the protractor was placed at a point on the right side of the head of the person assuming the role of the victim, approximately on the right temple, at eyebrow level. (RT 6482.) The string then was run from the center point of the protractor at five to ten degrees above parallel to the ground, to a point six feet behind. The six-foot distance used was based on the testimony during trial that "the closest footprints that were found by the investigating officers at the scene of Fred Rose's shooting, were six feet away from Fred Rose," according to Beckman. (RT 6483.) Beckman took the position of the shooter. His "role was to take the string and bring it back on a slight angle to show that if anybody was going to shoot from that position, your chances of hitting somebody was [sic] very slim." (RT 6483.)

Beckman testified that he did not bring the protractor into the jury room (RT 6481); he asserted that it was in the jury room "laying on the floor behind some boxes." (RT 6487.) The piece of string came from Beckman's jacket. (RT 6487.) Juror Collingwood recalled that the shooting was re-enacted during deliberations because some of the jurors did not understand some of the evidence regarding the shooting. There had been a discussion one day "and the next day we were still discussing it." (RT 6500.) There were attempts to illustrate what happened by drawing on

the board but some jurors still were not understanding. (RT 6494, 6500.) Juror Barickman recalled that the demonstration as an attempt by Beckman to prove that "the victim was knelt down when he was shot." (RT 6505-6506). This fact was Beckman's "big point." (RT 6507.) Barickman was not aware of where Beckman "came up with that information to do that demonstration to try to prove his point" (RT 6505) but believed that the re-enactment was based upon the testimony given in court (RT 6509).

Collingwood played the role of the victim in Beckman's re-enactment. The protractor was held to his head and was used to position the string at the same angle as the testimony indicated the path the fatal bullet took. (RT 6497, 6493.) Collingwood did not know where the protractor came from but assumed a juror brought it in. (RT 6496.) The string they used was about six feet long. (RT 6498.) Barickman assumed that Beckman brought both the protractor and the string into the jury room. (RT 6506.) The demonstration or re-enactment involved Collingwood assuming both standing and kneeling positions, and moving his head in various positions. (RT 6498-6499, 6500-6502.)

3. The Trial Court's Findings

Based on this record, the trial court made the following findings: Beckman had strong personal belief, based on his experiences in the Vietnam War, that Rose's fatal injury could only have been inflicted as a result of shooting from a helicopter or an execution-type of killing. (RT 6743.) Beckman took this belief and performed a simulation model on his home computer, and concluded that his preconception was in fact correct: that a person standing six feet away from the victim would have to be standing on a stool two feet higher than the victim in order to create the type of downward trajectory testified to by the medical examiner in this case.

(RT 6744.) Beckman then took this information that he had gathered and developed and "proceeded to duplicate the experiment inside the jury room" by using jurors to simulate the roles of victim and executioner. (RT 6744.)

Although the court found that the manner in which the protractor got into the jury room was unknown, it did find that the protractor was used, and that angles were discussed. (RT 6744.) It found that the difference between five and ten degrees would have had an impact in determining the circumstances of the offense (RT 6744), and that this type of experiment would not have been allowed in open court without a proper foundation (RT 6745). Creation of the experiment gave the impression of scientific certainty and took a set of circumstances that were an arguable possibility and gave them the imprimatur of scientific truth. One fact on which the juror based the experiment – the nearest footprints being 6 feet away – was in fact erroneous, and the very closest distance of the shoeprints identified as possibly belonging to appellant would have been 15 feet. (RT 6745.) Finally, the court determined that there was a substantial likelihood that the improper consideration of this evidence influenced the outcome of the jurors' decision.

B. The Trial Court Properly Granted a New Trial Based on Jury Misconduct

A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261; *People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Lewis* (2001) 26 Cal.4th 334, 364.) This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a

reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) When the People seek to overturn the discretionary grant of a new trial, it is a "'daunting task' and an 'uphill battle.'" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 654, quoting *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448.) An appellate court must give an order granting a motion for a new trial all the presumptions in favor of any appealable judgment. (*People v. Love* (1959) 51 Cal.2d 751, 755; *People v. Montgomery* (1976) 61 Cal.App.3d 718, 730.) The trial court's order was well-supported by the facts and the law. There was no abuse of discretion.

1. Beckman Committed Misconduct by Conducting an Improper Experiment at Home

The trial court correctly determined that appellant was entitled to a new penalty trial based on Beckman committing jury misconduct by conducting an experiment on his computer at home.[8]

There is no question that Beckman committed misconduct. Throughout the trial the court admonished the jury not to discuss the case, do research or conduct experiments outside of court. (See e.g. CT 676.)[9]

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[8] Section 1181 permits granting a new trial motion based for jury misconduct in the following circumstances: "2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property; 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; . . . ."

[9] Defense counsel in his amended motion for new trial cited to numerous instances of the court giving the admonition to the jury. (CT (continued...)

When giving jurors the guilt phase instructions, the court included CALJIC No. 1.03, which again told the juror not independently investigate the facts or law, or conduct experiments or reference works.[10] (RT 4959.) The jury was told that this instruction was applicable at the penalty phase as well. (CT 1088.)

A juror may not conduct an independent investigation into the facts of the case. (*People v. Pierce* (1979) 24 Cal.3d 199, 207; *People v. Conkling* (1896) 111 Cal. 616, 628; *People v. Castro* (1986) 184 Cal.App.3d 849, 853; *People v. Phillips* (1981) 122 Cal.App.3d 69, 81.) A juror relying on extrajudicial information in violation of the trial court's admonitions commits egregious misconduct. (*People v. Honeycutt* (1977) 20 Cal.3d 150, 157; see also *Bell v. State of California* (1998) 63 Cal.App.4th 919, 932-933 [juror discussed case and conducted experiment outside court in violation of court order].) Jury misconduct gives rise to a presumption of prejudice. (*People v. Conkling, supra*, 111 Cal. at p. 628; *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417; *People v. Marshall* (1990) 50 Cal.3d 907, 949.)

Despite the admonitions from the court, Beckman conducted an independent investigation in the form of an experiment or simulation on his

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[9](...continued)
1131-1134.)

[10] CALJIC No. 1.03 as given by the court as reads in its entirety:

"You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments or consult reference works or persons for additional information." (RT 4959.)

computer at home. The jury had been discussing the circumstances of the shooting and a dispute arose as to whether the shooting was execution-style as Beckman believed. One or more juror asked Beckman how he new it was an execution-style killing. (RT 6480.) Rather than resolving the question by discussion and review of the trial evidence with the other jurors, Beckman took the question home with him at night and, relying on his recollection of the evidence, "worked out height patterns and came up with the fact that anyone standing six feet away from another person would have to just about be standing on a stool two and a half feet high to get a downward trajectory through the back of the skull of an individual." (RT 6480-6481.) Beckman essentially created a piece of demonstrative or experimental evidence on his computer, which provided him with facts which corroborated and strengthened his view of the evidence.

Beckman's misconduct was consistent with other cases finding improper experiments. *People v. Conkling*, *supra*, 111 Cal. 616 was a homicide case in which the distance between the defendant and the victim was a critical issue. Two jurors committed misconduct by firing rifles to determine at what distance powder marks were left on clothing. (*Id.*, at p. 628.) In *People v. Castro*, *supra*, 184 Cal.App.3d 849, 853-854, relied on by the trial court in this case, a juror used high-powered binoculars at home to determine whether a correctional officer using binoculars could have identified an inmate participating in a riot. This constituted the receipt of evidence outside of the courtroom and established juror misconduct. Regardless of whether Beckman communicated the results of his experiment to the other jurors, he tainted his own deliberations, thereby violating appellant's right to 12 impartial jurors. (*People v. Pierce*, *supra*, 24 Cal.3d at p. 208; *People v. Castro*, *supra*, 184 Cal.App.3d at p. 853.)

Under the Sixth and Fourteenth Amendments, a criminal defendant has the right to confront the evidence and the witnesses against him, and the right to a jury that considers only the evidence presented at trial. (*Parker v. Gladden* (1966) 385 U.S. 363, 364-365; *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.) When a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. (*Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 853.)

The actual evidence from the trial about the relative positions of the shooter and victim was quite limited. According to Dr. Sherry, the medical examiner, the bullet entered the upper right-rear portion of the head and exited through the forehead on the right side. (RT 3873.) The wound was "back to front, slightly left to right and slightly downward" (RT 3878), consistent with the shooter being a little taller than the victim or holding the gun a little over his head (RT 3878) and consistent with the victim kneeling (RT 3878). Such a downward track could also have occurred if Rose's head had been tilted backwards when the bullet struck. (RT 3880.) Neither Sherry nor any other witness indicated the bullet's angle of entry had been measured. The two small photographs of the victim's head provided little or no relevant information beyond Sherry's testimony. (Peo. Exhs. 50-A, 50-B.) Sherry did state that the gun was at least 18 inches away from the victim's head when discharged. Had Beckman's experiment been part of the prosecutor's case at trial, appellant could have used the measurement of that angle to attack the validity of the scenario suggested by the experiment – possibly through Sherry or an independent expert analyzing the victim's wound – or by demonstrating alternate plausible scenarios inconsistent with

the execution-style scenario promoted by both Beckman and the prosecutor.

There was evidence of shoeprints around the crime scene which were consistent with the sole pattern on a pair of Nike shoes owned by appellant. None of those shoeprints, however, were found six feet from victim. Detective Castillo drew a diagram, People's Exhibit 51, which showed the Nike shoeprints at locations "D" and "F." He established the locations of these shoeprints with measurements respective to railroad tracks and a telephone pole at the scene, but not with respect to the pool of blood where the victim had lain. (RT 3981.) With regard to that pool, he initially stated that the shoeprints were "within a few feet." (RT 3981.) On further questioning, he was asked to clarify, and said that location "D" was about 15 feet from the pool, and that "F" was "a little bit closer" than 15 feet. (RT 4082.) In fact, during the course of proceedings leading up to the hearing on the new trial motion, Castillo acknowledged in a memorandum to the district attorney that he was wrong on this latter point, and that location "F" was farther than the 15-foot distance of location "D." (CT 1241.)

Had Beckman's experiment been part of the prosecutor's case at trial, appellant could have drawn attention to the fact that there was no evidence of footprints matching appellant's shoes six feet from the pool of blood, thereby undercutting the value of the experiment as corroboration for the prosecution's theory that this was likely an execution-style killing.

2. Beckman Committed Misconduct by Conducting an Improper Experiment in the Jury Room

The trial court also correctly determined that the experiment Beckman orchestrated inside the jury room the next day, using a protractor and string, and having jurors assume the roles of shooter and victim, was

also misconduct. What occurred in the jury room was not a re-enactment of the crime. Instead, as the trial court recognized, it was a re-enactment of Beckman's experiment: "Having gathered and developed this information outside the jury room, this juror then went into the jury room, proceeded to duplicate this experiment inside the jury room by posing different jurors in the role of victim and executioner." (RT 6744.) As such, this case is like those in which a juror conducts an experiment outside the jury room and shares the results with the other jurors.

It is well established that it is misconduct for a juror to conduct an independent investigation of the facts, to bring outside evidence into the jury room, to inject his or her own expertise into the jury's deliberation or to engage in an experiment which produces new evidence. (*Smoketree-Lake Murray Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 (*Smoketree*); see *People v. Pierce*, *supra*, 24 Cal.3d at p. 207.) For a juror to perform and report to other jurors the results of an out-of-court experiment conflicts with a defendant's constitutional right to a fair and impartial jury that considers only the evidence presented at trial. (*Doan v. Brigano* (6th Cir. 2001) 237 F.3d 722, 733.)

The trial court's finding that Beckman re-created his experiment in the jury room was sound. There is clearly no question that an experiment occurred – all three testifying jurors agreed there was. There is also no doubt that the re-creation was at Beckman's instigation. He acknowledged that he used his experiment at home "to back up the statements that were made about an execution instead of a murder." (RT 6481.) Collingwood said that it was Beckman that wanted to do the demonstration in the jury room. (RT 6495.) According to Barickman, this issue was Beckman's "big point." (RT 6507.) Beckman chose to play the role of the shooter (RT

6483, 6495), and they used a string from his jacket to conduct the experiment (RT 6484). Barickman assumed Beckman also provided the protractor they used (RT 6506), although Beckman claimed he found the protractor behind some boxes on the floor in the jury room. (RT 6487.) The demonstration in the jury room was clearly a re-creation of Beckman's experiment at home, intended to communicate to the other jurors the results of that experiment and to convince them that the shooting had been an execution-style killing. (See *People v. Castro*, *supra,* 184 Cal.App.3d at p. 853 [misconduct where a juror reported to other jurors on the results of his home use of binoculars to determine that officers using binoculars could have identified defendant as the perpetrator]; *Smoketree*, *supra*, 234 Cal.App.3d at pp. 1745-1749 [misconduct where juror with some knowledge about construction created a demonstration at home using kitty litter and crayons to show how concrete was poured, and repeated the demonstration in the jury room]; *Marino v. Vasquez* (9th Cir.1987) 812 F.2d 499 [misconduct where juror used her husband's handgun to test the accuracy of a witness' statement that a person would be unable to fire a handgun held in a certain position even though other jurors performed a similar experiment with a plastic toy gun].)

3. The Acts of Misconduct Were Prejudicial

The well-established rule in California is that jury misconduct gives rise to a presumption of prejudice. Whether the presumption is rebutted is determined by applying the "substantial likelihood" test. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1108; *People v. Marshall* (1990) 50 Cal.3d 907, 950.) The conviction must be reversed whenever the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to

the case which was not part of the trial record on which the case was submitted to the jury. (*Ibid.*) The test is an objective one. In effect, the court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror. (*Ibid.*)

The trial court correctly found a substantial likelihood that the improper consideration of this evidence influenced the outcome of the jurors' decision. (RT 6749.) The jury misconduct here was focused on a critical circumstance of the crime – whether or not the killing was committed "execution-style." The fact that a murder has been committed "execution-style" is a circumstance which jurors are very likely to see as making the crime distinctly worse. This Court has even assumed the potential significance of such a circumstance. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1177 [fact that killing was execution-style cited in determining death was not a grossly disproportionate sentence]; *People v. Gurule* (2002) 28 Cal.4th 557, 625 [photographs admitted for purpose of supporting prosecution theory that murder was committed execution-style were relevant]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) For non-capital murders, the fact that a murder is committed execution style is evidence that it "was carried out in a dispassionate and calculated manner" the can be considered for purpose of denying parole. (Cal. Code Regs., tit. 15, §§ 2402, sub. (c)(1)(B).)

Not only is such evidence objectively significant to jurors generally, it was clearly important to the jurors in this case. The prosecutor herself played an important role in piquing the jurors' interest in how the shooting occurred when she portrayed the killer as having Fred Rose was down "on

his knees begging for mercy."[11] (RT 6237.) The question became an issue during deliberations, with Beckman trying to convince other jurors who were dubious of his theory that the killing was, in fact, execution-style. The whole purpose of the experiments Beckman performed – at home and in the deliberation room – was to solidify his own opinion and then to convince the others to agree with him. The court pointed out in its decision that at least four times the juror's who testified mentioned how the manner of killing was an issue during deliberations. (See RT 6747, 6494, 6500, 6507.)

The trial court correctly pointed out that at the penalty phase, the decision is an individualized one in which the weighing process is not a mechanical counting of factors on either side of a scale (RT 6745, citing *People v. Brown* (1988) 46 Cal.3d 432; *People v. Bacigalupo* (1991) 1 Cal.4th 103), which makes rebutting the presumption of prejudice more difficult.

Cases in which the presumption of prejudice is overcome often involve misconduct involving issues of little importance to the case, or which is duplicative of evidence properly admitted. (See e.g., *People v. Marshall*, *supra*, 50 Cal.3d at pp. 949-951 [juror introduced extraneous law by telling jurors that juvenile records are automatically sealed at age 18; no prejudice because comment could not have any significant informing jurors of uncharged crimes].) By contrast, the misconduct here went to an issue which the prosecutor emphasized and on which the jury was focused in their deliberations. (Cf., *People v. Castro*, *supra*, 184 Cal.App.3d at p. 854 [prejudicial error to use binoculars test whether witness could identify

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[11] See Argument 15, showing how this remark by the prosecutor was misconduct.

defendant, where identity was an issue].)

A juror in this case could reasonably have made the life or death decision based on whether or not the shooting was execution-style. Accordingly, the trial court properly found that there was a substantial likelihood that the vote of one or more jurors was influenced by the misconduct. There was no abuse of discretion by the trial court in ordering a new penalty trial.

4. The Court of Appeal Erred in Reversing the Trial Court's Order Granting Appellant a New Penalty Trial.

In reversing the trial court's order for a new penalty trial the Court of Appeal made numerous errors. First, pervading the opinion was a reliance on an incorrect standard of prejudice for jury misconduct. California has long recognized that jury misconduct gives rise to a presumption of prejudice. (*People v. Conkling*, *supra*, 111 Cal. at p. 628; *People v. Holloway*, *supra*, 50 Cal.3d at p. 1108.) That presumption means that "unless the prosecution rebuts that presumption . . . , the defendant is entitled to a new trial." (*People v. Pierce*, *supra*, 24 Cal.3d at p. 207; accord, *People v. Marshall*, *supra*, 50 Cal.3d at p. 949; *People v. Miranda* (1987) 44 Cal.3d 57; *In re Stankewitz* (1985) 40 Cal.3d 391, 402.)

In *People v. Marshall*, *supra*, 50 Cal.3d 907, this Court for the first time clarified that the determination of whether the presumption of prejudice had been rebutted would be made under the substantial likelihood test:

> "A judgment adverse to a defendant in a criminal case must be reversed or vacated 'whenever ... the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial

matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury.' (2 ABA Standards for Criminal Justice, std. 8-3.7 (2d ed. 1980) p. 8.57; [other citations].)

"...

"'The ultimate issue of influence on the juror is resolved by reference to the substantial likelihood test, an objective standard. In effect, the court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror.' (2 ABA Standards for Criminal Justice, supra, std. 8-3.7, Commentary, p. 8.58.)

"Such 'prejudice analysis' is different from, and indeed less tolerant than, 'harmless-error analysis' for ordinary error at trial. The reason is as follows. Any deficiency that undermines the integrity of a trial -- which requires a proceeding at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury – introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice. [Citation.] Such a deficiency is threatened by jury misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial. By contrast, when the misconduct does not support such a finding, we must hold it nonprejudicial." (*People v. Marshall*, *supra*, 50 Cal.3d at pp. 950-951.)

This Court subsequently relied on the substantial likelihood test in a

manner consistent with *Marshall* in *People v. Holloway*, *supra*, 50 Cal.3d at p. 1109, *People v. Cooper* (1991) 53 Cal.3d 771, 838, and *In re Hitching* (1993) 6 Cal.4th 97, 118-119. In *In re Carpenter* (1995) 9 Cal.4th 634 this Court again confirmed that whether the presumption of prejudice was rebutted was determined under the *Marshall-Holloway* substantial likelihood test. *Carpenter* went on, however, to "summarize" how the substantial likelihood test is applied:

> "To summarize, when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citations.] The judgment must be set aside if the court finds prejudice under either test. The first of these tests is analogous to the general standard for harmless error analysis under California law. Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.

> "But a finding that the information was 'harmless' by appellate standards, and thus not 'inherently' biasing, does not end the inquiry. Ultimately, the test for determining whether juror misconduct likely resulted in actual bias is 'different from, and indeed less tolerant than,' normal harmless-error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. [Citation.] . . . Thus, even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias under the first test, the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. Under this second, or 'circumstantial,' test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. 'The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record,* that there is no substantial likelihood that the complaining party suffered actual harm.' [Citation.].) (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653-654.)

The Court of Appeal opinion quotes the *Carpenter* "summary" as the sole authority for its prejudice analysis. (CT 1544-1546.) The summary, however, has correctly come under sharp criticism as being completely inconsistent with the precedents to which it claims adherence. In a dissenting opinion in *People v. Von Villas* (1995) 36 Cal.App.4th 1425, Justice Fred Woods wrote:

> "The summary is more than inaccurate, it is

irreconcilable with *Marshall*, *Holloway*, and *Hitchings*. These three cases hold, as do a legion of earlier ones, that juror misconduct, such as the receipt of extraneous information, raises a presumption of prejudice. Quite apart from and prior to any "review of the entire record" the misconduct itself raises a presumption of prejudice which requires a reversal unless rebutted. This fundamental principle is omitted from [majority opinion author] Justice Arabian's summary.

". . .

"Additionally, *Marshall* and *Holloway* apply the review standard not to determine whether prejudice has been shown, as does Justice Arabian, but to determine whether it has been *rebutted*.

"Finally, Justice Arabian splits the simple, clear *single* ABA-Marshall-Holloway test (was a juror's vote *influenced* by exposure to extraneous matter) into a complicated, confusing, two-prong test.

"As to the first prong, Justice Arabian states it is 'analogous to . . . harmless error analysis.' (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.) In contrast, *Marshall* states its standard 'is different from, and indeed less tolerant than, "harmless error analysis."' [Citation.]

"In describing his second prong, Justice Arabian begins by incorporating *Marshall*'s 'was a juror's vote influenced' test, and ends by eviscerating it.

"For Justice Arabian, by either prong, the bottom line is harmless-error analysis. Regardless of how influential the extraneous matter was on a juror's vote, overwhelming guilt evidence will save the verdict." (*People v.*

Von Villas (1995) 36 Cal.App.4th 1425, 1455-1456, emphasis in original; parallel citations omitted.)

In a concurring opinion in *People v. Nesler* (1997) 16 Cal.4th 561, Justice Mosk recognized the same problem as Justice Woods:

> "In *In re Carpenter* (1995) 9 Cal.4th 634,, the majority recognized, under *In re Hitchings* (1993) 6 Cal.4th 97, and *People v. Holloway* (1990) 50 Cal.3d 1098, that it is misconduct 'for a juror to receive information outside of court about the pending case. . . .' (*In re Carpenter*, *supra*, 9 Cal.4th at p. 647.)
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> "The *Carpenter* majority also recognized, under decisions including *Holloway* and *People v. Marshall* (1990) 50 Cal.3d 907, that juror misconduct 'gives rise to a presumption of prejudice. . . .' (*In re Carpenter*, *supra*, 9 Cal.4th at p. 651; see *id.* at p. 650.) That means, of course, that 'unless the prosecution rebuts that presumption . . . , the defendant is entitled to a new trial.' (*People v. Pierce* (1979) 24 Cal.3d 199, 207; accord, e.g., *People v. Marshall*, *supra*, 50 Cal.3d at p. 949; *People v. Miranda* (1987) 44 Cal.3d 57, 117; [other citations].)
>
> "But, without mentioning the presumption of prejudice, the *Carpenter* majority went on to 'summarize' the law relating to the determination of prejudice. . . .
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> "When it is read literally and in the abstract, the *Carpenter* majority's 'summary' is problematical. The statement that '[t]he verdict will be set aside *only if* there appears a substantial likelihood of juror bias' (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653, italics added) seems to imply that the verdict will not be set aside if the reviewing court cannot

> determine whether or not there is, in fact, a substantial likelihood of such bias. An implication of this sort, which shifts the risk of nonpersuasion from the People to the defendant, amounts to a presumption of non prejudice. . . .
>
> "But when it is read reasonably and in context, the Carpenter majority's 'summary' is sound. Considered together with the presumption of prejudice, it may be understood thus: 'When juror misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record. The verdict will be set aside unless there appears no substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias unless the extraneous material, judged objectively, is not inherently and substantially likely to have influenced the juror. Second, looking to the nature of the misconduct and the surrounding circumstances, we will also find bias unless it is not substantially likely the juror was actually biased against the defendant.' (Cf. *In re Carpenter*, *supra*, 9 Cal.4th at p. 653 [source of the recast language].)" (*People v. Nesler*, *supra*, 16 Cal.4th 561, 591-592, Mosk, J. concurring in the judgment; parallel citations omitted.)

Appellant submits that the Court of Appeal's reliance on the *Carpenter* "summary" was incorrect and the error infected its analysis of the prejudice which resulted from Beckman's misconduct. Moreover, none of the reasons for finding no prejudice had merit. Each of the Court's stated reasons is quoted below, followed by appellant's response.

"First, the juror never mentioned his use of his home computer to the other jurors. Thus its use had no effect on the other jurors and did not in any way enhance the opinion of the offending juror." (CT 1547.) Whether

the juror told other jurors about using the computer was largely irrelevant. It was the information that Beckman obtained from the use of the computer that was most important, and he did communicate that information to the jurors by re-creating the computer simulation during deliberations. Furthermore, the fact that a juror committing misconduct does not reveal the misconduct to his fellow jurors does not eliminate the prejudice. A defendant is entitled to twelve unbiased jurors. (See, e.g., *People v Holloway*, *supra*, 50 Cal.3d at p. 1112 [reversal for misconduct where juror learning of appellant's prior criminal activity did not reveal the illicit information to other jurors].)

"Second, there was no evidence the offending juror obtained information from the computer or did computations he otherwise could not have done. While he used the computer to draw the heights and distances to scale, the drawing was nothing more than he could have done on paper or on the blackboard." (CT 1547.) Beckman created a computer simulation, or a model, of the shooting. To say a model or simulation is not information is to deny that demonstrative evidence contains information. Diagrams, maps, models, or computer animations which are admissible as evidence are designed to give visual effect to testimony. "Their use as testimony to the objects represented rests fundamentally on the theory that they are the pictorial communication of a qualified witness who uses this method of communication instead of or in addition to some other method." (Witkin, Cal. Evidence (4th ed. 2000) Demonstrative Evidence, §24 , p. 33.) Beckman created the simulation to enhance his ability to persuade the other jurors that the shooting was execution-style. Second, there was evidence that Beckman needed the computer – there was testimony that during the deliberations on how the shooting occurred, there were attempts to draw

what happened on the board. These efforts were unsuccessful because "nobody could draw that good." (RT 6500.) Furthermore, as discussed above, prejudice is presumed when misconduct has been shown. The proper inquiry for the Court of Appeal should have been whether the prosecution had affirmatively established that Beckman obtained no information or could otherwise have done the computations.

"Third, the offending juror used the computer only to help himself visualize the relative positions of Rose and Collins. Some jurors were unsure about the prosecutor's argument that Collins essentially executed Rose while Rose was on his knees or running away. The offending juror already agreed with the argument, and merely used the computer to help him visualize his thoughts to more effectively persuade his fellow jurors." (CT 1547.) Here the Court of Appeal acknowledged that Beckman intended to use the results of his computer work to influence the jurors during subsequent deliberations. Accordingly, the prosecution could not meet its burden of showing that the jurors were not influenced by Beckman's use of his visualization.

"Fourth, the evidence against Collins was strong." (CT 1547.) Here the Court of Appeal appear to be applying a harmless-error test to jury misconduct. As discussed above, however, the prejudice analysis under the substantial likelihood test, "is different from, and indeed less tolerant than, 'harmless-error analysis' for ordinary error at trial" because [a]ny deficiency that undermines the integrity of a trial. . . introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice." (*People v. Marshall*, *supra*, 50 Cal.3d at p. 951.)

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The Court of Appeal's prejudice analysis was flawed. There was no basis for the Court to reverse the trial court's order granting a new penalty trial. Accordingly, the death judgment should be reversed.

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THE TRIAL COURT CORRECTLY ORDERED A NEW PENALTY TRIAL BASED ON THE PROSECUTOR'S MISCONDUCT IN INFORMING THE JURORS THAT THE VICTIM'S FAMILY WANTED APPELLANT TO RECEIVE THE DEATH PENALTY

The trial court correctly ordered a new penalty trial based on prosecutorial misconduct (§1181, subdivision 5), which transpired during argument to the jury.[12] (RT 6750-6752, 6755.) The prosecutor made a lengthy appeal to the jury for vengeance, claiming the Rose family was entitled to vengeance and making clear to the jurors that the family wanted them to return a death verdict, in violation of *Booth v. Maryland* (1987) 482 U.S. 496. The court's order was amply supported by the prosecutor's

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[12] The issue is cognizable on appeal through this Court's order of November 13, 1996, which "denied without prejudice to subsequent consideration after judgment" appellant's petition for review from the Court of Appeal's decision reversing the trial court's order granting a new penalty trial. (11/13/96 Order.) Although that petition for review raised issues only relating to the jury misconduct discussed in Argument 1, "[o]n review of the decision of the Court of Appeal, the Supreme Court may review and decide any or all issues in the cause." (Cal. Rules of Court, former rule 29.2(a).) The cause in this case is the propriety of the trial court's grant of a new penalty trial, and the prosecutorial misconduct argued herein was one of the reasons given by the trial court for granting the new penalty trial. To give effect to the language in the Court's order that denial of the petition for review was without prejudice to subsequent consideration, former California Rules of Court, rule 29.2, subdivision (a) should apply to this issue.

To the extent this issue is not reviewable as part of the issue of the propriety of the trial court's new trial order, appellant requests that it be considered as an independent claim of prosecutorial misconduct for which reversal of the death judgment is warranted.

argument and the relevant case law. [13]

A. The Prosecutor's Argument

During her penalty phase argument to the jury, the prosecutor improperly urged the jury to avenge the death of Fred Rose on behalf of the family and society.

> "Just a couple more concepts I want to discuss with you before I close, ladies and gentlemen. One of them is vengeance. Now, Most of us have been raised to believe that vengeance is a bad thing, that it's not appropriate. I suggest to you, that under certain circumstances it's not only appropriate but in fact quite healthy. It has a legitimate place in our society and has a legitimate role within our criminal justice system. Don't let me kid you, when any prosecutor gets up in front of a jury or any court and asks that jury to come back with a verdict of death, that vengeance isn't involved. Because what this prosecutor is saying to you, ladies and gentlemen, is that someone did something so bad, so bad that it has to be done back to them. Now because I am not as eloquent as others . . . I want to quote to you from somebody who was very eloquent and how they felt about vengeance, and this is the quote, 'We have been plied and belabored with the notion that anger is invariably a dysfunction, a failure to cope with our environment. Great literature from Homer on teaches otherwise. It teaches that anger can be necessary for coping. We are told the desire for vengeance is primitive and shameful, but when the society becomes like ours, uneasy about calling prisons penitentiaries or penal institutions and instead calls [sic] them correctional facilities, society has lost its bearings. The idea of punishment is unintelligible if severed from the idea of retribution, which is inseparable from the concept of vengeance which is an expression of society's anger. If you have no anger, you have no justice. The society incapable of sustained focused anger in the form of controlled vengeance is decadent. If we lived in a world

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[13] In the People's appeal of the new trial order, the Court of Appeal determined it did not need to address the issue of prosecutorial misconduct, which was raised and argued by the parties, because "The trial court did not rely on those grounds in granting Collins a new trial." (CT 1542-1543.) The record indicates otherwise. (See RT 6750-6752, 6755.)

in which vengeance was really senseless, so would life be, or as MacBeth said, life would be a tale told by an idiot.'

"I am going to go away from the quote for just a moment. We don't have to take Shakespeare's words for it, we don't need MacBeth. Think about Clint Eastwood and all the Dirty Harry movies and Charles Bronson where he is an architect and goes out killing all these people because his wife has been murdered. Clint Eastwood in Dirty Harry, he has made millions of dollars playing this Dirty Harry, playing a kind of shall we say cop who uses pre-Miranda tactics on his prisoner. And why has he made all this money? Because it satisfies this longing for justice that we all have, this anger that we have.

"Let me go back to the quote here, 'We should use the criminal justice system to punish, that is to protect society from physical danger and to strengthen society by administering punishments that express and nourish through controlled indignation the vigor of our values. We should be ashamed to live in a society that does not intelligently express through its institutions the public's proper sense of proportionate punishment for the likes of people like this defendant.'" (RT 6282-6284.)

After the prosecutor discussed appellant's lack of remorse and why she believed mercy was inappropriate in this case, she returned to the subject of vengeance:

"Now, another area I want to talk to you about is the social impact of your decision. Somehow, it's a main point that by being a part of civilization, we give up something, but we give it up because we do get something in return and at some unknown point in our evolution from beast to man we voluntarily surrendered, we surrendered our right to individual justice. When man gave up this right to personal vengeance, he may have given up a great deal psychologically and the state's efforts can never ever give you the same feeling you get by exacting personal vengeance, but in return the state did give man two things. One, it lends us its powers so even the weak may have revenge, and secondly it does impose reason and order on its process of vengeance.

"Now, the Rose family, is part of this social contract. They

have given up their right to take personal vengeance on the defendant because they're law abiding. In return, they're entitled to action of the state that serves the same purpose. *They're entitled to vengeance, plain and simple. They're not allowed to get him themselves. They're not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right to vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled to get on their own.*" (RT 6282-6286, emphasis added.)

B. The Prosecutor Committed Prejudicial Misconduct by Informing the Jury That the Victim's Family Favored the Death Penalty for Appellant

In addressing the prosecutor's appeal to vengeance during the hearing on the new trial motion, the court first noted that the prosecutor thanked the jury on behalf of Detective Castillo and on behalf of Fred Rose's entire family and friends. (RT 6750.) The court then focused on the prosecutor's argument regarding vengeance, quoting liberally from the portion set out above, particularly the paragraph telling the jurors that the Rose family was part of the "social contract," that they had given up their right to take personal vengeance, but that they were entitled to "action by the state" that served the same purpose; that they "were entitled to vengeance, plain and simple. They're not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right for vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled on their own." (RT 6750-6751 [trial court's quotations from prosecutor's argument]; RT 6282-6286 [prosecutor's argument].)

The court then made these findings:

"I believe that the foregoing arguments were improper because they effectively told the jury exactly what the desires

> of the family were with respect to the death penalty and that is something that is not permitted by the law. . . . The exhortations to vengeance used in this case did not lose their power because of an occasional qualifier. The above arguments in their context were extraordinarily effective. Any objective observer could not but conclude beyond a reasonable doubt that the Rose family clamored for the imposition of the death penalty. This was prejudicial." (RT 6752.)

As noted in Argument 1, *ante*, a trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261; *People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Lewis* (2001) 26 Cal.4th 334, 364.) This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) When the People seek to overturn the discretionary grant of a new trial, it is a "'daunting task' and an 'uphill battle.'" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 654, quoting *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448.) An appellate court must give an order granting a motion for a new trial all the presumptions in favor of any appealable judgment. (*People v. Love* (1959) 51 Cal.2d 751, 755; *People v. Montgomery* (1976) 61 Cal.App.3d 718, 730.)

The trial court's factual finding that the prosecutor informed the jury that the Rose family wanted a death verdict was well-supported. There is no reasonable interpretation other than that the family wanted the death

penalty to the statements, "They are not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right for vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled on their own." (See *Hain v. Gibson* (10th Cir. 2002) 287 F.3d 1224, 1225 [statements of family member that person who committed "crime of this magnitude" must be punished to the "full extent of the law" and that "I feel strongly that the punishment should reflect the severity of the crime" strongly implied the view that defendant should receive the death penalty in violation of *Booth*].)

The court's legal ruling was also correct. Under *Booth v. Maryland*, *supra*, 482 U.S. 496 it is a violation of the Eighth Amendment to present to a jury information about the victim's family's characterizations and opinions of the crime, the defendant, and the appropriate sentence. (482 U.S. at pp. 508-509.) This Court has held that the prosecution may not elicit the views of a victim or victim's family as to the proper punishment. (*People v. Smith* (2003) 30 Cal.4th 581, 622, citing *Booth v. Maryland*, *supra*, 482 U.S. at pp. 508-509; *People v. Howard* (1992) 1 Cal.4th 1132, 1193.)[14]

It is misconduct for the prosecutor to refer to facts not in evidence in closing argument. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828.) It is

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[14] Although the more expansive holdings in *Booth* regarding the admissibility of victim-impact evidence was overruled (*Payne v. Tennessee* (1991) 501 U.S. 808), the Supreme Court left intact the holding in *Booth* that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2.)

also misconduct for the prosecutor to imply the existence of evidence known to the prosecutor but not to the jury. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213.) Referring to facts not in evidence during argument tends to make the prosecutor his own witness, offering unsworn testimony not subject to cross-examination in violation of the Sixth and Fourteenth Amendments. (*Ibid.*)

Although various members of the Fred Rose's family testified as to the impact the his loss on them, none offered testimony as to the sentence they believed the jury should impose. Moreover, they could not have done so consistent with the Eighth Amendment under *Booth*. Instead, the prosecutor spoke for them during argument and informed the jury that the family wanted a death verdict – in fact she told the jury that they "owed" such a verdict to the family because the family was not "allowed to get him themselves. They are not allowed to take this defendant to Claybourn and Chandler in North Hollywood and shoot a bullet into his head." (RT6286.)

The court correctly found the prosecutor's misconduct was prejudicial. (RT 6752.) The finding of prejudice should not be disturbed. Because a *Booth* violation is federal constitutional error, the trial court necessarily found the prosecution could not establish beyond a reasonable doubt that the error did not contribute to the jury's penalty decision. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The prosecution did not, and cannot now, show that the trial court abused its discretion in finding prejudice. "The trial judge is familiar with the evidence, witnesses, and proceedings, and is therefore in the best position to determine whether, in view of all the circumstances, justice demands a retrial. Where error or some other ground is established, his discretion in granting a new trial is seldom reversed. The presumptions on appeal are in favor of the order, and

the appellate court does not independently redetermine the question whether an error was prejudicial, or some other ground was compelling." (8 Witkin, Cal.Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 143, p. 644; see *Romero v. Riggs* (1994) 24 Cal.App.4th 117, 122.)

The victim's mother, wife and three children each testified at the penalty phase regarding the impact of the loss of their father on their lives. (See RT 5684-5697.) The family's powerful, emotional testimony would have made the jurors extremely sympathetic towards its wishes. The prosecutor's misconduct in telling the jury what verdict the family desired and urging them to render that verdict was, as the court found, "extraordinarily effective" and prejudicial. The trial court's decision to order a new penalty trial order was not only "reasonable" or "fairly debatable" (*Jiminez v. Sears, Roebuck & Co., supra,* 4 Cal.3d at p. 387), it was completely correct. Accordingly, the trial court's order granting a new trial for *Booth* error should be upheld and a new trial ordered.

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THE TRIAL COURT CORRECTLY ORDERED A NEW PENALTY TRIAL BASED ON THE ERRONEOUS ADMISSION OF PREJUDICIAL EVIDENCE OF OTHER CRIMES ALLEGED TO HAVE BEEN COMMITTED BY APPELLANT

The trial court correctly ordered a new penalty trial for appellant based on the erroneous admission of evidence, volunteered by a prosecution witness, that appellant had committed numerous crimes of violence at age 16 in North Hollywood. Fred Joseph, a store owner in North Hollywood, was supposed to testify about a single incident in which appellant was purported to have possessed a destructive device – specifically, a Molotov cocktail.[15] The prosecution had not provided any notice that it intended to prove any other criminal activity by appellant involving Joseph or known to him. The very weak evidence Joseph offered about appellant's possession of the destructive device, however, was overshadowed by Joseph's out-of-control testimony that appellant, among other things, had threatened to kill Joseph, had attempted to intimidate Joseph's customers into giving appellant money, and had threatened a superior court judge who was handling a juvenile case of appellant's. At the hearing on the motion for new trial, the court correctly determined it had erred in letting this evidence remain before the jury. The court found the evidence of these violent acts to be "powerful" and ordered a new penalty trial.[16]

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[15] Appellant will show in Argument 9, *post*, that evidence of this incident was insufficient and that the jury was incorrectly instructed regarding it.

[16] This issue is cognizable on appeal for the same reason as the issue in Argument 2, as explained in footnote 12 of that argument. To the extent this issue is not reviewable as part of the issue of the propriety of the trial (continued...)

A. Fred Joseph's Testimony

Fred Joseph owned a market and liquor store on Moorpark in North Hollywood in 1986. On April 20, 1986, he was outside in the parking lot behind his store, heading toward the trash cans, when a group of young men in two cars pulled up and started to jump out. (RT 5337.) Joseph ran back inside because he was afraid the young men were going to attack him. (RT 5337.) Although he did not see appellant in this group (RT 5338-5339, 5341, 5363), he offered that the reason he was afraid was because three weeks earlier Joseph's brother had told him appellant had threatened to kill Joseph. He explained further that appellant on that occasion had been behind the store "kind of intimidating customers at the back door for money." (RT 5338.)

On April 20, Joseph called the police after running back inside. (RT 5339.) He subsequently became aware that there was a fire in the parking lot. (RT 5339.) Joseph went outside the store when the police arrived. (RT 5340.) He saw an area where the parking lot had been burned and the remains of a glass bottle. (RT 5340.) That area was approximately 150 feet from Joseph's store. The bottle had not been thrown at his store. (RT 5357, 5360.)

On cross-examination, Joseph volunteered that he had trouble with appellant prior to April 20, and that on that previous occasion appellant had returned to the store "one hour after he threatened to kill me," which caused

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[16](...continued)
court's new trial order, appellant request that it be considered as an independent claim of trial court error – i.e., that the trial court erred in failing to strike the irrelevant testimony of Joseph and admonish the jury to disregard it.

Joseph to call the police. (RT 5342-5343.) Joseph offered that he had experience over the years with "characters that want to rob you and rip you off." (RT 5344.) He said he had trouble with appellant and had approached some juveniles that appellant "ran around with" and that these kids "backed off" but appellant did not: instead, "[h]e came with two cars of like Spanish gang members on me. Okay?" (RT 5345.) When defense counsel asked whether appellant was alone when Joseph on the first occasion encountered appellant, Joseph said that appellant was alone standing at the back door, that "customers were frightened of him. He was asking for money. But he was standing in a very military stance. Like very threatening. He was being very pushy." (RT 5345.) Joseph again repeated that it was this day that appellant threatened to kill him. (RT 5345.)

Joseph volunteered that the police arrested appellant on that prior occasion for possession of a knife. He added that, "They even arrested him with a knife. And it was an illegal search and seizure. [¶] And I can't understand. The guy had the knife. He had threatened me. He showed my brother the knife under his coat. They got him and let him go because it was an illegal search. [¶] I kept trying to have him arrested even with the judge. [¶] I mean, this guy is coming after me and I can't get him locked up." (RT 5347.)

In answer to the next question, Joseph offered: "I was trying to get him locked up. This judge is a juvenile judge. He works with gangs and he works with the North Hollywood Police. [¶] And I tried even with probation. . . And I wanted this guy off my back. [¶] I mean, wouldn't you want this guy off your back?" (RT 5348.)

Some further questioning revealed that Joseph approached a person he identified as a juvenile court judge, Jack Gold, after the incident with the

Molotov cocktail. (RT 5349.) Defense counsel asked if Joseph knew "whether Judge Gold ever had any contact as a bench officer with Mr. Collins?" (RT 5350.) Joseph answered, "I have only heard hearsay that he was looking for Jack's house." (RT 5350.)

When asked whether he had contact with appellant between their first meeting and April 20, 1986, Joseph responded that he "had contact with his [appellant's] friends and also with people down the street that he had threatened at the stained glass shop. [¶] It wasn't only me that he threatened in the area. Okay?" [¶] And I don't know how you run your life, but when we are out in the open we are like open targets. You got to take care of these people, these criminals fast." (RT 5350.)

Joseph was asked about previous instances in which, as a store owner, he felt like a victim before having any contact with appellant. Joseph responded: "Listen I have got an army of police on my side and I use them. These people are the victims if they come after us and that's my opinion, okay? [¶] And I admit he is not the only person, only criminal I have had locked up in the past so many years. Okay? [¶] But I don't know how you run your life, but when I got a guy coming after me with two carloads of people jumping me in the parking lot, I feel he means what he said. That he means he is going to kill me." (RT 5351.)

Appellant sought unsuccessfully to have the jury admonished to ignore Joseph's testimony (RT 5365) and to have the testimony stricken (RT 5617).

B. The Trial Court's Findings at the New Trial Motion Regarding Joseph's Testimony

At the hearing on the new trial motion, the trial court made the following findings with regard to the testimony of Joseph:

"I've invited briefs on the effect of my rulings allowing Mr. Joseph's testimony to be heard by the jury and this is an area that caused me great concern at the time. Now, neither side has briefed it for me.

"If you recall, counsel, the prosecution had given the defense notice that it intended to introduce as a factor in aggravation, among others, an act of violence directed at Mr. Joseph, specifically the throwing of a Molotov cocktail at Mr. Joseph. . . ."

"Early on Mr. Hill objected based on the then available offer of proof and objected to the introduction of such evidence arguing that the violence was aimed at real estate and not a person because the Molotov cocktail was thrown at a liquor store. I inquired in camera about whether or not the liquor store was inhabited and concluded that it was and based on the fact that it was thrown at the liquor store which was inhabited, I felt that clearly this is an act of violence against a person and I overruled the defense objection. Mr. Joseph was allowed to testify, and please let me be clear, I am not assessing blame on either side. It appears to me Mr. Joseph was a witness that was uncontrollable and provided partial information to the People as it was represented to me at different stages. Once he took the witness stand, it turned out that the Molotov cocktail was not even thrown at the liquor store at all but instead at a [garage][17] approximately 120 feet away, and again the defense moved for the exclusion of his testimony and I overruled the defense objection based on the case of authority cited by the People to the effect that sufficient notice has been given by virtu[]e of the proximity in time and totality of existing circumstances; but then on direct Mr. Joseph volunteered in response to another question that

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[17] During post-trial record correction proceedings, hundreds of examples of mistakes, or possible mistakes, by the court reporter were identified by the court and the trial attorneys and marked with brackets. The word "garage" is one example of this identification process. The actual trial testimony reflects that the purported Molotov cocktail was thrown in a parking lot, not a garage – a difference of no significance to this issue.

> Mr. Collins had committed other acts of violence of which notice was never given that he had threatened to kill Mr. Joseph three weeks earlier, and that he had threatened customers. On cross-examination, Mr. Joseph was uncontrollable and non[-]responsive at every turn of events. He repeated that Mr. Collins had threatened to kill him, that is Mr. Joseph, and then volunteered that Mr. Collins was the worst of the bunch, that other kids had been controlled but not Mr. Collins. He testified to attempted robberies where Mr. Collins was standing in a military stance threatening, asking customers for money, testified to an arrest totally unrelated in time and circumstance where Mr. Collins, where Mr. Joseph did a citizen's arrest on Mr. Collins with a knife and then volunteered that he, meaning Mr. Joseph, went to his customer, Jack Gold, who he believed to be a superior court judge. I believe Judge Gold is a commissioner or was a commissioner at the time and then further volunteered that Mr. Collins was looking for Jack Gold's house. Again, I am not assigning fault. I believe counsel had no way of knowing what was going to be said from one minute to the next, but all of these outbursts by Mr. Joseph brought to the attention of the trier of fact circumstances in aggravation[,] these acts of violence, which were not noted and which I think are rather powerful. Not the least of which is the suggestion that it was not beyond him to go looking for a superior court judge for whom he had matters pending to get the judge to do his bidding." (RT 6752-6754.)

The court then granted appellant a new penalty trial in part based on its failure to exclude or strike this evidence. (RT 6755, 6762.)

C. The Trial Court Correctly Ordered a New Trial Under Section 1181.5

When a new trial motion has been made, the trial court may grant a new trial "[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, ..." (§ 1181.5.) The court correctly relied on this section as supporting his decision to grant a new trial. (RT 6762.)

As noted in Arguments 1 and 2, *ante*, a trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 364; *People v. Hayes*, *supra*, 21 Cal.4th at pp. 1260-1261; *People v. Delgado*, *supra*, 5 Cal.4th at p. 328.) This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. (*Jiminez v. Sears, Roebuck & Co.*, *supra*, 4 Cal.3d at p. 387.) When the People seek to overturn the discretionary grant of a new trial, it is a "'daunting task' and an 'uphill battle.'" (*People v. Andrade*, *supra*, 79 Cal.App.4th at p. 654, quoting *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448.) An appellate court must give an order granting a motion for a new trial all the presumptions in favor of any appealable judgment. (*People v. Love*, *supra*, 51 Cal.2d at p. 755; *People v. Montgomery*, *supra*, 61 Cal.App.3d at p. 730.) There was no manifest abuse of discretion here; the court's decision was correct.

The court correctly determined that the evidence Joseph offered was inadmissible for lack of notice. For the penalty phase in a capital case, "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court prior to trial." (§ 190.3.) "The purpose of the statutory notice is to advise an accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty trial." (*People v. Miranda* (1987) 44 Cal.3d 57, 96.) Notice is sufficient only if it offers the defense that opportunity.

(See *People v. Howard* (1988) 44 Cal.3d 375, 425; *People v. Pride* (1992) 3 Cal.4th 195, 258.) The statutory requirement of notice "prior to trial" has been construed to mean "before the cause is called for trial." (*People v. Daniels* (1991) 52 Cal.3d 815, 879.)

There is no question that appellant did not have notice of any of the uncharged crimes to which Joseph referred other than the purported possession of a Molotov cocktail. The prosecutor acknowledged that the only criminal activity which she was attempting to prove through Joseph was a violation of section 12303.3, possession of a destructive device. (RT 5366, 5368-5369.) Accordingly, the trial court correctly determined that these uncharged crimes were inadmissible as aggravating evidence and concluded that it had erred in failing to strike Joseph's inadmissible testimony.

The trial court correctly recognized Joseph's inadmissible testimony regarding other crimes committed by appellant as "powerful" testimony. Evidence of unadjudicated acts of violence are admissible at a penalty phase because they tend "to show defendant's propensity for violence." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) The prosecutor, in her opening statement at the penalty phase told the jurors that she would show appellant was deserving of death in part because he had been violent at the age of 16 and had remained violent thereafter. (RT 5332.) Joseph's testimony regarding inadmissible violence and bad acts committed by appellant at age 16 therefore substantially bolstered one of the prosecution's significant themes in advocating for appellant's death.

The potential significance of evidence of uncharged crimes at a penalty phase is such that this Court has recommended hearings outside the presence of the jury to determine their admissibility. (*People v. Phillips*

(1985) 41 Cal.3d 29, 72 fn.25.) Where evidence of inadmissible other crimes evidence has been placed in evidence, a reviewing court "cannot gamble a life on the possibility" that they did not sway a single juror toward the death penalty. (*People v. Robertson* (1982) 33 Cal.3d 21, 55.) The trial court's order granting a new trial based on Fred Joseph's inadmissible testimony was correct; no manifest abuse of discretion (*People v. Hayes*, *supra*, 21 Cal.4th at pp. 1260-1261) can be demonstrated. Accordingly, appellant's death judgment must be set aside.

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THE TRIAL COURT ERRED IN DENYING APPELLANT'S MISTRIAL MOTION AFTER THE PROSECUTOR ELICITED INADMISSIBLE EVIDENCE THAT APPELLANT HAD RECENTLY BEEN RELEASED FROM PRISON

The trial court erred in denying appellant's motion for a mistrial after prosecution witness Maria Gutierrez made references in her testimony to the inadmissible facts that appellant had been in prison and had only recently been released from prison at the time Fred Rose was killed. Gutierrez was appellant's girlfriend at the time of his arrest and met him while he was incarcerated at the state prison in Susanville, California. The error denied appellant his rights to due process and a fair trial under state statutory law and under both the state and federal constitutions. (Cal. Const., art. I, §§ 15, 16 and 17; U.S. Const., 5th and 14th Amends.)

Appellant had moved in limine for an order that the prosecutor be instructed to advise Gutierrez that when she testified she was to make no mention of appellant's previous incarceration. Appellant argued that the fact that he was serving time in state prison and that he had only recently been released from prison at the time Rose was killed would be irrelevant and highly prejudicial. (CT 501-502.)[18] In response, the prosecutor told the court, "I would have no intention of eliciting from Maria Gutierrez that she

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[18] Although the court and prosecutor knew early on that appellant intended to testify (see e.g., RT 2347), the defense still sought to keep knowledge of appellant's recent imprisonment and parole status from the jury. The defense also moved in limine to prohibit the prosecution from presenting evidence that appellant was on parole (CT 491-492, RT 2342) and obtained a ruling excluding the testimony of appellant's parole officer from the prosecution's case-in-chief. (RT 2348-2349.) Earlier, appellant successfully moved to have the issue of appellant's charged priors bifurcated. (RT 345.)

met the defendant while he was in state prison. No problem with that. I had not intended to ask her that." (RT 2314.) The court then determined, "That renders the motion moot, but it's understood that there's to be no reference to the subject matter without first obtaining the permission of the court." (RT 2315.)

Despite her declared intention, the prosecutor asked questions of Gutierrez which elicited answers which included some of the very facts which the court ruled were not to be referenced. She asked Gutierrez how it was she came to have "run up a $1200 phone bill." Gutierrez answered that appellant "would call every night collect and he was in Susanville." (RT 2944.) Shortly thereafter, the prosecutor followed up, asking, "This was in a period of one month that you built up a $1200 collect phone bill?" Gutierrez answered, "No. This was when he was still in Susanville before he got out in December." (RT 2944.) Moments later appellant made a mistrial motion in chambers based on the prosecutor's eliciting both the fact that appellant was in Susanville and that he was released in the December just preceding the events of this case. (RT 2945.) The prosecutor claimed that she did not know that the witness would be making the response that she did, that the defense opened the area up, and that she doubted jurors knew that Susanville was a prison. (RT 2945-2946.) Without determining whether there was misconduct, the trial court denied the mistrial motion because it did not believe "that this is so prejudicial that it calls for a mistrial." (RT 2947.)

It is misconduct for a prosecutor to ask questions calling for inadmissible answers or intentionally elicit inadmissible testimony. (*People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Bonin* (1988) 46 Cal.3d 659, 689.) A prosecutor also has the duty to guard against statements by her

witnesses containing inadmissible evidence. (*People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Glass* (1975) 44 Cal.App.3d 772, 781-782; *People v. Schiers* (1971) 19 Cal.App.3d 102, 112; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688.)

The prosecutor's claim that her elicitation of this information was inadvertent is irrelevant. Misconduct may be found even where the prosecutor acts in good faith. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214; see *People v. Price* (1991) 1 Cal.4th 324, 447.) Even a witness' volunteered statement can provide the basis for a finding of incurable prejudice. (*People v. Rhinehart* (1973) 9 Cal.3d 139, 152.) Whether intentional or inadvertent, the prosecutor erred by allowing her witness to reveal appellant's recent imprisonment at the Susanville correctional facility. Her further expression of doubt that "anyone knows what Susanville is" is not convincing; even a juror who previously did not know there was a prison at Susanville would understand appellant had been in prison there after Gutierrez mentioned it was the place appellant was "before he got out in December." (RT 2944.) Because release from prison and parole are inextricably linked, jurors would also reasonably infer that appellant was on parole at the time of the offenses in this case. (See *People v. Stinson* (1963) 214 Cal.App.2d 476, 479-481 [police officer, mentioning defendant's parole officer, was making an improper allusion to a prior conviction].)

The evidence of appellant's recent imprisonment and parole status should not be underestimated. Just as evidence of criminal activity is inadmissible to show bad character, so too the fact that someone has served time in prison or is on parole is ordinarily inadmissible character trait evidence. (Evid. Code §1101; *People v. Morgan* (1978) 87 Cal.App.3d 59,

66; see *People v. Cruz* (1978) 83 Cal.App. 3d 308, 326-329 [jury improperly learned of defendant's juvenile crimes, CYA commitment and parole status].) There is a "grave danger" of prejudice when evidence of uncharged criminality is introduced. (*People v. Thompson* (1980) 27 Cal.3d 303, 317.) The reason for the exclusion of such evidence is not that it is never relevant; rather "the evidence is excluded because it has too much probative value." (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

The denial of a motion for mistrial is reviewed under the deferential abuse of discretion standard. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Price* (1991) 1 Cal.4th 324, 428.) The court should grant a mistrial where it judges the error incurable by admonition or instruction. (*People v. Wharton* (1991) 53 Cal.3d 522, 565; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Here, the court apparently found error, but underestimated its potential prejudice to appellant. As a result the court failed to either grant the mistrial or properly admonish the jury. This was error.

The error not only violated state law but federal constitutional law as well. Admission of evidence may violate the Due Process Clause of the Fourteenth Amendment when it is unduly prejudicial. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Erroneous admission of evidence of uncharged criminal acts may render a trial fundamentally unfair and thereby violate a defendant's right to due process (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381.)

> "While this Court has never [so] held . . . , our decisions . . . as well as decision by the courts of appeals and of state courts, suggest that

> evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." (*Spencer v. Texas* (1967) 385 U.S. 554, 572-574, dis. opn. of Warren, C.J.)

Furthermore, state evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of those rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) This expectation is protected against arbitrary deprivation under the Fourteenth Amendment. (*Ibid.*)

The error was prejudicial. The prosecution had a difficult case to prove. There were no eyewitnesses, and appellant was arrested far from the crime scene in another city. There was no definitive forensic evidence linking appellant to the homicide, and appellant had a plausible alibi defense. In these circumstances, evidence that appellant had very recently been released from prison would make jurors more likely to accept the prosecution's theory that appellant kidnaped and killed the victim, and to disbelieve appellant and his defense. Although appellant acknowledged when he testified that at the time of the homicide he had recently been released from prison, he did not have had to do so, and certainly would not have done so had the prosecution not already elicited the inadmissible information from Gutierrez. (See *People v. Cabrellis*, *supra*, 251 Cal.App.2d at p.688 [mistrial should have been granted when defendant forced to take stand to rebut false inference].) The prosecution cannot establish beyond a reasonable doubt that the error was not prejudicial (*Chapman v. California* (1967) 386 U.S. 18); moreover, it is reasonably probable that but for the error the outcome of the trial would have been

more favorable to appellant. (*People v. Watson* (1956) 46 Cal.2d 818.) Accordingly, appellant's convictions must be reversed.

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THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S RIGHTS TO REMAIN SILENT AND TO DUE PROCESS UNDER *DOYLE V. OHIO* BY USING APPELLANT'S POST-*MIRANDA* WARNING SILENCE FOR IMPEACHMENT

The prosecutor repeatedly violated appellant's right to remain silent under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*) during her cross-examination of appellant and during her guilt phase argument to the jury. Appellant presented an alibi defense at trial. The prosecutor attacked the credibility of the alibi by asking appellant why he did not tell the police or prosecutor about the alibi, either when he was questioned following the arrest or otherwise before trial. The prosecutor's violation of *Doyle* was not merely a single question or remark; she pursued the issue of appellant's silence relentlessly, asking not only why appellant remained silent but why he did not enlist others, including his mother, to contact the prosecution to plead his alibi for him. Her cross-examination on this subject covers over 11 pages of reporter's transcript. (RT 4738-4750.) She continued her misconduct during argument to the jury with a lengthy recap of her cross-examination on appellant's silence, finishing with her main point: "If you have got a righteous alibi, ladies and gentlemen, you tell it. And you keep telling it until somebody believes you because you know it's true." (RT 5109.) This cross-examination and argument by the prosecutor constituted multiple acts of misconduct and violated *Doyle*, as well as appellant's rights not to incriminate himself, to due process and a fair trial, and to a reliable penalty determination under both the state and federal constitutions. (Cal. Const.,art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th, 14th Amends.) The error is cognizable on appeal despite the absence of an objection from

appellant's counsel; alternatively, defense counsel rendered constitutionally ineffective assistance by failing to object. (Cal. Const., art. I, §15; U.S. Const., 6th, 14th Amends.)

A. Factual Background

Detective Castillo interviewed appellant for the first time on January 25, 1993, at 4:40 p.m. at which time Castillo read appellant his rights (RT 3997, 4799-4800) which, under *Miranda v. Arizona* (1966) 384 U.S. 436, include the right to remain silent. Castillo questioned appellant again on January 27 around 7:48 p.m. (RT 4008.) Although Castillo asked appellant about the circumstances under which appellant ended up in Fred Rose's car (RT 4003-4004), and accused appellant of killing Rose (RT 4006), he never asked about where appellant was at the time Rose was shot, and in fact deliberately withheld from appellant what time of day Rose was shot (RT 4803). Appellant did speak to Castillo. He made various exculpatory statements, some of which were contradictory, but did not indicate where he was at the time Rose was shot because the subject was never brought up. At trial, appellant presented an alibi defense based on his own testimony and the testimony of Silvia Gomez and Joe Valle: he visited Gomez at her home in East Los Angeles from around 5:30 or 6:00 p.m. until 8:00 p.m. the evening Fred Rose was shot. (RT 4434-4437 [appellant's testimony]; 4219, 4223 [Silvia Gomez's testimony].) Appellant also testified that he did not know he had an alibi for the crime until he learned when Rose was shot, which was after his interviews with Castillo. (RT 4528.) The prosecution learned about appellant's alibi prior to the presentation of the defense, apparently through the ordinary course of discovery in this case. (RT 4749, 4791.)

The prosecutor first introduced the idea of using appellant's silence

to impeach his alibi by asking appellant if he enjoyed being in jail. Appellant indicated he did not. (RT 4738.) She then asked appellant to "give us an explanation why you did not tell Detective Castillo that you were somewhere else" at the time Fred Rose was shot. (RT 4738.) Appellant indicated he did not think the detective would believe him. (RT 4739.)

The prosecutor persisted in questioning appellant about his silence regarding the alibi:

> "Q Did you even try?
>
> "A I figured there was no use even trying with him.
>
> "Q Why would you figure there is no use even trying? You gave him all kinds of other stories you wanted him to believe.
>
> "A Because, as you said, I did not know exactly what time that murder happened. I did not know exactly where I was at at that point in time.
>
> "Q Well, you could have done the exact same thing. Just told him everything you did the whole day.
>
> "A I imagine I could have done that, but I didn't.
>
> "Q Why not?
>
> "A I wasn't into helping him along with his investigation. He was trying to get me.
>
> "Q Mr. Collins, this investigator is trying to find out who committed a murder. You're his only suspect. [¶] If you knew you didn't commit the murder, why would you care if you're helping him. It is helping yourself, isn't it? It's not helping him. It's helping you.
>
> "A Past experience, every time I reach my hand out to help I get it slapped." (RT 4739.)

After a few questions about appellant's past encounters with police, the prosecutor returned to questioning appellant about why he remained

silent about his alibi:

"Q Isn't it true, sir, you had many opportunities – Detective Castillo gave you opportunity after opportunity after opportunity to tell him where you were that entire day?

"A Yes.

"Q You never did, did you?

"A No, I did not?

"Q And in the year and eight months since this murder you have been in jail, correct?

"A Yes, I have.

"Q How many times have you seen him in the courtroom?

"A Numerous.

"Q Have you ever once tried to say, 'Detective Castillo, it wasn't me'? [¶] I mean, by now you have got the time of the murder, right?

"A Yes.

"Q 'It wasn't me. Just check with Silvia Gomez. She will tell you where I was.'

"A I didn't figure that would do any good at that point. Especially after the prelim.

"Q Well, how about before the prelim? You knew what time the murder was by then, didn't you?

"A Yes, but I don't believe I had seen Detective Castillo on numerous occasions before the prelim.

"Q You saw him at the prelim and it lasted several days, didn't it?

"A Yes.

"Q You got the police reports. Certainly police reports were available to you starting January 28th in the afternoon after you got arraigned in municipal court; isn't that true?

"A I don't believe they became available to me." (RT 4740-4742.)

The prosecutor continued on in this vein:

"Q So you figured, 'I might as well stay in jail because I'm going to be doing this on a violation any way'? [¶] Is that what you're telling us?

"A Yes.

"Q And once that year was over, which would have been in January of this year, you still didn't think it was necessary? You would still rather stay in jail than telling anybody that you had a righteous alibi?

"A Well, I told my other attorney, Mr. Coady.

"Q Mr. Collins, I'm not talking about your attorney. Talking about you. [¶] You have no problem talking to people, do you, or communicating with people?

"A No, I do not.

"Q Why did you never, ever pick up a phone – and you're very good with a telephone, aren't you?

"A Yes, I am.

"Q – pick up a phone and say, 'Hey, Castillo. Check this out. I was at such and such a place when this murder went down'?

"A Didn't figure at that point it would do any good.

"Q Why not try? You keep telling us your life is on the line. Don't you think it's worth a try? (RT 4743.)

After an exchange about appellant's unfriendly relationship with Detective Castillo, the prosecutor returned to the issue of appellant's silence, this time during pretrial proceedings:

"Q Okay. How about me? You have seen me in court how may times?

"A Numerous occasions.

". . . . . .

"Q Any reason why you wouldn't say to me, 'Hey madam District Attorney or Miss District Attorney or Mrs. D'Agostino,'

whatever you want to call me, 'Lady, I got an alibi. You're barking up the wrong tree.'?

"A Because you are on his side of the street, not mine.

"Q Mr. Collins, fact of the matter is I'm not on any side of the street. I represent the People of the State of California.

"A Okay.

"Q Any reason why you didn't say to me, 'Mrs. D'Agostino, you're barking up the wrong tree. I got an alibi. Here's her name. Give her a call. You believe her, fine. If you don't believe her I'm back where I started. No better off, no worse off. [¶] Any reason?

"A Because it's my belief you're on his side of the street. (RT 4744-4745.)

After a few questions and answers regarding police bias, the prosecutor returned to appellant's silence yet again:

"Q Mr. Collins, you testified a little while ago that the reason you didn't say anything is because you didn't think the cops would believe you. And I'm now asking you if you didn't think they would believe you, why not Silvia?

"A I wouldn't see why they would believe her if they didn't believe me.

"Q Well, she is not an ex-con.

"A That's true.

"Q I think you're telling us the reason they wouldn't believe you, you were an ex-con and they would never believe you before. How about Silvia. That's not an ex-con.

"A It's like once they're set it's like a shark chasing bloody meat. Once he smells it, he's going after it. He's not going to divert his course for any reason. (RT 4746.)

There was another exchange regarding police officers before the prosecutor returned to appellant's silence:

"Q BY MS. D'AGOSTINO: When you talked to your mother and you have had all these three way conversations with your mother

and with Silvia and with your mother and with Joe Valle, did you ever tell your mother, 'Hey Ma –' and your mother loves you, doesn't she?

"A Yes.

"Q And your mother certainly would do anything you asked her to like putting in the three way phone and getting all these phone bills, right?

"A Yes.

"Q Did you ever tell her, 'Mother, Mom,' whatever you call her, 'I was at Silvia's house. You heard us all talking. Call the cops tell them it wasn't me'?

"A Through my own instructions to both her as well as anybody in this case on the defense, I told them, 'Don't have any contact whatsoever if you can avoid it because they will try to twist your words and try to use you against me.

"Q Mr. Collins, how is anyone going to twist your mother's words if she comes in and gives them the name and address of some house you were at when this murder happened? You tell us.

"A I don't believe they could twist that around.

"Q That's right. They can't. So why didn't you do it?

"A I told her to stay out. It's my business.

"Q And you're telling us that your mother is going to listen to you and stay out of it and let her son stay in jail for almost two years on a murder he allegedly didn't commit that he's got a perfect alibi for? [¶] Is that what you want the ladies and gentlemen of the jury to believe?

"A When I say something has to do with me and my life, she respects that.

"Q Mr. Collins, that's your mother. She doesn't want you in jail. She loves you. And you're telling us that she knows you have got an alibi and you're telling her not to tell anybody about it?

"A When I have told her don't mention anything to anybody about anything, you know, about the case or any information you

may gather from, you know, my conversations is simply because I don't want her putting herself and other people with you so you don't have the opportunity to twist their words.

"Q You don't want her doing what?

"A Otherwise if she was to give up Silvia or Joe or Mr. Delgado's name to the detectives, and that would be the same thing as me doing that, I told her, 'Don't do that because the police may in fact try to twist whatever they are trying to say.'

"Q How would that be the same as your doing it Mr. Collins? Your mother is not an ex-con. Your mother has had no run-ins with the police. Your mother is a citizen –

"A It would be the same as divulging defense witnesses.

"Q But Mr. Collins, you know that under the new law you have to divulge defense witnesses so what difference would that have made, sir?

"A I was never instructed to that in the law.

"Q Mr. Collins, you know perfectly well that we have had the names of Silvia Gomez and Mr. Valle certainly for the past three months, two months or whatever. And you knew that we were going to have to get them; isn't that true?

"A I figured they would come out.

"Q Mr. Collins, how would your mother calling Detective Castillo or calling me and saying, 'I have names and addresses of people with whom my son was when this murder happened. Check them out.' What do you think would happen to your mother if she did that?

"A Nothing would happen to her.

"Q That's right. Then why would you stop her from doing something like that, Mr. Collins?" (RT 4747-4750.)

At this point defense counsel interposed an objection:

"MR. HILL: Asked and answered. Objection.

"THE COURT: Sustained. 352." (RT 4750.)

The prosecutor did not return to the subject of appellant's silence until her argument to the jury, at which time she ripped into appellant for remaining silent about the alibi and used that silence specifically to attack his credibility and the veracity of his alibi:

> "What about his explanations to you right here on the witness stand about why he didn't tell the police about his alibi. That hasn't been that long ago and I don't think you could have forgotten that.
>
> "First he says they wouldn't believe him because he is an ex-con. Then he says, 'Well, let them do their own God damn work. I wasn't going to help them. I would have told them the moon was blue.'
>
> "He's got an 'alibi'? And he doesn't say a word about it?
>
> "So he's an ex-con. Okay. 'So why not have Silvia? She is not an ex-con. Why not have Silvia tell the cops about your alibi?'
>
> "Well, maybe Silvia is not the world's most credible witness either.
>
> "Okay. "How about your mother? How about your mother who wants to help you, who's been helping you right along?' Doesn't even ask his mother?
>
> "No, he doesn't mind staying in jail because he figured he was going to do a year on his parole violation anyway, et cetera, et cetera, et cetera.
>
> "This is so unbelievably ludicrous it is preposterous. And I can't believe that any one of you buy it for one moment.
>
> "If you have got a righteous alibi, ladies and gentlemen, you tell it. And you keep telling it until somebody believes you because you know it's true.
>
> "The reason he didn't discuss his alibi was because at that point it hadn't been formulated yet. It hadn't been totally

organized." (RT 5108-5109.)

B. The Prosecutor's Cross-Examination and Argument Violated *Doyle*

It is a violation of due process and fundamentally unfair for a prosecutor to use a defendant's silence following *Miranda* warnings to impeach his explanation subsequently offered at trial. (*Doyle v. Ohio* (1976) 426 U.S. 610.) The California courts and the Ninth Circuit have repeatedly given broad effect to *Doyle*. (See e.g., *People v. Galloway* (1979) 100 Cal.App.3d 551, 556; *People v. Farris* (1977) 66 Cal.App.3d 376, 389-390; *U.S. v. Killian* (9th Cir. 2002) 282 F.3d 1204, 1210.) Furthermore, it is misconduct for the prosecutor to use a defendant's silence for impeachment in violation of *Doyle*. (*People v. Galloway*, *supra*, 100 Cal.App.3d at pp. 556-562.)

Doyle is based on two separate principles: First, silence may be nothing more than the defendant's exercise of his right to remain silent following *Miranda* warnings. Such "post-arrest silence is insolubly ambiguous." (*Doyle v. Ohio*, *supra*, 426 U.S. at pp. 617-618.)[19] Second, *Miranda* warnings carry an implicit assurance from the state that a defendant's silence will carry no penalty. "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently

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[19] This prong of the *Doyle* rationale was based on previously-existing general rules of evidence: *Doyle* raised to a constitutional level the Supreme Court's previous holding in *United States v. Hale* (1975) 422 U.S. 171, which had relied on the Court's supervisory power to declare that it was improper for a prosecutor to draw an inference of a defendant's guilt from his post-arrest silence. In California, this Court made a similar pre-*Doyle* holding in *People v. Cockrell* (1965) 63 Cal.2d 659 based on article I, section 15 of the California Constitution.

offered at trial." (*Ibid.*)

When a defendant does talk to law enforcement officers after receiving *Miranda* warnings, *Doyle* still does not permit the prosecutor to use his silence as to matters his does not talk about. Rather, the prosecutor can impeach a defendant on cross-examination by inquiring into inconsistencies between his trial testimony and the statements made to the police. (*Anderson v. Charles* (1980) 447 U.S. 404, 408 (per curium); see *Doyle v. Ohio*, *supra*, 426 U.S. at p.632, fn. 11.)

The prosecutor's questioning and argument here were clear violations of *Doyle*. Appellant was informed by Castillo of his right to remain silent. (RT 3997, 4799-4800.)[20] The prosecutor betrayed over twenty times the state's implicit promise to appellant that his silence would not be used against him by asking him repeatedly, and in various ways, why he did not tell the police or prosecution about his alibi. She asked why appellant did not take the opportunity to explain his whereabouts at the time of the killing when questioned by Castillo, even though Castillo never asked where appellant was at the time of the shooting, and did not tell appellant when the shooting occurred. The prosecutor followed up with a series of questions asking appellant why he did not reveal his alibi during the months before trial, inquiring separately as to why he did not tell his alibi to Castillo or to the prosecutor herself, and why he did not have Silvia Gomez or even his mother tell the prosecution about his alibi. She capped this unconstitutional performance by arguing to the jury that "if you have got a righteous alibi, ladies and gentlemen, you tell it. And you keep telling it

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[20] Castillo agreed that he advised appellant of his rights (RT 3997) and appellant said Castillo "read him his rights" (RT 4799-4800). These are obvious shorthand expressions for giving *Miranda* warnings.

until somebody believes you because you know it's true." The unmistakable inferences the prosecutor sought the jury to draw from this point are precisely the ones prohibited by *Doyle*: that a defendant who remains silent about his defense until the time of trial is not to be believed, his alibi is not to be believed, and his silence is evidence of his guilt.

In *Doyle* the defendants claimed at trial they were framed by an informant in a narcotics case. The prosecutor committed constitutional error merely by asking each defendant on cross-examination whether they had told the police the "framing" story after being arrested. (*Doyle v. Ohio*, *supra*, 426 U.S. at p. 618.) Other cases following *Doyle* have often involved misconduct by the prosecutor which is far less flagrant than in this case. (See e.g., *People v. Galloway*, *supra*, 100 Cal.App.3d at p. 556 [error to question defendant about failure to mention alibi to anyone before he testified at trial]; *People v. Farris*, *supra*, 66 Cal.App.3d at pp. 389-390 [error to ask defendant questions such as "No one? You told no one before the preliminary hearing that Armelin and Nettles were the people that got out of that van?"]; *Reid v. Riddle* (4th Cir. 1977) 550 F.2d 1003, 1004 [prosecutor erred by asking defendant on cross-examination whether he told "Detective Duke or anybody" about his self-defense claim]; *United States v. Harp* (5th Cir. 1976) 536 F.2d 601, 602, fn.2 [prosecutor committed error in closing argument by stating, "Now doesn't it make sense that if the fact had been like the defendants said they had been, that they would have told somebody?"].)

The prosecutor's approach in this case was much like that in *Hassine v. Zimmerman* (3rd Cir. 1998) 160 F.3d 941 where the prosecutor committed *Doyle* error by asking the defendant how long he had been in jail with charges pending, and then asking him three times why he remained silent as

to his defense until he testified. The fact that appellant's trial testimony differed in some respects to the statements he made to the police following his arrest did not give the prosecution license to impeach him based on his failure to bring his alibi to the prosecution's attention before trial. (See also *Gravely v. Mills* (6th Cir. 1996) 87 F.3d 779, 787 [*Doyle* error committed despite fact that defendant had made prior inconsistent statements because the prosecutor went far beyond calling the jury's attention to the inconsistencies: "The prosecutor's clear intent was to persuade the jury that if [defendant's] trial testimony had indeed been true, he would have come forward earlier with his story."]; *United States v. Laury* (5th Cir. 1993) 985 F.2d 1293, 1303 [where defendant made statements to the police but did not reveal his alibi until trial, it was *Doyle* error for the prosecutor to suggest on cross-examination that it was implausible defendant would prefer to languish in jail than tell the FBI his alibi].) Accordingly, the prosecutor's questions and argument to the jury violated appellant's right to due process under *Doyle*.[21]

C. The Issue Was Not Waived

Appellant's counsel made no objection to the questions and arguments set forth above. An objection is generally, but not always, required to preserve a claim based on either prosecutorial misconduct or *Doyle* error. (See *People v. Green* (1980) 27 Cal.3d 1, 27 [misconduct]; *People v. Carter* (2003) 30 Cal.4th 1166, 1207 [*Doyle*].) In *People v.*

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[21] As an independent ground for reversal, the use of appellant's silence for purpose of impeaching his trial testimony also violated appellant's privilege against self-incrimination under article I, section 15 of the California Constitution and incorporated into Evidence Code section 940. (*People v. Givans* (1985) 166 Cal.App.3d 793, 800.)

Jacobs (1984) 158 Cal.App.3d 40, 48, the "extreme potential for prejudice arising from questions about a defendant's postarrest silence" permitted defendant to raise *Doyle* error on appeal in the absence of any objection below. A failure to object will also be excused when objection would be futile (*People v. Arias* (1996) 13 Cal.4th 92, 159) or when an admonition would not have cured the harm caused by the misconduct (*People v. Price* (1991) 1 Cal.4th 324, 447). Furthermore, in *People v. Hill* (1998) 17 Cal.4th 800, 821, this Court excused defense counsel from "the legal obligation to continually object" where he was "subjected to a constant barrage" of unethical conduct.

In the present case, the blatant impugning of appellant's constitutional right to remain silent was both extremely prejudicial and impossible to cure by admonition. (See *People v. Jacobs*, *supra*, 158 Cal.App.3d at p.48.) Furthermore, the constant barrage of misconduct by the prosecutor (see Arguments 2, 4-7, 11-16.) rivaled the unethical conduct of the prosecutor in *People v. Hill*, *supra*, 17 Cal.4th at pp. 819-839, thereby excusing counsel from his obligation to object.

To the extent the absence of an objection precludes direct review of the issue by this court, appellant's trial counsel provided ineffective assistance in failing to interpose an objection and request that the jury be admonished. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Pope* (1979) 23 Cal.3d 412.) There could be no conceivable strategic reason for allowing the prosecutor on cross-examination to repeatedly use appellant's silence to impeach him and discredit his alibi, or to allow her to argue appellant's silence to the jury for the same purpose. In fact, counsel attempted to address the matter briefly in argument, asserting that the case was going to go to trial regardless of what Silvia Gomez and Joe Valle said.

(RT 5186.) Effective counsel would have sought to exclude the evidence rather than respond to it at argument.

D. The Errors Were Prejudicial

The prejudice resulting from *Doyle* error is assessed under *Chapman v. California* (1967) 386 U.S. 18. Before a federal constitutional error can be held harmless, this court must determine that it could have had no effect upon the verdict and was harmless beyond a reasonable doubt. (*Id.*, at p. 24.) The state cannot demonstrate that the error was harmless here. The evidence of guilt was in no way overwhelming. There were no eyewitnesses to the killing and the evidence linking appellant to the crime scene was not compelling. The gun recovered in Bakersfield could not be established as the murder weapon despite the prosecution's attempt to do so. The improper use of appellant's silence touched a "live nerve of the defense" (*People v. Galloway*, *supra*, 100 Cal.App.3d at p. 561) in that it was used to undermine appellant's alibi which placed him in East Los Angeles at or near the time of the shooting in North Hollywood, which would make it impossible or very difficult for appellant to be the killer if the alibi was believed. Under these circumstances, the error cannot be deemed harmless whether analyzed under the *Chapman* standard or the state law error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.) Similarly, under the *Strickland* test for ineffective assistance of counsel, there is a reasonable probability that appellant would have received a more favorable outcome but for the unprofessional errors of his attorney.

The convictions and sentence of death must therefore be reversed.

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THE PROSECUTOR COMMITTED NUMEROUS ACTS OF MISCONDUCT WHILE CROSS-EXAMINING APPELLANT

Besides the *Doyle* error discussed in the previous argument, the prosecutor committed numerous other acts of serious misconduct while cross-examining appellant. These included making blatantly improper comments on the evidence to support her theory of the case, asking questions which improperly imparted inadmissible evidence to the jury, and ridiculing and arguing with appellant. This misconduct violated appellant's rights to due process, to a fair jury trial, to confront and cross-examine witnesses, and to a reliable determination of guilt and death-eligibility, all in violation of state law and the federal constitution. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th , 6th, 8th and 14th Amends.)

There were at least seven separate instances of misconduct, which are discussed here in the order in which they occurred:

1. Appellant acknowledged in his testimony that he had only been out of prison for a month at the time he stole Fred Rose's car, and claimed he had been trying to settle down and do well during that period. (RT 4557.) The prosecutor then asked,

"Q And you lasted a month before you got in this car, right?

"A Yes.

"Q That's [a] pretty good record for you, isn't it?"

"A Not for me. That's what happened at the time." (RT 4557.)

There was no objection to this comment.

A prosecutor who improperly cross-examines a defendant in order to place inadmissible prejudicial evidence before the jury is guilty of misconduct. (*People v. Evans* (1952) 39 Cal.2d 242, 248-249; *People v.*

Johnson (1978) 77 Cal.App.3d 866, 873-874.) The prosecutor may not interrogate witnesses "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner* (1975) 13 Cal.3d 612, 619; see *People v. Visciotti* (1992) 2 Cal.4th 1, 52 .) Improper questions that violate a previous ruling by the trial court "are particularly inexcusable." (*People v. Glass* (1975) 44 Cal.App.3d 772, 781-782.)

By her remark, "That's [a] pretty good record for you, isn't it?" the prosecutor illicitly informed the jury that appellant had suffered incarcerations prior to his prison term for robbery, and that he had re-offended after release from those incarcerations in less than a month. The prosecutor could not possibly believe reference to appellant's juvenile record, and how long he spent out of custody before re-offending, was admissible evidence here.[22] The impropriety of the prosecutor's conduct in this case was not cured by the fact that her question elicited a negative answer. The very nature of the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question. Her question was clear misconduct intended to bring otherwise-inadmissible information to the jury's attention.

2. Following some questions and answers about the interview

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[22] During the testimony of Salo Gutierrez appellant sought a ruling that the prosecutor could not elicit from the witness certain evidence about appellant's incarceration, including the date of his release. The court had deemed the issue moot when the prosecutor indicated she had no intention of introducing such evidence. (RT 2314-2315; see Argument 4, *ante*.)

Officer Coffey had with Lorenzo "Grande" Santana, in which appellant recalled that the district attorney had at some point said words to the effect that Coffey was a sloppy note-taker, this exchange took place:

"Q Mr. Collins, you remember almost every word that went on in this case, don't you? In this trial?

"A I would hope so.

"Q Okay.

"A My life is on the line.

"Q Y ou have said that a few times, sir. I think the jury is aware of that already.

"A I would hope so.

"Q Yes. So was Mr. Rose's.
Now –

"A Not in conjunction with myself.

"Q Sir, there is no question pending." (RT 4570.)

There was no objection to these comments.

The prosecutor's remarks in this exchange were argumentative, gratuitous and inflammatory, and therefore constituted misconduct. In *People v. Osband* (1996) 13 Cal.4th 622, 694, this Court found misconduct where the prosecutor engaged in the following exchange while cross-examining defendant about the beating of a woman: "'Q. Did you take anything from her?' [¶] 'A. No, I didn't' [¶] 'Q. Besides her dignity, I mean.'" Although this isolated incident of misconduct in *Osband* was deemed "de minimis," in the present case the misconduct of commenting on the evidence and arguing with appellant was just one of many incidents of misconduct during the cross-examination of appellant. (See also *People v. Hill*, *supra*, 17 Cal.4th at 819-820, 823, 827-828, 832-833 [rude, intemperate, unnecessarily sarcastic remarks]; *People v. Espinoza*, *supra*, 3

Cal.4th at p. 820.)

3. Appellant testified that he previously had an ATM card through a joint bank account with his mother in 1989, and that he had tried to withdraw more than $200 when using Rose's ATM card because the card he had with his mother did not have a limit. (RT 4431, 4578.) The prosecutor then asked, "Was the account in the name of Scott Rockefeller?" (RT 4578.) There was no objection to this remark.

Standing alone this comment might not merit mention, but it is again part of the pattern of misconduct committed by the prosecutor in this case. It is misconduct and unprofessional conduct to taunt or ridicule a witness during examination. (See *People v. Hill*, *supra*, 17 Cal.4th at 819-820, 823, 827-828, 832-833 [rude, intemperate, unnecessarily sarcastic remarks]; *Boyle v. Million* (6th Cir. 2000) 201 F.3d 711 [badgering and interrupting witness and calling witness names was misconduct].)

4. When the prosecutor cross-examined about Detective Castillo's interrogation of appellant regarding the circumstances under which the gun was thrown out the car window during the police chase, she asked,

> "Q . . . and you interrupted him and you said, 'Might just got passed my way.' You thought real fast there, huh?
>
> "A I was throwing stuff out of the car.
>
> "Q No, what I am saying is you were thinking real fast in the answers to Detective Castillo when he said, 'Why are your prints on the gun,' so you had to cover?
>
> "A Yes.
>
> "Q Pretty sharp thinking, pretty smooth." (RT 4657.)

Defense counsel moved to strike noting, "There's no question pending. All afternoon long, she's been making editorial comments without

questions." (RT 4657.) The court did not grant the motion, stating simply, "The jury has been advised statements of counsel are not evidence." (RT 4657.)

The comment was clearly improper and constituted misconduct; the prosecutor was incorporating improper argument into cross-examination and imparting her theory of the case to the jury through gratuitous remarks rather than through evidence. (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 722.) The prosecutor wanted to undermine appellant's credibility by convincing the jury appellant was a "sharp thinking" and "smooth" liar, and deliberately chose to argue that fact during cross-examination rather wait for final arguments. This characterization would also serve to bolster her portrait of appellant at the penalty phase as someone who would be a danger in the future if given a sentence of LWOP rather than death.

5. The prosecutor asked appellant a series of questions about why he did not go to the gas station across the street from the McDonald's restaurant at which he ate after visiting Silvia Gomez. Appellant responded to one question as follows:

> "A Can't recall my thought process. Was about at that point in time I was thinking and thinking about going to Bakersfield. Maybe I saw the gas station. Assumed I could get to the Valley, had enough gas, you know.
>
> "Q Or maybe you wanted to go right by the murder scene to be sure the cops had found the body, yes?" (RT 4698.)

Appellant's defense was that he was never at the scene of the homicide. Regardless of any circumstantial evidence supporting appellant's presence at the scene, however, the record is devoid of any substantial evidence that he "returned" there before going to Bakersfield.

Defense counsel objected that there was no question pending, and

the court sustained the objection. (RT 4698.) It is improper for a prosecutor to present potentially prejudicial "evidence" to a jury in the form of argument. (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 722.) As noted above, the prosecutor may not interrogate witnesses "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner*, *supra*, 13 Cal.3d 612, 619; see also *People v. Perez* (1962) 58 Cal.2d 229, 244 [asking questions suggesting fact harmful to defendant without belief facts could be proved].) The prosecutor had no evidence to support her theory that appellant returned to the scene of the crime, but nevertheless chose to plant that idea in the minds of the jury through an improper question to appellant. Furthermore, the prosecutor clearly had no expectation appellant would answer "yes" to her question; instead, the information she wanted the jury to hear was in her question, not in the anticipated answer.

6. The prosecutor asked appellant several questions about how he lied to both Salo Gutierrez and his mother about how he had obtained some money working in construction, including this exchange:

> "Q Is there some reason you keep telling your mother about construction, Salo construction? Did you have construction on your mind?
>
> ". . . .
>
> "A I would say on my mind because I would wear the construction hat at the bank and just because there's tools, you know, it fits. I used it at that point in time.
>
> "Q BY MRS. D'AGOSTINO: A quick thinker, aren't you Mr. Collins?" (RT 4699.)
>
> Defense counsel objected and asked that the prosecutor be

admonished. (RT 4699.) The court sustained the objection but did not give an admonition. (RT 4699.) The prosecutor's comment in the guise of a question was clearly improper and constituted misconduct. Like the "sharp thinking" and "smooth" remarks noted above, this is yet another example of the prosecutor attacking appellant's credibility and imparting her theory of the case to the jury through gratuitous remarks rather than through evidence. (See *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 722.)

7. The prosecutor asked a series of questions about appellant's telephone conversations with Silvia Gomez after his arrest. Gomez had testified that she believed appellant told her on January 26th that the homicide for which he had been arrested happened when appellant was visiting Gomez at her home. Appellant contended that he did not learn when the homicide occurred until later.

This exchange occurred:

> "Q Mr. Collins, she testified that on January 26th you told her when you called her that you were arrested for some murder and that the murder had happened when you were at her house. [¶] Now, how did you know the murder had happened when you were at her house?
>
> "A I did not know at that point in time.
>
> "Q Then how could you possibly tell her that?
>
> "A I don't believe that I did tell her that on that date.
>
> "Q Then she is lying also, right?
>
> "A I believe she is mistaken of what telephone call she actually got the information from me.
>
> "Q Mr. Collins, only the murderer would have known that the murder occurred sometime between 5:00 and 6:30 or 5:00 and 7:00. Only the murderer and people who heard the shots." (RT 4735.)

Defense counsel noted that there was no question pending and his

request that the prosecutor's comment be stricken was granted. (RT 4735-4736.)

There were two separate instances of misconduct in this exchange. First, the prosecutor improperly called upon appellant to comment on the veracity of the statement of Silvia Gomez. Forcing a defendant to comment on the veracity of another witness's testimony is improper. (*U.S. v. Henke* (9th Cir. 2000) 222 F.3d 633, 643; *U.S. v. Sanchez-Lima* (9th Cir.1998) 161 F.3d 545, 548- 549.) Lay opinion about the veracity of particular statements by another is inadmissible on that issue. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40.)

Second, this is a blatant example of the prosecutor simply arguing her case through the guise of cross-examination. Here she dispensed with any pretense of using the form of a question and devolved to simply arguing with appellant, informing the jury of her theory that appellant had revealed knowledge of the time of the murder to Gomez before he would have had been able to know it had he not been the perpetrator. This was clear misconduct. (See *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 722; *People v. Wagner*, *supra*, 13 Cal.3d at p. 619; *People v. Johnson*, *supra*, 77 Cal.App.3d at pp. 873-874.)

These acts of misconduct individually and collectively prejudiced appellant and deprived him of a fair trial. A prosecutor's unprofessional behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637; *People v. Hill*, *supra*, 17 Cal.4th at p. 681; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Under state law, a prosecutor commits misconduct when she uses deceptive or reprehensible methods to

attempt to persuade either the court or the jury. (*People v. Hill*, *supra*, 17 Cal.4th at p. 681; *People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.) Prosecutors who engage in rude or intemperate behavior greatly demean the office they hold and the People in whose name they serve. (See *People v. Bain* (1971) 5 Cal.3d 839, 849; *People v. Kelley* (1977) 75 Cal.App.3d 672, 680-689.)

When a defendant elects to testify, his testimony obviously becomes one of the critical moments in the trial. Here the prosecutor, rather than rise to the "elevated standard of conduct" (*People v. Hill*, *supra*, 17 Cal.4th at p. 819) expected of the state's representative, chose to engaged in a "constant barrage" (*ibid.* at p. 682) of unethical conduct at this critical moment in the trial, in order to undermine appellant's credibility and the viability of his entire defense. (See *People v. Galloway*, *supra*, 100 Cal.App.3d at p. 561 [misconduct touched a "live nerve of the defense"].) The lack of objections to some of the misconduct here should be excused in light of the pervasive and continuing course of misconduct by the prosecutor. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 683.) Moreover, the misconduct was not the sort which could be cured by admonition; rather, objecting to the comments and improper questions could have had the effect of simply reinforcing their content to the jury. By similar reasoning, any admonitions given by the court when appellant did object were ineffective at ameliorating the damage inflicted by the misconduct.

Because the pattern of misconduct rendered the trial fundamentally unfair, the conviction must be reversed. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637.) Even if the *Donnelly* standard is not met, the misconduct otherwise violated appellant's federal constitutional rights so as to require the prosecution to establish beyond a reasonable doubt theat the errors were

harmless. (*Chapman v. California*, *supra*, 386 U.S. 18.) Moreover, it is reasonably probable that the outcome of the trial would have been different but for the misconduct. (*People v. Watson*, *supra*, 46 Cal.2d 818.) The convictions must therefore be reversed.

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THE PROSECUTOR REPEATEDLY COMMITTED MISCONDUCT DURING HER GUILT PHASE ARGUMENT

During her guilt phase argument the prosecutor committed at least three acts of misconduct by referring to evidence outside the record and using for improper purposes evidence which was admitted for a limited purpose. This misconduct violated appellant's right to confront and cross-examine witnesses, to a fair jury trial, to due process, and to reliable determinations of guilt and death eligibility under both the state and federal constitutions. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th, 14th Amends.)

A. The Acts of Misconduct

1. The prosecutor tried to explain the lies and inconsistencies in the testimony of the various juvenile gang witnesses partly by evidence that they were afraid of appellant. To this end, the prosecutor drew the jury's attention to the demeanor of Michael Hernandez on the witness stand. Then she argued as follows: "Was there any doubt in your mind this man was afraid. You heard him testify he was wearing a tee shirt when he came to court that had the name of the institution that he is in on it and he asked for another shirt. We didn't have one and he put the shirt on inside out hoping that would hide the name of where he was. You heard him testify how scared he was and how when he was in custody, 'It's even easier to put a hit out on you.'" (RT 5085.) Except for the simple observation that Hernandez was wearing a tee-shirt, the prosecutor's references to, and her anecdote about, Hernandez's tee-shirt were evidence outside the record.[23] There was

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[23] It is probable that the prosecutor was not claiming that Hernandez (continued...)

no evidence presented that Hernandez asked to wear a different shirt so appellant would not find out what where he was incarcerated, or that he hid that name by turning his shirt inside out.

2. The prosecution had attempted to tie appellant to the murder of Fred Rose through evidence that he threw Rose's watch out of the car. A number of items thrown out of the car during the police chase were recovered, including a gun, but no watch was found. Rose was not wearing a watch when he was found. The watch was a potentially significant piece of evidence because, although appellant admitted stealing Rose's car and its contents, including Rose's wallet, he said he did not steal a watch (RT 4634), and claimed he had no contact with Rose. The only person the prosecution had to link appellant to the watch was Sergio Zamora, the juvenile who had 10 to 15 beers during the evening. On direct examination, Zamora testified that appellant threw a number of items out of the car, but equivocated about the watch:

> "Q [BY MRS. D'AGOSTINO] What kind of things did he grab from the glove compartment?
>
> "A Cards.
>
> "Q What else?
>
> "A Credit cards *and I think a watch.*
>
> "Q What kind of a watch; do you know?

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[23](...continued)
actually testified that he was wearing a shirt with his institution on it and asked for another shirt. A review of his testimony makes clear that is not the case. The first part of the sentence about the tee-shirt should probably read, "You heard him testify. He was wearing . . ." As the record reads now, the prosecutor not only referred to purported facts outside the record, but misstated the evidence as well. Appellant's principle contention here is that the prosecutor was referring to facts outside the record.

"A A black watch." (RT 3312, emphasis added.)

". . . . . .

"Q BY MS. D'AGOSTINO: Sergio, I'm going to show you this watch and ask you does this look like the watch that you saw being thrown out of the car?

"A I just seen the bottom.

"Q What portion of the watch are you talking about?

"A The wristband." (RT 3312-3313.)

The prosecutor noted for the record that the watch shown to the witness was a Casio G-Shock watch (RT 3313), which was the same model as Fred Rose wore, according to other testimony.[24]

In his argument to the jury, defense counsel questioned the prosecution's evidence that Rose's watch was thrown out of the car:

> "The one other element and this item of a watch, is rather difficult to deal with because it's obviously mentioned by one witness. That's Sergio Zamora who in his testimony said that Mr. Collins had said something or Collins threw it out the window of the car, a wallet, credit card *and I think a watch*. When he was asked about that by the prosecution, she showed him a watch and indicates something about a band that he had seen. You have to factor into his answer his state of sobriety, the fact that his comment and statement cannot be reconciled with anybody else. . . . [¶] The other items, the items that were either here in the glove compartment or in the possession or close to Mr. Collins, we know were found very close to that car which hit that chain link fence and became

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[24] The watch the prosecutor showed Zamora was not Rose's watch, but a purportedly similar watch obtained by the prosecution for identification purposes.

intertwined in it, and no one has found a watch. There's no evidence of any watch being found." (RT 5188-5189, emphasis added.)[25]

In her rebuttal argument, the prosecutor erroneously attacked defense counsel for misstating the evidence regarding Sergio Zamora's testimony about the watch:

> ". . . there were a couple of areas I thought were significant where there was a misstatement made by the defense. I don't think Mr. Hill did it deliberately, but I've got to point it out.
>
> "The first one he said yesterday, and he repeated it again this morning, had to do with the watch.
>
> "He said that Sergio's exact statement about the watch was that, 'The defendant threw out, I think, a watch.'"
>
> "*That is totally utterly false.* Sergio's statements on page 12 of his interview of January 25th, which was read into the record here, goes as follows:
>
> "Detective Castillo is questioning him. They are talking about property that the defendant threw out of the car: the bullets, the credit cards.
>
> "And Sergio then says at line 10, 'and a watch.' Not, 'I think,' but, 'and a watch.'
>
> ". . . . . .
>
> "He didn't say he thought it was a watch. He said 'a watch.'" (RT 5234-5235, emphasis added.)

In fact, it is the prosecutor's version of the evidence that is false. Defense counsel accurately recounted Zamora's testimony word for word. Neither the transcript of the police interview with Zamora on January 25th

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[25] Defense counsel had also made a brief reference to Zamora being the only person to see a watch much earlier in his argument. (RT 5127.)

nor the portion read by the prosecutor was in evidence. The prosecutor was apparently referring to information contained in one of her own questions posed to appellant, not to any piece of evidence: during cross-examination she asked appellant a number of questions about the watch, and about Zamora's claim to have seen a watch thrown out of the car. Appellant indicated he did not know where Zamora got any information about a watch, but that it was possible the police suggested it to Zamora. (RT 4634-4635.) The prosecutor followed up on this idea the following court day:

> "Q On Friday, Mr. Collins, there was some discussion about how it's possible that Mr. Zamora knew anything about a watch having been thrown out of the car. Do you remember that?
>
> "A Yes, ma'am.
>
> "Q And you said possibly someone had fed him that information or words to that [e]ffect. Is that an accurate synopsis of our discussion Friday?
>
> "A Yes, ma'am.
>
> "Q All right. I told you I would bring up the transcripts so we could get to that and this one is on tape unlike Mr. Coffey's with Mr. Santana. Do you recall that?
>
> "A Yes, ma'am.
>
> "Q Page 12 of the interview with Mr. Zamora, and I am referring to the interview which took place on January 25th at 2:15 a.m. at Bakersfield Jail, Mr. Zamora said, he's asked basically what had been thrown out of the car and he says, "and a watch," and the detective says "Yes?" Does that sound like the detective told him what's been thrown out?
>
> "A No it does not." (RT 4663-4664.)

The prosecutor's question about the statement purportedly made by Zamora to the police is not evidence, it is merely the statement of counsel. As such, the prosecutor's arguments on this point, referring to her own

statement rather than to evidence, were improper references to evidence outside the record, and her claim that defense counsel's version of the evidence was "utterly false" was itself false.

3. Appellant's prior conviction for robbery was admitted for purposes of impeachment, and the court instructed the jury as to that limited purpose of evidence of a prior conviction. (RT 4966.)[26] The prosecutor, however, in her argument to the jury used the prior for a different, and improper, purpose. She argued that appellant's motive was one piece of evidence of his guilt of the charged crimes, and that they could infer a motive to kill Fred Rose from the prior, because by killing Rose appellant enhanced his chances of not getting caught and being sent back to prison.

The prosecutor first raised the issue in her opening argument to the jury when she was discussing her theory why Rose would have cooperated with the perpetrator, which was responsive to the defense argument that Rose would have had the opportunity to escape from the car if appellant had kidnaped him: "And you have to remember that Fred Rose didn't know this defendant. He knew nothing about his background, didn't know about his prior robbery with a gun, and perhaps his decision that he wasn't going to leave any witnesses alive this time." (RT 5099.)[27] Defense counsel did not

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[26] CALJIC No. 2.50 [Evidence of Other Crimes] was also given, but it was tailored to apply to the evidence of the drive-by shooting, not to the prior robbery. (RT 4845-4846.) Furthermore, the prosecutor indicated she was not using the robbery prior as evidence under Evidence Code section 1101, subdivision (b). (RT 4860.)

[27] Appellant had testified that he had committed an armed robbery, not a robbery with a gun. (RT 4428.) Although the evidence at the penalty phase would show that crime was committed with the use of a gun, the state of the evidence at the guilt phase did not justify the prosecutor's

(continued...)

object at this point, but responded in his argument to the jury by pointing out that the jury was limited to considering the prior conviction for impeachment purposes, and that the prosecutor had gone beyond that by arguing that because of the prior that appellant could not afford to leave a witness against him. (RT 5196.)

In her closing argument, the prosecutor returned to this issue, noting that counsel had suggested

> ". . . that somehow I have done something wrong because I have gone beyond this defendant's prior conviction and argued to you that he could not afford to leave a witness behind him this time.
>
> "Well, think about it. If you were a young man his age and you had just gotten out of prison for an armed robbery and you had just robbed someone else and kidnaped them, would you want to leave that person alive to identify you so you could go back to prison?
>
> "Not this man. He's too fond of his freedom and partying. No way is he going to leave someone alive this time.
>
> "Obviously, the way he went to prison the first time someone must have identified him. He is not going to risk that again." (RT 5258-5259.)

Appellant objected that this was an impermissible use of the prior conviction. (RT 5259.) Respondent replied that "my argument is as logical as an argument could be. I'm not saying that he was identified before. I'm just saying it is obvious that that was his motive." (RT 5260.)

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[27](...continued)
characterization, and is technically a misstatement of the evidence which enhanced the likelihood that the jury would draw the improper inference that because appellant had previously committed a robbery using a gun, that he was guilty of the present crimes as charged.

The court correctly pointed out that the prosecutor's argument assumed a fact not in evidence – that there was someone who had identified appellant. The court also pointed out that if the motive was to eliminate a witness to avoid apprehension, then the fact that appellant was convicted of a felony had nothing to do with it; such a motive exists whether or not there is a prior conviction. (RT 5260.) The only remedy the court proposed however, was to read the jury the instruction on the limited use of prior convictions. (RT 5261.) But then the court gave no such instruction and no admonition to the jury, and instead allowed the prosecutor to paraphrase the instruction to the jury. (RT 5261.) Moreover, the prosecutor then paraphrased the wrong instruction – CALJIC No. 2.50 regarding evidence of other crimes, rather than CALJIC No. 2.23 on conviction for felonies affecting the believability of witnesses – and proceeded to reiterate much of her improper argument:

> "Ladies and gentlemen, one of the instructions you're going to get from the judge or that you have gotten from the judge and you will have it in the jury room has to do with defendant's prior conviction. And for what purposes you can consider it.
>
> "And you are not to consider it merely to show that he is a person who is predisposed to commit crimes.
>
> "So the argument that I just gave to you has nothing to do with his actual conviction. What I'm arguing to you is that inferences that I believe common sense tells you why somebody who has been in prison before would not want to go back and would therefore want to eliminate a witness." (RT 5262.)

Motive is not an element of the crimes charged. The prosecutor raised the issue of motive in the context of arguing that the evidence in her case supported a verdict that appellant committed the crimes charged. In

short, she was arguing that evidence of motive was evidence of identity. The prosecutor's theory was that appellant kidnaped and robbed the victim to get his money, and killed him to enhance his chances of avoiding the inevitable return to prison which would result from getting caught. But the prosecutor was missing a predicate fact necessary to make that argument – evidence of the underlying prior. Appellant's prior robbery had been introduced only for impeachment purposes and was not available as evidence of motive. The prosecutor's use of the prior for that purpose was improper and constituted misconduct.

Furthermore, despite her protestations to the contrary, the prosecutor's argument *did* rely on the improper inference that the prior criminal conduct demonstrated a criminal propensity (see Evid. Code § 1101, subd. (a)), specifically a propensity to commit murder. While a prosecutor may legitimately have a theory that a defendant's motive for a crime is to avoid going back to prison, the evidence to support such a theory cannot be the fact of the prior itself. If having a prior felony is a motive to avoid apprehension, then everyone with a prior has such a motive, and the propensity of such felons to act on that motive means that the prior becomes evidence of a propensity to commit crimes to avoid apprehension. Allowing such an inference violates the rule that evidence of other crimes is inadmissible to prove the accused had the propensity or disposition to commit the crime charged. (Evid. Code §1101, subd. (a); *People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

The prosecutor, therefore, committed misconduct in this argument by relying on evidence of the prior which was in violation of the court's ruling, and by arguing the fact not in evidence that appellant had been identified in his prior robbery.

B. The Prosecutor's Arguments Constituted Prejudicial Misconduct

It is misconduct for the prosecutor to state facts not in evidence or to imply the existence of evidence known to the prosecutor but not to the jury. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 212-213.) Prosecutorial misconduct clearly occurs when, during closing argument, a prosecutor refers to facts not in evidence. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 827-828; *People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Such statements tend to make the prosecutor his own witness, offering unsworn testimony not subject to cross-examination in violation of the Sixth and Fourteenth Amendments. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 213.) It is also misconduct for a prosecutor to make remarks in closing argument that refer to evidence determined to be inadmissible in a previous ruling of the trial court. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) It is the duty of an attorney to respectfully yield to the rulings of the court. (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126.) Each of the three incidents described above were clear misconduct by the prosecutor.

Although no objection was entered as to the first two incidents, all are cognizable on appeal. The failure to object and seek an admonition will not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; *People v. Price* (1991) 1 Cal.4th 324, 447.) Furthermore, misconduct which is part of a continual course of misconduct by the prosecutor may be cognizable despite the absence of objection to each specific incident. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 821.) Appellant submits that the misconduct here could not be cured by admonition, and that in light of the ongoing and continuous misconduct by the prosecutor, appellant did not

forfeit these claims of error.

The misconduct was prejudicial to appellant. Each of these acts of misconduct addressed a weakness in the prosecution's case. The juvenile gang members from Bakersfield were witnesses with severe credibility problems.

Michael Hernandez had lied to the police, told different versions of what happened over the course of making several statements and testifying twice, and was impeached by his prior convictions. The prosecutor sought to explain Hernandez's erratic testimony and reluctance to testify by emphasizing the witness's fear of appellant. Her improper extra-record story about Hernandez wanting to hide the logo on his tee-shirt served this purpose, making Hernandez seem more credible and sympathetic than the actual evidence showed, while at the same time portraying appellant as an especially frightening person.

Sergio Zamora had credibility problems similar to those of Hernandez, compounded by the additional fact that, having consumed 10 to 15 beers, he was drunk the night he purportedly saw the watch thrown out of the car. At both the preliminary hearing and at trial he made questionable new revelations favorable to the prosecution, yet at trial he remained uncertain whether he had seen a watch thrown out of the car. As mentioned above, the watch was significant because while appellant admitted taking Rose's car and wallet, he did not admit taking the watch, which was never found. Being able to firmly establish that appellant had Rose's watch would have greatly assisted the prosecution's case. The prosecution's improper reference to out-of-court statements by Zamora, in which he purportedly was more certain about seeing the watch, provided that assistance.

Finally, the prosecutor's use of appellant's prior robbery conviction for purposes of showing motive rather than simply impeachment was also significant. The prosecutor used the robbery improperly to explain why Rose was killed rather than just robbed, and inferentially, why appellant was the person who did it, rather than someone who did not have a prior robbery felony and prison term. This solidified the prosecution case as to identity, which was important because there were no eyewitnesses to tie appellant to the scene of the crime and only ambiguous forensic evidence existed suggesting appellant was the perpetrator.

The acts of misconduct here contributed to a fundamentally unfair trial, requiring reversal of the convictions and sentence of death. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. 637.) If the trial was not fundamentally unfair, the state nevertheless cannot show beyond a reasonable doubt that the violations of appellant's Sixth and Eighth Amendment rights, either individually or considered together, were harmless. (*Chapman v. California*, *supra*, 386 U.S. 18.) Even under state law error, it is reasonably probable that the jury would have reached a different result but for the error. (*People v. Watson*, *supra*, 46 Cal.2d 818.)

Accordingly, the misconduct set forth above was prejudicial, whether considered as individual incidents or a part of a course of conduct.

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THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THEY COULD CONVICT APPELLANT OF MURDER WITHOUT AGREEING WHETHER HE HAD COMMITTED MALICE MURDER OR FELONY-MURDER

Appellant was charged in Count 1 of the amended information with the wilful murder of Fred Rose with malice aforethought in violation of section 187, subdivision (a). (CT 124-145.) The prosecution proceeded at trial on both murder under section 187 and felony-murder under section 189, and the jury was instructed on both malice-murder and felony-murder. (CT 708-709, 810-814.) These instructions were erroneous and denied appellant his rights to have the state establish proof of the crimes beyond a reasonable doubt, to due process and to a reliable determination on allegations that he committed a capital offense under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the correlate provisions of the state constitution.

A. This Court Must Reconsider its Case Law Regarding the Relationship Between Premeditated Malice Murder and Felony-Murder

Appellant recognizes that this Court has heard and rejected various arguments pertaining to the relationship between malice murder and felony-murder (see e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. McPeters* (1992) 2 Cal.4th 1148, 1185), but submits that this line of cases does not address what appear to be irreconcilable contradictions in the law of first-degree murder in California.

Murder is explicitly defined only in section 187, which states that "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Malice aforethought is defined in section 188, and, contrary

to the common law, does not include within its definition the commission of a felony.[28] Section 189, the felony-murder statute, lists various factors which will elevate a murder to murder of the first degree.[29]

The plain language of these statutes leads to the conclusion, as this Court has stated as recently as 1995, that "To prove first degree murder *of any kind*, the prosecution must first establish a murder within section 187 -- that is, an unlawful killing with malice aforethought. [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 794, emphasis added.) Section 189 then provides guidance for fixing the degree of murder once murder with malice has been proven.

In fact, that was the law for many years. This Court had held that all types of murder, including felony-murder, were defined by section 187 and

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[28] Section 188 provides in pertinent part that:

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

[29] Section 189 provided, in pertinent part at the time the crimes alleged herein occurred, that:

> "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

therefore included the element of malice aforethought (*People v. Milton* (1904) 145 Cal. 169, 170-172), though in the case of first-degree felony-murder the necessary malice was presumed from commission of a felony listed in section 189 (*People v. Ketchel* (1969) 71 Cal.2d 635, 641-642; *People v. Milton*, *supra*, at p. 172).[30]

However, in *People v. Dillon* (1983) 34 Cal.3d 441, this Court re-examined the earlier cases and concluded that first-degree felony-murder was not merely an aggravated form of the malice murder defined by section 187, but was instead a separate and distinct crime, with different actus reus and mens rea elements, and defined exclusively by section 189. (*Id.* at pp. 465, 471-472.) Under this construction, malice aforethought is *not* an element of first-degree felony-murder. (*Id.* at pp. 465, 475, 477, fn. 24.)

To make matters more confusing, this Court has continued to occasionally assert that, despite *Dillon*, "There is still only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, quoting *People v. Pride*, *supra*, 3 Cal.4th at p. 249.) In light of these seeming contradictions, and the continuing uncertainty regarding the elements of certain kinds of first degree murder, this Court should consider whether the jury should have been allowed to convict appellant of first degree murder without being unanimous as to whether the killing was a felony-murder or premeditated and deliberate murder.

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[30] The prosecutor in this case argued that felony-murder did require a showing of malice, but that malice "is implied by virtue of the commission of the underlying crime. . . ." (RT 4999.)

B. The Trial Court Should Have Instructed the Jurors That to Convict Appellant of First Degree Murder, They Had to Be Unanimous as to Whether the Murder Was Premeditated and Deliberate Murder or Felony-Murder

Due process requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship* (1970) 397 U.S. 358, 364.) Although states have great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

Appellant submits that in California, under *People v. Dillon*, supra, 34 Cal.3d 441, malice murder and felony-murder have different elements which need to be proved beyond a reasonable doubt in order to convict. (See *id.* at pp. 465, 471-472, 475, 477 fn. 24.)

The United States Supreme Court addressed the due process implications of convicting a defendant of both premeditated murder and felony-murder in *Schad v. Arizona* (1991) 501 U.S. 624. The defendant in *Schad* challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony-murder or premeditated and deliberate murder. The Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.*, at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due

process the Court gave deference to Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (Id., at p. 636, emphasis added.) Thus, while Arizona has authoritatively determined not to treat premeditation and the commission of a felony as independent elements of the crime, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* suggests that due process is violated if there is not unanimity as to all the elements.

California has followed a different course than Arizona. Under *Dillon*, premeditated malice murder and felony-murder have different elements. Even if it is assumed there is one crime of murder (*People v. Davis* (1995) 10 Cal.4th 463, 515, but see *Dillon*, *supra*, 34 Cal.3d at p. 476, fn. 23), and malice murder and felony-murder may be described as two theories of that one crime (*People v. Pride*, *supra*, 3 Cal.4th at p. 249), they are crimes and/or theories with different elements, and one of those elements cannot be removed by the state without violating due process under *Winship*. "Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and

state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States*, *supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving *means* rather than *elements*:

> "The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S. 624, 631-632, ... Where, for example, an element of robbery is force or the threat of force, some jurors may conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement -- a disagreement about means -- would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force." (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.)

This case by contrast involves elements rather than theories, means, or "brute facts" that may at times be relied upon to establish the elements.

In *Dillon*, the Court was confronted with challenges that: (1) the felony-murder rule was an uncodified common law crime which was

abolished by the elimination of common law crimes effected by the Penal Code of 1872 (see § 6; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631-632); and (2) if codified by statute, then the California felony-murder rule created an unconstitutional presumption of the statutory element of malice, in violation of the holdings of *Mullaney* and *Sandstrom*. As a subsidiary point, the defendant also contended that application of the felony-murder rule denied him the equal protection of the law. (34 Cal.3d at p. 476, fn. 23.)

To resolve these issues, the *Dillon* opinion extensively reexamined the history of felony-murder in California, including the full legislative history of section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, fn. 19.)

Ultimately, *Dillon* concluded that the Legislature's belief that the first-degree felony-murder rule was codified in section 189 was controlling, "regardless of how shaky its historical foundation may be." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 471.) Thus, the Court was "required to construe section 189 as a statutory enactment of the first degree felony-murder rule in California." (*Id.*, at p. 472, fn. omitted.)

Finding a statutory basis for the first-degree felony-murder rule in section 189 disposed of the defendant's first challenge because the Court did not have the power to abrogate a legislatively-enacted rule. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 464.) The Court then addressed the contention that the first-degree felony-murder rule operated as an unconstitutional presumption of malice because malice is an element of murder as defined by section 187. (*Id.*, at p. 472.)

The resolution of that issue depended on this Court's conclusion that there are two distinct crimes of "murder," each with different elements:

> "We do not question defendant's major premise, i.e., that due process requires proof beyond a reasonable doubt of each element of the crime charged. [Citations.] Defendant's minor premise, however, is flawed by an incorrect view of the law of felony-murder in California. To be sure, numerous opinions of this Court recite that malice is 'presumed' (or a cognate phrase) by operation of the felony-murder rule. But none of those opinions speaks to the constitutional issues now raised, and their language is therefore not controlling. [Citation.]" (34 Cal.3d at pp. 473-474, fn. omitted.)

Addressing the constitutional issue for the first time, the Court conceded that, if the felony-murder rule did operate as a presumption of malice, the presumption was a conclusive one. (*Dillon*, *supra*, at p. 474.) The Court also conceded that malice is an essential element of the crime of murder defined in section 187.

> "In every case of murder other than felony-murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. (Pen. Code, §§ 187, 188; *People v. Bender* (1945) 27 Cal.2d 164, 180 [163 P.2d 8].)" (*Dillon*, at p. 475.)

However, the Court concluded that what appeared to be a conclusive presumption of malice in the felony-murder rule was not a true presumption but rather a rule of substantive law: "[A]s a matter of law malice is not an element of felony-murder." (*Ibid.*)

If there were any doubt that the Court was distinguishing between two crimes, both denominated murder and both potentially of the first degree, but with distinctly different statutory elements, it was laid to rest by the Court's response to the equal protection claim raised in *Dillon*:

> "There is likewise no merit in a narrow equal protection argument made by defendant. He reasons that the 'presumption' of malice discriminates against him because persons charged with 'the same crime,' i.e., murder other than felony-murder are allowed to reduce their degree of guilt by evidence negating the element of malice. *As shown above, in this state the two kinds of murder are not the 'same' crimes* and malice is not an element of felony-murder." (*Dillon*, *supra*, at p. 476, fn. 23, emphasis added; see also *id.*, at pp. 476-477, fn. 24.)

Even assuming this Court has retreated from the broad language of *Dillon* describing felony-murder and malice murder as "separate crimes" (see e.g., *People v. Pride*, *supra*, 3 Cal.4th at p. 249), it has continued to reaffirm that "the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, emphasis in original.) Therefore, under *Schad*, appellant's right to due process was violated when the court failed to require jury unanimity on each element of the crimes charged.

Alternatively, if the elements of malice murder and felony-murder are the same in California, then malice is an element of felony-murder, and the California felony-murder rule violates *Sandstrom* and *Mullaney* in that the required element of malice is unconstitutionally presumed. If that is true, the court failed to instruct the jurors that they must find malice in order to convict of felony-murder. Failure to do so amounts to an unconstitutional conclusive presumption. (*Carella v. California* (1989) 491 U.S. 263; *People v. Figueroa* (1986) 41 Cal.3d 714, 723-741.)

The error was prejudicial. When a jury is given instruction on a legally proper theory of guilt in conjunction with instructions on a legally

improper theory of guilt, any resulting conviction must be reversed unless it can be conclusively shown by reference to the jury verdicts that no juror relied upon the improper theory. (*People v. Green* (1980) 27 Cal.3d 1, 69; *People v. Guiton* (1993) 4 Cal.4th 1116; see also *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237-1238.) That determination cannot be made in this case, and the judgment and convictions must therefore be reversed.

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THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR EVIDENCE IN AGGRAVATION THAT APPELLANT WAS INVOLVED IN AN INCIDENT IN WHICH A MOLOTOV COCKTAIL WAS THROWN

The court committed multiple errors at the penalty phase in admitting evidence and instructing the jury as to an incident in which appellant was purportedly involved in possessing a glass bottle filled with a flammable liquid that was characterized as being a Molotov cocktail. The prosecution claimed that this incident constituted possession of a destructive device within the meaning of section 12303.3 and that it was admissible as criminal activity involving violence within the meaning of section 190.3, factor (b). The evidence presented, however, was insufficient to establish a violation of section 12303.3. Furthermore, incomplete and misleading jury instructions allowed the jury to rely on the incident as an aggravating factor without finding that it constituted criminal activity involving violence under factor (b). Finally, a violation of section 12303.3 as presented to the jury did not constitute a crime involving violence under factor (b). These errors violated appellant's state statutory rights and his rights under both state and federal constitutions to due process, a fair trial and a reliable penalty verdict. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th, and 14th Amends.)

A. Procedural and Factual Background

Prior to the beginning of the prosecution's penalty phase presentation, appellant challenged the admissibility of an incident of alleged criminal activity involving a purported Molotov cocktail on April 20, 1986. (RT 5319.) He pointed out that the incident involved a store owner discovering the remains of a glass bottle in the parking lot behind his

market, and evidence of some burning in the lot. (RT 5319.) Appellant questioned whether such an incident qualified as evidence in aggravation because factor (b) requires the incident to be both a violation of a penal statute and that the violence be directed toward people rather than property. (RT 5319.) The prosecutor responded: "I think we have an issue here that when you throw a Molotov cocktail at a business, you clearly are not discriminating between the business and or anyone might be present." (RT 5319-5320.) The court asked whether the business was open or not. The parties agreed that the business was open and the prosecutor added that employees were present. (RT 5320.) The court, after additional discussions,[31] found the incident to be admissible. (RT 5323.)

The evidence presented by the prosecution on this incident quickly deviated from the prosecutor's representations. Fred Joseph owned a market and liquor store on Moorpark in North Hollywood in 1986. On April 20, he was outside in the parking lot behind his store, heading toward the trash cans, when a group of young men in two cars pulled up and started to jump out. (RT 5337.) Joseph ran back inside. He was afraid the young men were going to attack him based on an experience three weeks earlier in which a person he identified as appellant threatened him at the store. (RT 5337-5338.) On April 20, however, he did not see appellant among the young males in the two cars. (RT 5338-5339, 5341, 5363.) After getting back inside the store, Joseph called the police. (RT 5339.) He subsequently became aware that there was a fire in the parking lot. (RT 5339.) Joseph

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[31] Appellant also argued that there was insufficient evidence that appellant actually threw the device in question. The court held that the evidence could be admissible if appellant was an aider and abettor, citing *People v. Bacigalupo* (1991) 1 Cal.4th 103.

went outside the store when the police arrived. (RT 5340.) He saw an area where the parking lot had been burned and a glass bottle. (RT 5340.) That area was approximately 150 feet from Joseph's store. The bottle had not been thrown at his store. (RT 5357, 5360.)

Following Joseph's testimony, appellant reiterated his position that there was insufficient evidence to establish appellant committed a crime admissible under section 190.3, factor (b). (RT 5365.) The prosecution indicated the crime it was attempting to show was possession of a destructive device under section 12303.3. (RT 5366, 5368-5369.) The court noted the discrepancy between the prosecutor's offer of proof and Joseph's testimony (RT 5370), but determined the prosecutor might be able to establish a crime under factor (b), and subsequently allowed her to proceed with additional witnesses as to this incident.

Lisa Nevolo testified that she was at the laundromat in North Hollywood near Fred Joseph's market at around 9 p.m. on April 20, 1986. (RT 5658-5659.) Nevolo was sitting in her car, in front of the laundromat, waiting for her laundry to dry, when she saw appellant and "a bunch of other kids" arrive. (RT 5660.) Appellant and one other person went into the laundromat; when they exited, appellant was holding a tire iron and "a Molotov cocktail," which Nevolo described as a glass bottle with fluid in it and "a rag stuck in the top." (RT 5660-5661.) The bottle was about the size of an old-fashioned glass Coke bottle. (RT 5668.) A few minutes later appellant and another person ran out of sight along the strip mall where the laundromat was located. (RT 5661.) Two or three minutes later there was a flash. (RT 5661-5662, 5670.) Nevolo then saw appellant and the other youth run past her and drive off. (RT 5662.) Appellant did not have anything in his hands at that time. (RT 5662.) She did not fear that the

building was on fire because the fire went out right away. (RT 5670.) She never saw the rag in the bottle lit, nor did she know who threw it. (RT 5670.)

John Mosely was a Los Angeles police officer in 1986 who interviewed Joseph after this incident. Mosely observed the burned patch on the ground in the parking lot. (RT 5674.) He recovered a glass fragment, part of a bottle cap, and a rag that was inside the glass. (RT 5675.) He formed the opinion that this had been a Molotov cocktail, which he described as a glass container filled with a flammable liquid and a wick which is soaked in the flammable liquid, then lit and thrown. (RT 5676.)

B. There Was Insufficient Evidence That the Device Involved in this Incident Was a Destructive Device Under Sections 12303.3 and 12301

Evidence of criminal activity under section 190.3, factor (b) must be limited to conduct that demonstrates the commission of a violation of a penal statute. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [construing 1977 death penalty statute]; *People v. Boyd* (1985) 38 Cal.3d 762, 776-778; *People v. Belmontes* (1988) 45 Cal.3d 744, 808.) The prosecution must establish each element of the offense beyond a reasonable doubt. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) The prosecution contended at trial that this incident demonstrated a violation of section 12303.3,[32] possessing or exploding a destructive device. (RT 5369.) The evidence

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[32] Section 12303.3 reads in relevant part:

> "Every person who possesses, explodes, ignites, or attempts to explode or ignite any destructive device or any explosive with intent to injure, intimidate, or terrify any person, or with intent to wrongfully injure or destroy any property, is guilty of a felony. . . ."

presented, however, was insufficient to establish that the liquid-filled bottle in this incident constituted a destructive device within the meaning of section 12303.3.

A destructive device for purposes of section 12303.3 is defined in section 12301[33], and includes certain devices with characteristics of a

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[33] Section 12301 in its entirety reads:

(a) The term "destructive device," as used in this chapter, shall include any of the following weapons:

(1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns.

(2) Any bomb, grenade, explosive missile, or similar device or any launching device therefor.

(3) Any weapon of a caliber greater than 0.60 caliber which fires fixed ammunition, or any ammunition therefor, other than a shotgun (smooth or rifled bore) conforming to the definition of a "destructive device" found in subsection (b) of Section 179.11 of Title 27 of the Code of Federal Regulations, shotgun ammunition (single projectile or shot), antique rifle, or an antique cannon. For purposes of this section, the term "antique cannon" means any cannon manufactured before January 1, 1899, which has been rendered incapable of firing or for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade. The term "antique rifle" means a firearm conforming to the definition of an "antique firearm" in Section 179.11 of Title 27 of the Code of Federal Regulations.

(4) Any rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch, or any launching device therefor, and any rocket, rocket-propelled projectile, or

(continued...)

Molotov cocktail:

> "(a) The term 'destructive device,' as used in this chapter shall include any of the following weapons:
>
> . . . .
>
> (5) Any breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination."

The prosecution failed to establish that the glass bottle appellant was seen holding was a destructive device under section 12301, subdivision (a)(5) in that there was no substantial evidence presented that the flashpoint[34] of the liquid in the bottle was 150 degrees Fahrenheit or less. In fact, there was no evidence of what the liquid was – nothing to establish its appearance, consistency or smell – beyond the fact that it ultimately

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[33](...continued)
similar device containing any explosive or incendiary material or any other chemical substance, other than the propellant for such device, except such devices as are designed primarily for emergency or distress signaling purposes.

5) Any breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(6) Any sealed device containing dry ice (CO_2) or other chemically reactive substances assembled for the purpose of causing an explosion by a chemical reaction.

[34] "Flashpoint" (more commonly "flash point") is defined as the lowest temperature at which the vapor of a combustible liquid can be made to ignite momentarily in air. (American Heritage Dict. (New College ed. 1976) p. 499.)

burned. None of the witnesses saw the liquid ignite, and there was no other substantial evidence of the manner in which the fire started. There was no testimony, expert or otherwise, regarding the flash point of common flammable liquids nor the temperature of common ignition devices such as matches. In short, there was nothing upon which a reasonable factfinder could decide beyond a reasonable doubt that the flashpoint of the liquid was under 150 degrees. The evidence that the device in question was a destructive device was therefore insufficient (see *Jackson v. Virginia* (1979) 443 U.S. 307), and should not have been presented to the jury.

Besides violating state statutory and constitutional law, the admission of evidence of this incident violated federal constitutional law as well. The erroneous admission of aggravating evidence violates the requirements of heightened reliability and relevance of evidence for determination of penalty in a capital trial under the Eighth Amendment's prohibition against cruel and unusual punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) Furthermore, California's state evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of those rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) This expectation is protected against arbitrary deprivation under the Fourteenth Amendment. (*Ibid.*) Admitting evidence of the Molotov cocktail incident at appellant's penalty trial was therefore a violation of his right to due process. Appellant's sentence of death must therefore be reversed.

C. The Court Erred in Failing to Adequately Instruct the Jury on the Definition of a Destructive Device

The court also erred in failing to give the jury an instruction defining a destructive device. The trial court has a sua sponte duty to define for the

jury terms having a technical meaning peculiar to the law. (*People v. Howard* (1988) 44 Cal.3d 375, 408; *People v. Failla* (1966) 64 Cal.2d 560, 565.) The term "destructive device" is a technical term requiring definition by the court. (See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 26 ["destructive device" under section 12301, subd. (a)(2) required further definition by the court].) Therefore, even if there was some evidence to find the bottle was a destructive device, the jury did not have the proper guidance to determine whether that evidence was sufficient to meet the technical definition of a destructive device. Particularly with regard to the flash point of the fluid, the jury did not have knowledge of the critical temperature which legally determined whether a particular liquid-filled bottle constituted a destructive device under section 12301, subdivision (a)(5) or not.

Instructions on uncharged crimes evidence in a capital case must not mislead the jury. (*People v. Malone* (1988) 47 Cal.3d 1, 48-49.) The failure to define a destructive device for the jury misled and misinformed the jurors as to how they should evaluate the evidence of this incident, and affected its determination of whether the incident could be considered as a factor in aggravation.

The instructional error also violated the federal constitution. There is an Eighth Amendment error when the sentencer weighs an invalid aggravating circumstance in deciding between life and death. (*Sochor v. Florida* (1992) 504 U.S. 527, 532; *Clemons v. Mississippi* (1990) 494 U.S. 738, 752.) The failure to properly instruct the jury regarding the definition of a destructive device misled the jury and allowed it improperly to rely on evidence of this incident without determining that it constituted a proper aggravating factor under California law, thereby rendering the penalty

determination unreliable under the Eighth Amendment. (See *Stringer v. Black* (1992) 503 U.S. 222, 232.)

D. Possession of the Liquid-filled Bottle Was Not a Crime of Violence Under Section 190.3, factor (b)

Finally, even if the prosecution provided sufficient evidence that appellant violated section 12303.3, that offense was not a crime of violence qualifying it as a valid factor in aggravation under section 190.3, factor (b). Section 12303.3 includes criminal conduct such as possessing or exploding a destructive device for the purpose of destroying property. Criminal activity under factor (b) must have involved "the use or attempted use of force or violence or the express or implied threat to use force or violence." (§190.3, factor (b).) Criminal violence or threats of violence directed towards property are not admissible under factor (b). (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1015.) Therefore, not every violation of section 12303.3 would constitute violent criminal activity within the meaning of factor (b). The trial court attempted to cure this problem by describing the conduct at issue in his instruction to the jury as: "possession of a destructive device with intent to injure or intimidate a person." (RT 6206.) Appellant submits, however, that even with this limitation the crime described in the court's instruction did not describe a crime of violence within the meaning of factor (b).

Simple possession of weapons or destructive devices is not inherently violent. (*People v. Belmontes* (1988) 45 Cal.3d 744, 809 [defendant had handgun in his waistband while stating he had all the protection he needed]; *People v. Dyer* (1988) 45 Cal.3d 26, 76 [ex-felon in possession of a gun is a non-violent crime]; see also *People v. Jackson* (1996) 13 Cal.4th 1114, 1235 [ex-felon in possession of a handgun is not in

every circumstance an act committed with actual or implied violence].) This Court has held, however, that additional circumstances beyond the elements of the crime itself may establish an implied threat making the offense eligible as aggravating evidence under factor (b). Accordingly, the fact that a person is in custody may contribute to a showing that weapon possession involves an implied threat of violence. (See e.g., *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; *People v. Harris* (1981) 28 Cal.3d 935-962-963.) Similarly, the nature of the weapon or weapons involved can affect whether possession is implicitly violent within the meaning of factor (b). (See *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [sharpened knife possessed by person in custody was a "classic instrument[] of violence"].)

This Court has rarely found illegal weapon possession outside a custodial setting to be violent criminal activity under factor (b). In *People v. Garceau* (1993) 6 Cal.4th 140, 203 defendant was an ex-felon in possession of an "arsenal" including a machine gun, silencer and concealable handguns. The Court found "such an arsenal" clearly to be factor (b) evidence. (*Ibid.*) In *People v. Michaels* (2002) 28 Cal.4th 486, 531-536, defendant illegally possessed a double-edged dagger with a seven-inch blade, a butcher knife and a concealed handgun in his car. This Court found that the criminal character of the possession of these weapons, including "classic instrument[s] of violence" (citing *People v. Ramirez*, *supra*, 50 Cal.3d at pp. 1186-1187), combined with defendant's use of those or similar weapons to commit crimes, was sufficient to permit a jury to find an implied threat of violence.

The limited circumstances under which weapon possession offenses can be deemed crimes of violence under factor (b) do not exist here. First,

appellant was not in custody. Second, the device possessed is not a "classic instrument" for perpetrating violence against people. Instead, it was a device designed to damage property. Destructive devices under section 12301 include a hodgepodge of items including some tracer ammunition and explosive CO_2 canisters as well as Molotov cocktails. A Molotov cocktail is a device generally used to inflict property damage through fire. (See *People v. Andrade* (2000) 85 Cal.App.4th 579, 585 [Molotov cocktail is a device designed to accelerate fire under section 451.1, subd. (a)(5)].) The damage allegedly caused by the device in this case – burnt asphalt in a parking lot – is certainly no greater than could be expected from a Molotov cocktail, and is likely less. Both parties at trial agreed that when appellant was originally charged in this matter in juvenile court it was disposed of as an act of vandalism or malicious mischief. (RT 5320-5321.) Vandalism is not a factor (b) crime of violence. (*People v. Stanley* (1995) 10 Cal.4th 764, 823-825.) Even arson is not inherently a crime of violence under factor (b) because it does not necessarily involve injury to people rather than property. (*Id.*, at p. 824; see *People v. Clark* (1990) 50 Cal.3d 583, 624, 626-627 [assuming without holding that a car arson was not factor (b) crime].) Therefore the mere possession of the instrumentality for committing vandalism, or even arson, cannot be considered a crime of violence under factor (b).

Third, there are no additional circumstances in this incident to support an implication that appellant's possession of the liquid-filled bottle was a crime of implied violence. In *People v. Stanley*, *supra*, 10 Cal.4th at p. 824 this Court recognized that burning a car was not a factor (b) crime by itself , but found it was admissible as such in light of a continuous course of threats of physical violence against the owner of the car. Although there

had been two previous contacts between appellant and Joseph, they did not include threats of physical violence against Joseph.[35] Moreover, there was no other evidence of appellant using similar devices in criminal activity. Accordingly, there were no circumstances which made the non-violent possession of the bottle an act of violence under factor (b).

Finally, the fact that the court limited the applicability of section 12303.3 to possession with the intent to threaten or intimidate did not elevate this incident to a crime of violence, either express or implied. Intimidation certainly includes the fear of suffering property damage. Because property crimes – either theft of, or damage to, property – are not factor (b) crimes of violence under *Boyd*, possession of a device causing someone to fear that their property may be damaged cannot be such a crime of violence either. To the extent there was evidence appellant possessed a destructive device, the jury may have relied on the incident as evidence in aggravation, because under the instruction given, they jury could have believed appellant possessed the device with the intent to threaten or intimidate only through the infliction or threat of infliction of property damage. Such reliance would not be proper because appellant's offense under such a scenario would not constitute a crime of violence under *Boyd* and within the meaning of factor (b).

Appellant's possession of the liquid-filled bottle was not a crime of violence, either express or implied, within the meaning of factor (b), and

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[35] The jury was instructed that hearsay statements made to Joseph by his brother were not to be considered for the truth of the matter asserted. (RT 6203.) Joseph testified that he believed appellant had threatened him based on statements from Joseph's brother (RT 5347), but there was no evidence before the jury of an actual threat.

admission of appellant's involvement in this incident was error. Besides violating state law, the admission of this evidence violated the requirements of heightened reliability and relevance at the penalty phase under the Eighth Amendment's prohibition against cruel and unusual punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.)

E. The Error was Prejudicial

Evidence of unadjudicated acts of violence are admissible at a penalty trial because they tend "to show defendant's propensity for violence." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) The purpose of the statutory exclusion of non-violent unadjudicated conduct is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.)

The prosecutor told the jury in her opening statement at the penalty phase that it was her intent to show how violent appellant was from the time he was 16 years old to the time of the crime. (RT 5332.) As part of her call for the death penalty she invited the jury to consider his violent past in determining how he would behave in prison if given a sentence of LWOP rather than death. (RT 6259.) Appellant's criminal history was a major portion of the prosecution's case for death, along with the circumstances of the crime. This particularly dramatic incident, involving a purported Molotov cocktail, was a significant piece of that criminal history. Had the jury not heard this evidence, there is a reasonable possibility the jury would have returned a life verdict instead of death. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, the prosecution cannot show beyond a reasonable doubt

that the federal constitutional errors did not contribute to the verdict. The death sentence must therefore be reversed.

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THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR EVIDENCE IN AGGRAVATION THAT APPELLANT POSSESSED A CONCEALED KNIFE IN 1989

The trial court committed at least three errors in admitting evidence in aggravation at the penalty phase that on January 13, 1989, appellant possessed a concealed weapon – a pocketknife – in violation of section 12020, subdivision (a). As with the incident involving the purported Molotov cocktail (Argument 9), the prosecution failed to present sufficient evidence to establish a violation of a penal statute – in this instance, the concealed weapon statute. Furthermore, incomplete and misleading jury instructions allowed the jury to rely on this incident as an aggravating factor without finding that it constituted criminal activity involving violence under section 190.3, factor (b). Finally, even if the prosecution established that appellant possessed a concealed weapon under section 12020, subdivision (a), the evidence presented to the jury did not constitute a crime involving violence under factor (b). These errors violated appellant's state statutory rights and his rights to due process, a fair trial and a reliable penalty verdict under both the state and federal constitutions. (Cal. Const., art. I, §§ 7, 15, 16, 17; U.S. Const., Amends. 5, 6, 8, 14.)

A. Procedural and Factual Background

On September 30, 1993, prior to opening statements at the penalty phase, the court asked the prosecutor what criminal acts she intended to use in aggravation. (RT 5317.) Among the various alleged crimes under factors (b) and (c) the prosecutor listed was the present incident, described as "use of a knife or attempted use of knife in trying to agitate somebody into a fight." (RT 5317.) Later that day, after argument over the admissibility of the Molotov cocktail incident, the court asked if there were

other incidents where it could anticipate problems. Defense counsel pointed to the present incident "in which a CRASH unit or the CRASH officer makes contact with the defendant and he is in possession of a knife. That is es[s]entially the sum total and substance of this one individual witness." (RT 5385.) The court commented that under *People v. Mason* (1991) 52 Cal.3d 909, and *People v. Boyd* (1985) 38 Cal.3d 762, that possession of a knife alone was not enough to constitute aggravating evidence under factor (b). (RT 5385.) Nevertheless, the next morning without further discussion, the prosecutor was permitted to proceed with the following evidence of this incident:

David Dattola was a South Gate police officer on January 13, 1989, when his attention was directed to a possible gang fight at South Gate High School. (RT 5390-5392.) Dattola saw a group of about ten people, one of whom was appellant. Some of the people in this group appeared to be in the Garden View Locals gang. (RT 5399-5400.) Appellant was wearing a purple bandana and no shirt. The purple bandana was the color of the Watts Varrio Grape Street gang. (RT 5397.) Dattola saw no other members of that gang in the group of ten. (RT 5397.) Dattola saw appellant "yelling and screaming." (RT 5392.) In Dattola's opinion, appellant appeared to be challenging another person to fight. (RT 5392-5293.)

When Dattola approached with his partner, Officer Sekiya, the subjects separated. Dattola followed appellant as he walked away. (RT 5394.) Dattola was wearing civilian clothes with a black jacket with the word "police" on it, which made him look like the school police. (RT 5395.) Dattola twice asked appellant to stop, but appellant refused. Dattola called Sekiya for assistance, and Sekiya arrested appellant. Appellant at that time told Dattola that he had believed the officers were school police

rather than regular police. (RT 5396.) Appellant was not a student at South Gate High School. (RT 5396.)

Dattola found a knife in one of appellant's front pants pockets. It was a pocketknife that was not folded over. (RT 5398.) Dattola said appellant was arrested for possession of a concealed weapon (RT 5398); however, the knife apparently was not found in appellant's pocket until after the arrest. (RT 5396-5397.).

B. There Was Insufficient Evidence That Appellant Possessed a Concealed Weapon Within the Meaning of Section 12020

As appellant has argued in Argument 9, evidence of criminal activity under section 190.3, factor (b) must be limited to conduct that demonstrates the commission of a violation of a penal statute. (*People v. Belmontes* (1988) 45 Cal.3d 744, 808; *People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyd* (1985) 38 Cal.3d 762, 776-778.) The prosecution must establish each element of the offense beyond a reasonable doubt. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) At the time of this alleged incident in 1989, section 12020 stated that any person "who carries concealed upon his or her person any dirk or dagger" was guilty of a felony. The prosecution in this case failed to establish that the pocketknife found in appellant's pants pocket was a dirk or dagger within the meaning of the statute.

Not all knives are dirks or daggers. In 1989, this Court's accepted definition of a dirk or dagger was as follows: "A dagger has been defined as any straight knife to be worn on the person which is capable of inflicting death except what is commonly known as a 'pocket-knife.' Dirk and dagger are used synonymously and consist of any straight stabbing weapon, as a dirk, stiletto, etc. They may consist of any weapon fitted primarily for

stabbing." (*People v. Forrest* (1967) 67 Cal.2d 478, 480, quoting *People v. Ruiz* (1928) 88 Cal.App. 502, 504; internal citations omitted.) *Forrest* held that the Legislature had "not included folding pocketknives within the meaning of 'dirk or dagger.'" (*People v. Forrest, supra*, 67 Cal.2d at p. 481.) "[W]hen a knife which, *like other pocketknives,* has many possible uses, some of which are clearly innocent and utilitarian, and also has a characteristic which in many situations would substantially limit the effectiveness of its use as a stabbing instrument, it cannot be held to be a weapon primarily designed for stabbing, and thus is not a dirk or dagger." (*Ibid.*, emphasis added; see *People v. Barrios* (1992) 7 Cal.App.4th 501, 503.)

In *People v. Bain* (1971) 5 Cal.3d 839, 851 this Court reaffirmed that "what is commonly known as a pocketknife" is not a dirk or dagger under section 12020, but held that under some circumstances the question of whether a folding knife is a dirk or dagger is a question for the jury. In *Bain*, the knife in question had handrails to prevent the hand from slipping onto the blade if used as a stabbing instrument, and a blade which locked in place when opened. (*Id.*, at pp. 851-852.) These characteristics could permit a jury to find the knife to be a dirk or dagger rather than a pocketknife.

The knife in this case was described by Dattola, the only witness to this incident who testified, as simply a pocketknife. (RT 5398.) Under *Forrest*, an ordinary pocketknife is not a dirk or dagger. The prosecution provided no additional relevant evidence, consistent with the decision in *Bain*, which could make the issue one for the jury to decide. The knife itself was not introduced. There was no evidence regarding the size of the knife other than that it fit in appellant's pocket even while open. There was

nothing to indicate the knife had handrails or a locking mechanism when open, or anything else which might otherwise suggest it was a knife designed for stabbing rather than simply being an ordinary pocketknife. The evidence was therefore insufficient to establish the knife was a dirk or dagger.

The Legislature made several relevant amendments to section 12020 subsequent to this incident. Effective as of 1994, "dirk or dagger" was defined in section 12020, subdivision (c)(24) as "a knife or other instrument with or without a handguard that is primarily designed, constructed, or altered to be a stabbing instrument designed to inflict great bodily injury or death." (Stats. 1993, ch. 1139 §2.) In 1995, this definition was amended in relevant part to read "a knife . . . that is capable of ready use as a stabbing weapon" rather than a knife "primarily designed, constructed, or altered to be a stabbing instrument." (Stats. 1995, ch 128 §2.) Accordingly, the statute now focuses on the weapon's capability as a stabbing instrument rather than its designed use. But in 1989, the design of the weapon was dispositive as to whether it was a dirk or dagger. The changes in the statute therefore serve to highlight how appellant's pocketknife was not a dirk or dagger in 1989. As a matter of law the knife found in appellant's pocket was not a dirk or dagger, and the evidence that appellant violated the concealed weapon statute was manifestly insufficient. (See *Jackson v. Virginia* (1979) 443 U.S. 307.)

Besides violating state statutory and constitutional law, the admission of evidence of this incident also violated federal constitutional law. The erroneous admission of aggravating evidence violates the requirements of due process, heightened reliability and relevance at the penalty phase under the Eighth Amendment's prohibition against cruel and

unusual punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) Appellant's sentence of death must therefore be reversed.

C. The Court Erred in Failing to Instruct the Jury Adequately on the Definition of a Concealed Weapon

Just as the trial court failed to give the jury an instruction defining a destructive device in Argument 9, so here the court failed to give the jury an instruction defining the weapon appellant was alleged to have possessed illegally. The trial court has a sua sponte duty to define for the jury terms having a technical meaning peculiar to the law. (*People v. Howard* (1988) 44 Cal.3d 375, 408; *People v. Failla* (1966) 64 Cal.2d 560, 565.) The words "dirk or dagger" are legal terms requiring definition by the court. The jurors in this case would not have understood the difference between a pocketknife and a dirk or dagger without guidance from the court. The Legislature's repeated redefinition of "dirk or dagger" in recent years (see e.g., amendments discussed in section B. *ante*) demonstrates that those words have a technical meaning peculiar to the law rather than a commonly understood meaning. Therefore, even if the jury was properly permitted to determine whether the knife in appellant's pocket was a concealed dirk or dagger, it did not have the proper guidance from the court to make that determination. The jury would have no way of knowing that pocketknives were not dirks or daggers or that it was necessary for the weapon to have been designed primarily as a stabbing instrument in order to be a dirk or dagger. It therefore was permitted to rely on this incident as a factor in aggravation without having determined that appellant possessed a concealed weapon within the meaning of section 12020.

Instructions on uncharged crimes evidence in a capital case must not mislead the jury. (*People v. Malone* (1988) 47 Cal.3d 1, 48-49.) The

failure to define the words dirk or dagger misled and misinformed the jurors as to how they should evaluate the evidence of this incident, and affected its determination of whether the incident could be considered as a factor in aggravation.

This instructional error also violated the federal constitution. There is an Eighth Amendment error when the sentencer weighs an invalid aggravating circumstance in deciding between life and death. (*Sochor v. Florida* (1992) 504 U.S. 527, 532; *Clemons v. Mississippi* (1990) 494 U.S. 738, 752.) The failure to properly instruct the jury regarding the definition of a destructive device misled the jury and allowed it improperly to rely on evidence of this incident without determining that it constituted a proper aggravating factor under California law, thereby rendering the penalty determination unreliable under the Eighth Amendment. (See *Stringer v. Black* (1992) 503 U.S. 222, 232.)

D. Possession of a Concealed Weapon Was Not a Crime of Violence Under Section 190.3, factor (b)

Even if appellant's possession of a pocketknife violated section 12020, that offense was not a crime of violence qualifying it as a valid factor in aggravation under section 190.3, factor (b). Criminal activity under factor (b) must have involved "the use or attempted use of force or violence or the express or implied threat to use force or violence." (§190.3, factor (b).) As discussed in Argument 9, simple possession of weapons is not inherently violent. (*People v. Belmontes* (1988) 45 Cal.3d 744, 809 [defendant had handgun in his waistband while stating he had all the protection he needed]; *People v. Dyer* (1988) 45 Cal.3d 26, 76 [ex-felon in possession of a gun is a non-violent crime]; see also *People v. Jackson* (1996) 13 Cal.4th 1114, 1235 [ex-felon in possession of a handgun is not in

every circumstance an act committed with actual or implied violence].)

There are no additional circumstances beyond the elements of the crime itself that established an implied threat which made this incident eligible as aggravating evidence under factor (b). The fact that a person is in custody may contribute to a showing that weapon possession involves an implied threat of violence (see e.g., *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; *People v. Harris* (1981) 28 Cal.3d 935-962-963), but appellant was not in custody at the time of this incident. The nature of the weapon involved can also affect whether possession of that weapon is implicitly violent within the meaning of factor (b) (see *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [knife sharpened by person in custody was a "classic instrument[] of violence"]), but a pocketknife by design is a multi-purpose tool, not a classic instrument of violence. In *People v. Michaels* (2002) 28 Cal.4th 486, 531-536, this Court found that the defendant's illegal possession of a double-edged dagger with a seven-inch blade, a butcher knife and a concealed handgun in his car combined with his use of those or similar weapons to commit crimes was sufficient to permit a jury to find an implied threat of violence. There was no evidence in this case of appellant using his pocketknife in another crime. The prosecution did present evidence of appellant's involvement in an assault with a knife, but that incident occurred three months after the incident in question here. There are no circumstances which could properly allow appellant's possession of a pocketknife to be an implied threat of violence. Under *Boyd* this was not a crime of violence within the meaning of factor (b), and admission of appellant's involvement in this incident was error. Besides violating state law, the admission of this evidence violated the requirements of heightened reliability and relevance at the penalty phase under the Eighth

Amendment's prohibition against cruel and unusual punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.)

E. The Error Was Prejudicial

The prejudice resulting from the admission of this incident is similar to that from the erroneously admitted Molotov cocktail incident discussed in Argument 9. Evidence of unadjudicated acts of violence are admissible at a penalty trial because they tend "to show defendant's propensity for violence." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) The purpose of the statutory exclusion of non-violent unadjudicated conduct is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.)

The prosecutor told the jury in her opening statement at the penalty phase that it was her intent to show how violent appellant was from the time he was 16 years old to the time of the crime. (RT 5332.) As part of her call for the death penalty she invited the jury to consider his violent past, including this incident, in determining how he would behave in prison if given a sentence of LWOP rather than death. (RT 6259.) Appellant's criminal history was a major portion of prosecution's case for death, and this was a significant piece of that history. Had the jury not heard this evidence, there is a reasonable possibility the jury would have returned a life verdict instead of death. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, the prosecution cannot show beyond a reasonable doubt that the federal constitutional errors did not contribute to the verdict. The death sentence must therefore be reversed.

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THE PROSECUTOR COMMITTED MISCONDUCT AT THE PENALTY PHASE BY BRINGING TO THE JURY'S ATTENTION THE ERRONEOUS FACT THAT APPELLANT WOULD RECEIVE A 30-YEAR REVIEW BY THE BOARD OF PRISON TERMS IF SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE

The prosecutor committed serious penalty phase misconduct during cross-examination of defense witness James Park, an expert on the corrections system, by asking him questions regarding the Board of Prison Terms provisions for a 30-year review of inmates serving sentences of life without the possibility of parole (LWOP). These questions improperly and incorrectly suggested the possibility that appellant might be released at some point even if the jury imposed a sentence of LWOP. The court found the prosecutor's questions were improper but denied appellant's motion for a mistrial. Although the court admonished the jury regarding the testimony about the 30-year review, that admonition was ineffective in curing the damage done by the misconduct. The error in failing to grant a mistrial denied appellant of due process, a fair trial and a reliable penalty proceeding under both state and federal law. (Cal. Const., art. I, §§ 7, 15, 16, 17; U.S. Const., 5th, 6th, 8th, 14th Amends.)

A. Factual and Procedural Background

The prosecutor announced early on that she intended to argue to the jury at penalty that appellant was an unsuitable candidate for life in prison without the possibility of parole (LWOP). She indicated that her argument was to be in part based on appellant's acts of misconduct in jail while awaiting trial. (RT 278.) The defense countered by presenting the testimony of James Park, a correctional consultant who had worked for the California Department of Corrections (CDC) for 31 years, to testify that

appellant would not pose a danger within the prison system if given a sentence of LWOP. (RT 5742.)

Park, who had classified over 15,000 inmates during his career at CDC (RT 5753), found nothing in appellant's records to indicate appellant would be a threat to society, to prison employees or other inmates at a level four (maximum security) prison serving a sentence of LWOP (RT 5779-5780).

During her lengthy cross-examination of Park, the prosecutor asked a series of questions about the rights and privileges enjoyed by inmates at level four facilities. (RT 5842-5844.) She followed this with questions about a particular procedure of the Board of Prison Terms:

> "Q Are you familiar with the concept of the 30 year review proce[]dure?
>
> "A The 30 year review proce[]dure? By the Adult Board of Prison Terms?
>
> "Q Yes.
>
> "A Not in detail. I know they do feel they ought to review prisoners from time to time even though they have no parole opportunity.
>
> "Q And that basically means from the minute they get into the prison system that particular 30 year date is set; isn't that correct?
>
> "A For a review by the Board of Prison Terms.
>
> "Q Then thereafter there is a review every five years, correct?
>
> "A I will accept that. I'm not sure." (RT 5844.)

The prosecutor then asked Park if he was aware that CDC was in the process of "redoing" its classification system. (RT 5845.) Shortly after this exchange appellant objected to the prosecutor's inquiry into Park's

knowledge of an escape attempt at the then-recently opened level four prison at Lancaster. (RT 5847.) The parties then went into chambers.

The court pointed out that the prosecutor had again ignored the court's request for an offer of proof in advance for potentially controversial evidentiary matters. Then the following exchange occurred:

> "[BY THE COURT] What is this thing about a 30 year review procedure? Is the jury supposed to now speculate life without parole means something other than that?
>
> "Where is that coming from? A 30 year review procedure. I know it is improper to suggest that life without possibility of parole means something other than that.
>
> "MS. D'AGOSTINO: I did not suggest this. There is a difference between the Governor's power to commute and the 30 year review.
>
> "THE COURT: That is disingenuous. Whatever the source is you have now introduced to the jurors the suggestion that there is such a thing as a 30 year review which, again, is reviewed at 35 years and thereafter every five years.
>
> "The implication is this is a review for something like release. What other reasonable – I'm shocked that you would do this, frankly." (RT 5848.)

The prosecutor claimed surprise at the court's reaction. (RT 5848-5849.)

The court continued:

> "I would like to know what is the possible relevance in a situation where you know that the issue is whether or not the jury is going to wonder whether LWOP means he is going to be released to ask about a 30 year review procedure. What is the relevance of that question?"
>
> "MS. D'AGOSTINO: The relevance of the question, if you want to know, is whether this man is aware. This man is holding himself out as an expert. I don't believe he is that kind of an expert.

"THE COURT: That is really reaching for straws." (RT 5849.)

The court went on to indicate that it believed that an admonition could cure the problem of jurors wondering about whether LWOP meant LWOP and whether the death penalty would be carried out. (RT 5850.) After a recess, the court examined Park in chambers to determine Park's understanding of what the 30-year review was. Park indicated "it would be wrong to imply that there was any parole consideration being given at that review. It is simply a review." (RT 5857.) He also indicated that he did not really know the scope of the review (RT 5857), adding, "But just knowing from past experience with parole boards, they do like to keep a string on everybody. But certainly it has nothing to do with parole." (RT 5857.) The parties determined that defense counsel would elicit Park's testimony as to his understanding of the 30-year review.

The prosecutor complained then that the court should not then admonish the jury because there was no way the jury would be misled after Park explained the 30-year review. The court determined otherwise and gave its reason:

> "I don't know what possible purpose you could have asked this witness about a thirty-year review.
>
> "Your offer of proof from chambers is you are required to test his knowledge of corrections and of the criminal justice system.
>
> "MRS. D'AGOSTINO: That's correct.
>
> "THE COURT: That argument -- forgive me -- but it is ludicrous.
>
> "You can test this witness' knowledge of the correctional system in a thousand ways without making

reference to this very sensitive issue that is dealt with in ever so many Supreme Court decisions.

"So I am trying to cure by instruction which could otherwise be serious error." (RT 5866.)

Subsequently the court added:

"You suggested to this jury there was a thirty-year review with five year subsequent periods.

"In addition to that you have suggested to the jury that administrations change, regulations change, and the inference is that life without possibility of parole can mean something other than that.

"That to me is potentially revers[i]ble error." (RT 5865-5866.)

Prior to the end of the in chambers conference, appellant moved for a mistrial, which the court denied stating that it believed the problem could be cured by instructing the jury. (RT 5867.)

Back in front of the jury, Park testified that the 30-year review was "not a parole hearing in any way." (RT 5873.) He indicated he could not "answer directly as to what the policy goals" were for the 30-year review. (RT 5873.) He assumed from past experience that the Board members "simply want to be assured that the prison system is working properly for that particular prisoner whether within program or security or so forth." (RT 5873.)

At the end of Park's testimony, the court instructed the jury, "Life without possibility of parole means exactly that, and for purposes of determining the sentence in this case, you must assume the defendant will never be paroled." (RT 5876.)

B. The Prosecutor Committed Misconduct, and Appellant's Mistrial Motion Should Have Been Granted

It is improper in California for jurors to consider the possibility of

pardon, parole or commutation in making the life-or-death decision in a capital case penalty trial. (*People v. Ramos* (1984) 37 Cal.3d 136, 153-159.) Such consideration is improper in part because it leads jurors to speculate improperly on the future behavior of the defendant and the decision-making of an unknown future Governor. (*Id.*, at p. 157.) Although *Ramos* involved the trial court giving the erroneous Briggs Instruction, *Ramos* and its rationale preclude either the court or counsel from advising the jury regarding the commutation, parole or pardon of the defendant. (*People v. Hovey* (1985) 44 Cal.3d 543, 581.) Prosecutors have violated *Ramos* in argument to the jury (see e.g., *People v. Davenport* (1985) 41 Cal.3d 247, 287-288), and during cross-examination (*People v. Keenan* (1988) 46 Cal.3d 478, 507-508).

It is misconduct for the prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist. (*People v. Warren* (1988) 45 Cal.3d 471, 480.) A prosecutor commits misconduct when she intentionally elicits inadmissible testimony. (*People v. Bonin* (1988) 46 Cal.3d 659, 689; see also, *People v. Smithey* (1999) 20 Cal.4th 936, 961[misconduct to attempt to elicit inadmissible evidence through opinion of an expert witness].) The prosecutor may not interrogate witnesses solely "for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner* (1975) 13 Cal.3d 612, 619; internal citations omitted.)

Considering these principles in light of the prosecutor's cross-examination of Park, it is evident that the prosecutor committed misconduct asking Park about the irrelevant Board of Prison Terms 30-year review process. As the court pointed out, the implication from the questioning was

that the 30-year review was "a review for something like release." (RT 5848.) The court determined that the prosecutor's ostensible reason for asking these questions – to test the witness' expertise – was "ludicrous." The court was correct.

The 30-year review in question is a now-deleted rule of the Board of Prison Term which provided that the Board would review the case of LWOP prisoners with only one felony conviction for possible referral to the Governor for consideration of clemency after 30 years had been served, and every 5 years thereafter. (Former Cal. Code Regs., tit. 15, § 2817.)[36] Thus, the prosecutor was bringing before the jury information about a process ancillary to the Governor's power to commute sentences and grant clemency and pardons. As such, bringing up this information was both misconduct and *Ramos* error.

It is not necessary that the Governor's power to commute or pardon be specifically mentioned to constitute *Ramos* error. (See e.g., *People v.*

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[36] Former California Code of Regulations, title 15, section 2817 read in relevant part:

"(a) Person Considered. Prisoners serving sentences of life imprisonment without possibility of parole (LWOP) who have suffered no more than one felony conviction shall be considered by the board for possible referral to the Governor.

" (b) Scheduling. The case of each prisoner serving a sentence of life without the possibility of parole described in (a) whose commitment offense was on or before September 11, 1982, shall be reviewed 12 years after reception and every third year thereafter. Those prisoners described in (a) whose commitment offense was after September 11, 1982, shall be reviewed 30 years after reception and every fifth year thereafter."

Section 2817 was deleted December 20, 1993 – effective January 19, 1994 – just two months after the prosecutor's remarks. (Cal. Code Regs., tit. 15, § 2817, Register 93, No. 52.)

Keenan, *supra*, 46 Cal.3d at p. 507.) The trial court correctly recognized that the prosecutor's examination created the inference that the jury should not assume that sentencing appellant to LWOP would mean he would never be released.

Furthermore, the 30-year review process was one which would never be available to appellant. Appellant had previously been convicted of robbery and had three felony convictions in the present case. Therefore, the 30-year review procedure, which was available only to LWOP inmates with only one felony conviction, had no application to appellant. It was implicit in the prosecutor's questioning, however, that the 30-year review would apply to appellant and that he would receive such a review after 30 years, and every five years thereafter. As such, the prosecutor's questioning constituted a misstatement of law, and was further misconduct on her part. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 829; *People v. Bell* (1989) 49 Cal.3d 502, 538.)

The prosecutor offered an explanation for her questioning of Park that made no sense. Any doubt that she was not really testing the witness' expertise was dispelled when she asked Park her last two questions on the topic – leading questions which simply required Park to agree with her that the 30-year review date was set at the time of an inmate's incarceration, and that further reviews occurred at five year intervals. (RT 5844.) These questions served the prosecutor's improper purpose of informing the jury about the mechanics of the 30-year review; they did nothing to test the witness' expertise.[37]

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[37] The prosecution never formally challenged Park's expertise or requested to voir dire him on his credentials.

Even if the prosecutor felt her references to the 30-year review was arguably proper, the court had told both parties to bring any potentially controversial issues to the court's attention ahead of time so they could be resolved in a hearing under Evidence Code section 402. It seems inconceivable the prosecutor would not recognize this as being such an issue. Her unbelievable justification for raising this topic demonstrates as much. Moreover, her contention that *Ramos* did not apply here because the 30-year review was not about the governor's commutation power is also implausible and incorrect. As discussed above, the reasoning underlying *Ramos* is the concern that the jury will focus on speculative matters such as the defendant's future behavior or the decisions of a future governor rather than the relevant sentencing factors. That reasoning is directly applicable to how the jury would react to information about the 30-year review. The court noted it had twice on that day invited offers of proof ahead of time.[38] The prosecutor's response when the court pointed this out to her was defiance: "I wasn't aware I was required to tell the court every question I'm going to ask on cross-examination." (RT 5847.) Repeated instances of deciding "to defy the court's order is outrageous misconduct." (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1374.) Even if the court's requests that the parties bring offers of proof to the court ahead of time do not rise to the level of being court orders, the prosecutor's defiance is nevertheless significant.

As the court found, the prosecutor's inquiry into the 30-year review

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[38] The court had previously expressed dismay at the failure of the prosecutor to bring potentially controversial evidentiary matters to its attention ahead of time rather than in front of the jury. (See e.g., RT 2922-2926, 2985-2988 [discussing tattoo evidence].)

process suggested the possibility that appellant might be released from prison at some time in the future even if sentenced to LWOP. Evidence suggesting such a possibility is inadmissible under *Ramos*, and bringing it to the jury in the guise of a question is misconduct. (See *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 722.) By suggesting that such a release would be possible for appellant, the prosecutor committed further misconduct by implying facts harmful to appellant's penalty case without a good faith belief that such a release was a realistic possibility. (*People v. Warren*, *supra*, 45 Cal.3d at p. 480.)

The court attempted to avoid reversible error by having Park explain the 30-year review, and by giving an admonition to the jury, but its remedy was inadequate. First, Park never gave a clear description of what the 30-year review was, although he did say it was not a parole hearing. Second, the admonition defined a sentence of LWOP for the jurors and told them to assume appellant would not be paroled, but did not address any concerns jurors might have had that the 30-year review could otherwise assist appellant in obtaining a release from prison. In fact, as noted above, the 30-year review process was ultimately related to the Governor's clemency power, not his parole power. The testimony of Park and the admonition therefore did not fix the damage done by the prosecutor's misconduct.

As previously noted (see Argument 4), the trial court has considerable discretion in deciding whether to grant a mistrial or whether the error can be cured by admonishing the jury. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 984; *People v. Price*, *supra*, 1 Cal.4th at p. 428.) The court should grant a mistrial where it judges the error incurable by admonition or instruction. (*People v. Wharton* (1991) 53 Cal.3d 522, 565; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) The court here recognized

the potential for reversible error if the remarks about the 30-year review were allowed to remain. Because the trial court erred in constructing a remedy through Park's testimony and by admonition, this court should not defer to its determination that the error was cured and no mistrial was necessary. Accordingly, appellant was deprived of his rights to due process, a fair trial and a reliable penalty determination under state law. (*People v. Ramos*, *supra*, 37 Cal.3d at pp. 153-159.) Additionally, the violation of appellant's state due process rights under *Ramos* deprived appellant of an important state-created liberty interest in violation of his rights to due process and equal protection under the Fourteenth Amendment of the federal constitution. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Evitts v. Lucy* (1985) 469 U.S. 387,401.)

C. The Error Was Prejudicial

The error was prejudicial. *Ramos* error is generally reversible (*People v. Ramos*, *supra*, 37 Cal.3d at p. 154; *People v. Garrison* (1989) 47 Cal.3d 746, 794; *People v. Montiel* (1985) 39 Cal.3d 910, 928), although the Court has conducted prejudicial error analysis where the *Ramos* error is evidentiary rather than instructional, and is therefore susceptible to cure by admonition (see e.g., *People v. Keenan*, *supra*, 46 Cal.3d at pp. 507-508). The standard for state law error at the penalty phase is whether there is a reasonable possibility that appellant would have obtained a more favorable result but for the error (*People v. Brown* (1988) 46 Cal.3d 432, 446-448), which is comparable to the federal constitutional standard of prejudice in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Ashmus* (1991) 54 Cal.3d 932, 984.) Here, the prosecution's penalty case was built partly on appellant's purported incorrigibility – that he was dangerous, clever and manipulative. The prosecution's case for death was not a strong one. There

was a single victim and appellant was quite young at the time of offense and had a short adult criminal record. It is reasonably possible under these circumstances that one or more jurors would have voted for life rather than death had the prosecutor not committed *Ramos* error. Stated otherwise, the state cannot establish beyond a reasonable doubt that the error did not affect the outcome. The sentence of death must be reversed.

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THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING TO THE JURY THAT IT COULD CONSIDER APPELLANT'S LACK OF REMORSE AS EVIDENCE IN AGGRAVATION AT THE PENALTY PHASE

The prosecutor told the jury in her penalty phase argument that appellant's lack of remorse could be considered as evidence in aggravation. The prosecutor knew that lack of remorse is not a permissible factor in aggravation, yet she tried to incorporate it into her case for death as both an aggravating circumstance of the offense and as evidence of bad character. Her argument constituted prosecutorial misconduct which violated appellant's state and federal constitutional rights to a fair trial, due process and a reliable penalty determination. (Cal. Const., art I, §§ 7, 15, 16, 17; U.S. Const., 5th, 6th, 8th and 14th Amends.)

The prosecutor began her argument for a death verdict by informing the jurors that she was limited to arguing as aggravation the factors in section 190.3, factors (a), (b) and (c). She then read factor (a) regarding the circumstances of the crime, and discussed how it applied:

> "Now, when we say the 'circumstances of the crime' we are not just talking about the robbery or the kidnaping or the murder of Fred Rose that you heard about at the guilt phase.
>
> "We are also talking about, and your are allowed to consider, the impact to the victim and to the victim's family.
>
> "You are allowed [to] consider *whether the defendant expressed any remorse or not.* And other things which directly relate to that particular crime."
>
> "Factor b –" (RT 6219, emphasis added.)

At that point, the court interrupted and called the attorneys to the side bar, which led to a conference in chambers in which the court indicated it

understood that remorse was a factor in mitigation, but that the absence of remorse is the absence of mitigation, which cannot be a factor in aggravation. (RT 6220.) The prosecutor's response was to accuse the court of being "very anti death penalty." (RT 6221.) She continued in this vein, claiming the court had permitted its personal opinions regarding the death penalty to influence its decision as to jury instructions, "and now it appears as though you're going to interrupt me every time I say something the court does not like during my argument." (RT 6221.) The prosecutor complained of feeling "extremely constrained. I'm following arguments that have been given by countless other prosecutors, none of which have ever been objected to." (RT 6221.)

The court denied it was biased and asked the prosecutor to address the issue on the merits. The prosecutor then said, "Factors relating to the circumstances of the crime whether the defendant right after the crime may have gone to someone and said 'I'm sorry' are all things a jury can consider. [¶] You are precluding me from telling them that. And that is not correct." (RT 6222.) Appellant's counsel submitted the matter without further argument. (RT 6222.) The court made no further ruling and did not admonish the jury in any manner. (RT 6222-6223.) The prosecutor's argument was a misstatement of the law which constituted prosecutorial misconduct, and the court's failure to admonish the jury was also error.

The prosecutor compounded her misconduct by returning to the subject of remorse later in her argument: "Lack of remorse, I can express to you is not, not, I repeat not a *separate* aggravating factor. *But it's an indicator of character.* It's something you can consider." (RT 6284, emphasis added.)

The statements to the jury that it could consider the absence of an

expression of remorse by appellant, first as an aggravating circumstance of the crime, and second as aggravating evidence of appellant's bad character, each misstated the law and constituted misconduct by the prosecutor.

A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3. (*People v. Crittenden* (1994) 9 Cal.4th 83, 148; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Lack of remorse is not a statutory aggravating factor. (See § 190.3.) The prosecution cannot properly argue that the absence of a particular mitigating factor constitutes the presence of an aggravating factor. (*People v. Davenport* (1985) 41 Cal.3d 247, 288-290.) It is therefore error for the prosecutor to argue a defendant's lack of remorse as a factor in aggravation to obtain a death verdict. (*Ibid.*; *People v. Keenan* (1988) 46 Cal.3d 478, 510; *People v. Rodriguez* (1986) 42 Cal.3d 730, 788-790.)

The prosecutor could not avoid the general proscription against using lack of remorse as aggravation by arguing it as a circumstance of the crime. A post-offense expression of remorse is not a circumstance of the crime in any ordinary sense of the phrase. Indeed, this Court has recognized that "[t]he concept of remorse for past offenses as a *mitigating* factor sometimes warranting less severe punishment or condemnation is universal" (*People v. Ghent* (1987) 43 Cal.3d 739, 771, emphasis added), and predates the current death penalty statutory scheme (*People v. Keenan*, *supra*, 46 Cal.3d at p. 510; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168). Under the modern statutory scheme, factors in mitigation which are not otherwise specified in section 190.3 may be considered under factor (k). (See e.g., *People v. Danielson* (1992) 3 Cal.4th 691, 788 fn. 7 [remorsefulness as mitigating character evidence under factor (k).]) Accordingly, any proper argument

about the absence of remorse would in the context of factor (k) evidence, not factor (a).

As set out above, the prosecutor's first mention of the absence of remorse was in the context of introducing its case in aggravation under section 190.3, factors (a), (b) and (c), and specifically factor (a), the circumstances of the crime. This cannot be understood in any way as being an argument against the jury finding remorse as a mitigator under factor (k). "[T]he propriety of commenting on lack of remorse depends to a degree on the inference one is asking the jury to draw from it." (*People v. Thompson* (1988) 45 Cal.3d 86, 124.) Moreover, the prosecutor had previously indicated to the court a belief that factor (a) evidence could only be aggravating. (See RT 6130 [arguing to court, "Where does it say the factors for a, b and c can also be mitigating?. . . I want to know that."].) The inference the prosecutor wanted the jury to draw from this argument was that appellant's lack of expression of remorse was a circumstance of the crime which made the crime worse, and therefore made appellant more deserving of death.[39] To the extent the prosecutor's remark in chambers explaining her argument is credible, it does not support her contention that the argument was proper; rather, it simply indicates that the prosecutor believed that the jury could consider the absence of an expression of remorse shortly after the crime as an aggravating circumstance of the crime.

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[39] This Court has held that a prosecutor may refer to a defendant's "overt remorselessness" as part of factor (a), meaning the murderer's attitude toward his actions and the victim at the time of the offense. (*People v. Cain* (1995) 10 Cal.4th 1, 76-79; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232.) But the prosecutor's remarks in the present case were neither directed toward, nor limited to, appellant's attitude at the time of the offense.

The prosecutor's second reference to lack of remorse was also improper. By stating that lack of remorse was not a *separate* aggravating factor, but that it *could* be considered as an indicator of character, the prosecutor encouraged the jurors to believe appellant's lack of remorse was evidence of bad character which could be considered as an aggravating factor. Bad character is not an aggravating factor under section 190.3, and the prosecutor's attempt to persuade the jury to rely on such non-statutory aggravating evidence to obtain a death verdict was therefore further misconduct. (See *People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776; *People v. Bell* (1989) 49 Cal.3d 502, 538 [misstatement of law by prosecutor is misconduct].)

These errors of injecting non-statutory aggravation into appellant's trial also violated the federal constitutional requirements that objective criteria guide the imposition of the death penalty (*Maynard v. Cartwright* (1988) 486 U.S. 356; *McCleskey v. Kemp* (1987) 481 U.S. 279, 299-306), and the heightened need for reliability in capital trial and sentencing procedures (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 (plur. opn.); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) Furthermore, the prosecutor's misconduct was sufficiently prejudicial to violate petitioner's due process rights. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 639.) To the extent the errors are otherwise only state law issues, they also deprived appellant of a state-created liberty interest and thereby violated his federal due process rights. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

These errors were prejudicial under either a state law or federal constitutional standard. The case was not one in which the jury would necessarily be inclined to impose death. There was only a single victim and appellant was a young man with only a limited adult criminal record. The

prosecutor's appeal to the jury was heavily based on emotion and emotionally-tinged evidence such as victim-impact testimony. Without the prosecutor's arguments that allowed the jury to consider appellant's purported lack of remorse as an aggravating evidence, it is reasonably possible that the jury would have reached a verdict more favorable to appellant. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Stated otherwise, the prosecution cannot show beyond a reasonable doubt that without the misconduct the jury would have reached a verdict of death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The sentence and judgement of death must therefore be reversed.

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THE PROSECUTOR COMMITTED MISCONDUCT BY URGING THE PENALTY PHASE JURY TO RENDER A VERDICT BASED ON VENGEANCE

In Argument 2, appellant has showed how the prosecutor's argument to the jurors exhorting them to avenge the victim's death on behalf of his family constituted misconduct and resulted in a violation of *Booth v. Maryland* (1987) 482 U.S. 496, when the prosecutor informed the jurors that the victim's family wanted appellant to receive the death penalty. The court did not consider, however, how the prosecutor's argument for vengeance, apart for the violation of *Booth*, constituted prejudicial misconduct. Appellant submits that the argument exhorting the jury to impose the death penalty as an act of vengeance was misconduct and deprived him of his rights to due process, a fair penalty trial and a reliable penalty determination. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th and 14th Amends.)

The relevant portion of the prosecutor's argument has been set forth in Argument 2, but is repeated here for convenience:

> "Just a couple more concepts I want to discuss with you before I close, ladies and gentlemen. One of them is vengeance. Now, most of us have been raised to believe that vengeance is a bad thing, that it's not appropriate. I suggest to you, that under certain circumstances it's not only appropriate but in fact quite healthy. It has a legitimate place in our society and has a legitimate role within our criminal justice system. Don't let me kid you, when any prosecutor gets up in front of a jury or any court and asks that jury to come back with a verdict of death, that vengeance isn't involved. Because what this prosecutor is saying to you, ladies and gentlemen, is that someone did something so bad, so bad that it has to be done back to them. Now because I am not as eloquent as others . . .

I want to quote to you from somebody who was very eloquent and how they felt about vengeance, and this is the quote, 'We have been plied and belabored with the notion that anger is invariably a dysfunction, a failure to cope with our environment. Great literature from Homer on teaches otherwise. It teaches that anger can be necessary for coping. We are told the desire for vengeance is primitive and shameful, but when the society becomes like ours, uneasy about calling prisons penitentiaries or penal institutions and instead calls [sic] them correctional facilities, society has lost its bearings. The idea of punishment is unintelligible if severed from the idea of retribution, which is inseparable from the concept of vengeance which is an expression of society's anger. If you have no anger, you have no justice. The society incapable of sustained focused anger in the form of controlled vengeance is decadent. If we lived in a world in which vengeance was really senseless, so would life be, or as MacBeth said, life would be a tale told by an idiot.'

"I am going to go away from the quote for just a moment. We don't have to take Shakespeare's words for it, we don't need MacBeth. Think about Clint Eastwood and all the Dirty Harry movies and Charles Bronson where he is an architect and goes out killing all these people because his wife has been murdered. Clint Eastwood in Dirty Harry, he has made millions of dollars playing this Dirty Harry, playing a kind of shall we say cop who uses pre-Miranda tactics on his prisoner. And why has he made all this money? Because it satisfies this longing for justice that we all have, this anger that we have.

"Let me go back to the quote here, 'We should use the criminal justice system to punish, that is to protect society from physical danger and to strengthen society by administering punishments that express and nourish through controlled indignation the vigor of our values. We should be ashamed to live in a society that does not intelligently express through its institutions the public's proper sense of proportionate punishment for the likes of people like this defendant.'" (RT 6282-6284.)

After the prosecutor discussed appellant's lack of remorse and why she believed mercy was inappropriate in this case, she returned to the subject of vengeance:

> "Now, another area I want to talk to you about is the social impact of your decision. Somehow, it's a main point that by being a part of civilization, we give up something, but we give it up because we do get something in return and at some unknown point in our evolution from beast to man we voluntarily surrendered, we surrendered our right to individual justice. When man gave up this right to personal vengeance, he may have given up a great deal psychologically and the state's efforts can never ever give you the same feeling you get by exacting personal vengeance, but in return the state did give man two things. One, it lends us its powers so even the weak may have revenge, and secondly it does impose reason and order on its process of vengeance.
>
> "Now, the Rose family, is part of this social contract. They have given up their right to take personal vengeance on the defendant because they're law abiding. In return, they're entitled to action of the state that serves the same purpose. They're entitled to vengeance, plain and simple. They're not allowed to get him themselves. They're not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right to vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled to get on their own." (RT 6282-6286.)

The Eighth Amendment requires that a verdict of death be a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.) Capital sentencing statutes must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428, internal citations and quotation marks omitted.) In California, section 190.3

sets out the factors that can be considered in aggravation. A desire for vengeance, or to provide a victim's family with vengeance, is not among them. Evidence in aggravation must be tied to a relevant statutory factor in aggravation under section 190.3. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 148; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Nothing in California's death penalty scheme expressly or inferentially allows the jury to rely on its desire for vengeance in deciding whether or not to impose the death penalty.

The prosecutor's argument was a blatant appeal to the passions and prejudices of the jury. Her appeal was remarkably straightforward: she said that punishment is "unintelligible" if severed from the concept of vengeance, and that "[i]f you have no anger you have no justice." She went to proclaim that "[t]he society incapable of sustained focused anger in the form of controlled vengeance is decadent." Reduced to its essence, the argument told the jury that it could and should rely on its anger, and express it by imposing a death verdict as an act of justifiable vengeance.

This Court has repeatedly held that isolated, brief references to retribution or community vengeance are potentially inflammatory, but do not constitute misconduct "so long as such arguments do not form the principal basis for advocating the imposition of the death penalty." (*People v. Ghent* (1987) 43 Cal.3d 739, 771; *People v. Anderson* (1990) 52 Cal.3d 453, 479-480; *People v. Wash* (1993) 6 Cal.4th 215, 262.) This general rule does not apply here because the prosecutor's argument was neither brief nor isolated; instead, it was a significant component in her case for death.

Moreover, to the extent that this rule might be interpreted as permitting the prosecution to argue for vengeance as long as it is not the "principle basis" of its argument for death, it is outdated and wrong. The

relevant language can be traced back at least to *People v. Floyd* (1970) 1 Cal.3d 694, 721-722, pre-dating both *Furman v. Georgia* (1972) 408 U.S. 238, which required guided discretion for state death penalty procedures to comport with the Eighth Amendment, and *People v. Bolton*, *supra*, 23 Cal.3d at pp. 213-214, which changed the focus on prosecutorial misconduct away from considerations of intentionality on the prosecutor's part to the impact of the misconduct on the defendant.

Post-*Furman*, capital sentencing statutes must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance. (*Godfrey v. Georgia*, *supra*, 446 U.S. at p. 428.) The "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of capital sentencing determination. . . ." (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) California's guided discretion scheme for the death penalty does not allow for juries to consider vengeance as a reason for choosing the death penalty over life without the possibility of parole. Accordingly, any substantial argument urging the jury to rely on vengeance in decided to impose the death penalty implicates the Eighth and Fourteenth Amendments.

Because the prosecutor's argument regarding vengeance was improper, it should be assessed in a manner consistent with similar kinds of misconduct. In this case the prosecutor's use of vengeance was similar to those in which the prosecutor makes its case for death based on biblical authority. This Court has frequently reiterated that it is patent misconduct to ask the jury to consider biblical teachings when deliberating. (*People v. Hill*, *supra*, 17 Cal.4th at p. 837; *People v. Wash*, *supra*, 6 Cal.4th at p. 261; *People v. Sandoval* (1992) 4 Cal.4th 155, 192.) This Court has noted that the invocation of the *lex talionis*, the ancient law of retributive justice based

on Mosaic law – and often expressed in the simplified form of "an eye for an eye" – "would appear to be a favorite of prosecutors in some capital cases." (*People v. Hill*, *supra*, 17 Cal.4th at p. 836 fn. 6; citing *People v. Wash*, *supra*, 6 Cal.4th at p. 259, fn. 18, and *People v. Montiel* (1993) 5 Cal.4th 877, 934, as examples.) An appeal to religious authority in support of the death penalty is improper because it tends to diminish the jury's personal sense of responsibility for the verdict. (*People v. Hill*, *supra*, 17 Cal.4th at p. 837; *People v. Wash*, *supra*, 6 Cal.4th at p. 261; *People v. Sandoval*, *supra*, 4 Cal.4th at pp. 191-194; *People v. Wrest* (1992) 3 Cal.4th 1088, 1105-1107.) Such argument also carries the potential that the jury will believe a higher law should be applied and ignore the trial court's instructions. (*People v. Hill*, *supra*, 17 Cal.4th at p. 837; *People v. Wrest*, *supra*, 3 Cal.4th at p. 1107.)

The prosecutor's call for vengeance was essentially a secular version of the same "eye for an eye" argument this Court has condemned. The fact that the argument makes no reference to religious doctrine is irrelevant to the potential effect it could have on the jury. Rather than theology, the prosecutor has simply used social contract theory to persuade the jury of its duty to impose the death penalty. A juror accepting the prosecutor's theory that society owed a death verdict to the Rose family as part of the social contract to which every citizen implicitly agrees would have the same diminished sense of responsibility as a juror moved by biblical authority. Such a juror would similarly be inclined to disregard the trial court's instructions about how to decide between life and death based on the evidence in the case, and base it on the retributive vengeance due to the victim's family.

There was no objection to this portion of the prosecutor's argument.

The argument is still preserved for appeal, however, because the prosecutor's emotional argument is not the kind which can readily be cured by admonition. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; *People v. Love* (1961) 56 Cal.2d 720, 733.) "Some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect. . . ." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 339.) Furthermore, this Court may reach the merits of a claim where, as here, "plain error" has been committed at the penalty phase. (See *People v. Wash*, *supra*, 6 Cal.4th at pp. 276-277 (conc. & dis. opn. of Mosk, J.) Finally, the cumulative effect of all the misconduct by the prosecutor during the penalty phase argument could not have been cured by an admonition. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077.)

These errors were prejudicial under either a state law or federal constitutional standard. The jury in this case would not necessarily have been inclined to impose a death verdict. There was only a single victim and appellant was a young man with a limited adult criminal history. The prosecutor's appeal to the jury was based on emotion and emotionally-charged evidence, such as victim-impact testimony, and emotional arguments such as this one. But for the prosecutor's misconduct urging the jury to avenge the victim's death on behalf of the surviving family, it is reasonably possible that the jury would have reached a verdict more favorable to appellant. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Stated otherwise, the prosecution cannot show beyond a reasonable doubt that without the misconduct the jury would have reached a verdict of death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Accordingly, the judgment of death must be reversed.

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THE PROSECUTOR COMMITTED MISCONDUCT BY URGING THE JURY TO SHOW APPELLANT THE SAME MERCY HE SHOWED THE VICTIM

In Argument 13, appellant has contended that the prosecutor improperly argued to the jury that it should consider vengeance as a reason for imposing the death penalty on appellant. The prosecutor made a further improper appeal to the jury during the same argument by telling the jury that it should show appellant the same mercy he showed to the victim, Fred Rose. Specifically, the prosecutor said:

> "I as a representative of the People of the State of California will be satisfied if you extend to this defendant the same sympathy and the same mercy that he extended to Fred Rose. And the same sympathy and the same mercy that he extended to everyone throughout his life. I will be satisfied if you do that." (RT 6230.)

Outside the presence of the jury, appellant objected to this comment, citing *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, and requested an admonition that the jury disregard it. (RT 6261.) The court noted appellant's objection (RT 6261), but did not admonish the jury. The prosecutor's comments were prejudicial misconduct and the failure to admonish the jury was error, thereby violating appellant's constitutional rights to due process, to a fair jury trial, and to a reliable and individualized penalty determination. (Cal. Const., art I, §§ 7, 15, 16, 17; U.S. Const., 5th, 6th, 8th and 14th Amends.)

"A prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade . . . the jury." (*People v. Price* (1991) 1 Cal.4th 324, 447; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Prosecutorial misconduct in closing argument can render a trial so

fundamentally unfair as to deny defendant due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-645; *People v. Harris* (1989) 47 Cal.3d 1047, 1084.) Under the Eighth Amendment, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" (*California v. Ramos*, *supra*, 463 U.S. 992 at pp. 998-999), including scrutiny of the prosecutor's penalty phase arguments (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-334, 337-341).

To be compatible with principles of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, capital sentencing statutes must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428, internal citations and quotation marks omitted.) Appeal to the passions and prejudice of the jury by the prosecution in a capital case violates "the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is considering." (*Sandoval v. Calderon* (2000) 231 F.3d 1140, 1150, citing *Godfrey v. Georgia*, *supra*.) The Eighth Amendment requires that a verdict of death must be a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.)

By urging the jury to "extend to this defendant the same sympathy and the same mercy that he extended to Fred Rose" the prosecutor improperly appealed to the passions and prejudice of the jury, asking them

to ignore the guided discretion of California's death penalty law and decide appellant's fate based on emotion and vengeance rather than as a reasoned moral response to the evidence, thereby violating principles of both the Fourteenth and Eighth Amendments.

Most jurisdictions addressing the legality of similar arguments have found them improper. In *Lesko v. Lehman*, *supra*, 925 F.2d 1527, cited by defense counsel when making his objection, the prosecutor committed misconduct by making remarks at the conclusion of his penalty phase closing argument very similar to those in this case. The prosecutor told the jury he could not stop them from showing sympathy to the defendants, but added:

> "So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980 [the date of the crime]. No more. No more." (*Id.* at p. 1540.)

The Third Circuit found that these comments by the prosecutor were "'directed to passion and prejudice rather than to an understanding of the facts and of the law.'" (*Id.* at p. 1541.) "[T]he prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned [their victims]." (*Ibid.*)

The Tenth Circuit in *Duvall v. Reynolds* (10th Cir. 1998) 139 F.3d 768, 795, found that the prosecutor improperly encouraged the jury to allow sympathy, sentiment or prejudice to influence its decision in a capital case where he argued, "you may find that only those who show mercy shall seek mercy, and that as a verdict of this jury, that you may show him the same mercy that he showed [the victim] on the night of the 15th of September."

The Supreme Court of Tennessee followed *Lesko* in *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812: "The prosecutor strayed beyond the bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings. . . , and encouraging the jury to give the defendant the same consideration that he had given his victims." The Court held that this was an improper argument that "encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*Ibid.*)

Florida has repeatedly found similar arguments by a prosecutor to be error. (E.g., *Urbin v. State* (Fla. 1998) 714 So.2d 411, 421-422 [urging the jury to show defendant the same mercy he showed the victim was "blatantly improper"]; *Rhodes v. State* (Fla. 1989) 547 So.2d 1201, 1206 [argument for jury to show defendant the same mercy shown to the victim on the day of her death was "an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation"]; see also *Kearse v. State* (Fla. 2000) 770 So.2d 1119, 1129-1130; *Richardson v. State* (Fla. 1992) 604 So.2d 1107, 1109.)

This Court has taken a different view, finding no state law violation[40] in *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465, where the prosecutor urged the jury to "show [defendant] the same mercy that he showed [the victim]." The Court reasoned that in light of the instruction that the jury could show mercy or sympathy, the prosecutor was simply arguing that defendant did not deserve mercy given the circumstances of the crime.

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[40] It appears that Ochoa did not claim the prosecutor's argument violated his federal constitutional rights.

Although the holding in *Ochoa* seemed dependent on the prosecutor's argument taken as a whole in the context of the case, and therefore would be of limited application as precedent, this Court recently relied on *Ochoa* in *People v. Hughes* (2002) 27 Cal.4th 287, 395, suggesting such arguments by the prosecutor have gained the Court's more general approval. In *Hughes*, the prosecutor argued at the capital penalty phase that "the jury should grant defendant as much 'sympathy and mercy' as he gave the victim while she was being 'terrorized.'" This Court rejected defendant's argument that this constituted an improper appeal to the jury's passion and prejudice, citing *Ochoa* without analysis.

This Court noted in *Ochoa* that "other jurisdictions reflect various views on this question," (19 Cal.4th at p. 465), citing to the contrasting opinions of *Duvall v. Reynolds*, *supra*, 139 F.3d 768, and *Commonwealth v. Pelzer* (1992) 612 A.2d 407, 416, [no error in prosecutor arguing that "the jurors should 'show [the defendants] the same mercy they showed [the victim]'"]. In fact, Pennsylvania appears to be the only jurisdiction besides California which has repeatedly and consistently approved this argument. *Ochoa* and the Pennsylvania cases are not endorsements of an appeal to vengeance. Instead, they rely on *interpreting* the prosecutor's remarks as simply urging the jury not to show sympathy or mercy consistent with the instructions in the case.[41] Appellant submits that the cases taking the

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[41] Pennsylvania cases, including *Commonwealth v. Pelzer*, *supra*, 612 A.2d at p. 416, which approve such arguments, do so with little or no analysis until traced back to *Commonwealth v. Travaglia* (1983) 467 A.2d 288, 301, where the prosecutor urged the jury to "Exhibit the same sympathy that was exhibited by these men on [the date of the crime]." In *Travaglia* the jury was instructed that sympathy was *not* to be considered in

(continued...)

prosecutor's words at face value – as an improper, direct call for vengeance – reflect a better understanding of the prosecutor's argument. Prosecutors who truly want to argue that sympathy and mercy are uncalled for in a particular case need not resort to inflammatory and prejudicial language used in this case. This Court should disapprove of the argument in this case, and such arguments generally.

Such disapproval would be consistent with California law condemning a prosecutor's use of deceptive or reprehensible methods to persuade the jury. Such methods include appeals to passion or prejudice during argument to the jury (see *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974-75 [prosecutor's inflammatory argument invited the jurors "to give into their prejudices and to buy into the various stereotypes that the prosecutor was promoting"]); and arguments that urge the jury to apply extra-judicial law and ignore the trial court's instructions (*People v. Wrest* (1992) 3 Cal.4th 1088, 1107; *People v. Hill* (1998) 17 Cal.4th 800, 830 [misstatement of applicable law]). The prosecutor's argument asking the jury to show appellant the same mercy he showed the victim was both an improper appeal to the passion and prejudice of the jury and an invitation for the jury to misapply the applicable law and rely on extra-judicial authority to determine appellant's sentence.

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[41](...continued)
making its sentencing decision. The appellate court found, from reading the whole argument, "that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their sympathy." (*Ibid.*) *Travaglia*, however, is the state court decision reversed in *Lesko v. Lehman*, *supra*, 925 F.2d 1527, for prosecutorial misconduct during argument, including the improper appeal to vengeance approved by the state court. As such, the Pennsylvania line of cases appears to be based on a shaky foundation.

Furthermore, this Court has repeatedly held that appeals to religious principles by the prosecution in argument is improper. (*People v. Wash* (1993) 6 Cal.4th 215, 258-261; *People v. Sandoval* (1992) 4 Cal.4th 155, 193-194.) Such appeals imply that extra-judicial law should be applied in the case, "displacing the law in the court's instructions." (*People v. Wrest, supra*, 3 Cal.4th 1088, 1107.) An appeal to extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. (*Sandoval v. Calderon* (9th Cir. 2000) 231 F.3d 1140, 1150, citing *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Although the prosecutor's argument here did not invoke the Bible, it improperly invoked the Biblical concept of vengeance, which is antithetical to the California system of guided discretion in capital cases. (See *Jones v. Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, at pp. 1559-1560.) Calling on the jury to "extend to this defendant the same sympathy and the same mercy that he extended to Fred Rose" is appealing to the "crude proportionality of 'an eye for an eye'" (see *Tison v. Arizona* (1987) 481 U.S. 137, 180-181 (dis. opn. of Brennan, J.), which this Court has condemned when prosecutors invoke Biblical authority directly.

This Court should therefore reconsider the propriety of the kind of argument made by the prosecutor here in light of the own authorities condemning reliance on extra-judicial authority and appeals to passion and prejudice, and in light of substantial authorities from other jurisdictions condemning the specific argument made to this jury.

The error was prejudicial. "A prosecutor's closing argument is an especially critical period of trial. Since it comes from an official

representative of the People, it carries great weight and must therefore be reasonably objective." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.) The misconduct denied appellant the right to a reliable penalty determination, and requires per se reversal of his death sentence under the Eighth Amendment. (See e.g., *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328; *Mills v. Maryland* (1988) 486 U.S. 367, 384; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-117; *Lockett v. Ohio* (1978) 438 U.S. 586, 608-609.)

Under any standard of review, the penalty judgment must be reversed. The case was a close one. The error cannot be considered harmless. There is a reasonable possibility (*People v. Brown* (1988) 46 Cal.3d 432, 446-448) that absent the prosecutor's improper plea to the passions and prejudices of the jury in her final remarks to them, the penalty verdict would have been different. Stated otherwise, the prosecution cannot establish beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 984.) The death judgment must therefore be reversed.

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THE PROSECUTOR COMMITTED MISCONDUCT DURING HER PENALTY PHASE ARGUMENT TO THE JURY BY RELYING ON INFLAMMATORY FACTS NOT IN EVIDENCE TO ARGUE FOR THE DEATH PENALTY

The prosecutor committed misconduct in her penalty phase argument to the jury when she argued inflammatory aggravating circumstances of the crime which were not in evidence. Specifically, the prosecutor argued as follows:

"[Appellant] killed Fred Rose in the back of the head. When, based on the evidence Mr. Rose was either on his knees begging for mercy or running away in fear from this defendant – ." (RT 6237.) Appellant objected. (RT 6237.) The court ignored the objection and said to counsel, "The jury has heard previously that statements of counsel are not evidence." (RT 6237.) The prosecutor then completed her statement: " – he executed this father of three and then he went out and partied." (RT 6237.)

There was no evidence whatsoever to support an argument that the victim begged for mercy. The prosecutor's argument on this point was pure embellishment designed to prejudice the jury and enhance her chances of obtaining a death verdict. Her other point – that the shooting could have occurred in only one of two ways, with Rose either on his knees or running away – was also unsupported by the evidence. The evidence on how the shooting occurred was extremely limited. The two scenarios described by the prosecution were not the only ways the shooting could have occurred. The medical examiner, Dr. Sherry, noted that the entry and exit wounds indicated a slight downward trajectory of the bullet, from back to front, assuming Rose's body was in "the standard anatomical position," meaning "hands down at the side standing and looking straight ahead." (RT 3878.)

While Sherry agreed with the prosecutor that the wound was consistent with one person kneeling and the other standing (RT 3878), he also agreed with defense counsel that it was consistent with "probably millions of different possibilities depending upon the position of the weapon and the position of the body." (RT 3880-3881.) The absence of stippling, tattooing, sooting or searing of the victim's scalp around the entry wound indicated the gun was fired more than 18 inches away (RT 3886-3887); it could have been fired up to 100 feet away (RT 3888). Accordingly, the evidence did not support the prosecution's claim that the victim necessarily was on his knees or running away.

The fact that a murder has been committed "execution-style" is a circumstance which jurors are very likely to see as making the crime distinctly worse. This Court has even assumed the potential significance of such a circumstance. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1177 [fact that killing was execution-style cited in determining death was not a grossly disproportionate sentence]; *People v. Gurule* (2002) 28 Cal.4th 557, 625 [photographs admitted for purpose of supporting prosecution theory that murder was committed execution-style were relevant]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) For non-capital murders, the fact that a murder is committed execution-style is evidence that it "was carried out in a dispassionate and calculated manner" that can be considered for purpose of denying parole. (Cal. Code Regs., tit. 15, § 2402, sub. (c)(1)(B).)

Under California law a prosecutor commits misconduct when she uses deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Such misconduct occurs when the prosecutor refers to facts not in evidence in argument to the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 828; *People v. Pinholster* (1992) 1

Cal.4th 865, 948.) Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, it is misconduct to mischaracterize that evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823; *People v. Avena* (1996) 13 Cal.4th 394, 420.) Arguing facts not in evidence tends to make the prosecutor her own witness, offering unsworn testimony not subject to cross-examination. (*People v. Hill*, *supra*, 17 Cal.4th at p. 828.) This Court has recognized that such testimony, "'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.'" (*People v. Bolton*, *supra,* 23 Cal.3d at p. 213, internal citations omitted; *People v. Benson*, *supra,* 52 Cal.3d at p. 794 [prosecutor may not go beyond the evidence in her argument to the jury]; *People v. Miranda* (1987) 44 Cal.3d 57, 108; *People v. Kirkes* (1952) 39 Cal.2d 719, 724.)

The prosecutor's argument about how Fred Rose was killed was misconduct under California law. Her claim that Rose begged for his life was an emotional appeal with no basis at all in the evidence. Her claim that the evidence supported only two possible scenarios for the shooting – the victim on his knees or running away – was also contrary to uncontradicted evidence. A prosecutor's vigorous presentation of evidence favorable to her side does not excuse either deliberate or mistaken misstatements of fact. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823; *People v. Purvis* (1963) 60 Cal.2d 323, 343.)

In addition to violating state law, the prosecutor's misconduct of injecting inflammatory and unreliable information into the penalty phase violated appellant's federal constitutional rights to due process, a fair trial, confrontation and cross-examination, and a reliable penalty determination.

By arguing facts not in evidence, the prosecutor deprived appellant of both notice of the evidence against him as well as the opportunity to meet that evidence through cross-examination and the presentation of other defense evidence. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-182; *Gardner v. Florida* (1977) 430 U.S. 349, 358-361; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Bolton*, *supra*, 23 Cal.3d at p. 215 fn. 4 [prosecutor acting as unsworn witness may violate Confrontation Clause].)

The trial court failed to correct the error when appellant objected. Instead of sustaining the objection, the court simply stated that the jury had already been informed that the arguments of counsel are not evidence. The court's remark apparently was directed toward counsel and not the jury, and cannot be considered an admonition to the jury.[42] Indeed, the belief that Rose was the victim of an execution-style killing became the "big issue" in penalty deliberations of at least one juror. (RT 6507; see Argument 1, *ante*.)

Misconduct that infringes upon a defendant's constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Hall* (2000) 82 Cal.App.4th 813, 817, citing *People v. Harris* (1989) 47 Cal.3d 1047, 1083.) Misconduct which does not otherwise infringe upon a defendant's constitutional rights may nevertheless infect the trial with such unfairness as to violate his right to due process rights under the Fourteenth Amendment.

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[42] Moreover, the misconduct here was not the kind which was readily cured by admonition. (*People v. Hill*, *supra*, 17 Cal.4th at p. 800; see *People v. Bolton*, *supra*, 23 Cal.3d at p. 214 [assessing prejudice without reference to admonition given to jury].)

(*Donnelley v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643; *People v. Hill* (1998) 17 Cal.4th 800, 819.) State law error at a capital penalty hearing is assessed under "reasonable possibility" standard of *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-449, which is comparable to the *Chapman* reasonable doubt test (*People v. Ashmus* (1991) 54 Cal.3d 932, 965).

This misconduct was highly prejudicial and reversible error under any applicable standard or review. The prosecution case for death was heavily dependent on the circumstances of this single homicide. The only other aggravating evidence the prosecutor had against this 21-year old defendant was a single adult robbery conviction and a string of juvenile misconduct and in-custody misconduct of limited significance. As noted above and in Argument 1, the jurors became so focused on the manner of the shooting that one juror did an independent experiment at home using his computer to test his and the prosecution's theory that the killing was "execution-style." (See RT 6705; Argument 1, *ante*.) "Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, *supra*, Trial, § 2901, p. 3550.) The prosecution cannot show beyond a reasonable doubt that the error was not prejudicial; stated otherwise, there is a reasonable possibility that but for the error here the jury would have reached a different penalty verdict. The sentence of death must therefore be reversed.

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THE PROSECUTOR COMMITTED MISCONDUCT BY REFERRING TO PURPORTED AGGRAVATING EVIDENCE OUTSIDE THE RECORD IN HER PENALTY PHASE ARGUMENT TO THE JURY

The prosecutor committed a further act of misconduct in her penalty phase argument by arguing facts not in evidence when she told the jury, "I cannot bring in every single bad thing this Defendant has done throughout his entire life to convince you to give him the death penalty." (RT 6219.) This statement constituted misconduct and violated appellant's state statutory rights under section 190.3 as well as his rights to confront and cross-examine witnesses, to a fair jury trial, and to due process and a reliable penalty determination under both the state and federal constitutions. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 5th, 6th, 8th, and 14th Amends.)

It is misconduct for the prosecutor to state facts not in evidence or to imply the existence of evidence known to the prosecutor but not to the jury. (*People v. Bolton*, *supra*, 23 Cal.3d at pp. 212-213.) Prosecutorial misconduct clearly occurs when, during closing argument, a prosecutor refers to facts not in evidence. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 827-828; *People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Such statements tend to make the prosecutor his own witness, offering unsworn testimony not subject to cross-examination in violation of the Sixth and Fourteenth Amendments. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 213.)

In capital cases, there are strict limits regarding what evidence of a defendant's prior bad acts can be introduced in aggravation during the penalty phase. Only prior felony convictions (§190.3, factor (c)) and criminal activity involving the use or attempted use of force or violence or the express or implied threat to use force or violence (190.3, factor (b)) are

admissible. (See generally, *People v. Balderas* (1986) 41 Cal.3d 144, 202.) The prosecution introduced evidence of two prior felony convictions under factor (c) and seven incidents of purported violent criminal activity under factor (b). The prosecutor's statement to the jury that she could not "bring in every single bad thing this defendant has done throughout his entire life to convince you to give him the death penalty" strongly implied that appellant had committed other bad acts worthy of the jury's consideration, but which were not admissible. This was misconduct.

In *People v. Bolton, supra*, 23 Cal.3d 208, 212, the defense in an assault case had been permitted to impeach the victim with prior felony convictions. The prosecutor commented on this ruling during closing argument: "I objected to that, because I think it is unfair, because I can't do the same thing to the defendant, and there are certain rules of court that favor one side or the other, and I can't do that." (*Id.*, at p. 212, fn. 1.) After a defense objection, the prosecutor continued: "You people don't know whether or not Clifford Hollister [the victim] could be afraid of Willie Bolton. You don't know, because that's just the way we do things here. For all you know, he may be just as bad a guy as Clifford Hollister." (*Ibid.*) This Court found misconduct because the prosecutor "twice hinted that, but for certain rules of evidence that shielded appellant, he could show that appellant was a man with a record of prior convictions or with a propensity for wrongful acts." (*Id.*, at p. 212.)

In *People v. Taylor* (1961) 197 Cal.App.2d 372, 381-382, the defense in a homicide case drew the jury's attention to the deceased's bad reputation for violence. The prosecutor argued in response that ". . . defense counsel kept arguing about the deceased's bad reputation for violence. Well, you know perfectly well that the prosecution is not

permitted to bring in any evidence along that same line. He can bring in all the evidence he wants about the bad reputation of one of the parties in this type of situation, but the prosecution, according to law, can't do the same." The Court of Appeal found that this statement could not reasonably be construed as anything other than an effort to get into the minds of the jurors the impression that if the law permitted, the prosecutor could prove that appellant also had a bad reputation for violence. (*Ibid.*)

A prosecutor's comment to the jury does not have to explicitly state the information outside the record to which it is referring in order to be misconduct. In both *Bolton* and *Taylor*, the illicit information was conveyed by the prosecutor to the jury only by way of implication – the prosecutor's remarks only implied that there was information, outside the record but in the prosecution's possession, relevant to the issue at hand. Nevertheless, the appellate courts in each of those cases found the implication sufficient to constitute prejudicial misconduct. The implied message in the prosecutor's remark in this case is also clear: jurors would have understood that the prosecutor was saying that appellant had committed crimes or other bad acts in his life which, but for the rules of evidence, she could have used to make a stronger case for a death verdict. (See also, *People v. Hill*, *supra*, 17 Cal.4th at p. 829 [misconduct to invite jury's inference of fact unsupported by the evidence in argument].) There is no question that the prosecutor's comment was misconduct.

Such misconduct is federal constitutional error as well. When the prosecutor refers to facts not in evidence, she takes on the role of being her own witness, offering unsworn testimony not subject to cross-examination, and violates the Sixth and Fourteenth Amendments. (See *People v. Bolton*, *supra*, 23 Cal.3d at p. 213.) Referring to facts outside the record,

uncontrolled by the processes of the court, also violates the Eighth Amendment requirements in capital cases for a heightened reliability at the penalty phase (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 (plur. opn.); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585), and for an individualized determination on the basis of the character of the individual and the circumstances of the crime (*Tuilaepa v. California* (1994) 512 U.S. 967, 972; *Woodson v. North Carolina* (1976) 428 U.S. 280). Even if the misconduct here does rise to the level of constitutional error by itself, it is part of a course of misconduct by the prosecutor that rendered the trial fundamentally unfair. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 463.)

Appellant made no objection to this misconduct. No objection was necessary to preserve the issue for appeal, however, where an objection and admonition would not have cured the harm caused by the improper remark. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) In *People v. Taylor*, *supra*, 197 Cal.App.2d at p. 382 the defense objected to the remark, but did not request an admonition. The appellate court nevertheless reversed, finding that no admonition would have removed the taint of the improper remark. (*Ibid.*) In *People v. Kirkes* (1952) 39 Cal.2d 719, 726, this Court found no admonition would have cured the harm caused by the prosecution vouching for the defendant's guilt and for the credibility of a prosecution witness, and noted the possibility that admonitions can serve to reinforce the damage inflicted by the misconduct rather than ameliorate it. In *People v. Love* (1961) 56 Cal.2d 720, 733, this Court in a capital case found no admonition would have cured the harm from the prosecutor arguing the superior deterrent effect of execution over imprisonment. Finally, in *People v. Bolton*, *supra*, 23 Cal.3d at pp. 214-215, there was both an objection and an

admonition regarding the prosecutor's misconduct. In finding no prejudice from the prosecutor's improper remark, however, this Court made no mention of any effect the admonition had, and made the assessment of prejudice based simply on the strength of the evidence. In the present case there is little likelihood here that an admonition to the jury would have cured the harm. In deciding appellant's fate, jurors would not have been able to set aside the specter of the other purported "bad things" appellant had done in his life. Instead, an admonition likely would have served simply to highlight the point that the prosecutor was making. The issue was therefore not waived by the failure to object or request an admonition.

The misconduct was prejudicial. It served to exaggerate appellant's criminal history, which was one of the principal factors in aggravation relied on by the prosecutor to make her case for appellant's execution. The properly admitted evidence against appellant under section 190.3, factors (b) and (c) was not so strong that the suggestion of additional evidence of bad acts would be inconsequential. It is reasonably possible that but for the prosecutor's remark implying she knew of additional crimes or bad acts committed by appellant, that at least one juror would have reached a verdict of life rather than death. (See *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448.) Stated otherwise, respondent cannot show beyond a reasonable doubt that the misconduct did not affect the outcome of the penalty trial. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The sentence and judgment of death must be reversed.

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THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY AT THE PENALTY PHASE REGARDING GENERAL PRINCIPLES OF LAW RELEVANT TO THE EVALUATION OF EVIDENCE

When the trial court instructed the jury at the penalty phase, it failed to give all the appropriate instructions for the evaluation of evidence which had been given at the guilt phase. Instead, it gave the jury the modified version of CALJIC No. 8.84.1 set out below in relevant part:

> "You are to be guided by the previous instructions given in the first phase of this case which are applicable and pertinent to the determination of penalty.
>
> "To the extent that the instructions I am now giving to you conflict with my earlier instructions, today's instructions shall prevail.
>
> "You are to completely disregard any instructions given in the first phase which had prohibited you from considering pity or sympathy for the defendant." (RT 6198.)

The court also told the jury that the previously-given instructions would only be made available to the jurors if the jurors requested them.[43] (RT 6197.)

The failure of the court to deliver the applicable instructions from the guilt phase was error and rendered the death verdict inherently unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15 and 17 of the California Constitution.

The trial court has a duty at the penalty phase of a capital trial to instruct sua sponte on the general principles of law relevant to the evidence,

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[43] No such request was made.

including those general principles relating to the evaluation of evidence. (*People v. Daniels* (1991) 52 Cal.3d 815, 885, citing *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884; *People v. Yrigouyen* (1955) 45 Cal.2d 46, 49; *People v. Reeder* (1976) 65 Cal.App.3d 235, 241.)

The court abdicated its responsibility to instruct in this case by leaving to the jury the determination of which guilt phase instructions were "applicable and pertinent" to the penalty phase, and which were not. The court committed further error by telling the jurors they were simply to be "guided by" the guilt phase instructions, which suggested that following those instructions was not mandatory. Finally, the court erred by leaving to the jurors the determination of which guilt phase instructions, other than the one regarding sympathy and pity for the defendant, conflicted with the penalty phase instructions and therefore did not apply.

In *People v. Babbitt* (1988) 45 Cal.3d 660, this Court admonished that "[t]o avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." (*Id.*, at p. 718, fn. 26.) The applicable pattern jury instruction, CALJIC No. 8.84.1, was subsequently modified to provide that the penalty jury should "[d]isregard all other instructions given to you in other phases of this trial." The Use Note to CALJIC No. 8.84.1 states: "[This instruction] should be followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88. [¶] Our recommended procedure may be more cumbersome than the suggestion advanced in footnote number 26 [of *Babbitt*], but the Committee believes it is less likely to result in confusion to the jury." (See *People v. Weaver* (2001) 26 Cal.4th 876, 982; cf. *People v. Carter* (2003) 30 Cal.4th 1166, 1222 ["we strongly caution trial courts not to dispense with penalty phase

evidentiary instructions in the future"].)

The trial court's instruction here was a clear violation of this Court's admonition in *Babbitt* to *expressly* tell the jurors which of the previously-given instructions continue to apply. This Court has recognized that the failure to specify which instructions of a set previously delivered continue to be applicable is "potentially misleading." (*People v. Weaver*, *supra*, 26 Cal.4th at p. 982.) This potential, previously expressed as "the possibility of confusion" (see *People v. Babbitt*, *supra*, 45 Cal.3d at pp. 717-718), was realized in this case, to appellant's detriment.

The jurors received the guilt phase instructions on September 22, 1993 (see RT 4956), and rendered their verdicts on September 30, 1993 (CT 897, 913-915). The penalty phase instructions were not delivered until October 25, 1993. (RT 6197.) Given the passage of time, it is unreasonable to believe that the jurors under such circumstances would even remember what the guilt phase instructions were, much less that they would or could correctly determine which of those instructions were "applicable and pertinent," and which did not conflict with the penalty phase instructions. Furthermore, the jurors were misled as to the significance of the guilt phase instructions when the court told them that there were only to be 'guided" by the applicable guilt phase instructions, rather than to follow them.

To the extent jurors could in some manner follow this instruction, and discern a basis upon which to apply some, but not all, of the guilt phase instructions, it is likely they would incorrectly fail to apply some instructions which were vital to the penalty phase decision-making. In *People v. Babbitt*, *supra*, 45 Cal.3d at pp. 717-718, this Court assumed that the jurors "could reasonably have understood" that previous instructions which made specific reference to guilt or innocence did not apply at the

penalty phase, whereas others making no such reference did apply. Applying this assumption to the present case, it would be necessary to assume that the jury failed to rely on significant guilt phase instructions which used the words "guilt," "guilty," and/or "innocence."

The court's instruction on the sufficiency of circumstantial evidence – a modified version of CALJIC No. 2.01 – repeatedly uses the words "guilt" and "guilty."[44] This would have been especially significant with

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[44] CALJIC No. 2.01, as delivered at the guilt phase, reads as follows:

> "However, a finding of guilt as to any crime, or finding a special circumstance alleged in this case to be true, may not be based on circumstantial evidence unless the proved circumstances are not only 1, consistent with the theory that the defendant is guilty of the crime and or consistent with the theory that a special circumstance is true, but 2, cannot be reconciled with any other rational conclusion.
>
> "Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt or the truth or a special circumstance allegation must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt or a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> "Also, if the circumstantial evidence as to any particular offense or special circumstance is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.
>
> "If, on the other hand, one interpretation of such

(continued...)

respect to several of the uncharged incidents in aggravation which the prosecution relied on to obtain the death verdict. Circumstantial evidence was critical to the prosecution's case for showing that appellant committed some of "criminal activity" alleged as section 190.3, factor (b) evidence in aggravation: the robbery of a convenience store on June 9, 1988, the possession of a Molotov cocktail for the purpose of threatening or intimidating, and the possession of a concealed dirk or dagger. Without an understanding of the limited sufficiency of circumstantial evidence to prove these acts, there is a reasonable possibility that one or more juror's factual determination on the truth of these alleged criminal activities was affected by the absence of a proper instruction. Because the prosecution's case for death depended heavily on appellant's alleged criminal history, a finding more favorable to appellant as to one or more of these previously-unadjudicated crimes by even one juror could have been pivotal in the "moral" and "essentially normative" judgment (see *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037), as to whether appellant deserved to live or die.

Accordingly, there was more than a "reasonable likelihood" that "the jury misunderstood the instructions" (*People v. Weaver*, *supra*, 26 Cal.4th at p. 984), because of the trial court's failure to specify which of the guilt-phase instructions applied at the penalty phase. This instructional lacuna rendered the death verdict inherently unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (See, e.g.,

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[44](...continued)
evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (RT 4960-4961.)

Eddings v. Oklahoma, *supra*, 455 U.S. 104; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The death judgment must therefore be reversed. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Brown*, *supra*, 46 Cal.3d 432, 446-448.)

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THE TRIAL COURT'S FAILURE TO INSTRUCT PROPERLY ON MENTAL AND EMOTIONAL DISTURBANCE AS A MITIGATING FACTOR VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant requested modification of the standard penalty phase jury instruction on mitigation and aggravation, CALJIC No. 8.85, to have the word "extreme" deleted as the adjective modifying "mental and emotional disturbance" in paragraph (d), so the factor would read: "Whether or not the offense was committed while the defendant was under the influence of mental or emotional disturbance." (CT 989.) Alternatively, appellant requested a special instruction informing the jury that it could consider whether or not the crime was committed while appellant was "under the influence of any mental or emotional disturbance whatsoever" as a circumstance extenuating the gravity of the offense. (CT 988-990.)[45] The court ruled against appellant, giving the standard CALJIC No. 8.85 instruction and refusing appellant's proposed special instruction. (RT 6108.)

The court's ruling was erroneous, and the instruction as given was constitutionally flawed. Appellant recognizes that this Court has previously

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[45] Proposed Special Instruction No. 21 reads in its entirety as follows:

"You have been instructed that whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance can be a mitigating factor.

"You may also consider whether or not the offense was committed while the defendant was under the influence of any mental or emotional disturbance whatsoever as a circumstance which extenuates the gravity of the crime." (CT 988.)

rejected the basic contentions raised in this argument (see, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 191-192), but submits that it should reconsider its previous rulings in light of the arguments made herein.

CALJIC No. 8.85 provides, pursuant to section 190.3, that a jury may consider certain factors to be mitigating only if it also finds the factors to be "extreme" or "substantial."[46] More specifically, the jury in this case was instructed that it could consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," and "[w]hether or not the defendant acted under extreme duress or under the substantial domination of another person." (CT 219-221; RT 1727-1740.)

These modifiers impermissibly raised the threshold for the consideration of mitigating evidence and risked misleading the jury into believing that if evidence of emotional disturbance or duress that was not extreme, it could not be considered in mitigation. The adjectives "extreme" in the list of mitigating factors rules out the possibility that lesser degrees of the disturbance can be mitigating, and thus act as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Stringer v. Black* (1992) 503 U.S. 222; *Mills v. Maryland* (1988) 486 U.S. 367, 374 (1988); *Lockett v. Ohio* (1978) 438 U.S. 586.) Such wording also renders these factors unconstitutionally vague, arbitrary, capricious, and incapable of principled application. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-64; *Godfrey v. Georgia*

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[46] CALJIC No. 8.85 reads in relevant part:

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."

(1980) 446 U.S. 420, 433.) The jury's consideration of these vague factors, through CALJIC No. 8.85, introduced impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments. (See *Boyde v. California* (1990) 494 U.S. 370, 380 [error when there is a reasonable likelihood that the jury applied an instruction in a way that prevents the consideration of constitutionally relevant evidence].)

Appellant recognizes that there are numerous cases holding that the word "extreme" need not be deleted from this instruction (*People v. Benson* (1990) 52 Cal.3d 754, 803-804) or similar ones (see, e.g., *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308, as well as cases holding that the language of factor (d) is not impermissibly restrictive. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1225.) However, these holdings are based on the assumption that jurors will utilize the "catchall" instruction provided by factor (k) to consider evidence of emotional and mental disturbance that may not be "extreme" or "substantial."

Appellant submits that the "catchall" provision of factor (k) does not cure the unconstitutional defect in the instruction. First, factor (k) makes no reference whatsoever to mental or emotional disturbance or duress and, in light of the more specific language of factors (d), factor (k) would not be understood by any reasonable juror as superseding that factor. In addition, by its terms, factor (k) refers only to "any *other* circumstances" not previously listed in CALJIC No. 8.85, and no reasonable juror would therefore understand it to include factors already included in the instruction. Accordingly, the court should have modified CALJIC No. 8.85 as requested by appellant, or given the clarifying instruction offered as an alternative.

The error was particularly prejudicial to appellant. His penalty phase defense included evidence of a conduct disorder of adolescence under Axis

I of the Diagnostic And Statistical Manual, Third Edition (DSM III). (RT 5704.) He had been diagnosed as having an attention deficit disorder and a mixed personality disorder under Axis II of the DSM III (RT 5704), which could predispose an individual to a conduct disorder (RT 5706). Appellant had poor impulse control as a 16-year-old and was in need of close supervision at that age which he never received. (RT 5573, 5581-5583.) The penalty phase jurors could have determined this evidence was insufficiently "extreme" to be considered as mitigating under factor (d), but reasonably could have find the same evidence sufficiently substantial to be mitigation if they had been properly instructed. The sentence and judgment of death must therefore be reversed.

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THE COURT'S PENALTY PHASE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court gave its principal instructions at the penalty phase prior to the parties' arguments to the jury. Its final instruction before those arguments was the following modified version of CALJIC No. 8.88:

> "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> "After having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> "An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> "A mitigating circumstance is any fact, condition, or event which as such, does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the

aggravating circumstances with the totality of the mitigating circumstances.

"To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

"Any mitigating evidence, standing alone, may be the basis for deciding that life without possibility of parole is the appropriate punishment." (RT 6209-6211.)

This instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. As such, the instruction violated appellant's rights to due process, to a fair trial by jury and to a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the correlate provisions of the California Constitution.

Appellant recognizes that similar arguments have been rejected by this Court in the past (see, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100; *People v. Duncan* (1991) 53 Cal.3d 955, 978), but respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered.

A. The Instruction Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard

Section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§190.3.)[47] The United States Supreme Court has held that this mandatory

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[47] The statute also states that if aggravating circumstances outweigh (continued...)

language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) The sentence of the foregoing instruction that purported to guide the jurors' decision on which penalty to select told them they could vote for death if "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it [sic] warrants death instead of life without parole." (RT 8388; CT 7662-7663.) Thus, the decision whether to impose death hinged on the words "so substantial," an impermissibly vague phrase which bestowed intolerably broad discretion on the jury.

To be constitutional, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death-penalty sentencing scheme must adequately inform the jurors of "what they must find to impose the death penalty. . . ." (*Id.*, at pp. 361-362.) A death-penalty sentencing scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth Amendment. (*Ibid.*)

The phrase "so substantial" is so lacking in any precise meaning that it did not inform the jurors what they were required to find in order to impose the death penalty, and so varied in meaning, and so broad in usage, that it is virtually incapable of explication or understanding in the context of

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[47](...continued)
mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction misinformed the jury regarding its role and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

deciding between life and death. It suggests a purely subjective standard, and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia*. . . ." (*Maynard, supra*, 486 U.S. 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, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*Id.*, at p. 391; see *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)[48]

In analyzing the word "substantial," the *Arnold* court concluded:

> "Black's Law Dictionary defines 'substantial' as 'of real worth and importance'; 'valuable.' Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. [fn.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result." (224 S.E.2d at p. 392.)

This Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty-phase concluding instruction, that "the

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[48] The Georgia Supreme Court seems to have analyzed the vagueness issue in *Arnold* under the Due Process Clause of the Fourteenth Amendment. (224 S.E.2d at p. 391; compare *Maynard v.Cartwright, supra*, 486 U.S. at pp. 361-362.)

differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case may differ factually, the differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

First, all three cases involve claims that the language of an important penalty-phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, emphasis added), while this instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.*, at p. 391.)[49]

In fact, using the term "substantial" in CALJIC No. 8.88 gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while

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[49] The United States Supreme Court has noted with apparent approval *Arnold's* conclusion that the term "substantial" is impermissibly vague in the context of determining whether a defendant had a "substantial history of serious assaultive criminal convictions." (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 867, fn. 5.)

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. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black*, *supra*, 503 U.S. 222, 235-236.) It is constitutionally impermissible to base the decision to impose death on such unspecific and subjective criteria. Because the instruction rendered the penalty determination unreliable, the death judgment must be reversed.

B. The Instruction Failed to Inform the Jury That the Principal Determination it Faced Was Whether the Death Penalty Was Appropriate, Not Merely Authorized Under the Law

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1037.) Indeed, this Court has consistently held that it would mislead jurors to say that the deliberative process is merely a simple weighing of factors, in which the appropriateness of the chosen penalty should not be considered. (*People v. Brown*, *supra*, 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *People v. Milner* (1988) 45 Cal.3d 227, 256-257.)

Again, this instruction told the jurors they could "return a judgment of death [if] . . . persuaded that the aggravating circumstances [we]re so

substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." In addition to infecting the deliberative process with ambiguity by using the term "so substantial," that instruction also failed to inform the jurors that the central inquiry was not whether death was "warranted," but rather whether it was appropriate.

Those two determinations are clearly not the same; a rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." Webster's Third New International Dictionary, Unabridged (1976 ed.) defines the verb "warrant" as, inter alia, "to give authority or power to for doing or forebearing to do something," or "to serve as or give sufficient ground or reason for" doing something. (*Id.*, at p. 2578.) By contrast, "appropriate" is defined as "specially suitable" or "belonging peculiarly." (*Id.*, at p. 106.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was legally or morally permitted. That is a far different finding than the one the jury is actually required to make: that death is a "specially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to

the standards of that earlier stage in our statutory sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding that special circumstances authorize the death penalty in a particular case. Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The deliberative instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty. The death judgment is thus constitutionally unreliable, and must be reversed.

C. The Instruction Failed to Inform the Jury it Could Impose a Life Sentence Even If the Aggravating Evidence Outweighed the Mitigating Evidence

The instruction at issue was also defective because it implied that death was the *only* appropriate sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances. . . ." However, it is clear under California law that a penalty jury may return a verdict of life without the possibility of parole even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown*, *supra*, 40 Cal.3d at pp. 538-541.) Here, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation outweighed that in mitigation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909, disapproved on another ground in *People v. Carmen* (1951) 36 Cal.2d 768.)

Moreover, the instruction failed to affirmatively inform the jurors

that they could return a life sentence even if the circumstances in aggravation outweighed those in mitigation. Such an affirmative instruction was required even absent a request, in light of the trial court's duty to instruct sua sponte "on the general principles governing the case. . . ." (*People v. Flannel* (1979) 25 Cal.3d 668, 681.) Because the principle at issue here is well-established and governs any capital case in California (see *People v. Brown*, *supra,* 40 Cal.3d at pp. 538-541), the trial court was obliged to instruct the jury on that point.

The failure to instruct on this crucial point was prejudicial because it deprived appellant of his right to have the jury given proper information concerning its sentencing discretion. (*People v. Easley* (1983) 34 Cal.3d 858, 884.) Moreover, since the defect in the instruction deprived appellant of an important procedural protection that California law affords capital defendants, its delivery deprived appellant of due process (U.S. Const., 5th and 14th Amends.; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346), and made the resulting verdict unreliable (U.S. Const., 8th and 14th Amends.; *Furman v. Georgia*, *supra*, 408 U.S. 238). The death judgment must therefore be reversed.

D. The Instruction Failed to Inform the Jurors That Appellant Did Not Have to Persuade Them That the Death Penalty Was Inappropriate

The instruction in question was also defective because it failed to inform the jurors, as this Court has held they must be informed, that neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) 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 it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> "To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]" (*Id.*, at pp. 727-728.)

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.*, at p. 727.) Nonetheless, the district court in *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instant instruction, taken from CALJIC No. 8.88, suffers from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

The Eighth and Fourteenth Amendments require capital sentencing juries to be carefully advised in order to avoid arbitrary and capricious application of the death penalty. The trial court's instructions, and its modified version of CALJIC No. 8.88 specifically, failed to comply with that requirement for each of the reasons argued above. Appellant's death judgment must be reversed.

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CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of this state's capital sentencing scheme violate the United States Constitution, either alone or in combination. Individually and collectively, these various constitutional defects require appellant's death sentence to be set aside.

As applied, the death penalty statute allows any conceivable circumstances of a crime, even ones squarely opposed to each other, to justify the imposition of the death penalty. This, as well as the absence of other procedural safeguards, results in a truly "wanton and freakish" system that randomly makes a few of the thousands of murderers in California subject to the ultimate sanction. The lack of needed safeguards to ensure reliable and fair determinations by juries and reviewing courts means that randomness dominates the entire process of applying the penalty of death.[50]

A. As Applied, Section 190.3 Allows Arbitrary and Capricious Imposition of Death, in Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments

Section 190.3, subdivision (a), violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of

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[50] Appellant recognizes that this Court has previously rejected some or all of his claims concerning the constitutionality of California's death penalty statute; however, not all of those arguments have been explicitly rejected by the federal courts. Appellant asserts these claims to allow the Court to reconsider its prior rulings, and to preserve those claims for any possible federal review.

every murder have been found to be "aggravating" within that statute's meaning, even features squarely at odds with others deemed supportive of death sentences in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975-976), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to that factor. Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, for example, the defendant: had a "hatred of religion";[51] sought to conceal evidence three weeks after the crime;[52] threatened witnesses after his arrest;[53] or disposed of the victim's body in a manner precluding its recovery.[54]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the

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[51] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.

[52] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[53] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

[54] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright*, *supra*, 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia*, *supra*, 446 U.S. 420].)

B. Because it Has No Safeguards Against Arbitrary and Capricious Sentencing, California's Death Penalty Statute Violates the Eighth and Fourteenth Amendments

The sentencing factors in section 190.3 do nothing to narrow the pool of murderers to those most deserving of death. A defendant convicted of felony-murder, like appellant, is automatically eligible for death, and burdened with an aggravating circumstance to be weighed on death's side of the scale. Moreover, as shown above, factor (a) allows prosecutors to argue that every articulable feature of a crime is an aggravating circumstance, even ones that are mutually exclusive.

Furthermore, California's death penalty statute has none of the safeguards used by other jurisdictions to guard against the arbitrary imposition of death. Juries are not required to make written findings or achieve unanimity as to aggravating circumstances, or to find beyond a reasonable doubt that the aggravating circumstances are proved, that the aggravating circumstances outweigh the ones in mitigation, 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 in the penalty phase of a capital case. Additionally, intercase

proportionality review is not only not required; it is not permitted. 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 process of making the most consequential decision a juror can make.

1. Failing to Instruct the Jury on Any Penalty Phase Burden of Proof Violated Appellant's Constitutional Rights to Due Process and Equal Protection of the Laws, and Against Cruel and Unusual Punishment

Appellant's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require the state to prove beyond a reasonable doubt that aggravating circumstances exist (except as to prior criminality), that aggravating circumstances outweigh mitigating circumstances, or that death is the appropriate sentence, and in fact does not require the jury to be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship*, *supra*, 397 U.S. 358.)

Some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is applied in an evenhanded manner, and that capital defendants are treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 112.) The requirement of a burden of proof is one of the most fundamental concepts in our system of justice, and any error in articulating such a burden is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) The reason is obvious: unless

instructed on the proper burden of proof, the jury may use an incorrect one, and each juror may apply the standard he or she believes is appropriate.

The same risk exists when there is no burden of proof, but the jury is not told that. In that case, jurors who believe the defendant should have the burden to prove mitigation in the penalty phase will follow that belief, raising the constitutionally-unacceptable possibility that a juror could vote for death after misallocating a nonexistent burden of proof to the defendant. That risk makes the failure to instruct at all on the burden of proof a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, because the jury is not provided with the guidance legally required for administration of the death penalty.

Erroneously failing to instruct the jury on the proper burden of proof is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 279-281.) In cases where the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one defendant should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant.

2. Beyond a Reasonable Doubt Is the Appropriate Burden of Proof for Factors Relied on to Impose a Death Sentence, and for Finding That Aggravation Outweighs Mitigation

Twenty-five states require that any factors relied on to impose death in a penalty phase must be proved beyond a reasonable doubt, and three

other states have related provisions.[55] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require the jury to base a death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[56] A fourth, Utah, has reversed a death judgment because it was based on a standard of proof less than proof beyond a reasonable doubt. (*State v.*

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[55] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); 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); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992; S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has the related requirement that, before making a death judgment, the jury must find beyond a reasonable doubt that no mitigating circumstances sufficient to warrant leniency exist. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) Arizona and Connecticut require the prosecution to prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[56] See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (N.C. 1979) 257 S.E.2d 569, 577.

Wood (Utah 1982) 648 P.2d 71, 83-84.) California does not require a reasonable-doubt standard to 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 then, the required finding need not be unanimous.

This Court has reasoned that penalty phase determinations are not "susceptible to a burden-of-proof qualification," because they are "moral and . . . not factual" calculations. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) However, the fact that the imposition of a death sentence involves a moral calculus does not mean that a decision of such magnitude should be made without rationality or conviction. (See *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the United States Supreme Court expressly found that the rationale for imposing a burden of proof beyond a reasonable doubt applies 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.'" (524 U.S. at p. 732, citing *Bullington v. Missouri* (1981) 451 U.S. 430, 441, quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424.)

The United States Supreme Court has now confirmed that, as a matter of due process under the Fourteenth Amendment, a standard of proof beyond a reasonable doubt must apply to any findings a sentencing jury is required to make as a prerequisite to returning a verdict of death. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the Court held that a state may not impose a sentence greater than that authorized by the jury's guilt verdict, unless the facts supporting an increased sentence (other than a prior

conviction) are also submitted to the jury and proven beyond a reasonable doubt. Under California's capital sentencing scheme, the jury may not impose a death sentence unless it finds that one or more aggravating factors exist, and that the aggravating factor or factors outweigh any mitigating factors. (§ 190.3.) Accordingly, under *Apprendi*, both the existence of any aggravating factors relied upon to impose a death sentence, and the determination that such factors outweigh any mitigating factors, must be made beyond a reasonable doubt.

This Court has rejected applying *Apprendi* to the penalty phase of a capital trial, relying in large part on *Walton v. Arizona* (1990) 497 U.S. 639, and on the conclusion that there is no constitutional right to a jury determination of facts that would subject a defendant to the death penalty. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453.) That reliance was misplaced, because the United States Supreme Court overruled *Walton* insofar as it conflicts with *Apprendi*, and stated that any "enumerated aggravating factors" in a death penalty statute which "operate as 'the functional equivalent of an element of a greater offense'" must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona* (2002) 536 U.S. 584, 609, quoting *Apprendi, supra*, 530 U.S. at p. 494, fn. 19.)

3. If Proof Beyond a Reasonable Doubt is Not Constitutionally Required for Finding That (1) An Aggravating Factor Exists, (2) Aggravation Outweighs Mitigation, and (3) Death is the Appropriate Sentence, Proof By a Preponderance of the Evidence Must Be Required

A burden of proof of at least a preponderance is required as a matter of due process, because that is the minimum burden historically permitted in any sentencing proceeding. No judge is permitted to impose a sentence without a firm belief that the considerations underlying his or her

sentencing decision have at least been shown to be more likely true than not. Thus, no judge ever had the power accorded penalty-phase jurors in California capital cases: to base "proof" of aggravating circumstances on any considerations they choose, without any burden on the prosecution, and to sentence the defendant to die based on those considerations. The absence of any historical authority for imposing sentence based on aggravating circumstances found with proof less than 51% is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice is given great weight in determining constitutionality].)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d 577, 643.) However, even in making a normative determination, one or more jurors on a given jury will inevitably be torn between sparing and taking the defendant's life, or finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and juries – respond similarly, so that the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptably "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260), indeed, it is the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. 367, 374), for one defendant to live and another die because one juror breaks a tie in favor of the defendant, and another in favor of the state, based on the same facts, with no uniformly applicable standards to guide them.

Moreover, California does impose the burden on the prosecution to persuade the sentencer that the defendant should receive the most severe

sentence in non-capital cases. (Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary to impose the upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital than capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

Finally, under Evidence Code section 520, "[t]he party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." In a capital case, any aggravating factor relates to wrongdoing; even factors like the defendant's age, when counted against him or her, are deemed to aggravate other wrongdoing. Evidence Code 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. 343, 346.)

Accordingly, appellant respectfully contends that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – was erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring decisions affecting life or liberty to be based on reliable evidence the decision-maker finds more likely than not to be true. For all of the above reasons, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, and as to the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protections afforded by state law violated federal due process. (*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, and is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 279-281.)

C. Failing to Require Unanimous Jury Agreement on Aggravating Factors Violates the Fifth, Sixth, Eighth and Fourteenth Amendments

1. Jury Agreement

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Accordingly, no instruction was given below requiring the jury to agree on any particular aggravating factor, or to agree that any particular combination of such factors warranted a death sentence. Thus, based on the instructions and record in this case, there is nothing to preclude the possibility that each juror voted for death based on a view of the balancing of the factors that, if voted on by the jury as a whole as a basis for imposing death, would have been rejected 11 to 1.

A death verdict could never satisfy the Eighth and Fourteenth Amendments if each juror found a different set of aggravating circumstances, and the jury as a whole rejected each such set of aggravating circumstances as a basis for imposing death by votes of 1 to 11. Because nothing in this record precludes the possibility that such a scenario could have occurred here, the result in this case is akin to the chaotic and unconstitutional result suggested by the plurality opinion in *Schad v. Arizona*, *supra*, 501 U.S. 624, 633 (plur. opn of Souter, J.).

Since the jurors had nothing to guide their decision, we cannot assume that they agreed on the reasons for imposing appellant's death sentence. It is a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to impose a death sentence with no assurance that the jury, or

at least a majority of it, ever found a single set of aggravating circumstances warranting the death penalty. A death sentence under those circumstances would be so arbitrary and capricious as to fail Eighth and Fourteenth Amendment scrutiny. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, pp. 188-189.)

2. Jury Unanimity

Of the 22 states that, like California, leave responsibility for death penalty sentencing to the jury, 14 require unanimous jury agreement on the aggravating factors proven.[57] California does not, and accordingly appellant's jurors were not required to agree which factors in aggravation were proven. Thus, each juror could have relied on different aggravating factors, and there may have been no actual agreement on why death was the appropriate sentence.

The United States Supreme Court's decision in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 confirms that under the Fourteenth Amendment Due Process Clause and the Sixth Amendment jury trial guarantee, all the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See also *Ring v. Arizona*, *supra*, 536 U.S. at p. 609 [all aggravating circumstances necessary for imposition of the death penalty must be found beyond a reasonable

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[57] See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. An. art. 905.6 (West 1993); Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 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).

doubt by the jury].) *Apprendi* 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 proven to the jury's satisfaction beyond a reasonable doubt. (530 U.S. at p. 489.) Under California's capital sentencing scheme, a death sentence may not be imposed absent findings that (1) at least one aggravating factor exists, and (2) the aggravating factor or factors outweigh any mitigating factors. (§ 190.3.) Thus, under *Apprendi* and *Ring*, the existence of the aggravating factors relied upon to impose a death sentence has to be found beyond a reasonable doubt by a unanimous jury.

Failing to require unanimity before evidence can be weighed as aggravation violates the Fifth, Sixth, Eighth and Fourteenth Amendments. Thus, appellant respectfully asks the Court to reconsider its holding "that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor*, *supra*, 52 Cal.3d at p. 749.) The United States Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) In light of the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584), the Fifth, Sixth, Eighth and Fourteenth Amendments cannot be satisfied by anything less than unanimity in the findings of a capital jury.

Although the determination that a circumstance is aggravating is clearly a crucial finding, under California law that determination need not be made unanimously, while an enhancing allegation in a non-capital case must. (See, e.g., §§ 1158, 1158a.) Since capital defendants are entitled to receive more rigorous protections than non-capital defendants (see *Monge*

v. California, supra, 524 U.S. at p.732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to non-capital defendants than to capital defendants would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra,* 897 F.2d at p. 421), unanimity with regard to aggravating circumstances must be constitutionally required.

The framers of the California Constitution deemed the requirement of jury unanimity to be such an integral part of criminal jurisprudence that it did not even have to be directly stated. (See *People v. Wheeler* (1979) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].) To apply that requirement to findings carrying a maximum punishment of one year in county jail, but not to those having 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), is so inequitable that it violates the Equal Protection Clause, and so irrational that it violates both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions (U.S. Const., 14th Amend., Cal. Const., art. I, §§ 7, 15, 17).

This Court has said that the safeguards applicable in criminal trials do not apply when the prosecution seeks to prove unadjudicated offenses in capital sentencing proceedings, "because the defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) However, the United States Supreme Court has recognized that the penalty phase of a capital case has "the hallmarks of a trial on guilt or innocence." (*Monge v. California, supra*, 524 U.S. at p. 726; see *Strickland v. Washington* (1984) 466 U.S. 668, 686-687.) Thus, while the unadjudicated offenses are not the only offenses the defendant is

being "tried for," the trial-within-a-trial on such matters often plays a dispositive role in determining whether death, the "penalty . . . unique 'in both its severity and its finality,'" is imposed. (*Monge v. California*, *supra*, 524 U.S. at p. 732, quoting *Gardner v. Florida*, *supra*, 430 U.S. 349, 357.)

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda* (1987) 44 Cal.3d 57, 99.) But the requirement of unanimity is not limited to final verdicts. For example, it is not enough for jurors to unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jury must unanimously agree on at least one such act to convict. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.) It is only fair and rational that when a jury is charged with the most serious task jurors ever confront – determining whether the balance of aggravating and mitigating circumstances warrants death – unanimity should be required as to the aggravation supporting that decision.

The error is reversible per se, because it permitted the jury to return a death judgment without making the findings required by law. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-281.) In any event, given the difficulty of the penalty determination, the state cannot show there is no reasonable possibility the failure to instruct on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; *People v. Brown*, *supra*, 46 Cal.3d 432, 448 .) And it certainly cannot be found that the error

had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 341.) As a result, that verdict must be set side.

D. California Law Violates the United States Constitution by Failing to Require the Jury to Base Death Sentences on Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And since California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316, revd. on other grounds by *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 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. (486 U.S. at p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional for failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated specific 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 via a petition for writ of habeas corpus, and must allege the

state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in non-capital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170, subd. (c).) Under the Fifth, Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than non-capital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to non-capital 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 sentencing decision is "normative," as in capital cases (*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 six require a written finding as to at least one aggravating factor relied on to impose death.[58] California's failure to require such findings renders its death penalty procedures unconstitutional.

E. As Interpreted By This Court, California's Death Penalty Statute Forbids Intercase Proportionality Review, Thus Guaranteeing Arbitrary, Discriminatory, or Disproportionate Imposition of the Death Penalty

In applying the Eighth Amendment ban on cruel and unusual punishment to the imposition of the death penalty, courts have required death judgments to be proportionate and reliable. Part of that requirement of reliability involves attempting to guarantee "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1983) 463 U.S. 939, 954 (plur. opn.), alterations in original, quoting *Proffitt v. Florida*, *supra*, 428 U.S. at p. 251 (opn. of Stewart, Powell, and

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[58] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); 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(e) (1987); 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. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.07(c) (West 1993); Va. Code Ann. § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

Stevens, JJ.).)

One common mechanism for ensuring reliability and proportionality in capital sentencing is comparative proportionality review, a procedure this Court has rejected. However, while the United States Supreme Court, in *Pulley v. Harris* (1984) 465 U.S. 37, declined to hold that comparative proportionality review is constitutionally required in capital sentencing, it did note that "a capital sentencing scheme [could be] so lacking in other checks on arbitrariness that it would not pass constitutional muster without [such] review." (*Id.*, at p. 51.) California's 1978 death penalty statute, as drafted, construed by this Court, and applied in fact, is the kind of arbitrary sentencing scheme *Harris* indicated would not be upheld. *Harris* explicitly contrasted the 1978 statute with the 1977 law in upholding the latter against a lack-of-comparative-proportionality-review challenge, and noted that the 1978 law "greatly expanded" the list of special circumstances. (*Id.*, at p. 52, fn. 14.)

That expanded list of special circumstances set out in section 190.2 fails to meaningfully narrow the pool of death-eligible defendants, and leaves more room for arbitrary sentencing than the death penalty schemes struck down in *Furman v. Georgia, supra.* The lack of comparative proportionality review deprives California's sentencing scheme of the only mechanism that might enable it to "pass constitutional muster."

Further, the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution; in that case, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra*, 428 U.S. at p. 206.) It is difficult, if not impossible, to demonstrate such a societal evolution without considering the facts and outcomes of

other cases. Thus, the United States Supreme Court regularly considers the facts of other cases in resolving claims that imposing the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796 fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Comparative, or "intercase," appellate review is a common feature in other jurisdictions that impose the death penalty; 31 of the 34 states that carry out capital punishment require it. By statute, Georgia requires its supreme court to determine whether a death "sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann., § 27-2537(c).) That provision was approved by the United States Supreme Court, because it provides a further safeguard "against a situation comparable to that presented in *Furman* . . . ." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 198.) Toward the same end, Florida judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida*, *supra*, 428 U.S. at p. 259.) Twenty-two states have statutes similar to Georgia's, and seven have judicially instituted similar review.[59]

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[59] 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. § 17-1035(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, 03, 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-

(continued...)

Section 190.3 does not require either the trial court or this Court to compare this and other similar cases to determine the relative proportionality of the sentence imposed, i.e., to carry out intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) Nor does section 190.3 forbid such review; its prohibition is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances making defendants eligible for death, and the absence of other procedural safeguards to ensure reliable and proportionate sentences, this Court's refusal to engage in intercase proportionality review violates the Eighth Amendment. The failure to conduct intercase proportionality review also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings which are conducted in an unconstitutionally arbitrary, unreviewable manner, or are skewed in favor of execution.

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[59](...continued)
25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

See also *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41, 51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

F. 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 Violates Equal Protection

As noted in the preceding arguments, the United States Supreme Court has repeatedly said that greater reliability is required in capital cases, and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite that directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with non-capital crimes. This different treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights . . . . It encompasses, in a sense, 'the right to have rights,' (*Trop v. Dulles* 356 U.S. 86, 102 (1958). . . ." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.) 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 more 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 non-capital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme by rejecting claims that failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violates equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) This Court's reasons were a more detailed version of the rationale used to justify not requiring any burden of proof in the penalty phase of a capital trial, unanimity as to the aggravating factors justifying a sentence of death, or written findings by the jury as to the factors supporting a sentence of death, i.e., that death sentences are moral and normative expressions of community standards. However, that rationale does not support denying those sentenced to death procedural protections afforded other convicted felons.

In holding that it was rational not to provide capital defendants the disparate sentencing review provided to non-capital defendants, *Allen* distinguished death judgments by pointing out that the primary sentencing authority in California capital cases is normally the jury, "[a] lay body [which] represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.)

But jurors are not the only bearers of community standards.

Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality are manifested in death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia*, *supra*, 433 U.S. 584), or offenders (*Enmund v. Florida*, *supra*, 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399). Juries are not immune from error, and may stray from the larger community consensus as expressed by statewide sentencing policies. Disparate sentence review is designed to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices.

While the state cannot preclude a sentencer from considering any factors that could cause it to reject the death penalty, it can and must provide rational criteria to narrow the sentencer's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the statutory criteria that narrow death eligibility, or the flat judicial prohibitions against imposing the death penalty on certain offenders, or for certain crimes.

Moreover, jurors are not the only sentencers. A verdict of death is always subject to independent review by the trial court, which not only can reduce a jury's verdict, but must do so under some circumstances. (See § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the lack of disparate sentence review cannot be justified on the ground that reducing a jury's verdict would interfere with its sentencing function.

A second reason *Allen* offered for rejecting the equal protection claims was that the range available to a trial court is broader under the

Determinate Sentencing Law than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments narrows to death or life without parole." (*Allen*, *supra*, 42 Cal.3d at p. 1287.) That rationale cannot withstand scrutiny, because the difference between life and death is not in fact "narrow"; and particularly not when contrasted with that between a sentence of two years and five years in prison.

The notion that the disparity between life and death is "narrow" not only violates common sense, it also contradicts specific pronouncements by the United States Supreme Court: the special concern for ensuring that every possible procedural protection is provided in capital cases "is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305 (opn. of Stewart, Powell, and Stephens, J.J.); see also *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan, supra*, 501 U.S. at p. 994; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 (opn. of Stewart, Powell, and Stevens, J.J.); *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 (conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.); *Reid v. Covert* (1957) 354 U.S. 1, 77 (conc. opn. of Harlan, J.).) The qualitative difference between a prison sentence and a death sentence militates for, not against, requiring disparate review in capital sentencing.

Finally, this Court in *Allen* said that the additional "nonquantifiable"

aspects of capital sentencing, as compared to non-capital sentencing, support treating felons sentenced to death differently. (42 Cal.3d at p. 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification, because it is one with very little difference. A trial judge may base a sentence choice in a non-capital case on a set of factors that includes precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare § 190.3, subds. (a) through (j), with Cal. Rules of Court, rules 421 and 423.) It is reasonable to assume that the Legislature created the disparate-review mechanism discussed above because "nonquantifiable factors" permeate all sentencing choices.

This Court has also said that the fact that a death sentence reflects community standards justifies denying capital defendants the disparate-sentence review provided all other convicted felons. (*People v. Allen*, *supra*, 42 Cal.3d at p. 1287.) But that fact cannot justify depriving capital defendants of this procedural right, because that type of review is routinely provided in virtually every state that applies the death penalty, as well as by the federal courts in considering whether evolving community standards permit the imposition of death in a particular case.

Nor can the fact that a death sentence reflects community standards justify refusing to require written jury findings, or accepting a verdict that may not be based on a unanimous agreement that particular aggravating factors are true. Those procedural protections are especially important in meeting the acute need for reliability and accurate factfinding in death-sentencing proceedings (*Monge v. California*, *supra*, 524 U.S. 571); withholding them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented,

and cannot withstand the close scrutiny that should apply when a fundamental interest is affected.

The denial of equal protection in not affording California capital defendants the procedural safeguards described above violated appellant's Eighth and Fourteenth Amendment rights and requires reversal of his death judgment.

G. Conclusion

For all the above reasons, California's death penalty law is unconstitutional, and appellant's judgment of death must be reversed.

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THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND SENTENCE OF DEATH

There were serious constitutional errors in appellant's trial, including prosecutorial misconduct, evidentiary errors in both phases of the trial and instructional error. As set forth in the preceding arguments, each error was sufficiently prejudicial to warrant reversal of appellant's penalty judgment. Even assuming that none of these errors is prejudicial by itself, their cumulative effect undermines any confidence in the integrity of the proceedings which ultimately resulted in a death judgment against appellant. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878; *People v. Hill*, *supra*, 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1206-1208; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439.)

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the

defendant. *(United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) The multiple instances of prosecutorial misconduct and evidentiary error, as well as the other errors in the guilt phase, when considered together must be found to have been prejudicial, and appellant's convictions reversed.

The death judgment against appellant also must be evaluated in light of the cumulative effect of error. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) Moreover, the errors being considered cumulatively must include those from both the guilt and penalty phases of trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase]; *Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888 ["Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the later."].) Evidence which may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial. (See *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].) The prosecutorial misconduct, jury misconduct, and erroneous consideration of various pieces of aggravating evidence were prejudicial when considered cumulatively, and particularly so when considered in light of all the errors at both phases of the trial.

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Williams* (1971) 22

Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 366; *People v. Pierce*, *supra*, 24 Cal.3d 199, 208.) Here, it certainly cannot be said that the errors had "no effect" on any juror. (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 341.) Given the number and severity of the errors in this case, their cumulative effect was to deny appellant due process, a fair trial by jury, and fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The convictions and sentence of death must therefore be reversed.

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THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A NEW REVIEW BY THE TRIAL JUDGE UNDER SECTION 190.4, SUBDIVISION (E)

After ordering a new penalty trial for appellant, Judge Kaplan recused himself pursuant to Code of Civil Procedure section 170.4 from presiding over any penalty retrial due to the prosecutor's personal attacks:

> "I have one last statement to make and that is that in light of the personal attacks against the court, I feel that justice would be best served if I would recuse myself from further hearings in this case. The People may wish to consider reassigning this case but that is something that is entirely and exclusively within their province. As for myself, I am going to recuse myself from presiding over further proceedings, *however I do not recuse myself from availability to making any supplemental or additional findings that may be required by any reviewing court.*" (RT 6763, emphasis added.)

During subsequent record correction proceedings on September 7, 1994, however, Judge Kaplan informed the parties he had determined that under Code of Civil Procedure section 170.4, that once a judge recuses himself, even though he may have intended the recusal to be for a limited purpose, the recusal is absolute except for those exceptions set out in the statute itself. (RT 6810-6812.) He cited *Geldermann v. Bruner* (1991) 229 Cal.App.3d 662 in support of this position.

As a result, after respondent's successful appeal of the court's order granting a new penalty trial, on remand the case was reassigned to a judge other than Judge Kaplan. Appellant objected to having anyone other than Judge Kaplan preside over appellant's automatic motion for modification of the verdict under section 190.4, subdivision (e) (herein simply "190.4(e)"). (RT 6927-6932.) The court noted appellant's objection but transferred the

case to Judge Schwab. (RT 6934.) Appellant renewed his objection to having a judge other than Judge Kaplan hear the 190.4(e) motion (RT 6948-6959); the court found that Judge Kaplan's recusal made him unavailable, and denied the objection (RT 6963). Judge Schwab denied the automatic motion to modify the verdict. (RT 6995.)

The trial court erred by denying appellant's objection to having anyone other than Judge Kaplan conduct the 190.4(e). Judge Kaplan sought to recuse himself in a limited manner, retaining his availability to make "any supplemental or additional findings that may be required by any reviewing court." (RT 6763.) The court's review under section 190.4(e) would be such a supplemental or additional finding. Judge Kaplan's clear intention was to avoid presiding over a penalty retrial in which the prosecutor would likely continue her pattern of personal attacks. Therefore, had the court's limited recusal order been given effect, Judge Kaplan would have heard the 190.4(e) motion.

A. The Limited Recusal By the Court Was Justified

There was no reason other than the personal attacks on the court by the prosecutor for Judge Kaplan to recuse himself. Those attacks, however, were very real, and provided a factual basis for the limited recusal. Some contentiousness between the court and the prosecutor has been shown above in this brief in the arguments regarding the prosecutor's misconduct. The prosecutor's real fury, however, fully manifested itself in three separate incidents during the penalty phase in which she directed personal attacks and accusations at the court, each of which is set out below.

The first incident occurred off the record following proceedings regarding jury instructions for the penalty phase on Thursday, October 21, or Friday, October 22, 1993. The court put its recollection of what

happened on that date on the record on November 23, 1993:

> "There's a few concerns I have, that at this time I should present on the record, but before we get to them, they're with regard to reference to some statements that were addressed to the court during the proceeding of Thursday, October the 28th, afternoon session. Mrs. D'Agostino made certain statements addressed to the court impugning the court's integrity and accusing the court of a number of things including giving quote 'defense loaded instructions,' not stating instructions accurately, during People's closing argument rolling its eyes, thumbing through and looking at its watch like I am taking up its time, the time of the court, also of effectively preventing the prosecution from getting a death penalty by your instructions to the, this is your quote, 'Your instructions to this jury and your answer to their questions because of your obvious feeling against the death penalty,' end of quote. These proceedings are reported in the transcript starting at page 6418, and I don't now want to repeat them. They are already part of the record, certain matters not part of the record which I think are pertinent what was going on at the time including my remarks to Mrs. D'Agostino that I would not tolerate what were personal attacks upon the court. In order to understand why I made those comments, whoever is reviewing that portion of the transcript should be aware of what transpired approximately a week earlier in camera and off the record. I don't recall if this occurred on Thursday, October the 21st or Friday, October the 22nd. It was at the end of the session during which both counsel met in camera to discuss instructions. These discussions did take place on the record with the defendant absent as the defendant had waived his presence, and after the conclusion of the session after the court reporter had folded up his machine, I believe with Mr. Hill still present Mrs. D'Agostino standing up approached me. I was sitting behind my desk, and stated to me in words that I do not recall exactly,[60] but perhaps Mrs. D'Agostino can

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[60] The parties unsuccessfully attempted to settle the record as to the exact wording of the prosecutor's remarks, but reached the following

(continued...)

remember that clearly, the context was her displeasure with the court's instructions concerning the penalty phase, and Mrs. D'Agostino stated to me that she hoped that some day I would have children and hope some day and this I don't remember either, my children should be murdered or if not something should happen to them so that I could understand what it was like to be a victim, because I have to infer she felt that my instructions did not sufficiently take into consideration the victims. Frankly, I was baffled. I did not think this was contemptuous. This was beyond contempt, and given what until then had been a relatively cordial relationship between both counsel, and the court was speechless. I remember responding to her rather meekly, 'Can we stick to the facts and the legal issues and do you have to resort to curses,' and I am, frankly, I cannot remember the exact words. That is why I would not allow counsel following that to come into chambers which they had done throughout the trial. I did not want to risk such an outburst. I don't think I need to be subjected to anything like that and that explains Mrs. D'Agostino's statement at page 6418, 'Your honor, I would rather put this on the record in chambers, but I will be happy to do it in open court.' That was responsive to my stating I would not see counsel in chambers anymore. It was based on what transpired off the record.

"In addition to that, with respect to Mrs. D'Agostino's observations about the court's conduct and that she had three

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[60](...continued)
stipulation: "The parties agree that the discussion in question occurred on either October 21 or 22, 1993. They further agree that neither of the attorneys nor Judge Kaplan remembers the exact words spoken by Deputy District Attorney D'Agostino and therefore do not attempt to settle the entirety of Mrs. D'Agostino's remarks. The parties stipulate that Mrs. D'Agostino, in her remarks to Judge Kaplan, expressed a belief that if Judge Kaplan ever had children who were murdered he would understand how the families of victims felt." Appellant submits that this settled statement is not inconsistent with Judge Kaplan's memory while at the same time recognizes that the prosecutor does not acknowledge making the most offensive remarks recalled by the court. (2 CT Supp. IV 359-360.)

witnesses, I've already stated I think those are entirely inaccurate comments. If at any time I did anything by way of physical language, I was looking away from the jury because at times there was very emotional testimony that was being covered and I didn't want them to observe the tears welling up in my eyes, and other than that, I didn't do anything different. The statement about three witnesses in the courtroom that supposedly saw me rolling my eyes, there were a number of people during closing arguments in the courtroom and it appeared to me that the majority of them were friends and relatives of the victim. There was a group of young people and this is pertinent to the proceedings when Mr. Hill was making his closing argument. I don't know where this is reflected in the transcript. I am sure you will remember it. He wrote on the board when arguing the concept of lingering doubt, the words, 'Can you be that sure,' and I was looking at the jury. I was looking at the audience. I cannot tell if it was two, three or four people, but some of the young people and I think they were all, I don't remember, mouthed the word 'Yes' so that the end of the argument, if you were looking at them you would have seen their mouths mouthing the word silently with the rest of the courtroom being basically audible. I don't expect counsel caught any of that. I don't know whether the jury did or not. It certainly caught my attention. Also, and I am sad to point this out, perhaps this was not intentional, but during the course of Mr. Hill's argument, Mrs. D'Agostino very visibly and often stretched her neck from side to side. I can understand that, she had been through a grueling and I am sure very demanding two and a half hour summation, but in addition to that, from time to time as Mr. Hill was covering certain points, Mrs. D'Agostino produced a facial expression that I don't really know how to describe except it included dilating the nostrils and having a grimace or a forced smile and directly looking into the jury box, and this happened that I observed several times during the course of Mr. Hill's summation.

"Thank you for your attention, counsel.

"MS. D'AGOSTINO: May I respond briefly, your Honor.

"THE COURT: Yes.

"MS. D'AGOSTINO: I had not expected and I certainly wanted to avoid having to put this on the record, but in view of the court's comments I must.

"The court has just characterized certain comments I made apparently off the record in chambers with respect to 'I hope you have children and that they would some day be murdered.' I cannot believe I ever said anything remotely resembling that. What I may have said may have been in response to a comment this court made which I did not want to put on the record which I now will, when you asked me and in no uncertain terms, 'Why don't you let God make the decision when this defendant dies,' and I responded to you, 'Because this defendant did not let God make the decision when Fred Rose died.' That's a statement that has remained in my mind which this court made and to which I responded. This court also said to me off the record with defense counsel being present when we were discussing Mrs. Collins, the defendant's mother, and you asked me a question when I made the comment about the hurt and the anger that the mother of Fred Rose had and the spouse of Fred Rose, Sharon Rose, and I was specifically talking about Doris Baker, the victim's mother, and you said to me, 'Why do you want to put another mother through this?' referring to the defendant's mother. Those were statements that were off the record. If any statement I made in chambers had anything to do with, or reflected in any way, shape or form about your having children that I hope would be murdered, I certainly did not say that. It may have been a response to perhaps if you had children you would understand where these mothers are coming from, but I certainly did not wish this court to have children that would be murdered, and I take strong offense to the court even implying any statement in that regard.

"THE COURT: Mr. Hill, do you have anything to add to this? I believe you were present when the statement was made about something should happen to the children.

"MR. HILL: I am sensitive to the role that I have as counsel for Mr. Collins and with respect to, due respect to counsel, I

would prefer not to make any future comments on the record.

"THE COURT: Well, if any comments are going to be made they will be on the record.

"MR. HILL: I didn't want to imply I was happy to make a comment off the record. I'm sorry I misspoke. There's not anything I can add.

"THE COURT: I simply want to reiterate I was so shocked at the time, that I discussed it with one of my colleagues because I was embar[r]assed to have allowed that to go by without saying anything, I was embar[r]assed about my own response being rather meek, "Do we have to resort to curses," something like that. Something that I will, that will remain --

"MS. D'AGOSTINO: If I in fact --

"THE COURT: Excuse me, counsel. Will remain in my mind. It was especially shocking because of the cordial relationship that had prevailed throughout the trial and has preceded the trial and quite out of the middle of nowhere.

"There was one other statement made by Mrs. D'Agostino. It was either that Friday or that Thursday and Mr. Hill was present, to the effect that, 'You know, he is guilty, don't you believe he is guilty,' or something like that. The implication to me being if the court had an opinion as to guilt, then, the court should be less concerned about due process th[a]n it should be otherwise. I feel people should deserve a fair trial. Thank you.

"MS. D'AGOSTINO: Your honor, I think again, and I don't want to have the last word here and certainly don't want to withdraw from the importance of this proceeding, if it comes to issues and things that were discussed off the record, there are plenty more that were discussed that could certainly go on the record.

"THE COURT: There are some things said on the record, I am sorry, off the record, but I don't recall. Have no present recollection of any particular things. That's not to say my memory might not be refreshed, but at the moment these are the very salient ones.

"I would also call both counsel's attention to page 69 of the transcript where both counsel at the time were given an opportunity to voir dire the court. Thank you." (RT 6469-6476.)

The second incident occurred near the beginning of the penalty phase arguments, when the prosecutor began arguing that appellant's lack of remorse was a circumstance of the crime under section 190.3, factor (a).[61] The court interrupted the argument and called the prosecutor to the sidebar to express concern that her argument was, in essence, that a lack of mitigation – in the form of an expression of remorse – could be considered as aggravation, which the court understood to be improper. (RT 6219-6220.) While arguing the matter in chambers, this exchange took place:

"MS. D'AGOSTINO: Absence of remorse is not mitigation. Presence of remorse -- I mean, Judge, I have got to close this door for [] a minute at this point in time. I really do.

"I want to go on the record , your Honor, right now very simply. I have not done this for a long time, although I have been very tempted to do so.

"Now, I have not done that because of my personal regard for this court. But it has not escaped either my attention or the attention of my colleagues that this court is very anti death penalty.

"And because of that, frankly, throughout this trial and certainly throughout the penalty phase I have felt as though I am opposing two lawyers: You and Mr. Hill.

"Where Mr. Hill has not objected, you have done so.

"May I further add we are not exactly speaking of a neophyte attorney here. Mr. Hill is a most -- I'd like to finish, your Honor.

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[61] Appellant has set out in Argument 12 why the prosecutor's remarks on this point were misconduct.

"THE COURT: You stated this.

"MS. D'AGOSTINO: No, I have not.

"Mr. Hill is a most experienced trial attorney. He has tried countless death penalty cases. If he wished to object to something, Mr. Hill certainly has a mouth and may do so.

"Your Honor, you are permitting your personal opinion, in my opinion, with reference to the death penalty to influence your decision with regard to jury instructions.

"And now it appears as though you're going to interrupt me every time I say something the court does not like during my argument.

"I feel extremely constrained. I'm following arguments that have been given by countless other prosecutors, none of which have ever been objected to.

"THE COURT: Counsel, all I can do is permit you to make your record.

"Needless to say, I don't agree with your characterizations. Not even a single one of them.

"I believe I have bent over backwards to be fair to both sides. And your suggestions to the contrary I think are baseless.

"And be that as it may, I would like to address a matter on its legal merits. (RT 6220-6222.)

The third incident occurred during jury deliberations when the jury sent a note out asking, "1, Do we consider the safety of fellow inmates in making our decision on how to vote, 2, How much consideration should we give any of the law as interpreted by counsel in closing arguments." (RT 6407.) The parties consulted with each other about the note before discussing it with the court. (RT 6407-6408.) There was easy agreement as to the response to the second question, but the first question provoked a lengthy argument which devolved into another personal attack on the court

by the prosecutor. The prosecutor noted that she and defense counsel had agreed that the answer to the first question should be "yes." (RT 6408.) The court disagreed, believing the jury was focusing on the issue of future dangerousness, and proposed the following answer: "You may consider evidence [on] such subject only as possible rebuttal to such evidence as may have been present as a mitigating factor but not as an aggravating circumstance." (RT 6416.)

The prosecutor objected:

> "MS. D'AGOSTINO: I note for the record, your Honor, our strenuous objection. Let me again state for the record that it appears to me when an answer has been agreed upon both by the prosecution and the defense and that answer clearly states the law, that I find it frankly --
>
> "THE COURT: Let's not editorialize about subjective feelings, if you would. It's a responsibility of the court to instruct on the law and I don't think that can be stipulated away. (RT 6416-6417.)

The court brought the jury in and answered the first question in a manner consistent with his proposed answer. (RT 6417-6418.) After the jury resumed deliberations, the prosecutor began this colloquy:

> "MS. D'AGOSTINO: Your Honor, I would rather put this on the record in chambers but I will be happy to do it in open court.
>
> "THE COURT: Certainly.
>
> "MS. D'AGOSTINO: And I feel on behalf of the People of the State of California, I must go on record as follows: I believe the totality of the instructions which the court has given the jury during the penalty phase which are clearly defense loaded, some of which do not accurately state the law --
>
> "THE COURT: One moment --

"MS. D'AGOSTINO: I would like an opportunity to finish.

"THE COURT: Not to accuse this court of being clearly prejudiced toward one side or another. If you express your argument, you may do that on the record.

"MS. D'AGOSTINO: I'm doing it on the record.

THE COURT: In this matter, we're taking a recess so you can revise your manner of addressing the court and go on record.

"MS. D'AGOSTINO: How does the court wish me to revise my manner when there are three witnesses, people in this courtroom who tell me that during my argument, my closing argument this court is rolling its eyes, thumbing through papers and looking at its watch like I am taking up its time.

"THE COURT: Well, Ms. D'Agostino, forgive me. That's nothing but ridiculous.

"MS. D'AGOSTINO: I can bring the people -- .

"THE COURT: We're not going to do that. This is so ridiculous, it's not funny.

"MS. D'AGOSTINO: Three people -- ,

"THE COURT: Do what you want to do, but don't insult me by saying something stupid as that.

"MS. D'AGOSTINO: Excuse me --

"THE COURT: Excuse me.

"MS. D'AGOSTINO: Don't raise your voice to me.

"THE COURT: Madam, I am speaking.

"MS. D'AGOSTINO: I'm not a madam. My name is Mrs. --

"THE COURT: This court is in recess until both --

"MS. D'AGOSTINO: You have effectively attempted to prevent the prosecution from getting a death penalty in this case by your instructions to this jury and your answer to their questions and you have done that because of your obvious feeling against the death penalty.

"THE COURT: That's your opinion. You have stated your opinion on the record. It's baseless, it's groundless.

"MS. D'AGOSTINO: No, it's not.

"THE COURT: You have continually -- from time to time made outrageous arguments to the court.

"MS. D'AGOSTINO: Your Honor --

"THE COURT: Excuse me, ma'am, I beg your pardon. I really consider it entirely inappropriate for you to and baseless for you to insult the court on the record, to impute motives to the court that do not exist.

"During the course of the trial, I'm sure and during both arguments I was looking up at my notes as they may have referred to the evidence. I look at my outline on the law and I did so from time to time during the trial probably also during the argument[,] probably during the course of argument by both sides.

"MS. D'AGOSTINO: You were paying attention very closely when Mr. Hill was arguing. It's also common knowledge throughout this courthouse by defense attorneys and the [prosecution] that you did not want to sit on this case.

"THE COURT: I did not -- that's so ridiculous that I did not want to sit on this case. As a matter of fact, I feel if I did not want to sit on this case I would not have sat on this case. These arguments are so outrageous. The record stands on its own.

"MS. D'AGOSTINO: Yes, it does.

"THE COURT: I think my rulings stand on their own merit. I have from time to time during the trial consulted with judges in this building who are perceived prosecution oriented, having to do with the applicable law. I've often followed their advice. I'm ashamed to say something like that because it tends to suggest that I need to be defensive about anything. I will say no more. My rulings are amply justified. I think the prosecution's outbursts during discussions of instructions are already on the record. I think the instructions cover the law.

They're reasonable, they're appropriate and they're neutral. Thank you.

"MS. D'AGOSTINO: They weren't outbursts, your Honor. (RT 6418-6421.)

These incidents clearly establish that there were personal attacks on Judge Kaplan by the prosecutor.[62] Such attacks were also improper and unprofessional. It is the duty of an attorney to "maintain the respect due to the courts of justice and judicial officers." (Bus. & Prof. Code section 6068, subd. (b).) "It is the imperative duty of an attorney to respectfully yield to the rulings of the court, whether right or wrong." (*Hawk v. Superior Court*, *supra*, 42 Cal.App.3d at p. 126; see also *People v. Pigage*, *supra*, 112 Cal.App.4th at pp. 1373-1374 ["constant bickering" with the court is beyond mere advocacy, and direct defiance of court orders is "outrageous misconduct"].)

It is equally clear that such attacks were an appropriate basis for the court to recuse itself on a limited basis. A judge shall be disqualified where "For any reason (A) the judge believes his or her recusal would further the interests of justice, ..." (Code Civ. Proc. 170.1, subd. (a)(6).)[63] Judge

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[62] If any question remained regarding the animus behind these incidents, it was dispelled when the prosecutor assisted the family and friends of the victim in an attempted recall campaign mounted against Judge Kaplan. The prosecutor's assistance included appearing on a talk radio program favorably promoting the recall effort. (RT 6969-6970: CT 1581-1591 [text of radio interview].)

[63] The complete text of section Code of Civil Procedure section 170.1, subdivision (a)(6) reads as follows:

"(6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to

(continued...)

Kaplan could reasonably infer that a penalty retrial in this case prosecuted by Mrs. D'Agostino would result in more of her vitriolic attacks, and that a trial marred by such behavior would not be in the interests of justice. The judge's remarks upon recusing himself suggest he believed it would be appropriate for the district attorney to assign a different deputy for such a retrial, but recognized that decision was not his to make. (RT 6763.)

Judge Kaplan did not recuse himself because of bias against the prosecutor. The language he used – "I feel that justice would be best served. . ." – is consistent with the language in section 170.1, subdivision (a)(6)(A) basing recusal on the belief it "would further the interests of justice." He did not base his recusal on either a belief "there is a substantial doubt as to his . . . capacity to be impartial" (subd. (a)(6)(B)) or that "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" (subd. (a)(6)(C)). Furthermore, the facts of the case do not establish that Judge Kaplan was biased or that a reasonable person might entertain a doubt as to his impartiality. Aside from the statutory limitation on limited recusal, there was no logical reason Judge Kaplan could not preside over the 190.4(e) review. Accordingly, Judge Kaplan's decision to recuse himself from any penalty retrial, but not from further proceedings such as a 190.4(e) hearing, was well-founded.

B. The Limited Recusal Should Not Have Precluded Judge Kaplan from Presiding over the 190.4(e) Hearing

Under 190.4(e), in every case in which the penalty jury returns a

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[63](...continued)
be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

death verdict, the defendant is deemed to have made an application for modification of the verdict. "In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall 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. The judge shall state on the record the reasons for his findings." (§ 190.4, subd. (e).)

There is little question that under this section the judge who presided at trial is to consider the motions to modify. Section 190.4(e) review "requires that the trial judge make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 793.) The trial judge, having heard the evidence, is in the best position to conduct the requisite re-weighing under 190.4(e). (*People v. Crew* (1991) 1 Cal.App.4th 1591, 1609 fn. 13.) Even when cases are remanded for new hearings under 190.4(e) the "correct procedure whenever possible" is to have the judge who tried the case to personally consider the matter. (*People v. Brown* (1988) 45 Cal.3d 1247, 1264, fn. 7.)

The failure to have the trial judge conduct the 190.4(e) review when he is available to do so undermines the reliability of a key safeguard in the California death penalty scheme. The Eighth and Fourteenth Amendments require that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 (opn. of Stewart, Powell, and Stevens,

JJ.) "If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia* (1980) 466 U.S. 420, 428.) Because of the qualitative difference between the punishment of death and life imprisonment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The 190.4(e) review by the trial judge is an integral part of California's death penalty scheme. (See *People v. Frierson* (1979) 25 Cal.3d 142, 175, 178-179.) By unnecessarily depriving appellant of the 190.4(e) review by Judge Kaplan, the court infringed on appellant's rights to due process, and a fair and reliable penalty trial. To the extent the violation was solely of appellant's state due process rights, appellant was deprived of an important state-created liberty interest in violation of his rights to due process and equal protection under the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Evitts v. Lucy* (1985) 469 U.S. 387, 401.)

Appellant recognizes that the general rule against limited recusals as expressed in *Geldermann v. Bruner*, *supra*, 229 Cal.App.3d 662 is that Code of Civil Procedure section 170.4 provides the only circumstances in which a judge can act after recusal, and that none of those circumstnaces appear to apply. The statutory limitation, however, cannot prevail in light of the constitutional considerations underpinning the general requirement that the trial judge conduct the 190.4(e) review. Here particularly, there was no rational basis upon which to deny appellant the right to have Judge Kaplan conduct the review. Judge Kaplan was the judicial officer with the most familiarity with the case. His limited recusal was based on concerns

that the interests of justice would not be served by a penalty retrial in which he presided and Mrs. D'Agostino served as the prosecutor. Under these unusual circumstances, Judge Kaplan's limited recusal did not prevent him from conducting the 190.4(e) review. The case should be remanded so Judge Kaplan can conduct that review.

Alternatively, this matter should be treated like a mistrial in which the prosecutor has intentionally caused the mistrial. (See *Oregon v. Kennedy* (1982) 456 U.S. 667, 676 [double jeopardy may apply where the prosecutor's conduct is intended to "goad" the defendant into moving for a mistrial]; *People v. Hathcock* (1973) 8 Cal.3d 599, 614 fn. 14 [holding open possibility that double jeopardy could be implicated where the prosecutor has deliberately caused the mistrial].) Appellant was deprived of having Judge Kaplan hear his automatic motion to modify as a direct result of the prosecutor's unprofessional and provocative conduct. Under such circumstances, because the statutory requirements predicate to the imposition of a death sentence cannot be fulfilled, a sentence of life without the possibility of parole should be imposed.

Accordingly, appellant's sentence of death must be reversed.

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APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW

The California death penalty procedure 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 death penalty here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant's sentence violates the Eighth Amendment as well. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21; *Stanford v. Kentucky*, *supra*, 492 U.S. at pp. 389-390 [dis. opn. of Brennan, J.].)

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 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.)

Consequently, this Court is bound by the ICCPR.[64]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. This is especially so in the present case where the jury sentenced appellant to death over ten years ago. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals 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. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

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[64] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

Appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California (*People v. Ghent, supra,* 43 Cal.3d at pp. 778-779; see also 43 Cal.3d at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511), but submits that the issue should be revisited in light of the growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

Accordingly, this Court should find that California's death penalty violates international law and reverse appellant's sentence of death.

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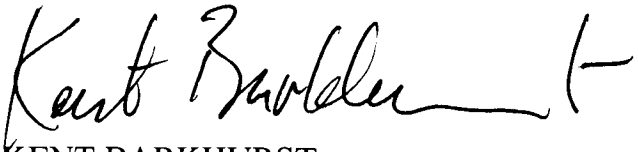
CONCLUSION

For the foregoing reasons, the entire judgment must be reversed.

DATED: January 23, 2004

Respectfully submitted,

LYNNE S. COFFIN
State Public Defender



KENT BARKHURST
Deputy State Public Defender

Attorneys for Appellant

Certificate of Counsel (Cal. Rules of Court, rule 36(b)(2))

I, Kent Barkhurst, am the Deputy State Public Defender assigned to represent appellant Scott Collins in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 86, 084 words in length.

KENT BARKHURST
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Collins* No.: S058537

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Office of the Attorney General
Attn: Theresa Cochrane
300 S. Spring Street
Los Angeles, CA 90013

Bruce C. Hill, Esq.
6400 Canoga Ave., Ste. 151
Woodland Hills, CA 91367-2437

Los Angeles County Superior Court
HON. HOWARD SCHWAB
Chatsworth Courthouse, Div. F48
9425 Penfield Ave.
Chatsworth, CA 91311

Los Angeles County Superior Court
HON. LEON S. KAPLAN
Northwest District, Dept. B
6230 Sylmar Avenue
Van Nuys, CA 91401

Mr. Scott F. Collins
(Appellant)

Los Angeles County District Attorney
Attn: Lea Purwin D'Agostino
6230 Sylmar Ave., Rm. 201
Van Nuys, CA 91401

Each said envelope was then, on January 23, 2004, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on January 23, 2004, at San Francisco, California.

DECLARANT