IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEPHEN REDD, Defendant and Appellant.	S059531 Orange Co. No. 94CF1766

APPELLANT'S OPENING BRIEF

After Decision by the Superior Court
of Orange County
Imposing the Judgment of Death
Honorable Francisco Briseño, Judge Presiding

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By Appointment of the
Supreme Court of the
State of California

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STATEMENT OF THE CASE

Appellant was charged as follows:

Count 1: a violation of Penal Code sections 459, 460, subdivision (b), and 461.2 (commercial burglary in the second degree, Sav-On Drug Store, March 13, 1994);

Count 2: a violation of Penal Code sections 211, 212.5, subdivision (b), 213, subdivision (a)(2) (second degree robbery, Dean Bugbee, March 13, 1994);

Count 3: a violation of Penal Code section 664/187, subdivision (a) (attempted deliberate, premeditated murder, James Shabakhti, May 31, 1994);

Count 4: a violation of Penal Code section 664/187, subdivision (a) (attempted deliberate, premeditated murder, Chris Weldman, May 31, 1994);

Count 5: a violation of Penal Code section 459, 460, subdivision (b), and 461.2 (commercial burglary in the second degree, Alpha Beta Market, July 18, 1994);

Count 6: a violation of Penal Code section 211, 212.5, subdivision (b), 213, subdivision (a)(2) (second degree robbery, Brenda Rambo, July 18, 1994);

Count 7: a violation of Penal Code section 187, subdivision (a) (murder, Timothy McVeigh, July 18, 1994.)

The following enhancements were alleged:

Penal Code section 1203.06, subdivision (a)(1) (Counts 1-7);

Penal Code section 12022.5, subdivision (a) (Counts 1-7);

Penal Code section 12022.7 (Count 3).

The following special circumstances were also alleged:

Penal Code section 190.2, subdivision (a)(17)(vii) (murder while in the commission of a burglary);

Penal Code section 190.2, subdivision (a)(17)(i) (murder while in the commission of a robbery).

Four prior robbery convictions (Pen. Code sec. 211) a prior conviction for attempted murder (Pen. Code sec. 664/187) were also charged. (CT 266-269.)

On October 25, 1996, the jury returned verdicts of guilty on all the charges, and found all the enhancements, special circumstances and prior convictions true. (CT 715-716.)

The penalty phase proceedings began on October 30, 1996. (CT 846-847.) On November 15, 2001, at 10:40 a.m. the jury returned with a verdict of death. (CT 999; 1002-1003.)

The court sentenced appellant to death on Count 7, and stayed imposition of the sentence on the Penal Code section 12022.5 enhancement attached to that count. (CT 1063.)

After finding Counts 2, 3, 4 and 6 to be serious felonies pursuant to Penal Code section 1192.7, subdivision (c), the court sentenced appellant on to 25-years-to-life in prison on Count 3, which the court deemed the principal count. Consecutive sentences of four years for the section 12022.5 enhancement and three years for the section 12022.7 enhancement were imposed. The sentences and enhancements on Counts 1 and 5 were stayed pursuant to Penal Code section 654. Consecutive 25-years-to-life sentences

were imposed for Counts 2, 4 and 6. Consecutive terms of one-third of the mid-term (16 months) were imposed for each enhancement.

The total commitment for Counts 1 through 6 was 111 years to life. The court granted 723 actual days of credit for time served, and 108 days of conduct credits for a total of 831 days. It imposed a restitution fine of $10,000 pursuant to Penal Code section 1202.4, subdivision (b). (CT 1064.)

The court found consecutive sentences justified because they were separate crimes with separate victims. Probation was denied because appellant was statutorily ineligible due to the use of a firearm. (CT 1064.) Appellant was informed of his right to an automatic appeal. (CT 1065.)

The court signed the judgment of death on February 28, 1997. (CT 1052-1060.)

Pursuant to Penal Code section 1239, this appeal is automatic.

* * *

STATEMENT OF THE FACTS

The Sav-On Robbery (Counts 1 and 2)

Dean Bugbee

On March 13, 1994, Dean Bugbee was employed at the Sav-On store located at 2690 Tustin Avenue, City of Orange, as a supervisor. (RT 936, 940.) At around 11 p.m., he was closing up. (RT 937.)

A man came in, but Bugbee did not notice him when he entered, only when the man put a gun over the safe door and said it was time for a "till audit." (RT 941.) Bugbee described the man to police as a white male, 32-38 years old, about 210 pounds and husky, with dark brown hair, and the same height as Bugbee, 5'8". (RT 943.) He had no facial hair. (RT 952.) He wore dark sunglasses, jeans, a dark blue long-sleeved, zip-up sweatshirt with the hood up over his head, and a baseball cap. (RT 943-945.) Bugbee could not tell whether the hair was a wig or natural hair. (RT 946.) The man had a chrome gun of "larger" caliber – the witness guessed it was a .45. (RT 946.) At trial, Bugbee did not recall whether it was an automatic or a revolver, but he remembered earlier telling police it was a chrome semiautomatic. (RT 946.) The robber took $2,000-$3,000 (RT 947) and left the store, but did not get into a car. (RT 948.)

Over defense objection, Bugbee testified to having identified appellant's photograph from a photographic lineup. (RT 955-957.)[1]

On cross-examination, the defense asked Bugbee to compare the heights of counsel and appellant, and Bugbee testified they were the same and that defense counsel was about four inches taller than Bugbee himself. (RT 960-961.) Bugbee reiterated that the robber stood right next to him and was about the same height as Bugbee. (RT 960-961; 963.) He also reiterated that he told the police the robber was between 32 and 38 years old. (RT 963.) He told the police that of the six photos, the one he identified was the closest, but that he was not saying that it was the robber. (RT 964.)

On redirect, the prosecutor asked whether what the witness told the police was that:

> [Y]ou picked number three as the person who had robbed you. You had identified him by the shape of his face and indicated that if he, the suspect, was to put on dark glasses that you would say it was the suspect who robbed you. (RT 964.)

The witness answered "yes." (RT 964.)

On recross-examination, Bugbee admitted that although the glasses would conceal the robber's eyes, they would not change his height. (RT 965.) The examination of the witness ended. (RT 965.)

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[1] Discussed in greater detail in Argument IV, *infra*.

The Attempted Murders (Counts 3 and 4)

James Shabakhti

On May 31, 1994, James Shabakhti was working as a patrol supervisor for a security company. (RT 967.) At about 10:40 p.m. he arrived at the location of the Vons Market on Tustin Avenue in the City of Orange, having been dispatched on a call concerning a transient harassing customers. (RT 969; 993.) He was in uniform, but not armed or wearing a bulletproof vest. (RT 970.)

He originally saw a man to the right of the Sav-One store area, which in turn was to the right of the Vons store. Shabakhti passed by the man and called for another security officer to back him up. (RT 971-972.) By that time, the man had walked to the area of the Vons store. Shabakhti got out of his car, approached the man, and asked him what he was doing there. (RT 973.) The man "walked away or didn't respond." (RT 974.) Shabakhti then asked for identification, and the man said he had none, and that he would leave. (RT 974; 975.) At that point, it was Shabakhti's intention to warn the man that he was trespassing. (RT 974.) Shabakhti told the man to have a seat and stay there. Shabakhti wanted to wait for backup. (RT 975.)

The man Shabakhti detained was a male Caucasian, in his mid-30s to 40 years old, six feet to six feet one inch tall, weighing 190-200 pounds.

The witness thought the man was wearing a wig (a dark-colored woman's wig, not a toupee), because the hair looked fake. (RT 980.) He was not clean; he looked like a transient. (RT 976.) He wore a dark blue sweater or sweatshirt with a hood and zippered in front, but the hood was not on his head. (RT 976-977.) Instead, he wore a covering which the witness originally described as a beanie or hat, (RT 978), then as a watchcap, black or navy blue. (RT 979.)

When Shabakhti's backup arrived, the man seemed to panic and pulled out a chrome semiautomatic gun. (RT 980-982.) The man pointed the gun at Shabakhti's face. Shabakhti was standing one or two steps away (about two to three feet) (RT 983-984) and he could see the man's face clearly. (RT 983-984.) The man then shot at the backup officer, Chris Weidman, who had run up to Shabakhti's car. (RT 984.) Shabakhti ran. (RT 986), only to be shot in the back by the second or third shot as he was running away. (RT 988.) The bullet entered from the tip of the shoulder, took part of the bone, and tore cartilage. (RT 988.) Shabakhti said that he was permanently disabled and would never get back full function of his right arm. (RT 991.)

While he was in the hospital, a detective named Mike Harper from the Orange police interviewed him and showed him photographs of

suspects. (RT 992.) One of the persons looked "just pretty much like who the individual was." (RT 994.) At trial, Shabakhti was shown Exhibit 10, the actual photographs he was shown at that time. (RT 995.) Shabakhti testified that he told Detective Harper that he could not be one hundred percent sure, but he would say it was number three. (RT 995.) He told the detective that the eyes were the same, but that the shooter did not have a beard, and that he was 90 to 95 percent sure that is was photograph number three. (RT 995.)

Susan Doggett

On May 31, 1994, Ms. Doggett and her husband were shopping at Von's Market on Tustin Avenue. (RT 1025.) She heard loud noises, and saw flashes of light, and thought it was gunfire. (RT 1026.) She heard about three shots. (RT 1029.) She yelled "get down," got down on the floor, and stayed there until someone came in and asked to have "911" called. Doggett asked the guard if it was safe to go outside, and he said it was. (RT 1028.) She found a man who had been shot and cared for him until paramedics arrived. (RT 1028.)

Chris Weidman

When Weidman arrived at the scene, he saw Shabakhti speaking with a man who was about 6'2" tall, and weighed about 200 pounds. (RT

1034.) Weidman thought the man was about 25-35 years old. He was wearing a wig, and a blue or purple sweatshirt. Weidman thought the man was wearing some type of dark brown makeup or shoe polish on his face. (RT 1054.) He had a shoulder length brown wig. (RT 1055.)

When the man pointed the gun at Weidman, Weidman put his hands up, and told him he "was the boss," and backed away (RT 1035-1036.) The gun was chromed, and the witness thought it was a 9 mm. (RT 1038.)

Weidman got back into his car, the man pointed the gun at Weidman's forehead and pulled the trigger. (RT 1039.) When glass from the car hit his forehead, Weidman grabbed his face and rolled out of the car, pretending to be dead. (RT 1044.) Weidman could not identify the shooter. (RT 1046-1047.)

Stephan Loya

On May 31, 1994, at about 10:45 p.m., Stephan Joseph Loya was driving on Bourbon Street in the city of Orange towards his sister-in-law's home. With him was his friend Alfred Mendez. (RT 1066.) As Loya pulled into the driveway of the sister-in-law's apartment, he saw a man jogging out of a nearby alley, which was about one hundred yards from the back parking lot of the Vons Market. The man pulled something that looked like a mask off his head. (RT 1067.) Later, on redirect, Loya would testify that it

was possible that the man took off a wig and a hat, not a mask. (RT 1084.) Loya had not heard any sounds like gunshots. (RT 1068.) The man was wearing jogging-type clothes, a zipped up hooded sweatshirt and dark clothing. (RT 1068.) Though Loya was not close, he could see that the man was about 5'10", and weighed 160 to 170 pounds. Because of the loose clothing, it was difficult for Loya to estimate the man's actual weight. (RT 1071.) He appeared to be young, and had a shaved head. Loya testified that the head seemed shaved, not bald, because it was a lighter color. (RT 1069-1070.) After taking off the mask, the man looked around and got into a light blue Ford Tempo, about a 1984 model, Loya thought. (RT 1072.) Because Loya believed the man had done something wrong, he wrote down the car's license plate, handed the paper to his friend Mendez so that Mendez could copy it and read it back to him to make sure it was accurate. (RT 1072-1073.) Loya decided to follow the man. (RT 1072.)

At first the man did not seem to notice that Loya and Mendez were following him, but after a while he started making "weird" turns, and sped up. (RT 1074.) The man then slammed on his brakes, came to a stop, and leaned over in his seat. (RT 1074.) Fearing that he might have a gun, Loya decided not to get too close. He followed him for about half a mile, for maybe three minutes. (RT 1075.) After the man ran a stop sign and got

away from Loya, Loya called the police. (RT 1076; 1082.) Loya testified he was shown photographs at the time, and selected two or three that were possible matches. (RT 1077.)

The prosecutor showed Loya a page from an address book. He identified the number written on it as the license plate number of the man he was following. The page also had the name "Alfred Mendez" written on it.

Officer Linda King

At about 1:00 a.m. on June 1, 1994, Fullerton Police detective Linda King received a report of a light blue Ford Tempo, license plate 2CKC669, that may have been involved in a shooting. (RT 1088-1089.) She was directed to go to the Streams Apartments, located at 1301 Deer Park Avenue, Fullerton. (RT 1089.) The only description she had of the driver was that he was a white male, though there may have been something about a wig or hat – she did not remember. (RT 1090.)

When she approached the apartments, she saw a white man leave a nearby building, cross behind her patrol car and go into the carport. He stopped to speak to a security guard. Everything looked normal; the man made eye contact with her, but his face was not familiar. (RT 1093-1094.) When shown a photograph of Stephen Redd at trial, she recognized him as the man she had seen. (RT 1098.)

After locating the car, she contacted her dispatcher, and set up a perimeter, which took about five to ten minutes. (RT 1095-1096.)

Accompanied by an entry team, she went to Apartment 31. (RT 1099-1100.) The front door was wide open and the lights were on. (RT 1100.) She did not find appellant. (RT 1101.)

Officer Jeffrey Burton

City of Orange police officer Jeffrey Burton responded to the Vons Market on May 31, 1994. (RT 1105.) He saw James Shabakhti being taken to the hospital. (RT 1107.)

Burton was shown photographs, and identified the black Toyota truck driven by one of the security guards. (RT 1108.) It had a bullet hole in the windshield and the hood, and there was shattered glass inside the truck. (RT 1114.) There was damage from bullets to both patrol trucks. (RT 1109-1111.) Other cars in the parking lot were also hit. (RT 1111.)

Burton found six separate brass bullet casings, indicating that a .380 caliber handgun had been fired at least six times. (RT 1122-1125.) accounted for five separate bullets, including the one fired into the victim. One bullet could not be found. (RT 1140.) The evidence was inconsistent with someone having fired three shots into the windshield. (RT 1137.) From

the pattern of the ejected shells, it was possible that the shooter stood in two different positions. (RT 1142.)

Detective Michael Harper

City of Orange Detective Michael Harper was the lead investigator into the shooting of James Shahbakhti. (RT 1145.) He testified that members of the Orange County police department ran a license check to determine the registered owner of the automobile whose license plate number had been taken down by Loya. The car was registered to appellant. (RT 1163.) When police went to 36 East Irma, Apartment K, La Habra, Stephen Redd's address, the car was not there. (RT 1147.)

Harper searched appellant's apartment pursuant to a warrant, and found, among other things, a red watch cap, a blue watch cap, a blue baseball-style cap, latex gloves, and a "longish wig," light brown in color.. (RT 1150-1151.) Harper found a bill of sale for a car, the purchaser being Stephen Redd. (RT 1153.) While he was in the apartment searching, he found letters, etc. indicating that it was appellant's residence. (RT 1165.) During the search of the apartment, Harper found two live rounds for a .380 handgun, two boxes for laser sights, receipts for two magazines for a .380 semiautomatic handgun. (RT 1153-1155.) The ammunition found in the apartment was the same type and brand as that found at the Vons Market.

(RT 1166.) Harper was shown photographs of a blue Mercury Topaz, with license plate 2CKC669, the car found by Detective King, and he testified that it matched the license plate and description given by Loya. (RT 1152.)

Harper prepared a photo lineup, later marked at the trial as Exhibit 10. (RT 1157.) The only photo available of appellant, which was number 3 in the photo lineup, had a beard and mustache. (RT 1158.)

The Burglary of the Alpha Beta, Robbery of Brenda Rambo, and Shooting of Timothy Mcveigh (Counts 5-7)

Officer Kelly Michael Carpenter

On July 18, 1994, at about 10:40 p.m., Brea police officer Kelly Michael Carpenter responded to a request for emergency assistance and a report of a robbery at the Alpha Beta grocery store in Yorba Linda. (RT 1168-1169.) He arrived about four minutes later, found a man lying inside the doorway, and a woman standing beside him. (RT 1169.) He later came to know the man was named Timothy McVeigh, and the woman was Brenda Rambo. (RT 1169-1170.) The man was severely injured, and Carpenter called for paramedics. Carpenter talked to Rambo, the sole eyewitness, and tried to get a description of the shooter. (RT 1170; 1174.)

He stayed with Rambo after McVeigh was taken away, and walked around the crime scene before leaving, observing that the cash register was

open, and two one-dollar bills and a pack of gum were on the counter. (RT 1175-1176.) A .380 caliber shell casing was found in the aisle. (RT 1178; 1186.) Rambo had told Carpenter the shooter wore glasses, and Carpenter found a pair of glasses outside. The glasses were not dusty, and fit the description given by Rambo. (RT 1183.) No fingerprints were found on any of the objects. (RT 1186.)

On cross-examination, Carpenter testified that he had tape recorded the interview with Rambo. (RT 1187.) However, neither the prosecutor nor the defense had the tape. Carpenter was asked to find the tape. (RT 1189.) After being recalled, Carpenter testified that the tape had been "recycled," because all that could be heard was the sound of Rambo's crying. (RT 1284.) He said that Detective Brakebill had conducted a more thorough interview. (RT 1285.)

Brenda Lynn Rambo

On July 18, 1994, Brenda Lynn Rambo was a clerk's helper at the Alpha Beta market. She bagged groceries and worked the cash register. (RT 1194.)

Around 10:40 p.m., a man walked in who caught Rambo's attention because he was wearing an ill-fitting wig that looked like a woman's. (RT 1194-1195.) In addition to the wig, the man wore dark-framed plastic

glasses, a purple-pinkish colored sweatshirt-type long sleeve shirt and jeans. (RT 1198.) He was white, in his late 40s or early 50s, with light eyes. (RT 1199.) Rambo believed he was wearing a baseball cap. (RT 1200.) The only other employee in the store at that time was Timothy McVeigh, who was towards the back of the store. There were no security guards. There were about six customers, but none at the register. (RT 1195-1196.)

The man looked at her, and came to her aisle, carrying a pack of gum. As she rang up the sale, he threw down a dollar and told her she'd have to break it. (RT 1197.) Then he pulled a chrome handgun and pointed it at her (RT 1198; 1203.)

She did not recall any conversation after the man pulled out the gun. She was scared that she would be shot. (RT 1201.) He reached over the counter, pulled out the cash register tray, and started taking money out. ((RT 1201-1202.) She testified that the man appeared calm. (RT 1203.)

Rambo called to McVeigh for help. (RT 1204.) McVeigh came to the front of store and grabbed the robber's left hand with his left hand. (RT 1204-1205.) McVeigh's right hand went around robber's right shoulder. They ended up face-to-face, very close to each other. While they were struggling, Rambo heard the gun go off and she realized McVeigh had been

shot. (RT 1205-1207.) When McVeigh stepped back, the robber pointed the gun at her. (RT 1207.) McVeigh fell a few feet away. (RT 1207.)

Rambo knelt down, and said "please don't." (RT 1208.) The robber did not say anything. Instead, he turned and left, taking the money. (RT 1208-1209.)

On July 21, 1994, Rambo was shown a photographic line-up. (RT 1216.) She circled, dated and put her initials on the picture of the individual she selected, telling the officer that although the robber did not have a beard and mustache, he appeared very similar to the person in the selected photograph. (RT 1216-1218.)

Paul Robert Diersing

Alpha Beta store manager Paul Robert Diersing testified that the robber took $156, that McVeigh had worked there 15 years, and that there was no armed security at the store. (RT 1243-1244.) The employees were instructed to remain safe, and do as a robber directed. (RT 1245.) He testified that he not fault McVeigh for acting as he did, and he did not know how he himself would react. (RT 1246.)

Dr. Richard I. Fukumoto

Pathologist. Dr. Richard Fukumoto performed an autopsy on the body of Timothy McVeigh (RT 1294.) The cause of death was acute

hemorrhage or bleeding due to a gunshot wound through the aorta and stomach. (RT 1339.)

The most significant injury was a close contact gunshot with the entry within the left abdominal wall a little to the left of midline. (RT 1298.) He found an area of bruising in the right back, cut into it and removed a bullet. (RT 1299.) There were two scratches to the left hand, and two scratches to the right, as well as bruises on the knuckle and the back of the right hand. The scratches to the right hand could have been caused by pushing on the gun. (RT 1321.) There was a scratch on the left forehead and bruising on the left lower lip, as well as a scratch in the right neck area. (RT 1299.) The bruising seemed recent. (RT 1300; 1302.) The injuries to the left hand were days old and in the pathologist's opinion had nothing to do with the event. (RT 1303.) However, the right hand injuries were recent, from zero to six hours old, as was the forehead scratch. (RT 1304.) The bruise on the lip was probably due to medical intervention. (RT 1304.) The doctor could not say whether the injury to the top of the head was done with a particular gun. (RT 1323.) The injuries to the back of the head were consistent with falling down after being shot. (RT 1324.) The scratch to the forehead was caused by some blunt instrument with an edge, which could have been the edge of a counter top. (RT 1325.)

Dr. Fukumoto found bleeding and swelling of recent origin in the left back of the head. (RT 1306-1307.) It indicated blunt force trauma to the head, consistent with being struck on the head by a weapon or hitting a hard object such as a counter, if it was at the correct angle. (RT 1308-1311.) There was other injury to the head more consistent with hitting a hard tile floor. (RT 1310.) The head injuries were not fatal, though the injury to the back of the head could have been serious enough to have caused a concussion. (RT 1312;1326.)

Because of evidence of darkening or smoke effect in the wound, the pathologist opined that McVeigh had been shot at close contact. (RT 1313.) The abdominal aorta was punctured by the bullet. (RT 1314.) The wound was consistent with the scenario of a struggle during which a gun went off. (RT 1314-1315.) The angle of the shot was from the victim's left to his right, front to back, and downward. (RT 1315.) The pathologist could not reconstruct how the event happened because he did not know the positions of the participants. (RT 1316.) He also could not say whether any of the injuries were defensive wounds. (RT 1318.) He testified that McVeigh was six feet tall and weighed 219 pounds. (RT 1296.)

The Weapons Evidence

Officer Robert Jansing

On March 6, 1995, United States Park Police Sergeant Robert Jansing arrested appellant on March 6, 1995 in San Francisco and subsequently searched and impounded the car appellant was driving.[2]

At trial, Jansing identified photographs depicting weapons, smoke grenades, a sawed-off rifle, bulletproof material, an attachment for an M-16 rifle to launch grenades, an AR-15 rifle with a magazine attached and a laser sight, a .380 semiautomatic pistol, loaded with a round in chamber, and a laser sight. (RT 1375-1377.) Also found was a black bag with many magazines of .223 caliber ammunition and blanks, as well as a motorcycle helmet lined with Kevlar to make it bulletproof, and a stun gun. Other objects were found that were not photographed. (RT 1378-1380.) All the weapons were locked in the trunk of appellant's Datsun. There were no guns in the passenger area. (RT 1375-1377; 1392.)

Dennis Fuller

Orange County crime laboratory forensic scientist Dennis Fuller testified that in July of 1994 he examined the bullets and casings taken from the Alpha Beta store and from McVeigh's body. (RT 1394-1395.) He

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[2] Officer Jansing's testimony is discussed in greater detail in Argument I, *infra*.

opined that all the bullets and casings had come from the same gun. (RT 1397.)

He was later given a .380 caliber Taurus semiautomatic pistol seized following appellant's arrest. (RT 1397-1398; 1404.) Two magazines were submitted with the gun – one was full and the other had 11 cartridges, one less than a full magazine holds. (RT 1399.) He conducted tests to determine whether the gun would fire accidentally and it would not – it functioned properly. (RT 1402-1403.) The gun required 6 1/4 to 6 1/2 pounds of force to fire in single action mode, and 9 1/2 to 10 1/4 pounds in double action mode. (RT 1403-1404.) It had two safety mechanisms, one internal and one external. (RT 1404.) It would not fire with the safety on. (RT 1406.) The gun had a laser device attached. (RT 1406.) According to Fuller, all the bullets and casings from the Alpha Beta scene were fired from that gun. (RT 1408.)

Detective Jerry Brakebill

Brea Police Department Detective Jerry Brakebill testified that he was in charge of investigating the Alpha Beta Market robbery and murder. (RT 1435.) He was first contacted the evening of July 18, 1994. He arrived at the market at about 11:30 p.m., and conducted a taped interview of Brenda Rambo, who was very emotional and crying. (RT 1437.)

After appellant's arrest, Brakebill flew up to San Francisco to see the impounded car. He was present at FBI headquarters when the car was inventoried, and brought back the evidence. (RT 1437-1438.) He identified numerous photographs of the car and its contents, which included a green money, a ski or beanie cap, binoculars, a notebook, a map of Kern County, car registration documents for another car, a sleeping bag, a green tarp, trash bags, a bulletproof helmet, body armor, magazines for a .380 caliber gun and two boxes of ammunition. (RT 1438-1442.)

Brakebill also identified a photograph of a purple sweater, which he thought had a hood, and a blue sweater. (RT 1442.) Eyeglasses were found in the car, both sunglasses and clear glasses. There was a license plate that did not belong to the seized vehicle. (RT 1443.) There were pieces of Kevlar material, a grenade holder, smoke grenades, a map of Monterey area, and scientific books. In addition there was a blue beanie-type cap, a piece that goes on a firearm, a box of ammunition, ammunition clips for an AR-15 weapon, a sight for a gun, and rounds of .223 ammunition for the AR-15. (RT 1444.)

Brakebill knew he was looking for a suspect who was supposed to have worn wigs, and in the car he found two brown wigs and a blond wig,

as well as two ammunition clips taped together, which, according to Brakebill, allows a weapon to be reloaded more quickly. (RT 1445-1446.)

Brakebill identified physical items present in the courtroom, including a knit cap, binoculars, two brown wigs, a blonde female wig, an El Monte police officer's badge, .380 caliber bullets, one of the smoke grenades, and a pair of glasses. (RT 1448-1449.)

He also identified a baseball cap with a San Francisco Giants' logo, a map of the Salinas area, a map of San Francisco, a navy blue watch cap, a map of the Bakersfield area, magazines for a .380 "auto." (RT 1450.) Originally the magazines had been loaded.

Also found were strips of .223 caliber rounds, a box of .380 ammunition, rifle cartridges for a .223 American Eagle weapon. There were 17 boxes of ammunition. (RT 1451.)

Brakebill identified a Kevlar body suit, sewn to a blue jacket, a black-handled sheathed knife that Jansing found in the car trunk, (RT 1453-1454), a piece of bulletproof chest protector, and a grenade holder with smoke grenades inside. (RT 1454.)

He identified a purple sweater with a hood, and a zipper on the front, a stun gun with a holder and battery, five loaded .223 magazines, and three

additional rounds, the other license plate, and about 25 loose .22 caliber rounds. (RT 1455.)

He was also shown and identified .223 caliber strips, two loaded .380 caliber semiautomatic magazines with 12 rounds in each magazine, two boxes of Winchester ammunition, and a black vinyl gun case. (RT 1456.)

He identified a Colt AR-15 weapon, which originally had clips taped to the side of the gun, and a laser sight on it. The boxes found in the search of appellant's apartment were the type of box from which the sight came. (RT 1457.)

Also identified by Brakebill was a part of an inoperable firearm which looked homemade, with a .22 caliber barrel attached. Inside the car, he found other parts of weapons. (RT 1458.)

He identified an M-203 grenade launcher, a bag with gun parts which was found in the trunk, a piece of Kevlar bulletproof material, and a Kevlar lined helmet, with a glass shield. (RT 1458-1459.)

He had no information that appellant had used the AR-15 or the helmet in any crime. (RT 1462.) He was confident that appellant possessed the .380 caliber Taurus pistol and laser sight in the spring and summer of 1994. (RT 1463.) He found no explosive (fragmentation) grenades, and he

had no evidence that bullets had been placed in the strips and fired. (RT 1464-1466.) They did not contain expended ammunition. (RT 1466.)

He had no information that the police badge was stolen, or that appellant had ever impersonated an officer. His information from Jansing was that all the weapons and the ammunition, as well as the knife, stun gun, smoke grenades and the Kevlar materials, were locked in the trunk. (RT 1467-1468.)

Brakebill testified that a person could put clothing over the Kevlar body suit, but the appearance was not consistent with the descriptions in the Sav-On or Vons robberies. (RT 1469.) He had asked agencies in San Francisco, Kern and Salinas, and there were no crimes there for which appellant might have been responsible. (RT 1470.) Brakebill did not know if the AR-15 was operational or not, but he had no reason to believe it was not. (RT 1474; 1477.)

Asked by the prosecutor, he testified that bullets were designed to shoot people, and that the Kevlar suit and helmet to protect against getting shot. Brakebill did not know when Redd acquired the weapons. (RT 1479.)

He said the laser sights were purchased in February of 1994, before the shootings of Shabakhti and McVeigh. One laser sight was on the .380 caliber weapon, and another on the AR-15. (RT 1480-1481.)

Brakebill stated that he had several conversations with Rambo. She did not tell him the robber was calm, but he did not ask. (RT 1471.) She did not volunteer it. (RT 1472.) She described the robber as wearing a hooded purple sweatshirt, being an older man with wrinkles around his eyes, wearing glasses, a baseball cap, and a shoulder-length wig. She did not say that the robber struck McVeigh with a gun. She told him McVeigh grabbed the robber without saying anything, the two struggled, and she heard the gun go off. (RT 1473.)

Brakebill testified that he later learned that appellant had been working for a short time in the San Fernando Valley during the late summer or early fall of 1994, after the Alpha Beta shooting, under his own name. (RT 1492.)

The guilt phase evidence portion of the trial ended. (RT 1498.)

The Penalty Phase - Prosecution Evidence

The Prior Convictions

On the evening of September 30, 1982, Gay Swanberg was working as the sole cashier at the Akron store in the City of Orange. (RT 1916.) The manager and the sorter were present, but there were no security personnel. Swanberg heard a noise from the door and saw a man in a blue jacket coming directly to her register. (RT 1917.) She remembered the blue jacket, long hair, and sunglasses, which were unusual at 7:45 at night. (RT 1919.)

The man, a white male, 30-35 years old, weighing over 200 pounds, pulled out a large gun, like a sawed off shotgun. (RT 1918.) Swanberg was very frightened. The man told her he wanted all the money. Because she did not have a key to the safe, she started to call the manager. The man told her not to touch the microphone, and instead to give him money from the cash register, which she did. (RT 1920.)

As he put $150 in his pocket and left, he told her not to come outside after him, because he had spent 50 cents on his bullets and he did not plan on wasting any. He was "very calm, matter of fact." After he left, he ran across the street. There was no car in the parking lot. (RT 1923.) The police were called and given the description. (RT 1921; 1926.)

Dennis Misko was working as a stereo salesman at Federated Group in Santa Ana on the evening of October 2, 1982. (RT 1929.) He was the supervisor that night. Although the store had a security service, they were not there that night. (RT 1931.) At around 8 p.m., a man entered wearing a dark wig, brand new levis, a navy blue jacket with a fur collar, and sunglasses. He was about 30-32 years old, stood over six feet, and weighed over 200 pounds. (RT 1931-1932.)

One of the other staff people asked if he could help him. The man opened his coat, pulled out a sawed off rifle and said, "You sure can. I want your bread. Give me your bread." (RT 1932.)

Misko, who was experienced with weapons following his service in Vietnam, described the weapon as an Army issue M-1 or M-14, with an altered stock, then called a jungle stock, now called a street stock. The weapon was cut in the front and rear to make it more like a long pistol rather than a rifle. Though Misko thought the man at first was joking because of the wig, the weapon was real. (RT 1933.)

At first, Misko laughed and said it was a nice gun. The man told him that this was serious and he loaded a round into the chamber while pointing it at Misko. (RT 1934.)

Misko became concerned about the safety of the other employees as well as himself. The robber turned the gun on another employee, and told him to open the register, but neither he nor Misko could do it. (RT 1935.) Eventually, another cashier opened it. (RT 1936.) The amount taken was several hundred dollars. Misko testified that at a preliminary hearing held in January 1983, he had identified Stephen Redd as the robber. (RT 1937.)

Laura Meraz, the cashier who had opened the register, testified to the same event. (RT 1939-1950.)

Robert Quihuiz testified to an armed robbery at the Bank of America on October 6, 1982, which also involved three other employees. (RT 1951.)

He testified that as the robber left, he said, "my landlord's going to love me for this." He also said, "don't try to follow me, I shoot people," and "you all have a nice day because I'm going to have a great one." (RT 1961-1963.)

Gary Stewart testified to an armed robbery from a West Katella bank branch. (RT 1997.) The robber took money from three other tellers. (RT 2002.) As he left, robber said, "unemployment is great. I used to be poor. Now I'm rich. I do this all the time." Then said, "have a good day." (RT 2006.) He also told them not to leave bank for ten minutes. (RT 2007.) The robber was very calm. (RT 2007.)

Everett Caldwell testified regarding the same robbery. As he left, the robber told everyone to stay there 10 minutes or he would blow them away. (RT 1991-1992.) He appeared quite jovial, as if having a good time. (RT 1992.) He identified appellant from photographs. (RT 1993.)

Michael Andre Canzoneri testified to a November 10, 1982, armed robbery at the East La Habra branch of Security Pacific Bank. (RT 2010.) He remembered that the robber said something about having to shoot customers, and warned them not to go outside. (RT 2017-2018.) The robber was extremely calm until he got to the chief teller's window. (RT 2018.)

Jacquelyn Gonzalez Coffery testified to the same events. (RT 2026.) The robber said a number of threatening things, and said something about it not being a joke. (RT 2029.) The robber was very menacing and threatening, commanding, vocal, continually threatening. He pointed the gun directly at her stomach. (RT 2032.)

Sharon Snowden, another teller, testified to the same robbery. (RT 2036.) When the robber came to her window, she did nothing at first. (RT 2039.) She could not believe what she was looking at, and was frightened. The robber said, "you tellers are an endangered species, " and told her to give him all her money. (RT 2040.) He said "have a nice day" before he left. (RT 2043.)

Now-retired La Habra police officer John Jack Reese testified that on November 10, 1982, while driving a marked police car and wearing a uniform, he responded to a silent alarm from a bank, and when he arrived at the scene, he got into position behind the door of his car for protection. (RT 2048-2052.)

A man came out of the side door of the bank, and because something looked wrong about him, Reese told him to stop. The man did, then looked back at Reese and took off running. (RT 2054.)

Reese ran after the man, but did not see that he had a gun. Reese did not have his own gun drawn. (RT 2055.) At the time, he thought there might have been a bank robbery, but had no confirmation. (RT 2056.) Reese drew his gun, and told the man to hold or he would shoot. The man ran another 15 feet and went into a bush. (RT 2057.)

Reese did not shoot. He did not know why the man was running or whether he had a gun. (RT 2058.) Reese also jumped into another bush, looking for cover. (RT 2058.) The man stepped out of the bush and there was burst of gunfire. Reese tried to hide but "didn't get all the way in." Many shots were fired – one hit him. The shots sounded like gunfire from an automatic. Reese had been hit midway between his ankle and knee. At the time, he thought his leg had been blown off. (RT 2059.)

Reese still wanted to take the suspect into custody. He aimed, but there were civilians in the background and he did not shoot. (RT 2060.) At that point Reese's partner arrived. Reese told him he had been shot and that the suspect was in a dead end alley and had an automatic weapon. (RT 2062.)

A car came out of the alley. (RT 2062.) Reese thought the driver looked like the man who had shot him, but he was not sure. Other police units arrived, and they chased after the car. (RT 2063.)

Reese eventually had ten surgeries to save his leg. (RT 2063-2064.) He returned to work in 1984, and worked another 10 years, but could no longer do patrol work, and had to work a desk job. Finally, the pain became too bad and he had to give up work. (RT 2065.)

On cross-examination, Reese stated that he did not take any psychological tests before becoming an officer, as they were not used at the time. (RT 2074.) Officers were not required to get counseling after stressful incidents, though that became available later. Psychological testing was also required later. (RT 2075.) There was no in-house psychological help. (RT 2075.) Reese had no idea what other departments offered. (RT 2077.)

On redirect, he said the department would pay for psychological counseling. (RT 2079.) He turned down counseling after he was shot, and just went back to work. (RT 2080.)

Retired police officer John West testified that he also responded to the silent alarm, and confirmed that a robbery had occurred. He then heard Reese on the radio saying he been hit. He arrived and saw Reese on the ground. Sgt. Machado, who was with Reese, pointed to a car driving away, and said that was him. West followed Officer Breur, who was directly behind the suspect. West drove parallel to them but one block away. (RT 2086.)

The cars came back his way. He tried to position himself so that it would look as if he was prepared to pull in front. The ploy did not work, because the police car's wheels spun and the suspect passed between West and the median. (RT 2089.) As soon as he passed by, the suspect fired two shots out through the back glass of the car. At that point, the suspect's car was going at 50 or 60 miles an hour. (RT 2089.) The shots blew out the suspect's back window, and hit West's windshield on the right side. (RT 2091.) One bullet hit his shotgun holder, which was between West's chest and the bullet, and fragmented, with one fragment going into the

headliner. (RT 2093; 2094.) West was hit either by glass or bullet fragments. (RT 2093.)

After the shots were fired, West fell in behind Breur's car. (RT 2096.) West testified there were between 15 and 20 police cars involved, and during the chase, they drove at speeds at more than 100 miles an hour at times, through wet streets. (RT 2098.) He could not see the driver. (RT 2103.)

Former police sergeant Raymond A. Breur. also responded to the November 10, 1982, silent alarm and participated in the chase. (RT 2109.) At first there was nothing unusual about the chase except the speed. Then the suspect began running stop signs. (RT 2110.) Breur did not know whether the man being chased was the person who had shot Reese but it seemed reasonable to assume so. (RT 2112.) Breur thought he might have a weapon, then he saw the suspect's back window explode and heard automatic weapon fire. (RT 2113.) He heard bullets hit his car – he could not say how many rounds. (RT 2113.)

He did not stop pursuing the car after being shot at, but the thought crossed his mind. (RT 2114.) "It was the day police work became real . . . A man was shooting at me. I could die." (RT 2114.) He decided to continue the pursuit because he had to do it. (RT 2114.)

Breur testified that the chase eventually went through four counties: Los Angeles, Riverside, San Bernardino and Orange, a distance of 45 to 50 miles. (RT 2119.) Breur was the officer who eventually caught the suspect, whom Breuer identified as appellant. (RT 2120.) There was bullet damage to Breur's car. He thought about 5-10 shots had been fired at him. (RT 2122.) Breur's car had a flat tire. (RT 2121-2122.)

Los Angeles police officer Jose Talavera, who was a La Habra police officer at the time, participated in the same chase. He testified that one point during the chase, appellant smiled and waved at him. (RT 2155.) At the point they made eye contact, the suspect did not have a gun in his hand, and he did not shoot at Talavera.

Former San Bernardino police officer Mike Cordua chased appellant by helicopter. (RT 2159.) After Cordua shot at the car from the helicopter, the car stopped, though not immediately. (RT 2165-2167.)

The helicopter landed, and Cordua went to see if he had hit the car. (RT 2168.) There appeared to be a bullet hole in the rearview mirror. (RT 2168.) The driver of the car did not shoot at the helicopter. (RT 2169.) Cordua testified that a shot would have been a threat to the helicopter. (RT 2170.) On redirect, Cordua testified that the car was traveling very fast and it would have been hard for the driver to get off a shot. (RT 2170.)

John Rees testified that in 1982, as a La Habra police officer, he responded the bank robbery scene. He saw Officer Reese down, and two officers tending to him. Rees continued in pursuit of the suspect's car, following it all the way until it was stopped. (RT 2179.) He was one of the officers who approached the driver. After the driver was taken into custody, Rees looked inside car, told other officers to inventory the contents, but saw that it was done correctly. Officer Stoner did the work. (RT 2180.)

Rees went through a list of items taken from the car: an AR 47, .22 caliber rifle with silencer, cut down, found in front seat; an AR 15 semiautomatic weapon with a silencer, one round in the chamber; a Browning high-powered 9 m.m. weapon, also on the front seat, a magazine with one live round, and one round in the gun at the time; a Ruger mini 14 gun, converted to full automatic, also on the front seat, a 30 round magazine, with 20 live rounds in it, one round in the chamber; a .308 caliber rifle on the front seat, a magazine with 19 rounds, one round in the chamber.

Other items included miscellaneous clothing, a gray sweatshirt, a blue long sleeve sweater, a pair of blue sweatpants, a red sweatshirt, a gold blanket, a tube of SuperGlue, a Thomas Guide map to the Los Angeles area, and two pairs of wire-framed glasses.

There were three boxes of soft-point ammunition, and more ammunition in the front seat, as well as magazines for the guns. A homemade bulletproof vest was found in the rear seat. There were 22 expended rounds in the car, from two separate weapons.

In the trunk, the police found a silencer, a green cap, socks, a gun bag, and three .30 round magazines for the "mini 14." There were four weapons in the front passenger compartment, loaded and capable of being fired. (RT 2192.)

The witness was shown photographs of evidence seized and of the car. A wig was shown in one of the photos. There was also a photo of a police officer wearing a handmade Kevlar body suit which had been located in the car. He was also shown a photograph of appellant on the day of his arrest. (RT 2192.)

During the search of appellant's house, police found ammunition in the master bedroom, as well as a semi-automatic rifle, and four wigs. (RT 2193-2194.)

Peter de Bernardi testified that as a California Highway Patrol officer he gave appellant a ticket on November 8, 1982, and seven months later received a letter from appellant, who was in prison at the time.

(RT 2196-2201.) He identified Exhibit 208 as a copy of the letter. (RT 2201.)

The court read a stipulation to the jury that the letter written to De Bernardi referred to the November 11, 1982, incident in La Habra, not to any August 1983 incident. (RT 2218.)

Victim Impact Evidence

Cheryl McVeigh, Timothy McVeigh's sister, testified as to the impact of McVeigh's death upon her and her family. McVeigh was a great brother, she said, her best friend. (RT 2220-2221.)

Cheryl McVeigh had three daughters. McVeigh spent a lot of time with them. (RT 2221.) She was home alone when her younger brother told her about the shooting. (RT 2221.) She could not believe anyone would hurt him. He never hurt anyone. He was not aggressive. When the doctors told her he had died, she thought they were lying. McVeigh had told her he would always be there for her. (RT 2223.) She was a single mother, and McVeigh would take the girls out. (RT 2223.) She could always talk to him. Now she was talking to a headstone. (RT 2224.)

Michael McVeigh, McVeigh's younger brother, testified. (RT 2225.) McVeigh spent time with Michael McVeigh's daughter. Michael McVeigh's son was born after McVeigh's death. McVeigh allowed Michael to be part

of his life. (RT 2227.) McVeigh was about 18 years old when their parents divorced. They did things together, such as fishing. (RT 2227.)

McVeigh let Michael borrow his new car for the senior prom. He was very giving. (RT 2228.) They took a trip together about a year before his death. McVeigh was very fatherly towards Michael's daughter.

McVeigh took care of his mother, who lived by herself, and visited their grandfather in the nursing home. (RT 2230.) When Michael was told McVeigh was dead, he realized he would not have a brother. (RT 2230.)

McVeigh's father, James McVeigh, testified that McVeigh was a good boy, a fun kid. He regretted he did not get a chance to say goodbye. He said that not a day went by that he didn't think of him. (RT 2233.)

Carol McVeigh, McVeigh's mother, testified that McVeigh was very responsible even as a little kid. He had a gift of humor. (RT 2235.) He had been working at the market for 15 years, and had become night manager. (RT 2237.) She and McVeigh were close, like best friends, and traveled together. (RT 2237.)

When she was called and told he'd been shot, she went to the hospital. (RT 2239.) The doctors would not let her hold him. She didn't get to say goodbye. (RT 2239.)

Mrs. McVeigh was shown photos of McVeigh. (RT 2240.) He had a passion for flying, and had put himself through America West Airlines school, and had the picture taken. (RT 2240.) He never flew with them because the layoffs started. (RT 2240.) "Any mother would have been proud to have him for a son," she said. (RT 2241.)

The Penalty Phase - Defense

Rosemary Redd

Appellant's then 73-year-old mother testified. Appellant was the first-born son, born June 4, 1945. Another son, Richard, is 2 1/2 years younger. They were military people when appellant was a child, living in south Los Angeles. She was married to Robert Redd, her first husband. They lived in Whittier, California during most of appellant's early life. (RT 2308.) They lived in two houses with eight units in the back of the property. Her parents lived in one home. The grandparents on the Redd side of the family lived in the same general area. The grandparents were around a lot while appellant was growing up, and had a close relationship with appellant. (RT 2311-2312.) The family were churchgoers most of their lives. (RT 2312.) Photos of family vacations, camping, and beach scenes were introduced. (RT 2312.)

Appellant's disposition was good and happy. He was ambitious. His father taught him how to shine shoes, and appellant would go to work on Saturdays with the father, and shine shoes for people in the shops. (RT 2313.) When he was 14, he worked all summer, making enough to buy a steel guitar. (RT 2313.)

They were a close family throughout that period of time. (RT 2314.) Friends would come over to the house all the time. He had a pool table, and Mrs. Redd stayed home. (RT 2315.) He graduated from Sierra High School in 1963, went to junior college, and married a woman named Diane on February 10, 1965. After his marriage, appellant lived with his wife only a couple of miles away. (RT 2318.) After he moved out, he worked for his father and grandfather in the real estate business. He became a police officer a year or two later, in May of 1967. (RT 2318.) He moved from Whittier to Thousand Oaks, and graduated from the sheriff's academy. (RT 2319.) The couple had two boys and a girl. (RT 2320.)

Mrs. Redd eventually had less contact with appellant but maintained contact with the grandchildren and daughter-in-law. They had moved further away. (RT 2321.) Appellant went to prison in early 1983. His mother maintained contact with him during that period. She visited frequently, and sent the maximum number of packages allowed. (RT 2321.) He wrote all the time. She testified that he still continues to write to her and she maintains a relationship with appellant. (RT 2322.) "He's my son and I'm going to support him as much as I can." Appellant sends artwork sometimes with his letters. He makes cards and artwork that is very

beautiful. It was important for her to receive these things from her son. (RT 2323.)

Michael Redd

Michael Shannon Redd, appellant's older son, was 29 years old at the time of his testimony. (RT 2324.) He was about six when his parents divorced. While he lived with his mother most of his life, he stayed with his father from ages 9 to 12, together with his brother. (RT 2325.) Their sister Melissa lived with their mother, but visited for a month or so at a time. (RT 2326.) When asked about memories of his father, he said he was not a good cook so they ate out all the time. It was a pretty good relationship – he taught them to ski. (RT 2326.)

They played chess and had pillow fights. Appellant taught them to surf. They went to the park. They were a pretty tight family. Michael eventually wanted to go with his mother because she did everything for them. Appellant made them do chores. He taught them the construction trade. (RT 2327.) His father knew how to do everything, including electrical and plumbing. (RT 2327.) Michael and his brother helped appellant build a house while living in Sherman Oaks. Michael wanted to play, but looking back he realized it taught him to work. (RT 2328.) Michael now lived in

Eureka with his wife and children, aged two years and six months. He worked in a grocery store. (RT 2328.)

After age 12 Michael moved back in with his mother, and they moved to Willits. His father visited, at one point working on a mall up there. They went surfing. After a house appellant had built was sold, his partner got most of the money. (RT 2329.) Appellant did not have much money, and was living with his mother. (RT 2330.)

Appellant went to prison in 1983. They maintained some contact, but Michael admitted that he (Michael) was not a good letter writer. (RT 2330.) Asked if the relationship still had "some" value, he answered yes. His dad had taught him a lot. He taught him how to work. He never let them down, and did his best. He still loved his father "very much."

On cross-examination, Michael testified that the last time he saw his father was before Michael moved to New Orleans in 1995. (RT 2333.) He also saw him at Thanksgiving, right after his release from Folsom, but could not remember the year.

The prosecutor asked Michael about the dates of the crimes. Michael said he did not know. (RT 2333.) His father was behaving normally, no mental problems. (RT 2334.)

In 1982, just before going to prison, appellant seemed troubled that he could not get work. (RT 2336.) Michael did not think there was anything physically wrong with appellant. (RT 2337.)

Michael did not know whether appellant knew Michael worked in a grocery store. He talked to him several times, but the last time Michael talked to appellant, Michael was working at gas station. (RT 2338.)

Michael admitted not having much contact with appellant in the last 15 years. (RT 2341.) However, he said, the relationship still had value for him. (RT 2342.)

Sean Redd

Sean Redd, appellant's younger son, testified. At the time of the trial, he was living in Fayetteville, North Carolina. He had been in the U.S. Army for 10 years, re-enlisted for another 6. (RT 2348.)

He was young when his parents separated, and did not remember much about family life before the separation. He lived with his father for a time. (RT 2349.) They were building a house. It was hard work, and his father worked hard to provide for them during that period. Most of the memories of his father were from that period. (RT 2350.)

He was a very good father. Money was tight, but they would do things together. They worked on the house, washed cars. Sean learned a good work ethic that he applied to his current occupation. (RT 2351.)

The father and sons lived in the house as it was being built. Sean was 17 when he moved out of his mother's house. (RT 2352.) He went into basic training in the National Guard. He came back and finished his senior year and went into advanced individual training after graduation. He joined the regular army and went into the Airborne. (RT 2353.)

Sean kept up with his father but not as much as he would have liked. Sean said he was a poor speller and embarrassed about it. (RT 2353.) He had letters from his father which expressed concern for his family. He had seen his father twice since joining the military, but felt he still had a relationship with his father that had value. (RT 2354.) He loved his father. He realized that his father had to be punished but Sean had two boys, ages six and three, and his father writes to the family. His father did beautiful artwork that Sean had framed in his house. He still loved his father. (RT 2355.)

On cross-examination, Sean testified that the events had been hard on the family. It was hard on his wife, and they were now separated. He said the children asked about their grandfather. Appellant had never seen

his grandchildren. (RT 2356.) He could not say how many jobs his father had held, but remembered him working very hard on the house. (RT 2358.)

Sean had four or five contacts with his father since 1980. He saw him right before November of1982. (RT 2359.) His father seemed stressed. Sean was not aware that his father was committing robberies. (RT 2360.)

Sean saw his father in Folsom Prison. He had been planning to come out to see him before the 1994 offenses. (RT 2360.) He was getting ready to come out and box with him. (RT 2361.) His father was a good boxer. (RT 2361.) He could be a hard man, who gave severe spankings. (RT 2362.)

His father worked as much as he could, but had a hard time finding work during the recession. (RT 2364.) He did not abuse his children. (RT 2365.)

Melissa Elizabeth Redd

Melissa Elizabeth Redd, appellant's daughter, testified. She had two children, one five years old and one 18 months old. She was the youngest in family. She had lived with her mother. (RT 2368.) She lived with her father for a while, but missed her mother. She was about seven years old. (RT 2369.) She remembered her father taking them to the beach and to the movies. (RT 2369-2370.)

Her father would not let her older brothers pick on her. She considered him her hero. (RT 2371.) He would pick up hitchhikers, which she thought was nice because everyone else passed them by. (RT 2371.)

She remembered him in a positive way. (RT 2371.) When her father moved in with his mother to find work in the Willits area, Melissa would visit her grandmother and see him. (RT 2371.) He stayed for a while but could not find work, so he moved back south. (RT 2372.)

Melissa had not seen much of her father for the last 14 years. He wrote letters and drew pictures for the kids. She was shown color photocopies of his drawings. (RT 2374.) She said that Rachelle, her daughter, knew they came from her grandfather. (RT 2376.)

She loved her father, though she had not had much of a chance to know him, but he was a positive figure. (RT 2377.) She realized he had done some bad things, but still loved him.

Eugene Lin

Eugene Lin, a former employer of appellant, testified that he owned a residence hotel and apartment buildings in North Hollywood. In the summer of 1994, after seeing appellant collecting cans and bottles to recycle, he offered appellant a job doing maintenance work. (RT 2383.) Appellant started working for Lin in September 17, 1994. He worked until

October 3, 1994. (RT 2384.) Lin gave him a room in the hotel, and appellant did maintenance work. The work was satisfactory. (RT 2385.)

On cross-examination, Lin testified that he did not see that appellant had any problems that prevented him from working. (RT 2389.) Lin paid him in cash.

Lin testified that one day appellant just left. Lin owed him about $80. (RT 2404.) Appellant sent Lin a letter on May 9, 1995.

Richard K. Lum

Richard Lum ran a recycling center in San Francisco where appellant sold bottles and other recyclables from late 1994 into 1995. Lum saw him a couple of times a week, and they would "make small talk." (RT 2423.)

Richard Alan Redd

Appellant's younger brother Richard Redd testified about life in Whittier, where they lived on the same property as their grandparents. Their father had built a house, there was a small swimming pool in the back, and they had lots of fun. (RT 2453.) It was a close family, loving and supportive; the paternal grandparents lived in same town. Appellant was very popular, and had lots of friends. Richard was more the quiet one. Appellant was very hard working – he always had odd jobs. (RT 2454.) He related well to other family members. They got along pretty well as

brothers. (RT 2455.) Appellant left home when he got married. After he became a policeman, Richard saw less and less of him. (RT 2456.)

Appellant's personality changed after he became a policeman. He was more "macho," stronger, tougher, especially after being assigned to the dangerous Firestone area. (RT 2457.) After he moved out to Thousand Oaks, Richard saw even less of him. (RT 2458.) Eventually appellant divorced and left the sheriff's department. The experience hit appellant pretty hard. After getting into construction, he was working very hard. (RT 2459.)

Appellant was "not a happy camper . . . [n]ot a man enjoying life." He threw everything into work. Richard worked with him on a house. Appellant was a "one-man army when it came to construction." (RT 2460.) But he was not a good businessman. He worked on a handshake, and partners would rescind their promises and he would get very little in the end. Eventually appellant could not find work during the recession and lived with their grandmother, and with Richard for a time. He had a hard time finding work. (RT 2461.)

For a while, appellant lived in a one bedroom trailer with Richard. Appellant was very friendly to Richard, but Richard could see the strain from being unemployed. (RT 2462.)

Appellant lived with Richard during two periods. During the first period appellant overate, had guns around, and talked about going off to war during the Afghan war. He seemed disillusioned with life. (RT 2463.)

Richard heard about the bank robbery, but thought nothing of it because he thought appellant was in Willits. Richard saw him later on television. He was very shocked. (RT 2464.) After appellant got out of prison, he lived with Richard again for a time. Though he lived rent-free, he did a lot of work on the mobile home, putting on a new roof and plumbing without being asked. He tried to get jobs, and went out every day looking for work, but because he had to tell everyone he had been in prison, he could not get work. (RT 2465.)

Richard recalled an occasion, when the family home filled with gas, when appellant saved his life. (RT 2466.) Appellant came home for a snack and smelled it, and dragged Richard out. This was about a year before appellant joined the police force. (RT 2467.) Richard felt that he (Richard) wouldn't be alive but for appellant. (RT 2468.)

On cross-examination, Richard said that both Richard and appellant came from almost identical backgrounds. (RT 2469.) Richard thought appellant had quite a bit of contact with the children after he divorce.

(RT 2470.) He admitted he had little knowledge of appellant's family life for the last 15 years. (RT 2471.)

Richard said he thought it was appellant's choice to resign from the police force. (RT 2473.) He did not know about appellant's real estate business except for what appellant told him. (RT 2476.)

Appellant could find some work before the robberies. Richard worked nights and appellant worked days. (RT 2478.) Appellant would fantasize about being a soldier of fortune. (RT 2479.)

Richard testified that about a week before the 1982 robbery, appellant painted his car brown. It had been white before. (RT 2497.) The last week appellant stayed at Richard's house, appellant flashed a lot of cash. He said he was doing bill collecting. (RT 2498.) Appellant kept most of his property in the car. (RT 2499.) Richard did not look in the trunk. (RT 2499.) In response to a question by the prosecutor, Richard testified that he had told police that the week before the robbery appellant was in a good mood. (RT 2499-2500.)

Allen Campbell

A former deputy sheriff, now an attorney, Allen Campbell worked for the Los Angeles Sheriff's department for 13 years. (RT 2521.) He

testified that he did not receive a psychological evaluation before joining the department. (RT 2521.)

He graduated from the sheriff's academy at the same time as appellant. Both were eventually assigned to the Firestone district. (RT 2523.) He worked there for about three years. Firestone was in greater southcentral Los Angeles, the "middle of the ghetto." (RT 2523.) While Campbell never worked with appellant, he did socialize with him (RT 2530.) He last talked to appellant when appellant told him he had quit. (RT 2532.)

Campbell described Firestone as a war zone, and he described his first day on the job. (RT 2525-2527.) Firestone was different than the rest of the department's assignments. (RT 2525.)

Campbell himself had been shot twice, once by a young man in the knee, and then by his own partner in the hand. (RT 2528.) His partner, who was named Wallace, was later killed. Wallace was appellant's training officer. (RT 2528.) Campbell testified that training officers have a special relationship to rookies – they are mentors. (RT 2528.)

Campbell left the sheriff's department after a shooting incident in which he killed a young man, and both he and his partner almost got shot. He took disability retirement, as he had previously been injured. (RT 2524.)

Campbell himself developed a lot of personal problems. He testified that the work affected his marriages. (RT 2529.)

On cross-examination, Campbell testified that he (Campbell) had been divorced twice. (RT 2543.) The prosecutor asked Campbell whether he (Campbell) had committed violent crimes after he retired, he said no. (RT 2544.) Asked if he had ever been arrested, he answered yes, twice, for drunk driving, and for felony hit-and-run. (RT 2545.) The "victim" of the hit-and-run, which occurred in March of 1980, was his best friend who was actually in the courtroom at the time of the trial. The witness explained that he and his friend left a "local establishment" in separate cars and as they were leaving they ran into each other. (RT 2555.) The case was dismissed.

In early 1983 Campbell was arrested for drunk driving in Los Angeles and pleaded guilty. (RT 2550.)

Thomas G. Grant

At the time of the trial the Thomas Grant was working as a private investigator. He was previously employed by the Los Angeles Sheriff's office, beginning in 1969. (RT 2565.) In 1970 he was working the West Hollywood substation. He did not know appellant before coming to work at West Hollywood, but while at West Hollywood, he worked the same shift as appellant.

At some point he heard about a car fire and a fatality that appellant was involved in. (RT 2569.) Appellant had been very upbeat, always laughing before then. (RT 2570.) The next day during the station meeting, appellant asked to speak and described the incident. The passenger was trapped in the car. Appellant tried to get him out but the door was jammed. He had to back off because of the heat and watched him burn to death. Appellant broke down and cried while describing the incident. (RT 2571.) Appellant felt he had panicked and was responsible for the death, because it occurred to him later that he could have broken the window with his flashlight or the butt of his gun. Grant had never seen an officer cry. Everyone was quiet. (RT 2572.) No one said anything and appellant finally sat down. (RT 2573.)

In the academy officers were taught that they have to deal with a lot of emotion in their jobs and they have to put up walls. Most officers have a callous attitude and it's rare to see them admit a mistake, especially if it cost someone his life.

Grant did not stay much longer at West Hollywood so did not personally see changes in appellant's behavior, but he heard about some behavioral issues. He did not elaborate. (RT 2574.) He had not seen or talked to appellant since then.

On cross-examination, Grant said he himself had quit the force after seven years and opened a music store. (RT 2577.) He struggled financially. He had become a private investigator four years before. (RT 2578.) He said he did not consider himself a financial success. (RT 2579.)

His knowledge of appellant came from a period of six months to a year in West Hollywood. (RT 2580.) The only unusual thing about appellant was that he was always happy. (RT 2581.) He seemed fine the last time Grant saw him. (RT 2582.)

Grant himself had not responded to many traffic situations. Mostly they were handled by the Highway Patrol. (RT 2584.) There was no special training at the academy for getting someone out of a burning car. (RT 2586.) Asked whether there were incidents Grant could have handled better, he answered that none had cost anyone his life. (RT 2586.)

Grant had never been shot at; he had only suffered minor injuries. (RT 2587.) He affirmed that he had never seen an officer cry, even during police funerals. Grant testified that here was no counseling to his knowledge. Grant said he did not know about counseling, but was not aware of any. (RT 2593.)

Norman M. Morein

Norman Morein testified as an expert witness for the defense. He was a sentencing consultant who had worked for the Department of Corrections for 25 years, and before that as a probation officer for five years. He had a degree in psychology. (RT 2599.) In his position with the Department he had evaluated thousands of inmates for placement in different institutions. (RT 2602-2606.)

He had been retained by the defense in this case to determine how well appellant had adjusted during his previous imprisonment. He examined documents provided by the defense. (RT 2608.)

According to the records, appellant arrived in prison in April of 1983 and stayed until 1992. There were three negative incidents in appellant's file, one primary one, and two minor write-ups. (RT 2612.)

On June 1, 1986, appellant attempted to escape from CMC East, which was a level 3 (out of 4) prison. (RT 2613.) He cut through cell bars using electrolysis. When he went by one of the towers he was told to stop. The guard fired a warning shot and appellant did not stop, so he was shot in the shoulder. He never left the grounds. (RT 2614.) He was prosecuted for escape without force and received additional time, as well as losing a lot of good-time credits. (RT 2615.) Appellant chose that day to escape because

the guard would check bars with his baton to see if they had been tampered with. (RT 2659.)

The prosecutor asked Morein where appellant got the hacksaw. The witness answered he could have gotten it in any number of places. Appellant also had razor blades in his cell which the witness said would not have been permitted. (RT 2719.) The sandpaper also found might have been permitted. (RT 2720.) There were an unusual number of batteries and a box with a wire bent to form a hook. (RT 2721.)

Morein opined that the manner of cutting the bars was sophisticated, but running after being told to halt by the guard in the tower was not. (RT 2724.) He was wounded, received an extra sentence, lost good time credits, and was sent to Folsom Prison. From the time he got out of the window, Morein testified, appellant's actions were "very stupid." (RT 2725.)

Appellant made no further escape attempts after being sent to Folsom. One disciplinary incident involving a failure to stand was not important because it was one instance in thousands of times he had been asked to stand. (RT 2673.)

Aside from the escape, appellant's record was one of the best Morein had ever seen – no assaultive or disrespectful conduct, a lot of positive

reports, a very good worker who also took vocational training. (RT 2617-2618.) He completed long courses in electronics and machine shop. He took college courses, and got all A's. As a member of the Men's Advisory Council, he had been elected by other inmates to represent them in meetings with staff. (RT 2619-2620.) Morein said that in past times, there was counseling and therapy offered in the prisons, but that was all gone now. It started disappearing with the advent of determinate sentencing around 1977. (RT 2620.) Appellant did not receive any psychological counseling. It would not have been available. (RT 2622.) Appellant did receive anger management counseling in 1993. (RT 2667.) However, there was no indication he had trouble managing anger. (RT 2677.)

Appellant had filed a couple of appeals that benefitted other inmates, having to do with bringing in magazines and books, things that decreased the level of violence. (RT 2623.) He had filed six appeals in all, which was not excessive, and it was not done to harass staff. (RT 2624.)

It was Morein's opinion that his adjustment was very good, except for the escape attempt, and would be good if appellant was returned. (RT 2626.) If sentenced to life without parole, appellant would go to a maximum security level 4 prison. (RT 2617-2618; 2628.)

Morein testified that the diagnostic impression from a psychologist writing a report for the Parole Board was that appellant had Axis One intermittent explosive disorder, and Axis Two excessive compulsive disorder. There was no indication he received treatment for those disorders. (RT 2723.) There was no indication that appellant quit the counseling program after parole. (RT 2724.)

Wiley M. Newman

Wiley M. Newman testified about conditions in the Firestone precinct. (RT 2733.) He met appellant at Firestone while both were assigned there – it was strictly a work relationship.

The witness characterized Firestone as a "combat zone." (RT 2734.) A Firestone deputy saw more violent crimes in a week than the average officer did in a year. (RT 2735.) On the average, he answered 20-25 calls a day, sometimes worked two to three hours of overtime. He said he felt bored if he didn't get to one or two fights a day. (RT 2736.)

Newman was asked about a man named Lou Wallace. (RT 2736.) He answered that he was an officer that was killed during that time. The witness believed Wallace and appellant "hung out" together. (RT 2737.) Six to ten officers were shot, including Newman himself. (RT 2737.) He did not receive any special counseling – he just went back to work. (RT 2738.)

Asked how he dealt with the stress, he answered that he was younger then. He did a lot of partying and drinking. (RT 2738.) When he came back from Vietnam, it was the best job he could get. "Firestone was just another mini war zone." (RT 2739.)

Newman worked with appellant for about a week. They both responded to a fire, and heard someone screaming inside. Fire fighters said it was too hot to go in. The next thing Newman knew, Newman was lying on the front yard holding the man in his arms. Newman was told by others that he had run into the house, through a burning wall. He did not think about the act before doing it; if he had, the man would have burned to death. He just did it. (RT 2740.) Appellant also received a medal, though he did not go into the building. (RT 2740.) Partners always received the same treatment. It was not unusual to receive an award even if one did not do anything. (RT 2741.)

Newman felt he (Newman) had changed during that time, and it was not for the better. (RT 2741.) Asked if the sheriff's office had counseling, he said, "point blank the sheriff's office didn't give a damn." (RT 2741.)

He asked for counseling at one point over a breakup with a girl. He had one session. Newman had been studying psychology and felt he knew more than the counselor did. The counselor basically told him to deal with

it. (RT 2742.) Newman felt he got more counseling from his grandmother than from the psychologist. (RT 2743.)

Newman did not know appellant had quit the force until the defense contacted him. He did not socialize with him. Apparently, the fire captain wrote that both officers had gone into the building. (RT 2753.) Newman had not told anyone that appellant had not gone in the house until he was interviewed by the prosecutor's investigator. (RT 2755.)

Robin Klein

A clinical psychologist in private practice, Robin Klein had been a police officer for 28 years. (RT 2756-2757.)

When Dr. Klein started with the force in 1962, there was no pre-employment psychological screening. (RT 2759.) Some persons, Klein testified, should not be police officers, such as people with poor impulse control, anxiety, or mental instability. (RT 2761.)

Police officers are exposed to large number of traumatic situations, but officers' self-perception gets in the way of seeking help. There is a build up of stress. (RT 2763.) Officers suffer a high rate of suicide, and a higher than average divorce rate. (RT 2764.) Officers rarely asked for help, because it is considered a sign of weakness – they are afraid of being relegated to the "rubber-gun squad." (RT 2766.)

For firefighters, the most traumatic event is seeing someone they cannot help. Seeing someone die by fire and being unable to help is a horrendous event. (RT 2769.) It is not unusual to have firefighters resign within a couple of years of such a traumatic event. (RT 2770.)

Dr. Klein testified that negative comments on a record prevent re-employment. (RT 2771.) Klein described an anniversary reaction, which he said caused a person to relive an experience on the anniversary of the event. He also said it was a common complaint that officers felt abandoned by their departments. (RT 2773.)

Michael Robert Mantell

A psychologist now in private practice, Dr. Robert Mantell was the former chief psychologist for the San Diego Police Department. (RT 2817), Mantell testified that police officers have much more stress, but not necessarily more psychological problems. (RT 2822.) It was hard to know how officers would react to a certain event until it happened. (RT 2825.) He agreed that certain people should not be police officers. (RT 2826.)

Although Mantell had not been asked to meet with appellant, and had not done so (RT 2867), he had reviewed appellant's school records, seeing nothing unusual in them. (RT 2827-2829.) He had also looked at records from the Los Angeles Sheriff's Department. (RT 2829.) There was

no evidence of pre-employment psychological testing in the records. (RT 2845.) The witness testified that there was nothing in the school records indicating appellant should not have been a police officer. (RT 2879.) The police checked criminal history, and did a background check. (RT 2881.) The records showed they talked to less than half a dozen people. One said he did not want to see him as a police officer, because he had a disrespect for the law. Others were positive. (RT 2882.)

The records showed that the first station requested was Firestone. (RT 2847.) There, appellant received a rating of competent, with excellent attitude and interest. (RT 2849.)

The next report stated that appellant could apply more common sense to field situations and improve personal relations with other deputies. In everything else, he was rated competent. (RT 2850.) The final evaluation from Firestone was a finding of overall competence. He had a lack of workable police knowledge and common sense, but had been counseled and had made a conscious effort to do better. (RT 2851.) There was no indication of a referral to psychological counseling. (RT 2852.)

The next review was from the West Hollywood assignment. Overall he had been found competent, with outstanding personal relations. (RT 2852.) In the next review he was found below average in observation

of rules and personal relations, apparently resulting from personal problems. (RT 2853.)

Mantell testified that the incident about appellant crying during briefing would have raised a psychological red flag. (RT 2853.) There was no indication of that incident in the record. (RT 2854.) There was a note that appellant had sought assistance, but it did not say what the assistance was. (RT 2854.) In the next report, in November of 1973, the witness saw reports of unsatisfactory work habits, and improvement needed in several areas. In the comment area, the report noted appellant's resignation. (RT 2855.) A recommendation for a psychological evaluation was dated October 7, 1973. Appellant resigned a day later. The report noted one counseling session on September 9, 1973. (RT 2856.) It reported vacillating behavior patterns occurring during the past two years. (RT 2857.)

The termination report indicated appellant had been warned and seemed visibly depressed. He was involved in two off-duty incidents, one involving a veiled threat to another officer. (RT 2858.) There was a list of problems. (RT 2859.) There was no indication that appellant was going to be fired, but he was going to be sent to a psychologist. (RT 2859.)

Mantell testified that dealing with traumatic events has a psychological impact. (RT 2860.) The incident of witnessing the car fire

seemed to mark the beginning of appellant's performance decline. (RT 2861.) The witness thought it unimaginable that a single counseling session would have helped. (RT 2862.)

Appellant's divorce record was noted. The petition was filed November 13, 1972, the interlocutory decree was filed February 13, 1973, and the final decree August 3, 1973. (RT 2863.) The records also indicated that appellant falsified police reports in 1972. He falsely blamed another driver for an accident. (RT 2889.) While off-duty, he took Hollywood officers on a chase. (RT 2890.) He threatened another officer with his weapon, but there was nothing in the record to indicate appellant pointed the gun at the other officer. (RT 2890-2891; 2912.) Appellant also mishandled prisoner money. (RT 2896.)

Mantell opined that appellant was suffering deterioration beginning in the 1970s and including the divorce. (RT 2864.) The witness opined that the job performance was consistent with someone suffering significant psychological stress. (RT 2911.) Appellant probably could not have gotten another job in law enforcement. (RT 2864.)

Appellant's criminal record indicated an indecent exposure conviction in 1974. (RT 2865.) The exposure incident happened around one

year after the resignation, and seemed an anniversary reaction, according to Mantell.[3] (RT 2865.)

* * *

[3] Mantell defined "anniversary reaction" as the way a person who has "not really dealt with a trauma" handles the memory of the traumatic event in the future. (RT 2865.)

POINTS AND AUTHORITIES AND ARGUMENT

I. THE TRIAL COURT ERRED PREJUDICIALLY WHEN IT REFUSED TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

Appellant's detention, arrest and the subsequent search of his car violated his rights under the Fourth Amendment to the United States Constitution. The evidence seized as a result should have been excluded from the trial.

This evidence was used against appellant in a variety of ways, and the trial court's refusal to exclude it was prejudicial error under the Fourth, Fifth, Eighth and Fourteenth Amendments, both by itself and in combination with other evidentiary errors.

B. The Hearing on the Suppression Motion

On September 13, 1996, the trial court heard appellant's motion to suppress the evidence, filed pursuant to Penal Code section 1538.5. (RT 38.) Before testimony began, the prosecution introduced copies of a search warrant obtained a day after appellant's arrest (Exhibit 1), the return to the warrant (Exhibit 2), and part of a policy manual of the United States Park Police regarding impounding and moving vehicles (Exhibit 3.) (RT 39.) The court then heard testimony.

Park Police Officer Robert Jansing

On March 6, 1995, United States Park Police Officer Robert Jansing was assigned to patrol the northern end of the Golden Gate National Recreation area in San Francisco, which encompasses Aquatic Park and Fort Mason. (RT 41.) He was on duty, in uniform, and in a marked police car. (RT 40-41.)

While driving through a public parking lot located on San Francisco county property shortly before 5 p.m., he saw a brown Datsun sedan that attracted his attention. (RT 41.) The car was parked in the lot, in an area knows as Gas House Cove, in the Marina area near Fort Mason, towards the west end of the northernmost area of the parking lot. (RT 42.)

The parking lot was not part of the Golden Gate National Recreation Area, but was "owned" (according to Jansing) by the San Francisco Park and Recreation Department. It provided parking for a city-owned yacht harbor. (RT 42.) Jansing testified that the Golden Gate National Recreation area is composed of pockets of federal park land "separated by city property all throughout the city." This particular area was city-owned property. (RT 55.)

According to Jansing, the yacht harbor was adjacent to the Golden Gate National Recreation area. Jansing testified that the car was parked

about 100 yards from the border of the national recreation area. (RT 42; 57.)

As Jansing drove by the car, he noticed that the registration sticker that listed the year was not completely flat on the license plate. (RT 43.) In his experience that often meant that the tag did not belong on the plate. He ran a computer check requesting registration information on the car. (RT 43.) The information returned indicated that the registration had actually expired a year earlier. (RT 43.) He testified that the time was about 4:50 p.m., and it was still daylight, and that he was about six to eight feet from the Datsun when he first saw the registration tag. (RT 58-59.)

After receiving the information, Jansing moved his patrol car behind the Datsun, so that the Datsun could not pull out. (RT 61.) Jansing asked the driver, whom he identified at the hearing as appellant, for his license and registration. (RT 43.) Appellant replied that he had just bought the car, and was not aware where the registration tag had come from. (RT 44.) He told Jansing that he had a driver's license, but not in his possession. (RT 45.)

Appellant had some type of paperwork for the car, either a bill of sale or an old registration, showing ownership in the name of somebody out of Canoga Park. (RT 44.) Appellant gave Jansing a birth certificate in the name of Richard Redd, and said that was his. (RT 45.) Jansing ran a

computer check for a driver's license based on the birth certificate, and it came back with "no match." (RT 45.)

Jansing returned to appellant, told him he was lying, and asked for his correct name. (RT 46.) Appellant insisted he was Richard Redd. (RT 46.) Jansing asked him to step out of his car, and handcuffed his hands behind his back "[t]o place him under arrest for no identification and giving me a false name," and for the registration violation. (RT 46.) His intent at that point was to take appellant into custody. (RT 47.) After handcuffing appellant, Jansing searched him, pulling a wallet from appellant's back pocket with a driver's license bearing the name Stephen Redd. (RT 48.) Jansing ran a warrant check with that name, and it came back as belonging to a suspect wanted for murder, attempted murder, and robbery. By this time, appellant was already in the back seat of the patrol car, handcuffed. (RT 48.)

Jansing requested an impound for the car. (RT 48.) His reason for requesting the impound was that he did not know who owned the car, and he thought it might have been stolen. (RT 49.) On cross-examination, Jansing would later admit that at the time of the stop, he had no report of a stolen vehicle. (RT 78.) A towing service was dispatched to impound the car. (RT 50.)

At that point, Jansing decided to conduct an inventory of the car's contents. (RT 50.) The reasons for taking an inventory were "mainly liability, in case there's anything in the vehicle, such as valuables, anything that might be later claimed to be missing . . . we have to know everything that's in the vehicle." (RT 50.) The inventory was required by "force policy." (RT 51.)

The policy required certain procedures: "[A] full inventory of the vehicle, including any compartments, any closed containers, the trunk, the exterior of the vehicle, note any damage, including the tires, broken glass, any interior or exterior damage to the vehicle." Jansing testified that he followed the procedure. (RT 51.)

Jansing identified Exhibit 3, the copy of Park Police General Order 2501, dealing with impounding cars. (RT 51.) That was the policy, he said, to which he had referred in his testimony. (RT 51-52.)

When Jansing searched the car's trunk, he found weapons and took them for safekeeping, removing them from the trunk and having them photographed. (RT 52; 71-73.) Because there was an FBI warrant along with the warrants from Orange County, Jansing asked the FBI to respond. He turned the weapons over to the FBI because they had a more secure spot to store them. (RT 52.) Jansing had the Datsun placed in the General

Services Administration's secure parking lot because he thought Orange County police might want to search it. (RT 53.)

Jansing took appellant to the San Francisco county jail and booked him on the warrants. (RT 53-54.) He started to write out a citation for the Vehicle Code violations, then decided "it wasn't worth it." (RT 54.)

Jansing was asked by the prosecutor about his training, and he testified that he received training to qualify him as a peace officer, which included an "832" course in Santa Rosa Junior College that lasted three or four days. (RT 54-55.) The certificate of completion from the course was introduced as Exhibit 4. (RT 55.)

Jansing also testified that he had received authorization to act as a San Francisco peace officer through a "letter of consent or authorization" from the Chief of Police giving all Park Police officers San Francisco police officer authority under Penal Code section 830.8, subdivision (b). (RT 56.) This letter was marked as Exhibit 5. (RT 56.)

On cross-examination, Jansing was shown a photo of the Datsun showing the license plate but no registration sticker. (RT 73.) Jansing testified that he had removed the sticker and placed it in evidence, later transferring it to the custody of the Brea Police Department. (RT 76.)

Jansing was shown defense Exhibit B, which he identified as sale documents similar to those provided by appellant. (RT 77.) They bore the name of Joel Contreras, in Canoga Park. (RT 77.)

Charles Trebbien

Appellant's parole agent testified that in March of 1994, after an incident where a security guard was injured during a robbery, he prepared an arrest warrant for appellant. (RT 79-80.) He testified that all parolees were subject to search conditions. (RT 81.) He did not testify that he told either Jansing or Detective Brakebill that appellant was on parole. (RT 79-82.)

Brea police officer Jerry Brakebill

City of Brea police officer Jerry Brakebill testified (beginning at RT 82) that he was the detective assigned to investigate the July 18, 1994 robbery and killing at the Alpha Beta Market. (RT 82.) On July 19, 1994, an arrest warrant had issued for appellant for that offense. (RT 85.)

After hearing of appellant's arrest in San Francisco, Brakebill prepared an affidavit seeking a search warrant for appellant's car, which incorporated Jansing's report of the search that he had conducted. (RT 86; 89.) He believed that he had probable cause to search the car because of information he had received from interviewing witnesses as well as from

physical evidence obtained during the investigation. He did not say what the information he received was. (RT 86.)

He served the search warrant on appellant on March 7, 1995 in San Francisco. (RT 82; Exhibit 1.) Brakebill searched the 1978 Datsun. (RT 83.) He also looked at items located at FBI headquarters in San Francisco which he was told had been taken from the car. (RT 83.)

When asked if he would have searched the car even if he had not had Jansing's report, he said he would have because the other officers might have missed evidence. (RT 86.) Brakebill was searching for a weapon used in the shooting, a wig, hats, and glasses. (RT 86.)

On cross-examination, Brakebill admitted the registration sticker was not listed on the return to the warrant that he had prepared. (RT 87.) Brakebill believed he had booked it into his evidence, and he thought he still had the actual sticker. (RT 87-88.)

Brakebill did not testify that he was aware of appellant's parole status at the time he searched the car. (RT 82-90.)

Stephen Redd

Appellant took the stand and testified that he had purchased the car in December of the previous year. (RT 91.) He testified that on the day of the arrest, Jansing approached and asked for registration and a driver's

license. (RT 91.) Appellant gave Jansing the bill of sale and the birth certificate for Richard Redd. (RT 91-92; 94; Exhibit B; Exhibit E.)

Jansing told him he did not place much stock in birth certificates, and as appellant started to go through his wallet, Jansing snatched it out of his hand. (RT 93.) Jansing took the wallet before handcuffing appellant. (RT 93.)

Appellant testified that he had not registered the car. (RT 99.) When the prosecutor asked about the ownership of the handgun and grenade launcher, appellant invoked his right against self-incrimination. (RT 100.) Rosenblum asked that he be ordered to answer. (RT 100.) After talking to defense counsel, appellant admitted owning the handgun, the ammunition, the Kevlar helmet, the wigs and the other weapons found in the car. (RT 101-102.)

Appellant stated that he did not give his real driver's license to Jansing because he had read in the newspaper that he was wanted in the shooting of a security guard in Orange, and knew he would be arrested. (RT 103.)

Appellant said he wore the wigs to places that played rock music because he was bald. (RT 111.) He did not know if they were men's or

women's wigs. (RT 111.) He admitted taking the birth certificate from his brother's mobile home without asking him. (RT 113.)

The police communications tape

The defense requested that the court listen to the tape recording of the conversation between Jansing and the dispatcher, and the tape was played. (RT 116-117; Exhibit C; Exhibit D.)

Robert Jansing recalled

Jansing was recalled to authenticate his voice on the tape recording of his dispatch call. (RT 116.) Jansing confirmed that the dispatcher announced that the time was 4:56 p.m. He denied telling the dispatcher that Richard Redd's date of birth was 1940. (RT 118-119.)

The Arguments

The defense submitted the matter on its papers, and additionally argued that the tape recording showed that only 26 seconds elapsed between Jansing's first communication with the dispatcher, in which Jansing gave the dispatcher the name of Richard Redd, and the second conversation, where Jansing gave the dispatcher appellant's true name. This very short span of time contradicted Jansing's testimony that he had removed appellant from the car, handcuffed him and then removed his wallet. The time span corroborated appellant's version of the facts, that is, that the wallet was

taken from appellant's hand as he sat in his car, and before he was arrested. (RT 124.)

The defense also argued that the information used to obtain the search warrant came from Jansing's report, and that if that information was excised from the warrant affidavit, there would be no nexus between the car appellant was arrested in and the crimes charged. (RT 125.)

In addition, the defense argued there was no evidence of San Francisco Police Department impound procedures, and this was required because Jansing was acting as a San Francisco officer. (RT 126-127.)

The government argued that the arrest was justified for the Vehicle Code violations (RT 128), and that the impound of the car was proper as incident to the arrest on the Vehicle Code violations and the warrants. (RT 129.) As to the question of when the wallet was seized, the prosecutor simply said that "Jansing is a heck of a lot more credible than the defendant . . . ." In any event, the government argued, even if the wallet was taken before appellant was handcuffed, the seizure was proper because Jansing had probable cause to arrest and appellant had declined to give reliable identification. (RT 128-129.)

The government also argued that the search of the car was justified under the inevitable discovery theory, since appellant had been arrested, and under the parole search condition. (RT 130-131.)

Although not repeated in oral argument, in its moving papers the government argued that the issue whether Officer Jansing had jurisdiction to act as a police officer under California law was irrelevant because under article I, section 28, subdivision (d) of the California Constitution, evidence was admissible and would not be subject to suppression under Penal Code section 1538.5 unless it was seized in violation of the Fourth Amendment to the United States Constitution, and there were no cases that found a federal constitutional violation because a search that was otherwise reasonable was conducted by someone who was not authorized to act as a police officer under state law. In a footnote, the government suggested that if Jansing was not a peace officer, then he was a private person, and his conduct would not come within the proscriptions of the Fourth Amendment, citing to *Walter v. United States* (1980) 447 U.S. 649, 656. (CT 218-219.)

The Ruling on the Suppression Motion

The judge found that appellant had standing to challenge the search. (RT 132.) He then denied the motion without stating reasons or making any factual findings. (RT 132.)

C. The Standard of Review

The trial court, in ruling on a motion to suppress evidence brought under Penal Code section 1538.5, finds the historical facts, selects the applicable rule of law, and applies the rule to the facts to determine whether the Fourth Amendment has been violated. On appeal, the trial court's resolution of the questions of fact is reviewed under the deferential substantial-evidence standard. Its choice of the legal rule, which is a pure question of law, is scrutinized under the standard of independent review. Finally, its application of the law to the facts, which is a mixed fact-law question predominantly one of law is also subject to independent review. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1119; *People v. Weaver* (2001) 26 Cal.4th 876, 924; *People v. Ayala* (2000) 24 Cal.4th 225, 235.)

The appellate court defers to the trial court's factual findings, whether express or implied, only if they are supported by substantial evidence. (*People v. Weaver*, *supra,* 26 Cal.4th 876, 924; *People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) However, if the trial court makes no findings, no presumption of correctness attaches, and the appellate court must make its own findings. (*Wiggins v. Smith* (2003) 539 U.S. 510, 530-531, 123 S.Ct. 2527, 2539-2540; *Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1014.)

D. The Burden Fell Upon the Government to Justify the Search Before the Trial Court, and on Appeal the People are Bound by the Justifications Offered Below

The burden of justifying a warrantless search, seizure, arrest or detention falls upon the prosecution. (*People v. Williams* (1999) 20 Cal.4th 119; *Wilder v. Superior Court* (1979) 92 Cal.App.3d 90.)

Thus, in order to justify the detention and search of appellant, the government had to present evidence to support every theory upon which it relied to justify the search and seizure. (*People v. Williams, supra,* 20 Cal.4th at pp. 129-130 ("[b]ecause law enforcement personnel, not the defendant, made the decision to proceed without a warrant, they, not the defendant, are in the best position to know what justification, if any, they had for doing so").)

On appeal, the government is bound by the justifications offered by it to the trial court and may not assert new justifications for the first time before an appellate court. As this Court stated in *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640:

> If the People had other theories to support their contention that the evidence was not the product of illegal police conduct the proper place to argue those theories was on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal. To allow a reopening of the question on the basis of new legal theories to support or contest the admissibility of

> the evidence, would defeat the purpose of Penal Code section 1538.5 and discourage parties from presenting all arguments relative to the question when the issue of admissibility of evidence is initially raised. [Citations.]" (*Id.*, at p. 640, fn. omitted.)

See also *People v. Williams, supra*, 20 Cal.4th at p. 130 ("once the prosecution has offered a justification for a warrantless search or seizure, defendants must present any arguments as to why that justification is inadequate . . . They must object on that basis to admission of the evidence or risk forfeiting the issue on appeal.")

E. Jansing's Powers to Detain and Arrest as a Peace Officer Derived Solely from the Limited Authority Granted by Penal Code Section 830.8

"Federal officers have only such powers to enforce California laws as the State of California has conferred upon them." (80 Ops.Cal.Atty.Gen. (1992) 297, 299-300.) "It is abundantly clear that the Legislature at no time intended to give federal officers the same authority to enforce state and local laws as it granted to California peace officers." (*Id.*)

California has chosen to grant federal officers extremely limited powers to enforce state and local laws. That power stems solely from Penal Code section 830.8:

> (a) *Federal criminal investigators and law enforcement officers are not California peace officers*, but may exercise

the powers of arrest of a peace officer in any of the following circumstances:

(1) Any circumstances specified in Section 836 or Section 5150 of the Welfare and Institutions Code for violations of state or local laws.

(2) When these investigators and law enforcement officers are engaged in the enforcement of federal criminal laws and exercise the arrest powers only incidental to the performance of these duties.

(3) When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.

(4) When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed.

In all of these instances, the provisions of Section 847 shall apply. These investigators and law enforcement officers, prior to the exercise of these arrest powers, shall have been certified by their agency heads as having satisfied the training requirements of Section 832, or the equivalent thereof.

...

(b) Duly authorized federal employees who comply with the training requirements set forth in Section 832 are peace officers when they are engaged in enforcing applicable state or local laws on property owned or possessed by the United States government, or on any street, sidewalk, or property adjacent thereto, and with the written consent of the sheriff or the chief of police, respectively, in whose jurisdiction the property is situated.

(c) National park rangers are not California peace officers but may exercise the powers of arrest of a peace officer as specified in Section 836 and the powers of a peace officer

> specified in Section 5150 of the Welfare and Institutions Code for violations of state or local laws provided these rangers are exercising the arrest powers incidental to the performance of their federal duties or providing or attempting to provide law enforcement services in response to a request initiated by California state park rangers to assist in preserving the peace and protecting state parks and other property for which California state park rangers are responsible. National park rangers, prior to the exercise of these arrest powers, shall have been certified by their agency heads as having satisfactorily completed the training requirements of Section 832.3, or the equivalent thereof.
>
> ...
>
> (Emphasis added.)

Through its enactment of this provision, the State of California has made it perfectly clear that federal officers who are enforcing state laws on state property may do so only under two sets of circumstances: (1) When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed; or (2) When they are operating on a street, sidewalk or property adjacent to federal land, after being certified by their agency heads as having satisfied the training requirements of Penal Code section 832, and they possess the written consent of the chief of police of the jurisdiction. Neither circumstance was present here.

The Ninth Circuit has ruled that: "[i]in order to determine the lawfulness of a traffic stop, the trial court need only find that (1) under the circumstances a reasonable officer would stop the suspect for violation of a specified law, and (2) it was within the detaining officer's scope of responsibility to enforce that law." (*United States v. Robles-Alvarez* (9th Cir. 1996) 75 F.3d 559, 561, abrogation on another point recognized by *United States v. Michael R.* (9th Cir. 1996) 90 F.3d 340.)

F. Because neither the Infraction of Expired Registration Nor the Alternative Felony/Misdemeanor of False Registration Involved "Immediate Danger to Persons or Property" Jansing Could Not Utilize the Arrest Powers of section 830.8, subdivision (a)(4)

Duly authorized federal employees may arrest for offenses "[w]hen probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed." (Pen. Code sec. 830.8, subd. (a)(4).)

The Attorney General has interpreted this provision to mean that federal law enforcement officers "may take law enforcement actions to enforce state or local laws while away from federal property with respect to . . . state offenses committed in their presence that pose a serious and

immediate threat to persons and property." (80 Ops.Cal.Atty.Gen. 297, *supra.*)

Neither the expired registration offense, an infraction, the failure to identify himself, another infraction, nor the alternative felony/misdemeanor offense of false registration[4] involve immediate danger or a serious and immediate threat to persons or property, so the detention and arrest could not be grounded on section 830.8, subdivision (a)(4).[5]

G. The Gas House Cove Parking Lot Was Not "Adjacent to" Federal Property, so Jansing Had No Power to Detain or Arrest Appellant

Jansing could have been acting lawfully as a peace officer if he was "engaged in enforcing applicable state or local laws on property owned or possessed by the United States government, or on any street, sidewalk, or property *adjacent thereto*, and with the written consent of the sheriff or the chief of police, respectively, in whose jurisdiction the property is situated." (Pen. Code sec. 830.8, subd. (b). (Emphasis added.)

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[4] Jansing did not specify what offenses he arrested appellant for, but presumably they were Vehicle Code section 4000, Vehicle Code section 31 (both infractions under Vehicle Code section 40000.1), or Vehicle Code section 4463.

[5] The government did not argue this justification at trial, and therefore should be precluded from arguing it on appeal.

Since Jansing admitted that the property was not owned by the federal government, the question then becomes whether the San Francisco county-owned parking lot next to the San Francisco county-owned yacht harbor,[6] which is several hundred yards from federal property is a "street, sidewalk, or property adjacent" to federal property.

What constitutes "adjacent" has not been decided by any California court and presents this Court with a question of first impression.

Black's Law Dictionary defines "adjacent" as "lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes. See Adjoining."

As can be seen from the maps of San Francisco,[7] the Gas House Cove parking area is separated from federal land by the entire yacht harbor. If an interpretation of "adjacent" includes an area such as Gas House Cove, then much of San Francisco's northern area is "adjacent" to some federal land or another.

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[6] See maps attached to appellant's requests for judicial notice as Exhibit A to Request No. 1 and Exhibits A and B to Request No. 3.

[7] Appellant has requested that this Court take judicial notice of the maps.

In addition, the distance must be measured, not as the crow flies, but as the police officer drives. Tracing the route from Fort Mason to the site of the arrest makes clear that the distance is much longer than Jansing said it was. (See Exhibit B attached to Request No. 3, where counsel computed the distance from the arrest site as testified to by Jansing and the entrance to Fort Mason as approximately 595 yards.)

The term "adjacent to" as used in the statute, must be interpreted to mean "next to," both to avoid an interpretation which would clearly conflict with the legislative intent, and to avoid constitutional problems, i.e., that the statute is void for vagueness.

The "void-for-vagueness" doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations.]" (*Kolender v. Lawson* (1983) 461 U.S. 352, 357, 103 S.Ct. 1855, 1858.)

In *Kolender v. Lawson*, the high court, speaking through Justice O'Connor,[8] found that the phrase "credible and reliable identification" in Penal Code section 647, subdivision (e) vested "virtually complete

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[8] Two justices, Justices White and Rehnquist, dissented. (*Lawson, supra*, 461 U.S. at p. 369, 103 S.Ct. at p. 1864.)

discretion in the hands of the police to determine whether the suspect has satisfied the statute . . . ." (*Kolender v. Lawson, supra*, 461 U.S. at p. 358, 103 S.Ct. at p. 1858.) The Court was concerned that when a legislature fails to provide sufficient guidelines to govern law enforcement, "a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections.'" (*Kolender v. Lawson, supra*, 461 U.S. at p. 358, quoting from *Smith v. Goguen* (1974) 415 U.S. 566, 575, 94 S.Ct. 1242, 1248.)

The Court also cited to *United States v. Reese* (1875) 92 U.S. 214, 221, 23 L.Ed.563:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government. (*Kolender v. Lawson, supra*, 461 U.S. at p. 358, 103 S.Ct. at p. 1858.)

If the word "adjacent" is not subject to precise interpretation, and interpreted to mean "next to," then Penal Code section 830.8 violates due process of law by allowing park police to use their own individual opinions as to how far beyond park limits they may detain and arrest citizens.

H. The Government Failed to Prove that the Head of Jansing's Agency Certified that Jansing Completed the Training Requirements of Penal Code section 832

Penal Code section 830.8 subdivision (a) requires that:

> In all of these instances, the provisions of Section 847 shall apply. These investigators and law enforcement officers, prior to the exercise of these arrest powers, shall have been certified by their agency heads as having satisfied the training requirements of Section 832, or the equivalent thereof.

The only proof the government provided to prove that Jansing had completed the training was a certificate of completion from a junior college course he took. (RT 55.) That was not a certification by his agency head.

Therefore, Jansing could not exercise any peace officer powers under Penal Code section 830.8, and the arrest of appellant was unlawful. (See, e.g., Pen. Code sec. 872, subd. (b) (officer may only testify as to hearsay received if properly trained); *Correa v. Superior Court* (2002) 27 Cal.4th 444, 464 (experience and training requirements of Penal Code section 872 assure that hearsay is reliable and satisfies due process).)

I. Jansing Did Not Have Authority to Use a Marked Police Vehicle or Other Emergency Equipment to Enforce State Laws

Jansing testified that he was using a marked police vehicle and that he used his police radio during the detention and arrest of appellant. He had no authority to do so.

The Attorney General has opined that federal "officers, while in uniform, may not use marked police vehicles and other emergency equipment to enforce state or local laws except upon request and under the direction of a California law enforcement agency." (80 Ops.Cal.Atty.Gen. 297, *supra.*)

Jansing had not been specifically directed and requested to detain and arrest appellant by any California law enforcement agency.

The Attorney General's opinion was grounded in the fact that "[n]othing in section 830.8 authorizes FPS[9] officers to use marked police vehicles or other emergency equipment when enforcing state or local laws. We know of no other statutory provision that authorizes FPS officers to operate marked police vehicles or other emergency equipment in the described circumstances." (*Ibid.*)

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[9] The opinion referred to Federal Protective Service officers, but the statutes being interpreted are the same as those involved here.

Because Jansing had no authority to use his marked police vehicle or his radio to effect the arrest, the arrest was unlawful.

J. The Legislature Intended to Severely Limit the Powers of Arrest of Federal Officers

The Legislature's clear intent was to limit the reach of federal officers to streets, sidewalks and similar property where offenders might stand and do damage to federal property.

As can be seen from the legislative history attached to appellant's Judicial Notice Request No. 2, when Assemblyman William Filante first requested the Legislative Counsel to draft a bill to give United States Park Police the powers of California peace officers, he intended that power to extend throughout the state.[10] When he introduced Assembly Bill 3874 on February 17, 1984, Assemblyman Filante still intended to grant peace officer authority to United States Park Police to the entire state, and to eliminate the need for the consent of local law enforcement. (Legislative History of AB 3874, attached to Request for Judicial Notice No. 2, p. 124.) The Assembly Committee on Criminal Law and Public Safety, in its report

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[10] On January 19, 1984, the Legislative Counsel received a request from Assemblyman Filante which instructed the Counsel to "Prepare a bill to expressly confer California peace officer status on United States Park Police." (Leg. History of AB 3874, p. 120.)

before the first hearing, stated that the proponents of the bill contended that the current authority, which extended only to property owned or possessed by the federal government, was insufficient because obtaining the consent of the sheriff or chief of police was "cumbersome" and "many of their duties cover areas not owned or possessed by the federal government, *such as local streets adjacent to parklands*." (*Id.*, p. 4; emphasis added.) The Committee questioned whether Park Police officers should have greater authority than other federal law enforcement officers. (*Ibid.*)

The Committee also questioned whether local law enforcement should be stripped of its power to consent, asking, "Shouldn't local law enforcement have some say in whether federal park police may enforce state and local laws on non-federal property? Might this bill lead to some conflict among local and federal law enforcement officers?" (*Id.*, at p. 5.)

And finally, the Committee asked:

> To the extent, the primary problem the bill seeks to address is the power of park police to make arrests on adjacent state or local property, couldn't the bill simply extend such arrest powers without making U.S. park police full peace officers?" (*Id.*, at p. 5.)

The bill was opposed by the California Peace Officers' Association, the California Police Chiefs' Association, the California State Sheriffs'

Association (Leg. History of AB 3874, *supra,* p. 2) and by the American Civil Liberties Union. (Leg. History of AB 3874, *supra,* p. 3.)

The legislative advocate for the state law enforcement groups stated that the organizations did "not understand the need for peace officer authority of United States Park Police." (*Id.*, p. 2.)

The ACLU thought it "inappropriate to give these police officers jurisdiction beyond Federal Parks" because "[t]hey are not accountable to any local government and may not be subject to other state laws." (*Id.*, p. 3.)

The bill was supported[11] by the Police Association of the District of Columbia which wrote a letter to Assemblyman Filante on April 30, 1984 in which it explained that the jurisdiction of the United States Park Police, which originally extended only to Washington, D.C., and later to all national parks, had been expanded by Congress in 1972 to the Golden Gate National Recreation Area because of its nature as "an urban park with the full range of urban law enforcement problems. . . ." (*Id.*, p. 11.)

The Association felt that because the officers spent "considerable amounts of time driving on city streets and highways in marked police

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[11] In fact, there is evidence that the bill was actually requested by the United States Park Police California Field Office. (Report to Senate Committee on Judiciary, Leg. History of AB 3874, *supra*, p. 20.)

vehicles . . ." and were "highly visible and easily identifiable as police officers, they are subject to calls from citizens for assistance." The Association claimed that "city and state courts have recognized Park Police officers as 'police officers' in the prosecuting of defendants," but the practice "is of questionable legality" because they were not listed as police officers in the California Penal Code, and were therefore vulnerable to lawsuits for false imprisonment. (*Id.*, p. 12.)

Apparently in response to the questions raised by the Assembly Committee and the opposition of local law enforcement and the ACLU, AB 3874 was amended May 22, 1984 to limit the peace officer powers of "duly authorized" federal employees to "any street, sidewalk or property adjacent to the lands owned or possessed by the United States Government." (Assembly Committee on Criminal Law and Public Safety report, Leg. History of AB 3874, *supra*, pp. 6; 77.)

As amended, the bill retained the requirement that local law enforcement give consent, and added a requirement that the federal officers meet basic peace officer training requirements. (*Id.*, p. 6.)

The ACLU withdrew its opposition in light of the amendments, but suggested that the officers should also "be required to comply with all State

Constitutional and statutory requirements that presently apply to California law enforcement officers." (*Id.*, p. 14.)

There is no second letter from the state law enforcement groups, but there is a handwritten note on a copy of the first letter stating, "no longer opposed as of May 22 amends." (*Id.*, p. 16.)

In addition, there is a letter from the Peace Officers Research Association of California dated July 19, 1984, stating that its prior opposition had been changed to "neutral/watch" based upon the "tightening up" of the "jurisdictional language . . . as well as defining the requirements for such powers." (*Id.*, p. 95.)

Even though the term "adjacent" was not specifically defined, it is clear that the legislative intent was not to confer widespread arrest powers upon United States Park Police officers. The legislators repeatedly emphasized the fact that "during routine patrol Park Police spend considerable amounts of time driving on city streets and highways in marked police vehicles, consequently they are called for assistance by the general public." (See Leg. History of AB 3874, *supra*, pp. 21, 25, 47.)

Jansing was not responding to a citizen's call for assistance. He was using this provision to basically "take a stroll" through a parking lot that was not in a direct route to any federal property.[12]

K. United States Park Police Officer Jansing Was Not Acting as a Private Citizen

At trial, the government argued that if Officer Jansing was outside his jurisdiction, he was acting as a private citizen, and thus his actions were completely immune from the remedy of suppression.

The right of private citizens to arrest each other derives in California from statute. The right of arrest does not include the right to search, except for weapons carried on the person. (Pen. Code sec. 846.)[13]

In *Walter v. United States, supra,* 447 U.S. at p. 656, 100 S.Ct. 2395, the case cited by the government at the suppression hearing, the majority of the high court noted in passing that "a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such

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[12] Jansing had to enter the parking lot from Marina Boulevard and exit back to Marina Boulevard. He was not simply "en route" to his federal destination. (See maps attached to judicial notice requests.)

[13] "Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to a magistrate before whom he is taken." (Pen. Code sec. 846.)

private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully," citing to *Burdeau v. McDowell* (1921) 256 U.S. 465, 475, 41 S.Ct. 574, 576.[14]

In *People v. Bush* (1974) 37 Cal.App.3d 952, 956-957, the Court of Appeal considered the question whether a seizure by an off-duty officer acting outside his jurisdiction was valid under the Fourth Amendment. The court held that the arrest was valid as a citizen's arrest because the officer had seen an offense committed in his presence, and there was no search because the item seized was in plain view.

Bush was disapproved by *People v. Zelinski* (1979) 24 Cal.3d 357, 363, fn. 6, insofar as that decision suggested that the permissible scope of a citizen's arrest went beyond the right to disarm the offender, as provided by Penal Code section 846.

Zelinski itself, which found a search by store employees fell within the purview of the Fourth Amendment, was considered to have been abrogated by article I, section 28, subdivision (d) of the California Constitution, by *People v. Taylor* (1990) 222 Cal.App.3d 612, 621.

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[14] The comment is dictum, since the Court held that the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI did not excuse the failure to obtain a search warrant. (*Walter v. United States, supra*, 447 U.S. at p. 656.)

According to *Taylor*, the question is now governed by *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 102 S.Ct. 2744 and *Collins v. Womancare* (9th Cir.1989) 878 F.2d 1145, 1154.

Lugar holds that in order to determine whether state action is involved in the deprivation of a federal right, the deprivation must be caused by the exercise of some right or privilege created by the state, or by a person for whom the state is responsible. In addition, the person charged with the deprivation must be a person who can be said to be a state actor, either because he is acting together with state officials, or because he is a state official himself.

Applying *Lugar*, the *Taylor* court found that private security guards, employed to provide security for the Santa Cruz Beach Boardwalk, even though licensed by the state, were not state agents. (*People v. Taylor, supra*, 222 Cal.App.3d at p. 625.) The security guards in that case had probable cause to arrest, having seen a public offense committed in their presence. The only question was whether the product of the subsequent search, which violated Penal Code section 846, could be used as evidence against the defendant. The court held that it could, because the "protection of the Fourth Amendment does not extend to searches carried out by private persons." (*People v. Taylor, supra*, 222 Cal.App.3d at p. 619.) See also

People v. Califano (1970) 5 Cal.App.3d 476; *People v. Martin* (1964) 225 Cal.App.2d 91; *People v. Lacey* (1973) 30 Cal.App.3d 170.)

In the present case, no public offense, whether infraction, misdemeanor or felony, was committed in Jansing's presence. A crime is committed in one's presence when the person gains knowledge of it through the use of the senses, together with knowledge already possessed. (*McBride v. United States* (1922) 284 F. 416, 419 ("Where an officer is apprised by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without warrant").) Jansing, as a private citizen, saw nothing that would give him probable cause to believe a crime was being committed. It is only when he used his "extrasensory" powers, that is, his police radio, that he acquired such probable cause. This constituted state action.

In addition, he could not exercise the powers of a private citizen to detain, because a private citizen has no such power. (See 74 Ops.Cal. Atty.Gen. (1991) 37 (no power to issue citation).)

People v. Lacey (1973) 30 Cal.App.3d 170, 174, is not to the contrary. There, a United States Marshal detained and frisked defendant, who was about to board an airplane, after a device known as a magnetometer gave off a signal indicating that the defendant may have been

carrying a weapon. The court held that the initial frisk was justified by the information received from the magnetometer. The further search and arrest for possession of a controlled substance were authorized as an arrest by a private person.

The use of "indicia of office" and the authority of peace officers in the course of an investigation precludes the government in this case from asserting that Jansing's actions were the equivalent of citizens' arrests.

There is authority from other jurisdictions to the effect that a peace officer identified as such to the arrestee cannot act as a mere private citizen because the assertion of purported official authority negates a theory that the officer was acting as a private citizen. (34 A.L.R. 4th 328; 5 Am. Jurisprudence 2d, Arrest, sec. 50; *United States v. Medearis* (2002) 236 F.Supp.2d 977; *Porter v. State* (Fla. 4th Dist. Ct. App. 2000) 765 So.2d 76; *State v. Heredia* (2001) 252 Ga. App. 89, 555 S.E.2d 91 (cert. denied (Mar. 11, 2002)); *People v. Nieto* (N.Y. Sup. Ct. 2002) 746 N.Y.S.2d 371; *Commonwealth v. Anzalone* (1979) 269 Pa. Super. 549, 410 A.2d 838, *Commonwealth v. Novick* (1981) 293 Pa. Super. 241, 438 A.2d 974.)

An arrest by uniformed police working outside their jurisdiction under circumstances which would have justified an arrest by a private citizen was invalidated in *Collins v. State* (Fla. 2d Dist. Ct. App. 1962) 143

So.2d 700, cert. den. (Fla.) 148 So.2d 280, where the circumstances justifying the arrest arose as the result of an investigation by the officers performed under color of their authority as police officers, thus granting them effective powers not available to private citizens.

In that case, the court found that the officers

> [w]ere acting under color of their office. We conclude that Collins admitted them to the motel room by virtue of the force and effect of their official position as police officers. He did not admit them as private citizens. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law. (*Collins v. State, supra,* 143 So.2d at p. 703.)

The California cases that have upheld warrantless arrests by officers made outside their jurisdiction did not involve the assertion of official authority.

For example, in *People v. Monson* (1972) 28 Cal.App.3d 935, 938-940, two Los Angeles police officers followed the defendant, a known burglar, into a fur store where he exchanged items with the owner. The officers spoke with the store owner, determined that one of the items exchanged by the defendant had recently been stolen, and placed

defendant's apartment, which was in Burbank, under surveillance. while they sought a warrant. Two other officers who stayed behind watching the apartment saw defendant putting five rifles in the trunk of a visitor's car, and arrested him for burglary. The court held that there was no search preceding the defendant's arrest, only a conversation with the store owner, which did not intrude on the defendant's privacy and therefore did not present a Fourth Amendment issue. The arrest by the officers in another city was based on Penal Code section 837, giving private citizens the power to arrest a person reasonably believed to have committed a felony.

In *People v. Ball* (1958) 162 Cal.App.2d 465, San Jose police officers were investigating a robbery in their jurisdiction. Having received information that one of the robbers was in defendant's Burbank house, they went there with officers from Burbank. They knocked on the door and asked to come in and look around, and defendant agreed. The officers and defendant eventually went outside, one of the San Jose officers re-entered the house, and found marijuana. (*Id.* at pp. 465-466.) The court found that defendant had consented to the search, and that the arrest by the San Jose officer who had found the marijuana was valid as a citizen's arrest. (*Id.*, at p. 468.)

In *People v. McCarty* (1958) 164 Cal.App.2d 322, 328, an arrest in Los Angeles by a Ventura police officer was valid when the victim of the robbery had identified defendant to the officer a few hours before, because the arrest could have been made by a private citizen. In any event, the arrest produced no evidence that was used against the defendant. (*Id.* at p. 329.)

In *People v. Alvarado* (1962) 208 Cal.App.2d 629,[15] officers outside their jurisdiction approached defendant, asked him if he was a narcotics user, which defendant admitted, and saw fresh needle marks on his arm, whereupon they arrested him and after arrest, searched his room. Relying upon *People v. Rios* (1956) 46 Cal.2d 297, the court found that the arrest could have been made by a private citizen and was therefore lawful. (*People v. Alvarado, supra*, 208 Cal.App.2d at p. 632.)

Here, Jansing clearly acted under color of his office. He used his patrol car to block appellant's car in so that appellant was not free to leave. He used his police radio to obtain information confirming his initial hunch that the registration tag did not belong to the car. He used the power of his uniform and his weapon to compel appellant to answer his questions, and finally, he used his handcuffs to restrain appellant and permit the search. The government cannot claim he was acting as a private citizen.

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[15] Disapproved in part by *People v. Zelinski, supra,* 24 Cal.3d 357.)

Here, there can be no question here that Officer Jansing is a government actor, a person for whom the government is responsible. He was a sworn federal police officer, equipped by the government with a marked car, a police uniform, a weapon, and a badge. (RT 41.)

In fact, it was because he was a police officer that he was able to detect that any offense had been committed at all. A purely private citizen, driving past the car, would not have been able to determine that the registration tag did not match the vehicle. A purely private citizen would not have seen a public offense committed in his presence. All he would have seen was a registration tag that was not completely affixed to the license plate, a commonplace occurrence.

In addition, a private citizen would not have had the right to place handcuffs on appellant and seize his wallet from his pocket. In fact, a private citizen who did that would probably be committing a robbery.

Therefore it cannot be said that Jansing was acting as a private citizen, exercising the arrest powers of a private citizen. He was a police officer, but one acting outside the law.

L. Since Jansing's Detention Could Not Be Characterized as a True Citizen's Arrest Nor as an Arrest Authorized by Section 830.8, subdivision (b), it was an Unlawful Arrest Which Violated the Fourth Amendment to the United States Constitution

Jansing's actions were in excess of the authority granted to him by California because the property where he conducted his detention was not adjacent to federal land.

Although he was not a private citizen, he possessed at most the rights of a private citizen to detain and arrest. (*People v. Califano* (1974) 5 Cal.App.3d 476, 484.) But a private citizen would not have had probable cause to detain or arrest, because no offense was committed in his presence. Therefore, the detention and arrest were without probable cause and unreasonable, and they violated the Fourth Amendment to the United States Constitution. A violation of the Fourth Amendment requires suppression of the evidence.

To permit federal police officers to exercise detention and arrest powers throughout California would be to sanction the creation of a "super-police" force, not answerable to local law enforcement authority, and whose actions could not controlled by the courts. Suppression of the evidence is the sole effective tool to control police abuses. It cannot seriously be

contended that someone such as appellant, in his situation, could reasonably bring a civil rights suit or that such a suit would provide sufficient deterrence.

M. A Seizure Conducted with Probable Cause But in Violation of State Law May Not Produce Admissible Evidence

Appellant respectfully submits that this Court's decision in *People v. McKay* (2002) 27 Cal.4th 601, where a majority of this Court concluded that the United States Supreme Court in *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323, 121 S.Ct. 1536, stood for the proposition that "all that is needed to justify a custodial arrest is a showing of probable cause" (*People v. McKay, supra*, 27 Cal.4th at p. 607), is incorrect.

This Court relied on this sentence from *Atwater*: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*Atwater v. Lago Vista, supra*, at p. 354, 121 S.Ct. at p. 1557.) From that sentence, this Court felt compelled to conclude, "[S]o long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest-even one effected in violation of state arrest procedures-does not violate the Fourth Amendment." (*People v. McKay, supra*, 27 Cal.4th at p. 618.)

Gail Atwater was arrested, handcuffed and jailed for failing to wear her seatbelt, which under Texas law was a misdemeanor, punishable only by a fine. Texas law, however, allowed the warrantless arrest of anyone violating the statute, but permitted the arresting officer to exercise discretion to issue a citation instead. (*Atwater v. Lago Vista, supra,* 532 U.S. at p. 323.)

Ms. Atwater sued the City of Lago Vista pursuant to 18 U.S.C. section 1983. The question presented to the United States Supreme Court was "whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses." (*Atwater v. Lago Vista, supra*, 532 U.S. at p. 326.)

Justice Souter, speaking for a five-to-four majority, held that the Fourth Amendment did not forbid a warrantless custodial arrest for a minor criminal offense. (*Atwater v. Lago Vista, supra*, 532 U.S. at p. 323.)

Justice O'Connor, speaking for herself, Justice Stevens, Justice Ginsburg, and Justice Breyer, dissented, finding the custodial arrest to be constitutionally unreasonable. (*Atwater v. Lago Vista, supra,* 532 U.S. at p. 368.)

Atwater did not hold that a custodial arrest made in violation of state law was permissible under the Fourth Amendment. That question was simply not before the Court. In fact, the majority pointed out that a number of states, including California, limit the powers of their police to make custodial arrests:

> Many jurisdictions, moreover, have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses. See, *e.g.*, Alabama Code sec. 32-1-4 (1999); *Cal. Veh. Code Ann. sec. 40504* (West 2000); Ky. Rev. Stat. Ann. secs. 431.015(1), (2) (Michie 1999); Louisiana Rev. Stat. Ann. sec. 32:391 (West 1989); Md. Transp. Code Ann. sec. 26- 202(a)(2) (1999); S.D. Codified Laws sec. 32-33-2 (1998); Tenn. Code Ann. sec. 40-7-118(b)(1) (1997); Va. Code Ann. sec. 46.2-936 (Supp.2000). (*Atwater v. Lago Vista, supra,* 532 U.S. at p. 352 (emphasis added).)

Even if this Court's reading of *Atwater* in *McKay* is correct, both cases are distinguishable and neither controls the present situation. Here, the question is whether the initial detention of appellant, conducted by a federal officer operating outside of his jurisdiction, in violation of state law, and in excess of his powers as a private citizen, can be considered reasonable. The answer is no.

As Justice Brown stated in *McKay*,

> The high court has historically applied such a reasonableness test-balancing the individual's and the state's interests-notwithstanding the existence of probable cause. In a

somewhat analogous case, the court held that a nighttime entry into a house to arrest a drunk driving suspect was unreasonable even though the officers had both probable cause and a legitimate claim of exigent circumstances. (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 104 S.Ct. 2091.) The court found the intrusion unreasonable solely on the basis of the minor nature of the offense."[T]he penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." (*Welsh*, at p. 754, fn. 14, 104 S.Ct. at p. 2100.) Given this expression of the state's interest, the court ruled a warrantless home arrest could not be sustained simply because the offender's blood-alcohol level might have dissipated while police obtained a warrant. (*Ibid.*) (*People v. McKay, supra*, 27 Cal.4th at p. 637; Brown, J. dissent.)

. . . the "touchstone" of the Fourth Amendment remains " 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 108-109, 98 S.Ct. 330, 332; see also *United States v. Ramirez* (1998) 523 U.S. 65, 71, 118 S.Ct. 992, 996-997.) "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . ' "to safeguard the privacy and security of individuals against arbitrary invasions." ' " (*Delaware v. Prouse* (1979) 440 U.S. 648, 653-654, 99 S.Ct. 1391, 1396 (Prouse), fn. omitted; *Camara v. Municipal Court* (1967) 387 U.S. 523, 528, 87 S.Ct. 1727, 1730.) "[T]he central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials." (*United States v. Ortiz* (1975) 422 U.S. 891, 895, 95 S.Ct. 2585, 2588). (*People v. McKay, supra*, 27 Cal.4th at p. 630; Brown, J. dissent.)

Justice Brown characterized the arrest and search in *McKay* as a "general warrant," and pointed out accurately that,

> General warrants were objectionable precisely because of their indiscriminate character, and the Fourth Amendment was designed to prevent indiscriminate searches and seizures conducted by petty officials with unfettered discretion. The framers sought to preclude "the petty tyranny of unregulated rummagers." (Amsterdam, Perspectives on the Fourth Amendment (1974) 58 Minn. L.Rev. 349, 411.) (*People v. McKay, supra,* 27 Cal.4th at p. 631, Brown, J. dissent.)

The detention and arrest in this case were not reasonable, and therefore violated the Fourth Amendment.

N. The Reasonableness of a Detention Should be Determined with Reference to State Law

The reasonableness of a detention should be determined with reference to state law. *United States v. Mota* (9th Cir. 1993) 982 F.2d 1384 has analyzed this situation correctly.

In *Mota,* defendants were arrested and placed in custody for a minor violation of a municipal code. Under state law, the police were not allowed to place defendants in custody for such offenses. The *Mota* court held that the lawfulness of the arrest had to be considered in light of state law, citing to *Michigan v. DeFillippo* (1979) 443 U.S. 31, 36, 99 S.Ct. 2627, which held that the question whether an officer is authorized to make an arrest depends on state law. (*United States v. Mota, supra*, 982 F.2d at p. 1387.)

The *Mota* court stated,

> [H]ere the government would have us sanction an otherwise unconstitutional search on the basis of an arrest which is illegal as a matter of state law. Precedent forecloses such a holding, however, for it is clear that state law governing arrests is relevant to assessing the constitutionality of a search incident to that arrest. In *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), for example, the Supreme Court reversed a conviction based on evidence seized during a search incident to arrest. The Court held that the search incident to arrest was unlawful since the arresting officers had no authority to arrest under state law. (*United States v. Mota, supra*, 982 F.2d at p. 1387.)

Similarly, in the present case, the government asks this Court to sanction an otherwise unconstitutional arrest, search and seizure on the basis of a detention which is patently illegal as a matter of state law. United States Supreme Court precedent does not allow this. See, *Ker v. California* (1963) 374 U.S. 23, 37, 83 S.Ct. 1623, 1632; *Welsh v. Wisconsin*, *supra,* 466 U.S. 740, 104 S.Ct. 2091; *United States v. Morrison* (2000) 529 U.S. 598, 617-619, 120 S.Ct. 1740, 1753-1755.)

California made a choice, a decision, to only empower certain classes of persons with the power to detain and arrest their fellow citizens:

> The Legislature's declared impetus for enactment of section 4.5 was to specify in one chapter of the code the government employees who can act as peace officers, and in some cases to set forth the powers they may exercise. The statement in section 830 that "notwithstanding any other provision of law, no person other than those designated in this

> chapter is a peace officer," spells out that goal. The provisions which follow, naming some classifications of employees as peace officers, providing that other employees are not peace officers but may exercise some of the functions of such officers under certain circumstances, and denying peace officer status or the right to carry firearms to others, provide a strong indication that the director's designation of custodial employees as peace officers, conflicts with the legislative scheme. (*County of Santa Clara v. Deputy Sheriffs' Assn.* (1992) 3 Cal.4th 873, 880.)

Unless this Court hold that detentions (or arrests) carried out with probable cause but in violation of state law may not produce admissible evidence, the protections afforded California citizens by the Fourth Amendment to the United States Constitution will evaporate. It is not realistic to say that a citizen who has been detained, arrested or searched in violation of state law may have a civil cause of action against the police officer. That is simply (as is clear from this case) not a sufficient deterrent.

These violations of state law render the detention unreasonable under state law, and the Fourth Amendment's mantle protects the state citizens, because an unreasonable detention equals a detention without probable cause.

O. Jansing Did Not Have Probable Cause to Seize the Wallet Before Arresting Appellant

Appellant testified that Jansing seized the wallet before placing him under arrest. This Court should accept appellant's version of the facts over

Jansing's. Appellant's testimony was supported by the 26-second time period between the first and second calls, which did not leave enough time to do all the acts that Jansing said he had done. (See, *Taylor v. Maddox*, *supra,* 366 F.3d 992 (state court's factual findings were unreasonable).)

In addition, Jansing removed the sticker from the license plate before photographing it, so the only evidence to support Jansing's version of the facts was Jansing's testimony (RT 76), and Jansing maintained that appellant's car was parked about 100 yards from federal property (RT 57), but as an examination of the maps submitted by appellant reveals, the distance is far longer than 100 yards.

Just as in *Taylor v. Maddox*, Jansing's answers were replete with "I don't recalls:" He could not recall whether the other cars were occupied, whether appellant had given him papers, whether he had checked the vehicle identification number over the radio, whether he used a key to open the trunk, where the key would have come from, whether he contacted the FBI before opening the trunk, whether he saw any documents. (RT 62; 69; 76-77.) The Ninth Circuit pointed out similar memory lapses in the testimony of the police officer who refuted petitioner's version of the facts. (*Taylor v. Maddox, supra*, 366 F.3d at p. 1004.)

Again, as in *Taylor v. Maddox*, the trial court ignored the tape recording, which clearly showed that only 26 seconds had elapsed between the first and second calls, rendering Jansing's version of the facts impossible. (See *Taylor v. Maddox, supra*, 366 F.3d at p. 1005 (trial and appellate court ignored unrefuted testimony).)

Moreover, unlike the trial judge in *Taylor*, who at least attempted to make factual findings, here the trial court made no statements. (Cf., *Taylor v. Maddox, supra,* 366 F.3d at p. 1004 (trial court "purported to give reasons for disbelieving Taylor's account . . . but his explanation defies rational understanding").)

See also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 340, 123 S.Ct. 1029 ("Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable.")

In short, the trial court had "before it, yet apparently ignore[d], evidence that support[ed]" appellant's version of the facts. (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 346, 123 S.Ct. 1029; *Taylor v. Maddox, supra,* 366 F.3d at p. 1001.)

The trial court's failure to properly weigh the evidence rendered its finding unreasonable and unsupportable. As the *Taylor* court said:

> In making findings, a judge must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings. The process of explaining and reconciling seemingly inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. On occasion, an effort to explain what turns out to be unexplainable will cause the finder of fact to change his mind. By contrast, failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding. (*Taylor v. Maddox, supra,* 366 F.3d at pp.1007-1008.)

Taylor sharply criticized the state courts for acting as if the unrefuted testimony of Taylor's attorney "didn't exist." (*Taylor v. Maddox, supra*, 366 F.3d at p. 1005.) Similarly here, the trial court acted as if the 26-second time period on the tape "didn't exist."

A court may only consider reliable evidence in making its findings. Reliable evidence is "direct and precise, internally consistent and plausible." (*Taylor v. Maddox, supra,* 366 F.3d at p. 1009, citing to *Anderson v. City of Bessemer* (1985) 470 U.S. 564, 575, 105 S.Ct. 1504 and *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 719.)

Jansing's testimony was not direct and precise, or internally consistent or plausible. It should not have been believed.

Since Jansing's testimony was not credible, the trial court should have accepted appellant's version of the facts, which established that

Jansing seized the wallet before checking on the identification offered by appellant. This seizure was without probable cause, since at that point, Jansing did not have information that appellant was not Richard Redd, and he did not have any reason to believe that the wallet contained evidence of a crime. (See *United States v. Woods* (1972) 468 F.2d 1024, 1025 (probable cause must precede seizure); see also *Chimel v. California* (1969) 395 U.S. 752, 763, 89 S.Ct. 2034.)

P. The Search of the Car Could Not Be Justified Under the Inventory-Search Exception

Inventory searches are reasonable under the Fourth Amendment only under certain circumstances. (*Colorado v. Bertine* (1987) 479 U.S. 367, 375-376, 107 S.Ct. 738; *South Dakota v. Opperman* (1976) 428 U.S. 364, 369, 376, 96 S.Ct. 3092; *Cady v. Dombrowski* (1973) 413 U.S. 433, 441-447, 93 S.Ct. 2523; *People v. Williams* (1999) 20 Cal.4th 119, 126 (for inventory search procedure to apply, police must follow standardized procedures); *Mozzetti v. Superior Court of Sacramento County* (1971) 4 Cal.3d 699, 706 (police inventory is a search within meaning of Fourth Amendment).)

Inventories of impounded vehicles are reasonable only when the process is aimed at securing or protecting the car and its contents. (*South*

Dakota v. Opperman, supra, 428 U.S. at p. 373, 96 S.Ct. at p. 3099.) They are unreasonable when used as ruses to conduct investigatory searches. (*Colorado v. Bertine, supra*, 479 U.S. at pp. 371-372, 107 S.Ct. at p. 741.)

The inventory search is only valid if the police initially obtained lawful custody of the vehicle. (*Virgil v. Superior Court of County of Placer* (1968) 268 Cal.App.2d 127; *People v. Nagel* (1971) 17 Cal.App.3d 492; see also *United States v. Rehkop* (8th Cir. 1996) 96 F.3d 301.)

Mere legal custody of the vehicle is insufficient to validate an inventory search. (*Mozzetti v. Superior Court, supra*, 4 Cal.3d at p. 710; *Cooper v. California* (1967) 386 U.S. 58, 61, 87 S.Ct. 788.) There must exist standardized criteria for the inventory. (*Florida v. Wells* (1990) 495 U.S. 1, 5, 110 S.Ct. 1632, 1635 (because there was no policy at all, search of closed container was unlawful).)

In the present case, Jansing testified that the U.S. Park Police had an impound policy, but the impound and search did not take place on federal property. It took place on San Francisco property. Thus, Jansing had to comply with the city's inventory search policy, and the government had the burden of proving that the city had a proper inventory search policy. (*People v. Williams, supra*, 20 Cal.4th at p. 137; *People v. Smith* (2002) 95 Cal.App.4th 283, 300.) This the government failed to do. (*South Dakota v.*

Operman, supra, 428 U.S. at p. 375 (search must be carried out in accordance with standard procedures of local police department); *Colorado v. Bertine, supra,* 479 U.S. at p. 374, n. 6; see also *United States v. Wanless* (9th Cir. 1989) 882 F.2d 1459, 1463 (in order to admit evidence secured through automobile inventory search in federal court, search must be conducted in accordance with standard procedure of state police).)

The inventory search could not be justified under Vehicle Code section 14602.6, which provides that when an officer determines that a person was driving while the driving privilege was suspended or revoked or without ever having been issued a driver's license, the officer may arrest the person and cause the removal and seizure of the vehicle, because here Jansing did not determine that appellant's license had been suspended or revoked, or that he did not have one. In fact, Jansing determined that appellant did in fact have a license.

Q. The Search Could Not Be Justified as Incident to Appellant's Arrest

Under the automobile exception to the warrant requirement, police need not obtain a warrant to search a vehicle after arresting its occupant when they have probable cause to believe that it contains contraband. (*Carroll v. United States* (1925) 267 U.S. 132, 153, 45 S.Ct. 280, 285

(automobile search); *United States v. Ross* (1982) 456 U.S. 798, 823, 102 S.Ct. 2157, 2172 (container in automobile when probable cause exists to search entire vehicle); *California v. Acevedo* (1991) 500 U.S. 565, 579-580, 111 S.Ct. 1982, 1990-1991 (container in automobile may be searched when probable cause exists to search only the container).) However, in this case, Jansing did not testify that he had probable cause to believe the automobile contained contraband. Therefore, the search could not be justified as incident to appellant's arrest.

Brakebill's search of the car cannot be justified as a search incident to arrest because Brakebill's search was tainted by the illegality of Jansing's conduct. (*Wong Sun v. United States* (1963) 371 U.S. 471, 487, 83 S.Ct. 407; *United States v. Ramirez-Sandoval* (9th Cir. 1989) 872 F.2d 1392, 1400.) Though Brakebill testified he would have still searched the vehicle if he had not had Jansing's inventory, he did not explain what his probable cause would have been. He simply said that there might have been more evidence the other officers had missed. (RT 86.)

Nor is Brakebill's search saved by the inevitable discovery exception, because that requires that the government prove by a preponderance of the evidence that the tainted evidence would have been discovered through lawful means. (*Nix v. Williams* (1984) 467 U.S. 431, 444, 104 S.Ct. 2501,

2509.) While Brakebill testified that he was searching for a weapon used in the shooting, a wig, hats, and glasses, he admitted that he already knew what was in the car from the inventory produced by Jansing. (RT 86.) He did not testify that he had independent probable cause to believe these items would be found in appellant's car eight months after the crimes.

R. The Search Could Not Be Justified by Appellant's Parole Condition, Because There was no Evidence Presented to Prove that Either Jansing or Brakebill Knew of the Parole Status

Neither Jansing nor Brakebill testified that they knew of appellant's parole status. A search may not be justified by a parole-search condition if the searching officers are not aware that the property being searched belongs to a person on parole. (*People v. Sanders* (2003) 31 Cal.4th 318, 335-336.)

S. The Illegal Search Tainted the Subsequent Warrant

Brakebill admitted that he had Jansing's report in his possession before he drafted the affidavit in support of the warrant. (RT 88-89.)

It was not reasonably likely that, in the absence of Jansing's information, the warrant affidavit contained sufficient evidence to justify a

search of the car. (*Galena v. Municipal Court* (1965) 237 Cal.App.2d 581 (persons in possession of stolen property will try to dispose of it quickly).)

T. Evidence May Be Excluded Under the Courts' Supervisory Powers When Seized from a Person in Willful Disobedience of the Law

In the present case, Jansing willfully disobeyed the law by detaining and arresting a person while operating outside his jurisdiction. The State of California had not granted Jansing such powers. It had given him authority to arrest on property "adjacent to" his own jurisdiction. It had not granted him letters of marque and reprisal so that he could wander around San Francisco looking for minor crimes to investigate.

Courts may use their supervisory power to exclude evidence taken from persons by "willful disobedience of law." (*McNabb v. United States* (1943) 318 U.S. 332, 345, 63 S.Ct. 608, 615; *Elkins v. United States* (1960) 364 U.S. 206, 223, 80 S.Ct. 1437, 1447; *Rea v. United States* (1956) 350 U.S. 214, 216-217, 76 S.Ct. 292, 293-294; *United States v. Payner* (1980) 447 U.S. 727, 735, 100 S.Ct. 2439, 2446.)

Jansing was not acting in good faith and in fact engaged in flagrant misconduct, and the "purpose and flagrancy" factor weighs in favor of suppression. Indeed, only suppression will serve the deterrence principle

inherent in the exclusionary rule. (*Brown v. Illinois* (1974) 422 U.S. 590, 602-604, 95 S.Ct. 2254; *United States v. Ienco* (7th Cir. 1999) 182 F.3d 517, 526; *United States v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1075 ("courts favor suppression if law enforcement officials . . . flagrantly broke the law in conducting the search").)

Jansing knew full well that the Gas House Cove parking area was not "adjacent to" federal property. As the First District recently held:

> [T]he trial court was correct in concluding that 40 years was enough time for responsible officials of the Oakland Police Department to learn and to educate their officers in the field that the ordinance in question was preempted by state law. That conclusion did not depend on any fine legal parsing or guesswork, but on the plain language of the state Vehicle Code, a body of law with which police officers are expected to be thoroughly conversant. Any possible doubt about the application of that language to the ordinance in question was settled decades ago. (*People v. McNeil* (2002) 96 Cal.App.4th 1302, 1309.)

There is good reason for California to limit the arrest powers of federal officers. California cannot control federal police officers, it cannot train them, it cannot hire them and it cannot fire them. California sought to limit that power through the grant of very limited arrest powers, and Jansing flagrantly violated those arrest powers. This Court should suppress the evidence in order to deter such conduct in the future.

U. Admission of the Evidence Seized from the Automobile was Prejudicial

The standard used to determine whether the erroneous admission of evidence was prejudicial is whether the reviewing court "may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681, 106 S.Ct. 1431, 1436; *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824; *Chambers v. Maroney* (1970) 399 U.S. 42, 52-53, 90 S.Ct. 1975, 1981-1982 (standard applied to admission of evidence obtained in violation of Fourth Amendment).)

The evidence seized from the automobile was overwhelmingly prejudicial, as even the trial judge recognized when he commented during the sentencing (in response to appellant's argument that he had been poorly represented) that, the "[r]ecord should be clear that it's tough to take on witnesses when there's physical evidence that puts the gun that's in your possession to the crimes involved." (RT 3374.)

And of course, it was not just the gun that was seized following appellant's detention. There were numerous other weapons, body armor, and disguises, all of which were paraded before the jury at the trial.

Without the handgun, the other weapons, wigs, etc., appellant's mistaken identification defense would have been viable. The error in denying appellant's motion to suppress the evidence was not harmless beyond a reasonable doubt.

V. Conclusion

Officer Jansing was "neither fish nor fowl, nor good red herring."[16] He was not a duly authorized police officer. He was not a private citizen. His actions were unlawful. The search could not be justified as incident to arrest, as an inventory search, as a parole search, or pursuant to the search warrant.

The trial court erred in denying appellant's motion to suppress the evidence.

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[16] Morris P. Tilley, *A Dictionary of Proverbs and Proverbial Phrases in England in the Sixteenth and Seventeenth Centuries* (Ann Arbor, 1950), p. 319.

II. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION FOR A LINEUP AND THAT ERROR DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS

A. The Procedural Facts

Appellant made his first appearance on March 13, 1995. The public defender was appointed and the arraignment continued to March 27, 1995. (Municipal Court Reporter's Transcript, hereafter MRT 1-2.) On April 7, 1995, the preliminary hearing was set for June 9, 1995. (MRT 6.) On June 9, 1995, the case was assigned to Judge Crandall for preliminary hearing. (MRT 9.) The hearing began that day. Only police officers testified. There was no testimony from percipient witnesses. (MRT 6-173.) The day before, the court had signed an order for a lineup at the prosecutor's request. (Municipal Court Clerk's Transcript, hereafter MCT, p. 132.)

During the preliminary hearing, the prosecutor informed the court that he had sent home a witness after he and defense counsel decided it would be better if she attended a live lineup rather than just see the defendant alone in court, and that they had scheduled a lineup for the 20th of that month. (RT 97.)

At the end of the continued hearing, the prosecutor announced he would not be proceeding on Counts 3 and 4 of the complaint, the robbery of

"Cloth World," explaining that the eyewitness in that case had not been able to identify appellant at the lineup, which had been held on the 20th, and in fact had picked someone else, a much younger person. Even though she had picked out appellant from a photographic lineup, the prosecutor stated that he was not convinced beyond a reasonable doubt that appellant was responsible for that offense, and that it would not be "proper to proceed against him." He added that he had received some information from defense counsel to the effect that they felt appellant was not responsible for that crime. (MRT 175.) Appellant was not held to answer on those counts. (MRT 178.)

More than a year later, on July 19, 1996, the defense filed a motion for a lineup, at which the witness Dean Bugbee, listed as the subject of the robbery and burglary occurring on March 13, 1994, and charged in Counts 1 and 2, would be required to appear. (Superior Court Clerk's Transcript, hereafter "CT," page 121.) The People opposed the motion on the grounds of untimeliness. (CT 134.)[17]

On August 16, 1996, during oral argument on the motion, the defense replied to the prosecutor's argument that the motion was untimely. The defense first pointed out that appellant had not made his first

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[17] Citing *Evans v. Superior Court* (1974) 11 Cal.3d 617.

appearance until a year after the offenses, so "by the time he came to court, the incident was somewhat stale." (Superior Court Reporter's Transcript, hereafter "RT," p. 24.)

About three months later, defense counsel stated, a live lineup was conducted "involving some witnesses from Los Angeles." Counsel stated it was "not practicable" to have conducted a lineup with Bugbee at that time because "discovery . . . came in chunks, as it does in a case of this size where there's in excess of 3,000 pages of discovery." (RT 24.) He said that "as a practical matter the defense could not have sifted through that discovery and made a request on time." Timeliness, counsel argued, was a "relative thing" because the case was old by the time it started its journey through the court system, and "the additional delay to this point doesn't really change things."

The court noted that, not only had time elapsed but the motion was "right on top of the trial," and the proximity to the trial was one factor that the Court mentioned in the *Evans* case. (RT 26.)

Defense counsel concurred in the court's understanding of *Evans*, but reiterated that "I didn't have a good enough grasp of the material at that time to advance a lineup motion on behalf of Mr. Redd himself because I hadn't had time to digest everything." Counsel emphasized that he was asking for a

lineup on only one of the charges. (RT 28.) He pointed out that the tentative identification was the only evidence linking appellant to that offense.

The prosecution refuted the contention that discovery had not been promptly turned over or that there was not additional evidence tying appellant to the offense. (RT 30-31.)

Defense counsel responded that he had not meant to suggest that the prosecution had not provided discovery, but instead, said that his attention had been focused on the capital case, and in any event, he knew that the witness, Mr. Bugbee, was not going to be present at the preliminary hearing. (RT 31.) He admitted that there were opportunities to bring the motion earlier, but that his focus had been directed at the more serious charges. (RT 32.)

The court denied the motion, stating, "based on the guidance given in *Evans*, I will deny the request for a lineup. . . ." The court found that the witness was material, but could not make a finding that there existed a reasonable likelihood of mistaken identification. The court held that there was enough time from the time appellant was taken into custody and the date of the hearing to make the motion, and that the motion was being made within about a month of the trial. (RT 32-33.)

At trial, Bugbee would not be asked to identify appellant in open court. Instead, only an out-of-court identification was introduced into evidence. (RT 955-957.)[18] Dean Bugbee's out-of-court identification would be the only eyewitness testimony presented to support Counts 1 and 2.

B. The Standard of Review

Because the decision whether to grant or deny a lineup motion is within the trial court's discretion, it should be reviewed for an abuse of that discretion. (See *People v. Baines* (1981) 30 Cal.3d 143, 149 (holding that court did not abuse discretion in denying motion).)

Although the term "abuse of discretion" is commonly used, it is one that the courts have struggled to define. This Court defined a trial court's "discretion" in 1887, as "a broad and elastic one [cit.] which we have equated with the sound judgment of the court, to be exercised according to the rules of law." (*Lent v. Tillson* (1887) 72 Cal. 404, 422.) Abuse of discretion has also been defined as "arbitrary determination, capriciousness or 'whimsical thinking.' " (*City of Fresno v. California Highway Com.* (1981) 118 Cal.App.3d 687, 700.)

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[18] This photograph would later be identified as one of appellant. (RT 1158.)

However, "[t]his pejorative boilerplate is misleading since it implies that in every case in which a trial court is reversed for an abuse of discretion its action was utterly irrational. Although irrationality is beyond the legal pale, it does not mark the legal boundaries which fence indiscretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) In the end, "all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195.)

C. The Trial Court Abused its Discretion in Denying the Lineup Motion

The leading California case on the right of the defense to compel the government to conduct a lineup is *Evans v. Superior Court, supra,* 11 Cal.3d 617. In that decision, which rested on the accused's right to due process of law and to receive reciprocal discovery (see *Wardius v. Oregon* (1973) 412 U.S. 470), this Court held that,

> [D]ue process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve. (*Evans v. Superior Court, supra*, 11 Cal.3d at p. 625.)

The questions whether eyewitness identification was a material issue and whether fundamental fairness required a lineup in a particular case were left to the discretion of the trial court. The benefits to the accused were to be weighed against the burden on the government and the witnesses. (*Evans v. Superior Court, supra*, 11 Cal.3d at p. 625.)

In the present case, the court made findings that the identification was material, and the prosecution did not challenge the defense allegations in the motion.

This Court also indicated that the trial court's discretion included:

> the right and responsibility on fairness considerations to deny a motion for a lineup when that motion is not made timely. Such motion should normally be made as soon after arrest or arraignment as practicable. We note that motions which are not made until shortly before trial should, unless good cause is clearly shown, be denied in most instances by reason of such delay. Dilatory or obstructive tactics made under the guise of seeking discovery but which tend to defeat the ends of justice will necessarily be weighed heavily on timeliness grounds against the granting of the motion within discretionary limits. (*Evans v. Superior Court, supra*,11 Cal.3d at p. 626.)

While in the present case, the motion was made long after the arrest, there is no evidence of "[d]ilatory or obstructive tactics." The motion was filed on July 19, though it was not heard until a month later. This was still a month before the trial.

Although the prosecutor objected on grounds of untimeliness, he made no showing that either he, law enforcement, or the witness would be unduly burdened or inconvenienced.

Over 40 years ago, the United States Supreme Court said:

> Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. (*United States v. Wade* (1967) 388 U.S. 218, 234-235, 87 S.Ct. 1926, 1936-1937.)

Although *Wade* spoke to the subject of the right to counsel at a lineup, the same can fairly be said of the right to a compel a lineup.

What appears is that defense counsel, as they readily conceded, were too focused on the capital charges to see that there was an identification issue in the other offenses. In other words, that they were not effectively assisting appellant as to these charges.

Under these circumstances, it was an abuse of discretion to deny the motion purely on untimeliness grounds.

D. Appellant Was Prejudiced by the Denial of the Lineup Motion

Because the right to a lineup involves due process of law, a federal constitutional right (see *Evans v. Superior Court, supra*, 11 Cal.3d at p. 625; U.S. Const., Amend. XIV), prejudice should be tested under the harmless error test of *Chapman v. California, supra,* 386 U.S. at p. 24, ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").)

Even though Bugbee was not a witness to the homicide that formed the basis for the capital charge, he was the sole witness to a similar event, which resulted in charges that were being tried together with the capital case. Furthermore, Bugbee did not identify appellant at trial – the sole evidence was in the form of a prior out-of-court identification, conducted using photographs. If Bugbee had failed to identify appellant at the lineup motion, it is certainly likely that appellant would have been acquitted of Counts 1 and 2, and that would have considerably lessened the evidence against appellant.

E. Conclusion

The refusal to allow the lineup motion was error, and it prejudiced appellant both as to Counts 1 and 2, and as to the capital charge.

* * *

III. APPELLANT DID NOT GIVE COUNSEL PERMISSION TO CONCEDE GUILT ON THE ATTEMPTED MURDERS (COUNTS 3 AND 4) DURING THE OPENING STATEMENT AND THERE WAS NO TACTICAL REASON TO DO SO

A. The Relevant Facts

During the opening statement, while discussing the shooting at the Vons market (which resulted in the attempted murders charged in Counts 3 and 4), defense counsel said that "Mr. Redd is observed walking in front of the Vons store." (RT 930.)

James Shabatkhi, the Vons guard who was actually shot, described the shooter as a male Caucasian, in his mid-30s to 40, six feet to six feet one inch tall, weighing 190-200 pounds. The witness thought the man was wearing a wig (a dark-colored woman's wig, not a toupee), because the hair looked fake. (RT 980.) He wore a dark blue sweater or sweatshirt with a hood and zippered in front, but the hood was not on his head. (RT 976-977.) On his head, he wore a covering which the witness originally described as a beanie or hat, (RT 978), then as a watchcap, black or navy blue. (RT 979.)

Shabakhti testified that while in the hospital recovering from the bullet wound, he was shown some photographs. At trial, he identified photograph number three in Exhibit 10, (a photograph of appellant (RT

1158)) and testified that he told the detective that he was 90 to 95 percent sure that was the shooter. (RT 995.) However, he did not identify appellant in the courtroom, and in fact was not even asked to.

The other guard, Chris Weidman, could not make an identification, either in or out of court (RT 1046-1047.) At trial, Weidman testified that thought the man was wearing some type of dark brown makeup or shoe polish on his face and had a shoulder-length brown wig. (RT 1054-1055.)

The man that Stephan Loya chased was, according to Loya, about 5'10", and weighed 160 to 170 pounds. He appeared to be young, and had a shaved head. (RT 1069-1070.)

Appellant complained to the court that counsel had conceded his guilt, but the court disregarded appellant's statements. (RT 1257-1281.)

During the guilt-phase closing argument, the prosecutor told the jury that he noticed that defense counsel did not admit that it was his client who had committed the crimes, but that counsel had admitted in his opening statement that it was Mr. Redd who was talking to the security guards. (RT 1581-1582 ["he [defense counsel] started off saying that Mr. Redd was . . . talking to the security guards, but then he . . . started calling him this person . . . ."].)

B. The Standard of Review

In order to show that counsel failed to provide constitutionally adequate legal representation, a defendant must show that counsel's performance was "deficient" because the "representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 104 S.Ct. 2052, 2064-2065.) In addition, he must then show prejudice flowing from counsel's actions or omission. (*Strickland v. Washington, supra*, 466 U.S. at pp. 691-692.)

A reviewing court will find prejudice when a defendant demonstrates a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257, citing *Strickland v. Washington, supra*, 466 U.S. at p. 694.)

In addition, a defendant must show that the action or omission "was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make." (*In re Sixto, supra*, 48 Cal.3d at p. 1257; *People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

C. There Could Not Have Been a Tactical Reason to Concede Guilt

A defense counsel's "concession of his client's guilt, when there exists no tactical reason to do so, can constitute ineffectiveness of counsel." (*People v. Gurule, supra*, 28 Cal.4th at p. 611; *People v. Davis* (1957) 48 Cal.2d 241, 257; *People v. Diggs* (1986) 177 Cal.App.3d 958, 970-971.)

In *Gurule*, this Court found that counsel's concession was not unreasonable, because the defendant had admitted participating in the robbery, but claimed that it was the co-defendant that had killed the victim. Thus, Gurule had already confessed to first degree murder on a felony-murder theory and the only question was the identity of the actual killer. (*People v. Gurule, supra*, 28 Cal.4th at pp. 611-612.)

This Court concluded that counsel's candor did not constitute ineffective assistance, as it may have been a tactical decision designed to convince the jury that his client did not deserve the severest penalty. (*People v. Gurule, supra*, 28 Cal.4th at p. 612.)

In the present case, by contrast, the sole question before the jury at the time the opening statement was made was who shot the Vons security guards. The identity of the shooter was what the case was all about. Yet defense counsel conceded that it was his client, "Mr. Redd," who was

standing outside the Vons store. Even though afterwards he referred to "the shooter," the damage had been done.

There could not possibly have been a tactical motive for making this admission, particularly since during the trial, defense counsel contested the identification of appellant as the Vons shooter.

Courts distinguish "between a statement which constitutes a tactical retreat, and one which amounts to a 'surrender of the sword.' " (*Messer v. Kemp* (11th Cir. 1985) 760 F.2d 1080, 1090, fn. 6 (cert. denied, 474 U.S. 1088 (1986)), quoting from *Wiley v. Sowders* (6th Cir. 1981) 647 F.2d 642, 649 (cert. denied, 454 U.S. 1091 (1981))). The latter "is a 'complete concession of the defendant's guilt' which constitutes ineffective assistance of counsel." *Messer v. Kemp, supra,* 760 F.2d at 1090 n. 6 (quoting *Francis v. Spraggins* (11th Cir. 1983) 720 F.2d 1190, 1194 (cert. denied, 470 U.S. 1059 (1985)); see also *Florida v. Nixon* (2004) ___ U.S. ___, 125 S.Ct. 551, 563 (concession of guilt without consultation with client is subject to *Strickland* analysis).)

In this case, counsel's admission that it was "Mr. Redd" who was standing outside the Vons Market was a complete concession of appellant's guilt on Counts 3 and 4, and it was done without consulting with appellant.

D. Appellant Was Prejudiced by Counsel's Concession

It is reasonably probable that a more favorable outcome would have ensued if defense counsel had not conceded that it was appellant who was at the Vons market.

While there was other evidence linking appellant to this crime (a blue hooded sweater and a .380 mm. handgun (RT 1438-1442) were found in appellant's car; appellant matched the sparse description; the automobile used by the man whom Loya chased was later traced to appellant (RT 1153); during a search of appellant's apartment, ammunition was found that matched the type used in the shooting (RT 1166), as well as a blue watch cap, latex gloves, and a wig, light brown, with longish hair (RT 1150)), these pieces of circumstantial evidence narrowed down the universe of suspects. It did not point inexorably to appellant. However, his counsel's concession did.

E. Conclusion

There was no possible tactical reason to concede that appellant was the Vons shooter, and the concession took away all possibility that the jury might find a reasonable doubt.

* * *

IV. THE ADMISSIONS OF THE PRIOR IDENTIFICATIONS CONSTITUTED PREJUDICIAL ERROR

A. The Procedural Facts

Out-of-Court Identification by Dean Bugbee

Dean Bugbee testified that on June 16, 1994, he looked at photographs of suspects at the request of police. (RT 952.) The prosecutor asked him what photograph he identified.

At this point, the defense objected to testimony about an out of court identification, citing Evidence Code section 1238. The objection was immediately overruled. (RT 955:15-16 [corrected].)

The prosecutor then asked Bugbee:

> Q. Would you please tell us who you selected and what you said when you made that selection?
>
> A. Number three. Looks the closest to the – it's hard to read.
>
> Q. I'll read it. Tell me if this is what you said. Did you say number three looks the closest by the shape of his face. If he was to put dark glasses on I would say it was him?
>
> A. Yes.
>
> Q. Why was it that you felt if the person put on dark glasses you could say it was him?

A. Because you couldn't see his eyes.

Q. The person that robbed you had dark glasses on?

A. Yes.

Q. What about this particular photograph, number three, has a beard and moustache. Did you say anything about that?

A. No.

Q. The person who robbed you has a beard and moustache; is that true? I'm sorry, did not have.

A. Yes.

Q. The person in this photograph did have a beard and moustache, true?

A. Yes.

Q. But yet you felt this was the person, number three?

A. And to be accurate what you said was this is the closest to the person who robbed you, true?

A. Yes.

Q. And when you made this identification were you trying to be as accurate as possible in pointing this person out to the police?

A. Yes.

Q. Would you have made this identification if you didn't feel this was the person?

A. No, I wouldn't. (RT 955-957; emphasis added.)

Out-of-Court Identification by James Shabakhti

Security guard Shabakhti testified that while he was in the hospital, a detective named Mike Harper from the Orange police interviewed him and showed him photographs of suspects. (RT 992.) One of the persons looked "just pretty much like who the individual was." (RT 994.) The witness was shown Exhibit 14, a photocopy of the photographic lineup and Exhibit 10, the actual photographs he was shown. (RT 995.) Shabakhti testified that he told Detective Harper that he could not be one hundred percent sure, but he would say it was number three. (RT 995.) He told the detective that the eyes were the same, but that the shooter did not have a beard. He told the detective that he was 90 to 95 percent sure that is was photo number three. (RT 995.)

Defense counsel did not reiterate his previous objection.

Testimony of Michael Harper

Harper testified that he prepared a photo lineup, which was marked at the trial as Exhibit 10. (RT 1157.) The only photo available of appellant,

which was number 3 in the photo lineup, had a beard and mustache. (RT 1158.)

Out-of-Court Identification by Brenda Rambo

Brenda Rambo testified that on July 21, 1994, she was shown a photographic line-up by police. (RT 1216.) She circled, dated and put her initials on the picture of the individual she selected, telling the officer that although the robber did not have a beard and mustache, he appeared very similar to the person in the selected photograph (RT 1216-1218.)

The prosecutor showed her Exhibit 99, a photographic lineup admonition, which she said she had read at the time and understood. (RT 1213.) She was shown Exhibits 100 and 101, and she identified photograph number 2 in Exhibit 100 as a photograph she had circled and dated, indicating that this was the person who was similar to the man who had robbed her and shot Timothy McVeigh. (RT 1216-1218.)

On cross-examination, Rambo reiterated that the photograph she picked out was the person who looked the most like the robber. (RT 1238.)

Testimony of Jerry Brakebill

Detective Jerry Brakebill testified that he spoke with Rambo on several occasions, one of them being July 21, 1994. (RT 1471.) She

described the robber as wearing a hooded purple sweatshirt, being an older man with wrinkles around his eyes, wearing glasses, a baseball cap, and a shoulder-length wig. (RT 1473.) Brakebill was not asked about the identification of the photograph.

Admission of Exhibit 100

Exhibit 100, the photographic line-up, was admitted into evidence without objection. (RT 1548.)

B. The Standard of Review is Whether The Sufficiency of the Out-of-Court Identification Was Sufficiently Substantial to Support the Conviction and Whether the Trial Court Abused its Discretion in Admitting the Evidence

The "sufficiency of an out-of-court identification to support a conviction should be determined under the substantial evidence test of *People v. Johnson* (1980) 26 Cal.3d 557, 578 that is used to determine the sufficiency of other forms of evidence to support a conviction." (*People v. Cuevas* (1995) 12 Cal.4th 252, 257.)

A reviewing court applies the abuse-of-discretion standard to any ruling by a trial court on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

C. The Admission of Out-of-Court Identifications, Even When the Declarant Testifies, Violates the Sixth Amendment to the United States Constitution

Any out-of-court statement admitted for its truth is hearsay, even though the witness who said it testifies in court. (Evid. Code sec. 1200, subd. (a).) Absent an exception, hearsay evidence is inadmissible. (Evid. Code sec. 1200, subd. (b).)

Under *Crawford v. Washington* (2004) ___ U.S. ___, 124 S.Ct. 1354, 158 L.Ed.2d 177, in order for hearsay evidence to be admissible, two requirements must be met: (1) the witness whose hearsay statement is sought to be introduced must be unavailable; and (2) the witness must at some time have been subject to cross-examination.

In the present case, the admission of the identification violated the first prong of *Crawford*: the witnesses were not unavailable, and therefore there was no need to introduce hearsay.

While the *Crawford* majority did say in dictum that when the declarant appears for cross-examination at trial, the Confrontation Clause "places no constraints at all on the use of his prior testimonial statements," (citing to *California v. Green* (1970) 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489), appellant respectfully submits that when the high court

actually re-visits *Green*, it will come to a different conclusion, because the witness was not available for cross-examination regarding the out-of-court statement. (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1369.)

Over 40 years ago, the high court warned that when there exists a suspect pretrial identification which "the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." (*United States v. Wade*, *supra,* 388 U.S. at p. 234.)

Thus, the admission of the hearsay out-of-court identification violated the Sixth Amendment to the United States Constitution.

D. Because the Government Did Not Comply with Evidence Code section 1238, the Testimony was Inadmissible

Evidence Code section 1238 purports to create an exception to the hearsay rule for out-of-court identifications:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:
>
> *(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;*

(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time. (Emphasis added.)

People v. Rodrigues (1994) 8 Cal.4th 1060, 1117-1118 found the admission of an out-of-court identification of a co-assailant[19] erroneous. There,

> The prosecutor asked Detective Williams on direct examination whether Vargas had positively identified Garcia at a preliminary hearing. Defense counsel objected on hearsay grounds. After the prosecutor asserted it was "a prior identification," the trial court overruled the objection. The detective then testified that Vargas did identify Garcia in court.

On appeal, Rodrigues argued that there had been no evidence, from Vargas or any other witness, that the occurrence was fresh in her mind at the time of her statement, and that Vargas had not previously testified that she made an identification of Garcia at the preliminary hearing.

This Court agreed that the identification had been erroneously admitted, but found the error harmless:

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[19] The witness' prior identification of the co-assailant served to show that she had consistently identified him, thereby making more credible her allegedly less certain identification of defendant. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1117.)

> Even if the foundational requirements for a prior identification were not all satisfied, the admission of the challenged evidence could not possibly have prejudiced defendant. First of all, the evidence was essentially cumulative of other evidence in the record demonstrating Vargas's recognition of Garcia. Vargas testified both on direct and redirect examination that, although she did not initially identify Garcia at his live lineup because she was afraid for herself and her child, she nonetheless recognized Garcia as one of the men she saw. Vargas was also able to recognize and identify Garcia from a photograph at the time of trial.
>
> More significantly, Vargas's recognition and identifications of defendant were not, as defendant suggests, uncertain. At trial, Vargas explained that although she recognized defendant as one of the fleeing men when initially shown his photo in 1987, she chose not to identify him at that time because she was afraid. However, Vargas overcame her fear and stepped forward to identify defendant both at his preliminary hearing and at a subsequent photographic lineup. She also identified him at trial. Since Vargas's testimony was both consistent and unwavering in this regard, it is not reasonably probable that the admission of Vargas's identification of Garcia at his preliminary hearing affected the verdict. [fn.om.] (*People v. Watson* (1956) 46 Cal.2d 818, 836.) (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 117-118.)

In *People v. Boyd* (1990) 222 Cal.App.3d 541 at 567, the witness testified that at the time of the lineup, the events of the crime were somewhat fresh in his mind and that when he made the identification, he was 75-80 percent certain of it. The appellate court held that the prior identification testimony was admissible.

People v. Mayfield (1972) 23 Cal.App.3d 236, 241 found that the testimony of one officer regarding a prior identification of defendant made by another officer who was now dead "was not admissible as an exception to the hearsay rule because the declarant [the deceased officer], was not present to testify, and at the preliminary hearing he did not testify that he made a photographic identification and, a fortiori, did not testify that such identification was a true reflection of his opinion at that time."

The *Mayfield* court found that the error did not require a reversal of the judgment because the transcript of the preliminary examination, which was properly admitted, "left no doubt that Martinez identified defendant as the person from whom he made two purchases of contraband, and the identification was independent from the objectionable hearsay photographic identification." (*People v. Mayfield, supra,* 23 Cal.App.3d at p. 241.)

In the present case, the out-of-court identification was the *sole* identification made by each witness.

None of the witnesses testified, prior to the introduction of the out-of-court identifications, that he or she "*made the identification and that it was a true reflection of his [her] opinion at that time.*" (Evid. Code sec. 1238; emphasis added.)

Thus, to the extent that Evidence Code section 1238 is constitutional after *Crawford*, the statute was not strictly followed, and the evidence was therefore inadmissible.

E. The Objection to the Admission of the Evidence Was Preserved and any Other Objection Would Have Been Fruitless

When the government introduced the first out-of-court identification, defense counsel objected, citing to the correct Evidence Code provision. Without so much as asking the prosecutor to respond, the trial court immediately overruled the objection.

Any other objection would have been futile. The trial court made it clear that it was not interested in hearing any objections to this type of evidence. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.)

In addition, the objection under the statute adequately preserved the constitutional objection, since counsel had alerted the court and opposing counsel to the fact that all the objections incorporated the federal and state constitutions.[20]

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[20] The defense filed a motion to have all objections, motions, etc. be treated as resting upon federal as well as state grounds. (CT 624-626.) The prosecution did not object.

In any event, to the extent defense counsel failed to object under the Sixth Amendment or *Crawford v. Washington*, the failure should be excused. The law in effect at the time would have required the trial court to overrule such an objection. (*People v. Kitchens* (1956) 46 Cal.2d 260, 263.)

Additionally, this Court may exercise its discretion to review an issue despite counsel's failure to raise it. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

F. The Admission of the Out-of-Court Identifications Prejudiced Appellant

The admission of the hearsay statements violated appellant's rights to confront witnesses and to due process of law. (See *People v. Ortiz* (1995) 38 Cal.App.4th 377 at p. 397, fn. 26; *Bruton v. United States* (1968) 391 U.S. 123; U.S. Const., Amendment VI; U.S. Const., Amendment XIV.) The error is thus of federal constitutional magnitude and is tested under the harmless-error rule. (See *People v. Rodrigues, supra*, 8 Cal.4th at p.1119, citing to *Chapman v. California, supra,* 386 U.S. at p. 24.)

Because the out-of-court identifications were the sole direct evidence of appellant's identity as the robber, the error was not harmless beyond a reasonable doubt.

Even under a lesser standard, it is reasonably probable that the admission of the out-of-court identifications affected the verdict. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

G. Conclusion

The admission of the out-of-court identifications constituted prejudicial error requiring reversal.

* * *

V. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT EVIDENCE AT THE GUILT PHASE

A. Introduction

The trial court permitted the prosecutor to introduce victim-impact evidence at the guilt phase of appellant's trial, which constituted prejudicial error under the state and federal constitutions.

B. The Procedural Facts

During the guilt phase, the prosecutor elicited testimony from James Shabakhti to the effect that Shabakhti suffered lasting health problems as a result of the shooting. The defense objected, but the objection was overruled. (RT 991.) The defense later elaborated on its objection in its motion for a new trial. (CT 1025.)

C. The Testimony Elicited from James Shabakhti Amounted to Victim Impact Evidence, Which Is Inadmissible at the Guilt Phase

The admission of victim impact evidence at the guilt phase denies a defendant a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 17 and 24 of the California Constitution. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2, 111 S.Ct. 2597 (evidence and argument relating to

victim and impact of the victim's death on the family admissible at capital *sentencing* hearing).)

In the present case, the evidence of Shabakhti's impairment was admitted at the guilt phase of the trial. It was not relevant to anything at issue during the guilt phase. Even though a great bodily injury allegation was charged (CT 266-269), there had already been ample evidence presented of the injuries suffered by Shabakhti. (RT 988.)

In *People v. Taylor* (2001) 26 Cal.4th 1155, 1172 this Court held that victim impact evidence admissible at the penalty phase is limited to evidence directly related to the capital offense. (See also, *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) *Taylor* does not authorize victim impact evidence concerning any crime other than the capital murder itself, unless the other crime is directly related to the capital crime.

In the present case, the shooting of James Shabakhti was not related in any way to the killing of Timothy McVeigh.

D. Appellant Was Prejudiced

Evidence of guilt was not "overwhelming," as in *People v. Taylor, supra*, 26 Cal.4th at p. 1171, and the error in admitting this evidence prejudiced appellant, both as to the attempted murder counts, and as to the

capital charge because of the "spillover" effect. (See *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 771-772.)

* * *

VI. THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING THE GOVERNMENT'S REQUEST TO INSTRUCT ON LESSER INCLUDED OFFENSE WITHIN FIRST DEGREE FELONY-MURDER

A. Introduction

The court's refusal to instruct on the lesser included offenses of second degree murder and manslaughter constituted prejudicial error.

B. The Procedural Facts

The prosecution requested that lesser included instructions of second degree murder and voluntary manslaughter be given as to Count 7 (the murder charge) in the event that the jury did not find that a robbery or a burglary took place, or that it found that the robbery was incidental to the murder. (RT 1517-1518; 1520.)

The defense did not specifically request instructions as to lesser included offenses, but did not object to such instructions, instead deferring to the court. (RT 1518.) In support of his request, the prosecutor stated that he wanted to be as cautious as possible, and he was "very reluctant to take out the instructions." (RT 1519.)

The judge refused to give the instructions, ruling that

> That is that I will not give instructions as to count seven on any lesser includeds. And I'm going to restrict the jury

> instructions on the felony murder application, and that's based on my assessment of the evidence that's been presented up to this particular point. (RT 1522.)

C. The Standard of Review

"An appellate court applies the independent or *de novo* standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense. Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." (*People v. Waidla*, *supra,* 22 Cal.4th at p. 733.)

D. The Trial Court Had a Duty to Instruct on Lesser Included Offenses Even Over Defense Objection, and Failed to Carry Out that Duty

The court must instruct *sua sponte* on lesser included offenses when there exists "evidence from which a rational trier of fact could find beyond a reasonable doubt" that the defendant committed the lesser offense. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081; *People v. Avena* (1996) 13 Cal.4th 394, 424.)

While speculation is insufficient to require the giving of an instruction on a lesser included offense (*People v. Wilson* (1992) 3 Cal.4th

926, 941), and a lesser-included instruction need not be given when there is no evidence that the offense is less than that charged (*People v. Barton* (1995) 12 Cal.4th 186, 195), here the prosecutor himself thought that the jury could conclude that a robbery or a burglary had not taken place, or that the robbery was incidental to the murder. (RT 1517-1518; 1520.) This was not speculation – it was the opinion of the man prosecuting the case. (Cf., *People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

The only evidence of the robbery was the testimony of Brenda Rambo. The prosecutor was in a good position to determine whether she was a completely credible witness. It was not speculation for him to opine that the jury might believe that a robbery had not taken place or that if it had, it was incidental to the murder.

E. The Error Prejudiced Appellant

This Court has held that the failure to instruct *sua sponte* on a lesser included offense in a *noncapital* case is state law error and not subject to reversal unless an examination of the entire record establishes a reasonable possibility that the error affected the outcome. (*People v. Breverman* (1998) 19 Cal.4th 142, 146; Cal. Const., art. VI, sec. 3.)

Appellant urges that this Court test the failure to instruct *upon request* in a *capital* case under the harmless error test of *Chapman v. California*, *supra,* 386 U.S. at p. 24, or alternatively that it find the error affected the outcome even under the *Watson* test. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 621 and fn. 3; *Beck v. Alabama* (1980) 447 U.S. 625, 100 S.Ct. 2382; *Schad v. Arizona* (1991) 501 U.S. 624, 647, 111 S.Ct. 2491, 2505.)

F. Conclusion

It was error to refuse to instruct on lesser included offenses, and the error requires reversal.

* * *

VII. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENSE COUNSEL

A. Introduction

The defense made three requests for instructions: (1) an objection to "double-counting" of the special circumstances of robbery and burglary which were based on the single entry into the store; (2) an instruction that would have informed the jury that it could consider the prior felony convictions only under factor (c); (3) an instruction that a single mitigating factor was sufficient; and (4) an instruction that an accidental killing could be considered in mitigation. The court refused to give any of the instructions as requested.

B. The Procedural Facts

Although conceding that the law at the time was against the defense position, defense counsel objected to the "double counting" of the special circumstances of robbery and burglary on the grounds that it violated appellant's due process rights. (RT 1837.) The prosecution objected to the instruction. (RT 1788.)

The defense also submitted a special instruction, which was denied, that would have informed the jury that it could consider the prior felony convictions only under factor (c) but not under factors (a) or (b). (CT 984.)

The court refused to instruct that a single mitigating factor was sufficient, instead instructing that it had to be "in relation to the aggravating factors." (CT 993.)

The court refused the defense's special instruction that an unintentional or accidental killing could be considered a mitigating factor. (CT 997.)

C. The Standard of Review

An appellate court conducts independent review of issues pertaining to jury instructions. (*People v. Waidla, supra,* 22 Cal.4th at pp. 733, 737.)

D. A Court's Refusal to Instruct Violates the Federal Constitution

The federal constitution guarantees criminal defendants a right to present a defense, and therefore a right to a requested instruction on the defense theory of the case, under the Sixth Amendment rights to trial by jury and compulsory process, and the Fourteenth Amendment right to due process. (*Mathews v. United States* (1988) 485 U.S. 58, 63, 100 S.Ct. 883 ("As a general proposition a defendant is entitled to an instruction as to any

recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor").)

Refusal to give an instruction on the defense theory infringes the defendant's Sixth Amendment and Fourteenth Amendment guarantees because it prevents the jury from considering defense evidence and from making findings of fact necessary to establish guilt. (See e.g., *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1198.)

E. The Court's Refusal to Instruct that the Robbery and the Burglary Constituted a Single Special Circumstance Violated Appellant's Rights under the Constitutions

While this Court has rejected the contention that multiple special circumstances that arise from a single act improperly and artificially inflate the factors in aggravation (see *People v. Pollock* (2004) 32 Cal.4th 1153, 1195-1196), appellant respectfully submits that this Court should reconsider its prior rulings.

Under recent United States Supreme Court decisions interpreting the Eighth Amendment prohibition against cruel and unusual punishments, the capital decision-making process involves two separate components: the eligibility decision and the selection decision. (*Tuilepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 2634.) To be eligible for the death

penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. (*Coker v. Georgia* (1977) 433 U.S. 584, 97 S.Ct. 2861.) Thus, in a homicide case, the trier of fact must convict the defendant of murder and find at least one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase in order to render the defendant eligible for the death penalty. (*Tuilepa v. California, supra*, 512 U.S. at p. 972; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244-246, 108 S.Ct. 546, 554-556; *Zant v. Stephens* (1983) 462 U.S. 862, 878, 103 S.Ct. 2733, 2743.) The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor, or in both. (*Lowenfield v. Phelps, supra*, 484 U.S. at pp. 244-246.)

The aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. (*Tuilepa v. California, supra*, 512 U.S. at p. 972; see *Arave v. Creech* (1993) 507 U.S. 463, 474, 113 S.Ct. 1534, 1542 ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm").) Second, the aggravating circumstance may not be unconstitutionally vague. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428, 100 S.Ct. 1759; see *Arave v. Creech,*

supra, 507 U.S., at p. 471 (court "'must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer'"), quoting *Walton v. Arizona* (1990) 497 U.S. 639, 654, 110 S.Ct. 3047, 3057.)

The Supreme Court has imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens, supra*, 462 U.S. at p. 879.)

"The eligibility decision fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death.'" (*Tuilepa v. California, supra*, 512 U.S. at p. 973, citing *Arave v. Creech, supra*, 508 U.S. at p. 471.) The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability. (*Ibid.*) Although the constitution permits some variance in the procedures by which these questions are addressed, the

states must "ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." (*Ibid.*; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 189, 96 S.Ct. 2909, 2932.)

Because the objectives of these two inquiries are often "in some tension," (*ibid.*) California and most other states have divided the two decision-making processes into separate guilt and penalty phases. (Pen. Code sec. 190.3.) During the penalty phase, most states prohibit the imposition of the death penalty unless the jury finds at least one aggravating factor to be present. (*Stringer v. Black* (1992) 503 U.S. 222, 229-230, 112 S.Ct. 1130, 1135-1136.)

In some states, such as Georgia, the jury considers the aggravating factor or factors along with all other circumstances of the case, but the factors have no specific function in the penalty decision. (*Ibid.*) By contrast, in California and other "weighing" states, the jury is required to weigh aggravating factors against mitigating factors, and the death penalty may only be imposed if "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; *Stringer v. Black, supra*, 503 U.S. at p. 230; *Clemons v. Mississippi* (1990) 494 U.S. 738, 745, 110 S.Ct. 1441, 1446; see also *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-475.)

Stringer v. Black, supra, 503 U.S. at p. 232 held that "the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor." Relying on that case, the Tenth Circuit held that when one aggravating factor "necessarily subsumes" another,

> [S]uch double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." (*United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111.)

The Fourth Circuit followed *McCullah* in *United States v. Tipton* (4th Cir. 1996) 90 F.3d 861, 899 (a submission of multiple overlapping aggravating factors "that permits and results in cumulative findings of more than one of the circumstances as an aggravating factor is constitutional error"), as did the Fifth Circuit in *United States v. Jones* (5th Cir. 1998) 132 F.3d 232, 251.

In this case, the robbery-murder special circumstance necessarily subsumed the factor of the burglary-murder special circumstance. Consequently, under *McCullah*, *Tipton* and *Jones*, the trial court's refusal to give appellant's requested instruction created the risk that appellant's death sentence was arbitrarily and unconstitutionally imposed.

Under the instructions as given, the jury could, using "common sense," consider the circumstances of the robbery and the burglary twice for

the same aggravating purpose, thus creating an unacceptable risk of an unreliable sentence and improperly skewing the penalty determination towards a finding of death in violation of the constitutional requirement of a heightened reliability in capital proceedings. (*Monge v. California* (1998) 524 U.S. 721, 733, 118 S.Ct. 2246.)

F. The Court's Refusal to Instruct that a Single Mitigating Factor was Sufficient Constituted Error

In the recent case of *Smith v. Texas* (2004) ___ U.S. ___, 124 S.Ct. 400, the high court held that an instruction that informed the jury it could consider a mitigating factor only if found aggravating factors not true failed to adequately allow jurors to give effect to relevant mitigating evidence proffered by the defendant, affirming its earlier ruling in *Penry v. Johnson* (2001) 532 U.S. 782, 797, 121 S.Ct. 1910.

Similarly here, the court's instruction that the jury could only consider a single mitigating factor "in relation to the aggravating factors," precluded the jury from being able to give whatever effect it wanted to the mitigating factor.

The denial of appellant's proposed instructions regarding mitigation violated appellant's Sixth, Eighth, and Fourteenth Amendment rights, and their California counterparts. (Cal. Const., art. I, secs. 15, 16, and 17; *Penry*

v. Lynaugh (1989) 492 U.S. 302, 319, 109 S.Ct. 2934 (overruled on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304, 122 S.Ct. 2242); *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399, 107 S.Ct. 1821; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, 102 S.Ct. 869; *Lockett v. Ohio* (1978) 438 U.S. 586, 98 S.Ct. 2954.)

The court's refusal to give this instruction was error. The instruction was non-argumentative and not cumulative with respect to the instructions on mitigation provided to the jury. Moreover, the instruction would have clarified for the jury the nature of the process of moral weighing in which they were to engage. It clarified the concepts set forth more generally and less clearly given in this case. Most importantly, it made explicit the fact that any single factor in mitigation could provide a sufficient reason for imposing a sentence of less than death.

"The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540 (reversed on other grounds in *California v. Brown* (1987) 479 U.S. 538, 107 S.Ct. 837).) The jury must be given that freedom, because the penalty determination is a "moral assessment of [the] facts as they reflect on whether defendant should be put to death." (*People v. Easley* (1983) 34 Cal.3d 858,

889; *People v. Haskett* (1982) 30 Cal.3d 841, 863.) Since that assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the circumstances." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035.)

People v. Sanders (1995) 11 Cal.4th 475, 557, noted with approval an instruction that

> [E]xpressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that a single factor could outweigh all other factors.'" (*People v. Sanders, supra*, 11 Cal.4th at p. 557, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 845.)

This Court stated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process . . . ." (*People v. Sanders, supra*, 11 Cal.4th at p. 557; see also *People v. Anderson* (2001) 25 Cal.4th 543, 599-600 (approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death).) Here, the trial court should have instructed the jury that any one of the mitigating factors could be deemed sufficient to justify a life sentence without reference to the

aggravating factors. Without this guidance, it is likely that one or more jurors did not realize that a single mitigating factor could outweigh all the aggravating evidence. The failure to give the defense instruction violated appellant's Sixth, Eighth and Fourteenth Amendment rights to liberty, an individualized and reliable determination of penalty, a fair trial and heightened capital case due process.

G. The Court's Refusal to Instruct that an Accidental Killing Could be Considered in Mitigation was Error

Smith v. Texas reiterated the prior holding of *Tennard v. Dretke* (2004) 542 U.S. ___, 124 S.Ct. 2562, that a jury must be allowed to consider any evidence that could logically prove or disprove some fact which a fact-finder could reasonably deem to have mitigating value. (*Tennard v. Dretke, supra*, 124 S.Ct. at p. 2570, citing to *McKoy v. North Carolina* (1990) 494 US. 433, 440, 110 S.Ct. 1227.)

Similarly here, a jury could well have considered that the fact the killing was accidental had some mitigating value, but it was precluded from considering this evidence because of the court's refusal to instruct. This was error.

H. The Errors Were Not Harmless Beyond a Reasonable Doubt

When a refusal to instruct involves federal due process concerns, the error is prejudicial unless it can be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at pp. 24-26.)

Further, the state law prejudice standard for errors affecting the penalty phase of a capital trial is the "same in substance and effect" as the federal test for reversible error under *Chapman v. California, supra*, 386 U.S. at p. 24. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) In practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that contributed to the death verdict (*Chapman v. California, supra*, 386 U.S. at p. 24), the trial court's failure to give the instructions set forth above requires reversal of the death sentence.

I. Conclusion

The instructional errors require reversal of the penalty phase of the trial.

* * *

VIII. THE PROSECUTOR COMMITTED NUMEROUS ACTS OF MISCONDUCT DURING THE GUILT AND PENALTY PHASES WHICH DENIED APPELLANT A FAIR TRIAL

A. The Procedural Facts

Guilt Phase Closing Argument

In the prosecutor's initial closing argument he told the jury that although he was not being critical of defense counsel he was "going to hit them hard," because they knew they were "big boys" and he expected them to hit him hard, but there were no "hard feelings" and after the case was over "we shake hands and go on to our next cases." (RT 1570.)

Referring to the defense's opening statement, the prosecutor said he was curious to see "what was their defense." (RT 1580.) He told the jury that he noticed that defense counsel did not admit that it was his client who had committed the crimes. (RT 1581.) He pointed out, however, that defense counsel had admitted that it was Mr. Redd who was talking to the security guards. (RT 1582.)

Defense counsel objected that the argument was "not a comment on the facts or the law." (RT 1583.) The objection was overruled. (RT 1583.)

The prosecutor told the jury that the defense attorneys were speculating that McVeigh did not see the gun or that he cut his hand on the

hammer because it helped their client. Defense counsel objected again, "on grounds of misconduct. He's addressing attorney's conduct and not the facts or the law." The court stated, "I'll note the objection. I'll overrule it at this point in time." (RT 1583-1584.) The prosecutor answered that he was concerned that the jury would go back to deliberate and someone will say that McVeigh did not see the gun. He advised the jury to "consider the source." (RT 1584; 1585-1586.)

Later, while discussing the witnesses' testimony, he again commented, "I don't know what the defense is. . . ." (RT 1590.)

The prosecutor referred to Joseph Loya as "a nice young man who did something very important in this case." He chose to get involved, and "deserves our thanks." (RT 1598-1599.) Referring to Loya and to other witnesses, he said, "These are the kinds of people we presented to you as witnesses. This is the kind of young man that you saw here who was willing to put himself out to do what he felt is right. That is the nature and quality of these witnesses." (RT 1959.)

When referring to defense counsel's cross-examination of Officer King, the prosecutor characterized it as "patronizing." Counsel's objection was overruled. (RT 1600.) In response, the prosecutor offered to withdraw the word, but added, "call it what you like." Then he praised the officer as

someone "willing to sacrifice" who "believes in what she does." (RT 1600-1601.)

The prosecutor accused the defense of trying to establish that McVeigh "got what he deserved" for interfering. The objection from defense counsel was overruled. (RT 1603-1604.)

At that point, defense counsel requested a sidebar conference, and argued that the prosecutor had overstepped his bounds when he attributed comments to the defense. The argument was inflammatory, and counsel requested that the objections be sustained. The court said that "counsel's concerns are well taken so if we [sic] can refrain from doing that." However, the court refused to admonish the jury "at this stage" but would consider doing it at conclusion of all the arguments. (RT 1605.)

The judge then told the jury that counsel disagreed about the latitude of argument, and what counsel say is not evidence, and the jury would be asked to decide the case on the merits. (RT 1605.) To the extent that counsel "get just a tad to the line" the jury was asked not to consider it. The conduct and thoughts of counsel was not something for the jury to look at, the jury was told by the judge. (RT 1606.)

While initially admitting that defense counsel's point was well taken, and claiming that he was not criticizing the defense, the prosecutor returned

to the earlier argument, repeating that the question to the store manager about company policy was designed to lead the jury to believe that McVeigh did something wrong. "That is ludicrous," the prosecutor stated. (RT 1606.) He repeated that defense attorneys are not bad people, the prosecutor continued. He was not criticizing them. (RT 1607.)

When referring to Park Police Officer Jansing, the prosecutor said he had "brought him down from San Francisco" so that the jury could see "the quality of him." (RT 1608.) Again returning to Loya, he reiterated, "a guy like him and guy like Mr. Loya are to be given credit." (RT 1608.)

He said, "Fortunately for us and for law enforcement there are people like Mr. Jansing who are willing to do their jobs properly . . . ." There was no objection. (RT 1608.)

The prosecutor then asked the jury to look at the trigger pull on the weapon that they would be given to take into the jury room. He asked them to "put the safety on" and they would see that "it's impossible to get that gun to fire." (RT 1609.)

The jurors were later instructed that they "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 1690.)

The prosecutor reiterated that he was going to listen to see if the defense conceded that appellant had committed the crimes and what the defense was. (RT 1612; 1627.) He was going to listen to see whether the defense would announce whether appellant was guilty of special circumstance murder. (RT 1628.)

The Court's Admonition

The court told the jury that counsel's arguments were not evidence. The jury was bound by its oath to follow the law as the judge gave it to them. The jurors were asked by the court not to speculate as to the attorneys' thought processes, and not to speculate about objections. The burden of proof, the court told the jury, was on the People. The defendant has no burden of proof. (RT 1630.)

During the final closing, the prosecutor said that "waiting and waiting and waiting to hear what the defense was . . . ." (RT 1662.) He expressed concern that one of the jurors "just doesn't get it" but he knew that "most of you have common sense." He reiterated that he lay awake at night worried that "you people will not get it." (RT 1665.)

The prosecutor accused defense counsel of "creating his own" reasonable doubt chart and told the jury that the court would not give the jury such a chart. The defense objection was overruled. (RT 1666.)

The prosecutor said that perhaps he had his priorities mixed up and the jury actually though that appellant was "a nice guy." (RT 1677.) Another objection was overruled. (RT 1677.)

The prosecutor told the jury that "if you cannot reach a decision on this, we are in sad shape." (RT 1684.) He again thanked Loya and Jansing. (RT 1685.)

Penalty Phase Cross-Examination of Experts

During the cross-examination of defense expert Norman Morein in the penalty phase, the prosecutor repeatedly asked about a nonviolent prior escape attempt on the part of appellant.

At one point, during a sidebar conference, the judge stated:

> I am concerned that at this stage in the proceedings that the last couple of questions could be misconstrued by the jury as to this person's future dangerousness is what I'm concerned about. (RT 2651.)

The court further warned the prosecutor:

> [N]ow it appears to me that we might go into an area that both sides are precluded from getting into in terms of having the jury start to speculate about is this defendant a danger in the future . . . . (RT 2652.)

After this warning, the prosecutor then asked:

> Q. And would you not agree with me that you need to look at a person's past *in order to determine what type of risk they might be in the future?*
>
> A. That's true. (RT 2683; emphasis added.)

During cross-examination of expert witness Mandell, the prosecutor started to argue with the witness, and the court said he had been doing well, "let's keep going." (RT 2885.)

The defense objected that the questions were argumentative. The prosecutor objected to defense counsel's objections, which had been sustained. (RT 2887.)

At sidebar, defense counsel expressed concern that the prosecutor's questions, which kept repeating "documents from the defense attorney" made it sound as if documents were doctored, when they were actually obtained from the prosecution. (RT 2888.)

Undeterred, the prosecutor continued to argue with the witness, and more objections were sustained. (RT 2905-2909.)

Penalty Phase Closing Argument

Before penalty phase closing, the court warned both sides about commenting on each other's integrity, since the jury had been informed it could consider counsel's arguments. (RT 3014.)

The prosecutor termed the defense "ridiculous" and "preposterous." (RT 3144.) The court sustained the objection as to the last comments. (RT 3144.) Defense counsel asked the court to admonish the jurors, and the court said, "Please. Let's proceed." (RT 3144.)

The prosecutor argued that appellant was smarter than 95 percent of the population. (RT 3146.) The defense objection was overruled. (RT 3146.)

While discussing the shootout and the police chase (RT 3152), the prosecutor asserted that appellant didn't like it when the police shot back. (RT 3155.) The defense objection was sustained, and the jury was asked to disregard the comment. (RT 3155.)

The prosecutor belittled the mitigation testimony, saying that Michael Redd exaggerated his testimony. (RT 3173.) A defense objection was sustained. (RT 3173.)

He accused witness Rick Lum of exaggerating. (RT 3178.) The defense objection was sustained. (RT 3179.)

He noted that all of the ex-police witnesses had said that Firestone was like a war zone. A defense objection was sustained. (RT 3185.)

The prosecutor argued that Dr. Klein was paid $1500 a day to talk about hypothetical police officers, and that he (the prosecutor) was not here

to try hypothetical officers, and that the testimony was designed so that the prosecutor could not confront the witness about the defendant. (RT 3197.)

At sidebar defense counsel accused the prosecutor of misstating the testimony, and argued that the tenor of the argument was now an attack on the defense. The court agreed that it could be construed as a charge of bad faith on the part of counsel. (RT 3199.) However, there was no admonition to the jury. (RT 3199.)

The prosecutor then proceeded to argue that Klein offered an "anniversary-reaction defense." The defense objection was sustained. (RT 3199.)

Dr. Mantell was accused by the prosecutor of charging $1,200 an hour to read from police files. The defense objection was sustained. (RT 3200.) The prosecutor answered that Klein had been paid $2,500 a day, and the jury saw him for two hours. "You do the math." (RT 3200.)

The prosecutor then proceeded to describe prison life:

> Number two, sometimes they say life without parole is worse punishment than the death penalty, that he has to sit in jail the rest of his life. It is not worse punishment. Life without parole – as you heard, in prison he gets to make friends, he gets to write letters, gets to watch TV. (RT 3214.)

The defense objected that there had been no testimony elicited on this point, and the court sustained the objection. (RT 3215.)

Also in the penalty phase closing argument, the prosecutor stated:

> [H]is choices put him here to where the community now is going to judge him and his actions. Our society must not be willing to overlook these types of aggravated . . . .

After defense counsel objected, the prosecutor offered to rephrase the argument. The court sustained the objection, and told the jury that they would be instructed that they could not consider public feeling or opinion. (RT 3222.)

During the penalty phase instructions, the jurors were told that they were not to be swayed by public opinion or public feelings. (RT 3273.)

The prosecutor also suggested that because the defense expert, Dr. Klein, had testified about hypothetical police officers, "that is what they give you as mitigating evidence."

> Then he talks about his opinions based on reviewing his reports, these reports. He never even talked to Mr. Redd. Can you imagine a doctor doing surgery . . . . (RT 3197.)

The defense objected again, pointing out that the prosecutor was once again attacking the nature of the defense. The court replied:

> I am concerned that it could be construed as bad faith on the part of counsel. So I think you have to be careful about that. And so let's go. (RT 3199.)

Shortly afterwards, the prosecutor returned to the theme:

> Okay. But it was from Dr. Klein that we first heard this term the anniversary reaction. He was the first witness that we

> heard about the anniversary-reaction defense. Okay. Then we went to Dr. Mantell. (RT 3199.)

The defense objected to the use of the term "anniversary-reaction defense." The court sustained the objection, and then the prosecutor replied, "Okay. Well whatever he called it, this anniversary-reaction syndrome, anniversary-reaction – whatever word you want to use." (RT 3200.)

On another occasion, the prosecutor argued:

> What happens here? Mr. Redd puts his hands out, waves them. He wants no more. Why is that aggravating? Why is that significant? See, everything is okay with Mr. Redd when he's doing the shooting. When he's got the gun and these police officers aren't firing back, things are great, let's keep the chase going. But the minute his life is at stake, when somebody fires at him, what does he do? All right. Enough. I don't want to get killed. It shows you the kind of man he is. When his life is on the line, he doesn't like it. (RT 3155.)

The defense objected that the prosecutor was arguing improper factor (b) evidence, and the court agreed, and asked the jury to disregard the argument. (RT 3155.)

Finally, the prosecutor once again referred to Officer Jansing as "the little park officer ranger who was there and didn't like the way the sticker was put on the car." (RT 3226.)

B. Introduction

Prosecutorial misconduct denies a defendant his right to a fair trial under article I, sections 7 and 17 of the California Constitution and the

Sixth and Fourteenth Amendments to the United States Constitution, and deprives him of a reliable adjudication of guilt and penalty in violation of the Eighth Amendment. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691, 106 S.Ct. 2142; see also *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.)

While a prosecutor may prosecute vigorously,

> But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (*Viereck v. United States* (1942) 318 U.S. 236, 248, 63 S.Ct. 561.)

A prosecutor commits misconduct when employs "deceptive or reprehensible methods to attempt to persuade either the court or jury." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215; see also *Berger v. United States* (1935) 295 U.S. 78, 55 S.Ct. 629.)

C. The Prosecutor Shifted the Standard of Proof Onto the Defense

By continually repeating that he was waiting to see what the defense would be, the prosecutor shifted the standard of proof onto the shoulders of the defense. The court actually recognized this, and gave a half-hearted admonition as to the burden of proof, but at no point informed the jury that the prosecutor was misstating the law. This was error requiring reversal.

(See *Lingar v. Bowersox* (8th Cir. 1999) 176 F.3d 453, 460 (harmless error when counsel misstates law but court properly instructs).)

D. The Prosecutor Improperly Denigrated Defense Counsel

"'A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.'" (*People v. Turner* (2004) 34 Cal.4th 406, 429, quoting *People v. Hill, supra,* 17 Cal.4th at p. 832; see also *People v. Cash* (2002) 28 Cal.4th 703, 732; *People v. Benmore* (2000) 22 Cal.4th 809, 846; *People v. Hawthorne* (1992) 4 Cal.4th 43, 59.) It is also improper to portray defense counsel as personally attacking the victim. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 704; *People v. Turner* (1983) 145 Cal.App.3d 658, 673-674.)

When a prosecutor denigrates defense counsel, the risk exists that the jury will shift its attention from considering the evidence to focus instead on the character of defense counsel or the charges made against him by the prosecution. (*People v. Benmore, supra*, 22 Cal.4th at p. 846; *People v. Fry* (1998) 18 Cal.4th 894, 977-978.) An attack on a defendant's attorneys can be as prejudicial as an attack on the defendant himself, and is "never excusable." (*People v. Hill, supra*, 17 Cal.4th at p. 832.) This is precisely what the prosecutor did here, and the judge did little to stop him.

E. The Prosecutor Improperly Vouched for Loya and Jansing

Vouching occurs when the prosecutor either invokes his prestige, or that of his office, in support of a witness' testimony. Vouching violates the Sixth and Fourteenth Amendments to the United States Constitution. (See, e.g., *United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 662 (court found misconduct when prosecutor vouched for state witnesses and bolstered their credibility by arguing that they were "professional" and "dedicated" and would not have obtained a job with the Drug Enforcement Administration unless they had integrity).)

Similarly here, the prosecutor's repeated comments about Loya and Jansing constituted vouching.

F. The Prosecutor Improperly Introduced Evidence of Future Dangerousness

Blithely disregarding the court's attempts to control his questions, the prosecutor elicited evidence from Dr. Morein, the defense expert, to the effect that appellant would be dangerous if allowed to live.

The introduction of evidence of future dangerousness violated appellant's rights to due process of law. (*Simmons v. North Carolina* (1994) 512 U.S. 154, 168-169, 114 S.Ct. 2187; *People v. Arias* (1996) 13 Cal.4th

92, 173, fn. 30; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1162; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.)

It is improper "under the guise of 'artful cross-examination,' to tell the jury the substance of inadmissible evidence." (*United States v. Hall* (4th Cir. 1993) 989 F.2d 711, 716; see also *Goldsmith v. Witkowski* (4th Cir. 1992) 981 F.2d 697, 704 (prosecutor may not present inadmissible evidence through the "back door"); *United States v. Check* (2d Cir. 1978) 582 F.2d 668, 683 (prosecutor may not introduce inadmissible hearsay through "artful" cross-examination).)

The prosecutor also committed misconduct by misleading the jury into believing it could consider nonstatutory aggravating factors. (*People v. Boyd* (1985) 38 Cal.3d 762, 773.)

G. The Prosecutor Improperly Denigrated the Penalty Phase Expert Witnesses

"The sentencing phase of a death penalty trial is one of the most critical proceedings in our criminal justice system . . . . Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." (*Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527, 1541, cert. denied, 502 U.S. 898; *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 315-316, cert. denied, 121 S.Ct. 2577 (2001)

(prosecutor improperly and prejudicially disparaged defendant's expert and the defendant's insanity defense by commenting, in part, that he thought aspects of the testimony were really unique and unusual).)

H. The Prosecutor Improperly Appealed to the Passion or Prejudice of the Jury

By berating the jury and worrying aloud that they would "not get it," the prosecutor engaged the personal pride of the jurors. He made their decision a comment about their own intelligence.

This argument was improper because it injected into the case broader issues than appellant's guilt and invited the jury to render a verdict based on their personal pride or public opinion. (See *People v. Morales* (1992) 5 Cal.App.4th 917, 928; *United States v. Polizzi* (9th Cir. 1986) 801 F.2d 1543, 1558; *United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1441, & nn. 30 & 31, and cases cited therein.)

I. Prosecutorial Misconduct Must Be Considered for its Cumulative Effect

Instances of prosecutorial misconduct must be viewed for their cumulative effect. (*People v. Pitts, supra,* 223 Cal.App.3d 606, 815; *United States v. Christophe* (9th Cir.1987) 833 F.2d 1296, 1301; *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1225.)

The acts of misconduct discussed here must also be considered in conjunction with the prosecutor's misleading argument regarding felony-murder and felony-murder special circumstances, discussed elsewhere in this brief.

J. Any Failures to Object Should be Excused Because they Would Have Been Futile

Defense counsel objected to the vast majority of the instances of misconduct. A lack of objection to the rest should be excused because objections would have been futile. (*People v. Anderson*, *supra,* 25 Cal.4th at p. 587.) Every one of counsel's objections made during the closing arguments was overruled. It was clear that although the court admonished the prosecutor outside the presence of the jury on more than one occasion, and expressed concern about the prosecutor's behavior, it was not prepared to convey to the jury that the prosecutor was doing anything wrong. There was no point in continuing to object.

K. The Misconduct Here Requires Reversal

Prosecutorial misconduct requires reversal under the United States Constitution when it "'so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 2471.)

Under the state constitution, the standard is lower. Even if the prosecutorial comment falls short of rendering the trial fundamentally unfair, it constitutes reversible misconduct when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Cash, supra*, 28 Cal.4th at p. 733.)

In this case, the prosecutor's acts of misconduct were not "brief, truncated by an objection, and not resumed." (*People v. Cash, supra*, 28 Cal.4th at p. 733.) They were extensive, and even after objections were sustained, resumed. Although the trial judge expressed concern about the prosecutor's behavior, but took no effective action to control counsel.

In addition, the statements made during closing in the penalty phase were particularly prejudicial, because the court instructed the jury that the arguments of counsel could be considered in the penalty phase.

L. Conclusion

This Court recognizes that a prosecutor's closing argument is an especially critical period of the trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Because the argument comes from a government official, a person chosen to represent the People of the State of California, it carries great weight and must therefore be fair and objective. (*People v. Talle*

(1952) 111 Cal.App.2d 650, 677; *People v. Hill*, *supra,* 17 Cal.4th 800; see also *Berger v. United States*, *supra,* 295 U.S. 78.)

The repeated misconduct by the prosecutor, coupled with the ineffective attempts by the court to control his behavior, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, 94 S.Ct. 1868; see also, *Darden v. Wainwright*, *supra,* 477 U.S. at p.181.)

* * *

IX. THE FELONY-MURDER SPECIAL CIRCUMSTANCE FAILS TO NARROW THE CLASS OF FELONY-MURDERERS TO THOSE GENUINELY ELIGIBLE FOR AND DESERVING OF DEATH

A. Introduction

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder.

The felony-murder special circumstances fail to meaningfully narrow the class of felony-murderers eligible for death. In fact, it saves from death those most deserving of it: persons who kill wilfully, purposely, maliciously, and then take something from the victim as a memento of their heinous crime. This is not a meaningful narrowing.

B. The Procedural Facts

During the prosecution's closing argument, the jurors were told that felony-murder was the "intentional, unintentional or even accidental" killing of another during the commission of burglary or robbery. (RT 1619.) They were told that even if person being robbed had a heart attack during the robbery it was first degree murder. (RT 1610.) It was irrelevant whether

appellant and McVeigh were tugging at the gun, the prosecutor argued, and whether it subsequently went off, "because under the felony murder rule . . . this defendant is guilty of first degree murder *and the special circumstances."* (RT 1621; emphasis added.) He said it would be felony-murder if appellant had a traffic accident while trying to flee, or if he drove home after stealing a candy bar from a store and drove through a stoplight, or if Mr. Loya was chasing him and he hit someone. (RT 1621.) He was responsible for first degree murder and the special circumstance. (RT 1621.)

After reading from the special circumstances instruction, the prosecutor told the jury that the special circumstance was "almost identical to felony murder. . . . Whether it's intentional, unintentional or accidental it's still special circumstance." The only distinction, he said, was that if "you went in to murder somebody, if your intention was to murder somebody and you killed them and then after you killed them you picked their pockets, that is not special circumstance because your intention was to kill them, not to rob or burglarize." (RT 1622.) He argued that appellant had shot McVeigh to prevent being captured. (RT 1623.)

He challenged the defense to say whether appellant was guilty of special circumstance murder. He predicted that defense counsel would say

that it was the law that it was first degree murder and special circumstance even if the killing was accidental. (RT 1628.)

Defense counsel said just that. During his closing argument, defense counsel emphasized several times that whether "the death of Mr. McVeigh was an accident or could have been an accident or whether it was intentional, it don't [sic] matter." (RT 1654-1655), and that the felony murder rule was "a good rule." (RT 1655.)

He then argued that the two men, appellant and the decedent, had fought over the gun, and it had discharged. He then repeated that "for purposes of the felony murder rule it don't [sic] matter." (RT 1658.)

At no point did counsel argue that there was any difference between the elements of felony-murder and felony-murder special circumstances. The impression the jury was left with after defense counsel's argument is that they were both exactly the same and that felony murder was a "good rule" and intent "don't matter."

The court instructed the jury that "Every person who unlawfully kills a human being during the commission or attempted commission of a burglary and/or robbery is guilty of the crime of murder in violation of section 187 of the Penal Code." (RT 1709.)

It also instructed that "The *lawful* [sic] killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime of burglary and/or robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime." (RT 1709.)[21]

As to the special circumstance, the jurors were told that

> To find that the special circumstance referred to in these instructions as murder in the commission of a burglary and/or robbery is true, it must be proved: One, that the murder was committed while the defendant was engaged in the commission or attempted commission of a burglary or robbery; and, two, the murder was committed in order to carry out or advance the commission of the crime of burglary and /or robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted burglary or robbery was merely incidental to the commission of murder. (RT 1713-1714.)

C. The Standard of Review

This Court reviews the correctness of jury instructions *de novo*. (*People v. Waidla, supra,* 22 Cal.4th at p. 733.)

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[21] The written instructions, which were given to the jury, correctly stated "unlawful." (CT 775.)

D. The Felony-Murder Special Circumstance Instruction Failed to Narrow the Class of Felony-Murderers Eligible for Death

As this Court recognized at one point:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (conc. opn. of White, J.); accord, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 (plur. opn.).)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

However, now almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as killings committed in a panic, or under the dominion of a mental breakdown. (*People v. Dillon* (1984) 34 Cal.3d 441, 462.) This Court practically conceded that in *People v. Hayes* (1990) 52 Cal.3d 577:

> A murder is of the first degree if "committed in the perpetration of, or attempt to perpetrate" any of certain enumerated felonies, one of which is burglary. (§ 189.) Under this provision, a killing is committed in the perpetration of an enumerated felony if the killing and the felony "are parts of one continuous transaction." [Cits.] We have indicated that *the reach of the felony-murder special circumstance is equally broad.* (*People v. Hayes, supra*, 52 Cal.3d at pp. 631-632; fn. om.; emphasis added.)

Thus, the felony-murder special circumstances are unconstitutionally overbroad, in violation of the state and federal prohibitions against cruel and unusual punishment, the guarantees of equal protection and due process, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I, sections 7 and 17 of the California Constitution.

In 1990, Proposition 115 amended Penal Code sections 189 and 190.2 to further broaden their coverage. Five additional felonies were added to the felony-murder provisions of section 189, and section 190.2 was amended to broaden several of the special circumstances, to add two additional felony special circumstances and to expand the circumstances in which accomplices would be death-eligible. The amendments made the felony-murder provisions of section 189 and the felony special circumstances in section 190.2 nearly identical.

California makes felony-murder *simpliciter* a "narrowing" circumstance. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1144-1145 & fn. 8.) Thus, any person who kills while "engaged in, or . . . an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" any of twelve listed felonies is not only guilty of first degree murder, but is also

automatically eligible for death even if the defendant did not intend to kill. (Pen. Code sec. 189; Pen. Code sec. 190.2 subd. (a)(17); Pen. Code sec. 190.2 subd. (b).)

Penal Code section 190.2 subdivision (a)(17) subjects a defendant to the death penalty if "[t]he murder was committed while in the defendant was engaged in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" any of twelve listed felonies. The breadth of the felony-murder special circumstances is due not only to the fact that virtually all first degree felony murders are special circumstances cases,[22] but also to the fact that the California felony murder rule itself is exceedingly broad in at least three respects. First, the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary, crimes which themselves are defined broadly by statute and court decision. Second, the felony-murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape (see *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165) or as a "natural and probable consequence" of the felony

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[22] With the narrow exception left by *Tison v. Arizona* (1987) 481 U.S. 137, 107 S.Ct. 1676 and Penal Code section 190.2, subdivision (d), for an accomplice who was not the actual killer and was not a major participant in the underlying felony and acted with less than reckless indifference to human life.

(see *People v. Birden* (1986) 179 Cal.App.3d 1020, 1024-1025). Third, the felony-murder rule is not limited in its application by normal rules of causation (see *People v. Johnson* (1992) 5 Cal.App.4th 552, 561), and applies to altogether accidental and unforeseeable deaths:

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable. (*People v. Dillon, supra,* 34 Cal.3d at p. 477.)

The felony-murder special circumstances are broader in one respect than the felony-murder rule, because they cover a species of implied malice murder as well, under a provocative act theory. (See *Taylor v. Superior Court* (1970) 3 Cal.3d 578; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068.)

In an attempt to save what is patently an unconstitutional death penalty scheme, this Court has interpreted the California's special circumstances, to *exempt* those felony-murderers who intend to kill, and in fact do kill, in cold blood, and then form the intent to rob, perhaps to keep a souvenir of their deed.

Thus, if appellant took property merely to obtain a reminder or token of the incident (see *People v. Marshall* (1997) 15 Cal.4th 1, 41), to give a false impression about his actual motive for the murder, or in some other way to facilitate or conceal the killing (see *People v. Zapien* (1993) 4 Cal.4th 929, 984) he would *not* be eligible for death. (*People v. Bolden* (2002) 29 Cal.4th 515, 554; *People v. Mendoza, supra,* 24 Cal.4th at p.182 ("the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder").)

All other felony-murderers, including those who kill accidentally, as is the case here, are eligible for death.

Not only is this interpretation at odds with the voters' understanding of the death penalty law they voted in, it is the very essence of capricious selection. (*Furman v. Georgia, supra,* 408 U.S. at pp. 309-310 (Stewart, J., concurring).)

E. Felony-Murder Special Circumstances are Unconstitutional in that they Fail to Require the Government to Prove *Mens Rea*

The felony-murder special circumstances are unconstitutional in that they fail to require that prosecution prove the requisite *mens rea* before an individual can be subject to the death penalty under the felony-murder

robbery and/or burglary special circumstance provisions, as required in *Enmund v. Florida* (1982) 458 U.S. 782, 102 S.Ct. 3368.

In *Enmund*, the United States Supreme Court rejected the notion that an aider and abettor in a felony murder "who neither took life, attempted to take life, nor intended to take life" could be sentenced to death without proof of intent to kill. (*Enmund v. Florida, supra*, 458 U.S. at p. 787.) Five years later, in *Tison v. Arizona, supra,* 481 U.S. at p.137, the Court expanded the concept of "intent" to include "reckless disregard." However, neither *Enmund* nor *Tison* directly addressed whether the state had to prove any mens rea with regard to the actual killer.

Following *Enmund* but before *Tison* was decided, this Court decided *Carlos v. Superior Court* (1983) 35 Cal.3d 131. In *Carlos,* the Court considered "the longstanding judicial antipathy toward the felony-murder rule, which has led courts to give it the narrowest possible application. (*People v. Satchell* (1971) 6 Cal.3d 28, 33-34.)" (*People v. Anderson, supra,* 43 Cal.3d at p. 1158 (Broussard, J., dissenting)).

> That antipathy stems from the artificial and arbitrary character of the rule. When the felony-murder rule standing alone--without proof of malice or premeditation--serves as a basis for the death penalty, the danger of arbitrariness is increased, and the need for a limiting construction greater. (*Ibid.*)

Mindful of such concerns, and following extensive analysis of the statute, the *Carlos* court concluded,

> [W]e construe the word "intentionally" in subdivision (b) of section 190.2 to apply to all defendants – actual killers and accomplices alike – and to require an intent to kill before a defendant is subject to a special circumstance finding under paragraph 17 of that section. (*Carlos v. Superior Court, supra*, 35 Cal.3d at pp. 153-154.)

A bare four years later, this Court rejected *Carlos* in *People v. Anderson*:

> [W]e conclude that the broad holding of *Carlos* that intent to kill is an element of the felony-murder special circumstance cannot stand, and that the following narrow holding must be put in its place: intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved before the trier of fact can find the special circumstance to be true. (*People v. Anderson, supra,* 43 Cal.3d at pp.1138-39).

In his incisive dissent from the majority opinion in *Anderson*, Justice Allen Broussard dissected the reasoning behind the reversal, and warned that the majority's decision could very well result in California's entire death penalty scheme being declared unconstitutional. Justice Broussard began by noting that "the majority do not say that *Carlos* was wrong but that it is outdated. They assert that two subsequent Supreme Court decisions (*Cabana v. Bullock* (1986) 474 U.S. 376, 106 S.Ct. 689 and *Tison v.*

Arizona, supra, 481 U.S. 137 , 107 S.Ct. 1676), both five-to-four decisions, read *Enmund* more narrowly than we did[.]"

Justice Broussard found it "disingenuous to claim that a passing remark in *Cabana v. Bullock* and a mistaken footnote in *Tison v. Arizona* justify reconsideration of that decision." (*Id.* at p. 1156).

> *Carlos* did not say that one interpretation of *Enmund* was right and another wrong. We said that *Enmund* could reasonably be interpreted to require proof of intent for the actual killer. The fact that a bare majority of the court in *Tison* adopted a narrower view in no way refutes that assertion. And in a still later case, *Booth v. Maryland* (1987) 482 U.S. ___, 107 S.Ct. 2529, another five-to-four majority appeared to reject much of the reasoning of *Tison*. (*Id.* at p. 1155).

Justice Broussard continued by questioning whether the statutory language of the code itself was reasonably susceptible to only a single interpretation. He determined it was not, and, applying the canons of interpretation of penal statutes, concluded, "[T]he issue in this case, as in *Carlos*, is one of choosing between alternative reasonable interpretations[.]" (*Id.* at p.1160.) In addition, he pointed to the language of the original initiative that resulted in the adoption of the expanded death penalty statute in 1978, commenting that the very fact the ballot presentation and arguments failed to address the "intent to kill" issue in the case of an unintentional killer was significant:

> As we said in *Carlos*, "[t]he adoption of a law to permit infliction of the death penalty upon an accidental killer would be a momentous step, raising grave moral questions." (35 Cal.3d at p. 145 [parallel citations and footnote omitted]). It certainly would be a very significant departure from the 1977 law, perhaps the most significant change effected by the initiative. One could reasonably expect a change of this magnitude would be made clear in both legal text and ballot argument. The absence of any such language suggests that the drafters did not intend to permit execution of an unintentional killer. (*Id.* at p. 1161.)

Most importantly, Justice Broussard addressed the critical issue of interpreting the statute to avoid doubtful constitutionality.

> The majority recognize the rule that a statute should be construed to avoid grave and doubtful constitutional questions, and that when *Carlos* was decided a construction of the 1978 law which would permit the execution of an unintentional killer might violate the Eighth Amendment as construed in *Enmund v. Florida, supra*, 458 U.S. 782, 102 S.Ct. 3368. (Cit. om.) The majority assume that such questions raised by *Enmund* have been fully and finally resolved. . . . [T]his assumption is itself dubious . . . . (*Id.* at p. 1162.)

Justice Broussard's concern that the majority had misunderstood *Enmund* found support in a later decision by the United States Supreme Court, *Hopkins v. Reeves* (1995) 524 U.S. 88, 99-100, 118 S.Ct. 1895. In *Hopkins*, a case involving an actual killer, the Court made clear its assumption that *Enmund* and *Tison* had established minimum *mens rea* requirements for imposition of the death penalty:

> The Court of Appeals . . . reasoned that because [*Enmund* and *Tison*] require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. . . . *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, so long as their requirement is satisfied at some point thereafter. (*Id.* at pp. 99-100.)

In addition, a number of lower courts have understood that the *Enmund/Tison* mens rea requirements have to be met before defendants are sentenced to death. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439; *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345), (overruled on other grounds, *State v. Stout* (2001) 46 S.W.3d 689).)

The evidence in this case supports a conclusion that the man who entered the store intended to rob, not to kill. In fact, the prosecutor conceded that the killing may have been accidental, but told the jury that it did not matter whether it was or not. Thus, it may be assumed that the jury found an accidental killing.

In *People v. Williams* (1994) 30 Cal.4th 1758, 1762, this Court interpreted CALJIC No. 8.81.17, which requires that the killing be committed "in order to carry out or advance . . . facilitate the escape

therefrom or to avoid detection" of the underlying offense to be what distinguishes felony-murder special circumstances from ordinary felony-murder, which requires that the killing occur during the commission or attempted commission of the underlying felony.

But in order to "advance, facilitate, or avoid detection," a killing must be intentional. An accidental killing does not advance or facilitate anything. It is by its nature an unintentional act.

It was therefore vitally important that the jury be instructed that it had to find *mens rea*, that is, intent to kill.

F. A Constitutional Interpretation of the Felony-Murder Special Circumstances Required that the Jury be Informed that the Killing Had to be Intentional

The felony-murder special circumstance, interpreted in a manner so as to render it constitutional, cannot render all robbery felony-murders special circumstance cases; otherwise, there would be no point to the special circumstance. For the special circumstance to apply, the prosecution must prove that the defendant killed the victim for the purpose of robbery.

Yet that distinction was completely eliminated both by the prosecutor and by appellant's own attorney. The prosecutor repeated that appellant was guilty both of first degree murder and of the special circumstance whether the death was "intentional, unintentional or even

accidental . . . even if he tripped going out of the store and the gun went off and hit someone in the parking lot . . . he's liable for special circumstance murder." (RT 1579.)

Rather than correcting this glaring misstatement, defense counsel added to it, saying that whether"the death of Mr. McVeigh was an accident or could have been an accident or whether it was intentional, it don't [sic] matter." (RT 1654-1655), and that the felony murder rule was "a good rule." (RT 1655.)

While this Court has said that it presumes the jury follows the trial court's instructions and disregards counsel's arguments when they conflict, that is simply not a realistic view in this case. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 179.)

In this case, however, *both* the prosecutor and defense counsel made the same argument, and the trial court did nothing to correct the misstatements. The unadorned instruction given could not possibly correct the message given to the jurors by both counsel.

G. The Felony-Murder Statute Violates the Equal Protection Clause

The scheme violates equal protection pursuant to the Fourteenth Amendment in that the death penalty statute permits the prosecution to seek the death penalty in the case of an individual who commits murder

unintentionally in the course of a felony while certain premeditated murderers are subject to life in prison at most.

As discussed earlier, in his dissent in *Anderson*, Justice Broussard voiced concern that the United States Supreme Court had yet to address significant issues of constitutional proportions relating to the California death-penalty scheme. (See *Godfrey v. Georgia*, *supra,* 446 U.S. at p. 427.)[23]

The present case involves an accidental murder occurring during the course of a robbery. The felony-murder special circumstance cannot constitutionally apply.

H. The Felony-Murder Rule is not a "Good Rule," as Defense Counsel Argued

The felony-murder rule has been roundly criticized both by commentators and this court. As one commentator put it, "[t]he felony

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[23] See also *Enmund, supra,* 458 U.S. at 798, citing H. Hart, *Punishment and Responsibility* 162 (1968): "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" In addition, the *Enmund* court relied on robbery/homicide statistics to support its decision: "[C]ompetent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself. Model Penal Code section 210.2, Comment, p. 38, and n. 96. This conclusion was based on three comparisons of robbery statistics, each of which showed that only about one-half of one percent of robberies resulted in homicide. (*Id.* at p. 799.)

murder rule has an extensive history of thoughtful condemnation." (Gerber, *The Felony Murder Rule: Conundrum Without Principle* (1999) 31 Ariz. St. L.J. 763, 766.) This Court recognized in *People v. Washington* (1965) 62 Cal.2d 777, 783, that the "felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability." (See also *In re Christian S.* (1994) 7 Cal.4th 768, 785 (conc. opn. of Mosk, J.); *People v. Satchell, supra,* 6 Cal.3d at p. 33, disapproved on another point in *People v. Flood* (1998) 18 Cal.4th 470.)

As recently as 2004, Justice Moreno, in his concurring opinion in *People v. Robertson* (2004) 34 Cal.4th 156, 174-175) pointed out that the felony-murder rule "has been roundly criticized both by commentators and this court."

I. Conclusion

Felony-murder special circumstances are unconstitutional, and it is time that this Court acknowledged that fact.

* * *

X. CALIFORNIA'S DEATH PENALTY SCHEME VIOLATES THE FEDERAL CONSTITUTION

A. Introduction

Many aspects of California's death penalty statutory scheme, alone or in combination with each other, violate the federal Constitution. Challenges to many of these aspects have been rejected by this Court, but these challenges retain their constitutional validity under the United States Constitution since they have not been rejected on the merits by the Supreme Court. Therefore appellant presents each argument in this section in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional bases. Individually and collectively, these constitutional defects require that appellant's sentence of death be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime –

even circumstances squarely opposed to each other (*e.g.*, the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of *narrowing* the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose *expanding* the class of first degree murderers with the intention of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other on any point. Paradoxically, the rule that "death is different" has been interpreted to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards

needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

B. The Relevant Facts

In this case, the jurors were informed that they were to set aside the jury instructions that they had received at the end of the guilt phase, and even though some of the instructions they would receive at the penalty phase were similar, they were to follow only those, not the earlier ones. (RT 2968.) In addition, if there was any conflict between the instructions given at the end of the penalty phase and those given at the beginning of the penalty phase, the former would control. (RT 2968.)

When it instructed on the right of the defendant not to testify, the court informed the jurors that appellant had a right to rely on the failure, if any, of the People to prove beyond a reasonable doubt every element of the charges contained within factors (b) and (c). (RT 2979.) They were also instructed that "As it relates to the crimes charged in the third amended information and the proof of aggravating factors (b) and (c), a defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily proved, he is entitled to a verdict of not guilty. This presumption places upon the

People the burden of proving him guilty beyond a reasonable doubt." (RT 2982-2983.)

The court told the jurors that in the penalty phase they were "entitled to listen to their arguments." (RT 3004.)

After the closing arguments, the jurors were told that they were to disregard "all other instructions given to you in other phases of this trial." (RT 3273.)

They were read the entire list of aggravating and mitigating factors, and told to "consider, take into account, and be guided by" them, if they were applicable. (RT 3274.)

Factor (a) concerned the circumstances of the crime; factor (b) the presence or absence of prior violent criminal activity; and factor (c) the presence or absence of prior felony convictions. (RT 3274.)

The jurors were told that before they could consider evidence under factor (b) as an aggravating circumstance, they had to be satisfied beyond a reasonable doubt that appellant had committed the act. (RT 3278.)

The jurors were not read the prior acts charged, but were told they were at the end of "page 10 and also on page 11." (RT 3278-3279.)

The jurors were told that they did not have to unanimously agree on the criminal activity: "If any juror is convinced beyond a reasonable doubt

that such criminal activity occurred, that juror may consider that activity as a factor in aggravation." (RT 3279.)

Regarding the prior convictions, the jurors were told that before they could consider them under factor (c), they had to be satisfied beyond a reasonable doubt that appellant had been convicted of those crimes. (RT 3281.)

The jurors were told that there was no requirement that they agree unanimously on any matter offered in mitigation or aggravation. (RT 3285.)

They were also told that in order to return a judgment of death, each juror had to be persuaded that the aggravating circumstances were "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (RT 3292.) They were not told that they had to be persuaded beyond a reasonable doubt.

The jurors were told that in order to make a determination as to the penalty, "all 12 jurors must agree." (RT 3292.)

C. Penal Code section 190.2 is Impermissibly Overbroad and Therefore Invalid

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments

to the United States Constitution. As this Court has recognized, a death penalty law must meaningfully distinguish the few who must die from the many that must live.(*People v. Edelbacher, supra,* 47 Cal.3d at p. 1023.)

In order to meet this constitutional mandate, California must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (See *Zant v. Stephens, supra,* 462 U.S. at p. 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo, supra,* 6 Cal.4th at p. 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer.*

Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" (emphasis added); *People v. Epps* (1986) 182 Cal.App.3d 1102, 1120 ("The most reasonable interpretation of the intent of the Briggs Initiative is that it specifically deleted the requirement that felony murder be premeditated and deliberate in order to greatly expand application of the death penalty in California."); *People v. Frierson* (1979) 25 Cal.3d 142, 152.)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon, supra,* 34 Cal.3d at p. 477.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of

special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1324-26.)[24] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required

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[24] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," *i.e.*, a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, *i.e.*, a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The lack of meaningful narrowing has not been addressed by the United States Supreme Court. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court had rejected similar claims in *Pulley v. Harris* (1984) 465 U.S. 37, 53, but this is not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by statute. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer

eligible for the death penalty. It is time that this Court accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

D. The Death Verdict Must be Set Aside Because the Jury was not Instructed on the Burden of Proof or That It Had to Find That the Aggravating Factors Outweighed the Mitigating Factors Unanimously and Beyond a Reasonable Doubt

California's death penalty scheme violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in *Blakely v. Washington* (2004) ____ U.S. ____, 124 S.Ct. 2531; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, because the statutory scheme does not require the trier of fact to find the existence of aggravating factors supporting the imposition of the death penalty both unanimously and beyond a reasonable doubt, nor to find that those aggravating factors outweigh circumstances in mitigation beyond a reasonable doubt.

In *Blakely v. Washington, supra*, 124 S.Ct. at p. 2536, a majority of the United States Supreme Court, speaking through Justice Scalia, applied

the rule previously articulated in *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

In *Ring v. Arizona, supra*, the high court applied *Apprendi* to find unconstitutional an Arizona law that permitted the judge to find one of ten aggravating circumstances to permit the imposition of the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at pp. 603-609.)

In all three cases, the high court found the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than could have been imposed under the laws of the respective states without the factual finding made by the judge. (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537.)

In *Blakely*, the majority began by answering Washington's contention that the statutory maximum for the offense was in fact ten years, the maximum for that type of offense, by pointing out that the Court's precedents had made clear that the phrase "statutory maximum" for purposes of apply the *Apprendi* rule "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or*

admitted by the defendant. (*Blakely, supra*, 124 S.Ct. at p. 2537; emphasis in original.)

The majority also rejected the argument that the sentence was similar to those previously upheld in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 106 S.Ct. 2411 and *Williams v. New York* (1949) 337 U.S. 241, 69 S.Ct. 1079. It distinguished *McMillan*, which involved a sentencing scheme that imposed a statutory minimum if a judge found a particular fact, because there the statute did not authorize a sentence in excess of that otherwise allowed for the underlying offense.

Williams, the Court noted, involved an indeterminate-sentencing scheme that permitted but did not compel a judge to rely on facts outside the trial record in determining whether to sentence a defendant to death. Because the judge could have sentenced the defendant to death without giving any reason at all, neither *McMillan* nor *Williams* involved a sentence greater than what state law authorized on the basis of the verdict alone. (*Blakely v. Washington, supra*,124 S.Ct. at p. 2538.)

The State's final attempt to distinguish *Apprendi* and *Ring*, on the grounds that the enumerated grounds for departure were illustrative and not exhaustive, was also rebuffed because "it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that

authority only upon finding some additional fact." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2538.)

The Court emphasized that its commitment to *Apprendi* was not merely respect for precedent but

> [T]the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. (*Blakely v. Washington, supra*, 124 S.Ct. at pp. 2538 -2539.)

In closing the majority stated,

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State. (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2543.)

In *Ring v. Arizona, supra*, 536 U.S. at p. 588, the high court held that defendants "are entitled to a jury determination of *any fact* on which the legislature conditions an increase in their maximum punishment, overruling in part its prior decision in *Walton v. Arizona, supra,* 497 U.S. 639, which had upheld the statute on the grounds that the additional facts found by the judge were deemed "sentencing considerations" and not "elements." After

Apprendi, the high court said, those distinctions were irrelevant. (*Ring v. Arizona, supra*, 536 U.S. at pp. 588-589.)

The California statutory scheme is the functional equivalent of that invalidated in *Ring*, *Apprendi* and *Blakely* because both schemes permit the "trier of fact" to make factual determinations necessary to impose an enhanced sentence without attaching to those determinations the Sixth Amendment rights attendant to factual determinations made by juries: the right to a unanimous jury finding beyond a reasonable doubt. Analysis of these decisions demonstrates that the California death penalty sentencing scheme, as previously interpreted by the this Court, violates due process principles embodied in the Fifth, Sixth and Fourteenth Amendments because it does not require capital juries to find aggravating factors either beyond a reasonable doubt or unanimously. This failure renders the statutory scheme unconstitutional.

The similarities between the death penalty schemes in Arizona and California compel a conclusion here identical to that reached in *Ring*. The *Ring* decision described Arizona's statutory framework: there, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determined the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. (*Ring v.*

Arizona, supra, 122 S.Ct. at p. 2432.) Like California's statute, Arizona law provides that first-degree murder "is punishable by death or life imprisonment as provided by section 13-703." (Ariz. Rev. Stat. Ann. sec. 13-1105(C) (West 2001). However, in Arizona, at the conclusion of a sentencing hearing, the judge determined the presence or absence of enumerated "aggravating circumstances" and any "mitigating circumstances." State law authorized "the judge to sentence the defendant to death only if there is at least one aggravating circumstance and "there are no mitigating circumstances sufficiently substantial to call for leniency." (*Ring v. Arizona, supra*, 536 U.S. at pp. 592-593, citing Ariz. Rev. Stat. Ann. sec.13-703(F).)

That Arizona's statutory scheme permitted a judge, rather than a jury, to make the additional factual findings necessary to impose the death penalty is a distinction without a difference for the purpose of analysis under *Ring*. (See *Ring v. Arizona, supra*, 536 U.S. at p. 598.) Both statutory schemes require "aggravating circumstances" that must be determined by the "trier of fact."

Arizona Revised Statute section 13-703(E) provides:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if

> the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Similarly, Penal Code section 190.3 mandates that the trier of fact,

> [S]hall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement for a term of life without the possibility of parole.

Logic dictates that for aggravating circumstances to "outweigh" mitigating circumstances, there must be at least one aggravating circumstance to place on the scale. Section 190.3 thus requires, just like Arizona's statute, a finding that there is at least one aggravator, and then that factors in aggravation outweigh the factors in mitigation.

Section 190.3 also is similar to Arizona law, because it requires the trier of fact, in determining the penalty, to consider a list of specific factors which the legislature has identified as aggravating or mitigating the offense. (See Ariz. Rev. Stat. Ann. sec. 13-703(F).)[25]

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[25] While some of the listed factors resemble some of the California's special circumstances, *e.g.* multiple murders (compare Pen. Code sec. 190.2, subd. (3) to Ariz. Rev. Stat. Ann. sec. 13-703(F)(8), previous homicides; Pen. Code sec. 190.2, subd. (2) to Ariz. Rev. Stat. Ann. section 13-703(F)(1), peace officer victim; Pen. Code sec. 190.2, subd. (7) to Ariz. Rev. Stat. Ann. sec. 13-703(F)(10)), others more closely resemble the list of

Section 190.3 therefore suffers from the same infirmities as the Arizona statute.

As appellant has noted, this court has held that *Apprendi* and *Ring* have no impact on California's capital sentencing law. But courts in other states have come to a different conclusion with respect to aspects of their

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circumstances in aggravation or mitigation (compare Pen. Code sec. 190.3, subd. (c) (prior felony conviction) to Ariz. Rev. Stat. Ann. sec. 13-703(F)(2) (prior conviction of serious offense); Pen. Code sec. 190.3, subd. (a) (circumstances of the crime) to Ariz. Rev. Stat. Ann. sec. 13-703(F)(6) (offense committed in an especially heinous, cruel or depraved manner), and Ariz. Rev. Stat. Ann. sec. 13-703(F)(3) (in committing the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered), and Ariz. Rev. Stat. Ann. sec. 13-703(F)(9) (victim under 15, or 70 years or older); compare also, Pen. Code sec. 190.3, subd. (i) (age of the defendant at time of crime) to Ariz. Rev. Stat. Ann. sec. 13-703(F)(5) (same), and Ariz. Rev. Stat. Ann. sec. 13-703(F)(9) (defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under 15 or was 70 years or older); compare Pen. Code sec. 190.3, subd. (h) (defendant's capacity to appreciate criminality of his conduct or conform to requirements of law impaired by mental disease, defect, or intoxication) to Ariz. Rev. Stat. Ann. sec. 13-703(G)(1) (defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired); compare Pen. Code sec. 190.3, subd. (g) (whether defendant acted under extreme duress or substantial domination of another) to Ariz. Rev. Stat. Ann. sec. 13-703(G)(2) (defendant under unusual and substantial duress); compare Pen. Code sec. 190.3, subd. (k) (any other circumstance extenuating the gravity of the crime) to Ariz. Rev. Stat. Ann. sec. 13-703(G) (any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense).)

state capital sentencing statutes that resemble California's. Appellant submits that in light of the ruling by the high courts of other states, this court should re-examine its position on the effect of *Apprendi* and *Ring* since these courts presciently and correctly anticipated the ruling in *Blakely.*

In Colorado, after the jury reaches a verdict finding the defendant guilty of first degree murder, there is a four-step process for determining penalty. During the third step, aggravating factors found true beyond a reasonable doubt in the first step are weighed against mitigating evidence offered by the defendant in the second step. (*Woldt v. People* (Colo. 2003) 64 P.3d 256, 260-261, 265.) The Colorado Supreme Court held that *Ring* governs the step three weighing of aggravating against mitigating circumstances and ruled the state law unconstitutional under *Ring* because it did not require that a jury perform this weighing. (*Id.* at pp. 266-267.) Step three in Colorado resembles the penalty selection phase in California. If appellant were tried in Colorado, the *Woldt* decision would mandate that the jury make the ultimate penalty decision of whether the aggravating circumstances are so substantial in comparison with the mitigating factors as to warrant death beyond a reasonable doubt. Now *Blakely* mandates this result in California.

In Missouri, a sentence of death cannot be imposed unless the penalty phase trier finds: (1) at least one aggravating factor is present, (2) the aggravating factor warrants death, (3) aggravating factors outweigh mitigating factors and (4) based on all the circumstances the death penalty is to be imposed. (*State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 258.) The state argued in *Whitfield* that *Ring* did not affect steps 2, 3 and 4 because those steps call for a jury to give its subjective opinion about whether the death penalty is appropriate and do not relate to factual predicates for imposing the death penalty. (*Id.* at p. 259.) The Missouri Supreme Court rejected the state's argument, holding that all of these steps are factual either in whole or part. (*Id.* at pp. 259-261.) If appellant had been tried in Missouri, *Whitfield* would mandate that the jury make the ultimate penalty decision of whether the aggravating circumstances are so substantial in comparison with the mitigating factors as to warrant death beyond a reasonable doubt. *Blakely* also mandates this result.

Similarly, the Nevada Supreme Court has held that *Ring* applies to the provision of Nevada's capital sentencing law that conditions a sentence of death on a finding that no mitigating circumstances are sufficient to outweigh the aggravating circumstances. (*Johnson v. State* (Nev. 2002) 59 P.3d 450, 460 and fn. 34.) The Nevada Supreme Court expressly held that

this finding increased the defendant's authorized punishment and had to be found by a jury beyond a reasonable doubt. (*Id.* at p. 460.) This ruling too is in harmony with *Blakely*.

In addition, after the United States Supreme Court remanded *Ring* to the Arizona Supreme Court, that court interpreted *Ring* as requiring that the jury decide whether the mitigating factors, when compared to the aggravating factors, are sufficiently substantial to call for leniency. (*State v. Ring* (2003) 204 Ariz. 534, 65 P.3d 915, 942-943.) The Arizona Supreme Court thus viewed the balancing of aggravating and mitigating factors, and the penalty determination that results from that balancing, as an element of the death sentence that had to be determined by the jury beyond a reasonable doubt. (See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala.L.Rev. 1091, 1126-1127 (noting that all of the features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency, since both findings are essential predicates for a sentence of death).)

Appellant is aware that this Court has characterized the penalty determination in a capital case in California as a moral and normative

decision, as opposed to a purely factual one. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and

> irrevocable moral judgment. (*State v. Rizzo* (2003) 261 Conn. 171, 238, fn. 37, 833 A.2d 363, 408-409, fn. 37.)

Connecticut is not alone in this view. Several other states also require that the ultimate penalty determination be made beyond a reasonable doubt. (E.g., Ark. Code Ann. sec. 5-4-603(a)(2) (Michie 1993) ("The jury shall impose a sentence of death if . . . [a]ggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist"); New Jersey Stat. Ann. sec. 2C:11-3(c)(3)(a) (West 1995) ("If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death"); New York Crim. Pro. Law sec. 400.27(11)(a) (McKinney 2004) ("The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors."); Ohio Rev. Code Ann. sec. 2929.03(D)(1) (West 1997) ("The prosecution shall have the burden of proving beyond a reasonable doubt that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."); Tenn. Code Ann. sec. 39-13-204(g)(1)(B) (2003) ("If the jury unanimously determines that . . . [s]uch [aggravating] circumstances have

been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, then the sentence shall be death."); Utah Code Ann. sec. 76-3-207(5)(b) (2003) ("The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in the circumstances."); see also *Olsen v. State* (Wyo. 2003) 67 P.3d 536, 590 (state has the burden of negating mitigating evidence "by proof beyond a reasonable doubt").)

Moreover, *Blakely* mandates that the right to a jury finding beyond a reasonable doubt applies to all findings, including findings that a state may label as moral or normative. (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537 (the right to a jury finding beyond a reasonable doubt applies to any findings necessary to the imposition of the sentence).) In *Blakely,* the high court made it clear that, as Justice Breyer pointed out in his dissent, that a jury must find not only the facts that make up the crime, but also all punishment-increasing facts about the way the offender carried out the crime. (*Id.* at p. 2551.) The central concern of *Blakely* was not the nature of the finding that is necessary to impose a sentence, but rather who makes the

finding. Under *Blakely*, where a sentence depends on a predicate finding, that finding must be made by the jury, not a court alone, and cannot be made by a standard other than proof beyond a reasonable doubt. California law already recognizes that the jury must find aggravating circumstances beyond the elements of the crime (CALJIC No. 8.88), and make the decision that the aggravating circumstances are so substantial in comparison to the mitigating circumstances as to warrant death instead of life without parole. Under *Apprendi*, *Ring* and *Blakely*, it makes no difference whether a state labels this finding a factual one or a moral and normative one. In *Apprendi*, *Ring* and *Blakely,* the United States Supreme Court has mandated that the requisite finding, however it is labeled, be made by a jury beyond a reasonable doubt. Although California law accords with this mandate by having the finding made by a jury, it violates this mandate by not requiring that the finding be made beyond a reasonable doubt.

For these reasons, appellant submits that the trial court erred when it failed to instruct the jury that they could not impose a judgment of death unless they found beyond a reasonable doubt that one or more aggravating circumstances existed and that the aggravating circumstances are so substantial in comparison to the mitigating circumstances as to warrant death instead of life without parole. The beyond a reasonable doubt

standard should apply to these determinations as a matter of state law, as it does in the states discussed above. In addition, the application of the beyond a reasonable doubt standard is required under the Sixth and Fourteenth Amendments to the United States Constitution by virtue of the analysis in *Apprendi*, *Ring* and *Blakely*.

Appellant contends that the error requires reversal of his death sentence. The United States Supreme Court has considered the question of whether a constitutionally deficient reasonable doubt instruction may be harmless error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 276, 113 S.Ct. 2078.) The court held that a mis-description of the burden of proof vitiates the jury's findings and is structural error that defies harmless-error analysis and is reversible *per se*. (*Id.* at pp. 281-282.) This standard clearly applies when the court completely fails to instruct the jury on the prosecutor's burden of proof beyond a reasonable doubt. (*People v. Phillips* (1997) 59 Cal.App.4th 952, 956-958.) Under this standard, the judgment in appellant's case must be reversed.

E. The Lack of an Unanimous Finding by the Jury Invalidates the California Death Penalty Scheme

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.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to the defendant's jury requiring jury agreement on any particular aggravating factor. Indeed, the jury was instructed, consistent with CALJIC No. 8.87, that they need not all agree on aggravating factors.

In this case, there was no requirement that even a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of the twelve jurors voted for a death sentence based on a perception of what was aggravating enough to warrant imposition of the death penalty, which would have lost by a vote of one to eleven had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed the death sentence based on any agreement on reasons therefore, including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth and Fourteenth

Amendments.[26] Furthermore, it violates the Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The United States Supreme Court has made clear that such determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of less consequence. (*Ring v. Arizona, supra*; *Blakely v. Washington, supra.*)

These protections include jury unanimity. The high court has held that a verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334, 100 S.Ct. 2214.)[27] Particularly given the "acute need for reliability in capital

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[26] See, *e.g.*, *Griffin v. United States* (1991) 502 U.S. 46, 51 (historical practice given great weight in constitutionality determination); *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. 272, 276-277 (due process determination informed by historical settled usages).

[27] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana*

proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732; *accord, Johnson v. Mississippi, supra,* 486 U.S. at p. 584), the Sixth, Eighth and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.[28]

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code secs. 1158, 1158a.) Surely capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants. (See *Monge v.*

(1972) 406 U.S. 356, 360, 92 S.Ct. 1620, 1624; *Apodaca v. Oregon* (1972) 406 U.S. 404, 406, 92 S.Ct. 1628, 1630.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[28] The *Monge* decision developed this point as some length. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 1205.) Because death is unique "in both its severity and finality," (*Id.* at p. 357), the courts have recognized an acute need for reliability in capital sentencing proceedings. (See *Lockett v. Ohio, supra,* 438 U.S. at p. 604 (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also, *Strickland v. Washington, supra,* 466 U.S. at p. 704 ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.").)

California, supra, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994, 111 S.Ct. 2680, 2701),[29] and certainly no less. (*Ring v. Arizona, supra*, 536 U.S. at p. 608.)

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[30] To apply the requirement to findings carrying a maximum punishment of one year in the county jail, but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), violates the equal protection clause and both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, 119 S.Ct. 1707, 1709-1710, the high court interpreted 21 U.S.C. section 848(a),

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[29] Under the federal death penalty statute "a finding with respect to any aggravating factor must be unanimous." (Tit. 21, United States Code, sec. 848(k).)

[30] The first sentence of article I, section 16 provides "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 (confirming the inviolability of the unanimity requirement in criminal trials).)

and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire. (*Richardson v. United States, supra*, 526 U.S. at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk that: (a) the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and that: (b) the jurors, not being forced to do so, will fail to focus upon

specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

Even if the ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision (*People v. Hayes, supra,* 52 Cal.3d at p. 643), the United States Supreme Court has made clear, through its latest pronouncements in *Ring* and *Blakely,* that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisites to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

F. Failure to Instruct Which Factors Are Aggravating and that Mitigating Factors Need not be Found Beyond a Reasonable Doubt and Unanimously Violates the Federal Constitution

The trial court instructed that the circumstances of the homicide could be considered as a mitigating or an aggravating factor, but did not

instruct that the jury could find them mitigating factors without having to find them beyond a reasonable doubt.

This Court has previously held that the trial court is not required to distinguish between aggravating and mitigating factors. (See, e.g., *People v. Cox* (1991) 53 Cal.3d 618, 673), even after *Ring* and *Apprendi*. (*People v. Prieto* (2003) 30 Cal.4th 226, 271-272.)

Appellant respectfully submits this Court's decisions are simply incorrect, especially now in light of the high court's reiteration of *Ring* and *Apprendi* in *Blakely*. *Ring* and *Apprendi* made clear that aggravating factors much be found true beyond a reasonable doubt, but that mitigating factors need not be. If a jury is not told what are aggravators and what are mitigators, it cannot decide which factors have to be found beyond a reasonable doubt, and which do not.

It is well settled that in a capital case it is improper to preclude a jury from considering relevant mitigating evidence. (*Mills v. Maryland* (1988) 486 U.S. 367, 373, 108 S.Ct. 1860; *McKoy v. North Carolina, supra,* 494 U.S. at p. 434.) In *Mills,* the trial court failed to instruct the jury what it should do if some, but not all, of the jurors were willing to recognize a mitigating circumstance. (*Mills v. Maryland, supra*, at p. 379.) The Supreme Court held that there was a substantial probability that reasonable

jurors may have thought they were precluded from considering a particular mitigating circumstance unless all twelve agreed upon its existence. (*Id.* at p. 384.) Vacating the death penalty, the Court explained, "[t]he possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." (*Ibid.*) In the instant case, the same possibility existed.

The refusal to give appellant's proposed instruction violated appellant's Sixth, Eighth and Fourteenth Amendment rights to liberty, a fair and impartial jury, a reliable determination of penalty, fair trial and heightened capital case due process. Appellant's death sentence must be reversed. (*Mills v. Maryland, supra*, 486 U.S. at p. 375.)

G. The Lack of a Requirement of Written Findings Renders California's Death Penalty Scheme Unconstitutional

California's death penalty scheme does not require that the jury make written findings as to the aggravating factors it selects in imposing the death penalty. This omission deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review of his case. (See *California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra,* 428 U.S. at p. 195.)

California juries have absolute discretion and receive virtually no guidance on how they should weigh aggravating and mitigating circumstances. (See *Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980.) The failure to require written findings therefore makes it impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 314, 83 S.Ct. 745, 758 (overruled on another point by *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 5, 112 S.Ct. 1715, 1717); contra, *People v. Rodriguez* (1986) 42 Cal.3d. 730, 777-779.)

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It 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.*, 11 Cal.3d at p. 267.)[31] The same analysis surely must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 (statement of reasons essential to meaningful appellate review).)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code sec. 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case has to be required to identify for the record in some fashion the aggravating circumstances found.

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[31] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Tit. 15, Cal. Code of Regs., sec. 2280 et seq.)

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, *supra,* 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (*Id.,* at p. 383, fn. 15.) The fact that the decision to impose death may be "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra,* 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[32]

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[32] See Ala. Code secs. 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. sec. 13-703(d) (1989); Ark. Code Ann. sec. 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. sec. 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. sec. 921.141(3) (West 1985); Ga. Code Ann. sec. 17-10-30(c) (Harrison 1990); Idaho Code sec. 19-2515(e) (1987); Ky. Rev. Stat. Ann. sec. 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27,

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence — including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not

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sec. 413(I) (1992); Miss. Code Ann. sec. 99-19-103 (1993); Mont. Code Ann. sec. 46-18-306 (1993); Neb. Rev. Stat. sec. 29-2522 (1989); Nev. Rev. Stat. Ann. sec. 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. sec. 630:5(IV) (1992); N.M. Stat. Ann. sec. 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, sec. 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. sec. 9711 (1982); S.C. Code Ann. sec. 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. sec. 23A-27A-5 (1988); Tenn. Code Ann. sec. 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. sec. 37.071(c) (West 1993); Va. Code Ann. sec. 19.2-264.4(D) (Michie 1990); Wyo. Stat. sec. 6-2-102(e) (1988).

only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

Accordingly, the failure to require written findings with regard to aggravating factors deprived appellant of his Eighth Amendment right to meaningful appellate review, and reversal is required.

H. California's Death Penalty Statute as Interpreted by this Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954, 103 S.Ct. 3418, 3427 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 248-251, 96 S.Ct. 2960, 2965-2966 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has rejected. In *Pulley v. Harris*, *supra,* 465 U.S. at p. 51, the high court, while declining to hold that comparative proportionality review an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726. Further, the statutorty scheme lacks numerous other procedural safeguards commonly

utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to pass constitutional muster.

Further, it should be borne in mind that 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. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, 122 S.Ct. 2248, 2249, fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831, n. 31, 108 S.Ct. 2687, 2691; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22, 102 S.Ct. 3368, 3376; *Coker v. Georgia* (1977) 433 U.S. 584, 596, n. 10, 97 S.Ct. 2861, 2868, n.10.)

Twenty-nine of the 34 states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. sec. 27-2537(c).) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259, 96 S.Ct. 2960, 2969.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[33]

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[33] See Ala. Code sec. 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. sec. 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, sec. 4209(g)(2) (1992); Ga. Code Ann. sec. 17-10-35(c)(3) (Harrison 1990); Idaho Code sec. 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. sec. 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. sec. 99-19-105(3)(c) (1993); Mont. Code Ann. sec. 46-18-310(3) (1993); Neb. Rev. Stat. sec. 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. sec. 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. sec. 630:5(XI)(c) (1992); N.M. Stat. Ann. sec. 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. sec. 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. sec. 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. sec. 9711(h)(3)(iii) (1993); S.C. Code Ann. sec. 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. sec. 23A-27A-12(3) (1988); Tenn. Code Ann. sec. 39-13-206(c)(1)(D) (1993); Va. Code Ann. sec. 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. sec. 10.95.130(2)(b) (West 1990); Wyo. Stat. sec. 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 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

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, *i.e.*, inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants 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 that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or

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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.

her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

I. The Death Penalty Scheme is Unconstitutional Because it Does Not Require at Least Some Burden of Proof

There must be some burden of proof placed upon the government at the penalty phase, to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, 102 S.Ct. 869, 875 ("Capital punishment must be imposed fairly, and with reasonable consistency, or not at all)".)

The trial court's failure to instruct on any penalty phase burden of proof at all deprived appellant of his rights to due process, equal protection,

and freedom from cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The failure to articulate a proper burden of proof is automatic constitutional error under the Sixth, Eighth and Fourteenth Amendments, and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282, 113 S.Ct. 2078.) That should be the result here as well.

If in the alternative, it were permissible not to have any burden of proof at all, the trial court still erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 282.)

Jurors who are not informed as to the burden of proof might believe that the burden fell upon appellant to prove why he should not die. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof, rendering the failure to give any instruction at all a violation of the Eighth and Fourteenth Amendments. Nor is the prejudice cured by CALJIC No. 8.88, because that instruction tells the jurors they can assign any weight they want to any factor. That does not

prevent jurors from assigning any burden of proof they want, and indeed may encourage jurors to unconstitutionally put the burden of proof on the defendant to justify a sentence of less than death, since every penalty phase always begins with a "presumption of death" (i.e., the aggravating factors already proven in the guilt phase which caused the jury to find a special circumstance), and jurors will assume it is the defendant's burden to overcome that presumption.

J. California's Aggravating and Mitigating Factors Allow Arbitrary and Capricious Imposition of Death and Therefore Violates the Federal Constitution

Penal Code section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a) directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some

fact beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.) Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant having sought to conceal evidence three weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10), or having a hatred of religion (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582), or threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204) or disposed of the victim's body in a manner that precluded its recovery (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35).

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge in the United States Supreme Court (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), 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.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no

basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 108 S.Ct. 1853, 1858 (discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420).)

The inclusion in the list of mitigating factors of such adjectives as "extreme" (see factor (d)) acts as a barrier to consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See, *Mills v. Maryland* (1988) 486 U.S. 367, 108 S.Ct. 1860; *Lockett v. Ohio* (1978) 438 U.S. 586, 98 S.Ct. 2954.) This wording renders factor (d), unconstitutionally vague, arbitrary, capricious and/or incapable of principled application. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362, 108 S.Ct. 1853, 1857-1858; *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759.) The jury's consideration of this vague factor, in turn, introduces impermissible unreliability into the sentencing, in violation of the Eighth and Fourteenth Amendments. It also may induce the jury to ignore factor (d) if it did not find that the mental or emotional disturbance was "extreme." Notwithstanding the catchall factor (k) instruction, a jury may take the instruction at face value and decided only "extreme" emotional or mental disturbance is mitigating.

The principle of *inclusio unius est exclusio alterius* (the inclusion of one thing is the exclusion of another) is a standard principle of interpretation of statutory construction. (See, e.g., *Courtesy Ambulance Service of San Bernardino v. Superior Court* (1992) 8 Cal.App.4th 1504, 1514; *People v. Weatherill* (1989) 215 Cal.App.3d 1569, 1584.) Since it is a maxim of common interpretation of language, it is also how lay people would be expected to interpret a jury instruction. Jurors who hear that "extreme" emotional or mental disturbance is a factor to consider ("*inclusio unius*") would naturally conclude that "nonextreme" emotional or mental disturbance is a factor not to consider ("*exclusio alterius*"). This is manifestly unconstitutional.

Factor (k) does not cure such error, among other reasons, because of another principle of language interpretation – that the specific prevails over the general. (See, e.g., *People v. Stewart* (1983) 145 Cal.App.3d 967, 975.) But even if factor (k) only provided a contradiction for the jurors rather than something that would be subsumed to the specific factor (d), there would still be error, because a contradictory instruction does not absolve the error in a constitutionally infirm instruction. (*Yates v. Evatt* (1991) 500 U.S. 391, 401, fn. 6, 111 S.Ct. 1884.)

Nor could there be any "harmless error" analysis here. First, the error went to mitigating evidence in the record. The government cannot carry its burden of showing no reasonable possibility the error affected the verdict (*Chapman v. California, supra*, 386 U.S. at pp. 23-24), especially given the "amorphous human factors" that may be considered during death-selection in California. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 (cert. denied 517 U.S. 1111, 116 S.Ct. 1335).)

K. The Unbounded Discretion Granted Prosecutors in California Violates the Federal Constitution

In this state, the prosecutor has sole authority to make what is literally a life or death decision, without any legal standards to be used as guidance. Irrespective of whether prosecutorial discretion in charging is constitutional in other situations, the difference between life and death is not at all analogous to the usual prosecutorial discretion situation, *e.g.*, the difference between charging something as a burglary or a theft.

As it stands, an individual prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As the late Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness. Under this

statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, or simple arbitrariness.

Moreover, the absence of any standards to guide the prosecutor"s discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status. To seek the death penalty on the basis of factors that are constitutionally impermissible, such as race, violates the Fifth, Eighth, and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 885, 103 S.Ct. 2733, 2747.) Furthermore, under this court"s expansive interpretation of the lying-in-wait theory of first-degree and special circumstance murder (see *People v. Morales* (1989) 48 Cal.3d 527, 557-558), and due to the statutory inclusion of most felony murder categories as first-degree and special circumstance murders, prosecutors are free to seek the death penalty in the vast majority of murder cases. This fact enhances the potential for abuse of the unbridled discretion conferred on prosecutors under the law.

Like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina* (1976) 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, the arbitrary and wanton prosecutorial discretion – in charging, prosecuting, and deciding whether to submit the case to a penalty phase jury – allowed by the California scheme is contrary to the principled decision-making mandated by the Fifth, Eighth, and Fourteenth Amendments. (*Furman v. Georgia, supra,* 408 U.S. 238.) The judgment of death in this case is the product of that unconstitutional system and for that reason may not stand.

State action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, 103 S.Ct. 1855.) This standard applies to prosecutors as much as other state actors. (*Ibid.*)

L. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants.

The United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed 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 this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This different treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., Amend. XIV.)

Equal protection analysis begins with identifying the interest at stake. In 1975, 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 (emphasis added).) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles* (1958) 356 U.S. 86, 102." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental

interest without showing that it has a compelling interest which 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, 62 S.Ct. 1110, 1113.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the disparate treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[34] as in *People v. Snow* (2003) 30 Cal.4th 43,[35] this Court analogized the process of determining whether to impose death to a

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[34] "As explained earlier, the penalty phase determination in California is held to be normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*People v. Prieto, supra*, 30 Cal.4th at p. 275; emphasis added.)

[35] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*People v. Snow, supra*, 30 Cal.4th at p.126, fn. 3; emphasis added.)

sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where

death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*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 which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S.Ct. 1756, 1774.) Principles of uniformity and proportionality live in the area of 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* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399, 411, 106 S.Ct. 2595; *Atkins v. Virginia, supra.*)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See sec. 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim 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 (emphasis added).) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 106 S.Ct. 2595, 2602). "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 *Reid v. Covert* (1957) 354 U.S. 1, 77, 77 S.Ct. 1222, 1261 (conc. opn. of Harlan, J.); *Gardner v. Florida* (1977) 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204-1205; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 (plur. opn.); *Beck v. Alabama* (1980) 447 U.S. 625, 637, 100 S.Ct. 2382, 2389; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.) The qualitative difference between a prison

sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, 42 Cal.3d at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the determinate sentencing on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000)

531 U.S. 98, 104, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, *e.g.*, *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases (*Allen*, *supra*, 42 Cal.3d at p. 1286)) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors

that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[36]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis

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[36] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 587, 608.)

that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

M. The California Death Penalty Scheme Violates International Law

Illinois Supreme Court Justice Harrison, in the dissent in *People v. Bull* (1998) 185 Ill.2d 179, 225, 705 N.E.2d 824, answered the majority's contention that the American criminal justice system was one of the best in the world by saying,

> The sentiment has a pleasant and reassuring tone, but it overlooks an important fact. The supposedly "inferior" justice systems of other nations are abandoning capital punishment at an unprecedented rate. Hood, *The Death Penalty: The USA in World Perspective*, 6 J. Transnat'l L. & Pol'y 517, 519 (1997). With the exception of Japan, the United States is now the only well-established democracy that has not abolished the death penalty expressly or in practice. Wyman, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. Transnat'l L. & Pol'y 543, 544 (1997). Western Europe is free of capital punishment (6 J. Transnat'l L. & Pol'y at 525), as are most countries in our hemisphere (6 J. Transnat'l L. & Pol'y at 570). Even in the United States, 12 states and the District of Columbia presently have no death penalty for any offense, no matter how severe. A. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 Am.Crim. L.Rev. 93, 99 n. 54 (1997). (*Bull, supra*, 185 Ill.2d at p. 225, 705 N.E.2d at p. 846, 235 Ill.Dec. at p.663.)

The abolition of the death penalty is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389, 109 S.Ct. 2969, (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, 108 S.Ct. 2687, (plur. opn. of Stevens, J.).) Indeed, *all* nations of Western Europe have now abolished the death penalty. (*The Death Penalty: List of Abolitionist and Retentionist Countries* (Jan. 1, 2000) Amnesty International <http://web.amnesty.org/library/index/ENGACT500052000> (as of Jan. 7, 2005).)[37]

In fact, it is now one of the requirements for admission into the European Union. The draft Constitution for Europe, recently adopted by all 25 heads of state or government of the Union reads:

> Everyone has the right to life. No one shall be condemned to the death penalty, or executed....No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. (Arts. II-2 & II-19, Draft Constitution for Europe.)

This fact is especially important since our Founding Fathers looked to the nations of Western Europe as models on which the laws of civilized nations were founded, and for the meaning of terms in the Constitution.

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[37] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

"When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1; *Miller v. United States* (1870) 78 U.S. 268, 315, (dis. opn. of Field, J.); see also, e.g., *Geer v. Connecticut* (1896) 161 U.S. 519, 524, 16 S.Ct. 600; *Hilton v. Guyot* (1895) 159 U.S. 113, 227, 16 S.Ct. 139; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292, 8 S.Ct. 461; *Martin v. Waddell's Lessee* (1842) 41 U.S. 367, 409.) Thus, for example, Congress' power to prosecute war, as a matter of constitutional law, was limited by the power recognized by the law of nations; and what civilized nations of Europe forbade, such as poisoned weapons or slavery or wartime prisoners, were constitutionally forbidden here. (*Miller v. United States, supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

Moreover, due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra*, 408 U.S. at p.

420 (dis. opn. of Powell, J.).) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100, 78 S.Ct. 590.)

In short, "cruel and unusual punishment," as defined in the Constitution, is not limited solely to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. As defined in the Constitution, it encompasses whatever violates evolving standards of decency. And if the standards of decency, as perceived by the civilized nations of Europe which our Framers looked to as models, have themselves evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own.

In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is

overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 315, 122 S.Ct. at p. 2249, fn. 21.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes, such as treason or air piracy – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the

most serious crimes.")[38] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright*, *supra*, 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California, and use of death as regular punishment, violate international law, and therefore violate the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[38] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1, 30.)

N. The Insufficiency of Post-Conviction Relief Undermines the Validity of California's Death Penalty Scheme

Appellant incorporates by reference Justice Blackmun's opinion in *Callins v. Collins* (1994) 510 U.S. 1141, 114 S.Ct. 1127, 1130 (opn. of Blackmun, J., dissenting from denial of cert.)[39] The opinion is complete, and there is no need to add to it, except to say the limitations cited therein apply to California postconviction proceedings as well as federal ones.

Appellant also incorporates by reference Justice Blackmun's concurrence in *Sawyer v. Whitley* (1992) 505 U.S. 333, 357-360, 112 S.Ct. 2514, in which he grappled with the likely reality that the ever-increasing procedural barriers to meaningful federal habeas corpus relief "undermine[] the very legitimacy of capital punishment itself." Moreover, the procedural barriers have continued to mount since *Sawyer*, and have now been joined by an ever-growing set of procedural barriers in state court as well. (See, e.g., *In re Clark* (1993) 5 Cal.4th 750.) The severe diminution of the availability of federal habeas corpus relief and the labyrinth a petitioner must navigate to try to obtain it, as well as the ever-increasing creation of new procedural barriers in California, and the

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[39] "From this day forward, I no longer shall tinker with the machinery of death."

combination of the two, operate to render the system of review of capital convictions and sentences more arbitrary and less reliable than was contemplated when capital punishment resumed in 1976 (*Gregg v. Georgia, supra*, 428 U.S. 153), and more arbitrary and less reliable than is required for there to be meaningful post-conviction review.

O. Appellant Was Prejudiced Because He Was Sentenced to Death Under an Unconstitutional Statutory Scheme

Error under *Blakely* is structural, and the penalty phase verdict of death must be reversed regardless of prejudice: "Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2538.)

Without a jury instruction defining the burden of proof as to factors in aggravation, the weight of aggravating versus mitigating factors, nor any requirement of unanimity, *Blakely* bars the imposition of the death penalty. No jury instruction on the burden of proof was given in this case and in fact, the jury was not required to unanimously find that any factor in aggravation was present. Moreover, the failure to properly instruct on the burden of proof alone is a structural error "without which [the penalty trial]

cannot not serve its function." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281.)

As Justice Scalia stated in *Sullivan, supra*,

> Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty beyond a reasonable doubt, the question whether the same verdict of guilty beyond a reasonable doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt - not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. See *Yates, supra*, at 413-414 (Scalia, J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach v. United States,* 326 U.S. 607, 614 (1946). (*Sullivan, supra*, 508 U.S. at p. 280.)

Appellant's death sentence constitutes a miscarriage of justice and mandates reversal without regard to prejudice.

P. The Arbitrary Administration of the Death Penalty Renders it Unconstitutional

Appellant adopts by reference Judge Noonan's dissenting opinion in *Jeffers v. Lewis* (1994) 38 F.3d 411, 425-427. The circumstances of California's administration of the death penalty, especially as they exist at this time, are strikingly similar to those in Arizona discussed in the *Jeffers* dissent, and the ultimate selection of who lives and who dies is arbitrary, for those reasons.

Q. Conclusion

These systemic errors mandate that appellant's sentence be reversed.

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XI. THE EFFECT OF THE CUMULATIVE ERRORS DENIED APPELLANT A FAIR TRIAL ON THE GUILT AND PENALTY PHASES IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION

The evidentiary and instructional errors which riddled appellant's guilt phase trial resulted in convictions which are constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. (*Beck v. Alabama* (1980) 447 U.S. 625 (Eighth Amendment also requires heightened reliability in guilt determination in capital cases).)

This Court must consider the cumulative prejudicial impact of the evidentiary and instructional errors at the guilt phase, all of which are of federal constitutional magnitude. (*People v. Holt* (1984) 37 Cal.3d 436, 458-459 (considering the cumulative prejudicial impact of various errors); *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15, 98 S.Ct. 1930 (cumulative effect of errors violated federal due process); *Cupp v. Naughten* (1973) 414 U.S. 141, 146-149 (errors must be assessed in context of overall trial to determine if constitutional violation occurred).)

The decision in *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, reversed a conviction after considering the cumulative prejudicial impact of several errors, announcing that "[w]here . . . there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial." (*Id.* at 1381; see also *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 964; *United States v. Tory* (9th Cir. 1995) 52 F.3d 207, 211.)

XII. CONCLUSION

Appellant's convictions and his death sentence must be set aside.

Dated: _____

Respectfully submitted,

_____
GRACE LIDIA SUAREZ
Attorney for Appellant

WORD COUNT CERTIFICATE

I hereby certify that this document contains 60,554 words, as computed by the Corel WordPerfect word processing program.

Executed on _____, _____ at San Francisco, California.

_____
GRACE LIDIA SUAREZ
Attorney for Appellant

PROOF OF SERVICE

I, the undersigned, say that I am over eighteen years of age and not a party to the above action. My business address is 508 Liberty Street, San Francisco, California 94114.

On _____, _____, I served the attached on the following by placing true copies thereof, enclosed in a sealed envelope with postage fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Stephen Redd	Attorney General's Office, San Francisco 455 Golden Gate, S. 11000 San Francisco CA 94102 Counsel for Respondent
Hon. Francisco P. Briseno Judge of the Superior Court Orange County Superior Court Criminal Courts Operations 700 Civic Center Drive West, room K100 Santa Ana CA 92702-2024	Mr. Donald Rubright Asst. Public Defender Orange County Public Defender 14 Civic Center Plaza Santa Ana CA 92701
Mr. Lewis R. Rosenblum District Attorney Orange County District Attorney PO Box 808 Santa Ana CA 92702	Mr. Scott Kauffman Staff Attorney California Appellate Project 101 Second Street, Suite 600 San Francisco CA 94105

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

Executed on _____, _____, at San Francisco, California.

_____
Grace Lidia Suarez