No. S074804
(Riverside County Superior Ct. No. CR - 63743)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CISCO HARTSCH,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California

(HONORABLE W. CHARLES MORGAN, JUDGE, of the Superior Court)

MICHAEL J. HERSEK
State Public Defender

WILLIAM HASSLER
Bar No. 114928
Deputy State Public Defender

221 Main Street, Tenth Floor
San Francisco, California 94105
Telephone: (415) 904-5627

Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CISCO JAMES HARTSCH, Defendant and Appellant.	No. S074804 (Riverside Co. No. CR- 63743)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.)[1]

STATEMENT OF THE CASE

On February 7, 1996, the Riverside County District Attorney filed a five-count information against appellant Cisco Hartsch. Counts I through III charged that appellant murdered Kenneth Gorman, Ellen Creque and Diana Angelica Delgado, respectively, in violation of section 187. Counts I through III also alleged that appellant 1) personally used a firearm in the

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

commission of each of those murders, within the meaning of sections 12022.5, subdivision (a), and 1192.7, subdivision (c)(8), and 2) was also charged with murdering the other two victims, within the meaning of section 190.2, subdivision (a)(3). Count III further alleged that appellant murdered Diana Delgado while engaged in the commission or attempted commission of a robbery, within the meaning of former section 190.2, subdivision (a)(17)(i). Count IV charged appellant with discharging a firearm at an occupied dwelling, in violation of section 246. Count V charged appellant with defacing property with graffitti in violation of section 594, subdivision (a). (1 CT 164-167.)[2]

Jury selection began on July 13, 1998. (5 CT 1172.)

On July 16, 1998, the trial court granted appellant's motion that all of his trial objections should be "deemed objections under the applicable provisions of article 1, section 7, 13, 15, and 16 of the California Constitution, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States Constitution." (3 CT 608-609; 5 RT 887-888.)

On July 22, 1998, appellant moved for a mistrial based on the prosecutor's discriminatory exercise of peremptory challenges in violation of *People v. Wheeler*. (18 CT 4955; 7 RT 1187-1190.)

On July 27, 1998, appellant entered a plea of guilty to Count V of the Information. (19 CT 5302-5303.)

The jury trial began on July 29, 1998. (19 CT 5306-5307.) On September 21, 1998, the jury returned its verdicts, finding appellant guilty

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[2] All citations to the record on appeal will first identify the number of the volume of the Clerk's (CT) or Reporter's (RT) Transcript involved, then give the page number, e.g, 1 CT 1.

of first degree murder on Counts I, II, and III, and further finding both the special circumstance allegations under section 190.2, subdivision (a)(3), and the allegations of personal use of a firearm, true. On Count IV, the jury found appellant guilty of violating section 246, and found true the allegation that he personally used a firearm. However, as to Count III, the jury did not find true the special circumstance allegation under section 190.2, subdivision (a)(17). (*Id.* at pp. 5387-5389.)

The penalty phase began on September 28, 1998. (20 CT 5650-5651.) On October 16, 1998, the jury returned a verdict of death. (21 CT 5790.)

On November 13, 1998, the trial court sentenced appellant to death. (21 CT 5807-5808.)

This appeal is automatic under section 1239.

STATEMENT OF FACTS

I. Guilt Phase Facts

The guilt phase evidence concerned the shooting deaths of Kenneth Gorman and Ellen Creque ("Creque" and "Gorman"), and the subsequent fatal shooting of Diana Angelica Delgado ("Diana Delgado"). Gorman and Creque were shot in a citrus grove in Riverside, California, on June 15, 1995. (9 RT 1423-1428, 1437-1438, 1442-1443, 18 RT 2656, 2668.) Diana Delgado was found dead from gunshot wounds on June 25, 1995, in another citrus grove near where Creque and Gorman were killed. (9 RT 1386, 10 RT 1504-1506, 1512-1514, 1519-1521.)

Appellant was convicted of all three murders based on the testimony

of his former good friend, Francisco Castaneda ("Castaneda").[3] (2 CT 441; 9 RT 1404.) Castaneda testified that he saw appellant murder Gorman and Creque (16 RT 2363-2366), and provided the most crucial testimony linking appellant to Diana Delgado's murder. Castaneda testified that he happened to bump into appellant and Ms. Delgado together the night she disappeared, and that several hours later he saw appellant in possession of valuable jewelry belonging to Ms. Delgado which she would not have given up freely. (16 RT 2365-2366, 2400-2402.)

A. The Events Of June 14-15, 1995

In June of 1995,[4] appellant and his siblings Charles Rushing ("Chucky"), Suzi Silva and Ileene Silva, lived with their parents Joseph and Josephine Hartsch in a small house in Colton, California. (11 RT 1643-1644.) Appellant, then 18 years old, and Chucky, who turned 22 on June 15, slept in a converted garage behind the house. (11 RT 1644, 1648, 12 RT 1838.) On June 14, Castaneda visited appellant and Chucky. Castaneda was an old friend who had grown up with appellant and his older brothers, but was no longer a close friend and did not spend much time at their house. (11 RT 1708, 1739, 1940.)

Castaneda is older and significantly larger than appellant or Chucky. At the time of appellant's trial, Castaneda was six feet three inches tall, and weighed about 260 pounds. (13 RT 1941, 16 RT 2432-2433, 2456.)

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[3] As noted above, appellant was also convicted of discharging a firearm into an occupied dwelling. (Pen. Code, § 594.) Castaneda's testimony was crucial to the prosecution's case as to that offense as well. (See 16 RT 2352-2355.)

[4] The great majority of the incidents involved in the guilt phase occurred in June of 1995; unless otherwise noted all subsequent references to "June" are to that year.

Castaneda was heavily involved in drug use, and was admittedly using "speed" (methamphetamine) on a daily basis during June of 1995. (17 RT 2607-2608.) Castaneda also had a significant criminal history. He was convicted of car theft on at least six occasions between 1990 and 1996 (16 RT 2344, 17 RT 2601, 19 RT 2833), and in both 1993 and 1998 pled guilty to being an ex-felon in possession of a gun. Further, he admitted at trial to having shot at least three people, two in 1989 and one in 1993. (17 RT 2601-2606.)

Sometime between 11:30 p.m. on the night of June 14 and 1:00 a.m. on the morning of June 15, appellant, Chucky and Castaneda brought Tameka Ramos and Rene Velasquez to the converted garage for a party. (12 RT 1852-1853, 13 RT 1955, 1987, 1990, 2002-2004, 2025-2026.) Castaneda drove the five of them in a stolen blue Honda. (16 RT 2344, 2831, 19 RT 2833-2834.) At the converted garage they all drank beer and watched videos. After a while Castaneda, Chucky and Rene decided to take methamphetamine. Tameka did not want to take the drug, so appellant took her to a nearby lake for approximately an hour while the others consumed the methamphetamine. (12 RT 1862-1863, 13 RT 1996-1999, 2027-2029.) Castaneda thought that appellant seemed pretty drunk that night and that appellant "took a hit of the speed pipe" earlier in the evening. (17 RT 2475-2476.) By all accounts, shortly after appellant and Tameka returned at around 1:45 a.m., appellant and Castaneda left for about 35-40 minutes. (12 RT 1864-1865, 13 RT 1998-1999, 2030-2031.)

According to Castaneda, he and appellant went to go "target

shooting" in some nearby citrus groves when they left the party that night.[5] (16 RT 2349, 17 RT 2476.) Castaneda drove the stolen Honda, and they took a nine-shot .22 caliber revolver appellant kept in his bedroom. (16 RT 2348-2349, 2352.) They did not go directly to the groves, but first went to the nearby town of Highgrove to drive around looking for friends. (17 RT 2489-2491.)

At some point they drove past a house in Highgrove that Castaneda recognized as the home of a man named Steve with whom appellant and his family had "problems." (16 RT 2352- 2354.) The second time they passed that address in the course of their drive, appellant pulled out his gun and shot at the house several times. Castaneda was completely surprised when appellant shot at the house. (*Id.* at pp. 2395, 2494.) Although Castaneda claimed he was "paranoid" about the police after appellant shot at that house, he then stopped at a nearby house so appellant could pick roses to take back to Tameka and Rene. (*Id.* at p. 2356.)

Elisa Rios, who lived with her brother Steve Arevalo at 588 Prospect Avenue in Highgrove, testified that their house was hit by gunfire at around 2:30 a.m. on June 15, 1995. (11 RT 1598-1601.) Her brother had an ongoing feud with appellant prior to that incident. (*Id.* at p. 1602.) In 1992, appellant chased Arevalo in a car. (*Id.* at pp. 1635-1636.)[6]

After picking the roses, appellant and Castaneda drove on to the

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[5] None of the people at appellant's house that night remembered exactly when Castaneda and appellant left to go target shooting, or any other specifics about timing. (26 RT 3747-3748 [prosecutor asserting in his summation that none of the witnesses kept track of time that night].)

[6] Investigator Wes Daw testified at trial that he went to 588 Prospect Avenue on November 3, 1995, and recovered a .22 caliber bullet from the wall. (14 RT 2150-2151.)

groves to go shooting. Both of them knew those groves well because they, Chucky, and various friends had been target shooting there before. (12 RT 1855, 15 RT 2233-2234.) Castaneda, Chucky and Gabriel Delgado had also taken stolen cars there to "strip" them. (16 RT 2335.) When they arrived at the groves, Castaneda and appellant found a blue pickup truck parked there. Appellant said something to Castaneda about "jacking it," i.e., stealing from the truck, and got out. (*Id.* at pp. 2358-2359.)[7] At that point Castaneda did not think any people were in the truck, because they had not seen anyone. (16 RT 2360-2361, 17 RT 2502-2504.) Castaneda parked his car at an angle to the truck and about ten feet away, and put on his bright lights to aid appellant. (16 RT 2360, 2362.) According to Castaneda, before appellant got out of the car, he did not say anything about anyone being in the truck, or about shooting or robbing anyone. (17 RT 2508.)

When appellant was within two feet of the truck a woman suddenly sat up from the seat, which appeared to startle him. The woman then awakened a man sleeping next to her, who yelled at appellant. (16 RT 2361-2363.) Appellant argued with the man for a moment, then pulled out his gun and fired into the truck, shattering the closed window. (*Id.* at pp. 2363-2364.)

After firing a series of shots into the truck, appellant came back to the car and reloaded his gun. (16 RT 2365-2366.) Castaneda claimed that

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[7] Two officers, Detectives William Barnes and Allan Payne, testified about their recollections of what Castaneda told them appellant said before approaching the pickup truck that night. Barnes recalled that Castaneda quoted appellant as saying he was going to "jack 'em," i.e., rob the people in the truck. (23 RT 3376.) Paine was less sure. He said Castaneda did use the words "jack it," i.e., steal from the truck, in describing what appellant said, but might also have used the words "jack 'em." (24 RT 3532-3534.)

at that point he started to move the car and urged appellant to leave, but appellant pointed the gun at him and said: "They don't want to die. They're not dead yet." (*Id.* at p. 2366.) Appellant walked back to the truck and shot into it again. (*Id.* at p. 2368.) Castaneda could have driven away, but waited because he feared that if he left he and/or appellant would be caught. (17 RT 2519-2521.)

After a few moments, appellant got back in the car with Castaneda, and they drove away. (17 RT 2523.) As they drove, appellant told Castaneda that: "The bitch didn't want to die and [] she had nice tits." (16 RT 2371.) Castaneda also saw and/or heard appellant throwing shell casings out the car window. (16 RT 2373, 17 RT 2526.) When they got back to appellant's house, Castaneda claims that he warned appellant that if they "got caught" he "wasn't going to take the blame," whereupon appellant assured him no one would find out what had happened. (16 RT 2374-2375.)[8] About an hour later, Castaneda went to the residence of his girlfriend Veronica Delgado, her mother Diana Madrid, her sister Diana Delgado, and her brother Gabriel Delgado, and spent the rest of the night sleeping outside in his car. (15 RT 2194-2195, 16 RT 2376-2380.)

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[8] The foregoing account of what happened on the night of June 14-15, 1995, is based primarily on Castaneda's largely uncorroborated testimony. All or most of the evidence offered as corroboration for Castaneda's testimony that appellant committed the murders of Creque and Gorman, such as the fact that appellant had a .22 caliber revolver about a month before the shootings (19 RT 2827), or that Castaneda was able to point out used .22 caliber shell casings to the police (*id.* at pp. 2810-2811, 2817-2818), or that a shell casing found at appellant's house was "probably" fired from the same gun as those found at the murder scene (21 RT 3093-3098, 22 RT 3178-3179), was equally consistent with the defense theory that Castaneda killed Creque and Gorman. (26 RT 3789.)

Shortly after Castaneda left appellant's house, sometime after 4:30 a.m, appellant and Chucky drove Rene and Tameka home, and then went on to work at California Foods. (12 RT 1866-1867.) However, a supervisor sent them home to change their shoes because they were wearing tennis shoes. (*Id.* at pp. 1867-1868.) Appellant later told the police that he owned two pairs of Nike tennis shoes at that time – one black pair and one white pair. (14 RT 2092-2093.) Castaneda told the police he could not remember whether appellant was wearing white Nikes the night they went target shooting, and Chucky testified that he could not remember either. (12 RT 1868, 22 RT 3477.) However, two supervisors from appellant's workplace claimed to recall that he was wearing white tennis shoes when he first arrived at work that morning. (14 RT 2059, 2077.)

Appellant's father, Joseph Hartsch, left for work as usual at around 4:30 a.m. on June 15, 1995. (11 RT 1659.) Before he left, he saw the lights on in the garage where appellant and Chucky slept and stuck his head in to tell them to get ready for work. He saw them both in the garage, with two girls he did not know, but did not see Castaneda. (*Id.* at pp. 1665-1666, 1668-1669.)

In the morning on June 15, 1995, Castaneda told Gabriel Delgado about the shooting at the groves. (16 RT 2382, 19 2834-2836.) Castaneda testified that later that evening he had a conversation with Diana Delgado in which she said she might be pregnant. Still later that same evening, Castaneda and Gabriel Delgado went out to "steal stereos and stuff from cars." (16 RT 2387, 2390.)

The bodies of Gorman and Creque were discovered early in the morning on June 15, 1995, still in the pickup. The windows on both sides of the truck were shattered. (9 RT 1423-1428, 1437-1438, 1443-1444,

1459-1460.) The police searched the area and recovered a number of shoe prints, a .22 caliber bullet, some .22 caliber shell casings, and a .38 caliber shell casing. (*Id.* at pp. 1446-1447, 1457.)

B. The Events Of June 16-17 1995

According to Castaneda, on Friday, June 16, 1995, he showed Gabriel Delgado a newspaper article about the Creque/Gorman killings and said the article was about "the deal I was telling you about . . . ." When Veronica Delgado saw that article Castaneda told her it was about him and appellant, and that he was present when the murders happened. But when Veronica got upset, Castaneda told her he was just kidding. (16 RT 2391-2393, 17 RT 2547-2548.)

There was extensive testimony about Diana Delgado's actions on June 16, 1995. Castaneda said that he talked to Ms. Delgado that day at around 1 p.m. and also that he tried to find her several times later that day, without success. (17 RT 2550-2553.) According to Ms. Delgado's brother, Jesse Melgoza, she came to their grandmother's house, where he was recuperating from a car accident, at around 5:00 p.m. on June 16. Shortly after Ms. Delgado arrived, Melgoza fell asleep; when he woke up at around 7:30 or 8:00 p.m. she was gone. (16 RT 2297-2300.) Melgoza spoke to Ms. Delgado on the telephone at around 9:00 or 9:30 p.m. that evening, when she called to say she had a ride home. (*Id.* at pp. 2300, 2302-2303.)

Diane Madrid testified that she also saw Diana Delgado on June 16 and that Ms. Delgado was wearing "quite a few rings," including a "heart-shaped" one and a diamond one worth "$1,200 or 600 [*sic*]." (15 RT 2206-2207.) Michael Batease, who drove Ms. Delgado around town for about three hours on June 16, also noticed her jewelry. He remembered that she was wearing a large diamond ring and a second ring with a bird design. (*Id.*

at pp. 2256-2258, 16 RT 2272-2274.)

Appellant and Diana Delgado knew each other and had "gone out" together in the past. (11 RT 1649-1650, 12 RT 1801-1802.) According to Castaneda, he and his sister, Alvina Martinez, ran into Diana Delgado and appellant on the street at around 10 p.m. on June 16. (16 RT 2394-2395.) Castaneda pulled over when Castaneda saw appellant's pickup truck, and when appellant pulled alongside he saw that Ms. Delgado was in appellant's truck. (*Id.* at p. 2395.) Appellant said he and Ms. Delgado were headed to the groves to have sex, and she smiled and appeared happy when appellant said that. (*Id.* at p. 2396.) Castaneda testified that before leaving appellant promised to come by Castaneda's mother's house later that evening. (*Id.* at p. 2397.) Alvina Martinez confirmed that she and Castaneda ran into appellant and Ms. Delgado "before 2:00 a.m." on June 16, and that Diana seemed "happy" and "normal" at that time. (17 RT 2617, 2622-2623.)

According to Castaneda, appellant came to his house after midnight on June 16 and showed him some jewelry. Castaneda recalled that appellant showed him "two necklaces," one of which he "recognized as being [Diana Delgado's]." (16 RT 2400-2401.) When Castaneda asked appellant where he got the jewelry appellant just "smiled" back at him. (*Id.* at p. 2402.) Castaneda said he was not worried about Ms. Delgado at that point, even though he thought appellant might have beaten her up and stolen the jewelry from her. (17 RT 2557-2558.)

In the morning on June 17, 1995, after a long talk about "run[ning] off" together, Castaneda and Veronica Delgado decided to drive to Texas. After a few hours spent borrowing money from friends and family, they drove off with Veronica's baby daughter in the stolen Honda. (16 RT 2408-2409, 20 RT 2926-2932.) It took them several days to reach Texas. At

several stops along the way in New Mexico, Castaneda stole souvenirs from gift shops. (17 RT 2418-2420, 20 RT 2933-2935.)

C. The Discovery Of Diana Delgado's Body And The Police Investigation

On June 20, 1995, workmen found Diana Delgado's body about 20 feet from the road in a citrus grove near the Highgrove dump in Riverside County. (10 RT 1505-06, 1513-1516, 1530-1531, 1529, 1537.) The body was identified as Ms. Delgado's through fingerprints. (*Id.* at pp. 1519-1520, 1524-1525, 1541, 15 RT 2213-2214.) Riverside Sheriff's Deputy George Stanley observed the body as it was found at the scene. He gave his opinion that Ms. Delgado was killed at that location without a struggle, and while in an upright position, because her blood "was all in a down flow." (10 RT 1541-1542, 1546-1547.)

In a search of the area around Diana Delgado's body, police collected a number of shoe print impressions, most of which were reportedly made by athletic shoes with a "chevron-shaped [sole] pattern." (10 RT 1551-1553, 14 RT 2110.) Similar shoe impressions had been found earlier near the scene of the Creque/Gorman killings. (10 RT 1474-1480, 21 RT 3126-3127.) On June 21, the police went to appellant's residence in Colton and found similar shoe impressions outside the house. (14 RT 2111-2112.) During police questioning on June 23, appellant said that he wore a size 9½ shoe, and owned one black pair of Nike tennis shoes and one white pair. (*Id.* at pp. 2090-2092.) When they executed a search warrant at appellant's house the next day, the police seized a pair of black, size 9½ Nike tennis shoes from his bedroom. (*Id.* at pp. 2116-2119, 2125-2127.)[9]

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[9] Which tennis shoes appellant was wearing on the night of June 14-
(continued...)

Prosecution criminalist Paul Sham testified at trial that he compared the shoe impressions from the Creque/Gorman and Diana Delgado murder scenes. He also compared those impressions to both the impressions taken outside appellant's house and to impressions made from pairs of tennis shoes belonging to appellant, Castaneda, Gorman, Creque, and Diana Delgado. (21 RT 3115-3119.) Sham concluded that: 1) four impressions from the scene of Diana Delgado's murder and two impressions from the scene of the Creque/Gorman killings could have been made by the same shoe, or by different shoes with the same sole pattern (*id.* at pp. 3126-3127); 2) none of those six impressions from the two murder scenes could have been made by a size 12 shoe (*id.* at p. 3162); 3) all six impressions from the two murder scenes were made by a shoe in the range of a size 9½ (*id.* at p. 3157); and 4) he could not say whether either pair of Nike tennis shoes given to him for comparison, one size 12 belonging to Castaneda and one size 9½ belonging to appellant, made those impressions, because he did not compare those shoes to the impressions to make that determination. (*Id.* at pp. 3122, 3155-3156).

Criminalist Sham also examined the shell casings and other ballistics

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[9](...continued)
15 became important at trial because the black Nikes found in appellant's room [P's. Ex. 182] did not match the footprints with a distinctive "chevron pattern" found at the two murder scenes, and because the police never found any white Nikes belonging to appellant. (9 RT 1391, 1396, 14 RT 2110, 21 RT 3116-3127, 3155-3156.) The prosecutor claimed that appellant was wearing white Nikes on June 14-15 but later disposed of them, and argued that appellant's purported "destruction of [that] evidence" not only demonstrated his consciousness of guilt, but also corroborated Castaneda's account of the Creque/Gorman killings. (26 RT 3836, 3839-3841.)

evidence. Sham examined four .22 caliber shell casings and one .38 caliber shell casing that were found at or near the scene of the Creque/Gorman killings and one .22 caliber casing found at appellant's house, and determined that all five .22 caliber casings were "probably" fired from the same firearm. (21 RT 3093-3098.) In other words, there was some similarity between the firing pin impressions on those casings but not enough "to say that [they] were [all] fired from the same firearm." (*Id.* at p. 3099.)[10]

Sham also examined several bullets that were recovered in the investigation of the Gorman, Creque, and Delgado murders. Those included bullets recovered from the victims' bodies during autopsies, one bullet found at the house at 588 Prospect Street, and other bullets found in the truck where Creque and Gorman were shot. (21 RT 3100-3103, 3108.) Many of those bullets were too damaged to be useful, but the ones he managed to "obtain [] useful information" from were all .22 caliber. (*Id.* at pp. 3104, 3111, 3113.) Based on his examination of those bullets, Sham concluded that the same firearm "probably fired 10 of [the] bullets from the Creque/Gorman investigation, and also three from the Delgado investigation." (*Id.* at p. 3115.)

The police tried to collect fingerprint evidence at the scene of Diana Delgado's murder. They took three "comparable" latent fingerprints off beer bottles found at the scene, compared them to prints from appellant,

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[10] Firearms examiner James Warner examined the same ballistics evidence as Sham. His conclusions differed in that he felt there were "sufficient patterns of striations" on all five .22 caliber shell casings so that he could say they "could only" have been fired by the same weapon. (22 RT 3178-3181.)

Castaneda, and Gabriel Delgado, and submitted them "to the Cal-ID computer system." None of those latent prints matched any of the known prints used for comparison, or any of the prints in the computer database. (15 RT 2168-2169, 2174-2176, 2182-2185.)

A day or two after Castaneda and Veronica Delgado got to Texas, Diana Madrid called and told Veronica that Diana Delgado had been found murdered. Castaneda and Veronica started back to California that same day, but were stopped for speeding in Sonora, Texas. The police arrested Castaneda for car theft, and Veronica left him behind and flew home with her baby. (17 RT 2423-2424, 20 RT 2936-2939.)

In Riverside, police officers interviewed Veronica Delgado and the rest of her family about Diana Delgado's murder. They also asked Veronica about the double murder that happened a few days earlier. She told the police about her conversation with Castaneda about the newspaper article concerning the double murder. She said Castaneda first told her the article was about him and appellant and then claimed he was kidding when she became upset. (20 RT 2940-2943.)

On June 24, 1995, officers from the Riverside Police Department and Sheriff's Department went to Texas to interview Castaneda about the Creque/Gorman killings. Castaneda at first refused to talk. On June 25, he changed his mind and gave a lengthy statement in which he described the shooting of the two people in the pickup truck. (17 RT 2426, 19 RT 2804-2807.) Castaneda also said he would waive extradition and return to California to help the police investigation into the murders. He was flown back to Riverside by the police that same day. (17 RT 2427-2428, 19 RT 2807-2808.)

Appellant was arrested on June 24, 1995. After being asked to

waive his *Miranda* rights, he was subjected to a taped interrogation by several police officers that lasted about four hours. (22 RT 3217-3218.) In that interview, the officers told appellant that Castaneda was "spilling his guts" and accusing appellant of shooting Creque and Gorman. Appellant responded then, as he did numerous times during that interview, that he "was all drunk" on the evening of June 14, and accordingly could not say exactly what happened. (*Id.* at pp. 3223-3225; see also 3230, 3233, 3238.)

At first, appellant denied point-blank to the officers that he was involved in shooting the two people in the grove that night. (22 RT 3264-3265.) After a time, appellant said he recalled going "cruising" with Castaneda that night, and returning to the house later, but he did not remember anything about a shooting. (*Id.* at pp. 3231-3232, 3237-3238.) Appellant said he probably could not recall the shooting because the alcohol "hit" him at that point. He said it was possible he shot up the truck without knowing anyone was in it. (*Id.* at pp. 3236-3238.) Appellant also said that Gabriel Delgado had given him a .22 caliber revolver and that he sold it to a "black guy" outside a liquor store about two weeks before that interview. (*Id.* at pp. 3225-3226.)

The interrogating officer told appellant that the police believed that his tennis shoes would match the distinctive shoe impressions found at the two crime scenes. (22 RT 3226-3227.) Appellant told the officers he was wearing his black Nikes on the night of June 14-15 (15 CT 4045), and was "pretty insistent" about the fact that those shoes would not match any shoe impressions from the crime scenes. (22 RT 3228.)

Castaneda arrived in Riverside with the police officers late on June 25, 1995. Castaneda retraced for the officers the route he and appellant supposedly took in the early morning hours on June 14-15. Along the way,

Castaneda pointed out where Gorman's and Creque's pickup was parked, and he showed the officers the house on Prospect Street at which appellant supposedly shot. (17 RT 2429-2430, 19 RT 2808-2810.) Castaneda showed the officers 1) the spot where appellant stopped to pick roses, and 2) a piece of gang graffiti he and appellant saw and discussed that night. (17 RT 2430, 19 RT 2809.) Castaneda also directed the officers to two places where he claimed appellant had thrown shell casings out of the car window as they drove away from the scene of the Creque/Gorman killings. (17 RT 2431, 19 RT 2810.) The police searched those areas, and found two .22 caliber shell casings in the first area, but nothing in the second. (19 RT 2811-2812, 2815-2818.) In the course of the investigation, officers also found eight rounds of .22 caliber ammunition at the house where Castaneda was living in June of 1995. (20 RT 2920, 2952, 26 RT 3681.)

On June 27, 1995, the police placed appellant and Castaneda together in a jail cell with a hidden microphone in order to record any incriminating statements appellant might make. (22 RT 3240-3241.) When Castaneda came into the cell appellant "seemed excited to see him." Then, with Castaneda standing by, appellant called Chucky and told him to "call Little Mikey and tell him to get rid of the shit." (*Id.* at p. 3243.) Chucky testified at trial that "the shit" appellant was referring to in that telephone conversation was marijuana. (13 RT 1912-1913.) Appellant also told Chucky in that telephone conversation that "they got the wrong shoes," and later told Castaneda that his "mom threw the other shoes away." (22 RT 3245-3246.)

II. Penalty Phase Facts

A. Evidence In Aggravation

The prosecution's penalty phase evidence consisted of evidence about violent activity appellant allegedly engaged in as a juvenile, and testimony by relatives of the three murder victims about the impact of their deaths. The evidence of prior violent acts consisted of testimony about seven incidents, the first of which allegedly occurred in May of 1991, when appellant was 14 years old. (29 RT 4479 [appellant was born on February 10, 1977].) The "victim impact" evidence from family members related to the victims' positive attributes and the detrimental impact of their deaths on the families.

Appellant's evidence in mitigation consisted of testimony from his family and friends about positive aspects of his personality, his former supervisor and probation officer about his performance at work and rehabilitative progress, and school officials about his educational record.

1. Evidence Of Alleged Prior Violent Crimes

The first alleged prior act of violence involved an attempted auto burglary in Riverside on May 16, 1991. (27 RT 4042-4043.) Carol Smaniotto was at work at a restaurant that day when she learned that someone was attempting to break into her vehicle, which was parked just outside. Smaniotto and some of her co-workers rushed out to intervene. When they got to her vehicle they saw several young men driving off in a pickup truck. One of the men fell out of the truck and brandished a knife at Smaniotto and her friends.[11] (*Id.* at pp. 4015-4018.) Shortly thereafter one

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[11] According to the prosecutor, Francisco Castaneda was the "heavyset" young man who brandished a knife during that incident. (27 RT (continued...)

of Smaniotto's co-workers pointed the pickup truck out to the police, who detained the passengers and seized several potential weapons – a knife, a baseball bat, a wrench, and a "slide hammer." (*Id.* at pp. 4036-4038, 4041-4044.) One of the officers who detained the passengers in the pickup, Richard Riddle, testified that appellant was in the truck, and that appellant admitted that he "'had the bat'" during the attempted theft. (*Id.* at pp. 4045-4049.)

The next incident allegedly occurred in the Highgrove area of Riverside on January 11, 1992, when appellant was 14 years old. In that incident, shots were allegedly fired from a vehicle occupied by appellant, his father, and his brother Chucky. (27 RT 4004-4005, 29 RT 4479.) At about 11:30 p.m. that night, Mary Palacio heard something ram her front door, and when she opened the door saw a truck right outside her house. She did not recognize the people in the truck, but saw that a gun was pointed from the passenger side. (27 RT 4077-4079.) Palacio later heard "about two" shots, but did not see whether they came from that truck. Palacio called the police, and her grandson, Shawn Maley, went outside to talk to them. (*Id.* at p. 4080.)

Maley pointed out a pickup truck, and the police stopped it. The truck was occupied by appellant, his father Joseph Hartsch ("Joseph"), and Chucky. (27 RT 4084-4086.) Joseph told the police he and his sons were at the apartment house looking for someone named Tommy Gomez. (*Id.* at p. 4087.) Joseph testified at trial that they were actually looking for someone called "Half Man" who shot at appellant about a week earlier. (*Id.* at pp.

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[11](...continued)
4003.)

4059-4060.) Police found a .22 caliber pistol under the seat of the truck and three clips of .22 caliber ammunition in appellant's pocket. (*Id.* at pp. 4091-4092, 4096.) Chucky testified that appellant had a single ammunition clip in his pocket that night but that their father had the gun. (*Id.* at pp. 4069-4070.)

The third incident was an alleged armed robbery that occurred in San Bernardino on September 25, 1993, when appellant was 16. (27 RT 4005-4006, 4104-4106.) At about 12:30 a.m. on that date, Adeline Tafoya and her boyfriend Chris Runyon were confronted by three young Hispanic males who asked for their "jackets" in a "threatening and demanding" manner. (*Id.* at pp. 4104-4108.) One of the men had his hand in his pocket, suggesting that he might have a gun. Tafoya ran away, and the men assaulted Runyon and took his jacket. (*Id.* at pp. 4109-4111.) Tafoya later identified three suspects brought to her by the police as the assailants. (*Id.* at pp. 4111-4113.) Appellant was one of those suspects Tafoya identified, and he resisted arrest that night. (*Id.* at pp. 4116-4120.)

The fourth and fifth incidents involved appellant's former girlfriend, Armanda Ramirez, who testified that appellant hit her on two occasions. On the first occasion, she hit appellant first; the second time, he hit her and pulled her hair when she refused to leave his house. (27 RT 4127-4129, 4132.) Ramirez denied that appellant hit her any other time. (*Id.* at pp. 4130.)

The sixth incident occurred on October 16, 1994, when appellant was 17 years old and in a program for juvenile offenders in Nevada. Appellant allegedly compelled another juvenile to orally copulate him. (27 RT 4007.) On that date appellant and the alleged victim, Shane Alesna, were participating in a 10-day bicycle trip as part of a program called Right

of Passage and were sleeping together in a large tent. (28 RT 4159-4162.) Alesna, who is approximately 6 months older than appellant, testified that appellant got angry at him and hit him over a minor disagreement. After being briefly called away, appellant returned and confronted Alesna again, hit him, and told him to "suck his dick." After Alesna orally copulated appellant, appellant left him alone. (*Id.* at pp. 4178-4182.)

Two or three weeks later, Alesna heard that appellant was bragging about what he had done and reported the incident to the staff. (28 RT 4183, 4198, 4209.) Appellant was interviewed concerning the incident and wrote out a statement indicating that he was "pissed off" at Alesna that day, hit Alesna several times, and "'told him to suck my dick. . . ." (*Id.* at pp. 4211-4215; Peo's. Exh. 286.)

The final incident offered as aggravation involved a homicide that occurred in San Bernardino on May 24, 1993, when appellant was still 16. (27 RT 4008.) Richard Mestas heard a gunshot on the street outside his house at around 10:00 or 11:00 p.m. that night. When he looked out the window toward Roosevelt Elementary School, he saw three or four people running away and two others struggling on the ground. (28 RT 4240-4241, 4243-4244.) At around 11:00 that night, the police responded to reports of a body on the sidewalk at the elementary school and found the body of 20-year-old Michael Wheeler, who died of gunshot wounds. (*Id.* at pp. 4248-4249, 4252-4253, 4269-4270, 4272, 4286-4287.) A San Bernardino police officer found "fresh" .22 caliber shell casings at the scene and observed that the victim had a gunshot wound to the back of his head. (*Id.* at pp. 4268-4272.)

Robert Medina, who at the time of trial had been an inmate at the Riverside County Jail since May of 1995, testified that he and appellant

were in adjoining cells from July of 1995 to April of 1997. Medina claimed that during that period appellant told him he had murdered a "black guy" near Roosevelt Elementary School in San Bernardino by shooting him in the back with a .22 caliber rifle. Medina also claimed that appellant told him he remembered that the murder happened on May 24 because his mother's brother died that day. (28 RT 4289-4293.) Emma Herrera, the wife of appellant's uncle, testified that her son, Arthur Ted Hartsch, died on May 24, 1995. (*Id.* at pp. 4322-4323.)

Medina had previously been convicted of numerous felonies. (28 RT 4309-4310.) He testified that he received a plea bargain after "providing information" not just in this case, but in at least two others. In two of those cases, Medina reported to police that other inmates had admitted to him that *they* had committed murders. (*Id.* at pp. 4292-4294.) The bargain Medina received was that he would be released "when done testifying [for the prosecution] in all [three] cases" rather than serving out his sentence, which was to run through January 25, 2001. (*Id.* at pp. 4294-4295, 4304, 4313.) Medina and the Riverside District Attorney's Office engaged in protracted negotiation over the terms of that bargain, which apparently came to a head when Medina threatened the prosecutor handling one of the other murders that he would become a "deaf mute" – i.e., would refuse to testify – unless his deal was completed before he was sentenced on those then-pending charges. (*Id.* at pp. 4308-4312.)

2. Victim Impact Evidence

Kenneth Gorman's brother, Curtis Grant, and sister, Diane Chapman, testified that Gorman was the youngest boy out of six children in the family and that he was placed in foster care at the age of three with two of his brothers. The father in that foster home sexually molested Gorman and the

other two boys. He was tried on charges relating to those acts, and Gorman testified at his trial. (28 RT 4328-4330, 4334-4335.)

Chapman testified that Gorman lived with her from when he was about 15 until he was almost 17, and that he was very smart but "never really had a chance at his life." (28 RT 4332-4333.) Grant testified that he had a close relationship with Gorman and missed having him around. The last time he saw Gorman was when Gorman stole his pickup truck four days before the murder. Gorman had problems with drugs and was "head strong," but he was also a caring person. Grant had experienced problems with his mental stability and his career that he felt were caused by Gorman's murder. (*Id.* at pp. 4336-4338.)

Ellen Creque's brother, Jerry Gower, testified that he lived with his sister until their parents divorced when Creque was eight or nine years old, and that he maintained contact with her through their childhoods. He and Creque developed a good relationship in the year or two before she was murdered. Gower relapsed into alcohol abuse after Creque was killed, which caused him to lose his landscaping business. Since his sister's murder, Gower did not trust or help people anymore. (28 RT 4342-4346.)

Ellen Creque's 21-year old daughter, Misty Dawn Creque, testified that her mother's death still affected her at the time of trial. Misty missed many things about her mother, including her pretty voice, her cooking, and the poetry and songs she would create. Misty also missed being with her brothers and sisters, because the family split up when her mother died. (28 RT 4347-4351.)

Veronica Delgado testified that she and Diana Delgado grew up together and were together all the time before her death. Ms. Delgado was funny, and Veronica missed being with her. (28 RT 4353-4354.)

Diana Madrid testified that Diana Delgado was a "very special child, . . very loving, always smiling," who loved art and people in general. Madrid said her daughter was "like . . . the soul of our family" and held the family together; without her their "life has been chaos." (28 RT 4355-4356.) Madrid also said Gabriel Delgado was tremendously affected by Ms. Delgado's death, because he turned his back on his gang friends. (29 RT 4367.) Madrid assembled a "montage" of pictures and other items relating to Ms. Delgado, including pictures and bible verses, and explained the significance of some of those items for the jury. (28 RT 4357-4358.)

B. Mitigating Evidence

Appellant was born February 10, 1977. (27 RT 4122.) His mother, Josephine Hartsch ("Josephine"), did not marry appellant's father until 1988, when appellant was approximately 11 years old. (29 RT 4495.) In 1981, when appellant was about age three, his father, Joseph Hartsch, was sent to prison for several years. (*Id.* at pp. 4480-4481.) Josephine did not say what crime Joseph was sentenced to prison for on that occasion, but it was apparently for Assault with Intent to Murder. (11 RT 1670.)[12]

When Joseph went to prison in 1981, only appellant and his half-brother Joey were with Josephine. At that time Josephine "couldn't find" her daughter Diane and son Chucky, because they had been taken away by their father when appellant was an infant. Josephine ultimately found Diane and Chucky when they called her from a foster home in Washington state

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[12] Joseph Hartsch testified that he was "probably" convicted of the following serious and violent felonies: Armed Robbery in 1970, Possession of a Billy Club in 1972, Possession of a Deadly Weapon in 1976, Assault with Intent to Murder in 1981, and Ex-Felon in Possession of a Firearm in 1992. (11 RT 1670.)

after their father was arrested there.[13] (29 RT 4479-4481.)

Josephine lived with a man named James Silva while Joseph was in prison. Josephine and Silva had two children, Suzie and Ileene, and she stayed with Silva until Suzie was five. Josephine said Silva was mean to her children, including appellant, and "wanted to kind of beat [them] up." Silva was physically and verbally abusive to Josephine in front of the children and was an alcoholic. He hit her and the children with a belt, and picked on and hit the children for no reason, particularly on Friday nights when he came home drunk. (29 RT 4481-4483.)

Appellant was close to his brother Joey. When Joseph got out of prison, he took appellant and Joey to live with him. Appellant was then eight or nine years old. Josephine continued to see appellant and Joey, and saw that appellant was much happier and less scared than while living with Silva. After about a year, she and Joseph got back together, which made appellant happy. (29 RT 4483-4485.)

Appellant was shy as a child, but he got along with his more outgoing older brother Joey. They participated together in sports, and both won medals in karate. (29 RT 4485-4486.) From an early age appellant wanted to follow after Joey and his friends, but Joey would not "let [appellant] go with them" until he was about 13 and Joey was about 14. From then on they did things together, until Joey was sent to the California Youth Authority ("CYA"). (*Id.* at pp. 4487-4488.) Joseph was imprisoned again about the same time Joey went to the CYA. After his father and brother were imprisoned, appellant was left "by himself," became quiet, and

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[13] It is unclear what Josephine meant in testifying that Chucky and Diane were taken to Washington by "their" father, since she also testified that they had different fathers. (29 RT 4479.)

"didn't know what to do." (*Id.* at pp. 4488-4489.)

Officials from appellant's school would sometimes call his parents to say he was not attending class. When Josephine would ask appellant "how come he didn't go" to school he would say it was because there were "other guys [at school] that didn't get along with him." Josephine often "didn't see [appellant's] report card." When she did see his report card, he would have Ds and Fs, and she would tell him he was flunking. But when he promised to try harder, she would "le[ave] it like that." (29 RT 4492-4493.)

Josephine tried to supervise appellant as he grew up, but had a hard time getting him to obey a curfew or discuss his friends. He sometimes came home drunk, and she also thought he might have been taking drugs. When appellant came home drunk, Josephine would get mad, and yell at appellant that "he would possibly end up in juvenile hall . . . ." (29 RT 4490-4492.) She also noticed that at times appellant would come home smelling like marijuana, and that after the age of about 15 or 16, appellant had lots of young girls staying overnight in his room. (*Id.* at pp. 4500-4501.)

Josephine said she knew that appellant was a member of the Mount Vernon Westside gang from a very early age, and that his bedroom was "totally covered with gang-related slogans and graffiti." However, she also claimed she "didn't know what [he was] doing . . . if [he was] in a gang or not . . . ."[14] (29 RT 4499-4500.) Whenever appellant got arrested and/or put in juvenile hall, Josephine told him to stay home and to stop hanging around with friends who were a bad influence. (*Id.* at pp. 4493.)

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[14] Appellant admitted having been a gang member for several years. He told the police he "jumped in" to the West Side Verdugo gang when he was about 13 years old. (15 CT 4018.)

Filberto Barba Robles, a production supervisor at California Foods, testified that appellant worked under him for about six months in 1995. Appellant was a very good employee, who to his recollection was only late for work once. (12 RT 1840, 14 RT 2074, 29 RT 4437-4439.)

Ronald Joseph Hopkins testified that from July to November 1993, he was appellant's juvenile parole officer in San Bernardino County. Appellant was cooperative and successful in completing assignments. When Hopkins asked appellant to do something, he complied. (29 RT 4441-4443.) In his October 1993 assessment, Hopkins wrote that appellant was intelligent and independent, and had a good family relationship. Hopkins also wrote that appellant was "well-adjusted in normal social settings," and that although his family supervision was poor, with further intervention appellant could lead a law-abiding life. (*Id.* at pp. 4444-4446.)

Cliff Grady, a counselor employed at the Right of Passage youth program when appellant was a student there in 1994, testified about the program generally and about his observations of appellant at that time. (29 RT 4508-4513.) Assessing appellant's academic performance during his time at Right of Passage, Grady said that appellant was "pretty much [] a B student," with "good comprehension when he read." In fact, appellant was named student of the week in early July of 1994, and generally "progressed pretty well" through the various levels of the program. (*Id.* at pp. 4514-4516.)

Grady also recalled that appellant was artistic and inclined to write poetry. He was cooperative and less likely to cause problems than most students, but was also "very quiet and cautious." (29 RT 4513-4514.) Grady said that appellant was bright, but unwilling to push himself to really achieve, and did not seem to see "much of a future for himself." (*Id.* at p.

4516.) Grady also said that appellant was "pretty honest about the fact" that he would go back to his gang lifestyle. (*Ibid.*) When Grady talked to appellant about his future, appellant said he could not "survive [on the street] the way [Grady] want[ed him] to live;" that "none of you [counselors]" would be there for him; and that accordingly he would "go back to what he knows," the gang lifestyle. (*Id.* at p. 4519.) Appellant did not flaunt the fact that he was going to go back to the gang life, but was matter of fact about it like many students in that program. (*Id.* at p. 4523.)

Appellant's sister Suzie Silva testified that she had a nice relationship with him, and that they got along fine. He used to take her, their sister Ileene, and their nephew Nathaniel places, and he helped them with their work. When asked what it would mean to her if appellant was sentenced to death, Suzie said she could not "talk about [it]." (29 RT 4527-4528.)

Appellant's sister Diane Ramirez testified that she had only lived in the same household with him for a year to a year and a half and that their relationship during that time was all right, although they fought the way older sisters and younger brothers normally do. (29 RT 4536-4537.) However, after she moved out and had children appellant came over a lot, and stayed for hours playing with his nieces and nephews. Ramirez and her children love appellant, and it would "take away a lot" from them if he was executed. (*Id.* at pp. 4538-4539.)

Malissa Burns testified that she had known appellant for over six years through letters and phone calls. (20 RT 2904-2908, 29 RT 4529-4530.) She and appellant had been somewhat estranged before she came to Riverside for the trial, but she had fallen in love with him all over again. She planned to marry appellant within days after her testimony at the

penalty phase. (29 RT 4520-4530.) She said that appellant had changed and "matured immensely" over the time she knew him, and that even if he was sentenced to die, they would still be married. (*Id.* at p. 4531.)

Josephine testified that if appellant was sentenced to die the impact on her and her family would be "[n]ot so good," while if he was sentenced to life without the possibility of parole they could visit him and "he could get to know his nieces and nephews." (29 RT 4494.)

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I.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S *WHEELER/BATSON* MOTION BY FAILING TO FIND THAT A PRIMA FACIE CASE OF DISCRIMINATION EXISTED

During jury selection, the prosecutor exercised peremptory challenges to exclude five of the first seven African-Americans called for voir dire; the other two were struck by the defense. Appellant objected under *People v. Wheeler* (1979) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79, after the prosecutor peremptorily challenged the fourth African-American prospective juror. (7 RT 1186-1188.)[15] Before the trial court ruled on that objection, the prosecutor peremptorily challenged a fifth African-American. (17 CT 5047, 7 RT 1186-1188.) The trial court denied appellant's motion without comment. (7 RT 1188-1189.) Following the

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[15] At the outset of trial, the trial court ruled that in making his trial objections appellant would not be required to expressly state that they were based on any specific provision or provisions of the state or federal constitutions, and that those objections would be "deemed" to have been made "under the applicable provisions of article 1, sections 7, 13, 15 and 16 of the California Constitution, and the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (3 CT 608-612; 5 RT 887-888.) The trial court simply required appellant to "state the grounds" for his objections – i.e., "cumulative, irrelevant, hearsay, whatever" – sufficiently to alert the prosecutor to "the reason[s]" for the objections, so that he could respond. (*Id.* at p. 888.) Because appellant complied with that requirement, his objection here, like his objections throughout the trial, preserved all federal and state constitutional claims. In any event, this Court has held that an objection at trial under *Wheeler* also states a federal constitutional claim under *Batson v. Kentucky*, *supra*, 476 U.S. 79. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn.3 [federal claim under *Batson* can be raised for the first time on appeal where the defendant raised a *Wheeler* claim at trial].)

denial of appellant's motion, the prosecutor used peremptory challenges to exclude two of the remaining three African-Americans in the venire. Only one African-American sat on appellant's jury.

The trial court erred in refusing to find that a prima facie case of discrimination had been shown under *Wheeler/Batson*. The trial court did not ask the prosecutor his reasons for striking the five African-American jurors, and the prosecutor offered none. Thus, the only issue is whether appellant had satisfied "the requirements of *Batson*'s first step by producing evidence sufficient to permit the [court] to draw an inference that discrimination ha[d] occurred." (*Johnson v. California* (2005) __ U.S. __, 125 S.Ct. 2410, 2417.) Since the record before the trial court clearly established a prima facie case that the prosecutor had engaged in the discriminatory use of peremptory challenges under *Batson v. Kentucky*, *supra*, 476 U.S. 79, the burden should have shifted to the prosecutor to come forward with a race-neutral explanation for striking the five African-American prospective jurors at issue. (*Id.* at p. 97.) The trial court's erroneous refusal to find that a *Wheeler/Batson* prima facie case had been established violated appellant's state and federal constitutional rights to trial by an impartial jury, equal protection and due process of the law (*People v. Wheeler*, *supra*, 22 Cal.3d 258; *Batson v. Kentucky, supra*, 476 U.S. 79; Cal. Const., art. I, § 16; U.S. Const., 6th and 14th Amends.), and requires reversal of his convictions and sentence.

A. Factual Background

1. The Jury Selection Procedure At Trial

Jury selection in this case proceeded in what this Court called the "usual" manner in *People v. Gray* (2005) 37 Cal.3d 168, 184. The pool of prospective jurors was first reduced when some were excused on the

grounds of hardship. (See, e.g., 3 RT 645-651.) The remaining prospective jurors filled out a lengthy questionnaire. (See, e.g., 4 RT 710-712.) The prospective jurors were then subject to examination, first by the court and then by counsel, "concerning their impartiality and their views on the death penalty." (*Gray*, *supra*, at p. 184.) After several of the prospective jurors were excused for various reasons, and the parties exercised challenges for cause, the remaining prospective jurors were subject to peremptory challenges. Twelve jurors and four alternates were selected by that method.

Appellant brought a *Wheeler/Batson* motion after the prosecutor used a peremptory challenge against African-American prospective juror George Clarke. (7 RT 1185-1186.) When the trial court heard appellant's *Wheeler/Batson* motion, the prosecutor had used peremptory challenges against five African-American prospective jurors. (*Id.* at pp. 1187-1188.)

Outside the presence of the prospective jurors, defense counsel argued that the prosecutor had used peremptory challenges against every African-American "seated among the 12 prospective jurors" except one the defense had challenged for cause, and another with an occupation "akin to law enforcement." (7 RT 1188-1189.) Counsel further pointed out that there were only nine African-Americans in the entire venire, and that three had not yet been called for voir dire.[16] (*Id.* at pp. 1188-1189.) The prosecutor did not respond to defense counsel's argument, or make any other comment, and the trial court denied the *Wheeler/Batson* motion without explanation. (*Ibid.*)

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[16] Counsel erred in stating that there were only nine African-Americans in the venire; there were in fact ten. (6 CT 1179, 7 CT 1779, 10 CT 2544, 12 CT 3310, 13 CT 3565, 14 CT 3865, 17 CT 4615, 18 CT 5003, 5048, 5089.)

The prosecutor exercised four additional peremptory challenges following the denial of appellant's motion, including two against African-Americans and one against a Hispanic. (7 RT 1256-1258.)

2. The Questionnaire And Voir Dire Responses Of The Five African-American Jurors Peremptorily Challenged By The Prosecution

a. Jacqueline Brown

The first juror, Jacqueline Brown, wrote in her questionnaire that she was single and had lived in Riverside for 35 years, and had completed high school, obtained AA and AS degrees, and been in the Army. She worked as a medical clerk and a medical record technician. She owned a gun. (17 CT 4615-4618, 4625.) She had never heard anything about appellant's case, promised to avoid outside influences on her decision, and had no philosophical or other views that would make it difficult for her to sit in judgment of someone. (*Id.* at pp. 4618-4621.) She had never served on a jury, been arrested or accused of a crime, or testified at a trial. She had no friends or relatives who had ever been charged with or the victims of a violent crime. (*Id.* at pp. 4618-4624.) Her car was stolen in 1994, but she felt "good" about the response of law enforcement to that crime. (*Id.* at p. 4623.)

In her questionnaire, Ms. Brown answered a long series of questions designed to expose any biases or prejudices that could affect her as a juror. She wrote that she: would put aside her feelings and follow the court's instructions; would use the same standards in evaluating police officers as other witnesses; did not have relationships with anyone in law enforcement or the criminal justice system; would not be affected by viewing photographs of the victims; was not biased for or against either the defense or the prosecution; would follow the instruction that the defendant is

presumed innocent unless proven guilty beyond a reasonable doubt; would resolve conflicts in the evidence; would evaluate defense and prosecution witnesses using the same criteria; would consider scientific and expert evidence; would deliberate openly; would refrain from discussing the case outside the jury room; and would be impartial. (17 CT 4625-4635.) The only problem she noted was that her back might "flair [*sic*] up." (*Id.* at pp. 4635-4636.)

Ms. Brown also wrote that she was "moderately in favor" of the death penalty, and felt the death penalty was used "too seldom." (17 CT 4639.) Finally, she wrote that she would not automatically vote for either life without the possibility of parole or the death penalty, and could put aside her feelings and follow the law as the court explained it. (*Id.* at pp. 4639-4642.)

The prosecutor struck Ms. Brown without asking her a single question, and without the benefit of any questioning by the court or defense counsel. (6 RT 1084.)

b. George Clarke

The next juror, Mr. Clarke, wrote that he was divorced, had a 27-year-old daughter, and had graduated from high school, worked as a welder, and been in the Army. He had never heard anything about appellant's case, and owned "all kinds of guns." (18 CT 5003-5006, 5013.) Mr. Clarke had never served on a jury, been arrested or accused of a crime, or testified at a trial. (*Id.* at pp. 5007-5008, 5012.) His brother was accused of driving while intoxicated some 30 years earlier, but otherwise he had no friends or relatives who had ever been accused of, the victim of, or a witness to a crime. (*Id.* at pp. 5009-5012.) He felt "good" about the responses of the judicial system. (*Id.* at pp. 5010-5011.) He "strongly" supported the death

penalty. (*Id.* at p. 5027.)

Like Ms. Brown, Mr. Clarke wrote that he: would set aside his feelings and follow the court's instructions; would use the same standards in evaluating police officers as other witnesses; did not have relationships with anyone in law enforcement or the criminal justice system; was not biased for or against either the defense or the prosecution; would follow the instruction that the defendant is presumed innocent unless proven guilty beyond a reasonable doubt; would evaluate defense and prosecution witnesses using the same criteria; would consider expert testimony; would deliberate openly; would refrain from discussing the case outside the jury room; and would be impartial. (18 CT 5013-5015, 5019-5022.) He could think of no reason he could not be an impartial juror. (*Id.* at pp. 5023-5025.)

In response to the trial court's questions, Mr. Clarke stated that he: would not vote automatically for either death or life without the possibility of parole; would listen to the evidence from both sides and discuss it with his fellow jurors; would listen to and discuss any expert testimony presented; and would not disclose any aspect of the case to anyone outside the jury. (7 RT 1136-1139.) Mr. Clarke was not examined by either party before being struck by the prosecutor. (*Id.* at p. 1185.)

c. Odie Lee Brown

The third juror, Mr. Brown, wrote that he was divorced, had five grown children, had graduated from high school, and worked for 32 years for the city of Highland Park, Michigan. (7 CT 1779-1782.) He had never heard anything about appellant's case, and promised to avoid all outside influences on his decision. He had served as a grand juror and on a jury in a civil case. He had never been arrested or accused of a crime, had never

been the victim of a crime, and had never testified at a trial. (*Id.* at pp. 1782-1788.)

Mr. Brown also wrote that he: could set aside his feelings and follow the court's instructions; would not be affected by viewing photographs of the deceased; did not know anyone associated with law enforcement or the case; was not biased for or against either the prosecution or the defense; would resolve conflicts in the evidence; would follow the instruction that a defendant is innocent until proven guilty beyond a reasonable doubt; would evaluate all witnesses by the same standards; would consider scientific and expert evidence; would refrain from discussing the case outside the jury room; and would deliberate openly and be impartial. (7 CT 1789-1799.) Mr. Brown wrote that he: could not think of a reason he would not be impartial; had "neutral" feelings on the death penalty; and would set his feelings aside and "follow the law" if asked to decide whether to impose death. (*Id.* at pp. 1799-1801, 1803, 1806-1807.)

Mr. Brown was questioned very briefly. The trial court asked about his questionnaire response that he would "vote automatically" if asked to determine the truth of the special circumstances, and Mr. Brown responded that he wrote that in "error," and would not vote that way. (6 RT 1058-1059.) The prosecutor's questioning was also brief; he asked only if Mr. Brown had a problem with the "beyond a reasonable doubt" standard. (*Id.* at pp. 1075-1076.) After Mr. Brown responded that the standard was "fine" with him, the prosecutor challenged him without further questioning. (*Id.* at p. 1085.)

d. T.J. Anderson

Mr. Anderson wrote in his questionnaire that he was separated from his wife but lived with his 11-year-old son, and that he had B.S. and M.A.

degrees and served 16 years in the Air Force. He kept a shotgun for home defense. (10 CT 2544-2546, 2554.) He had never been on a jury or testified in a trial, and had never been arrested. (*Id.* at pp. 2549-2553.) He had not had unpleasant encounters with the police, and his brother-in-law was a police sergeant. (*Id.* at pp. 2556-2558.) His son had been convicted of attempted armed robbery, but he wrote that his son received a "fair hearing and legal representation." (*Id.* at p. 2550.)

Mr. Anderson had never read or heard anything about appellant's case, and promised to avoid any outside influence on his verdict and to keep an open mind. (10 CT 2547-2548.) He said he: would follow the court's instructions; would not be affected by viewing disturbing photographs; would not be biased for or against either side in the case; would fairly and impartially consider the evidence presented; would listen to expert testimony; and would deliberate openly and discuss the case freely. He also said no medical issues, handicaps or personal problems affected his ability to serve. (*Id.* at pp. 2554-2555, 2559-2565.) The only problem he noted was that he was awaiting the results of a "CT scan [concerning] possible lung cancer." (*Id.* at pp. 2564-2565.)

Mr. Anderson wrote that he opposed the death penalty based on his religious belief that "life is sacred" (10 CT 2567-2568), but also that his views would not prevent him from finding appellant guilty, finding the special circumstances true, or voting for the death penalty, "depending on the circumstances." (*Id.* at pp. 2568-2571.)

Mr. Anderson was questioned only briefly by the trial judge, and testified that he would consider all that evidence with an open mind, and could vote for death "if the circumstances warranted it." (6 RT 1092.) The prosecutor only asked Mr. Anderson whether he could vote for death if it

was warranted; he responded that he could. (7 RT 1109-1110.)

e. Katrina Williams

The last juror, Katrina Williams, wrote in her questionnaire that she was unmarried, had attended Sonoma State College, and worked as an assistant librarian for the University of California at Riverside. (18 CT 5047-5049.) She also wrote that she had never heard anything about appellant's case, would avoid outside influences on her decision, and had no feelings that made it difficult for her to sit in judgment of someone. (*Id.* at pp. 5050-5052.) She had never served on a jury, been arrested or accused of a crime, or testified at a trial. (*Id.* at pp. 5051-5054.)

Ms. Williams also wrote that she: would put aside her feelings and follow the court's instructions; would evaluate the testimony of police officers by the same standards as that of other witnesses; did not have relationships with anyone in law enforcement or the criminal justice system; would not be affected by viewing photographs of the deceased; would not be biased for or against either the defense or the prosecution; would follow the instruction that the defendant is presumed innocent unless proven guilty beyond a reasonable doubt; would resolve conflicts in the evidence; would evaluate defense and prosecution witnesses using the same criteria; would consider scientific and expert evidence; would deliberate openly; would refrain from discussing the case outside the jury room; and would be impartial. (18 CT 5057-5067.)

Ms. Williams wrote that her third cousin had been convicted of murder, but also wrote that her cousin was "treated fairly" by the criminal justice system. (18 CT 5053.) Her car was stolen in 1997, but she felt "great" about the response of law enforcement to that crime. (*Id.* at p. 5055.) She reported a number of positive experiences with the police. (*Id.*

at p. 5059.)

Ms. Williams wrote that she was "neutral" on the death penalty, and felt that death could be a "fair sentence." (18 CT 5070-5071.) Finally, she wrote that she would not automatically vote for either life without the possibility of parole or the death penalty, and could put aside her feelings and follow the law as the court explained it. (*Id.* at pp. 5072-5075.)

Ms. Williams was questioned only briefly by the trial judge, who clarified that she understood that jurors must resolve factual conflicts. (7 RT 1148-1149.) She was also questioned briefly by defense counsel, and responded that she would be able to impose either life without the possibility of parole or the death penalty, and had not prejudged the case. (*Id.* at pp. 1165-1166.) The prosecutor did not question Williams before striking her. (*Id.* at p. 1187.)

B. Applicable Legal Standards

Under both the California Constitution and the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, a prosecutor is prohibited from using peremptory challenges to exclude jurors because of group bias. (*People v. Wheeler*, *supra,* 22 Cal.3d at pp. 276-277; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) Both *Batson* and *Wheeler* require the trial court to conduct a three-step analysis. In step one, the defendant bears the initial burden to make a prima facie showing that the prosecutor challenged the prospective jurors at issue based on group bias. If the trial court finds that a prima facie case has been shown, the burden shifts to the prosecutor in step two to provide race-neutral explanations for striking those jurors, and in step three the court must determine whether the proffered reasons are genuine. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Wheeler*, *supra*, 22 Cal.3d at pp.

280-282; *People v. Ward* (2005) 36 Cal.4th 186, 200.)

A defendant satisfies his or her burden at the first step of the *Wheeler/Batson* analysis by "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California*, *supra*, 125 S.Ct. at pp. 2417-2419; *People v. Gray*, *supra*, 37 Cal.4th at p.186.)

A trial court's "error in finding that no prima facie case had been established [under *Wheeler/Batson*], and in failing to require the prosecutor to justify his challenges . . . is reversible per se." (*People v. Motton* (1985) 39 Cal.3d 596, 608.)

C. The Prosecutor's Use Of Peremptory Strikes To Exclude Five Of Seven African-American Prospective Jurors From The Jury, Considered Together With Other Relevant Circumstances, Raises An Inference Of Discrimination Under *Batson*

The trial court should have considered whether the circumstances of this case "'raise[d] an inference' that the prosecut[or] ha[d] excluded venire members . . . on account of their race." (*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195.) The "totality of the relevant facts" supporting a prima facie case of discrimination in this case, including readily apparent statistical disparities in the prosecutor's use of peremptory challenges (*Miller-El v. Dretke* (2005) __ U.S. __, 125 S.Ct. 2317, 2324-2325, quoting *Batson*, *supra*, 476 U.S. at pp. 94, 96), was more than "sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred." (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2417.) Indeed, the prima facie case showing here is clear and indisputable. After no or only brief questioning on voir dire, the prosecutor peremptorily challenged five African-American prospective jurors.

Moreover, there are no "relevant circumstances" in this case that "rebut the inference of discriminatory purpose based on statistical disparity." (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108.) Appellant cannot be required to show that no conceivable legitimate reason existed for the strikes to satisfy his burden at the prima facie stage, because under such a rule "it is difficult to imagine how any defendant could prevail on a *Batson* claim following a trial court's summary rejection of the *Batson* challenge at the first step of the *Batson* test." (*Id.* at p. 1108, fn. 12.)

This case is similar to *Johnson v. California*, in which the United States Supreme Court found that a prima facie case under *Batson* was shown, and *Williams v. Runnels*, in which the Ninth Circuit applied *Johnson*'s analytical framework and found a prima facie case under *Batson* based on statistical disparities in the prosecutor's use of peremptory challenges. In all three cases the statistical evidence concerning the prosecutor's use of peremptory challenges against African-American prospective jurors was sufficiently "suspicious" to justify requiring the prosecutor to "produce actual answers" to the questions raised by his or her actions. (*Johnson*, *supra*, 125 S.Ct. at pp. 2418-2419; see *Williams*, *supra*, 432 F.3d at pp. 1106-1107.) Further, there is far more substantial evidence supporting an inference of discrimination in this case than in two post-*Johnson* decisions by this Court in which the record simply did "not support" a reasonable inference of discrimination. (*People v. Gray*, *supra*, 37 Cal.4th at p. 187, and *People v. Cornwell*, *supra*, 37 Cal.4th at p. 70.) Thus, the trial court clearly erred in denying appellant's *Wheeler/Batson* motion on the ground that no prima facie case had been shown.

1. The Statistical Evidence Supports a Reasonable Inference Of Discrimination

This case involves persuasive statistical evidence that the prosecutor's use of peremptory challenges was tainted by discrimination. The prosecutor challenged a far higher percentage of the African-American than the Caucasian prospective jurors. (See *Hernandez v. New York* (1991) 500 U.S. 352, 362 [evidence of "disparate impact should be given appropriate weight in determining whether the prosecutor acted with forbidden intent"]; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091 ["inference of bias" established by evidence that prosecutor used five out of six peremptory challenges against African-Americans]; *People v. Motton*, *supra*, 39 Cal.3d at p. 607 [prima facie case shown under *Wheeler/Batson* where the prosecutor had used five of eight peremptories against African-Americans when the motion was made, and ultimately used seven of 13 challenges against that group].) Because the burden of persuasion appellant was required to carry in this first step of the *Batson* inquiry was far lower than the third step burden confronting the petitioner in *Miller-El* (see *Johnson v. California*, *supra*, 125 S.Ct. at pp. 2417-2418), the statistical evidence in this case was highly probative of discrimination.

The ethnic origins of the prospective jurors were disclosed in their questionnaires. (See, e.g., 12 CT 3138, 14 CT 3865, 5003.) Of 92 prospective jurors in the total venire,[17] 85 were ultimately called for voir

[17] There are 91 such questionnaires in the record on appeal. The questionnaire of one prospective juror called for voir dire, Angela Garcia, is not in the record. She is treated as Hispanic here based on her name.

dire.[18] Forty-eight of those prospective jurors had been passed for cause when appellant's *Wheeler/Batson* motion was heard, including 33 Caucasians (69%)[19] and seven African-Americans (15%).[20] Of those 48 prospective jurors, the prosecutor exercised peremptory challenges against five of the seven African-Americans (71%),[21] but only 9 of the 33 Caucasians (27%).[22]

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[18] 6 RT 924-925, 988, 1047, 1058, 1085-1086, 7 RT 1131, 1147, 1203, 1258-1259.

[19] 6 CT 1352, 1394, 1437, 1480, 7 CT 1694, 1737, 1821, 1864, 8 CT 1992, 2204, 9 CT 2416, 2502, 10 CT 2587, 2629, 11 CT 2883, 3053, 3095, 12 CT 3137, 3181, 3266, 13 CT 3609, 3652, 14 CT 3738, 3781, 16 CT 4274, 4317, 4402, 17 CT 4573, 4659, 4703, 4791, 18 CT 4916, 19 CT 5218.

[20] Brown (17 CT 4615), Brown (7 CT 1779), Anderson (10 CT 2544), Clarke (18 CT 5003), Williams (18 CT 5047), Collier (12 CT 3310) and Purdom (13 CT 3565).

[21] Defense counsel struck Mr. Collier and Ms. Purdom (7 RT 1255-1256), and the record shows why. As defense counsel argued to the trial court, Mr. Collier's occupation as a school security officer was "akin to law enforcement" (*id.* at p. 1189); Collier wrote in his questionnaire that he worked with the district attorney, sheriff's department, and probation office. (12 CT 3322, 3325.) Collier was also an "undercover" agent in the Air Force. (*Id.* at p. 3313; see 7 RT 1078.) And Purdom's questionnaire indicated that she placed a very high value on DNA evidence as proof of guilt (13 CT 3583), and held strong, pro-prosecution views on the death penalty. (*Id.* at p. 3588 [she wrote that the "rights of life liberty etc" of murderers "are no longer valid," and that murderers "should not expect (to have their lives) paid for by tax paying families of the victims"].)

[22] Parker (8 CT 2204, 6 RT 1038), Shermanaka (12 CT 3652, 6 RT 1040), Young (17 CT 4573, 6 RT 1085), Cordoba (9 CT 2502, 6 RT 1115), Vaden (9 CT 2415, 6 RT 1115), Steinberg (10 CT 2629, 6 RT 1116), Presley (14 CT 3738, 6 RT 1117), Sitton (12 CT 3171, 6 RT 1185), and

(continued...)

Seventeen more prospective jurors were called for voir dire after the trial court rejected appellant's *Wheeler/Batson* motion. (7 RT 1195-1197.) Fifteen of those 16 prospective jurors were passed for cause (*id.* at pp. 1215, 1255), including 11 Caucasians[23] and three African-Americans.[24] The prosecutor used peremptory challenges against two of those three African-Americans (*id.* at pp. 1256-1258), but only one of the eleven Caucasians. (*Id.* at p. 1258.)

The overall statistics concerning jury selection in this case fully support a reasonable inference of discrimination. Thus, of the 16 jurors and alternates selected in this case, 12 were Caucasians[25] and only one was African-American,[26] a ratio of 12 to one, even though the ratio of Caucasian to African-American prospective jurors passed for cause was only four and a half to one (44 to 10). Moreover, during the course of the trial the prosecutor used peremptory challenges against seven of the ten African-Americans who were passed for cause (70%), but only ten of the 44 Caucasians (23%).[27]

This statistical evidence alone clearly supports a reasonable

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[22](...continued)
Hall (12 CT 3137, 7 RT 1186).

[23] 5 CT 1223, 6 CT 1480, 1522, 1565, 1608, 12 CT 3353, 3395, 13 CT 3480, 14 CT 3908, 3951, 18 CT 4961.

[24] 5 CT 1179, 14 CT 3865, 18 CT 5003.

[25] 5 CT 1223, 6 CT 1352, 1395, 1438, 1480, 1522, 1565, 1608, 13 CT 3609, 16 CT 4274, 4317, 17 CT 4961.

[26] 5 CT 1179.

[27] 6 RT 1038, 1040, 1084-1085, 1115, 7 RT 1185-1187, 1257-1258.

inference that the prosecutor used peremptory challenges to exclude African-American prospective jurors based on their race. As the Court said in *Miller-El*, "Happenstance is unlikely to produce [such a] disparity." (*Id.* 125 S.Ct. at p. 2325; see *People v. Hall* (1983) 35 Cal.3d 161, 168-169 ["disparate treatment" of jurors who differ only in ethnicity is "strongly suggestive" of bias].)

Demonstration of "disparate impact should be given appropriate weight in determining whether the prosecutor acted with forbidden intent." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 362.) As noted above, the prosecutor 1) had struck 71% of the African-American jurors passed for cause, and only 27% of the Caucasians, when appellant's *Wheeler/Batson* motion was heard, 2) struck two of the remaining three African-Americans in the venire after the motion was denied, and 3) used peremptory challenges against African-Americans during the trial at almost three times the rate he used them against Caucasians (70% to 23%). Those significant statistical disparities support a reasonable inference that racial bias was involved in the prosecutor's use of peremptory challenges.

2. Nothing In The Record Rebuts The Inference Of Discrimination Arising From The Statistical Disparities In This Case

Leaving aside the other statistical evidence of discrimination in this case, the mere fact that the prosecutor had struck five of seven African-American prospective jurors when appellant's *Wheeler/Batson* motion was heard was sufficient by itself to support an inference of discrimination. (*Johnson v. California*, *supra*, 125 S.Ct. at pp. 2418-2419; *Paulino v. Castro*, *supra*, 371 F.3d at p. 1091.) Moreover, there are no other "relevant circumstances" shown by the record that rebut that inference, i.e., circumstances that "do more than indicate that the record would support

race-neutral reasons for the questioned challenges." (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108.) Neither the questionnaire nor the voir dire responses of the challenged African-American jurors suggest that they were biased against law enforcement, favored criminal defendants, or would otherwise have been undesirable prosecution jurors. Further, the prosecutor's failure to question those jurors to investigate any issues raised by their questionnaire responses, or to uncover any hidden biases, undermines any claim that all five of those jurors were so obviously biased that the inference of discrimination is rebutted.

At any rate, this Court should not "engag[e] in needless and imperfect speculation" about the prosecutor's possible reasons for striking those jurors, since what matters is the "'real reasons'" for the strikes, not speculation that the ""prosecutor might have had good reasons . . . ."" (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2418, quoting *Paulino v. Castro*, *supra*, 371 F.3d at p. 1090.) The prosecutor's failure to "engage [those] jurors in more than desultory voir dire, or to ask any questions at all," supports the inference that racial discrimination was the motivation for challenging them. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 281; see also *People v. Box* (2000) 23 Cal.4th 1153, 1189 [evaluating vigor of prosecutor's questioning of juror as evidence of intent].)

a. The Jurors' Questionnaire And Voir Dire Responses Do Not Rebut The Inference Of Discrimination

Nothing in the questionnaire or voir dire responses of the five African-American prospective jurors at issue "rebut[ted the] inference of discriminatory purpose based on statistical disparity" that arose in this case. (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108.) As demonstrated above, the questionnaire responses of those jurors did not raise any red flags about

their suitability to sit as jurors. (Sec. A(2), *supra*.) Thus, for example, all five jurors were willing to impose the death penalty. (7 CT 1806, 10 CT 2570-2571, 17 CT 4641, 18 CT 5026-5027, 5073-5074.) Indeed, two of them expressed stronger support for the death penalty than most of the serving jurors and alternates. (17 CT 4639 [Ms. Brown wrote that the death penalty is used too seldom], 18 CT 5027 [Mr. Clarke wrote that he "strongly" supports the death penalty].) Further, none of the five jurors reported unpleasant experiences as jurors, crime victims, or criminal defendants (17 CT 4623 [Ms. Brown wrote that she felt "good" about how the police dealt with a car theft], 18 CT 5010-5011 [Mr. Clarke wrote that he felt "good" about how law enforcement responds to crimes], 5055 [Ms. Williams wrote that she felt "great" about how the police handled the theft of her car]), or expressed negative views of the police or law enforcement (10 CT 2558 [Mr. Anderson wrote that his brother-in law is a police sergeant], 18 CT 5009, 5033 [both Mr. Clarke and Ms. Williams wrote that their relatives who had been arrested were treated fairly].) (Compare *People v. Cornwell*, *supra*, 37 Cal.4th at p. 70 [excused juror's "express distrust of the criminal justice system and its treatment of African-American defendants" demonstrated non-racial reason for striking her].) In short, none of the jurors was biased against the prosecution or for the defense, or was reluctant to serve, and all said they could follow the law.

Under Code of Civil Procedure section 223 the prosecutor had "the right to examine, by oral and direct questioning, any or all of the prospective jurors." The prosecutor's failure to question three of the five African-American prospective jurors at issue, or to ask the other two jurors any but the most basic questions (6 RT 1075-1076, 1109-1110), indicates that he was not concerned about their questionnaire responses, and evinces

a determination to strike them anyway. That failure to "engage [those] jurors in more than desultory voir dire, or to ask any questions at all," *supports* the inference of discrimination established by the bare facts of these strikes. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 281; see also *People v. Box*, *supra*, 23 Cal.4th at p. 1189 [evaluating vigor of prosecutor's questioning of jurors as evidence of intent].) It certainly does not rebut that inference.

b. No Other Relevant Circumstances Rebut The Inference Of Discrimination

The kind of circumstances that serve to rebut the inference of discrimination arising from evidence of statistical disparities in the prosecutor's use of peremptory challenges are those that "erode[] the premises of [the movant's] allegations of discrimination . . . ." (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108.) Thus, if the defendant alleges in moving for relief under *Wheeler/Batson* that the prosecutor has struck every African-American juror called for voir dire, the premise of that allegation is eroded by showing that only one African-American had been called for voir dire when the motion was heard. (*Id* at p. 1108, fn. 9; *Wade v. Terhune*, *supra*, 202 F.3d 1198.) However, in this case the prosecutor had already struck five of seven African-Americans called for voir dire (71%) when appellant's *Wheeler/Batson* motion was heard.

Further, unlike *Williams*, *supra*, it cannot be argued here that the inference of discrimination is rebutted because the prosecutor "did not use a peremptory challenge against an African-American juror after [appellant's] *Wheeler* objection." (432 F.3d at p. 1109.) While that circumstance was not sufficiently persuasive to "refute the inference" of discrimination based on the prosecutor's prior challenges in *Williams*, it is completely inapposite

here. The prosecutor here peremptorily challenged the fifth African-American immediately after appellant raised his *Wheeler/Batson* objection. Moreover, that the prosecutor used half of his final four peremptory challenges to strike two of the three African-Americans remaining in the venire after appellant's *Wheeler/Batson* motion was denied is a circumstance that supports rather than undermines the prima facie showing. There are no circumstances in this case that rebut the inference of discrimination.

3. The Trial Court Clearly Erred In Denying The *Wheeler/Batson* Motion

The evidence that the prosecutor used a disproportionate number of his peremptory challenges against African-Americans, and the absence of any obvious non-racial reasons for those peremptory challenges, clearly supports at least a "reasonable inference" that the prosecutor's challenges resulted from improper group bias. (See *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 69-70 [applying the "reasonable inference" standard to a *Wheeler/Batson* claim].) The trial court should have found that a prima facie case of discrimination existed, because the evidence of improper bias as to the prosecutor's challenges to these five African-American jurors was certainly "'close' or 'suspicious'" enough to establish a reasonable inference of discrimination. (*Cornwell*, *supra*, at p. 73, citing *Johnson v. California*, *supra*, 125 S.Ct. at p. 2419.)

In *Johnson*, *supra*, the trial judge refused to find a prima facie case of discrimination after the prosecutor struck all three African Americans in the venire. (125 S.Ct. at p. 2414.) The high court reversed, relying on the fact that this Court and the lower courts which considered the sufficiency of the prima facie showing in that case said the facts were "suspicious," and

finding that "[t]hose inferences that discrimination may have occurred were sufficient to establish a prima facie case. . . ." (*Id.* at p. 2419.) Thus, *Johnson* shows that at the first step of the *Batson* inquiry the movant is not required to present conclusive evidence of discrimination, but rather must point to facts sufficient to support "suspicions and inferences that discrimination may have infected the jury selection process." (*Id.* at p. 2418.)

In *Williams v. Runnels*, *supra*, the prosecutor used three of his first four peremptory challenges against African-Americans. (432 F.3d at p. 1107.) The Ninth Circuit reversed the trial court's holding that a prima facie showing had not been made, stating that the "bare facts present[ed] a statistical disparity." (*Id.* at p. 1108.)

The facts of this case cannot be meaningfully distinguished from those in *Johnson* or *Williams*. In all three cases, "the prosecutor used peremptory challenges to remove prospective African-American jurors" without offering any explanation for the challenges after the defendant moved for relief under *Wheeler/Batson*, and the trial court "summarily found that [the defendant] had failed to make a prima facie showing of bias." (*Williams*, *supra*, 432 F.3d at p. 1108.) Here, just as in *Johnson* and *Williams*, it was clearly suspicious that the prosecutor struck five seemingly unobjectionable jurors whose only common characteristic was that they were African-Americans. Under *Johnson*, all that is required to establish a prima facie case are facts sufficient to give rise to suspicion that discrimination has occurred. (125 S.Ct. at p. 2419.) Such facts are present here.

In contrast, this case is completely distinguishable from cases in which this Court found that no *Wheeler/Batson* prima facie case was

established under the standard set out in *Johnson*. This case involves far stronger evidence supporting a prima facie case than either *People v. Gray*, *supra*, 37 Cal.4th 168, or *People v. Cornwell*, *supra*, 37 Cal.4th 50, two post-*Johnson* decisions in which this Court applied the "reasonable inference" standard and found that the lower court did not error in finding that no prima facie case had been shown.[28]

In *Cornwell*, there were two African-American prospective jurors in a venire of 117. The prosecutor struck one of them, and the other one served on the jury. (37 Cal.4th at p. 67.) Moreover, as this Court noted, the challenged juror gave voir dire responses – including statements that her aunt had been unfairly prosecuted for homicide, and that she lacked trust in the criminal justice system's treatment of African-Americans – that would have provided legitimate reasons for "*any* prosecutor to challenge her." (*Id.* at p. 70, original italics.)

In *Gray*, there were eight African-Americans in a panel of approximately 100. The prosecutor excluded two of the African-Americans and two served on the jury. (37 Cal.4th at pp. 184, 187.) The Court concluded that those facts "failed to raise a reasonable inference of racial discrimination" (*id.* at p. 188), and that "the record contain[ed] plausible and credible reasons supporting the prosecutor's" challenges to both the African-American jurors who were struck. (*Id.* at p. 192.)

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[28] Appellant does not concede that either *Gray* or *Cornwell* was correctly decided, or that either case properly applied the "reasonable inference" standard set out in *California v. Johnson* to its own facts. However, that question is irrelevant to the resolution of appellant's claim, because the evidence of discrimination is much stronger here, and there is no countervailing evidence supporting the trial court's finding like that involved in those cases.

Obviously, neither *Gray* nor *Cornwell* involved anything like the highly-suspicious circumstances in this case. Those two cases demonstrate no more than that a prima facie case cannot be based simply on evidence that the prosecutor struck *some* African-Americans, at least not when there were only a few African-American prospective jurors, and half of them ended up serving on the jury. Thus, when the prosecutor strikes one of two African-American prospective jurors, and has obvious, valid grounds for doing so (*Cornwell*, *supra*, 37 Cal.4th at p. 633), or when only four African-Americans are in the venire and two of them serve on the jury (*Gray*, *supra*, 37 Cal.4th at p. 187), it can be said that the "record does not support [] an inference" of discrimination. (*Ibid.*)

The facts of this case are far closer to those in *Johnson v. California* and *Williams v. Runnels* than to those of either *Cornwell* or *Gray,* and are fully as suspicious as the facts *Johnson* found sufficient to support a prima facie case. Accordingly, appellant met the relatively low threshold for finding a prima facie case under *Wheeler/Batson.* (*Johnson*, *supra*, 125 S.Ct. 2410.) It was clearly suspicious that the prosecutor had used peremptory challenges against the qualified African-Americans prospective jurors at a rate more than twice as high as the rate at which he challenged similarly-situated Caucasians (71% compared to 27%). Moreover, it was highly suspicious that the prosecutor challenged African-Americans whose questionnaire responses suggested they would be impartial jurors without even attempting to elicit any information to the contrary. Those circumstances cried out for further inquiry, and the trial court's failure to conduct such an inquiry was clearly erroneous.

D. This Court Must Review The Denial Of Appellant's *Wheeler/Batson* Motion De Novo, Because The Trial Court Is Presumed To Have Applied *Wheeler*'s "Strong Likelihood" Standard, Rather Than *Batson*'s "Reasonable Inference" Standard, In Denying That Motion

As demonstrated above, the trial court erred in finding that appellant had not set forth a prima facie case of discrimination in support of his *Wheeler/Batson* motion, because there was ample evidence to support finding a prima facie case under the applicable state and federal precedents. Moreover, since the trial court is presumed to have applied controlling California law, the court must have applied the improper "strong likelihood" standard then used by California courts, which *Johnson v. California, supra*, 125 S.Ct. at pp. 2416-2418, rejected as imposing too heavy a burden on the moving party. Because the trial court applied the incorrect standard in denying appellant's motion, this Court must review its ruling de novo, rather than deferentially.

While *Batson* and *Wheeler* both place the initial burden of making a prima facie showing of discrimination on the defendant, for many years this Court applied a standard for determining whether that step-one burden had been satisfied that differed significantly from the standard set by the United States Supreme Court.[29] This Court long held that a prima facie case under

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[29] The development of those differing standards may be attributable, at least in part, to the fact that *Wheeler* predated *Batson*. But *Wheeler* also used confusing and contradictory language in setting out the prima facie burden. Thus, at one point *Wheeler* asserts that the movant must show "a *strong likelihood* that" prospective jurors "are being challenged because of their group association rather than because of any specific bias." (22 Cal.3d at p. 280, emphasis added.) But the next paragraph of the opinion frames the standard quite differently, stating that "the court must determine

(continued...)

Wheeler required evidence showing a "strong likelihood" that the prosecutor's use of peremptory challenges was motivated by improper group bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154, quoting *Wheeler*, *supra*, 22 Cal.3d at p. 280 [evidence showing a "strong likelihood" of discrimination required]; *People v. Reynoso* (2003) 31 Cal. 4th 903, 924 [same].) Under *Batson*, on the other hand, the defendant is only required to demonstrate a "reasonable inference" of bias to make out a prima facie case. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 94.) In *People v. Box*, *supra*, 23 Cal.4th 1153, this Court attempted to reconcile those disparate standards by holding that a "'strong likelihood' means a 'reasonable inference.'" (*Id.* at p. 1188, fn.7.)

In *California v. Johnson*, *supra*,125 S.Ct. 2410, the United States Supreme Court held that those two standards are different. Rejecting the holding in *Box* that the "strong likelihood" and "reasonable inference" standards are identical (*id.* at p. 2415, fn. 2), the high court ruled that California's standard was "at odds" with the proper "reasonable inference" standard used under *Batson*. (*Id.* at p. 2419.) The Court further held that the California standard is an "inappropriate yardstick by which to measure the sufficiency of a prima facie case" for equal protection purposes. (*Id.* at p. 2416.) In *People v. Gray*, *supra*, 37 Cal.4th at pp. 186-188, this Court acknowledged *Johnson*'s "reject[ion]" of its view that the "reasonable inference" and "strong likelihood" standards are the same. (See also *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 66-67.) Accordingly, this Court held

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[29](...continued)
whether a *reasonable inference* arises" that challenges are being based on "group bias alone." (*Id.* emphasis added.)

that under *Wheeler*, as under *Batson*, the movant need only set forth facts supporting an "'inference of discriminatory purpose'" to make a prima facie showing. (*Gray*, *supra*, 37 Cal.4th at p. 186, quoting *Johnson*, *supra*, 125 S.Ct. at p. 2416.)

Here, the trial court summarily denied appellant's motion, without asking the prosecutor to state race-neutral reasons for his challenges and without offering any explication of its decision. The trial court's unexplained ruling amounted to an implicit finding that appellant had not established a prima facie case. (See *People v. Howard*, *supra*, 1 Cal.4th 1132, 1154 [when the trial court "denied the motion without asking the prosecutor to explain his challenges" it ruled "in effect that defendant had failed to establish a prima facie case" under *Wheeler*].) Although the trial court failed to specify what legal standard it was applying (see 7 RT 1189), at the time of that hearing, two years before the decision in *Box*, California courts applied the state law "strong likelihood" standard to *Wheeler/Batson* objections, not the federal constitutional "reasonable inference" standard. (See *Wade v. Terhune*, *supra*, 202 F.3d at pp. 1195-1197.)

Of course, the trial court is presumed to have followed this Court's precedents, and thus to have applied the "strong likelihood" test. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [trial court presumed to follow the law without explicit statement to the contrary]; *People v. Jeffers* (1987) 43 Cal.3d 984, 1000 [same].) Because the trial court applied an erroneous and impermissibly stringent standard, this Court must review that court's ruling de novo, rather than deferentially. (See *People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1015 [a ruling that is erroneous as a matter of law is not entitled to deference]; see also *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077 [on federal habeas, appellate court reviews a trial court's

finding of no *Wheeler/Batson* prima facie case de novo where the court applied the improper "strong likelihood" standard]; *Paulino v. Castro*, *supra*, 371 F.3d at p. 1090 [same].) De novo review shows that the denial of appellant's *Wheeler/Batson* motion was erroneous.[30]

E. Reversal Is Required

This Court has unanimously held that a trial court's "error in finding that no prima facie case had been established [under *Wheeler/Batson*], and

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[30] De novo review of the trial court's ruling would still be required even if the trial court had applied the correct standard in ruling on appellant's motion. With all due respect, the Court's practice of applying deferential review to trial court findings that no prima facie case existed for *Wheeler/Batson* purposes (see *People v. Howard*, *supra*, 1 Cal.4th at p. 1155), is unsound. As numerous other courts have held, the proper standard of review for a prima facie case ruling under *Batson* is de novo. (See e.g., *Mahaffey v. Page* (1998) 162 F.3d 481, 484; see also *United States v. Hartsfield* (10th Cir. 1992) 976 F.2d 1349, 1355-56; *State v. Sledd* (Kan. 1992) 825 P.2d 114, 118; *State v. Butler* (Tenn. Crim. App. 1990) 795 S.W.2d 680, 687; *State v. Pharris* (Utah Ct. App. 1993) 846 P.2d 454, 459; *Valdez v. People* (Colo. 1998) 966 P.2d 587, 591.) De novo review of the mixed question of fact and law presented at the prima facie inquiry is also more appropriate in light of this Court's role in safeguarding the constitutional rights embodied in *Wheeler* and *Batson*.

This Court's use of a "considerable deference" standard in reviewing trial court rulings on whether a prima facie case was shown under *Wheeler/Batson* (see, e.g., *Howard*, *supra*, 1 Cal.4th at p. 1155) appears to be based on dicta regarding a trial judge's ability to make close judgments based on his or her observations of the proceedings, understanding of trial techniques, and knowledge of local prosecutors. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281.) However, that reliance on the trial court's ability to observe the events at trial is misplaced. The trial court is not required to weigh credibility in determining whether a prima facie case of discrimination existed, and is therefore in no better position than a reviewing court to determine whether the defense satisfied its burden.

in failing to require the prosecutor to justify his challenges . . . is reversible per se." (*People v. Motton*, *supra*, 39 Cal.3d at p. 608; *People v. Hall*, *supra*, 35 Cal.3d at p. 171 [three years after the trial it was "unrealistic" to think that on remand the prosecutor could recall his reasons for challenging minority jurors, or that the court could "assess those reasons"].) Thus, reversal of the convictions and death sentence is required here, because the record below demonstrates that appellant established a reasonable inference that the prosecutor engaged in the discriminatory exercise of peremptory challenges.

Moreover, when the trial court fails to conduct a proper analysis of a claim brought under *Wheeler* and *Batson*, a reviewing court cannot foreclose the possibility of discrimination. (See *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1086 [when trial court improperly found no prima facie case, reviewing court cannot determine if nondiscriminatory reasons existed for the challenges].) Accordingly, the failure to consider *Batson* claims has been found to be "structural," and not subject to harmless-error review. (*Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 248; *Ford v. Norris* (8th Cir.1995) 67 F.3d 162, 171; *Ramseur v. Beyer* (3d Cir. 1992) 983 F.2d 1215, 1225, fn. 6 (en banc).)

Accordingly, appellant's convictions, special circumstance findings, and death sentence must be reversed.

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II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING STATEMENTS ELICITED FROM APPELLANT IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO COUNSEL

After appellant was arraigned and counsel was appointed to represent him on these charges, the police put him with Francisco Castaneda in a cell containing a hidden tape recorder in an attempt to elicit incriminating statements from appellant. The trial court committed prejudicial error in denying appellant's motion to exclude evidence of his statements made during that jail cell conversation, because the tactics used to obtain them violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the analogous provisions of the California Constitution. (*Massiah v. United States* (1964) 377 U.S. 201; *In re Wilson* (1992) 3 Cal.4th 945.)

A. Factual Background

On June 27, 1995, three days after appellant was arrested and interrogated in connection with the Creque/Gorman killings, and invoked his *Miranda* rights (22 RT 3216-3217), and on the same day a felony complaint was filed charging appellant with committing those murders (1 CT 1-2), the police put Castaneda and appellant together in a cell containing a hidden recording device. (8 RT 1306-1307.) At that point Castaneda had already "implicate[d]" appellant in the Creque/Gorman killings, and had assisted the officers investigating those murders by showing them the route he and appellant allegedly took the night of the murders, and by pointing out where appellant allegedly discarded shell casings. (*Id.* at pp. 1311-1312.)

Appellant moved pretrial to exclude any evidence concerning "any

and all statements [he allegedly made] during the course of [that] jail 'conversation'" with Castaneda, on the grounds that Castaneda was acting as a police agent during the encounter, and that the deliberate use of such an agent to elicit incriminating information violated his rights under the Fifth and Sixth Amendments to the federal Constitution. (2 CT 521-522, 561-567; 8 RT 1320.) At a hearing on that motion on July 27, 1998, the trial court listened to the tape of the conversation between appellant and Castaneda (Peo's. Exh. 279B), and heard the testimony of Michael Eveland, the Riverside Police detective who arranged for appellant and Castaneda to be put in the cell together. (8 RT 1274, 1307, 1309.) Eveland testified that Castaneda had been "cooperat[ing]" with the police in their investigation at that point, but "was not acting as . . . [a] law enforcement agent" in the incident in question. Eveland testified that Castaneda did not know about the tape recorder in the cell, but admitted that he put Castaneda in with appellant to "see if [appellant] would make any incriminating statements . . . ." (*Id.* at pp. 1307, 1309, 22 RT 3241.)[31] The trial court denied the motion on the ground that Castaneda "was not a police agent." (8 RT 1320.)

At trial, the prosecution offered in evidence a "three or four minute[]" portion of the tape recording of the conversation between appellant and Castaneda, to be played in concert with a copy of the transcript of that conversation projected on a screen. (22 RT 3164, 3244-3245.) Appellant's "renew[ed]" objection to the admission of that evidence was overruled by the trial court. (*Id.* at pp. 3164-3165.)

Detective Eveland testified that Castaneda and appellant were

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[31] Detective Eveland testified that he also put the two men together to "check the truthfulness of Castaneda's statements." (8 RT 1307.)

together in that cell for about 45 minutes and described the substance of their taped conversation. He also played the portion of the audiotape of their encounter in which appellant was speaking on the telephone to his brother Chucky. (22 RT 3242-3247.) In that telephone call appellant said that "they got the wrong shoes," and told Chucky to call "Little Mikey" and "tell him to get rid of the fuckin' shit." (*Id.* at p. 3245.)

Detective Eveland described the conversation between appellant and Castaneda, testifying that appellant told Castaneda more than once that "they got the wrong shoes," and also said that his "mom threw the other shoes. I got rid of that shit." (22 RT 3246.) Eveland further testified that appellant told Castaneda that "[t]hey ain't got no evidence," and talked about "[getting] rid of that gun" because "[t]hat's the only thing they can use, man, the fuckin' gun." (*Id.* at pp. 3246-3247.)

Francisco Castaneda also testified about his encounter with appellant in the jail cell on June 27, 1995. According to Castaneda, appellant said his mother "got rid" of the "white Nikes" appellant "was wearing when he committed this double murder." (17 RT 2436-2438.) Appellant also said that the police had "nothing on him," and that he [appellant] told the police during his interrogation to "'check the shoes' – because they weren't going to find them." (*Id.* at p. 2437.) Castaneda said he heard appellant tell Chucky on the telephone to "get rid of the shit," and that he knew what appellant meant by that statement: get rid of the "nine-shot .22 revolver." (*Id.* at pp. 2437-2438.) In fact, Castaneda claimed that after the phone call with Chucky appellant whispered to him that it was the .22 revolver he wanted Little Mikey to get rid of, and that Mikey had the gun. (*Id.* at p. 2527.)

Castaneda testified that the police never told him he would not be

charged in connection with these three shootings, but admitted he was never "concerned" that he might be charged. (17 RT 2602.) Castaneda also testified that the police told him it was in his best interest to cooperate in their investigation, and that he would and/or "might" be charged as an accessory. (*Id.* at pp. 2602-2603.) However, Castaneda never was charged as an accessory, and at the time of trial had never heard anything more about the possibility of being charged with any crime related to these shootings. (*Id.* at pp. 2603-2604.)

In his closing argument the prosecutor replayed the tape of the jailhouse conversation for the jurors, and said that "every time I hear it, it kind of sends a chill down my spine. And it does that because that's a murderer talking. Is that the statement of an innocent man?" (26 RT 3832.)

B. Applicable Legal Standards

In *Massiah v. United States*, *supra*, 377 U.S. 201, 206, the high court held that use of a defendant's incriminating statements that were "deliberately elicited" by an undercover prosecution agent in contravention of the defendant's right to counsel violates the Sixth Amendment. This Court has endorsed that rule in numerous cases. (See, e.g., *Wilson*, *supra*, 3 Cal.4th 945, 950; *People v. Slayton* (2001) 26 Cal.4th 1076, 1079; *People v. Frye* (1998) 18 Cal.4th 894, 993.)

To prevail on a *Massiah* claim, a defendant "must establish that the informant 1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and 2) deliberately elicited incriminating statements." (*In re Neely* (1993) 6 Cal.4th 901, 915-916.) Under *Massiah*, "the essential inquiry is whether the government intentionally created a situation likely to induce the defendant to make

incriminating statements without the assistance of counsel." (*People v. Frye*, *supra*, 18 Cal.4th at p. 993; see *United States v. Henry* (1980) 447 U.S. 264, 274.)

C. The Police Violated Appellant's Constitutional Rights By Using Castaneda As An Agent To Elicit Incriminating Statements

A defendant's Sixth Amendment right to have his counsel present during police questioning of any kind attaches upon the commencement of formal judicial proceedings on the charges (*Kirby v. Illinois* (1972) 406 U.S. 682, 688-690), or in other words, "when the government's role shifts from investigation to accusation." (*Moran v. Burdine* (1986) 475 U.S. 412, 430; *People v. Matson* (1990) 50 Cal.3d 826, 868.) Here, appellant's right to counsel attached when he was arrested on these charges, a felony complaint was filed alleging he committed the crimes at issue (see *Sweat v. Arkansas* (1985) 469 U.S. 1172, 1177 (dis. opn. of Brennan, J.)), and he was arraigned while represented by appointed counsel. (1 CT 1-3.)

The trial court clearly erred when it found that the police conduct involved here did not violate the principles set out in *Massiah*, *supra*, 377 U.S. 201. Contrary to the trial court's ruling, the evidence before the court clearly showed that Castaneda was a police agent, and made efforts to "stimulate conversations about the crime charged." (*United States v. Henry*, *supra*, 447 U.S. at p. 271, fn. 9.)

1. Castaneda Was Acting As A Police Agent

The facts of this case more than support the required inference that Castaneda, who was uniquely placed to elicit incriminating statements from appellant and had already demonstrated his eagerness to help the police convict him, was acting as a police agent.

Where the informant is a jailhouse inmate, the requirement to show that he or she was a police agent is not met where law enforcement officials merely accept information the informant elicited on his or her own initiative, with no official promises, encouragement, or guidance. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240.) However, the requisite preexisting arrangement need not be explicit or formal, but may be "inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct" over a period of time. (*United States v. York* (1991) 933 F.2d 1343, 1357; *In re Neely*, *supra*, 6 Cal.4th at p. 915.) Circumstances probative of an agency relationship include the government's having directed the informant to focus upon a specific person, such as a cellmate, or having instructed the informant as to the specific type of information sought by the government. (*Id.* at p. 1356.)

This was not a situation where the police "passively receiv[ed] information provided by an enterprising inmate. . . ." (*United States v. York*, *supra*, 933 F.2d at pp. 1356-1357; see also *Kuhlman v. Wilson* (1986) 477 U.S. 436, 459 [police informant must do something "beyond merely listening"].) Rather, the police used Castaneda to "stimulate conversation[]" with appellant (*United States v. Henry, supra*, 447 U.S. at p. 273; *In re Neely*, *supra*, 6 Cal.4th at p. 916) precisely because he was uniquely placed to elicit incriminating statements, and had already demonstrated his eagerness to help the police build a case against appellant. Based on the facts in this case, Castaneda was clearly acting as a police agent.

First, Castaneda had an obvious incentive to incriminate appellant, since he and appellant were the only plausible suspects in these three

murders. In fact, Castaneda was a very likely suspect, because there was ample evidence to suggest that he either committed the murders himself or was an accomplice in their commission. Thus, Castaneda was admittedly present when Creque and Gorman were killed (16 RT 2358-2359, 19 RT 2836-2838), and seemingly had more of a motive to kill Diana Delgado than appellant: Castaneda, not appellant, asked Diana Madrid how much Ms. Delgado's diamond ring was worth the week before she was killed, and had a heated argument with Ms. Delgado about the same time. (23 RT 3363-3370.) Also, the purse Ms. Delgado had the night she disappeared was found at Castaneda's house, not appellant's. (15 RT 2222-2224, 2230-2233, 16 RT 2297.) Moreover, Castaneda had a more extensive prior record of violent crimes than appellant (17 RT 2601-2602 [Castaneda shot at least three men before these murders]), and, unlike appellant, left the state without advance notice immediately after the shootings. (*Id.* at pp. 2413-2414, 2417-2418, 20 RT 2925.) That a suspect flees from the scene of a criminal investigation is, of course, commonly looked on as evidence of his or her "consciousness of guilt." (CALJIC No. 2.52; *People v. Mendoza* (2000) 24 Cal.4th 130, 180.)

Moreover, Castaneda not only had an incentive to act as an agent for the police so as to incriminate appellant, he had *already* acted on their behalf in that cause before he was put in the cell to elicit incriminating statements. Shortly after he was arrested, Castaneda was confronted with the evidence of his involvement in these crimes and told the "door was open" for him to help himself. (17 RT 2445-2447, 23 RT 3419-3420.) In other words, the police indicated to Castaneda that he could avoid prosecution by helping them convict appellant, and he accepted the invitation. Thus, Castaneda led the police through a purported re-enactment

of the Creque/Gorman killings immediately after they brought him back to California, and pointed out to the police where appellant supposedly discarded used shell casings after those shootings. (19 RT 2808-2811, 2817-2818.)[32]

Moreover, in light of Castaneda's numerous prior felony convictions (17 RT 2601-2602), and of the fact that the police had supposedly told him they viewed him as an accessory to the Creque/Gorman murders (*id.* at p. 2603), it is extremely difficult to believe he did not understand that the implicit message conveyed by the police conduct was: "get appellant to say something incriminating and you can help yourself." So even assuming there was no explicit agreement that Castaneda would act as a police agent, it was no mere coincidence that he was put in the cell with appellant. Castaneda, an experienced felon and possible suspect who obviously knew how to advance his own interests, immediately started encouraging appellant to talk about the case. Accordingly, there manifestly was "'evidence that the parties behaved as though there was an agreement between them'" (*Neely*, *supra*, 6 Cal.4th at p. 915), and thus that Castaneda was a police agent.

This case stands in stark contrast to others in which this Court has found that informants were not police agents under *Massiah*. In *People v. Coffman* (2004) 34 Cal.4th 1, 68, the Court held that the mere fact that a "known informant . . . was housed near" the defendant did not "compel" the conclusion that the informant was a police agent. That holding was based on the fact that the informant "acted on her own initiative," and on the

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[32] Of course, Castaneda would have known where to find those shell casings if *he*, rather than appellant, discarded them after committing the murders.

"absence of any evidence that the authorities had encouraged her to supply information and insinuated that to do so would be to her benefit. . . ." (*Ibid.*) *People v. Frye*, *supra*, 18 Cal.4th 894, 991-993, held that arranging for a defendant charged with murder to talk to an uncharged confederate the defendant contended was "as guilty as" he was did not violate *Massiah*, principally because the defendant was told beforehand that the conversation would be recorded. Finally, *People v. Williams* (1997) 16 Cal.4th 153, 203-204, held that a jailhouse informant who went to the police offering to inform against the defendant, and who ultimately provided damaging information, was not a police agent because he "initiated" the contact with the police, who told him that they had an "absolutely airtight case" and did not need his statement. (See also *People v. Jenkins* (2000) 22 Cal.4th 900, 1008 [defendant failed to put on evidence that informant was police agent]; *People v. Hart* (1999) 20 Cal.4th 546, 636 [informant elicited damaging statements before approaching the police]; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1248-1249 [informant acted "on his own initiative" in eliciting damaging information from defendant, and the police tried to "dispel" the notion of any implied promise of leniency].)

Here, unlike *Williams*, the initiative to elicit information from appellant came from the police – Detective Eveland set up the recorded meeting to "see if [appellant] would make any incriminating statements." (8 RT 1307-1308.) Further, unlike *Frye*, appellant was not informed that any incriminating remarks he made while in the cell with Castaneda would be recorded. Finally, unlike *Coffman*, the evidence suggests that the police either encouraged Castaneda to supply them with information, or insinuated he would benefit from doing so. Thus, the police indicated to Castaneda that it was in his best interest to cooperate in their investigation (17 RT

2603), and Castaneda had already been helping the police before this incident, by pointing an accusing finger at appellant. Thus, this case is entirely distinguishable from cases like *Coffman*, *Williams* and *Frye*, where this Court found that there was insufficient evidence that an informant was acting as a police agent.

Here, Castaneda was acting as a police agent, because the police "intentionally created a situation which would likely cause the defendant to make incriminating statements." (*United States v. Henry*, *supra*, 447 U.S. at p. 274; *United States v. Harris* (9th Cir. 1984) 738 F.2d 1068, 1071.) The facts of this case are similar to those in *Randolph v. State of California* (9th Cir. 2004) 380 F.3d 1133, 1139, where an inmate approached the prosecutors with what they took as "an offer to testify against [the defendant]." After that meeting, the prosecutors put the informant back in the cell with the defendant, but without promising that he would receive any benefits for providing incriminating information; the informant ultimately gave damaging testimony against the defendant, and received probation instead of a prison term for his pending charges. (*Id.* at p. 1144.) The Ninth Circuit found that because the authorities "knew or should have known that [the informant] hoped he would be given leniency if he provided useful information," and because the informant did receive leniency, the informant's cooperation with the State rendered him a police agent. (*Ibid.*)

The determining factor in deciding whether an informant is a police agent is not the "government's intent or overt acts . . . ; rather, it is the 'likely . . . result' of the government's acts." (*Randolph*, *supra*, 380 F.3d at p. 1144, quoting *United States v. Henry*, *supra*, 447 U.S. at p. 271.) Thus, because the relationship between the informant and the authorities in that

case was one in which the informant had every incentive to help the prosecution, and the prosecution had every reason to expect his help, the lack of any evidence that there was an explicit agreement to that effect was unimportant (*Ibid.*) This case cannot be meaningfully distinguished from *Randolph*.

Thus, while there is no evidence Castaneda approached the police with an offer to incriminate appellant, he had no need to. Castaneda had already accused appellant of committing the murders, had helped the police gather evidence against appellant, had been informed that he could be prosecuted as an accessory to two of the murders, and had been told by the police that the "door was open" to help himself. (17 RT 2445-2447, 23 RT 3419-3420.) Under those circumstances, Castaneda must have known he could help himself by hurting appellant, and the police must have known Castaneda would probably try to do that. Since the "likely result" of putting Castaneda in a cell with appellant was that he would try to elicit incriminating statements from appellant, Castaneda was acting as a police agent.[33]

2. Castaneda Deliberately Tried To Elicit Incriminating Statements

The potentially incriminating statements appellant made during this

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[33] The purported fact that Castaneda was not told that his conversation with appellant would be recorded has little bearing on whether he was a police agent. Castaneda would have had the same incentive to elicit incriminating statements even if he did not know the police would be able to tape those statements; in fact, he might have felt his cooperation would be more valuable, and better rewarded, if the only evidence the police would have of appellant's responses to his efforts to "stimulate conversation[]" about the murders (*United States v. Henry, supra*, 447 U.S. at p. 273) was his testimony.

taped conversation were not the products of "luck or happenstance" (*Kuhlmann v. Wilson*, *supra*, 477 U.S. at p. 459), but rather of Castaneda's conscious efforts to "stimulate" conversation with appellant about the charged offense, and to "actively engage[]" in a discussion of the crimes that would produce incriminating statements. (*In re Neely*, *supra*, 6 Cal.4th at pp. 915-916, quoting *United States v. Henry, supra*, 447 U.S. at p. 273.) Accordingly, both prongs of the *Massiah* rule are met here. (*Ibid.*)

Even leaving aside the obvious fact that the police must have known Castaneda would try to "help himself" by getting appellant to say things that would incriminate him, the transcripts of the taped conversation clearly show Castaneda trying to elicit just the kind of "incriminating statements" Detective Eveland wanted. Thus, although the transcripts of that conversation indicate that much of what the two men said is indecipherable, the portions that have been transcribed show Castaneda actively engaging appellant in a discussion of the crimes.[34]

Castaneda's first substantive remarks to appellant were clearly designed to lead to a discussion about the crimes. Depending on which of the two transcripts of that conversation in the record is more correct,

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[34] Two substantially different versions of that transcript are included in the Clerk's Transcript, the first at pages 4145-4163 and the second at pages 4165-4181. They will be referred to herein as TX1 and TX2 respectively. Except for the opening sections of both transcripts, which purport to transcribe appellant's side of a telephone call with his brother Chucky, in which appellant supposedly told Chucky to call "Little Mikey" from a phone booth and order him to "get rid of the shit" (TX1 p. 3, 15 CT 4147; TX 2 p. 3, 15 CT 4167), the two transcripts might almost be of different conversations. In analyzing what was said in the cell by appellant and Castaneda appellant relies primarily on TX1, which the prosecutor asserted was the more accurate of the two transcripts. (29 RT 4552.)

Castaneda said either "I just want to hear what you got to say. I ain't saying nothing. . . . I got evidence in my car" (TX1, p. 4; 15 CT 4148), or "I ain't saying fucking nothing . . . they got me two counts . . . and the guy told me . . . you'll be free if we find out what happened . . . they got evidence in my car" (TX2 p. 3; 15 CT 4167). It is irrelevant which transcript is more correct, because in either case Castaneda is manifestly attempting to stimulate a discussion about the crimes. When Castaneda insists that he "ain't saying fuckin' nothing" to the police, although they have found "evidence" in his car, he is talking about the crimes and inviting appellant to do the same.

Castaneda next tells appellant, according to the first transcript: "Well you know what? I told them I didn't see the ____ dude. I told them I didn't go to your pad man." He then asks appellant what "they [said] about the knife." Then Castaneda tells appellant he "told [the police] I gave [the knife] to you," and asks "what's up? Man I was all fuckin' scared." (TX1 p.4-5; 15 CT 4148-4149.) Again, Castaneda is clearly talking about the crimes and trying to lead appellant into a discussion of them. Indeed, when appellant then starts to talk about other matters Castaneda immediately brings the conversation back to the crimes by asking when appellant was arrested. (*Id.* at p. 4149.)[35]

Later, after a discussion of the arrest, appellant's interrogation, and other matters (TX1 pp. 5-7; 15 CT 4149-4151), appellant proclaims that "[t]hey ain't got no evidence." To that Castaneda replies: "Yeah they do." (*Id.* at p. 4151.) Again, Castaneda's remark amounts to a suggestion that

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[35] None of this discussion appears in TX2.

the two men discuss the evidence of the crimes.

After a further discussion of peripheral matters, and a great deal of reportedly unintelligible conversation, Castaneda says to appellant: "I hope fuckin' ___ get rid of that gun. [*sic*] That's the only thing they can use man, the fuckin' gun." (TX1 p. 13; 15 CT 4157.) That gambit, of course, involved one of the most important pieces of evidence in the case, and was well-calculated to elicit an incriminating statement from appellant about the gun.

Finally, Castaneda told appellant he had spoken to "Amanda" on the telephone the previous day, and had told her "all kinds of shit." (TX1 p. 17; 15 CT 4161-4162.) That reference was clearly to Armanda Ramirez, Angelica's good friend who testified at both the guilt and penalty phases.[36] (23 RT 3298, 27 RT 4126.) By bringing Ms. Ramirez up, Castaneda again opened the door for appellant to make incriminating admissions.

Thus, Castaneda was far from a "passive listener" during this conversation. (*United States v. Henry*, *supra*, 447 U.S. at p. 271.) Rather, Castaneda prodded and probed appellant throughout their meeting, in a manner entirely consistent with the conclusion that Castaneda was trying to induce appellant to incriminate himself, so that he [Castaneda] could save himself from prosecution for these crimes. The State has an affirmative obligation "not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (*Maine v. Moulton* (1985) 474 U.S. 159, 168.) Because the police in this case used tactics intentionally designed to circumvent that protection, this Court must reverse appellant's

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[36] Ms. Ramirez was referred to as Amanda at some points in the trial (e.g., 18 RT 2747, 19 RT 2847, 20 RT 2945, 26 RT 3695-3996), and as Armanda at others. (E.g., 26 RT 3692, 3695.)

convictions and death sentence.

D. The Erroneous Admission Of This Evidence Obtained In Violation Of The Constitution Requires Reversal Of The Convictions And Sentence

Because this evidence concerning appellant's statements to Castaneda was obtained in violation of appellant's rights under the Sixth and Fourteenth Amendments to the federal Constitution, this Court must reverse the convictions and resulting death sentence unless it finds that those violations were harmless beyond a reasonable doubt. (*Chapman v. California* (1966) 386 U.S. 18, 24; accord *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) In making this determination, the inquiry is *not* "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered" based upon the strength of the evidence. (*Sullivan v. Louisiana*, *supra*, at p. 279.) Rather, the reviewing court must determine "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Ibid.*) Under these standards, respondent cannot prove that the error was harmless beyond a reasonable doubt.

The illicit fruits of this violation of appellant's constitutional rights include the following alleged statements by appellant: 1) that the police had the "wrong shoes," and there was "no evidence" against him because his mother did what he asked, and "got rid" of the shoes he was wearing the night of the double murder (17 RT 2436-2438, 22 RT 3246); 2) that it was necessary to "get rid of the gun" because that was the only thing the police could "use" against him (*id.* at p. 3247); and 3) that the "shit" he told Little Mikey to "get rid of" was the .22 caliber revolver allegedly used in these three murders. (17 RT 2437-2438.) Those statements were, as the prosecutor argued, strong evidence that appellant committed the charged

murders, and thus their admission could not have been harmless error as to the guilt verdicts.

The admission of the statements elicited by Castaneda was prejudicial even though the admissibility of the independent tape recording of appellant's telephone conversation with his brother was not affected by the *Massiah* violation. The statements Castaneda elicited from appellant after the telephone call, and Castaneda's testimony about those statements, provided context for appellant's conversation with his brother. Without them, appellant's telephone statements would have had little, if any, value as evidence of his guilt. Thus, the meaning of appellant's statement on the telephone that the police had the "wrong shoes" would have been far more ambiguous without appellant's statements to Castaneda explaining that the police had the wrong shoes because his mother "got rid of" the right ones. And without Castaneda's testimony that the "shit" Little Mikey was to get rid of was the murder weapon, rather than marijuana as Chucky stated, appellant's statement about getting rid of the shit would have been irrelevant. Only because Castaneda was in the cell, as a police agent, was he able to put such a sinister gloss on appellant's statements to his brother in that telephone call.

Moreover, even assuming that the erroneous admission of these statements was harmless as to the guilt verdict, this Court cannot find that the jurors' consideration of that evidence was harmless beyond a reasonable doubt at the penalty phase. That is particularly true in light of the requirement of heightened reliability applicable to all phases of capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280.) The prosecutor's argument that appellant's statements were "chill[ing]," and that appellant's voice on the tape recording was that of a "murderer,"

indicate how prejudicial this evidence was. Since it is certainly possible that one or more of the jurors chose to vote for death based on this evidence that the prosecutor described as chilling, reversal of the death judgment is required in any event.

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III.

THE TRIAL COURT'S REFUSAL TO SEVER THE THREE MURDER CHARGES RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR, AND VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE DETERMINATION ON GUILT AND PENALTY

A. Introduction

As set forth above, appellant was tried jointly on three counts of first degree murder. (1 CT 164-167.) That trial was fundamentally unfair because appellant was forced to defend against the combined weight of all the charged murders together, and the prosecutor was allowed to introduce highly inflammatory evidence that was only relevant to one of the charged murders. Accordingly, appellant's trial violated the rule that joinder "must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 448; *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.)

The trial court's ruling refusing to sever the Creque/Gorman murder charges from the Delgado murder charge was an abuse of discretion because the court did not "analyze realistically the prejudice which [would flow] from joinder in light of all the circumstances . . . ." (*People v. Smallwood* (1986) 42 Cal.3d 415, 425.) The only possible relevance of evidence about the Creque/Gorman murders to the question of whether appellant killed Delgado, or of evidence about the Delgado murder to whether appellant killed Creque and Gorman, was as evidence of his identity, and these crimes were insufficiently similar to be cross-admissible on that basis. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 403 [for

evidence of another crime to be admissible to prove identity, it and the charged crimes must be "sufficiently distinctive"].)

Each of the convictions and the death judgment must also be reversed because the refusal to sever these charges "actually resulted in 'gross unfairness' amounting to a denial of due process" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162, quoting *People v. Arias* (1996) 13 Cal.App.4th 92, 127; U.S. Const., 5th and 14th Amends.; Cal. Const., art I, §§ 15 and 16), and deprived appellant of a fair and impartial trial, due process, and equal protection. (U.S. Const., 5th, 6th, and 14th Amends.; Cal. Const., art I, §§ 15 and 16; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503.) Reversal is further required because the refusal to sever these charges deprived appellant of his federal and state constitutional rights to a fair, reliable, non-arbitrary, and individualized penalty determination (see *Woodson v. North Carolina* (1976) 428 U.S. 280; U.S. Const., 5th, 8th, and 14th Amends; Cal. Const., art. I, §§ 16 and 17), since hearing the evidence as to both the double murder and the Delgado murder jointly surely influenced the jury's penalty determination as well.

B. Procedural History

Appellant moved to sever this case into three separate matters, with Counts I and II of the Information (the Creque/Gorman killings) to be tried jointly, and Counts III and IV (the Delgado murder and the shooting at the Prospect Avenue house) to be tried individually, on the grounds that the charged incidents involved different motives and were "[un]related" and "[un]connected," and that a joint trial would be "severely prejudic[ial]" because it would deprive appellant of his rights to "a fair trial and due process of law." (2 CT 432, 437; 3 RT 209-213.) While appellant

conceded that a consolidated trial on all four counts was authorized under Section 954, he asked the court to sever those counts because a joint trial would be fundamentally unfair. (2 CT 437-438.) Appellant also stated that "the issues of knowledge and intent are not in issue herein." (2 CT 440.)

Appellant argued that there was no "significant" cross-admissible evidence as to any of the four counts aside from Francisco Castaneda's testimony, and that the alleged fact that "the same .22 caliber gun, which has never been recovered," was used in all the offenses was not evidence that he committed them. (2 CT 440-441; 3 RT 213.) Appellant also argued that none of the evidence of the charged murders went to any of the issues on which evidence of unrelated charges may be offered under Evidence Code section 1101, subdivision (b). (2 CT 439-441.) Thus, appellant argued, a joint trial would be only slightly more efficient than separate ones, but far more prejudicial and unfair. (2 CT 442.)[37]

The prosecution's opposed the severance motion on the grounds that the "crimes [were] cross-admissible;" and "even if they [were] not cross-admissible" a joint trial would not cause "undue prejudice." (4 CT 929.) The prosecution argued that the evidence as to the charged murders was cross-admissible on the issues of identity, intent and common plan, and to prove the alleged special circumstance of multiple murder. (*Id.* at p. 931.)

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[37] Appellant submitted a written "Offer of Proof in Support of Motion for Severance" which he asked the trial court to consider ex parte. (Sixth Supp. Clerk's Tran. ("6 SCT") 7-10; 3 RT 211-212.) That offer stated that appellant was "not willing to testify, [or] personally [] present any evidence on his own behalf" as to the Creque/Gorman killings or the shooting at the Arevalo house, but was "prepared and willing to testify" that he had sex with Diana Delgado on June 16, 1995, and that she thereafter left with persons unknown. (6 SCT 7-9.) The trial court refused to consider that document. (3 RT 222-223.)

The prosecution argued that the evidence of the killings was cross-admissible on identity because the crimes were "similar," since 1) there were footprints at each scene matching defendant's prints,[38] 2) the same gun was used in both killings, 3) the killings occurred in "approximate[ly]" the same location, and 4) each victim suffered multiple gun shot wounds. (*Id.* at pp. 930-931.) The prosecution also argued that the evidence was cross-admissible to show a common plan, i.e., that appellant killed Diana Delgado in the orange grove because he "success[fully]" killed Creque and Gorman there two nights earlier. (*Id.* at p. 932.)

At the hearing on appellant's motion, defense counsel stated that intent was "not an issue" based on the facts of the crimes. (3 RT 210.) Counsel further argued that the crimes did not involve any common plan because the supposed motives for them were different. (*Id.* at pp. 209-210.)

The prosecutor argued that if the charges were severed the evidence of each of the killings would come in at the trial on the other one as a separate murder special circumstance, and that the "evidence [would] be the same regardless of which murder we took first." (3 RT 214.) The court asked whether this would involve joining a "weak case with a strong case," and the prosecutor replied that neither murder charge was stronger since both relied on Castaneda's testimony. (*Id.* at pp. 216-217.) The prosecutor also said the "issue . . . with respect to . . . all three murders" was whether appellant or Castaneda was the killer. (*Id.* at p. 218.)

The trial judge denied the motion without explanation (3 RT 228-230), although he had earlier recognized a disparity in the strength of the

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[38] No evidence concerning any footprints found at either of the murder scenes was presented at the preliminary hearing in this matter. (1 CT 27-162.)

evidence on the Creque/Gorman and Diana Delgado murders. (*Id.* at p. 216.)

C. Applicable Legal Standards

Penal Code section 954 authorizes the state to join two or more offenses of the same class of crime in one pleading, subject to a trial court's authority to order separate trials. A trial court should exercise this authority when necessary to accord a criminal defendant the fundamental rights to due process and a fair trial. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 448; *Calderon v. Superior Court*, *supra*, 87 Cal.App.4th at p. 939.) For example, joinder is preferable when consolidating charges will avoid harassment of the defendant and/or the waste of public funds involved in placing the same general facts before different juries. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 408.)

The fact that joinder may be preferable under California law does not mean that it is acceptable in all circumstances. In fact, severance may be constitutionally required if joinder would be so prejudicial as to deny the defendant his Fifth and Fourteenth Amendment rights to a fair trial. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244; see *United States v. Lane* (1985) 474 U.S. 438, 446, fn. 8.) The concept that a consolidated trial may deprive a defendant of due process has been long-recognized in this state. (See *In re Anthony T.* (1980) 112 Cal.App.3d 92, 101-102; *People v. Burns* (1969) 270 Cal.App.2d 238, 252.)

The decision whether to join or sever counts is within the trial court's discretion. (See *People* v. *Cummings* (1993) 4 Cal.4th 1233, 1284 [denial of severance reviewed for abuse of discretion].) Four factors have traditionally been used to assess whether a trial court's refusal to sever counts constituted an abuse of discretion. An abuse of discretion may be

found where: 1) evidence of the jointly-tried crimes would not be cross-admissible at separate trials;[39] 2) certain of the charges are unusually likely to inflame the jury against the defendant; 3) a weak case has been joined with a strong case so that the spillover effect of aggregate evidence on several charges might alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*People* v. *Sandoval* (1992) 4 Cal.4th 155, 172-173; see *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454 [exercise of discretion viewed with highest degree of scrutiny where joinder itself gives rise to special circumstance allegation of multiple murder].)

Overall, the test is a simple one. A court should order separate trials of otherwise joinable offenses when it appears that severance is required in the interest of justice. (*People* v. *Bean* (1988) 46 Cal.3d 919, 935.) Severance "may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial." (*Ibid.*) Thus, the criteria developed by appellate courts may be of aid in arriving at the ultimate decision regarding whether to sever or join offenses, but the final test is whether a denial of severance, or the granting of joinder, denied the defendant a fair trial.

It is the defendant's burden to demonstrate a clear showing of

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[39] The enactment of Penal Code section 954.1 to some extent limited the treatment of cross-admissibility as a primary factor for determining the prejudice from a failure to sever. However, this statute merely means that the absence of cross-admissibility alone is not sufficient to prevent joinder. It does not mean that the lack of cross-admissibility is no longer a factor suggesting possible prejudice. (*Belton* v. *Superior Court* (1993) 19 Cal.App.4th 1279, 1286.)

potential prejudice arising from the trial court's order granting consolidation or denying severance. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) Essentially, assuming the lack of cross-admissibility, this determination revolves around the likelihood of whether a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one of the charged offenses might permit the knowledge of the other charged offenses to tip the balance so that it convicts the defendant. (*People v. Bean*, *supra*, 46 Cal.3d at p. 936.)

Additionally, even if it was not an abuse of discretion for the trial court to deny a motion to sever counts, reversal may still be required if consolidation resulted in gross unfairness amounting to a denial of due process. (*People v. Arias*, *supra*,13 Cal.4th at p. 127.)

That due process principle is acknowledged by federal courts. For misjoinder of counts to be reversible error under federal constitutional law, the consolidation must have resulted in prejudice so great that it denied the defendant a fair trial. (*United States v. Lane*, *supra*, 474 U.S. at p. 445, fn. 8; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1083.) In making this determination, the reviewing court looks at each count separately to decide if the trial of one count was rendered unfair because of the joinder of that count with one or more of the other counts. (*Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1149; *Featherstone v. Estelle*, *supra*, 948 F.2d at p. 1503.)

Federal courts have recognized the high risk of prejudice that ensues when the consolidation of counts permits evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084.) This risk exists because jurors at a joint trial cannot adequately

compartmentalize damaging information about the defendant; thus, a joint trial often prejudices the jurors' conceptions of the defendant and of the strength of the evidence against him or her on each of the counts. (*United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) Also, jurors are prone to regard a defendant charged with multiple crimes with a more jaundiced eye, and to conclude that the defendant must be bad to have been charged with so many offenses, and may convict on one count based on evidence which only applies to another count. (*United States v. Ragghianti* (9th Cir. 1975) 527 F.2d 586, 587; *United States v. Smith* (2nd Cir. 1940) 112 F.2d 83, 85; *United States v. Lotsch* (2nd Cir. 1939) 102 F.2d 35, 36.)

As shown below, the denial of severance in this case was an abuse of discretion, and violated appellant's state and federal due process rights to a fair trial.

D. The Trial Court Abused Its Discretion By Refusing To Sever The Creque/Gorman Charges From The Delgado Charge

These three murder counts were of the same class of crimes under section 954, and thus, as appellant conceded, met the statutory requirements for joinder. (2 CT 432, 437.) Nevertheless, severance was warranted under state law because, as appellant argued below, there was no "significant" cross-admissible evidence concerning the separate Creque/Gorman and Delgado murders, and he was likely to suffer unfair prejudice at a joint trial on those charges. (*Id.* at pp. 444-445; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1315 [defendant required to make a "clear showing of prejudice" in support of motion for separate trials].)

Moreover, even assuming that some of the evidence as to the Creque/Gorman murder would have been admissible at a separate trial on

the Delgado murder, or vice versa, it was still an abuse of discretion to deny severance. The effect of refusing to sever these charges was that the jury heard highly inflammatory evidence from the Creque/Gorman murder that would have been irrelevant, and thus inadmissible, at a separate trial of appellant on the Delgado murder. Thus, under this Court's four-part test, the trial court abused its discretion in ordering a joint trial on these charges, and the guilt verdicts and death judgment must be reversed. (See *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 452.)

1. The Facts Before the Trial Court When It Heard The Severance Motion[40]

a. The Gorman/Creque Murder

Detective Michael Eveland of the Riverside Police Department testified that Ellen Creque and Kenneth Gorman both died from multiple .22 caliber gunshot wounds on June 15, 1995, in Riverside. (1 CT 34-39.) Detective Eveland came to suspect appellant of involvement in the murders after monitoring a police interview with Gabriel Delgado and interviewing Francisco Castaneda, on June 23, 1995. (*Id.* at p. 39-41.)

Francisco Castaneda testified that he and appellant were together from the evening of June 14, 1995, until early morning on June 15, 1995. (1 CT 66-68.) They were at appellant's house most of the night, and at one point went out "cruising to shoot [appellant's] gun" in some nearby orange

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[40] Only the facts before the trial court at the time it ruled on the severance motion are relevant to whether that decision was an abuse of discretion. (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.) Since there was no testimonial or other evidence offered at the preliminary examination concerning any footprints found at the two murder scenes, that evidence was not a part of the factual record before the trial court when it ruled on appellant's severance motion.

groves. (*Id.* at pp. 71-72.) To Castaneda, appellant seemed "pretty much" intoxicated that night. (*Id.* at pp. 116-117.)

Castaneda said that when he and appellant got to the groves they found a parked pickup truck; he pulled in behind the truck so it could not pull out and "threw on [his] bright lights." (1 CT 75-76, 105.) Appellant said "let's jack it," meaning "let's take the truck [or] see what [is] in it," and went over to the truck. A man in the driver's seat of the truck got mad and started yelling at appellant, whereupon appellant "fired into the truck" eight or nine times. (*Id.* at pp. 77, 101, 108.) Appellant did not say beforehand that he intended to kill anyone in the truck. (*Id.* at p. 130.)

Castaneda testified that appellant came back to the car after firing those shots and reloaded his gun, and that appellant said: "the bitch don't want to die yet." (1 CT 77-78.) Appellant then went back and fired into the passenger side of the truck approximately nine more times. (*Id.* at p. 78.)

Appellant then got back in the car with Castaneda, and they drove to appellant's house. On the way, appellant threw shell casings out the car window, and talked about the killings. (1 CT 78-80.) Appellant said the female victim "didn't want to die," and that she said: "'Oh, God, help me." Appellant said that when the victim said that he replied: "God can't help you now because Mt. Vernon is here to rob, kill and destroy." (*Id.* at p. 80.) Appellant also told Castaneda that he reached into the truck and pulled down the female victim's shirt; appellant then made a sexual comment about the female victim. (*Id.* at pp. 80-81.)

Castaneda left appellant's house shortly after they got back, and arrived at his girlfriend's house about 4:00 a.m. (1 CT 81, 117-118.) He slept in his car the rest of that night. The next day he told his girlfriend, Veronica Delgado, and her brother, Gabriel Delgado, about the shooting.

(*Id.* at pp. 119-121.)

b. The Delgado Murder

Allen Paine, a Riverside Sheriff's Department detective, testified that on June 20, 1995, Diana Delgado's fully-clothed body was found in an orange grove in Highgrove, "roughly a mile" from where the bodies of Creque and Gorman were found five days earlier. (1 CT 48-50.) Ms. Delgado died from multiple gunshot wounds to the head. (*Id.* at p. 53.)

Diana Delgado's brother, Jesse Melgoza, reported that Ms. Delgado called him in the late afternoon or early evening of June 16, 1995, and told him that she would get a ride home that night with appellant. (2 RT 52-53.) Appellant was identified as the suspect in Ms. Delgado's murder based on information from Francisco Castaneda. (*Id.* at pp. 53-54.)

Castaneda testified that between 11:00 p.m. and midnight on June 16, 1995, he and his sister Alvina ran into appellant and Diana Delgado on High Street in Highgrove. Appellant told them that he and Ms. Delgado were going to the groves to have sex. (1 CT 83-85.) Appellant came to Castaneda's house an hour to an hour and a half later with jewelry that Castaneda recognized as belonging to Ms. Delgado. (*Id.* at pp. 85-87.) When Castaneda saw the jewelry, he thought that appellant "had beaten or assaulted" Ms. Delgado, because she "wouldn't just give up her jewelry . . . ." (*Id.* at pp. 136.)

The next morning, June 17, 1995, Castaneda and Veronica Delgado set off for Texas in a stolen car. (1 CT 82-83, 93, 122-124.) Castaneda left because he feared that he might be killed, and feared being charged with involvement in the double murder. (*Id.* at pp. 87-88, 124, 141.) A few days later, Castaneda was arrested in Texas for speeding in a stolen car, and was brought back to Riverside by the police. (*Id.* at pp. 82-83, 126, 140.) In

Texas, Castaneda told the police he knew nothing about Diana Delgado's disappearance. However, about two weeks after returning to California, Castaneda told the police he saw Ms. Delgado with appellant on the evening of July 16, 1995. (*Id.* at pp. 83, 126.)

c. Expert Testimony Relating To Both Murders

Paul Sham, a criminalist, examined bullets and bullet fragments from the Creque/Gorman and Delgdao murders that he received from the Riverside Police Department and the Riverside Sheriff's Department. (1 CT 148-149, 158.) Sham testified that: all the bullets and fragments were .22 caliber; "most of" the bullets and fragments from the Police Department "were fired by the same firearm;" some of the bullets and fragments from the Sheriff's Department "could have been fired by the same firearm;" and some of the bullets and fragments from both agencies "probably were fired by the same firearm." (*Id.* at pp. 150-151.)

2. There Was No Significant Cross-Admissible Evidence

Although the existence of cross-admissible evidence "is not the sine qua non of joint trials" (*People v. Marquez* (1992) 1 Cal.4th 553, 572), the presence of cross-admissible evidence can suffice to negate any prejudice from joint trials. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1316.) Accordingly, it follows that joinder is less appropriate where the evidence is not cross-admissible. (See *United States v. Lewis*, *supra*, 787 F.2d at p. 1322.) Thus, the first step in analyzing the prejudicial impact of a joint trial is to determine whether there was cross-admissible evidence. (*People v. Memro* (1995) 11 Cal.4th 783, 850.) Here, as defense counsel argued below (1 CT 440), the joined charges did not involve any significant cross-admissible evidence.

Evidence of one crime is cross-admissible if the evidence "would [] have been admissible in the trial of the other [crime] had they been tried separately." (*People v. Gray* (2005) 37 Cal.4th 168, 222.) The only evidence here that arguably met that standard was Sham's testimony, which indicated that the same gun was probably used in all three murders, and thus that the same person probably committed them all.[41] Yet, while Sham clearly would have been a witness at each of separate trials on these charges, his testimony would have been different at each one. He would not have been permitted to testify at a separate trial on the Delgado murder that the same gun was used in the Creque/Gorman murder, or vice versa.

The same-gun evidence would not have been cross-admissible at separate trials because it would have been irrelevant. (Evid. Code, § 210.) It would have had no tendency in reason to prove the central disputed question of identity – whether appellant or Castaneda was the killer – and was not inconsistent with appellant's defense theory that Castaneda committed all three murders. (26 RT 3789 [defense counsel argues Castaneda committed all three murders].) At the same time, the evidence would have been highly prejudicial. The clear inference of Sham's same-

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[41] The prosecution's opposition to appellant's motion cites evidence that "footprints were found [at both murder scenes] that match" appellant as supporting the conclusion that the crimes were sufficiently distinctive to be relevant to prove his identity as the killer. Defense counsel also discussed that evidence at the hearing on this motion, arguing that "Mr. Sham's testimony at the preliminary hearing" about that footprint evidence was limited to stating that the prints "are of the same class characteristic [*sic*] . . . ." (3 RT 210.) However, there is no testimony by any witness concerning footprints in the record on appeal of the preliminary hearing, and accordingly no such evidence was before the court when it ruled on appellant's motion.

gun testimony at separate trials would have been that appellant committed another uncharged murder or murders besides the one or ones being tried. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404 [substantial prejudice is inherent when evidence is presented that the defendant committed uncharged crimes].)

3. These Crimes Lacked Sufficient Common Marks For Their Evidence To Be Cross-Admissible

The remaining evidence as to the Creque/Gorman and Delgado murders was also not cross-admissible, because the crimes were insufficiently similar. Evidence of separate charges is cross-admissible if an "evidentiary connection" exists between the charges, i.e., if they have distinctive "common marks" which support inferences about identity, motive, or another material fact (*People v. Bean*, *supra*, 46 Cal.3d at pp. 936-938; *People v. Johnson* (1988) 47 Cal.3d 576, 588), or if evidence on one charge "logically support[s]" an inference of guilt on another one. (*People v. Arias*, *supra*, 13 Cal.4th at p. 128.) There were no such connections here.

Aside from the evidence that the same gun was used, the Creque/Gorman and Delgado charges involved unrelated offenses, with different settings, victims, and alleged motivations. (3 RT 209-219; see *Calderon v. Superior Court*, *supra*, 87 Cal.App.4th at pp. 939-941 [there is a problem of prejudice in exposing the jury to evidence of crimes that are "entirely separate" episodes].) That these murders were generally similar, because they occurred close together in time and location, is insufficient. This Court rejected a similar argument in *People v. Bean*, *supra*, where the crimes at issue were substantially more similar than these two. In *Bean*, the two murders occurred only about 10 to 12 blocks, and three days, apart,

and both victims were older women who were assaulted in their home, sustained head wounds, and had their cars stolen and abandoned in the same area. (46 Cal.3d at p. 937.) This Court said that even such a relatively high degree of similarity was insufficient to show a "common modus operandi and thus [to] warrant[] an inference that the same person committed" both crimes, and that the evidence was accordingly not cross-admissible. (*Id.* at p. 938.) There was nothing like that degree of similarity with these murders.

For evidence of separate crimes to be cross-admissible on the issue of identity, the manner in which they were committed must be so similar as to "amount to a signature." (*People v. Kipp* (1998) 18 Cal.4th 349, 370; *People v. Catlin* (2001) 26 Cal.4th 81, 111.) For evidence of separate crimes to be cross-admissible to show a common plan or design, they must have "such a concurrence of common features that [they] are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Catlin*, *supra*, 26 Cal.4th at p. 111, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th 380, 402.) These three crimes clearly did not meet those standards, because they involved few, if any, "distinctive marks." (*Bean*, *supra*, 46 Cal.3d at p. 937.) The only common but hardly distinctive features of the homicides were the weapon, a gun, and the location, a grove. Moreover, even if these crimes were generally similar, the evidence as to each one was almost completely distinct.

4. The Evidence Of Each Charge Lacked Independent Significance To The Other Charge

Evidence of crimes that are not distinctively similar can still be cross-admissible if that evidence has independent evidentiary significance as to each crime, i.e., if the crimes have some factual connection that is

probative of a disputed issue. (See *People v. Arias*, *supra*, 13 Cal.4th at pp. 127-128; *People v. Catlin*, *supra*, 26 Cal.4th at pp. 111-112; *People v. Price* (1991) 1 Cal.4th 324, 388.) In *Arias*, this Court held that murder and robbery charges from one incident were properly joined with kidnap and robbery charges from another incident which occurred two weeks later because the latter charges were "an outgrowth" of the defendant's "desire to flee apprehension" for the earlier crimes. Thus, the murder "supplied evidence of [the] motive" for the kidnaping, while the kidnaping/robbery "indicated consciousness of guilt" as to the murder. (13 Cal.4th at pp. 127-128.)

Here, none of the evidence about these crimes had independent significance as to any of the others. Thus, for example, the evidence that appellant shot Gorman and Creque because he was angry that Gorman yelled at him, or because he was startled to find people in the car (1 CT 77, 108; 26 RT 3761), did not help prove that appellant killed Delgado. The first homicides were unrelated to and provided no evidence of any motive for the later one. The evidence of these crimes simply was not cross-admissible on that basis.

5. The Prejudice From Refusing To Sever These Charges Outweighed The Benefits

This Court must weigh the prejudicial effect of joinder against its benefits, a "highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case." (*Williams v. Superior Court, supra*, 36 Cal.3d at pp. 451-452; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 425-426.) In doing that weighing, the Court must consider the factors used to determine whether joinder poses a substantial risk of prejudice, including whether "certain of the charges are unusually likely to

inflame the jury against the defendant; . . . and [] any one of the charges carries the death penalty." (*People v. Cunningham* (2001) 25 Cal.4th 926, 985.) Here, those factors indicated that joinder would be highly prejudicial.

a. The Refusal To Sever These Charges Led To The Admission of Irrelevant And Inflammatory Evidence

While, as stated above, cross-admissible evidence "is not the sine qua non of joint trials" (*People v. Marquez*, *supra*, 1 Cal.4th at p. 572), no court has said that charges must be tried jointly simply because they involve some cross-admissible evidence. Such a rule would conflict with the purpose behind severance of counts – avoiding undue prejudice. (See *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 447.) The dispositive question is whether a joint trial will be prejudicial to the defendant. Here, even assuming arguendo that these charges did involve some cross-admissible evidence, joining them was still an abuse of discretion because the effect was that the jury heard highly inflammatory evidence concerning the Creque/Gorman murder that would have been irrelevant and inadmissible at a separate trial on the Delgado murder, and vice versa.

It was only because these charges were tried jointly that the jury deciding whether appellant killed Diana Delgado, and whether that crime was a first degree murder, would hear Castaneda's highly inflammatory account of what appellant allegedly did and said during the Creque/Gorman murder. If appellant were tried separately on the Delgado charge, there would be no conceivable evidentiary value to that testimony, and the jury would not have before it Castaneda's claim that appellant callously killed the other two victims when deciding whether appellant committed premeditated and deliberate murder in the Delgado case.

Thus, at a separate trial on the Delgado murder the jury would not hear Castaneda testify, as he did at the preliminary hearing, that during the Creque/Gorman killings appellant 1) said "the bitch won't die," 2) told the dying victim that "God can't help you now because Mt. Vernon is here to rob, kill and destroy," and 3) pulled down the victim's shirt and made sexual comments about her. (1 CT 79-80.) That testimony was far more inflammatory than the evidence from the Delgado murder, and thus that factor weighed against joining them. (See *People v. Mason* (1991) 52 Cal.3d 909, 933 [it can be error to join an inflammatory charge with a less-egregious one "under circumstances where the jury cannot be expected to try both fairly"].)

Castaneda's testimony about what appellant allegedly said and did was very inflammatory, i.e., it "tend[ed] to cause strong feelings of anger [and/or] indignation [and/or] to stir the passions." (Black's Law Dict. (7th. Ed. 1999) p. 782, col. 2.) Moreover, none of that testimony related to any of the purportedly cross-admissible aspects of the evidence concerning the Creque/Gorman murder.

Similarly, it was only because these charges were tried jointly that the jury deciding whether appellant committed the Creque/Gorman murder heard the evidence indicating that appellant allegedly lured the 14-year-old Diana Delgado to the same groves to murder and rob her. That evidence, which was completely irrelevant to the disputed issues concerning the Creque/Gorman murder – whether appellant or Castaneda killed those victims, and, assuming he did, whether the killings were first-degree murders – was highly prejudicial.

The evidence about Diana Delgado's murder, which suggested that appellant induced her to go with him for a romantic tryst and then killed

and robbed her, must have impacted the jury's evaluation of whether appellant killed Creque and Gorman. In the first place, that evidence was also highly inflammatory, since Delgado was so young, was a friend of appellant's sisters (12 RT 1649), and was apparently killed in a far more calculated fashion than Creque and Gorman. Moreover, unlike the Creque/Gorman murder, there was no direct evidence Castaneda was present when Delgado was killed. Thus, in deciding whether appellant or Castaneda killed Creque and Gorman, the jury must have been influenced by the evidence that appellant killed Delgado.

b. The Benefits Of Joinder Were Minimal

After considering the factors enumerated above, the trial court was required to weigh the potential prejudice against the benefits of joinder (*People v. Bean*, *supra*, 46 Cal.3d at p. 936; *People v. Smallwood*, *supra*, 42 Cal.3d at p. 430), and should have realized that a joint trial would not yield any substantial benefits. These cases involved only a few common witnesses – Castaneda, the criminalist (Mr. Sham), and possibly Diana Delgado's brother and sister, Gabriel and Vanessa Delgado – and since the evidence of the charges was not cross-admissible in any significant way, "there simply was no significant judicial economy to be gained from joinder." (*Smallwood*, *supra*, 42 Cal.3d at p. 430.)

Moreover, even if separate trials would have involved more time and/or expense than a joint trial, they would have been *more* efficient because they would have produced verdicts untainted by the prejudicial effect of admitting "other crimes" evidence. (See *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428.) As defense counsel said, the prosecution's "whole purpose" in seeking to join these charges was "not so much saving of time but [bolstering]" its case. (3 RT 213.) Thus, it was an abuse of

discretion to deny appellant's severance motion.

E. Denying Severance Of These Charges Made The Trial Fundamentally Unfair

Even if the Court decides that the trial court's denial of the severance motion was correct at the time it was made, it must reverse the judgment if appellant shows that the joint trial actually resulted in gross unfairness amounting to a denial of due process. (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.) The general law regarding the standards that apply in making this determination is discussed in Section C, above. Application of those standards to this case reveals the type of gross unfairness that compels reversal.

Appellant was actually prejudiced by the joinder. While the trial court should have realized, based on the evidence from the preliminary hearing, that at a joint trial the jurors deciding whether appellant killed Diana Delgado would be unfairly influenced by Castaneda's inflammatory testimony about what appellant allegedly said and did during the Creque/Gorman murder, Castaneda's testimony proved to be even more inflammatory than his preliminary hearing statements.

Castaneda testified at the preliminary hearing that appellant said "'the bitch don't want to die'" when he paused after firing into the pickup at the Creque/Gorman murder, and later said that appellant "pulled [Creque's] shirt . . . down," and made "some comment about her sexually . . . ." (1 CT 78, 80-81.) At trial, Castaneda gave a still more inflammatory account of those events. He testified that appellant said the victims in the truck "d[id]n't want to die," and then embellished his account by saying that during the drive home appellant said that 1) he "grabbed" Creque's breast when he reached into the truck, and 2) "[t]he bitch didn't want to die and []

she had nice tits." (16 RT 2366, 2369-2371, 2373.) Clearly, that irrelevant and repugnant testimony would have been inadmissible at a separate trial on the Delgado homicide.

Appellant was also prejudiced because the jury heard and considered the irrelevant evidence concerning the Delgado murder in deciding whether appellant committed the Gorman/Creque murder. That evidence concerning the Delgado murder would also have been inadmissible at a separate trial on the other murder.

This case is a prime example of the "spillover effect" that can render the failure to sever charges fundamentally unfair. (See *United States v. Lewis*, *supra*, 787 F.2d at p. 1322; *Drew v. United States* (D.C. Cir. 1964) 331 F.2d 85, 88.) The refusal to sever these charges permitted the state to use the evidence of unrelated murders to convince the jury that appellant committed three murders, and that each of those murders was premeditated and deliberate.

The only real issues in this case were whether appellant, not Castaneda, committed the murders, and, if so, whether the crimes were first degree murders. (3 RT 210 [defense counsel states that based on evidence of multiple gunshot wounds to the head at close range, intent to kill is not an issue]; 26 RT 3760-3762 [defense counsel argues that intent is not an issue; the issues are the identity of the killer, and whether the murders are first or second degree]; 3809 [prosecutor argues that the defense "concedes" that either appellant or Castaneda committed the murders].) The trial court's refusal to sever these charges permitted the state to use Castaneda's testimony about appellant's alleged words and deeds that only related to the Creque/Gorman charge to inflame the jury and secure a first degree murder verdict on the Delgado charge, and to use inflammatory evidence from the

Delgado charge – which suggested that appellant lured the victim to an isolated spot to rob, murder and possibly rape her – to overcome the jury's doubts concerning the truth of Castaneda's testimony that appellant murdered Creque and Gorman. That fundamentally unfair procedure violated appellant's right to due process.

F. Reversal Is Required

For all the reasons stated above, refusing to sever these unrelated charges was an abuse of discretion (see *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1315-1318 [refusing to sever "joinable" charges can be reversible error if it results in demonstrable prejudice]), which rendered the trial and the jury's verdicts "fundamentally unfair," in violation of the federal and state constitutions. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal.Const., art I, §§ 15, 16, and 17; *People v. Arias*, *supra*, 13 Cal.4th at p. 127; *Featherstone v. Estelle*, *supra*, 948 F.2d at p. 1503.)[42]

Both this Court and the Ninth Circuit have found reversible error in conducting a joint trial of separate murder charges where there was no cross-admissible evidence, and where the procedure deprived the defendant of a fair trial or due process of law. (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 425-426; *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1083-1087; *People*

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[42] Trying these charges together also violated appellant's right to be tried by an unbiased jury, under article I, section 16 of the California Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution, which is a structural defect requiring reversal per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 265-266; *Gray v. Mississippi* (1987) 481 U.S. 648, 663-668.) Further, given the prejudicial effect of the denial of severance in this case, the jury's verdict cannot be considered reliable, and therefore cannot stand in the face of the Eighth Amendment prohibition against cruel and unusual punishment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

v. Turner (1984) 37 Cal.3d 302, 313, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104; *Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337, 341 [reversible error to join homicide and firearm possession charges because the jury heard prejudicial evidence about defendant's prior counterfeiting conviction that was only relevant to the possession charge].) This Court should do so again, and should reverse appellant's convictions, special circumstance findings and death sentence.

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IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING DIANA MADRID'S TESTIMONY INDICATING THAT FRANCISCO CASTANEDA ASSAULTED AND/OR RAPED HER DAUGHTER, DIANA DELGADO

Because the prosecution's case for capital murder relied primarily on Francisco Castaneda' testimony, and because the defense theory was that Castaneda actually committed all the charged homicides himself (see 9 RT 1404 [defense counsel's opening statement]), the defense made repeated attacks on his credibility. However, the trial court repeatedly stymied appellant's efforts to impeach Castaneda, and to present his defense theory, in deference to the prosecutor's argument that only appellant, not Castaneda, was "on trial." (25 RT 3621, 3646.)

Thus, the trial court refused to allow appellant to present testimony from Diana Delgado's mother which suggested that Castaneda raped and/or assaulted Diana several weeks before she was killed. By precluding appellant from fully presenting the evidence supporting his theory of the case, the trial court deprived appellant of his constitutional rights to present a defense, to confrontation and cross-examination, to compulsory process, and to a fair and reliable determination on guilt and penalty. (U.S. Const., Amends. 5th, 6th, 8th, and 14th; Cal. Const., art. 1, §§ 7, 15 and 29.)

A. Factual Background

Castaneda testified at trial about his relationship to Diana Delgado. Specifically, he testified that: he cared about Ms. Delgado, who was like a sister to him (17 RT 2584); he and Ms. Delgado never had an argument where she ran out of the house and he brought her back; and he never had sex with Ms. Delgado or threatened her. (*Id.* at pp. 2586-2587.) In fact,

Castaneda claimed that he was so close to Ms. Delgado that the night before she died she confided to him her fear that she might be pregnant. (*Id.* at p. 2587.)

Appellant called Diana Madrid, Ms. Delgado's mother, as a defense witness. Prior to Ms. Madrid's testimony, the prosecutor asked the trial court to exclude any testimony from her about an incident that occurred a "couple of weeks" before her daughter was killed. (23 RT 3314-3315.) Based on the defense investigative reports, the prosecutor stated that he anticipated that Madrid would testify as follows: that Castaneda and Ms. Delgado had an "argument at the house;" that Ms. Delgado left; that Castaneda went after her; and that when Ms. Delgado returned an hour or two later she was "somewhat disheveled." (*Id.* at p. 3315.) The prosecutor stated that the defense would try use that testimony to "intimate that [Castaneda] raped [Ms. Delgado] on that occasion," and argued that the testimony was both speculative and irrelevant (*Ibid.*)

Defense counsel argued that Ms. Madrid's testimony about the incident in question would be relevant, and described what he expected Madrid to testify, adding several particulars that were not in the prosecutor's account. Counsel stated that when Ms. Delgado returned to the house on that occasion, along with Castaneda, she was

> very upset, disheveled, with smeared makeup and grass or weeds or tree-type debris on her clothing. [Delgado] said to [Castaneda], "I'm going to tell my mother." And [Castaneda] said, "Go ahead and tell her. There's nothing she's going to do about it." [Delgado] then told her mother, "I can't tell you [about it] right now," and then spent the next two hours in the shower.

(23 RT 3317.) Defense counsel argued that the testimony was relevant to support the inference that Castaneda assaulted and/or raped Ms. Delgado,

which would impeach Castaneda's testimony that he never assaulted her, and that no incident like this one ever occurred. (*Id.* at p. 3316.)

The trial court ruled that Castaneda's relationship with Ms. Delgado was relevant, and that the defense could put on evidence showing "how far [that relationship had] deteriorated." (23 RT 3317-3318.) Accordingly, the court admitted the testimony that Castaneda and Ms. Delgado had an argument, and that she was upset and angry with him when they came back to the house. (*Id.* at p. 3318.) However, the court found that the proposed testimony that Ms. Delgado was "disheveled" and took a long shower was irrelevant and excluded it. (*Ibid.*)

Ms. Madrid testified about the incident in question at trial. She said that Castaneda and her daughter had an argument a "couple of weeks" before Ms. Delgado disappeared. (23 RT 3368.) Ms. Delgado was angry about Castaneda's relationship with her sister Veronica Delgado, and ran out of the house in an upset state. (*Id.* at pp. 3368-3369.) Castaneda then grabbed Ms. Madrid's car keys and went after Ms. Delgado, promising to bring her back. (*Id.* at p. 3369.) When Castaneda came back with Ms. Delgado about 45 minutes later she was still upset. (*Id.* at p. 3370.) The trial court sustained the prosecutor's relevancy objection to defense counsel's question asking Ms. Madrid to "describe [how her daughter's] clothing" looked when she came back to the house. (*Ibid.*)

B. The Trial Court Erred By Excluding Madrid's Relevant Testimony That Would Have Impeached Castaneda And Supported The Defense Theory Of The Case

Since all relevant evidence is admissible (Evid. Code, § 351; *People v. Jones* (1998) 17 Cal.4th 279, 325), it was error to exclude Madrid's relevant testimony. The definition of relevant evidence set out in Evidence

Code section 210 "is manifestly broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843; see also *People v. Williams* (1997) 16 Cal.4th 153, 249.) While a trial court has broad discretion to determine the relevance of evidence (*People v. Scheid* (1997) 16 Cal.4th 1, 14), "a trial court's authority to exclude relevant evidence must yield to a defendant's right to a fair trial." (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1777.)

The trial court's ruling was based on an improperly straitened view of the scope of relevant evidence. Thus, the court stated that the proposed testimony did not "t[ie] up" the evidence about Ms. Delgado's "disheveled" appearance, but that interpretation ignored the clear context of the testimony. If Ms. Madrid's testimony would have been, as defense counsel indicated, that Ms. Delgado came back with her makeup "smeared" and with grass and weeds on her clothes, and that Ms. Delgado threatened Castaneda that she would "tell" what had happened, but instead took a two-hour long shower (23 RT 3317), the clear implication of that testimony would have been that Castaneda did something traumatic to Ms. Delgado that she was ashamed to discuss and that involved throwing or pushing her to the ground, and that Ms. Delgado was anxious to wash off the physical and/or emotional residue of her experience. As defense counsel argued, the obvious inference was that Castaneda assaulted and/or raped Ms. Delgado. (*Id.* at p. 3316.)

That evidence would have relevant to impeachment, as appellant argued. (23 RT 3316.) First, testimony suggesting that Castaneda raped and/or assaulted Ms. Delgado would have impeached his testimony that Ms. Delgado was like a sister to him (17 RT 2584), and that there had never

been an incident like the one in question. (*Id.* at pp. 2586-2587.) The excluded testimony would have presented a very different picture of Castaneda's relationship with Ms. Delgado, and would have accordingly cast doubt on all of Castaneda's extremely damaging testimony.

Further, this evidence would also have helped to establish that Castaneda had a motive to kill Ms. Delgado, and a far more substantial one than appellant supposedly had. Thus, the jury would probably have thought Castaneda had a motive to kill Ms. Delgado if they had known that: Castaneda's rosy account of his relationship with Ms. Delgado was false; despite his testimony to the contrary, Castaneda may have assaulted and/or raped her shortly before she was killed; and Ms. Delgado had threatened to tell her mother about that rape and/or assault.

This testimony would have been highly relevant and favorable to the defense, and the trial court committed an abuse of discretion in excluding it.

C. Excluding This Testimony Was Federal Constitutional Error

The exclusion of this testimony was also a violation of appellant's rights under the federal constitution, including his right to present witnesses and evidence in his own defense (*Washington v. Texas* (1967) 388 U.S. 14, 18-19 ["[t]he right to offer the testimony of witnesses . . . is in plain terms the right to present a defense . . . [and] is a fundamental element of due process of law"]), and his right to confront and cross-examine the prosecution's witnesses. (*Olden v. Kentucky* (1988) 488 U.S. 227, 231-232 [precluding the defendant from presenting testimony that would serve as a basis for impeachment violates the Confrontation Clause].) As defense counsel argued, the excluded testimony would have served to impeach Castaneda's testimony that he had never assaulted Ms. Delgado, and that

there had never been an incident where he followed her out of the house after they argued, and thus would have undercut his credibility in general. (23 RT 3316.)

Here, when defense counsel argued that the evidence would impeach Castaneda, and "go to his credibility" (23 RT 3316), both the prosecutor and the trial court surely understood counsel to mean that the evidence was relevant both to support the defense theory of the case – that Castaneda committed all three of the charged homicides (9 RT 1404) – and to show that Castaneda's testimony was false, and falsely self-exculpatory. Counsel's argument against the exclusion of this evidence was sufficient because it "alerted the court to the nature of the anticipated evidence and the basis upon which its [admission] was sought." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)[43]

The state may not arbitrarily deny a defendant the opportunity to present testimony that is "relevant and material, and . . . vital to the defense" (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, quoting *Washington v. Texas*, *supra*, 388 U.S. at p. 16), or apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 293.) That rule was violated in this case.

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[43] Under the trial court's pretrial ruling, appellant's objection to the admission of this evidence preserved all federal and constitutional claims because it was deemed to have been made "under the applicable provisions of article 1, sections 7, 13, 15 and 16 of the California Constitution, and the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (3 CT 608-612; 5 RT 887-888; see Note 15, *supra*.)

D. The Trial Court's Refusal To Admit This Testimony Was Reversible Error

The erroneous exclusion of this relevant and exculpatory evidence was reversible error, under either the *Watson* standard for state law error (*People v. Watson* (1956) 46 Cal.2d 818, 836), or the *Chapman* standard for federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The exclusion of this evidence deprived appellant both of the opportunity to impeach the credibility of his chief accuser, and of his right to present evidence supporting his theory of the case – that Castaneda committed the charged homicides and was falsely accusing him of those crimes.

If the jury had heard this testimony indicating that Castaneda probably lied when he claimed that he never assaulted Diana Delgado they would have been more likely to credit the abundant evidence indicating that Castaneda committed the charged homicides. That evidence included, as to all three homicides, the evidence of Castaneda's propensity to violence, as demonstrated by his extensive criminal record and the fact that he admitted shooting at least three other people before these shootings occurred. (17 RT 2601-2602.) Second, as to the Creque/Gorman murder, there was the evidence that Castaneda was present when it occurred (16 RT 2358-2368), told people about it the next day (*id.* at pp. 2391-2393, 17 2547-2548), and led the police to used shell casings from those shootings. (*Id.* at p. 2431, 19 RT 2810.)

The evidence that Castaneda killed Diana Delgado was equally or more damning. There was testimony that Castaneda asked Diana Madrid about the value of a diamond ring belonging to Ms. Delgado shortly before she was killed (23 RT 3367-3368), and argued with Ms. Delgado about his

relationship with her sister shortly before she was murdered. (*Id.* at pp. 3368-3670.) Also, the purse Ms. Delgado was carrying on the night she was killed was ultimately found at Castaneda's house. (15 RT 2222-2224, 2230-2233, 16 RT 2297.) Finally, and most damningly, Castaneda left the state without advance notice the day after Ms. Delgado was killed. (17 RT 2413-2414, 2417-2418, 20 RT 2925.)

If, along with hearing all the foregoing evidence pointing to Castaneda as the perpetrator of all three homicides, the jury had also heard Ms. Madrid's testimony about this incident which clearly suggested that Castaneda assaulted Diana Delgado just weeks before the charged homicides occurred, they would have been far more likely to conclude that a reasonable doubt existed as to whether appellant killed Ms. Delgado, and thus whether he committed any of the charged homicides. Reversal of the convictions and sentence is therefore required.

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V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING REQUESTED INSTRUCTIONS ON AIDING AND ABETTING FELONY MURDER, AND ON EVALUATING THE CONSCIOUSNESS OF GUILT OF WITNESSES

The prosecution's case for capital murder rested almost entirely on the highly-suspect testimony of Castaneda, who was a possible accomplice to appellant's commission of the charged crimes, and may have been the actual perpetrator of those crimes. Nonetheless, the trial court refused to give defense-requested instructions that would have brought home to the jury just how strong the evidence was against Castaneda, and thus how important it was to examine his testimony with a critical eye. Denying those crucial instructions was reversible error under California statutory law, article 1, sections 7, 13, 15 and 16 of the California Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A. The Trial Court Erred By Refusing To Give CALJIC No. 8.27, Because That Instruction Would Have Made It Clear That Castaneda Could Be Found To Be An Accomplice To Felony Murder

1. Factual Background

Francisco Castaneda testified that when they came upon the pickup truck parked out in the citrus grove, appellant said that he intended to go "jack" it. (16 RT 2358-2359.) Castaneda understood appellant to mean that he planned to steal from the truck. (*Id.* at p. 2359.) Castaneda parked his car behind the pickup truck and turned on his bright lights to protect appellant. (*Id.* at pp. 2360, 2362.) According to Castaneda, after appellant shot the victims Castaneda drove home by a different route to avoid the

police. (*Id.* at p. 2370, 17 RT 2499-2500.) Castaneda did not report the shootings to the police until he was arrested in Texas and questioned by Riverside police officers about these crimes.

Two officers, Detectives William Barnes and Allan Payne, testified about their recollections of Castaneda's account of what appellant said before approaching the pickup truck that night. According to Barnes, Castaneda claimed that appellant said he was going to "jack 'em," i.e., rob the people in the truck. (23 RT 3376.) But according to Paine, Castaneda stated that appellant said he was going to "jack it," i.e., steal from the truck, although Castaneda might also have stated that appellant said he was going to "jack 'em." (24 RT 3532-3534.)

Appellant asked the trial court to instruct the jury pursuant to CALJIC No. 8.27 [Aiding and Abetting Felony Murder].[44] (20 CT 5500; 25 RT 3620-3626.)

In support of his request for CALJIC No. 8.27, defense counsel

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[44] The version of CALJIC No. 8.27 requested by appellant read as follows:

> If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of (felony), all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.

(20 CT 5500.)

argued that the instruction "supplement[ed]" CALJIC No. 3.01,[45] which the trial court had agreed to give, by telling the jurors they could find that Castaneda was an accomplice to felony murder. Counsel argued that without CALJIC No. 8.27 the jurors would be unable to "make the leap" from aiding and abetting a robbery to aiding and abetting felony murder. (25 RT 3620-3621, 3623-3625.) The trial court said it did not "think [CALJIC No. 8.27] is intended for this," and refused to give it. (*Id.* at p. 3626.)

2. Applicable Legal Standards

It is well-settled that the trial court has a sua sponte duty to instruct on the general principles of law "closely and openly connected with the facts" of the case. (*People v. St. Martin* (1970) 1 Cal.3e 524, 531; *People v.*

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[45] The version of CALJIC No. 3.01 given at trial read as follows:

> A person aids and abets the [commission] of a crime when he or she, 1) with knowledge of the unlawful purpose of the perpetrator and 2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and 3) by act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> Mere presence at the scene of the crime which does not itself assist the commission of the crime who is subject to prosecution for the identical crimes charged which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(20 CT 5436; 26 RT 3857-3858.)

Breverman (1998) 19 Cal.4th 142, 152.) Moreover, any doubts as to the sufficiency of the evidence to support a defense-requested instruction must be resolved in favor of the accused. (*People v. Wilson* (1967) 66 Cal.2d 749, 762; *People v. Flannel* (1979) 25 Cal.3d 668, 685.)

This Court has made it clear that "[w]hen an accomplice is called as a witness by the prosecution, the court must instruct the jurors sua sponte to mistrust his testimony. [Citations.]" (*People v. Williams* (1988) 45 Cal.3d 1268, 1314; *People v. Guiuan* (1998) 18 Cal.4th 558, 564.) That rule is based on the long-standing view, derived from common law, that accomplice testimony comes from a "tainted source," because accomplices are so likely to testify "'in the hope of favor or to obtain immunity. . . .'" (*Guiuan*, *supra*, at p. 565, quoting *People v. Coffey* (1911) 161 Cal. 433, 438.)

An accomplice is anyone "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; *People v. Brown* (2003) 31 Cal.4th 518, 555; *People v. Arias* (1996) 13 Cal.4th 92, 142-143.) That definition encompasses all principals to a crime (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960), including aiders and abettors. (*People v. Gordon* (1973) 10 Cal.3d 460, 468.) To qualify as an aider and abettor, the subject must act with knowledge of the criminal purpose of the perpetrator, and with an intent or purpose either of committing the offense or of encouraging or facilitating the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Under the felony-murder doctrine, a defendant who does not kill the victim[s] can be held liable for murder if he and the actual killer shared the intent to commit the felony which gave rise to the application of the felony-

murder rule. (*People v. Pulido* (1997) 15 Cal.4th 713, 721.)

3. The Trial Court Erred By Refusing To Give CALJIC No. 8.27

Based on their conclusions about the evidence presented at trial, the jurors could have drawn differing conclusions about Castaneda's liability as an accomplice to the killings of Creque and Gorman. Thus, if the jurors believed Castaneda's claim that there was no indication that anyone was in the pickup truck before appellant went over to it, and that appellant said beforehand he was going to "jack" the truck, not its occupants, they could have adopted the prosecutor's view that Castaneda was only an accomplice to an attempted theft. (26 RT 3741 [prosecutor argued that appellant only developed an intent to rob after being surprised by the people in the pickup].) On the other hand, if the jurors believed the testimony that Castaneda told the police in June of 1995 that appellant said he was going to "jack *them*," i.e., the people in the truck, and concluded that Castaneda's trial testimony to the contrary was false and self-serving, as defense counsel suggested (*id.* at p. 3778), they could have concluded that Castaneda was an accomplice to robbery. (*People v. Beeman*, *supra*, 35 Cal.3d at p. 560.)

However, as defense counsel argued in urging the trial court to deliver CALJIC No. 8.27, even if the jurors decided that Castaneda was an accomplice to robbery, "absent [an] instruction" on aiding and abetting felony murder they would be unable "make the leap from aiding and abetting a robbery to aiding and abetting a murder . . . ." (25 RT 3623.) Making that leap was crucial in this case. Thus, if the jurors had known Castaneda could have been "liable to prosecution for the identical offense charged against" appellant concerning the Creque/Gorman killings (Pen. Code, § 1111; *People v. Brown*, *supra*, 31 Cal.4th at p. 555), i.e., that

Castaneda faced the possibility of being prosecuted for felony murder, they would have been far less likely to credit his testimony.

The trial court may have been right when it said CALJIC No. 8.27 was not "intended" to be used in the way appellant sought to use it here. (25 RT 3626.) Like most instructions on aiding and abetting, CALJIC No. 8.27 is usually requested by the prosecution to support a theory that the defendant is liable for the acts of an associate. (See *People v. Pulido, supra,* 15 Cal.4th at p. 728 [CALJIC NO. 8.27 given over defense objection to support an aiding an abetting theory].) However, because the prosecution's case relied so heavily on Castaneda's testimony, and because the defense theory under which the jury could have found that Castaneda was an aider and abettor to the Creque/Gorman murder required the jury to make a "leap" they could not make without this instruction, in this case it was necessary to give CALJIC NO. 8.27 at the request of the defense.

The prosecution's case for a first degree murder conviction on the Creque/Gorman killings was based on Castaneda's testimony that put all the blame for those killings on appellant. The prosecution's case for the death penalty also relied heavily on Castaneda's testimony, because it included disturbing details about things appellant allegedly said in committing those crimes that made them appear even more egregious than their bare facts indicated. (See 16 RT 2367-2372, 17 RT 2518-2519 [Castaneda claims he tried to get appellant to stop shooting, and that appellant said "the bitch didn't want to die and [has] nice tits"].) If the jurors had known Castaneda faced liability for first degree murder because he aided and abetted appellant's attempt to rob Creque and Gorman, they would have understood how great his incentive was to satisfy the prosecution, because by helping secure a death sentence for appellant he could avoid prosecution for murder

himself. And of course, Castaneda did avoid being charged with any crime arising out of the Creque/Gorman shootings. (31 RT 4656.)

Because CALJIC No. 8.27 was not given, it is highly unlikely the jurors understood that they could treat Castaneda as an accomplice to felony murder. As this Court has said, the felony murder rule is based on a "highly artificial concept" (*People v. Phillips* (1966) 64 Cal.2d 574, 582) which "erodes the relationship between criminal culpability and moral culpability." (*People v. Washington* (1965) 62 Cal.2d 777, 783.) Indeed, because that doctrine makes someone who aids and abets an attempted robbery liable for killings committed by others during the crime, even if the killings were unintended or accidental (*People v. Dillon* (1983) 34 Cal.3d 441, 447), the felony murder rule seems to flout the traditional moral logic of criminal punishment – that the defendant's punishment is justified by his moral responsibility for the crimes he commits. (Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty* (2005) 40 Harv. C.R.-C.L. L. Rev.407, 427.)

Without any explanation of accomplice liability under the felony murder rule, it is quite likely that this jury did not understand that Castaneda was potentially liable for the Creque/Gorman killings even if he did not personally commit them, and did not fully appreciate either how enormous his incentive was to testify falsely, or how "tainted [a] source" he was. (*Guiuan*, *supra*, 18 Cal.4th at p. 565.) Therefore, the trial court erred in failing to give the requested instruction.

Moreover, because appellant had a state law right to have the jury properly instructed, the failure to give this instruction violated his right to due process under the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Clemons v. Mississippi* (1990) 494 U.S.

738, 746 ["[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"].) The erroneous refusal to give the requested instruction further violated appellant's federal constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to a fundamentally fair and reliable penalty trial based on a proper consideration of relevant sentencing factors, and undistorted by improper, nonstatutory aggravation. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

4. Refusing This Instruction Was Reversible Error

The erroneous failure to give the requested instruction was prejudicial under any standard, including those set out in *People v. Watson* (1956) 46 Cal.2d 818, 836, and *Chapman v. California* (1967) 386 U.S. 18, 24. The failure to give this instruction was not harmless error. Since the guilt phase determination in this case ultimately revolved around Castaneda's credibility, the trial court's refusal to provide the jury with the information it needed to understand that they could find that Castaneda was liable as an aider and abettor for first-degree murder, and that he therefore had a very strong incentive to exaggerate appellant's guilt and to minimize his own, severely hindered the defense. Without this instruction defense counsel was hampered in arguing to the jury that Castaneda's testimony should be discounted.

If the jurors had known that Castaneda could have been convicted of first-degree murder based on his actions they would have realized the full extent of the pressure he faced from the prosecution. With that information the jurors would have been more skeptical of Castaneda, and less likely to believe that: 1) appellant held the gun on Castaneda to keep him from leaving the Creque/Gorman murder scene before appellant went back to the victims' truck (16 RT 2365-2368); 2) Castaneda just happened to run into

appellant and Diana Delgado on June 16th, and to see appellant with her jewelry a few hours later (16 RT 2394-2396, 2400-2402); and 3) Castaneda and Veronica Delgado simply happened to go to Texas immediately after the last of these killings. (17 RT 2563.)

If the jurors had known the full extent of Castaneda's potential criminal exposure they would have more fully understood his motivation to lie to avoid that risk, and would have had a more substantial basis for disbelieving his testimony. If the jury disbelieved Castaneda's testimony it could not have found beyond a reasonable doubt that appellant killed any of the three victims. Therefore, it is possible that appellant would not have been convicted of first-degree murder if the requested instruction was given.

Moreover, the jury might also have refused to credit Castaneda's gratuitous and unsupported assertions that appellant called Creque a "bitch," told Creque that "God can't save you now" as he shot her, and grabbed Creque's breast while she was dying. (16 RT 2371-2372.) That testimony certainly increased the apparent egregiousness of the crime, and probably played a role in the jury's decision to impose the death penalty. An error of this magnitude simply cannot be harmless, either under the harmless beyond a reasonable doubt test applicable to federal constitutional error (*Chapman v. California*, *supra*, 386 U.S. at p. 24), or under the reasonable possibility test applicable to errors of state law at the penalty phase of a capital trial. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448, see, e.g., *People v. Roder* (1983) 33 Cal.3d 491, 505.)

Under either state or federal law, appellant's conviction and death sentence must be reversed.

B. The Trial Court Committed Reversible Error In Denying Defense-Requested Instructions That Would Have Focused The Jurors' Attention On The Evidence Supporting The Theory That Castaneda Committed The Charged Crimes

The defense proffered 11 special jury instructions designed to focus the jurors' attention on the extensive evidence that Francisco Castaneda committed the charged crimes. Those instructions were carefully crafted and appropriate. They contained proper statements of law that were not covered by any of the instructions the jury received; they were not argumentative, and they pinpointed appellant's third-party culpability theory of the case, not specific evidence. The trial court denied each and every one of these special instructions. As a result, not a single instruction was given on third-party culpability, although that was the heart of appellant's defense. The court's refusal to give the requested instructions denied appellant his state law right to instructions on his theory of defense, as well as his rights to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the applicable sections of the California Constitution.

1. Factual Background

The defense proposed a series of jury instructions labeled as Special Instructions F through O and Z that were designed to assist the jury in considering the evidence pointing to Francisco Castaneda as the perpetrator of these crimes. Most of those instructions were modeled on the CALJIC instructions which state that various kinds of evidence about the defendant – that he or she fled after the crime, had a motive to commit the crime, made false statements about the crime, etc. – can be used as a basis for

inferring that he or she committed the charged crimes. Appellant sought to apply those same well-established legal principles to Castaneda. The requested instructions included ones based on CALJIC Nos. 2.03 (20 CT 5514 [Spec. Instr. F])[46], 2.04 (20 CT 5515 [Spec. Instr. G])[47], 2.06 (20 CT 5516 [Spec. Instr. H])[48], 2.11.5 (20 CT 5517 [Spec. Instr. I])[49], 2.20 (20 CT

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[46] Special Instruction F read as follows:

> If you should find that before this trial a witness made wilfully false or deliberately misleading statements concerning the crime(s) for which the defendant is now being tried, you may consider such statement(s) as a circumstance tending to prove a consciousness of guilt on the part of said witness. Such conduct may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The weight and significance of such evidence, if any, are matter for your determination.

(20 CT 5514.)

[47] Special Instruction G read as follows:

> If you should find that before this trial a witness attempted to, or did persuade, another witness to testify falsely or attempted to, or did fabricate, evidence concerning the crime(s) for which the defendant is being tried, you may consider such conduct as a circumstance tending to prove a consciousness of guilt on the part of said witness. Such conduct may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The weight and significance of such evidence, if any, are matters for your determination.

(20 CT 5515.)

[48] Special Instruction H read as follows:

(continued...)

5518 [Spec. Instr. J])[50], 2.21.2 (20 CT 5519-5520 [Spec. Instrs. K and L])[51],

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[48](...continued)
If you should find that before this trial a witness attempted to, or did, suppress evidence concerning the crime(s) for which the defendant is now being tried, you may consider such conduct as a circumstance tending to prove a consciousness of guilt on the part of said witness. Such conduct may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The weight and significance of such evidence, if any, are matters for your determination.

(20 CT 5516.)

[49] Special Instruction I read, in pertinent part, as follows:

If the evidence presented in this case convinces you beyond a reasonable doubt that the defendant is guilty, you should so find, even though you may believe that one or more other persons are also guilty.

On the other hand, if you entertain a reasonable doubt of the defendant's guilt after an impartial consideration of the evidence presented in the case, including any evidence of the guilt of another person or persons, it is your duty to find the defendant not guilty.

(20 CT 5517.)

[50] Special Instruction J read, in pertinent part, as follows:

If you find that an individual was in conscious possession of recently stolen property, the fact of such possession, together with corroborating evidence tending to prove he committed the theft, is sufficient to permit an inference that he stole the property.

(20 CT 5518.)

2.51 (20 CT 5521 [Spec. Instr. M])[52], 2.52 (20 CT 5522 [Spec. Instr. N])[53]and 2.62 (20 CT 5523 [Spec. Instr. O]).[54] (25 RT 3644–3645.)

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[51] Special Instruction K read as follows:

> In judging the statement made by any witness who testified against the defendant, if you should have any reasonable doubt as to the credibility or truthfulness of such statement, you must resolve that doubt in favor of the defendant, and find such statement to be untrue.

(20 CT 5519.)

Special Instruction L read, in pertinent part, as follows:

> If you should find that during the course of this trial a witness' testimony was willfully false or deliberately misleading, in whole or in part, you may consider such testimony is assessing the witness' credibility. Such evidence of a witness' false or misleading testimony may not be considered as a circumstance tending to prove the guilt of defendant.

(20 CT 5520.)

[52] Special Instruction M read as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive in the defendant or another person may tend to establish that person's guilt.

(20 CT 5521.)

[53] Special Instruction N read, in pertinent part, as follows:

(continued...)

Additionally, appellant proposed an instruction that would have told the jurors that they could consider the defense evidence that someone else committed the charged crimes, or that someone else had the motive and opportunity to commit them, in determining whether a reasonable doubt existed as to appellant's guilt. (20 CT 5536 [Spec. Instr. Z].)[55]

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[53](...continued)
The flight of a person immediately after the commission of a crime, although not sufficient to establish his guilt, is a fact which, if proved, may be considered by you in the light of all other proved facts in judging the testimony, credibility, and culpability of the witness.

(20 CT 5522.)

[54] Special Instruction O read, in pertinent part, as follows:

If, during the course of this trial. You should find that a witness failed to explain or deny any evidence which tended to incriminate him, and which he can [*sic*] reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of his testimony and, as indicating that, among the inferences that may be drawn therefrom, those unfavorable to the witness are the more probable.

(20 CT 5523.)

[55] Special Instruction Z read, in pertinent part, as follows:

"Evidence has been presented during the course of this trial indicating or tending to prove that someone other than the defendant committed, or may have had a motive and opportunity to commit, the offense(s) charged. In this regard, it is not required that the defendant prove this fact beyond a reasonable doubt.

(continued...)

Defense counsel informed the trial court that Instructions F through O were intended to "allow the jury to weigh the evidence" of Castaneda's guilt in the same way the CALJIC instructions on which they were based alerted jurors to specific types of evidence showing the defendant's guilt. (25 RT 3644-3645.)

The prosecutor opposed the requested instructions on the grounds that: 1) they were "argumentative;" 2) the CALJIC instructions on which the requested instructions were based only applied to defendants; 3) Castaneda was "not on trial;" 4) Castaneda's credibility was covered by other instructions; 5) they were "contrary to" CALJIC 2.21.2; and 6) they took the jury's focus away from appellant's guilt or innocence. (25 RT 3646.)

The trial court agreed that the "motive" of the requested instructions – "put[ing the] onus" for the crimes on Castaneda – was "good or correct." However, the court refused to give the instructions on the ground that "adequate instructions" were "in place" on those points already, including CALJIC No. 2.20, and that the requested instructions accordingly "border[ed] on the argumentative." (25 RT 3646-3647.)

As for Special Instruction Z, the prosecutor opposed it on the grounds that it was argumentative, confusing, and covered by other

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[55](...continued)

> The weight and significance of such evidence are matters for your determination. If after consideration of all of the evidence presented, you have a reasonable doubt that the defendant committed the offenses charged, you must give the defendant the benefit of the doubt and find him not guilty.

(20 CT 5536.)

instructions. (25 RT 3657.) The trial court refused that instruction on the ground that the only purpose it served that was not covered by the standard CALJIC instructions was to "point the finger" at Castaneda as a possible suspect. (*Id.* at p. 3658.)

2. The Trial Court Erred in Refusing To Give These Non-Argumentative Instructions On The Defense Theory Of The Case

The trial court erred in refusing to give the requested instructions. A criminal defendant is entitled upon request to instructions which either relate the particular facts of his or her case to any legal issue, or pinpoint the crux of the defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) Thus, a defendant is entitled to jury instructions on any theory of the case which is supported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.4th 515, 558; *People v. Breverman* (1998) 19 Cal.4th 142, 157.) In fact, "[t]he court must give any correct instructions on defendant's theory of the case which the evidence justifies, no matter how weak or unconvincing that evidence may be." (*People v. Bynum* (1971) 4 Cal.3d 589, 604; see *People v. Kane* (1946) 27 Cal.2d 693, 700.)

The primary grounds upon which the prosecutor opposed the requested instructions was that they were argumentative, and that they would tend to take the jury's focus away from the question of whether appellant was guilty or innocent. (25 RT 3546, 3657.) However, the instructions were in fact non-argumentative, proper statements of law that were fully supported by substantial evidence, and were not covered by other instructions. (See *People v. Flannel*, *supra*, 25 Cal.3d at p. 685.) Further, since the defense theory of the case was that Castaneda committed the

charged crimes (9 RT 1404), it was entirely appropriate for appellant to request instructions that would permit the jury to consider the evidence suggesting that Castaneda's actions demonstrated his consciousness of guilt for those crimes.

a. The Instructions Were Not Argumentative, And Were Proper Statements Of The Law

The requested instructions were not argumentative, i.e., they did not "invite the jury to draw inferences favorable to the parties from specified items of evidence." (*People v. Wright* (1990) 45 Cal.3d 1126, 1135.) The CALJIC instructions upon which almost all the requested instructions are based have been held not to be argumentative. Therefore, defense-requested instructions which parallel their CALJIC counterparts, i.e., which point out the same sorts of inferences about the consciousness of guilt of third parties, should not be considered argumentative or improper statements of the law. The due process clause of the Fourteenth Amendment requires a "balances of forces between the accused and his accuser" in criminal prosecutions (*Wardius v. Oregon* (1973) 412 U.S. 470, 474), and that balance is disrupted when the trial court refuses defense instructions that are based on the same principles underlying instructions that are routinely given to benefit the prosecution.

Jurors are routinely instructed that evidence of false statements and other acts by the *defendant* can be considered as proof of his or her consciousness of guilt. (E.g., CALJIC Nos. 2.03, 2.04, 2.06, 2.21.2.) This Court has repeatedly upheld the propriety of such instructions against claims that they are improper "pinpoint" instructions, on the basis that those instructions merely inform the jurors about evidence they may consider in reaching their verdict. (*People v. Kelly* (1991) 1 Cal.4th 495, 531-532.

[CALJIC No. 2.03]; *People v. Arias* (1996) 13 Cal.4th 92, 141 [same]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224 [CALJIC Nos. 2.03, 2.04, 2.52]; *People v. Bolin* (1998) 18 Cal.4th 297, 326-327 [CALJIC Nos. 2.06, 252].) Specifically, this Court has said that instructions on consciousness of guilt are not argumentative because although they point out the incriminating nature of certain behavior by the defendant they "also clarify[] that such activity [is] not of itself sufficient to prove [the] defendant's guilt, and allow[] the jury to decide the weight and significance assigned to such behavior." (*Jackson*, *supra*, 13 Cal.4th at p. 1224.)

The requested instructions on third-party consciousness of guilt have the same qualities as the instructions this Court has approved in the above-cited cases. Thus, Special Instructions F, G, and H, which would have told the jurors they could consider particular types of evidence as "tending to prove" the "consciousness of guilt" of a witness, would also have told them that the "weight and significance of [that] evidence, if any, are matters for your determination." (20 CT 5514, 5515, 5516.) Similarly, Special Instructions L, M, and N, which would have told the jurors they could "consider" whether a witness made false statements, had a motive, or fled after the crime, in assessing his or her credibility, would also have told them that the "weight" or "weight and significance" to be accorded to that evidence was up to them. (20 CT 5520-5522.) That direction to the jury to decide the weight and significance of the evidence for itself echoes the language this Court has found to render the CALJIC consciousness of guilt instructions non-argumentative. (*Kelly*, *supra*, 1 Cal.4th at p. 531-532.)[56]

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[56] That the requested instructions would not have told the jurors that the specific types of "consciousness of guilt" evidence to which each

(continued...)

Further, the defense of third-party culpability is well-established. It is settled law that where sufficient evidence exists to support that theory, the defense may rely on the claim that a third party committed the charged offense, and may present "third-party culpability evidence" in support of that theory. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017; *People v. Hall* (1986) 41 Cal.3d 826, 833.) Therefore, Special Instruction Z, which would simply have informed the jury that it could consider the evidence presented by the defense in support of a third-party culpability theory in deciding appellant's guilt, was not argumentative.

b. The Requested Instructions Were Supported By Substantial Evidence

It is well-settled that a defendant is entitled to pinpoint instructions on the defense theory of the case, and on the burden of proof applicable to that theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120; *People v. Wright*, *supra*, 45 Cal.3d at pp. 1136-1137.) The evidence required to support a third-party culpability theory need not amount to "'substantial proof of a probability'" that the third party committed the crime. Such evidence "need only be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall*, *supra*, 41 Cal.3d at p. 833) Accordingly, a defendant who presents evidence sufficient to support a third-party culpability theory, i.e., evidence of third-party guilt giving rise to a

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[56](...continued)
referred were "not sufficient by [themselves] to prove guilt," as is done by CALJIC Nos. 2.03, 2.04, 2.05, et al, did not render the requested instructions argumentative. As the prosecutor pointed out, Castaneda was "not on trial" below. (25 RT 3646.) Since the jurors did not need to decide whether Castaneda's guilt had been proven, it would have been meaningless to tell them that any inferences they might draw about his consciousness of guilt were insufficient to prove his guilt.

reasonable doubt of his or her own guilt (*id.* at pp. 829, 833; *People v. Figueroa* (1986) 41 Cal.3d 714, 722), is entitled to instructions on that theory.

There was ample evidence of Castaneda's culpability to support giving the requested instructions, particularly since any doubts as to the sufficiency of that evidence must be resolved in appellant's favor. (*People v. Flannel, supra*, 25 Cal.3d at p. 685; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 372.) First, there was abundant evidence of Castaneda's propensity to violence, as demonstrated by his extensive criminal record and the fact that he admitted shooting at least three other people before these shootings occurred. (17 RT 2601-2602.) Second, as to the Creque/Gorman killings, Castaneda was present when they occurred (16 RT 2358-2368), told people about them the next day (*id.* at pp. 2391-2393, 17 2547-2548), and led the police to used shell casings from those shootings. (*Id.* at p. 2431, 19 RT 2810.) Although Castaneda claimed that none of the evidence was actually inculpatory, because he was supposedly an innocent bystander when appellant shot the victims, that evidence was equally consistent with the conclusion that Castaneda was the killer.

Third, as to the Delgado shooting, there was evidence that Castaneda asked Diana Madrid about the value of a diamond ring belonging to Diana Delgado shortly before she was killed (23 RT 3367-3368), argued with Ms. Delgado about his relationship with her sister shortly before she was murdered (*id.* at pp. 3368-3670), and, after the murder, had possession of the purse Ms. Delgado was carrying on the night she was killed. (15 RT 2222-2224, 2230-2233, 16 RT 2297.) Finally, and most damningly, Castaneda left the state without advance notice the day after Ms. Delgado was killed. (17 RT 2413-2414, 2417-2418, 20 RT 2925.)

While that evidence may have been insufficient to prove that Castaneda committed the three murders, it was more than sufficient to raise a reasonable doubt about appellant's guilt. (*Hall*, *supra*, 41 Cal.3d at p. 833; see also *People v. Hannon* (1977) 19 Cal.3d 588, 597 [for instructions on consciousness of guilt to be given, there must be "some evidence" to support that inference].) Accordingly, the requested instructions were supported by the evidence.

c. The Issues Raised By The Requested Instructions Were Not Covered By Any Other Instructions

Of course, trial courts are not required to instruct on points which are adequately covered by other instructions. (*People v. Garceau* (1993) 6 Cal.4th 140, 192-193; *People v. Catlin* (2001) 26 Cal.4th 81, 152.) However, that rule does not apply here. Contrary to the court's statement (25 RT 3646), none of the instructions given, and certainly not CALJIC No. 2.20, covered the points that would have been conveyed by the requested instructions on third-party consciousness of guilt and/or culpability. (See *People v. Kane*, *supra*, 27 Cal.2d at pp. 698-702 [the trial court committed reversible error by refusing to instruct that the defendant could not be convicted of robbery if the taking was with the consent of the supposed victim; general instructions on the elements of robbery and the nature of reasonable doubt did not cover the issues raised by the requested instructions].)

As given at trial, CALJIC No. 2.20 told the jurors that, in "determining the believability of a witness," they could consider "anything [having] a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to" the witness'

character, demeanor, bias, motive, attitude and prior consistent or inconsistent statements. (20 CT 5418; 26 RT 3851-3852.) That language in no way covered the import of the requested instructions, which would have informed the jurors that they could consider Castaneda's actions as supporting an inference of his consciousness of guilt.

The same is true of CALJIC Nos. 2.21.2 and 2.23, both of which were given below. (20 CT 5421, 5423.) Those instructions informed the jurors about particular factors they could consider in weighing the credibility of witnesses. (CALJIC Nos. 2.21.2 [willfully false testimony by a witness], 2.23 [prior felony conviction of a witness].) The language of those instructions did not cover the quite different issue of the kinds of conduct by a witness which would support an inference that he or she felt a consciousness of guilt.

This case is easily distinguishable from *People v. Harrison* (2005) 35 Cal.4th 208, in which this Court upheld the refusal of a special instruction on weighing the testimony of a prosecution witness. In *Harrison*, the Court found that the requested instruction referring to testimony given "in the hope or expectation of leniency" was covered by CALJIC No. 2.20, which relates to "the credibility of witnesses in general," and CALJIC No. 2.23, which relates to the "credibility of a witness who has been convicted of a felony." (*Id.* at pp. 253-254.) Thus, like CALJIC 2.20, the special instruction in *Harrison* applied to *all* witnesses. Moreover, as this Court found, that instruction related to precisely the subjects covered by CALJIC No. 2.20 – the "factors [the jury] could consider in determining the believability of a witness." (*Id.* at p. 254.)

That is not the case here. The CALJIC instructions on consciousness of guilt did not apply to the actions of all witness, including Castaneda, but

rather to appellant's actions only. (20 CT 5411-5412 [CALJIC Nos. 2.03 and 2.06].) Since those instructions specifically referred to "the defendant," the jurors could not have understood them to mean that they were free to draw equivalent inferences about Castaneda's consciousness of guilt from the evidence of *his* actions. Therefore, unlike the CALJIC instructions in *Harrison*, the instructions given below were not the functional equivalent of, and could not substitute for, the requested instructions.

Neither CALJIC No. 2.20 nor any other instruction given in this case informed the jurors that they could consider evidence about the actions of anyone other than appellant as indicating a consciousness of guilt. Thus, the trial court's basis for refusing these instructions was erroneous.

3. The Refusal To Give The Requested Instructions Violated Appellant's Constitutional Right To Instruction On The Defense Theory Of The Case

The United States Constitution guarantees criminal defendants the right to present a defense, and therefore the right to requested instructions on the defense theory of the case. (*Mathews v. United States* (1988) 485 U.S. 58, 63 ["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"]; *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854, 857-58 [rights to trial by jury and due process abridged by failure to give requested instruction on defense theory of the case]; *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871 [right to present defense evidence arises under the Sixth Amendment right to compulsory process and the Fourteenth Amendment right to due process].) Consequently, the trial court's failure to instruct on the defense theory of the case violated appellant's Sixth Amendment right to present a defense,

compulsory process, and trial by jury, his Fourteenth Amendment right to due process, and his Eighth Amendment right to reliable guilt and penalty determinations.

The prosecution opposed these requested instructions on the basis that because they asked the jury to decide whether Castaneda was guilty of the charged crimes, they took the "jury's focus and attention away from why they're here: [] to determine [appellant's] guilt or innocence." (25 RT 3646.) However, the defense theory in this case was third party liability; i.e., that Castaneda committed the charged crimes. Third party liability is a well-established defense theory (see *People v. Hall*, *supra,* 41 Cal.3d at p. 833) that necessarily requires the jury to consider whether someone else committed the charged crime. Thus, while the prosecution understandably opposed any instructions that might cause the jury to focus on the evidence of Castaneda's guilt, because such instructions might give the jury a reason to doubt his testimony against appellant, refusing these instructions deprived appellant of his right to instruction on his theory of defense.

4. The Court's Refusal To Instruct On The Defense Theory Was Reversible Error

The erroneous failure to give the requested instructions was prejudicial under any standard, including that set out in *People v. Watson*, *supra*, 46 Cal.2d at p. 836. Moreover, the failure to instruct on the defense theory of the case is reversible error under the federal constitution if evidence supports that theory, and other instructions do not adequately cover it. (See *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 743.) As shown above, the requested instructions were supported by substantial evidence, and the general instructions on witness credibility that were given did not cover the subject matter of the requested instructions.

The Sixth and Fourteenth Amendments mandate that "[t]he right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction *can never be considered harmless error.*" (*United States v. Zuniga* (9th Cir. 1993) 6 F.3d 569, 571-572 [citations omitted; emphasis added]; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 159-160 [reversible error to refuse to instruct on defense theory of the case]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 [same].) A defendant has as much right as the prosecution to have the jury consider his theories which are supported by the evidence; reciprocity and "a balance of forces between the accused and his accuser" are essential to the provision of a fair trial. (See *Wardius v. Oregon*, *supra*, 412 U.S. at pp. 474-476 & fn. 6.)

At any rate, the failure to give these instructions was not harmless error even under the *Watson* standard, and therefore certainly not under the *Chapman* standard for federal constitutional error. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This case ultimately turned on the related questions of whether Castaneda's testimony was credible, since his largely uncorroborated testimony was crucially important to the prosecutions case on all three charged homicides, and whether, and to what extent, Castaneda was guilty of the charged murders. The trial court's refusal to instruct the jurors that they could consider whether Castaneda's actions showed his consciousness of guilt, and whether, based on such an inference that Castaneda was conscious of his guilt, any reasonable doubt existed as to appellant's guilt, severely hampered the defense.

Moreover, since the basic defense theory in this case was that Castaneda was the perpetrator, it could not have been harmless error to

refuse to give instructions designed to support that theory. If the jury believed that Castaneda's behavior betrayed his consciousness that he was guilty of these crimes, in the face of his testimony that he was utterly innocent and appellant completely guilty, the jury would necessarily have concluded that a reasonable doubt existed as to appellant's guilt. Thus, it is reasonably probable that appellant would not have been convicted of first degree murder if the requested instructions were given. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

In sum, the trial court's refusal to give the requested instructions on a witness' consciousness of guilt violated appellant's state law and federal due process rights to instructions on his theory of defense. Under either state or federal law, appellant's conviction and death sentence must be reversed.

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VI.

THE CUMULATIVE PREJUDICE ARISING FROM THE TRIAL COURT'S ERRONEOUS EXCLUSION OF EVIDENCE OFFERED TO IMPEACH CASTANEDA (ARGUMENT IV), AND REFUSAL TO GIVE INSTRUCTIONS THAT WOULD HAVE PERMITTED THE JURY TO CONSIDER WHETHER CASTANEDA EITHER COMMITTED THE CHARGED MURDERS OR WAS AN ACCOMPLICE TO THE CREQUE/GORMAN MURDERS (ARGUMENT V), REQUIRES REVERSAL OF THE GUILT AND PENALTY VERDICTS

Arguments IV and V, *supra*, set out separate errors which require reversal of appellant's convictions and sentence. The cumulative effect of those errors cannot have been harmless, and is an independent basis upon which appellant's convictions and sentence must be reversed. (See *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1474 [the cumulative force of separate errors is particularly harmful where "the convictions are based on the largely uncorroborated testimony of a single accomplice or co-conspirator"]; cf. *People v. Harrison* (2005) 35 Cal.4th 208, 259 [cumulative effect of alleged trial errors does not require reversal where only errors found were harmless]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 ["Multiple errors, even if harmless individually, may prejudice the defendant"].)

The errors raised in Arguments IV and V relate directly to two of the central issues in this case: 1) whether appellant or Castaneda committed the charged crimes; and 2) whether Castaneda's crucial testimony against appellant was credible. Counsel emphasized those points throughout the trial. (3 RT 219 [the prosecutor indicates the defense will argue that Castaneda, not appellant, was "the shooter"], 9 RT 1404 [in

opening statement, defense counsel says Castaneda committed the murders], 26 RT 3789 [in closing argument, defense counsel argues Castaneda committed all three murders], 3793-3798 [in closing argument, defense counsel says Castaneda is lying, and appellant cannot be convicted without Castaneda's testimony], 3809 [in closing argument, prosecutor argues the defense concedes either appellant or Castaneda is guilty].) The trial court's erroneous exclusion of evidence that would have indicated Castaneda had a motive to kill Diana Delgado, and lied in testifying that he never had a violent argument with and/or assaulted her (Argmt. IV), and the court's refusal to give instructions that would have enabled the jury to evaluate whether Castaneda was an accomplice to the Creque/Gorman murder, and/or whether his actions demonstrated his consciousness of guilt for the charged murders (Argmt. V), went to the core of those issues, and the heart of appellant's defense.

It is indisputable that Castaneda's testimony was the prosecution's most crucial evidence. (26 RT 3771-3772 [in closing argument, defense counsel says Castaneda's testimony is the prosecution's "entire case"].) No other witness could have testified that appellant shot Creque and Gorman, or that appellant had Diana Delgado's jewelry the night she was killed, and only Castaneda allegedly heard appellant make additional incriminating statements, beyond those on the tape recording, when Castaneda was put in appellant's cell as a police agent. (Argmt. II, *supra.*) It is also beyond dispute that Castaneda, who had a history of extremely violent criminality (17 RT 2601-2602 [Castaneda admitted shooting at least three other people before these murders]), was the most likely suspect other than appellant in the charged murders. Thus, as to the Creque/Gorman murders, Castaneda: 1) was present when they occurred

(16 RT 2358-2368); 2) told people about them the next day (*id.* at pp. 2391-2393, 17 2547-2548); and 3) led the police to expended shell casings used in the murders. (*Id.* at p. 2431, 19 RT 2810.) As to the Delgado murder, Castaneda: 1) asked Diana Madrid about the value of Delgado's diamond ring shortly before she was killed (23 RT 3367-3368); 2) argued with Delgado about his relationship with her sister shortly before she was murdered (*id.* at pp. 3368-3670); 3) had the purse Delgado was carrying the night she was killed at his house after she was killed (15 RT 2222-2224, 2230-2233, 16 RT 2297); and 4) left the state without advance notice the day after Delgado was killed. (17 RT 2413-2414, 2417-2418, 20 RT 2925.)

The cumulative effect of those errors cannot be found to have been harmless, under either the *Watson* standard for state law error (*People v. Watson* (1956) 46 Cal.2d 818, 836), or the *Chapman* standard for federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Because the defense in this case was entirely premised on convincing the jury that Castaneda was lying, and had actually committed the charged murders himself, it cannot have been harmless error to first exclude impeachment testimony that would have *shown* him to have lied about at least one crucial point – that he was like a brother to Delgado, and had no reason to harm her – and to then refuse instructions that would have shown the jury how strong the evidence was that Castaneda was involved in the charged murders as either an accomplice or the sole perpetrator, and thus how strong his incentive was to aid the prosecution by falsely implicating appellant. In combination, those errors served to eviscerate the defense case, and to prevent appellant from presenting his theory of defense.

VII.

THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE THAT APPELLANT SHAVED "187" INTO HIS HAIR WHILE AWAITING TRIAL

Over appellant's objection under Evidence Code section 352, the trial court admitted the guilt phase testimony of a jailer about an incident where appellant had "187" shaved into his hair. Because 187 is the California Penal Code section number for murder,[57] that testimony was admitted against appellant as an implicit admission that he committed the charged killings. The admission of that testimony violated appellant's rights under California statutory and decisional law, under the California Constitution, article 1, sections 7, 13, 15 and 16, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.[58]

A. Factual Background

Riverside County Sheriff's Deputy John Wilson testified that he worked at the Temecula Jail while appellant was incarcerated there awaiting trial on these charges. Wilson said he knew appellant, and that on October 2, 1995, he saw appellant wearing a "Mohawk" haircut with the numbers "187" shaved into it. (19 RT 2787, 2790.) Because Wilson knew that was

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[57] Section 187 reads, in pertinent part, as follows: "(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[58] Under the trial court's pre-trial ruling, appellant's objection to the admission of this evidence preserved all federal and constitutional claims because it was deemed to have been made "under the applicable provisions of article 1, sections 7, 13, 15 and 16 of the California Constitution, and the Fourth, Sixth, Eighth and fourteenth Amendments to the United States Constitution." (3 CT 608-612; 5 RT 887-888; see Note 15, *supra*.)

the number of the Penal Code section for murder, he went to get a camera to photograph appellant's head. But when Wilson returned with a camera appellant had already shaved his hair. (*Id.* at p. 2791.)

Appellant sought to exclude Wilson's testimony about this incident on the grounds that it was both irrelevant and unduly prejudicial, citing Evidence Code section 352. Defense counsel argued that the evidence had minimal value as proof that appellant committed the charged murders, saying it was no more probative than if appellant had said he was "charged" with murder. Counsel also argued that whatever slight probative value the evidence might have would be heavily outweighed by its prejudicial effect. The prosecutor's position was simply that appellant's actions constituted "an implicit admission on his part. . . ." (19 RT 2789.)

The trial court admitted the testimony, holding that while there could be an "innocent explanation" for appellant's alleged action, admitting the testimony would have "no prejudicial effect either." (19 RT 2789.) Thus, the court said that although the testimony might not have much "weight," it was still relevant. (*Ibid.*) The jury was not given any specific limiting instruction on how to consider this evidence. In his closing argument the prosecutor claimed that the evidence was proof that appellant was a "cocky, arrogant, son of a bitch," who claimed his status as a killer as a "badge of honor." (30 RT 4584.)

B. Applicable Legal Standards

Only relevant evidence is admissible. (Evid. Code, § 210; *People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Evidence is relevant if it tends "'logically, naturally, and by reasonable inference'" to establish material facts in the case. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.)

A trial court should exclude evidence under section 352 if the

probative value of that evidence is substantially outweighed by the probability that admitting it will create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.) Speculative evidence should be excluded under section 352 when the prejudicial effect of that evidence outweighs its probative value. (*People v. Lewis* (2001) 26 Cal.4th 334, 373.)

Trial court rulings on the admission or exclusion of evidence under section 352 are reviewed for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 973; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

The admission of irrelevant and/or improperly prejudicial evidence warrants reversal where it is reasonably probable the jury would have reached a different result in the absence of that evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 20.)

When the erroneous admission of unduly prejudicial evidence over a defendant's section 352 objection renders the trial fundamentally unfair, an "additional legal consequence" of that error is a violation of the defendant's federal constitutional rights to due process and a reliable verdict. (*People v. Partida* (2005) 37 Cal.4th 428, 438-439.)

C. The Trial Court Improperly Admitted The "187" Evidence

The trial court erred in admitting the evidence because, as appellant argued below, it was irrelevant and had very limited probative value and significant prejudicial impact. (19 RT 2789.) As defense counsel indicated, Deputy Wilson's testimony was insufficient to support the inference the prosecution wanted the jury to draw from it – that appellant shaved "187" into his hair to affirm that he had in fact committed the charged murders. Even assuming Wilson's testimony about appellant's actions was true, it was pure speculation to claim that those actions amounted to an "implicit admission" of guilt. (See *People v. Burton* (1961) 55 Cal.2d 328, 346-347; see also *People v. Cornwell* (2005) 37 Cal.4th 50, 81 [evidence properly excluded where its "speculative relevance" and "marginal probative value" were outweighed by the possibility of undue consumption of time and juror confusion]; *People v. Babbitt* (1985) 45 Cal.3d 660, 684 ["exclusion of evidence that produces only speculative inferences is not an abuse of discretion"].)

Because appellant was a teenager in custody facing capital charges when this incident allegedly occurred (19 RT 2788), he must have been experiencing extreme pressure and stress at the time. Given that teenage boys like appellant are inherently prone to "experiment, risk-taking and bravado" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 395 (dis. opn. of Brennan, J.)), and that appellant was in a situation that would have daunted even the most prison-hardened individual, the prosecutor's claim that appellant's hairstyle choice amounted to a forthright acknowledgment that he committed the charged murders, rather than a display of false bravado, was simply unfounded. It is at least equally likely that appellant was playing the *role* of a hardened killer, to appear more formidable to other

inmates who might be inclined to prey upon him because he was young and undersized (17 RT 2433), as that he was making what was in effect a truthful confession of guilt. Thus, the probative value of this evidence was very limited, because it was not at all clear that appellant's actions amounted to an implicit admission of guilt. (See *People v. Lewis*, *supra*, 26 Cal.4th at 373-374 [it is not an abuse of discretion to exclude evidence that is "too speculative" under section 352].)

The conduct involved here was far less incriminating, and thus less probative as evidence that appellant was conscious of or conceded his guilt, than the kind of conduct that has most often been admitted on the basis that it constitutes an "implied admission" of guilt – the defendant's flight after the commission of a crime or when confronted by the police. (See *People v. Zapien* (1993) 4 Cal.4th 929, 983; *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 543.) Thus, as this Court has said: "Flight is a factor tending to connect an accused with the commission of an offense." (*People v. Hoyt* (1942) 20 Cal.2d 306, 313.) The same can hardly be said of this evidence that appellant had a particular haircut. While fleeing from the police may be an unambiguous expression of a consciousness of guilt, the meaning of appellant's conduct was highly ambiguous. In fact, as set forth above, that conduct was more than likely no more than an act of foolish braggadocio.

Yet while the probative value of this evidence was slight, the prejudicial impact of admitting it was high. The prosecutor argued both that this evidence helped prove that appellant committed these murders, and thus that Francisco Castaneda did not, and also that appellant's action demonstrated that he was a "cocky, arrogant son of a bitch." (30 RT 4584.) Thus, the prosecutor encouraged the jury to use Deputy Wilson's testimony

both as affirmative evidence of appellant's guilt and as aggravating evidence that appellant exhibited callousness and a lack of remorse while incarcerated. Accordingly, this was just the type of evidence this Court has said should be excluded when challenged as excessively prejudicial under section 352: that which "uniquely tends to evoke an emotional bias against [the defendant] . . . as an individual and which has very little impact on the issues." (*People v. Wright* (1985) 39 Cal.3d 576, 585; *People v. Garceau* (1993) 6 Cal.4th 140, 178.)

This case is distinguishable from *People v. Ochoa* (2001) 26 Cal.4th 398, 438-439, in which this Court held that the trial court properly admitted a police officer's testimony that "defendant had on his forehead a tattoo of the number '187,' the Penal Code section proscribing murder, . . . after the charged homicides occurred." That holding is based on the reasoning that the tattoo was "highly probative" as an admission or a "manifestation of [defendant's] consciousness of guilt," since it was "unlikely that an innocent person would so advertise his connection to murder." (*Ibid.*) Even assuming that *Ochoa* was properly decided on that point, appellant's haircut was far less probative evidence of his state of mind than a tattoo.

A tattoo, which is "an indelible mark or figure fixed upon the body" (Webster's 9th New Collegiate Dict (1989) p. 1208), is vastly different from a haircut. A tattoo is a "fixed" and "indelible" public statement, particularly when placed on the wearer's forehead, as was the case in *Ochoa*. (26 Cal.4th at p. 437.) A haircut, as the record below demonstrates, is an ephemeral expression which can be deleted and/or replaced in a matter of moments. (19 RT 2791 [appellant shaved his head before Deputy Wilson could return with a camera].) Thus, while it is probably true that an innocent person would be highly unlikely to *permanently* "advertise his

connection to [a] murder" by tattooing his face (*Ochoa*, *supra*, 26 Cal.4th at p. 438), it is far more likely that a teenager might use a haircut to make himself seem more formidable to the frightening population of his cell block. (See *People v. Lawley* (2002) 27 Cal.4th 102, 155 [a third party's claim of responsibility for the charged homicide "might have been an exercise designed to enhance [] his" prestige].)

The premise under which Deputy Wilson's testimony about this incident was admitted – that it amounted to a forthright admission of guilt – was rank speculation. Moreover, as defense counsel predicted, the prosecutor made the incident seem highly prejudicial in his argument to the jury. (19 RT 2789.) Accordingly, it was an abuse of discretion to admit that testimony.

Further, because the erroneous admission of that testimony rendered appellant's trial fundamentally unfair, the error also violated appellant's rights to a fair trial and to fair and reliable determinations on guilt and penalty, and to due process of law, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*People v. Partida*, *supra*, 37 Cal.4th at pp. 438-439; see *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385 [admission of irrelevant evidence that defendant owned knives and scratched "Death is His" on a closet door amounted to a denial of due process]; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Ford v. Wainwright* (1986) 477 U.S. 399; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) The erroneous admission of evidence violates due process where it necessarily prevented the defendant from receiving a fair trial. (*McKinney*, *supra*, 993 F.2d at 1384; *Lisenba v. California* (1991) 314 U.S. 219, 236.) That was the case here.

The admission of this irrelevant and highly prejudicial evidence very

likely impacted the jury's verdicts on both guilt and penalty, making those verdicts unreliable and the entire trial unfair. Thus, to render their guilt verdict the jury was obliged to decide whether appellant or Castaneda committed the murders (27 RT 3809 [prosecutor arguing that the defense concedes that either appellant or Castaneda is the killer]), and this evidence that appellant supposedly admitted his guilt must have affected that determination. As for the penalty verdict, the prosecutor's argument concerning this improperly admitted evidence – that it showed appellant to be a "cocky, arrogant son of a bitch" (30 RT 4584) – surely had a negative impact on the jury's evaluation of appellant's moral culpability. (See *Roberts v. Louisiana* (1976) 428 U.S. 325, 333-334 [penalty phase jury must consider the "attributes" of the defendant].) Accordingly, because the admission of this evidence prevented appellant from receiving a fair and reliable trial as to both guilt and penalty, its admission also violated his federal constitutional rights. (U.S. Const., 5th, 6th, 8th and 14th Amends.)

D. The Error Requires Reversal Of The Convictions And Death Sentence

The admission of excessively prejudicial evidence in violation of Section 352 is reversible error when it is reasonably probable the jury would have "reached a result more favorable to" the defendant but for the admission of that evidence. (*People v. Alcala* (1992) 4 Cal.4th 742, 791.) That is clearly the case here, because the crucial issue before the jury was whether appellant or Francisco Castaneda committed these murders, and the prosecutor contended that this evidence amounted to an implicit admission of guilt by appellant. If they had not heard this testimony about appellant's supposed "admission," it is reasonably probable the jurors would have concluded that Castaneda was the killer, or that they could not find

appellant guilt beyond a reasonable doubt based on his testimony.[59] Thus, it was Castaneda, not appellant, who had a heated argument with Diana Delgado about a week before she died (23 RT 3368-70), and left the state abruptly right afterward (17 RT 2413-2414, 2417-2418, 20 RT 2925), and the police found Delgado's purse at Castaneda's house, not appellant's. (15 RT 2222-2224, 2230-2233, 16 RT 2297.) That evidence of Castaneda's guilt would certainly have weighed more heavily with the jury if they had not heard this evidence that appellant supposedly admitted committing the murders.

Moreover, because the admission of this excessively prejudicial evidence also violated the federal Constitution, the effect of admitting it must be assessed under the *Chapman* standard, i.e., is it clear beyond a reasonable doubt that the error did not contribute to the verdict? (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Quartermain* (1997) 16 Cal.4th 600, 621.) It is not. Thus, even assuming that there was no prejudice resulting from the admission of this evidence under the standard for state law errors, reversal is still required because the error clearly was not harmless beyond a reasonable doubt.

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[59] Castaneda's testimony was, of course, motivated by his desperate desire to avoid being prosecuted for these crimes, not by altruism. (See 17 RT 2602-2603 [while Castaneda was in custody the police told him it was in his interest to help them, and that he could be charged as an accomplice to the murders].)

VIII.

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

At the request of the prosecution, and over defense objection (25 RT 3601-3602), the trial court delivered instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading, allowed inferences unsupported by the evidence, and constituted improper pinpoint instructions.

The trial court instructed the jury pursuant to CALJIC Nos. 2.03 and 2.06. (20 CT 5411-5412.) The version of CALJIC No. 2.03 given to the jury read as follows:

> If you find that before this trial the defendant made a willfully false or misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that statement is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(*Id.* at p. 5411.) The version of CALJIC No. 2.06 given to the jury read as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(*Id.* at p. 5412.)

Giving those instructions was error, because they were unnecessary and improperly argumentative, and because they permitted the jury to draw irrational inferences against appellant. That instructional error deprived

appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)[60] Those instructions were particularly prejudicial because the trial court refused a series of defense-proposed special instructions that would have informed the jury that it could consider similar inferences about Francisco Castaneda's consciousness of guilt based on *his* actions and/or false statements. (See Argmt. V(B), *supra.*) Accordingly, reversal of the guilt verdicts on Counts I, II and III, and of the death judgment, is required.

A. The Consciousness Of Guilt Instructions Improperly Duplicated The Circumstantial Evidence Instruction

It was unnecessary to instruct the jury with CALJIC Nos. 2.03 and 2.06. This Court has held that trial courts should not give specific instructions relating to the consideration of evidence which simply reiterate a general principle upon which the jury has already been instructed. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) Here, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (20 CT 5408-5410.) Those instructions amply informed the jury that it could draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt – including his state of mind –

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[60] Under the trial court's pre-trial ruling, appellant's objection to the instructions preserved all federal and constitutional claims because it was deemed to have been made "under the applicable provisions of article 1, sections 7, 13, 15 and 16 of the California Constitution, and the Fourth, Sixth, Eighth and fourteenth Amendments to the United States Constitution." (3 CT 608-612; 5 RT 887-888; see Note 15, *supra.*)

from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt, nor on permissive inferences of the guilt of prosecution witnesses, and in particular not of Castaneda's guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing for discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violated equal protection].)

B. The Consciousness Of Guilt Instructions Were Unfairly Partisan And Argumentative

The instructions here directed the jury's attention only to appellant's acts which supposedly demonstrated a consciousness of guilt, not to any acts by Castaneda which demonstrated *his* consciousness of guilt, such as his flight immediately after the charged homicides. Thus, the instructions were not just unnecessary, but impermissibly argumentative.

The trial court must refuse to deliver argumentative instructions. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby effectively "intimating to the jury that special consideration

should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as ones which "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted].) Even neutrally phrased instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or which "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and must be refused. (*Ibid.*)

Judged by this standard, the consciousness of guilt instructions given in this case are impermissibly argumentative. Structurally, those instructions are almost identical to the defense "pinpoint" instruction this Court found to be argumentative in *People v. Mincey, supra*, 2 Cal.4th at p. 437. Like the instructions in this case, the instruction in *Mincey* asked the jurors to "infer the existence of [the proposing party's] version of the facts." (*Id.*) Since the instruction in *Mincey* was held to be argumentative, the instructions at issue here should also be held to be argumentative.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions based on an analogy to *People v. Mincey, supra*, 2 Cal.4th 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction," but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense. [Citation omitted].'" However, that holding does not explain why two instructions that are identical in structure should be analyzed differently, or why instructions that highlight the prosecution's version of

the facts are permissible while ones highlighting the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatcheit* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.)

To insure fairness and equal treatment, this Court should reconsider its decisions that have found California's consciousness of guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra,* 30 Cal.4th at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implie[d] certain conclusions from specified evidence." (*People v. Wright, supra,* 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th. 495, 531-532, and several subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the consciousness of guilt instructions, noting that they tell the jury that consciousness-of-guilt evidence is not sufficient by itself to prove guilt. Based on that fact, the Court concluded:

"If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, at p. 532.)

More recently, this Court abandoned the *Kelly* rationale that consciousness of guilt instructions are protective or neutral when it held that failing to give such instructions was harmless error because those instructions "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the notion that such instructions have a protective aspect is weak at best, and often entirely illusory. The instructions do not specify what else is required beyond the suggested inference that the defendant feels conscious of his or her guilt before the jury can find that guilt has been established beyond a reasonable doubt. The instructions thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use it *in combination* with the consciousness of guilt evidence to find that the defendant is guilty.

Finding that a consciousness of guilt instruction based on flight unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction will always be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, that court joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397

S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[61]

The reasoning of two of those cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case disapproving a flight instruction (*id.* at p. 748), and extended the reasoning of that case to cover all similar consciousness of guilt instructions:

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[61] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons for disapproving flight instructions also applied to an instruction on the defendant's false statements].)

The argumentative consciousness of guilt instructions given in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution and placing the trial court's imprimatur on the prosecution's theory of the case. Those instructions therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 5th and 14th Amends.; Cal. Const. art. I, §§ 7 & 15), his right to be acquitted unless found guilty beyond a reasonable doubt by an impartial and properly-instructed jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; U.S. Const., 6th and 14th Amends.; Cal. Const. art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal. Const. art. I, § 17.)

C. The Consciousness Of Guilt Instructions Permitted The Jury To Draw An Irrational Permissive Inference About Appellant's Guilt

The consciousness of guilt instructions given here were also constitutionally defective because they embodied an improper permissive inference. Those instructions permitted the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., that he destroyed or concealed evidence, or made false statements. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 977.) An instruction which embodies a permissive inference can intrude improperly upon a jury's exclusive role as fact finder.

(See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence, and to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to the need to "consider all evidence will not cure this defect." (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.* at p. 900 (conc. opn. Rymer, J.) ["inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 296.) The due process clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) The rational connection required is not merely a logical or reasonable one, but rather a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Constitution requires "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it

operates under the facts of a specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

Here, the consciousness of guilt evidence was relevant to whether appellant committed the charged homicides. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) The irrational inference permitted by these instructions concerned appellant's mental state at the time he allegedly committed the homicides. The improper instructions permitted the jury to use the consciousness of guilt evidence to infer not only that appellant killed Gorman, Creque and Delgado, but that he did so while harboring the intents or mental states required for conviction of first degree murder. Although consciousness of guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)

Therefore, appellant's actions after the crimes, upon which the consciousness of guilt inferences were based, were simply not probative of whether he harbored the mental states for first degree premeditated murder or first degree felony murder. There was no rational connection between appellant's alleged destruction of evidence or making of false statements and 1) premeditation, 2) deliberation, 3) malice aforethought, 4) a specific intent to kill, or 5) an intent to rob. That appellant allegedly engaged in acts calculated to avoid apprehension after the crimes cannot reasonably be deemed to support an inference that he had the requisite mental state for

first degree murder.

This Court has previously rejected the claim that the consciousness of guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [CALJIC Nos. 2.03 & 2.06].) However, appellant respectfully asks this Court to reconsider and overrule these holdings, and to hold that delivering the consciousness of guilt instructions given in this case was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, 871, which noted that the consciousness of guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

However, *Crandell*'s analysis is mistaken, and inapplicable here, for three reasons. First, consciousness of guilt instructions do not speak of "consciousness of some wrongdoing;" but of "consciousness of guilt," and *Crandell* does not explain why jurors would interpret such instructions to mean something they do not say. Elsewhere in the standard instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., CT 5434 [CALJIC No. 2.90, stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [] guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a

verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship* (1970) 397 U.S. 358, 364; see *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Second, although the consciousness of guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences, or otherwise hint that there are any applicable limits on the jury's use of the evidence. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad since they expressly advise the jurors that the "weight and significance" of the consciousness of guilt evidence, "if any, are matters for your" determination.

Third, this Court has itself drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness of guilt evidence, among other facts, to find an intent to rob. (*Id.* at p. 608.) Since this Court considered consciousness of guilt evidence in finding substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

Because the consciousness of guilt instructions permitted the jury to draw an irrational inference of guilt against appellant, giving them undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7 & 15.) The instructions also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th and

14th Amends.; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, violated appellant's right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17.)

D. Giving These Pinpoint Instructions On Consciousness Of Guilt Was Not Harmless Beyond A Reasonable Doubt

Giving these consciousness of guilt instructions was an error of federal constitutional magnitude, as well as a violation of state law. Accordingly, appellant's murder convictions must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].) In this case, those instructions were not harmless beyond a reasonable doubt, and thus the convictions on Counts 1, 2 and 3 must be reversed.

The defense theory in this case was that Castaneda committed the charged murders, not appellant. (See 9 RT 1404 [defense counsel's opening statement].) Yet the trial court improperly refused to give a series of defense-requested special jury instructions that would have pointed to the evidence of Castaneda's acts, such as his flight after the murders, that demonstrated *his* consciousness of guilt. (Argmt. V(B), *supra*.) Giving these instructions which focused the jury's attention on the evidence allegedly showing *appellant's* consciousness of guilt, while rejecting equivalent instructions concerning Castaneda's actions, unfairly hindered the defense. In that context, this Court cannot find that it was harmless

beyond a reasonable doubt to give these unnecessary and argumentative instructions.

Moreover, since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the erroneous instruction (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S.578, 590; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The penalty judgment must therefore also be reversed.

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IX.

THE INSTRUCTIONS GIVEN AT TRIAL IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363), and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is [one] of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court here gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than constitutionally required. Because those instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.01, 2.02 and 2.90)

The jury was given two interrelated instructions which discussed the relationship between the reasonable doubt requirement and circumstantial evidence – CALJIC Nos. 2.01 and 2.02. (20 CT 5409; 26 RT 3848 [No. 2.01];[62] 20 CT 5410; 26 RT 3848-3849 [No. 2.02].[63]) Those instructions,

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[62] CALJIC No. 2.01, as read to the jury, states:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt. If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(26 RT 3848)

[63] CALJIC No. 2.02, as read to the jury, states:

(continued...)

which addressed different evidentiary issues in almost identical terms, told appellant's jury that if one interpretation of the evidence "appears to be reasonable, you must accept [it] and reject the unreasonable" interpretation. (26 RT 3848-3849.) Thus, those instructions informed the jury, in effect, that if appellant *reasonably appeared* to be guilty, they were to find him guilty even if they entertained a reasonable doubt as to his guilt. This repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), trial by jury (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S.

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[63](...continued)

> The specific intent and/or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged in Counts I, II, and III unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state, but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any such specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(26 RT 3848-3849.)

625, 638.)[64]

First, the instructions not only allowed, they compelled, the jury to find appellant guilty on all counts, and to find the special circumstances true,[65] using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (20 CT 5409-5410; 26 RT 3848-3849.) However, an interpretation that appears reasonable is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278, emphasis added ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty"].) Thus, the instructions

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[64] Although defense counsel did not object to CALJIC Nos. 2.01 and 2.02 (25 RT 3601), the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

[65] The charged special circumstances were multiple murder (Pen. Code, § 190.2, subd.(a)(3)), and murder committed during the commission or attempted commission of a robbery (Pen. Code. § 190.2, subd.(a)(17)(A)). (1 CT 164-166.)

improperly required conviction and findings of fact necessary to a conviction on a degree of proof less than the one required by the Constitution.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instructions created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, italics added, fn. omitted.) Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, these instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (20 CT 5409-5410; 26 RT 3848-3839, emphasis added.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction which required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to

his innocence.

These instructions had the effect of reversing the burden of proof, since they required the jury to find appellant guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. The erroneous instructions were prejudicial with regard to guilt in that they required the jury to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict appellant because he was a likely suspect, rather than because they believed him guilty beyond a reasonable doubt.

The constitutional defects in the circumstantial evidence instructions are likely to have affected the jury's deliberations, since there was little if any direct evidence other than the highly-suspect testimony of Francisco Castaneda that appellant killed Creque and Gorman, and none at all that he killed Diana Delgado. Thus, the jury could have accepted the prosecution's account of the incident as a reasonable one, and found appellant guilty, without being convinced that the prosecution had met its burden of establishing guilt beyond a reasonable doubt.

Moreover, the focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by suggesting that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For these reasons, there is a reasonable likelihood the jury applied

the circumstantial evidence instructions to find appellant's guilt on a standard which was less than the Constitution requires.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard

The trial court gave four other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.2, 2.22, 2.27 and 8.20. (20 CT 5421, 5708; 26 RT 3852-3853, 4626 [No. 2.21.2 (Witness Willfully False)]; 20 CT 5422, 5709; 26 RT 3853, 4626 [No. 2.22 (Weighing Conflicting Testimony)]; 20 CT 5424, 5711; 26 RT 3853-3854, 4626-4627 [No. 2.27 (Sufficiency of Testimony of One Witness)]; 20 CT 5451-5422; 26 RT 3863-3864 [No. 8.20 (Deliberate and Premeditated Murder)].) Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)[66]

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence,

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[66] Although defense counsel failed to object to these instructions, appellant's claims are still reviewable on appeal. (See fn. 64, *ante*, which is incorporated by reference here.)

[they believed] the *probability of truth* favors his or her testimony in other particulars." (20 CT 5421, 5709; 26 RT 3852-3853, 30 RT 4626, italics added.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[67] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

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[67] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, which found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

(20 CT 5422, 5709; 26 RT 3853, 30 RT 4626.) That instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (20 CT 5424, 21 CT 5711; 26 RT 3853-3854, 30 RT 4626-4627), was likewise flawed. That instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact."

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. That instruction told the jury that the necessary deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation. . . ." (20 CT 5451-5422; 26 RT 3863-3864, italics added.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as

opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in Section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial evidence instructions].) While recognizing the

shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what they say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction which dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (See generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to

overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

D. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Moreover, even if the erroneous instructions are viewed only as burden-shifting instructions, giving them was reversible error unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its case was not strong, and involved almost no direct evidence of guilt. The only witness to any of the charged crimes was Castaneda, who not only had numerous felony convictions, and was of dubious credibility, but also had a substantial personal interest in implicating appellant.

Given that paucity of reliable, direct evidence of guilt, instructions on the importance of circumstantial evidence and how it was to be considered were crucial to the jury's determination of guilt. Similarly, the need for strict adherence by the jury to the reasonable doubt burden of proof

was crucial. Because these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, the reliability of the jury's findings is cast into substantial question.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, the guilt judgments and penalty determination must be reversed.

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X.

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE AGGRAVATING EVIDENCE ABOUT AN ALLEGED "DRIVE-BY" SHOOTING, AND, IN THE ALTERNATIVE, BY INCORRECTLY INSTRUCTING THE JURY ON THE ELEMENTS REQUIRED FOR ASSAULT WITH A DEADLY WEAPON

Over appellant's objection, the trial court admitted in aggravation evidence that appellant engaged in violent criminal activity as a 14-year-old boy. That evidence concerned appellant's arrest while riding in a truck with his father and his older brother after 1) appellant's father rammed the truck into the door of an apartment, 2) the group shouted "bad things," and 3) someone in the truck, but not appellant, pointed a gun at a woman and fired one or two shots into the air. The trial court instructed the jury on the elements of assault with a deadly weapon under section 245, subdivision (a), with regard to this incident. As shown below, the evidence was insufficient to prove the alleged crime, and the admission of the aggravating evidence violated section 190.3, subdivision (b), as well as appellant's rights to due process, a fair trial and equal protection (U.S. Const, 5th, 6th and 14th Amends.; Cal. Const., art. 1, §§ 7, 13, 15 & 16), and to a reliable penalty verdict (U.S. Const, 8th Amend.), and requires reversal of his death sentence.[68]

Even assuming there was sufficient evidence to support a conviction

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[68] Under the trial court's pre-trial ruling, appellant's objection to the admission of this evidence preserved all federal and constitutional claims because it was deemed to have been made "under the applicable provisions of article 1, sections 7, 13, 15 and 16 of the California Constitution, and the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (3 CT 608-612; 5 RT 887-888; see Note 15, *supra.*)

on the assault charge, the trial court erred in instructing the jury on the elements required to find beyond a reasonable doubt that appellant committed a violation of section 245, subdivision (a). (See *People v. Williams* (2001) 26 Cal.4th 779, 788.) That error also violated appellant's rights to due process, a fair trial and equal protection (U.S. Const, 5th, 6th and 14th Amends.; Cal. Const., art. 1, §§ 7, 13, 15 & 16), and to a reliable penalty verdict (U.S. Const, 8th Amend.), and independently requires reversal of his death sentence.

A. Factual Background

On September 4, 1997, the prosecution filed an Amended Notice of Intention to Produce Evidence in Aggravation. The notice included evidence of "[a]ll facts and circumstances relating to an assault with a firearm occurring on or about January 11, 1992, in an apartment complex in the Highgrove area of Riverside County . . . ." (1 CT 217-218.) Appellant filed a written motion to exclude any and all proposed evidence in aggravation concerning "his criminal activities and conduct" (20 CT 5561-5582), and a hearing on that motion was held on September 28, 1998. (*Id.* at p. 5650.)

At that hearing, defense counsel argued that the evidence concerning the incident of January 11, 1992, was legally insufficient to support a conviction under section 245, subdivision (a), and was therefore inadmissible under section 190.3, subdivision (b). (27 RT 3957.) The prosecutor's offer concerning that incident, based on a written police report, was as follows: appellant's father was driving the vehicle, and appellant and his brother were passengers; a female "victim" saw the vehicle outside her house; that victim and a relative named Shawn Maley saw the vehicle drive past "on more than one occasion yelling out gang slogans and saying

'Shoot, shoot, shoot'," and heard several gunshots; those victims saw the vehicle drive on and around their lawn, and called the police; the victims pointed out the vehicle to the police; the police stopped and searched the vehicle and its occupants, and found a gun under the passenger seat and "three fully-loaded .22 caliber clips that matched the gun" in appellant's pocket. (*Id.* at pp. 3958-3959.)

The prosecutor argued that the evidence was admissible because 1) the men in the vehicle yelled threats and fired shots while driving through the apartment complex, and 2) those threats must have been aimed at the witnesses since the truck was stopped in front of their apartment. (27 RT 3959-3960.) However, the trial judge said the evidence was insufficient to show "a crime of violence or attempted violence" unless the evidence showed that the "threats and shots" were "directed" at the alleged victims. (*Id.* at p. 3961.) The court also said evidence that appellant and his family members were "doing donuts, being obnoxious, [being] intimidating," or even that they were firing shots into the ground, would not suffice to show that the "threats and shots" were directed at those alleged victims. (*Ibid.*) Thus, the court said that unless the prosecutor was prepared to present testimony from appellant's father or brother that appellant had aided and abetted a violent crime it would be inappropriate to admit the evidence. (*Id.* at p. 3962.) Accordingly, the court told the prosecutor not to put on any evidence about the incident without first showing that it "was an act of violence or attempted violence." (*Id.* at p. 3963.)

The trial judge subsequently changed his mind and admitted evidence about the incident. (27 RT 3990.) The judge reasoned that the alleged acts by appellant and his family members – driving on the lawn, shouting "Shoot, shoot," firing shots, etc. – were meant to intimidate the

people inside the apartment, and were therefore "all threat." (*Id.* at p. 3992.)

The evidence produced at trial only partially matched the prosecution's proffer. Mary Palacio testified at trial that something rammed the front door of her apartment in Riverside on January 11, 1992. When she looked outside a truck containing three men was stopped a few feet from the door. One of the men pointed a gun at Palacio, and they all said "bad words" to her. (27 RT 4077-4079, 4084.) Palacio immediately ducked back inside, and a few minutes later heard "about two" gunshots outside. (*Id.* at pp. 4079-4081.) She did not see the faces of the men in the truck, and could only say that the man on the passenger side had the gun. (*Id.* at pp. 4078-4079.)

However, Shawn Maley, who was mentioned in the police report, did not testify at trial. No witness testified that the truck drove past several times, and there was no evidence that the people in the truck yelled "Shoot, shoot" or issued any threats to Palacio or anyone else in her apartment.

The officers who responded to Palacio's call pulled over a maroon pickup truck pointed out by Palacio's grandson and detained its occupants – appellant, his brother Chucky, and his father Joseph Hartsch Sr. (27 RT 4064, 4072, 4084-4086.) Deputy Eric Briddick testified that Joseph Hartsch said they were at the apartment complex looking for a man named Tommy Gomez, and pointed out the apartment where Gomez supposedly lived. However, Briddick later determined that no one by that name lived there. (*Id.* at pp. 4086-4087.)

Joseph and Chucky Hartsch both testified that they went to the apartment complex with appellant to find someone named Half Man who had shot at and/or assaulted appellant earlier that week. (27 RT 4059-4060,

4067-4069.) They both also testified that there was a gun in their truck that night, but that appellant did not handle or shoot it. (*Id.* at pp. 4063-4064, 4066, 4069-4071.) Chucky testified that Joseph fired the gun once or twice that night, but into the air, "not at the apartments." (*Id.* at p. 4071.) Deputy John Anderson testified that he searched the truck after he took appellant and the other two men into custody, and found a .22 caliber pistol under the bench seat of the truck. (*Id.* at pp. 4091-4093.) Deputy David Brown was also involved in that search, and testified that he found three .22 caliber magazines in appellant's coat pocket. (*Id.* at pp. 4095-4096.)

Defense counsel renewed his objection to this evidence at the jury instruction conference, claiming that merely "pointing a firearm" at someone was not a violation of section 245, subdivision (a). The trial court responded that "under those circumstances, it surely" was. (29 RT 4365.) Accordingly, the court instructed the jury with modified versions of CALJIC Nos. 9.00 and 9.02, detailing the elements of a violation of section 245, subdivision (a). (21 CT 5729.)[69]

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[69] The modified version of CALJIC No. 9.00 given at trial read in pertinent part as follows:

> In order to prove an assault, each of the following elements must be proved: 1) A person willfully committed an act which by its very nature would probably and directly result in the application of physical force on another person; 2) At the time the act was committed, the person intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another person; and 3) At the time the act was committed, the person had the present ability to apply physical force to the person of another.

(continued...)

B. The Trial Court Erred In Admitting This Evidence And In Instructing The Jury On Its Consideration

1. The Evidence Was Insufficient To Prove That Appellant Committed An Assault With A Deadly Weapon Within The Meaning Of Section 245, Subdivision (a)

The trial court erred in admitting evidence concerning this incident to show that appellant committed an assault with a deadly weapon. The prosecution's case was insufficient to prove that appellant violated section 245, subdivision (a) for three reasons: 1) it failed to prove the required act;

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[69](...continued)

> "Willfully" means that the person committing the act did so intentionally.
>
> To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an inquiry is inflicted it may be considered in connection with other evidence in determining whether an assault was committed and, if so, the nature of the assault.

(21 CT 5727.)

The modified version of CALJIC No. 9.02 given at trial read in pertinent part as follows:

> Every person who commits an assault upon the person of another with a deadly weapon or instrument is guilty of a violation of Section 245(a)(1) or with a firearm is guilty of a violation of Section 245(a)(2) of the Penal Code. . . . In order to prove this crime, each of the following elements must be proved: 1) A person was assaulted; and 2) The assault was committed with a deadly weapon or instrument or with a firearm.

(21 CT 5729.)

2) it failed to prove the required mental state; and 3) it failed to prove accomplice liability. Given this failure of proof, the admission and consideration of the aggravating assault evidence violated section 190.3, subdivision (b), the due process clause of the Fourteenth Amendment, and the prohibition against cruel and unusual punishment of the Eighth Amendment.

a. Applicable Legal Standards

A verdict based on insufficient evidence violates a defendant's right to due process under the Fourteenth Amendment to the federal Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-314.) When the sufficiency of the evidence supporting a conviction is challenged on appeal the court reviews the whole record in the light most favorable to the judgment, to determine whether there was substantial evidence, i.e., credible and solid evidence, from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

Section 190.3, subdivision (b), authorizes the prosecution to present any evidence showing the "presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied thereat to use force or violence." (*People v. Anderson* (2001) 25 Cal.4th 543, 584.) However, such evidence of the defendant's prior "criminal activity" is only admissible if it "'demonstrates the commission of an actual crime, specifically the violation of a penal statute'" involving the use, or threatened use, of force or violence. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 148, quoting *People v. Phillips* (1985) 41 Cal.3d 29, 72.) Such evidence of prior criminal activity can only be considered by the jury as evidence in aggravation if proven beyond a

reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 53.)

The crime of assault with a deadly weapon requires proof beyond a reasonable doubt that 1) a person was assaulted and 2) the assault was committed with a deadly weapon or a firearm. (Pen. Code, § 245, subd. (a); 21 CT 5729 [CALJIC No. 9.02].) An assault, in turn, requires proof of three elements: 1) "[a] person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person;" 2) "[t]he person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and 3) "[a]t the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another." (CALJIC No. 9.00 (2002 rev.); *People v. Williams*, *supra*, 26 Cal.4th at p. 788.)[70]

b. The Prosecution Failed To Prove Any Of The Elements Of The Assault Charge

The evidence presented at trial clearly was insufficient to prove the assault with a deadly weapon alleged as an aggravating factor under section 190.3, subdivision (b). In ruling on the admissibility of this other crimes evidence, the trial court properly focused on whether the conduct involved the use or threat of force or violence. (See 14 RT 3961 [initially finding the evidence insufficient to show a crime of violence or attempted violence], 3990 [subsequently finding that the shooting involved a threat of

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[70] Appellant's jury was instructed under the former version of CALJIC No. 9.00, which did not include the "actual knowledge" requirement announced in *People v. Williams*, *supra*, 26 Cal.4th at pp. 787-788. (See 21 CT 5727 [CALJIC No. 9.00 (1998 Revision)].)

violence].) However, the trial court never determined whether the proffer or the proof presented substantial evidence of "each and every element" of the "particular other crime[]" enumerated by the prosecutor. (*People v. Phillips, supra,* 41 Cal.3d at p. 72, fn. 25.) They did not.

First, the prosecution failed to establish the actus reus for assault with a deadly weapon, since there is no evidence that appellant handled or fired the gun. Palacio testified that when she went outside after the truck hit her apartment one of the men in it pointed a gun at her (27 RT 4077), and that later she heard gunshots outside. (*Id.* at pp. 4080-4081.) She did not know who pointed the gun, except that it was the man on the passenger's side of the truck. (*Id.* at p. 4079.) She did not know who fired the shots, because she only heard them fired outside; she did not see anyone in the truck fire any shots. (*Id.* at p. 4080.) The fact that appellant possessed the ammunition clips when the police stopped the truck does not prove either that he, rather than his father or brother, pointed the gun at Palacio, or that he fired the shots that Palacio heard a "few minutes" later. (*Id.* at p. 4081.) Indeed, the only – and uncontradicted – evidence about the identity of the person who pointed or fired the gun excludes appellant. Appellant's father and brother both testified that appellant did not shoot or even handle the gun. (*Id.* at pp. 4063-4064, 4066, 4069-4071.) In short, the prosecution's proffer and its proof failed to establish that appellant committed the acts that allegedly formed the basis of the assault charge.[71]

Second, the prosecution failed to prove the mens rea for assault with

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[71] Even assuming, *arguendo*, that there was proof that appellant handled or fired the gun, the acts of pointing the gun and/or firing it into the air would still be insufficient for the reasons stated below in the discussion of accomplice liability.

a deadly weapon. Without an assaultive act, there was a fortiori no assaultive intent. As this Court has explained: "the question of intent for assault is determined by the character of the defendant's willful conduct considered in conjunction with its direct and probable consequences." (*People* v. *Colantuono* (1994) 7 Cal.4th 206, 217.) In this case, the undisputed evidence shows that appellant did not handle or fire the gun. Because appellant committed no act likely to result in injury to another, he had no intent to commit a battery and no actual knowledge that would lead a reasonable person to know that his purportedly offending act would probably and directly result in a battery. (*Williams*, *supra*, 26 Cal.4th at p. 784.)

Third, the prosecution failed to prove assault with a deadly weapon on an aiding and abetting theory – the only theory of liability acknowledged by the trial court. (See 27 RT 3962.) Perhaps recognizing the absence of evidence, the prosecutor never even suggested that appellant could be liable as an accomplice. Such a conviction would require evidence that on the night in question: 1) appellant's father or brother violated section 245, subdivision (a); 2) appellant both knew that the other man intended to commit that violation, and intended to assist him in its commission; and 3) appellant engaged in conduct which assisted the commission of the crime. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) Insufficiency of the evidence on any one of these elements would defeat the charge. (See *Jackson v. Virginia*, *supra*, 443 U.S. at p. 316 [due process requires "proof beyond a reasonable doubt of the existence of every element of the offense"].)

Here, the evidence fails to prove these essential elements. Thus, at the outset, the prosecution did not show that an assault was committed by

anyone. The firing of the gun did not give rise to an assault. Palacio, the prosecution's only percipient witness, was inside her apartment when the shots were fired. The shots were not fired at the apartment. The shooting occurred at night, and there was no evidence that anyone except appellant, his father and his brother was outside the apartment or on the street at the time. And the uncontroverted testimony of appellant's brother, Chucky, established there were no potential victims: the gun was fired into the air. (27 RT 4071.) This was not "an act that by its nature would probably and directly result in the application of physical force on another person." (CALJIC No. 9.00; *People v. Colantuono*, *supra*, 7 Cal.4th at p. 214.) As this Court has held, "[r]eckless conduct alone does not constitute a sufficient basis for assault . . . ." (*Williams*, *supra*, 26 Cal.4th at p. 785, quoting *Colantuono*, *supra*, 7 Cal.4th at p. 219; see *People v. Carmen* (1951) 36 Cal.2d 768, 775 [noting that it is not an assault to fire a gun into the air for the purpose of scaring someone].) Indeed, the trial court understood this principle when it initially and correctly found the evidence insufficient to support the assault charge because there was no evidence that the shots were directed at any alleged victim. (27 RT 3961.)

Nor does the act of pointing the gun at Palacio give rise to an assault. Confronting a person with a loaded gun, when coupled with an intent to shoot that person and/or with the uttering of threats to the person, may constitute an assault with a deadly weapon. (See, e.g., *People v. McMakin* (1857) 8 Cal.547, 549 [evidence proved assault with a deadly weapon where defendant pointed a gun at the victim and threatened to shoot him if he did not leave]; *People v. Raviart* (2001) 93 Cal.App.4th 258, 265-266 [evidence proved assault with a deadly weapon where defendant confronted by two police officers drew a loaded handgun with

the intent to shoot both officers]; *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1050 [evidence proved assault with a deadly weapon where defendant pointed his gun at everyone in the room and made a "conditional threat"].) However, there was no evidence of either an intent to shoot or a stated threat in this case. Therefore, there was no assault. And since there was no assault, appellant cannot be vicariously liable for that crime as an accomplice. (*People v. Collins* (1878) 53 Cal. 185, 187 [where principal did not enter building with felonious intent, defendant could not be privy to a burglary]; *People v. Perez*, *supra*, 35 Cal.4th at p. 1227 ["[w]ithout proof of a criminal act by [the principal] to which [the defendant] contributed, the prosecution could not convict [the defendant] as an aider and abettor"].)[72]

But even assuming, arguendo, that either pointing the gun at Palacio or firing it into the air was a sufficient act for an assault, the evidence would still be insufficient to prove that appellant aided and abetted the offense. At most, the record shows a 14-year-old boy riding in a truck with his father and older brother while one or both of those men engaged in criminal conduct. But being with his father and older brother did not make appellant an accomplice. There is no evidence, let alone substantial evidence, that appellant 1) had actual knowledge that a battery would probably and directly result from the gun bearer's conduct, 2) intended to assist the gun bearer, and, 3) in fact assisted the gun bearer in committing an assault. That appellant had the ammunition clips in his pocket may be

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[72] Moreover, because neither pointing the gun at Palacio nor firing it into the air was an act that by its nature would probably and directly result in a battery, there is no evidence, let alone substantial evidence, that whoever pointed the gun and/or fired it acted with an awareness of facts that would have led a reasonable person to realize that a battery would directly, naturally and probably result from his conduct.

evidence that he knew his father or brother was armed, but does not establish by "solid" and "credible" evidence that he knew that man's intent, intended to assist him, or aided and abetted his commission of a crime. (See *People v. Campbell* (1994) 25 Cal.App.4th 402, 407-408 [evidence supporting conviction for aiding and abetting must be solid and credible].) Indeed, the record does not show that appellant voluntarily possessed the clips.[73] In sum, there is insufficient evidence to prove that appellant was an accomplice to an assault with a deadly weapon. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560 [to be liable as an accomplice, the defendant must know and share the full extent of the principal's criminal purpose, and actively promote or assist the perpetrator's commission of the target offense]; *People v. Prettyman* (1996) 14 Cal.4th 248, 262 [same].)[74]

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[73] A father's use of a minor relative to commit a crime is more often grounds for terminating his parental rights than for seeking the minor's execution when he, as an 18-year-old, commits a murder. (See, e.g. *Adoption of D.S.C.* (1979) 93 Cal.App.3d 14, 25 [evidence that father committed armed burglary with his 17-year-old wife as an accomplice held sufficient to render him unfit to be a parent to their child].)

[74] As explained *ante* in footnote 70, the mental state requirement for assault set forth in *Williams* controls this case. But even assuming, arguendo, that the evidence is judged under the instruction given to the jury, it would still be insufficient to prove an assault with a deadly weapon. Even in the absence of the "actual knowledge" requirement imposed by *Williams*, the prosecution failed to prove that appellant was guilty of assault with a deadly weapon either as the principal or as an aider and abettor. For the reasons stated above, there is no substantial evidence that appellant (or the actual shooter) 1) "willfully committed an act that by its very nature would probably and directly result in the application of physical force on another person;" 2) "intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another person;" and 3) "had the present

(continued...)

For all these reasons, the prosecution failed to present substantial evidence proving beyond a reasonable doubt that appellant was guilty of assault with a deadly weapon in violation of section 245, subdivision (a). As this Court noted long ago, "it is not enough for the [prosecution] simply to point to 'some' evidence supporting the finding' it urges in a capital case. (*People v. Bassett* (1968) 69 Cal.2d 122, 138, footnote omitted, quoting *People v. Holt* (1944) 25 Cal.2d 59, 70.) Given the insufficiency of the evidence, the trial court violated section 190.3, subdivision (b), and the due process clause of the Fourteenth Amendment by admitting evidence about, and instructing the jury on, this incident. (*Jackson v. Virginia*, *supra*, 443 U.S. 307.)

The erroneous admission and consideration of the insufficient assault evidence also violated the "special need for reliability in the determination that death is the appropriate punishment" arising under the Eighth Amendment's prohibition against cruel and unusual punishment. (*Johnson* v. *Mississippi* (1988) 486 U.S. 578, 584.) There is no question that a death sentence that rests in part on an invalid conviction for another crime violates this principle. (*Johnson*, *supra*, at p. 585 [finding Eighth Amendment violation where death sentence was based, at least in part, on a felony assault that was later vacated].) This Court has found similar Eighth Amendment error. (*People v. Horton* (1995) 11 Cal.4th 1068, 1134 [setting aside prior murder special circumstance based on conviction tainted by denial of counsel at critical stage of proceedings].) The conclusion in *Horton* applies equally here: "the special need for reliability

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[74](...continued)
ability to apply physical force to the person of another." (21 CT 5727.)

in the death penalty context is undermined whenever a prior conviction [upon which a death penalty judgment is based] is tainted by a fatal constitutional defect." (*Id.* at p. 1135.) The use of the invalid assault evidence rendered appellant's death sentence arbitrary and unreliable under the Eighth Amendment.

c. The Error Requires Reversal Of The Death Judgment

The erroneous admission of the invalid assault evidence as an aggravating factor requires reversal of appellant's death sentence under both the state law reasonable possibility standard (*People v. Phillips*, *supra*, 41 Cal.3d at p. 83; *People v. Belmontes* (1988) 45 Cal.3d 744, 1032 809) and the federal harmless error test. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The error contributed to the death verdict, and the State cannot prove the erroneously admitted evidence was harmless beyond a reasonable doubt.

The premise of the prosecutor's argument for a death sentence was that appellant was "beyond redemption" because he chose to "involve himself in the gang lifestyle at a very early age," and that appellant was so "firmly entrenched in the gang activity and lifestyle" that he would not "suffer all that much" if sentenced to life in prison without the possibility of parole. (30 RT 4582, 4587-4588.) In making that argument, the prosecutor relied upon the testimony about this supposed assault with a deadly weapon. (*Id.* at p. 4578.) Accordingly, this Court cannot say with confidence that this added increment of evidence about appellant's troubled life did not lead the jury to impose the ultimate penalty. (See, e.g., *People v. Minife* (1996) 13 Cal.4th 1055, 1071 ["the jury argument of the district attorney tips the scale in favor of finding prejudice" from evidentiary

error]; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757 [evidentiary error prejudicial due in large part to prosecutor's exploitation of error in argument]; *People v. Varona* (1983) 143 Cal.App. 3d 566, 570 [same]; *United States Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-1441 [same].)

The most important mitigating facts relating to appellant's moral culpability were that he was barely eighteen at the time of the capital crimes, and that his background and upbringing made it almost inevitable, as even the prosecutor seemed to concede, that he would become involved in violent crime at a young age. (11 RT 1670 [appellant's father was repeatedly convicted of violent felonies], 17 RT 4582 [the prosecutor admits that "it's true" appellant had no "good role models" as a child].) To determine the appropriate penalty, the jury had to weigh those mitigating factors against the evidence that appellant committed a number of violent crimes. This evidence added additional weight to the prosecutor's argument that appellant was irredeemable because he started a steadily-worsening career of violent crimes at an early age.

As the Ninth Circuit has said:

> The determination whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors; in effect to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted a jury because it is a uniquely moral decision in which bright line rules have little value.

(*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044.) In light of the "amorphous" and "uniquely moral" nature of the penalty determination, and of the need for heightened "reliability in the determination that death is the appropriate punishment" (*Woodson v. North Carolina* (1976) 428 U.S.

280, 305), it cannot be said with confidence that this evidence did not contribute to the jury's decision to impose the death penalty. Accordingly, the Court cannot find that this error was harmless beyond a reasonable doubt.

2. The Trial Court Erred In Instructing The Jury On The Elements Of Assault With A Deadly Weapon

a. Introduction And Applicable Standards

As noted above, this Court has held that a necessary element of a conviction for assault is that the defendant must have been aware of facts that would have lead a reasonable person to realize that a direct, natural and probable result of his or her act would be that physical force would be applied to another person. (*People v. Williams, supra,* 26 Cal.4th at p. 788.) In *Williams* the Court clarified the mental state requirement for assault as previously articulated in *People v. Colantuono, supra,* 7 Cal.4th at p. 214, and applied the new "actual knowledge" requirement to a case in which the jury was not instructed on that element. (*Williams*, *supra*, 26 Cal.4th at p. 783 [jury instructed under CALJIC No. 9.00 (1994 rev.)].) Accordingly, *Williams* applies to this case.

To establish a violation of Penal Code section 245, subdivision (a), the prosecution must prove beyond a reasonable doubt that 1) a person was assaulted and 2) the assault was committed with a deadly weapon or a firearm. (Pen. Code, § 245, subd. (a); 21 CT 5729 [CALJIC No. 9.02].) An assault, in turn, requires proof of three elements: 1) "[a] person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person;" 2) "[t]he person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of

this act that physical force would be applied to another person; and 3) "[a]t the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another." (CALJIC No. 9.00 (2002 rev.); *People v. Williams*, *supra*, 26 Cal.4th at p. 788.)

It is well settled that, "though there is no *sua sponte* duty at the penalty phase to instruct on the elements of 'other crimes' introduced in aggravation (citation), when such instructions are given, they should be accurate and complete." (*People v. Montiel* (1993) 5 Cal.4th 877, 942; accord, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Cummings, supra*, 4 Cal.4th at p. 1337; *People v. Malone* (1988) 47 Cal.3d 1, 49.) The "right to correct instructions on crimes introduced in aggravation at the penalty phase stems from the right to have the penalty jury consider such crimes only if it finds them true beyond a reasonable doubt." (*People v. Montiel, supra*, at p. 942; *see also People v. Robertson* (1982) 33 Cal.3d 21, 53-55, and authorities cited therein.)

With respect to the evidence concerning the January 11, 1992, incident in which appellant, his brother and his father were detained after someone fired shots at an apartment complex, appellant's jury was instructed under the former version of CALJIC No. 9.00, which did not include the "actual knowledge" requirement announced in *Williams*. (See 21 CT 5727 [CALJIC No. 9.00 (1998 Revision)].) The trial court's failure to instruct on that element was reversible error.

b. The Trial Court's Failure To Instruct The Jury On The Elements Required For A Violation Of Section 245, Subdivision (a), Violated State Law and The Federal Constitution

Here, the trial court provided the jury with CALJIC No. 9.00 (21 CT

5727), and a modified version of CALJIC No. 9.02 (21 CT 5729), which are set forth *supra*, at pages 175-176, footnote 69, and incorporated by reference here. Neither of those instructions informed the jury that they were required to find that appellant had actual knowledge of facts such that he should have known his actions "by [their] nature [would] probably and directly result in physical force being applied to another . . . ." (*People v. Williams*, *supra*, 26 Cal.4th at p. 788.) Hence, the court erred by failing to provide complete and accurate instructions on the elements of section 245, subdivision (a). Without instruction on the "actual knowledge" element, the jury was not required to find the essential prerequisite for considering the alleged assault as factor (b) aggravation – that the prosecution had proved each and every element of the crime beyond a reasonable doubt. (See *People v. Montiel, supra*, 5 Cal.4th at p. 942.)

By negating the requirement of proof beyond a reasonable doubt, the instructional error also violated appellant's rights to a fair and reliable jury determination of the appropriate penalty, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304-305.) Furthermore, the instructional error violated appellant's right to due process under the Fourteenth Amendment, since long standing and well-established authority created a constitutionally protected, "substantial and legitimate expectation" that appellant would not be deprived of his life in the absence of proof beyond a reasonable doubt of the criminal activity alleged under factor (b) on which the jurors received correct instructions. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [although federal constitution does not require states to employ jury sentencing in non-capital cases, once state does so, the right is protected by federal due process because a defendant "has a substantial and legitimate

expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion"]; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301, cert. denied 513 U.S. 914 (1994); *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) For all of these reasons, the court's instructional error also violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth.

c. The Error Requires Reversal Of Appellant's Death Sentence

The failure to properly instruct the jury on the intent required for a conviction under section 245, subdivision (a), was not harmless error even under the *Watson* standard, and therefore certainly not under the *Chapman* standard for federal constitutional error. (*Chapman v. California*, *supra*, 387 U.S. at p. 24.) While this Court said in *Williams* that the failure to instruct the jury on this point was "unlikely to affect the outcome of most assault cases, because the defendant's knowledge of the relevant factual circumstances is rarely in dispute" (26 Cal.4th at p. 790), that is not the case here. Unlike the situation in *Williams*, where the defendant admitted loading his shotgun and firing at a vehicle knowing the victim was "in the near vicinity" (*ibid*), in this case there was no evidence to establish that appellant ever fired any shots, let alone that he did so knowing anyone was within range of those shots. Because the undisputed evidence was that appellant did not handle or fire the gun (27 RT 4063-4064, 4066, 4069-4071), he could not have had actual knowledge of facts that would have lead a reasonable person to know that his acts would probably and directly result in a battery. (*Williams*, *supra*, 26 Cal.4th at p. 784.)

Moreover, to the extent that the jury relied on an aiding and abetting theory in finding that appellant committed a violation of section 245,

subdivision (a), which the trial court suggested was the prosecution's only plausible theory (27 RT 3962), the failure to instruct the jury that the jury had to find that appellant had actual knowledge that his acts might cause a battery was clearly prejudicial. Even assuming that appellant's father and/or brother committed an act or acts that *they* should have known would probably result in a battery, there was no evidence that appellant even knew the act or acts would be committed, or that he shared the assumed actual knowledge of whoever fired the shots. Accordingly, the trial court's failure to properly instruct on the knowledge requirement for a conviction under section 245, subdivision (a), requires reversal of the death judgment in any event.

C. Conclusion

Reversal of the death judgment is mandated here because the trial court erred in admitting this insufficient evidence that appellant committed a violation of section 245, subdivision (a), or, in the alternative, failed to properly instruct the jury on the required elements of that offense.

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XI.

THE TRIAL COURT'S ERRONEOUS ADMISSION OF HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

The trial court erred by admitting improper and highly-prejudicial victim impact testimony which exceeded the appropriate limits on such evidence. The error requires reversal of appellant's death judgment.

A. Factual Background

1. The Pretrial Hearing On Victim Impact Evidence

On September 21, 1998, appellant filed a motion to preclude the presentation of "victim impact" evidence at the penalty trial. (20 CT 5587-5612.) That motion argued, *inter alia*, that in the context of appellant's case such evidence of the victims' good qualities and/or of the impact of the victims' deaths on their friends and families was improper and inadmissible because the evidence: did not "fall within the parameters set forth by" *Payne v. Tennessee* (1991) 501 U.S. 808, 830 (20 CT 5599); did not relate to facts known to appellant at the time of the crime, or tend to prove his culpability (*id.* at pp. 5601-5603); would be more prejudicial than probative (*id.* at pp. 5603-5608); and would improperly call upon the jurors to consider improper factors such as the victims' race, education and social standing in making their penalty determination. (*Id.* at pp. 5608-5609.)

The trial court held a hearing to determine the admissibility of the proposed victim impact evidence. (27 RT 3931-3939.) At that hearing, defense counsel asked the trial court to exclude all such evidence, but said that if the court admitted the evidence appellant would seek to offer "bad character" evidence regarding the victims. (*Id.* at pp. 3931-3932.) The court stated that the only appropriate victim impact evidence would relate to

the impact of an individual victim's death on the witness; i.e., "the huge loss [the witness] suffered," and that good character evidence about the victims, such as evidence that a victim was a "Nobel laureate from Berkeley," would not "come out" at trial. (*Id.* at pp. 3934-3935.) Thus, the court said it would only admit victim impact evidence as to "impact, not [to the victim's] background as being good, bad, [or] their social status . . ." (*Id.* at p. 3937.)

The prosecutor agreed with the trial court's view on the limits of acceptable victim impact evidence, and argued that accordingly the defense should not be permitted to impeach the prosecution's victim impact witnesses with "character assassination" about their prior crimes, bad acts, etc. (27 RT 3937.) Defense counsel agreed that if the prosecution did not offer good character" evidence concerning the victims, then evidence about their bad character would be inadmissible, but asked that any denial of the motion to exclude victim impact evidence be without prejudice until it became clear whether the prosecutor would violate that restriction. (*Id.* at pp. 3938.) The trial court responded that it could not conceive of any situation where testimony about the victims' good qualities, e.g., that the victim was "dear," would open the door to impeachment with bad character evidence. (*Ibid.*)

2. Victim Impact Evidence Presented At Trial

Kenneth Gorman's brother, Curtis Grant, and sister, Diane Chapman, gave victim impact testimony. Grant testified that Gorman was his youngest brother, and that they were in foster care together. Grant and Gorman were both sexually molested by the father in that foster home. Gorman testified at the foster father's trial on charges relating to that molestation, but Grant was too embarrassed to testify. (28 RT 4334-4335.)

Curtis Grant also testified that he and his brother were very close, and that Gorman was a caring person. (28 RT 4336-4337.) Grant became depressed when his brother was killed, and he stopped going to school because of his depression. Grant testified that he was suicidal and on medication at the time of trial. (*Id.* at pp. 4338-4339.)

Diana Chapman testified that Gorman was the youngest of six siblings, and that he lived with her from the age of about 15 until he was almost 17. She said Gorman was very smart, but "never really had a chance at his life." (28 RT 4332-4333.)

Creque's brother, Jerry Gower, testified that he lived with his sister until their parents divorced, when Creque was eight or nine years old, and that he maintained contact with her through their childhoods. Gower and Creque developed a good relationship in the last years before she was murdered. Gower relapsed into alcohol abuse after Creque was killed, and his alcoholism caused him to lose his landscaping business. Gower also said that since Creque's murder he did not trust or help people anymore. (28 RT 4342-4346.)

Creque's adult daughter, Misty Dawn Creque, testified that her mother's death still affected her at the time of trial. Misty Creque missed many things about her mother, including her pretty voice, her cooking, and the poetry and songs she would create. Misty Creque also said that her family broke up after her mother's death, and that she missed being with her brothers and sisters. (28 RT 4346-4351.)

Veronica Delgado, Diana Delgado's sister, testified that she and her sister grew up together and were together "all the time" before Delgado's death. Diana Delgado was funny, and her sister missed not being with her. (28 RT 4353-4354.)

Diana Madrid, Diana Delgado's mother, testified that her daughter was a "very special child, . . very loving, always smiling," who loved art and people in general. Diana Delgado was "like . . . the soul of [their] family," and held the family together. Thus, without Diana Delgado "[their] life has been chaos." Madrid showed the jury a montage she had made of pictures and other items relating to her daughter. That montage included a bible verse (Romans 8:28) and a picture of Ms. Delgado's headstone, and Madrid explained the significance of some of the items. (28 RT 4357-4358; Peo's. Exh. 329.)

B. The Victim Impact Evidence Was Admitted Without Necessary Safeguards To Confine It Within Constitutional Bounds

"'It is the general rule that the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.' [Citations.]" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735.) Therefore, to determine the scope of the victim impact evidence permitted by *Payne v. Tennessee*, *supra*, 501 U.S. 808, it is necessary to examine the facts before the United States Supreme Court in that case.

Payne involved a single victim impact witness who testified about the effects of the murder of a mother and her two year old daughter on the woman's three year old son who was present at the scene of the crime, and suffered serious injuries in the attack himself. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 811-812.) The boy's grandmother testified that he cried for his mother and sister, that he worried about his sister, and that he could not seem to understand why his mother did not come home. (*Id.* at pp. 814-815.)

To be consistent with the facts and holding of *Payne*, the admission of victim impact evidence must be attended by appropriate safeguards to minimize its prejudicial effect, and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. Three such safeguards apply to the nature of the evidence itself.[75] None of them was employed in the instant case.

First, victim impact evidence should be limited to testimony from a single witness, like the grandmother's testimony in *Payne*. This limitation is imposed by judicial decision in New Jersey. (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180) In *Muhammad*, the Supreme Court of New Jersey explained the reason for the limitation thusly:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.

(*State v. Muhammad, supra*, 678 A.2d at p. 180.) This limitation on victim impact evidence is also imposed in Illinois by statute. (725 ILCS 120/3(a)(3); see *People v. Richardson* (Ill. 2001) 751 N.E.2d 1104, 1106-1107.)

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[75] An additional safeguard that was not employed in this case was the giving of appropriate instructions on the proper use of victim impact evidence. Appellant proposed such an instruction, which would have told the jurors not to allow any such evidence to "divert" them from their proper role of soberly deciding whether to sentence appellant to die. (20 CT 5764 [Def. Spec. Instr. F.) However, the trial court refused to give that instruction. (29 RT 4393-4394; Argmt. XII, *infra*.)

Second, victim impact evidence should be limited to testimony describing the effect of the murder on a family member present at the scene during or immediately after the crime. Third, victim impact evidence should be restricted to testimony concerning those effects of the murder which were either known or reasonably apparent to the defendant at the time he committed the crime, or properly introduced to prove the charges at the guilt phase of the trial. These limitations are consistent with *Payne*, where the victim impact evidence described the effect of the crime on the victims' son and brother who was present at the scene of the crime. Given the boy's presence at the scene, and the fact that he was critically injured during the attack, the defendant presumably was well-aware of his likely grief and suffering.

In addition to comporting with *Payne*, these limitations are necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes, and to avoid expanding the scope of the aggravating circumstances set out in those statutes so much that they become unconstitutionally vague. In California, aggravating evidence is admissible only when relevant to one of the statutory factors. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Victim impact evidence is admitted on the theory that it is relevant to factor (a) of section 190.3, which permits the sentencer to consider the "circumstances of the offense." (*People v. Edwards* (1991) 54 Cal.3d 787, 835.)

However, to be relevant to the circumstances of the offense, the evidence must show circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) The only victim impact evidence meeting that standard is evidence about 1) "the immediate injurious impact of the capital murder" (*People v. Montiel*

(1993) 5 Cal.4th 877, 935), 2) the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes, and 3) facts of the crime which were disclosed by the evidence properly received during the guilt phase. (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.).)

Here, none of the limitations required by *Payne* was met. First, rather than present a single witness for each victim as was done in *Payne*, the prosecutor in this case presented two victim impact witnesses for each of the three victims. That unnecessarily extensive presentation violated the first of the *Payne* safeguards.

Second, there were no witnesses to any of the murders charged in this case. Therefore, none of the victim impact witnesses could or did testify about the effect of any of those murders on a family member present at the scene during or immediately after the crime, as occurred in *Payne*.

Third, the victim impact evidence in this case included information appellant could not possibly have known regarding the personalities, personal histories, and characteristics of the victims, and/or the idiosyncratic responses of the victims' family members to their deaths. Thus, appellant could not have known that Gorman had been molested by a foster parent and had testified at that man's criminal trial, or that Gorman was a smart, caring person who "never had a chance at his life." (28 RT 4333-4335, 4337.) Moreover, appellant certainly could not have known that Gorman's brother, Curtis Grant, would become depressed and stop attending college as a result of Gorman's death. (*Id.* at pp. 4338-4339.)

Similarly, there was nothing about the actual circumstances of the Creque/Gorman shooting that could have alerted appellant to the facts that

Creque had a pretty voice and/or made up poetry for her children. (28 RT 4350.) And appellant certainly could not have known that Creque's death would cause her brother to relapse into alcohol abuse, lose his landscaping business, and cease trusting and helping people (*id.* at pp. 4345-4346), or would cause her children to be separated. (*Id.* at p. 4350.)

The admission of victim impact testimony suggesting that Curtis Grant's depression, and Jerry Gower's alcoholism and attendant business failure, were consequences of these murders, and could therefore be considered factors making the murders more egregious, far exceeded the confines of acceptable victim impact evidence. (See *People v. Harris* (2005) 37 Cal.4th 310, 352 [victim impact testimony that the victim's coffin was inadvertently opened in the presence of mourners, and about the "screaming and fainting of funeral attendees" that ensued, should have been excluded because it was "too remote from any act by the defendant to be relevant to his culpability].) An interpretation of "circumstances of the crime" so broad as to allow for the admission of the victim impact evidence in this case would render that factor unconstitutionally overbroad and vague. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

When deciding between life and death, the jury should be given clear and objective standards providing specific and detailed guidance. (See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776.) Sentencing factors must have a common-sense core of meaning juries are capable of understanding. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.) Things that happen after the crime – like Mr. Grant's descent into depression and Mr. Gower's renewed problems with alcohol abuse – do not fall within any reasonable common sense definition of the phrase "circumstances of the crime."

Accordingly, if that evidence was properly introduced under state law, factor (a) of section 190.3 is unconstitutionally vague. (But see *People v. Boyette* (2002) 29 Cal.4th 381, 445.)[76]

The trial court's admission of this improper victim impact evidence violated appellant's right to a fair and reliable penalty determination, and denied him due process by rendering the penalty trial fundamentally unfair. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17; *Tuilaepa v. California*, *supra*, 512 U.S. 967; *Payne v. Tennessee*, *supra*, 501 U.S. 808.)

C. The Erroneous Admission Of Victim Impact Evidence Requires Reversal Of Appellant's Death Sentence

Because the trial court's error occurred at the penalty phase of a capital trial, this Court must determine whether there is a "reasonable possibility" it affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) But because the error violated appellant's rights under the federal constitution, the State must prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The respondent cannot meet that burden here.

The prosecutor emphasized the victim impact evidence during his closing arguments, telling the jurors to consider the victims, and that appellant took away "the hopes and dreams and love and affection" of the

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[76] Moreover, much of the victim impact testimony admitted at trial, i.e., the testimony that Gorman was smart and caring (28 RT 4333, 4337), and that Diana Delgado was a very special and loving person (*id.* at p. 4357), violated the trial court's stated limitation that it would not admit testimony about the victims' "background as being good . . ." (27 RT 3937.)

victims' families and friends. (30 RT 4566-4567.) He also said the victims' families would never get over their losses. (*Id.* at p. 4568.) But despite those arguments, the trial court did not properly instruct the jury on the appropriate use of victim impact evidence. (See Argmt. XII, *infra*.)

"Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) The presentation of emotionally-charged victim impact testimony in this case, and the prosecutor's arguments based on that evidence, played a major role in convincing the jury to impose the death penalty on appellant despite the fact that he was only 18 when these crimes occurred, and that his family background was such that it would have been a near-miracle if he had not become involved in violence. (30 RT 4613-4615 [defense counsel argues that appellant's behavior was the product of his father's teachings, since his father took appellant on a drive-by shooting when he was only a child].) However, once the jurors were overwhelmed by the raw emotion generated by the prosecution's victim impact evidence, they could not give the mitigating evidence of appellant's reduced moral culpability the consideration it deserved. (See *Le v. Mullin* (10th Cir. 2002) 311 F.3d 1002, 1016.) Accordingly, reversal is required.

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XII.

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S PROPOSED INSTRUCTION REGARDING THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE

As set forth in the preceding argument, the prosecution presented extensive victim impact testimony during the penalty phase. That testimony, as set forth in substantial detail in the preceding argument, came from Gorman's brother and sister (28 RT 4327-4339), Creque's brother and daughter (*id.* at pp. 4341-4351), and Diana Delgado's mother and sister (*id.* at pp. 4352-4358). (Argmt. XI, *supra.*) That victim impact testimony dealt with numerous topics that were clearly irrelevant to the only aspect of the "circumstances of the crime[s]" which is a proper subject of victim impact testimony: the immediate harm caused by the crimes to the victim's family and friends. (*People v. Pollack* (2005) 32 Cal.4th 1153, 1182.) For example, Curtis Grant testified that he and Gorman were molested as children (28 RT 4334-4335), and Jerry Gower testified that at some point between the time of Creque's death in June of 1995 and his appearance as a witness on October 7, 1998, he "started drinking again and lost his landscaping business. . . ." (*Id.* at pp. 4275, 4345.) Finally, Diana Madrid displayed for the jury a montage of items including a bible verse presented to her by Diana Delgado on the day Delgado "g[ave] her life to Christ," and a photograph of her daughter's headstone. (*Id.* at pp. 4357-4358.)

In response to the presentation of that extensive and improper testimony, appellant submitted a proposed jury instruction that read as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by defendant's crimes, as it directly

> relates to the circumstances of the capital offense [*sic*]. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must make this decision soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional, though relevant subjects, may provide legitimate reasons to sway you to show mercy.

(21 CT 5764 [Def. Spec. Instr. F.) However, the trial court refused to give the requested instruction. (28 RT 4393-4394.) The refusal to give that instruction was error.

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842 [discussing the need for instructions on victim impact evidence].) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the integrity of the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim-impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that in every case in which victim impact evidence is introduced, the trial court must instruct the jurors on the appropriate use of that evidence, and admonish them against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) The Supreme Court of Pennsylvania

has also recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 158-159.)

Although the language of the required instruction varies in each state depending on the role victim impact evidence plays in that state's statutory scheme, common features of such instructions are an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors.

The limiting instruction proposed by appellant appropriately conveyed this explanation to the jury. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195 [stating that a jury must never be influenced by passion or prejudice].) Although in *Pollock* this Court held that the trial court properly refused to give an instruction intended to limit the jury's consideration of victim impact evidence, it did so because the instruction incorrectly suggested that the jury could not be influenced by sympathy for the victims. (*Ibid.*) The requested instruction in this case was neither inaccurate nor misleading, and would have been consistent with the rule that a capital "jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.)

Assuming, arguendo, that the proposed instruction was somehow deficient, the trial court nevertheless should have given a properly-revised version of that instruction. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924.) An appropriate instruction for California would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than

> another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence.

This instruction duplicates the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at pp. 158-159.

In the absence of such an instruction, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision. None of the instructions actually given at the trial would have prevented the jury's penalty verdict from being tainted by such improper considerations.[77]

In view of the emotionally-charged victim impact evidence admitted in this case, and the reliance the prosecutor placed on that evidence during his closing argument (29 RT 4466-4468), the trial court's failure to give the requested instruction violated appellant's rights to a fair, non-arbitrary, and reliable sentencing determination, and to have the jury consider all mitigating circumstances (see, e.g., *Skipper v. South Carolina* (1986) 476 U.S.1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604) and make an individualized determination whether he should be executed. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879; U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.)

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[77] Even assuming that the standard instruction concerning the consideration of evidence admitted for a limited purpose, CALJIC No. 2.09, would have sufficed, it was not given at the penalty phase.

XIII.

THE ADMISSION AND USE OF EVIDENCE OF PRIOR UNADJUDICATED CRIMINAL ACTIVITY VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. Introduction

At the penalty phase of appellant's trial, the prosecution introduced in aggravation evidence of seven incidents of alleged prior criminality under factor (b) of section 190.3. The earliest of those incidents occurred when appellant was 14; the most recent while he was still 17.

As appellant argued below (20 CT 5562, 5614), the State's reliance on such unadjudicated criminal activity[78] during the penalty phase deprived him of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, the protection of the collateral estoppel rule, the guarantee against double jeopardy, and a reliable and non-arbitrary penalty determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition, even if (arguendo) a jury may properly rely upon this type of evidence in determining penalty, the jury's reliance on the particular evidence of unadjudicated criminal activity at issue was

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[78] While some of these incidents were adjudicated in juvenile court, they did not result in felony convictions within the meaning of factor (c) of section 190.3. (*People v. Burton* (1989) 48 Cal.3d 843, 861-862.) Thus, they are "unadjudicated" alleged offenses within the meaning of factor (b). (See *id.* at p. 862; *People v. Lewis* (2001) 26 Cal.4th 334, 378.)

particularly unreliable and therefore violative of appellant's rights to due process and a reliable penalty determination. Appellant's death judgment must therefore be reversed.

B. The Trial Court's Use Of Subdivision (b) Violated Appellant's Constitutional Rights, Including His Fifth, Sixth, Eighth And Fourteenth Amendment Rights To Due Process And A Reliable Penalty Determination[79]

Section 190.3, subdivision (b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (21 CT 5697; 30 RT 4619-4620.) Pursuant to that factor, the prosecution in this case presented evidence of seven incidents of alleged criminal activity by appellant: an assault with a deadly weapon that occurred on May 16, 1991 (27 RT 4002, 4015-4016); an assault with a firearm that occurred on January 11, 1992 (*id.* at pp. 4004-4005, 4059); an armed robbery that occurred on September 25, 1993 (*id.* at pp. 4005-4006, 4104-4106); two batteries (*id.* at pp. 4127-4129, 4132); a forced oral copulation that occurred on October 16, 1994 (*id.* at pp. 4007-4008, 28 RT 4178-4182); and a robbery and homicide that occurred on May 24, 1993. (27 RT 4008.) The jury was expressly told to weigh the presence or absence of that alleged criminal activity. (30 RT 4619.)

As appellant argued at trial, the admission of evidence of previously

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[79] Although the United States Supreme Court, in *Tuilaepa v. California* (1994) 512 U.S. 967, 977, determined that factor (b) was not unconstitutionally vague, that opinion did not address the issues raised herein.

unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated his rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276.) Admission of the unadjudicated prior criminal activity also denied appellant the rights to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offenses") by an impartial and unanimous jury, to effective assistance of counsel, and to effective confrontation of witnesses, under the Sixth and Fourteenth Amendments, and to equal protection of the law under the Fourteenth Amendment. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

Factor (b), as written and as interpreted by this Court, is an open-ended aggravating factor that fosters arbitrary and capricious application of the death penalty, and thus violates the Eighth Amendment requirement that the procedures used to impose the death penalty must make a rational distinction "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted factor (b) in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be *more* rigorous than those provided non-capital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Lockett v. Ohio* (1978) 438 U.S. 586, 605-

606), this Court has turned this mandate on its head, singling out capital defendants for *less* procedural protection than is afforded other criminal defendants. For example, this Court has ruled that: in order to consider evidence under factor (b), it is not necessary for the 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057); the jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192); and the trial court is not required to enumerate the other crimes the jury should consider, or to instruct on the elements of those crimes. (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207.) This Court has also ruled that 1) unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under factor (b), while felony convictions, even for violent crimes, rendered after the capital homicide are not (*People v. Morales* (1989) 48 Cal.3d 527, 567), and 2) a threat of violence is admissible if, by happenstance, the words are uttered in a state where such threats are a criminal offense. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261.) This Court has also held that juvenile conduct is admissible under factor (b) (*People v. Burton* (1989) 48 Cal.3d 843, 862), as are offenses dismissed pursuant to a plea bargain. (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659.) In sum, this Court has indeed treated death differently, by *lowering* rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same jury for the penalty phase adjudication of other crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of

guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such an offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi, supra*, 486 U.S. at p. 585), and the jurors must give the determination whether such an offense has been proved the exact same level of deliberation and impartiality as would have been required of them in a separate criminal trial; when a state provides for capital sentencing by a jury, the due process clause of the Fourteenth Amendment requires that jury to be impartial.[80] (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 (1971) [where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand]; *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of appellant's guilt of the previously unadjudicated offenses were the same jurors who had just convicted him of capital murder. It would seem self-evident that a jury which already has unanimously found a defendant guilty of capital murder cannot be impartial in considering whether similar but unrelated violent crimes have been

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[80] The United States Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.) Similarly, due process protections apply to a capital sentencing proceeding. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358.)

proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).) Moreover, several of the unadjudicated offenses appellant's jurors were asked to impartially evaluate involved alleged assaults against women, making it impossible for the jury that had just convicted appellant of assaulting and murdering two women to fairly evaluate that evidence.[81]

A finding of guilt by such a biased factfinder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554, relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of the trial forced appellant to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. (*Pointer v. United States* (1894) 151 U.S. 396, 408-409; *Lewis v. United States* (1892) 146 U.S. 370, 376.) The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. (*Dyer v. Calderon* (9th Cir. en banc 1998) 151 F.3d 970, 973, and citations therein.)

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[81] Even in the unlikely event that only a single juror was impermissibly prejudiced against him, appellant's rights would still be violated. (See *People v. Pierce* (1979) 24 Cal.3d 199, 208 ("[A] conviction cannot stand if even a single juror has been improperly influenced."].)

In this case, counsel for appellant understandably did not question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and questioning the potential jurors about other violent crimes unquestionably would have tainted the impartiality of the jury that was impaneled. Counsel could not adequately examine potential jurors during voir dire as to their biases and potential prejudices with respect to the prior unadjudicated crimes – in particular, those involving women – without forfeiting appellant's constitutional right not to have such subjects brought before the jurors. Requiring appellant to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

Further, because California does not allow the use of unadjudicated offenses in non-capital sentencing, the use of this evidence in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) It also violated appellant's Fourteenth Amendment right to due process because the State applies its law in an irrational and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) Finally, the failure to require jury unanimity with respect to such unadjudicated conduct not only exacerbated this defect, but itself violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty.

A series of recent decisions by the United States Supreme Court clearly indicate that the existence of any aggravating factors relied upon to

impose a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See *Ring v. Arizona* (2002) 536 U.S. 584, 609.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in appellant's case was instructed that the prosecutor had the burden of proving the other crimes evidence beyond a reasonable doubt (21 CT 5700; 30 RT 4621), the jury was *not* instructed on the need for a unanimous finding; nor is such an instruction required under California's sentencing scheme. The jurors' consideration of this evidence thus violated appellant's rights to due process of law, to trial by jury, and to a reliable capital sentencing determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See Argmt. XIX, Section A, *infra*.)

C. Some Of The Unadjudicated Criminal Activity Alleged Against Appellant Was Outside Applicable Statutes Of Limitations And Therefore Was Improperly Introduced As Evidence In Aggravation

At the time the information was filed in this case, February 7, 1996, substantive criminal charges could not have been brought against appellant based on some of the criminal conduct alleged against him as aggravation. Thus, the statute of limitations had expired on both of the alleged violations of section 245, subdivision (a), which each occurred more than three years before February of 1996.[82] The two alleged incidents of misdemeanor battery involving Ms. Ramirez, which allegedly occurred during the three

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[82] Section 245, subdivision (a)(1), had a maximum statute of limitations of three years. (§§ 245, subd. (a), 800.)

months prior to June of 1995, were also time-barred.[83] The admission of such stale evidence of criminal conduct at the penalty phase violated appellant's due process rights to a fair trial and to effectively confront and rebut the aggravating evidence presented against him, and the constitutional requirement of heightened reliability in capital trials. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; see *Gardner v. Florida, supra*, 430 U.S. 349, 362.)

Statutes of limitations are not mere technicalities. They exist to ensure the level of reliability required in any criminal case, and to an enhanced degree in capital cases. As this Court has observed, such statutes recognize the "difficulty faced by both the government and a criminal defendant in obtaining *reliable* evidence (or any evidence at all) as time passes following the commission of a crime." (*People v. Zamora* (1976) 18 Cal.3d 538, 546, italics added.) Limitation periods "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*United States v. Marion* (1971) 404 U.S. 307, 322; see *Stogner v. California* (2003) 539 U.S. 607, 615.)

Appellant is aware that this Court has held that because there is no statute of limitations for murder, the expiration of the statute of limitations for any other substantive crime does not constrain the prosecution from introducing evidence of such crime at the penalty phase of a capital trial. (*People v. Heishman, supra*, 45 Cal.3d at p. 192; accord, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 772.) *Heishman*, however, relied on *People v. Terry* (1969) 70 Cal.2d 410, a capital case decided prior to *Furman v.*

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[83] Section 242 had a maximum statute of limitations of one year. (§§ 243, subd. (a), 802, subd. (a).)

Georgia (1972) 408 U.S. 238, the case that inaugurated modern capital punishment jurisprudence. Since that time, the United States Supreme Court has explicitly held that the Eighth Amendment's guarantee of a reliable penalty determination requires that the procedures governing a capital sentencer's consideration of "other crimes" evidence must conform to the constitutional standards governing proof of the substantive offense. (See *Johnson v. Mississippi, supra*, 486 U.S. at pp. 585-586 [invalidating a death judgment because one of the aggravating circumstances was based on a prior conviction that had been found constitutionally defective by a state appellate court].)

In light of *Johnson*, this Court's focus on capital murder as the predicate offense rendering the statute of limitations inapplicable to any other crimes alleged at the penalty phase is misdirected. The jury's consideration of evidence of other violent crimes committed by the defendant is likely to have "an ascertainable and 'dramatic' impact" (*Zant v Stephens* (1983) 462 U.S. 862, 903 (conc. opn. of Rehnquist, J.), and even to prove "decisive" in the choice of penalty (*Gardner v. Florida, supra*, 430 U.S. at p. 359), especially when compounded by the lack of an impartial jury. Therefore, allowing the prosecution to litigate time-barred offenses necessarily creates an unacceptable risk of unfairness and introduces unreliable evidence into the penalty determination. Because allowing the jury to consider such a charge denies the defendant a fair penalty trial, a death sentence based even in part on such evidence is fatally defective. (See *Johnson v. Mississippi, supra*, 486 U.S. at pp. 586, 590; *Gardner v. Florida, supra*, 430 U.S. at pp. 359, 362.)

D. Appellant's Alleged Juvenile Misconduct Was Improperly Introduced As Evidence In Aggravation

All of the incidents of prior criminality offered as evidence in aggravation at trial were alleged to have occurred before appellant turned 18. Evidence of such juvenile misconduct is insufficiently relevant or reliable to be considered by a penalty phase jury, because such misconduct cannot serve as a sufficient basis for concluding that the death penalty would be appropriate to serve society's legitimate interests in deterrence and retribution, and accordingly the admission of this evidence violated the Eighth and Fourteenth Amendments.

The "social purposes" served by the imposition of capital punishment are "'retribution and deterrence of capital crimes by prospective offenders . . . .'" (*Atkins v. Virgina* (2002) 536 U.S. 304, 319, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 183.) Unless the imposition of the death penalty serves one or both of those purposes it constitutes cruel and unusual punishment. (*Coker v. Georgia* (1977) 433 U.S. 584, 592.) Because minors lack maturity and self-control, it violates the Eighth Amendment to allow the jury to use evidence of the defendant's juvenile misconduct as a basis for imposing the death penalty.

In *Simmons v. Roper* (2005) 543 U.S. 551, 574-574, the United States Supreme Court held that because of the great differences in maturity and judgment between adults and minors the death penalty is a disproportionate penalty for offenders under the age of 18. Even prior to *Simmons*, the high court had recognized that "youth is more than a chronological fact. It is a time and condition of life when a person may be susceptible to influence and to psychological damage." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 115.) In *Johnson v. Texas* (1993) 509

U.S. 350, the high court observed that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." (*Id.* at p. 367 [recognizing that a sentencer in a capital case must be allowed to consider the *mitigating* qualities of youth in the course of its deliberations over the appropriate penalty]; see *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834-835 [because juveniles are "more vulnerable, more impulsive, and less self-disciplined than adults . . . less culpability should attach to a crime committed by a juvenile than to a similar crime committed by an adult"].) In light of those well-understood differences between minors and adults it is inconsistent with the Eighth Amendment to use evidence of juvenile misconduct as aggravating evidence in the penalty phase of a capital trial.

Moreover, evidence of juvenile misconduct is insufficiently reliable to be considered in the penalty phase of a capital trial, because jurors cannot readily differentiate which acts of juvenile criminality actually demonstrate the degree of heightened culpability required to support the imposition of a death sentence. (See *Simmons*, *supra*, 543 U.S. at p. 573.) "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (*Ibid.*)

The consideration as aggravation in the penalty phase of this capital trial of appellant's "impetuous and ill-considered actions"as a minor, acts that occurred when he was particularly "susceptible to influence and psychological damage" (*Johnson*, *supra*, 509 U.S. at p. 367), was in direct conflict with federal constitutional guarantees of due process, the

prohibition against cruel and unusual punishment. and the constitutionally-based heightened need for reliability of capital trials and sentencing procedures. (U.S. Const., 5th, 6th, 8th & 14th Amends.) The use of such evidence was also in direct conflict with the rehabilitative goal and "fresh start" promise of the juvenile court system.

Appellant recognizes that this Court has declared that "nothing in the 1977 or 1978 [death penalty statutes] indicates an intent to exclude violent criminal misconduct while a juvenile as an aggravating factor." (*People v Lucky* (1988) 45 Cal.3d 259, 295.) Appellant respectfully submits that the *Lucky* analysis is flawed, and should be reconsidered in light of *Roper v. Simmons*, *supra*.

E. Conclusion

For all the foregoing reasons, the prosecution's use of evidence of unadjudicated criminal activity against appellant requires reversal of the judgment of death. (See *Johnson v. Mississippi, supra*, 486 U.S. at p. 590; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown, supra*, 46 Cal.3d at p. 448.)

XIV.

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS BY REFUSING TO INSTRUCT THE JURORS THAT THEY COULD CONSIDER ANY LINGERING DOUBTS AS TO APPELLANT'S GUILT IN MAKING THEIR PENALTY DETERMINATION

Appellant asked the trial court to deliver the following instruction to the penalty-phase jury:

> Although you have found the defendant guilty of murder in the first degree beyond a reasonable doubt, you may demand a greater degree of certainty for the imposition of the death penalty. The finding of guilt is not infallible and any lingering or residual doubts which you may entertain on the question of his guilt, even though it [*sic*] does not rise to the level of a reasonable doubt, may be considered by you in determining the appropriate penalty to be imposed. Lingering or residual doubt is defined as the state of mind between "beyond a reasonable doubt" and "beyond all possible doubt." Thus, if you have any lingering or residual doubt concerning [appellant's] guilt, you may consider that as a factor in mitigation, upon which to base a sentence of life imprisonment without the possibility of parole.

(21 CT 5774 [Def. Special Inst. No. M]; 29 RT 4400-4401.) The trial court refused to give that instruction. (29 RT 4401.)

The trial court's refusal to give that requested instruction on lingering doubt violated state law, denied appellant his constitutional rights to due process, a fair trial, and a reliable penalty determination (U.S. Const., 5th, 6th, 8th and 14th Amends.), and was prejudicial. Reversal of the death judgment is therefore required.

A. The Requested Instruction Was Required Under State Law

This Court has long recognized that a capital defendant has a state law right to have the penalty phase jurors consider any residual or lingering doubt as to his guilt. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1238; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Terry* (1964) 61 Cal.2d 137, 145-147.) A jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving the defendant's guilt beyond a reasonable doubt, but may still demand a greater degree of certainty of guilt before imposing the death penalty. (See *People v. Terry*, *supra*, 61 Cal.2d at pp. 145-146.) In particular, both factors (a) and (k) of section 190.3 authorize a sentencing jury to consider any such lingering doubts about a capital defendant's guilt. (*People v. Sanchez* (1995) 12 Cal.4th 1, 77; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272.) Thus, a jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving the defendant's guilt beyond a reasonable doubt, but may still demand a greater degree of certainty of guilt before imposing the death penalty. (See *People v. Terry, supra*, 61 Cal.2d at pp. 145-146.)

A trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20; see also *People v. Thompson* (1988) 45 Cal.3d 86, 134-135 [recognizing the propriety of an appropriately-phrased instruction to considering lingering doubt regarding defendant's intent to kill]; *People v. Kaurish* (1990) 52 Cal.3d 648, 705-706 [rejecting claim that court should have given defense instruction where court's instruction that jurors could consider lingering doubt was sufficient].) A

number of trial courts in this state have found that giving this type of instruction was warranted by the evidence. (See, e.g., *People v. Cain* (1995) 10 Cal.4th 1, 66, fn. 23 [jury instructed on lingering doubt as mitigating circumstance]; *People v. Kaurish, supra*, 52 Cal.3d at p. 706-707 [jury given lingering doubt instruction].) Further, giving this type of instruction is in accord with sections 1093, subdivision (f), and 1127, both of which direct trial courts to charge the jury on the points of law that are correct and pertinent to the issues.

A lingering doubt instruction was warranted and appropriate here. The entire premise of the defense in this case was that the evidence of appellant's guilt was not what it appeared, and that he was in fact completely innocent. Thus, defense counsel argued throughout the trial that Francisco Castaneda committed the charged homicides. (See 3 RT 219, 9 RT 1404.) Moreover, Castaneda's testimony was absolutely essential to a guilty verdict on each of these murder charges, and given the facts that Castaneda had an extensive record of violent crimes (17 RT 2601-2602), exhibited a consciousness of guilt by fleeing the area immediately after the murders (16 RT 2400-2409), and, based on his own testimony, was at least a possible accomplice to the Creque/Gorman murder, there was an ample basis for the jury to distrust his testimony.

Yet, under the court's instructions any juror convinced that *some* doubt existed as to appellant's guilt would have had no legal basis for applying such doubt to his or her penalty determination. (See *Carter v. Kentucky* (1981) 450 U.S. 288, 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law"].) Each juror in this case was required to make a moral and normative decision whether appellant deserved to live or die (see

People v. Brown (1988) 46 Cal.3d 432, 448), and, in making that determination, the lingering question of whether the defendant is, in fact, guilty can be of great consequence. (See Koosed, *Averting Executions By Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt* (2001) 21 N. Ill. U.L. Rev. 41, 54-60 [discussing studies that establish the primacy of lingering doubt as the reason juries return life sentences rather than death verdicts].)

This Court has held that instructions on lingering doubt are not required on the theory that section 190.3, factors (a) and (k) adequately alert the jury that it can consider lingering doubt in reaching its penalty determination. (*People v. Osband* (1996) 13 Cal.4th 622, 716.) However, that conclusion is mistaken. The instructions on those factors would not lead a reasonable juror to understand that they permit the weighing of any residual doubt as to guilt in the penalty calculation.

Factor (a) directs itself to the circumstances of the crime, and a juror is likely to believe that it relates to the manner in which the crime was committed, and not necessarily to the defendant's involvement in the crime. Factor (a) encourages a juror to focus on the crime itself, and not the relative culpability or guilt of the persons who may have committed that crime. Thus, it does not lend itself to the consideration of lingering doubt of guilt based, as here, on the identity of the perpetrator.

Factor (k) directs the jury to consider any circumstance extenuating the gravity of the crime. Again, this factor focuses on the nature of the crime, not on any lingering doubt the jury may have about a defendant's participation in the crime. This factor also directs the jury to consider any aspect of the defendant's character or record, but does not make clear that this phrase relates at all to residual doubt about the defendant's guilt.

Thus, factors (a) and (k) do not give the jury a ready way to address lingering doubts regarding the defendant's guilt of the offense. Because appellant's requested instruction would have provided a method for the jury to give effect to such residual doubt, it should have been given by the trial court.

Moreover, appellant's requested instruction was appropriately phrased. (See *People v. Thompson, supra*, 45 Cal.3d at p. 134.) Unlike the requested instruction in *Thompson, supra*, appellant's lingering doubt instruction did not "invit[e] readjudication of matters resolved at the guilt phase" (*id.* at p. 135); instead, it simply called upon the jurors to "consider" any "lingering or residual doubts [they might] entertain on the question of [appellant's] guilt" in determining the appropriate penalty. (21 CT 5774.) Thus, the instruction would merely have *permitted* the jury to consider lingering doubt.

Lingering doubt instructions are inherently defense-oriented, but the plain, clearly-understandable language of appellant's instruction merely told the jurors they *could* consider any such doubts they entertained in determining the appropriate penalty, not that they were *required* to consider them. (21 CT 5774 [lingering doubt "may be considered by you" in determining the appropriate penalty].) Thus, the proposed instruction was effectively no different than the court-approved consciousness of guilt and confession or admission instructions which read: "If you find . . . , you may consider. . . ." (CALJIC Nos. 2.03, 2.70, 2.71; see also CALJIC Nos. 2.04, 2.06, 2.52.)

In short, even if it is assumed that the trial court has discretion to refuse to give a requested lingering doubt instruction in some cases, it was an abuse of discretion to refuse to so instruct in the instant case, because

the instruction was not just "warranted by the evidence" (*People v. Cox, supra*, 53 Cal.3d at p. 678, fn. 20), but was rather *required* so the jury could give effect to this important mitigating circumstance.

B. The Trial Court's Refusal To Give The Requested Instruction Violated Appellant's Federal Constitutional Rights.

The trial court's refusal to give the instruction was not only error under state law, it also violated appellant's federal constitutional rights to due process, equal protection, a fair trial by jury, and a reliable and non-arbitrary penalty determination, under the Fifth, Sixth, Eighth and Fourteenth Amendments. By refusing to specifically instruct on lingering doubt, the court failed to give the jury guidance with respect to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

The United States Supreme Court recently addressed the issue of lingering doubt in *Oregon v. Guzek* (2006)__ U.S. __, 126 S.Ct. 1226. The case decided a "narrow" federal question. (*Id.* at p. 1230.) The Court held that the Eighth and Fourteenth Amendments do not prohibit a state from excluding *new* alibi evidence at a penalty *retrial* under specified circumstances. (*Id.* at p. 1231.) Thus, *Guzek*'s holding is about the state's "authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." (*Id.* at p. 1232.)

In announcing *Guzek*'s limited rule, the high court clarified that its previous cases do not hold that a defendant at a capital sentencing hearing has an Eighth Amendment right to introduce "*new* evidence that shows he

was not present at the scene of the crime." (*Id.* at pp. 1231-1232, original italics.) However, the decision also recognizes that a defendant's alibi claim (or other claim of innocence) would be relevant mitigation evidence at sentencing. (*Id.* at p. 1233 ["The legitimacy of these trial management and evidentiary considerations, along with the typically minimal adverse impact that a restriction would have on a defendant's ability to present his alibi claim at resentencing convinces us that the Eighth Amendment does not protect defendant's right to present the evidence at issue here."].) Thus, under the Eighth Amendment, the identity of the perpetrator of the murder falls within the rule that "'the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and *any of the circumstances of the offense that the defendant proffers* as a basis for a sentence less than death.'" (*Id.* at p. 1229, original italics, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

In rejecting appellant's proposed instruction, the trial court violated the Eighth and Fourteenth Amendments. Without the lingering doubt instruction, there is a reasonable likelihood that the jury was precluded from considering and giving effect to constitutionally relevant mitigating evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380.) As explained in section A, supra, and incorporated by reference here, the given penalty phase instructions did not enable the jury to utilize any residual doubt they had about appellant's guilt as a reason for returning a sentence less than death.[84]

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[84] The high court's assertion in *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173, fn. 6, that it was "doubtful" that capital defendants have an

(continued...)

The trial court's refusal to give appellant's lingering doubt instruction also violated the due process clause of the Fourteenth Amendment, by arbitrarily depriving appellant of his state-created liberty interest not to be sentenced to death by a jury that was not adequately instructed on its ability to give effect to its lingering doubt as a mitigating factor in determining the appropriate penalty. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterley v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) California law mandates that penalty phase jurors must be instructed that they may consider lingering doubt as mitigation when warranted by the evidence. (*People v. Terry, supra*, 61 Cal.3d at pp. 145-147; see *People v. Cox, supra*, 53 Cal.3d at pp. 677-678; *People v. Thompson, supra*, 45 Cal.3d at p. 134.) Denying appellant a state-created right granted to other capital defendants whose juries were given a lingering doubt instruction further violated the equal protection clause of the Fourteenth Amendment. (See *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 425.)

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[84](...continued)
Eighth Amendment right to have the sentencing jury instructed to consider residual doubt does not undermine appellant's federal constitutional claim. As noted previously, *Guzek* recognizes that evidence supporting a defendant's innocence is relevant mitigation evidence. (126 S.Ct. at p. 1233.) And as set forth above, merely instructing the sentencing jurors in the bare language of factors (a) and (k) is not sufficient to allow them to give mitigating effect to such evidence. (See Section A, *supra*.)

C. The Error Requires Reversal Of Appellant's Death Sentence

The refusal to instruct the jury on the concept of lingering doubt was prejudicial under both the state law and federal constitutional harmless error standards. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown, supra,* 46 Cal.3d 432, 448.) Admittedly, appellant was convicted of three murders, which weighed in favor of a death sentence. However, as explained in Argument VI, *supra*, and incorporated by reference here, the prosecution's guilt-phase case rested almost completely on Castaneda, who the defense contended was in fact the actual killer and who had every incentive to falsely implicate appellant. (26 RT 3771-3772, 3793-3799.) Given the serious questions about Castaneda's credibility, the jury certainly could have harbored a lingering doubt about appellant's guilt. When the prosecution bases its capital murder case almost entirely on the always-suspect testimony of an accomplice, and particularly when that accomplice could have been the actual killer, lingering doubt as to the defendant's guilt could tip the balance of aggravating and mitigating circumstances toward a life sentence.

That possibility was real here. Although appellant was convicted of three murders and also had committed other crimes, the aggravating evidence was countered by ample evidence that those crimes were the products of his very troubled upbringing. Appellant was only 18 when the capital crimes occurred, and by the prosecutor's own account was raised in a world devoid of positive role models. (30 RT 4582.) Indeed, appellant's father not only committed violent crimes and went to prison while appellant was still a child (11 RT 1670, 29 4487-4489), he took appellant on drive-by shootings with his older brother when appellant was only 14.

(27 RT 4059-4060, 4067-4069, 30 RT 4614.) Moreover, appellant's mother's testimony indicated that she essentially abandoned him to the streets, and to the examples of his father, his older brothers, and their criminal confederates, before he was old enough for high school. (29 RT 4490-4493, 4499-4501.) Thus, even though the crimes of which appellant was convicted made him eligible for the death penalty, it was clear that those crimes were the products of his blighted childhood and adolescence.

Given the tension between the aggravating and mitigating evidence, if the jurors had understood that they could consider any lingering doubts about appellant's guilt in making their penalty determination, it is reasonably possible they would have chosen to be merciful.

Therefore, the death judgment must be reversed.

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XV.

THE TRIAL COURT VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS BY ARBITRARILY DENYING HIS MOTION TO MODIFY THE JURY'S DEATH VERDICT

The death sentence in this case must be reversed, and the matter remanded to the trial court for a new hearing on appellant's automatic motion to modify the sentence, because the trial judge failed to carry out his duties to 1) "independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in [his] independent judgment, the weight of the evidence support[ed] the jury verdict" (*People v. Millwee* (1998) 18 Cal.4th 96, 166), and 2) "state the reasons" for denying the motion. (*People v. Sheldon* (1989) 48 Cal.3d 935, 962-963.)

A. Factual Background

On November 13, 1998, appellant's automatic motion for modification of the verdict under section 190.4, subdivision (e), was heard. (31 RT 4655-4661.) Appellant's counsel submitted the matter on the "arguments and matters previously brought before this Court," but asked the court to consider whether it was disproportionate to sentence appellant to death when Francisco Castaneda escaped all punishment for his part in the crimes. Counsel asked the court to reduce appellant's sentence to life in prison without the possibility of parole based on that disproportion. (*Id.* at pp. 4656-4657.) The prosecutor responded that "proportionality has no place with respect to determination with respect to this particular defendant." (*Id.* at p. 4657.)

However, after hearing those arguments the court did not respond to

or rule on appellant's motion. Instead, the court first detailed the sentence to be imposed and then reviewed the charges filed, appellant's plea to those charges, and the verdicts returned by the jury. In other words, the court essentially recited the procedural history of the case. (31 RT 4658-4660.) The court then made the following recital:

> Thereafter, on Friday, November the 13th, 1998, the defendant's motion for modification of verdict and finding imposing the death penalty was heard by the Court, and said motion was denied. Whereupon the defendant's counsel stated there was no legal cause why sentence should not be pronounced, and the Court pronounced the judgment as follows: . . .

(*Id.* at p. 4661.) The court then sentenced appellant to death. (*Ibid.*)

After pronouncing that sentence the trial court made the following statement:

> This is truly something that didn't have to happen for anyone. It's ugly for anyone. People don't take responsibility for what they do anymore. It's [*sic*] permeates every level of society. You just don't get any help at home, friends, neighbors – it's sad. It's sad for all of us.

(21 RT 4662.) The court said nothing else of consequence before recessing the proceeding.

On June 25, 2004, at a hearing concerning correction of the record on appeal in this matter, appellant's counsel on appeal asked the trial judge about his statement on November 13, 1998, that appellant's motion for modification of the verdict "was heard" and "denied"on that same date. Appellate counsel asked the judge whether there was "something else besides [the record] I have," i.e., whether there was some other proceeding or portion of a proceeding not reflected in the record on appeal as it was then constituted in which the trial court ruled on appellant's modification

motion. (Reporter's Transcript on Appeal of 6/25/04 ("RT for 6/25/04"), 30-31.) The trial judge responded that there was "[n]othing [] omitted" from the record, and explained that when he said at the hearing on November 13, 1998, that the motion "was" heard and denied he was referring to "one and the same hearing, one and the same point in time." The judge then explained that his remarks at that hearing concerning the denial of the modification motion were from "a script which I'm reading from . . . . It's just a script so that I can go through all the machinations." (*Id.* at p. 31.)

B. Applicable Legal Standards

Section 190.4, subdivision (e), provides that every defendant sentenced to death "shall be deemed to have made" a motion for modification of that sentence, and further provides that:

> [i]n ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to the law and the evidence presented. The judge shall state on the record the reasons for his findings.

Thus, to comply with the requirements of section 190.4, subdivision (e), "the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death judgment. The court must state the reasons for its ruling on the record." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.) Further, the trial court is required to "provide a ruling [on the modification motion] adequate 'to insure thoughtful and effective appellate review.'" (*People v. Arias* (1996) 13

Cal.4th 92, 191-192, quoting *People v. Rodriquez* (1986) 42 Cal.3d 730, 794.) As this Court said in *Arias*, *supra*, the trial court need not "recount every detail" of the matters it considers mitigating or aggravating, but must "indicate[] its clear understanding of its duty to weigh all the mitigating and aggravating evidence." (13 Cal.4th at p. 192.)

As interpreted by this Court, section 190.4, subdivision (e), requires the trial judge to "make an independent determination whether imposition of the death penalty upon the defendant is *proper* in light of the relevant evidence and the applicable law." (*People v. Rodriguez, supra*, 42 Cal.3d. at p. 793, italics added; *People v. Viera* (2005) 35 Cal.4th 264, 301.) In drafting section 190.4, subdivision (e), the Legislature "intended that the trial judge exercise [its] responsibilities for independent review. . . ." (*Rodriquez*, *supra*, 42 Cal.3d at p. 794.) In addition, this Court suggested in *Rodriguez* that such an independent review of the verdict by the trial court may also be required by the Eighth and Fourteenth Amendments to the federal Constitution. (*Ibid.*; see also, *People v. Frierson* (1979) 25 Cal.3d 142, 178-179.)

On appeal, this Court independently reviews the ruling of the trial court on a capital defendant's motion to modify the death sentence, after independently considering the record. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1267; *People v. Mickey* (1991) 54 Cal.3d 612, 704.) When the trial court has failed to comply with the requirements that it "make an independent determination whether imposition of the death sentence is proper in light of the relevant evidence and applicable law," and state on the record its reasons for denying the modification motion, the proper remedy is to remand the matter for a new hearing on that motion. (*People v. Burgener* (2002) 29 Cal.4th 833, 891 [failure to make independent determination];

People v. Sheldon, *supra*, 48 Cal.3d at pp. 962-963 [failure to state reasons].)

C. This Matter Should Be Remanded To The Trial Court For A New Hearing On Appellant's Motion To Modify The Verdict, Because The Trial Court Did Not Independently Reweigh The Evidence Or State Its Reasons For Denying Modification

The trial court erred in ruling on appellant's motion to modify the verdict, because it is clear from the record that the court did not exercise its discretion to independently reweigh the mitigating and aggravating evidence, and did not state on the record the reasons for denying the motion. The trial court's failure to understand and apply the proper standard in evaluating appellant's motion for modification of the verdict requires this Court to "vacate the judgment of death and remand [the case to the trial court] for a new hearing on the application for modification of the verdict." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 891-892.)

In *Burgener*, this Court found that the trial judge "failed to exercise his statutory duty to reweigh the evidence," and to determine whether that evidence "supported the judgment of death," because there was no "indication in the record" that the judge understood that duty, and the judge's statements "betray[ed his] reliance on a lesser standard of review." (*Id.* at pp. 890-891.) Thus, since the trial judge's statements did not "indicate that [he] had undertaken an independent review of the evidence or balancing of the aggravating and mitigating factors," this Court remanded the matter to the trial court for a rehearing on the motion. (*Ibid*; see also *People v. Bonillas* (1989) 48 Cal.3d 757, 801 [trial court's reference to incorrect standard of review in ruling on modification motion, and failure to indicate which aggravating or mitigating circumstances it considered and

the relative weight it gave to them, required remand for rehearing].)

This case involves more compelling evidence than *Burgener* that the trial court failed to comply with its statutory duty to reweigh the evidence. The record here does not merely indicate that the trial judge failed to apply the correct standard in ruling on the motion; that record affirmatively shows that the judge merely read from a "script" which included the formulaic statement that he had "denied" the motion. (RT for 6/25/04, 31.) In ruling on appellant's motion, the trial judge did not cite to any specific aggravating and/or mitigating circumstances or evidence, or indicate in any other manner that he had weighed any of the evidence. (21 RT 4658-4651.) *All* the court said about the motion for modification was that it had been "denied." (*Id.* at p. 4651.)

Unlike *People v. Mayfield* (1993) 5 Cal.4th 142, 196, this is not a case where although the trial court "misstated the applicable [standard for reviewing modification motions], it nevertheless applied the proper concept." In *Mayfield*, the trial court found in ruling on the motion to modify the verdict "that . . . the jury's assessment of the evidence that the circumstances in aggravation outweigh those in mitigation . . . is supported by the weight of the evidence and is not contrary to the law or the evidence." (*Id.* at p. 196.) The trial court in *Mayfield* also said it had made the "assessment . . . [that] the factors in aggravation beyond a reasonable doubt outweigh those in mitigation . . . ." (*Ibid.*) Since the trial judge here said so forthrightly that he was simply reciting a "script so that [he could] go through all the machinations" required by the statute (RT for 6/25/04, 31), this Court cannot conclude that this judge, like the one in *Mayfield*, "correctly applied the law" even though he failed to cite the correct standard. (*Ibid.*)

For the same reasons, vacation of the death judgment and remand for a new hearing is also required because the trial court failed to state its reasons for denying appellant's motion to modify the verdict. (*People v. Sheldon*, *supra*, 48 Cal.3d at pp. 962-963.) Merely reading a script saying that the motion had been denied was insufficient to comply with the requirement that the court state its reasons for denying the motion.

Thus, in *Bonillas*, *supra*, 48 Cal.3d 757, this Court remanded the case for a new hearing on the defendant's motion to modify the verdict both because the trial court's comments indicated that it used an improper standard of decision in denying that motion, and because the court's stated reasons for denying the motion were "insufficiently specific" to indicate which factors it relied upon and to "'assure thoughtful and effective appellate review . . . .'" (48 Cal.3d at p. 801, quoting *People v. Rodriquez*, *supra*, 42 Cal.3d at p. 794.) Moreover, a remand was ordered in *Bonillas* even though the trial court said in denying the motion that the "aggravating circumstances [in the case]. . . exceed[ed] the mitigating circumstances." (48 Cal.3d at p. 801.) Since the trial judge here did not provide any explanation or justification for refusing to modify the death verdict, remand is clearly required under *Bonillas*.

Further, the script the trial judge read from here was not a "prepared statement" which amounted to a "tentative opinion," and thus complied with the requirements of section 190.4, subdivision (e), on that basis, as was the case in *People v. Brown* (1993) 6 Cal.4th 322, 339-340. Unlike *Brown*, where the defendant claimed on appeal that he was deprived of meaningful oral argument by the trial court's use of such a prepared statement because it indicated the judge had prejudged the motion (6 Cal.4th at p. 339), the trial court's reading of a "script" in this case amounted to a wholesale

violation of appellant's right to meaningful review of the jury's penalty determination.

This case presents a far more compelling case for reversal and remand than either *Bonillas*, *supra*, or *Burgener*, *supra*. The trial judge here merely stated that he "had" denied the motion, without indicating *any* basis for that denial, or stating *any* reasons supporting it. (31 RT 4661.) Clearly, the record of the trial court's ruling is insufficient in all respects to permit "thoughtful and effective appellate review" of that decision, and the sentence must accordingly be reversed and the case remanded to the trial court for a new hearing. (*Bonillas*, *supra*, 48 Cal.3d at p. 801 [remand ordered where the trial court's statement that the aggravating circumstances "exceeded" those in mitigation was "insufficiently specific"]; *People v. Sheldon*, *supra*, 48 Cal.3d at pp. 962-963 [remand ordered where the trial judge failed to state his reasons for denying the automatic motion to modify the verdict].)

D. The Trial Court's Failure To Independently Reweigh The Evidence Violated Appellant's Rights Under The State And Federal Constitutions

The trial court's conduct of the modification hearing violated appellant's federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendment to the federal Constitution, and the analogous provisions of the California Constitution (Art. I, §§ 1, 7, 15, 16, 17.) Because the death penalty is qualitatively different than any other sentence, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The high court said in *Gregg v. Georgia* (1976) 428 U.S. 153, 204-206, that judicial review

of the jury's findings "serves as a check against the random or arbitrary imposition of the death penalty." In California, the trial court is charged with the initial judicial review of the verdict. By failing to conduct that judicial review as required by the statute, the trial court violated appellant's constitutional rights against the arbitrary and capricious imposition of the death penalty.

Both this Court and the United States Supreme Court have consistently recognized the critical importance of strict compliance with the requirements of section 190.4, subdivision (e), in ensuring the heightened reliability of death judgments under California's statutory scheme. (See, e.g. *People v. Frierson*, *supra*, 25 Cal.3d at p. 179 [finding California's death penalty statute constitutional in part due to automatic modification procedure required under section 190.4(e)]; accord *Pulley v. Harris* (1984) 465 U.S. 37, 51-53; *People v. Diaz* (1992) 3 Cal.4th 495, 575, n.34; see also *Proffitt v. Florida* (1976) 428 U.S. 242, 248-250 [Florida statute's provision requiring trial judge to consider jury's recommendation, independently weigh evidence in determining penalty, and provide statement of reasons in support of death judgment, protects against arbitrary and capricious imposition of death in violation of Eighth Amendment].) There was no such strict compliance with the requirements of section 190.4, subdivision (e), in this case.

Furthermore, the trial court's failure to independently reweigh the evidence deprived appellant of his constitutionally protected, legitimate expectation that he would be deprived of his liberty or life only by a court following state law in deciding his motion to modify the death sentence. (See *Hicks v. Oklahoma* (1980) 447 U.S. 345, 346 [statute entitling the defendant to have his punishment fixed by a jury created a constitutionally

protected liberty interest; violation of the statute amounted to an arbitrary deprivation of his right to due process under the Fourteenth Amendment].) Thus, the trial court's violation of the statutory procedures set out in section 190.4, subdivision (e), also implicated appellant's federal procedural due process rights.

In *Walker v. Deeds* (9th Cir. 1994) 50 F.3d 670, 672-673, for instance, the Ninth Circuit held that a Nevada sentencing statute implicated a defendant's constitutional rights and created a constitutionally protected liberty interest. Relying on *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346, the appellate court found that when a state has provided a specific method for determining whether a certain sentence shall be imposed, it is not correct to say that the defendant's interest in having that method adhered to "'is merely a matter of state procedural law.'" (*Id.* [citing *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300, and *Hicks, supra*].) Every capital defendant in California has a substantial and legitimate expectation that he or she will not be deprived of life or liberty unless the trial court complies with the requirements of section 190.4, subdivision (e). The trial court's failure to do so here clearly implicated appellant's constitutionally protected liberty interest.

Finally, the trial court's failure to comply with the requirements of section 190.4, subdivision (e), also implicated the defendant's rights under the Eighth Amendment. On at least two occasions Justice Mosk suggested that the procedure required by section 190.4, subdivision (e), implicates the Eighth Amendment right to a fair, accurate, and reliable penalty determination. (See, *People v. Allison* (1989) 48 Cal.3d 879, 917-918 (dis. opn. of Mosk, J.); *People v. Heishman* (1988) 45 Cal.3d 147, 206 (dis. opn. of Mosk, J.).) As Justice Mosk pointed out in *Allison*, *supra*, the Eighth

Amendment's "requirement of heightened reliability for a sentence of death" requires the trial judge, not a reviewing court, to rule on the motion for modification. Since "only the trial judge has had the opportunity to observe the defendant and the demeanor of the witnesses . . . it is only that judge who can make a constitutionally adequate determination as to whether the defendant should be sentenced to death in accordance with the verdict." (48 Cal.3d at p. 917-918.)

For all the reasons set forth above, the penalty judgment in this case should be reversed and the case remanded to the trial court for a new hearing on appellant's motion to modify the penalty verdict.

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XVI.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. The failure to conduct intercase proportionality review in capital cases violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

The Eighth Amendment to the United States Constitution forbids cruel and unusual punishments. The jurisprudence applying that ban to capital cases requires death judgments to be both proportionate and reliable, which are closely related concepts. Part of the requirement of reliability 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* (1983) 463 U.S. 939, 954 (plur. opn., alterations in original), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opn. of Stewart, Powell, and Stevens, JJ.).)

The United States Supreme Court has lauded comparative proportionality review as a means to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as ensuring that the death penalty will not be imposed on a capriciously-selected group of convicted defendants. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review is an important tool in ensuring the constitutionality

of a state's death penalty scheme.

Despite its recognition of the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily required for a state death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court ruled that California's capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme, i.e., that the application of the relevant factors provides jury guidance and lessens the chance that the death penalty will be arbitrarily applied. (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) This case illustrates that California's statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) It is because comparative case review is the most rational and effective means by which to ascertain whether a scheme produces arbitrary results that the vast majority of the states that sanction capital punishment require such review.

The capital sentencing scheme in effect at appellant's trial was "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Section 190.2 immunizes few if any first degree murderers from death eligibility, and section 190.3 provides little guidance

to juries in making the death-sentencing decision. California's scheme fails to provide any method for ensuring consistency in capital sentencing verdicts, and consequently defendants with widely-varying degrees of relative culpability are sentenced to death.

The lack of intercase proportionality review violated appellant's Eighth and Fourteenth Amendment right against the arbitrary and capricious imposition of a death sentence, and requires the reversal of that sentence.

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XVII.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

California's death penalty statute fails to provide any of the safeguards against the arbitrary imposition of death common to other death penalty sentencing schemes. Juries do not make written findings or achieve unanimity as to aggravating circumstances, and need not find beyond a reasonable doubt that: 1) any aggravating circumstances have been proved; 2) the aggravating factors outweigh the mitigating circumstances; or 3) death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, penalty phase juries are not instructed on any burden of proof. Under the rationale that the decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making applicable to all other parts of the law have been banished from the process of deciding whether to impose death. Those omissions run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.[85]

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[85] Appellant recognizes that in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court said that the "routine or generic claims" it has "repeatedly [] rejected," and which are raised on appeal primarily to "preserve them for review by the federal courts, . . . will be deemed fairly presented so long as [they are] stated in a straightforward manner accompanied by a brief argument." Because appellant does not know whether the federal court will likewise deem such claims "fully presented," the presentation of "generic" claims in this brief is perhaps more expansive than contemplated by this Court. To the extent that the Court finds the presentation of any such claim in this brief to be unduly extensive, appellant apologizes. The State Public Defender's office is in the process

(continued...)

A. The Statute And Instructions Unconstitutionally Fail To Assign The State The Burden Of Proving Beyond A Reasonable Doubt That Aggravating Factors Exist And Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

Before a defendant can be sentenced to death in California the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3), and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538.) However, under the California scheme neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty needs to be proved pursuant to any delineated burden of proof. The failure to assign a burden of proof renders California's death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . . ." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842.) However, that reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington*

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[85](...continued)
of developing more straightforward versions of all such claims to meet both this Court's standard and that of the federal courts, but has not yet completed that process.

(2004) 542 U.S. 296.

Those three decisions by the high court effectively dispose of any argument that the federal Constitution allows a defendant to be sentenced to death by a jury which has not found beyond a reasonable doubt that specific aggravating circumstances exist, that those factors outweigh the mitigating evidence presented, and that death is the appropriate penalty. As Justice Scalia said in distilling the holding in *Ring*: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for a conviction of first degree murder with a special circumstance is death, *Apprendi* did not apply to California capital sentencing. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263.) In light of the United States Supreme Court's decisions, those holdings are simply untenable because, read together, the *Apprendi* line of cases renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.)

As *Apprendi* states, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." Under California's sentencing scheme, the death penalty may not be imposed based solely upon a verdict of first

degree murder with special circumstances. While it is true that such a verdict carries a maximum sentence of death (Pen. Code, § 190.2), the statute "'authorizes a maximum punishment of death only in a formal sense'." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) To impose death, the jury must also find at least one aggravating factor, and find that the aggravating factor or factors outweigh any mitigating factors, and death is appropriate. Those additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) Thus *Blakely-Ring-Apprendi* require that the jury be instructed to find those factors, and determine their weight, beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the sentencer's functions, and that facts must be found before the death penalty may be considered. (See, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 478 [penalty jury's role includes "find[ing] facts"]; *People v. Johnson* (1993) 6 Cal.4th 1, 48 [finding it appropriate to give CALJIC No. 2.21 to penalty jury in light of "the admissibility of penalty phase testimony on a variety of factual matters . . . ."].) Nonetheless, this Court has held that *Ring* does not apply to capital sentencing in California because the facts found at the penalty phase "bear upon, but do not necessarily determine," which penalty is appropriate. (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has also sought to distinguish *Ring* by comparing California's capital

sentencing process to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

However, before a California jury can weigh the aggravating and mitigating circumstances it must first decide whether any statutory aggravating circumstances exist. Thus, while the determination whether the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, that determination is no less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. Thus, under *Apprendi*, *Ring*, and *Blakely*, a California jury's determination that the aggravating factors substantially outweigh those in mitigation must be made beyond a reasonable doubt.

This Court has also relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) However, in *Ring* the state also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances based on that "difference," and the high court rebuffed that reasoning. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi v. New Jersey*, 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

It is certainly true that the decision whether to impose death or life is moral and normative. However, this Court errs in using that fact to eliminate procedural protections which render the decision more rational and reliable, and in allowing the findings that are prerequisites to that decision to be uncertain, undefined, and subject to dispute not only as to their significance, but also their accuracy. This Court's refusal to accept the

applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require The Jury To Be Instructed That It May Impose A Sentence Of Death Only If Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Ones, And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.) The primary procedural safeguard in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof, which in criminal cases is rooted in the due process clauses of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Under the Fourteenth and Eighth Amendments, the burden of proof for factual determinations during the penalty phase must be beyond a reasonable doubt.

2. Imposition Of Life Imprisonment Without Parole Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake, and on the social goal of reducing erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) Selection of a constitutionally appropriate burden of persuasion is accomplished by

weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

The "private interests affected by the proceeding" in this context are obviously of the highest order. Yet even far less important interests are protected by the requirement of proof beyond a reasonable doubt. (See *In re Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender].) Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," the United States Supreme Court reasoned:

> When the State brings a criminal action to deny a defendant liberty or life, ... 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation.]

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423-424, 427.)

Moreover, there is substantial room for error in deciding whether to impose the death penalty, because that decision involves "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kramer*, *supra*, 455 U.S. at p.

763.) A burden of proof beyond a reasonable doubt can effectively reduce that risk of error, since that standard is "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

Finally, "the countervailing governmental interest supporting use of the challenged procedure" also calls for imposition of a reasonable doubt standard. The use of that standard would not deprive the State of the power to impose capital punishment, it would maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Thus, under the Eighth and Fourteenth Amendments, a death sentence may not be imposed unless the sentencer is convinced beyond a reasonable doubt that death is the appropriate sentence.

C. The Constitution Requires The State To Bear Some Burden Of Persuasion At The Penalty Phase

The failure of the penalty phase instructions here to assign any burden of persuasion regarding the jury's ultimate penalty phase determinations is unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

Allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, it is reasonably likely that different juries will impose different standards of proof in deciding whether to impose death, and that who bears the burden of persuasion as to the sentencing determination will vary from case to case. Such arbitrariness

undermines the requirement of a meaningful basis for distinguishing the few cases in which the death penalty is appropriate, and is unacceptable under the Eighth and Fourteenth Amendments. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374.)

Further, while California's scheme allocates no burden to the prosecution, the prosecution must obviously have *some* burden to show that the aggravating factors outweigh the mitigating ones, because the jury must impose a sentence of life without possibility of parole if it does not make that finding (Pen. Code, § 190.3), and may reject death even if no mitigation is presented. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979.)

Section 190.4, subdivision (e), clearly suggests that some sort of finding must be "proved" by the prosecution and reviewed by the trial court, since it requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to determine "whether the jury's findings and verdicts . . . are contrary to law or the evidence presented." Clearly, a jury could not make a finding without imposing some sort of burden on the party offering the evidence on which that finding is based. The failure to inform capital jurors how to make the factual findings they are legally required to make is inexplicable.

Moreover, California imposes on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible in noncapital cases. (See Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520.) In a capital case, *any* aggravating factor relates to wrongdoing – even

factors that are not themselves wrongdoing, such as the defendant's age, are deemed to aggravate other wrongdoing by the defendant – and the prosecution must thus bear the burden of proof to establish any such factors. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments. In addition, providing greater protections to noncapital 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* (9th Cir. 1990) 897 F.2d 417, 421.)

The burden of proof is among the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that it had to make unanimous findings on aggravating circumstances, or even that a simple majority of them had to agree that any particular aggravating factor or combination of aggravating factors warranted a death sentence. Thus, the jurors were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe the jury imposed the death sentence in this case based on any agreement other than the general one that, based on a comparison of the aggravating and mitigating factors, death was warranted. Thus, in deciding

to impose death, each juror may have relied on evidence that only he or she believed existed. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

While this Court has held that "there is no constitutional requirement for [a penalty phase] jury to reach unanimous agreement on the circumstances in aggravation that support its verdict" (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749), appellant asserts that failing to require unanimity as to aggravating circumstances encourages jurors to act in an arbitrary, capricious and unreviewable manner, and thus slants the sentencing process in favor of execution. The lack of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – in particular its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) However, that is not the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* undermines the reasoning in *Hildwin*, and thus the

constitutional validity of this Court's ruling in *Bacigalupo*.[86]

Under *Ring*, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California* (1998) 524 U.S. 721, 732), the Sixth and Eighth Amendments are not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the California Constitution assumes that there will be jury unanimity in criminal trials. The first sentence of article I, section 16 of the Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

The failure to require the jury to unanimously find the aggravating factors true also stands in stark contrast to the rules applied in California to noncapital cases. Thus, where a defendant faces special allegations that may increase the severity of his sentence the jury must render a separate, unanimous verdict on each such allegation. (See, e.g., Penal Code, § 1158(a).) Since capital defendants are entitled to more rigorous protections than noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing

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[86] Appellant acknowledges that the Court has held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor (*People v. Prieto*, *supra*, 30 Cal.4th at p. 265), but, as shown previously, that holding is mistaken. (See Subsection A, *supra*.)

more protection to noncapital than to capital defendants would violate the Fourteenth Amendment's equal protection requirement (see e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), unanimity with regard to aggravating circumstances must be constitutionally required. To apply the requirement to an enhancement finding carrying only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), violates the equal protection, due process and cruel and unusual punishment clauses, and the Sixth Amendment guarantee of a fair jury trial.

Where a death penalty statute permits a wide range of possible aggravators, as California's does, and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously on the existence of each aggravator to be considered there is a grave risk the verdict will cover up wide disagreement among the jurors about just what the defendant did, and that the jurors will fail to focus upon specific factual details, and will simply impose death based on all the evidence. Such an inherently unreliable decision-making process is unacceptable in a capital context.

E. The Penalty Jury Should Also Have Been Instructed On The Presumption of Life

In noncapital cases, and at the guilt phase of a capital trial, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Accordingly, appellant requested an instruction that would have

told the jurors that if they had any doubt as to the correct punishment, they were required to vote for life over death. (21 CT 5782; Def. Spec. Instr. No. S.)[87] The trial court refused to give that instruction.

Appellant submits that the trial court's failure to instruct the jury that the law favors life, and presumes life imprisonment without parole to be the appropriate sentence, violated his rights to due process of law (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15), to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and 14th Amends.; Cal. Const. art. I, § 17), and to the equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

This Court has held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" provided the state properly limits death eligibility. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) However, as the other subsections of this argument demonstrate, California's death penalty law is remarkably deficient in the protections required for the consistent and reliable imposition of capital punishment, and a presumption of life

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[87] Defense Special Instruction No. S read as follows:

> If you should have a doubt as to which penalty is more appropriate, death or life imprisonment without the possibility of parole, you must give the defendant the benefit of that doubt, and render a verdict fixing the punishment as life without the possibility of parole.

(21 CT 5782.)

instruction is thus constitutionally required.

F. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XVIII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered by you in reducing the degree of moral culpability of the defendant, or justify a sentence of life in prison without the possibility of parole.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and is appropriate by considering the totality of the aggravating circumstances

> with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(21 CT 5737-5738; 30 RT 4637.)

That instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed because it did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Giving that flawed instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), a fair trial by jury (U.S. Const., 6th & 14th Amends.), and a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.) and requires reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instruction Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard Which Did Not Provide Adequate Guidance And Direction

Pursuant to CALJIC No. 8.88, the question of whether to impose a death sentence hinged on whether the jurors were "persuaded that the aggravating circumstances [we]re so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole." (30 RT 4637.) However, the words "so substantial" provided the jurors with no guidance as to "what they ha[d] to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) Using that phrase violated the federal constitution because it created a vague, directionless and unquantifiable standard, inviting the sentencer to

impose death through the exercise of "the kind of open-ended discretion held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)[88]

Appellant acknowledges that this Court has opined that, in this context, "the differences between [*Arnold* and California capital cases] are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Appellant submits that the differences between those cases do not undercut the Georgia Supreme Court's reasoning.

This case has at least one quality in common with *Arnold* and *Breaux*: it featured penalty-phase instructions which did not "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Arnold*, *supra*, 224 S.E.2d at p. at p. 391.) The instant instruction, like the one in *Breaux*, uses the term

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[88] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

"substantial" to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty.

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those identified in *Arnold*, because No. 8.88 governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance. Nothing about CALJIC No. 8.88 "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Because the instruction rendered the penalty determination unreliable, the death judgment must be reversed.

B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether The Death Penalty Is The Appropriate Punishment, Not Simply An Authorized One

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538.) However, CALJIC No. 8.88 does not make that standard of appropriateness clear. Telling the jurors they may return a judgment of death if the aggravating evidence "warrants" death does not inform them that the central inquiry is whether death is the appropriate penalty.

A rational juror could find in a particular case that death was warranted but not appropriate, because "warranted" has a considerably broader meaning than "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground

for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found that such a sentence was permitted, not that it was "especially suitable," fit, and proper, i.e., appropriate. The Supreme Court has demanded that death sentences be based on the conclusion that death is the appropriate punishment, not merely one that is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate.

Whether death is "warranted" is decided when the jury finds the existence of a special circumstance authorizing the death penalty. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, even if the jury makes the preliminary determination that death is warranted or authorized it may still decide that penalty is not appropriate.

Further, the instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (30 RT 4636.) That reference did not tell the jurors they could only return a death verdict if it was appropriate.

This crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) That judgment must therefore be reversed.

C. The Instructions Failed To Inform The Jurors That They Were Required To Impose Life Without The Possibility of Parole If They Found That Mitigation Outweighed Aggravation

Section 190.3 directs that after the jury considers the aggravating and mitigating factors it "shall impose" a sentence of imprisonment for life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, §190.3.) The United States Supreme Court has held that this requirement is consistent with the individualized consideration of the defendant's culpability required by the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88, which tells the jury that death may be imposed if the aggravating circumstances are "so substantial" in comparison to the mitigating circumstances that death is warranted. Use of the phrase "so substantial" does not properly convey the "greater than" test mandated by section 190.3. CALJIC No. 8.88 would permit the imposition of a death penalty whenever aggravating circumstances were "of substance" or "considerable," even if outweighed by the mitigating circumstances. Because it fails to conform to the specific mandate of section 190.3, CALJIC No. 8.88 violates the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p.346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 (emphasis original).)

This Court has approved the language of CALJIC No. 8.88 on the basis that since it states that a death verdict requires that aggravation

outweigh mitigation, "it [i]s unnecessary to instruct the jury of the converse." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant respectfully asserts that the Court's conclusion conflicts with numerous opinions disapproving instructions emphasizing the prosecution's theory of a case while minimizing or ignoring the defense theory. (See e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *Reagan v. United States* (1895) 157 U.S. 301, 310.)

The law does not rely on jurors to infer one rule from the statement of its opposite. (See *People v. Moore*, *supra*, 43 Cal.2d at pp. 526-527.) Thus, even assuming that the instruction at issue here was a correct statement of law, it stated only the conditions under which a death verdict could be returned, and not those under which a verdict of life was required.

It is well-settled that in criminal trials the jury must be instructed on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) Denying that fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, CALJIC No. 8.88 is not saved by the fact that it is a sentencing instruction, as opposed to one guiding the determination of guilt or innocence, since reliance on such a distinction would violate equal protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, slighting a defense theory in instructions not only denies due process, but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the case. (See *Zemina v. Solem* (D.S.D. 1977)

438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028.) Reversal of appellant's death sentence is required.

D. Conclusion

As set forth above, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment, and the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XIX.

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

The jury was instructed on section 190.3 pursuant to CALJIC Nos. 8.85, the standard instruction regarding the statutory sentencing factors (21 CT 5697-5698), and 8.88, the standard instruction regarding the weighing of those factors. (*Id.* at pp. 5736-5737.) Those instructions rendered appellant's death sentence unconstitutional in several ways. First, the application of section 190.3, subdivision (a), resulted in the arbitrary and capricious imposition of the death penalty. Second, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Third, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fourth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instructions to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Sixth, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Appellant's death judgment must be reversed.

A. The Instruction On Section 190.3, Subdivision (a), And Application Of That Sentencing Factor, Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Section 190.3, subsection (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within its meaning, even ones squarely at odds with others deemed aggravating in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975-976), it has been used in ways so arbitrary and contradictory as to violate both due process of law and the Eighth Amendment.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that using the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding it to be a relevant "circumstance of the crime" that, e.g., the defendant hated religion,[89] sought to conceal evidence after the crime,[90] threatened witnesses,[91] disposed of the victim's body so it could not be recovered,[92] or

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[89] *People v. Nicholas* (1991) 54 Cal.3d 551, 581-582.

[90] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[91] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

[92] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

had a mental condition which compelled him to commit the crime.[93]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even ones starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California*, *supra,* 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.) That factor is therefore unconstitutional as applied. (*Ibid.*)

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

Although most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case, the trial court did not delete those inapplicable factors from the instruction. Including those irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, and violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions (see, e.g., *People*

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[93] *People v. Smith* (2005) 35 Cal.4th 334, 352.

v. Carpenter (1999) 21 Cal.4th 1016, 1064), but requests reconsideration for the reasons given below, and to preserve the issue for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b) and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) But the "whether or not" formulation used in CALJIC No. 8.85 suggests that the jury can consider the inapplicable factors as well. (21 CT 5697-5698.) Instructing jurors on irrelevant matters dilutes their focus, distracts their attention, and introduces confusion into their deliberations. In this context, irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, the failure to delete mitigating factors unsupported by the evidence inevitably denigrates the defendant's mitigation evidence. Appellant's jury was effectively invited to sentence him to death because there was evidence in mitigation for "only" one or two factors, while there was either evidence in aggravation or no evidence with respect to the rest. The failure to screen out inapplicable factors here undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to individualized sentencing based on permissible factors relating to him and the crimes. That error also artificially inflated the weight of the aggravating factors, and violated the constitutional requirement of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 447 U.S. 625, 637.) Reversal of appellant's death judgment is required.

C. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded A Fair, Reliable And Evenhanded Application Of The Death Penalty

The instructions given below concerning the statutory sentencing factors did not inform the jury which of those factors were aggravating, which were mitigating, or which could be either aggravating or mitigating, depending upon the evidence. (21 CT 5697-5698.) Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – i.e., factors (c), (d), (e), (f), (g), and (i) – is relevant solely as mitigation. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance on which factors could be considered solely as mitigating, the jury was free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and to aggravate appellant's sentence based on nonexistent or irrational aggravating factors. That precluded the reliable, individualized capital sentencing determination required by the federal constitution (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879), and was reversible error.

D. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded The Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); 21 CT 5697), and "substantial" (see factor (g); 21 CT 5697-5698), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

E. Failing To Require The Jury To Make Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law

CALJIC Nos. 8.85 and 8.88 as given in this case did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing sentence. Failing to require such express findings deprived appellant of his Fourteenth Amendment and Eighth Amendment rights to meaningful appellate review, and his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Because California juries have total, unguided discretion on how to weigh the statutory sentencing factors (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. This Court held that parole boards must state their reasons for denying parole because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*In re Sturm* (1974) 11 Cal.3d 258, 267.) The same reasoning must apply to the far graver decision to put someone to death. Further, in noncapital cases California requires the sentencer to state on the record the

reasons for its sentence choice. (Pen. Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Accordingly, the sentencer in a capital case must identify for the record the aggravating circumstances upon which its sentence is based.

The fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral," does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. (See, e.g., Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); State v. White (Del. 1978) 395 A.2d 1082, 1090.) California's failure to require such findings renders its procedures unconstitutional.

F. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Those Safeguards To Capital Defendants Violates Equal Protection

As noted previously, the United States Supreme Court has repeatedly said that heightened reliability is required in capital cases, and that courts must be vigilant in ensuring procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732.) However, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to ones charged with noncapital crimes, in violation of the constitutional guarantee

of equal protection.

"[P]ersonal 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.) In the case of interests identified as "fundamental," courts "subject[] the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing both that it is justified by a compelling purpose, and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.) The State cannot meet that burden here, because in capital cases the state and federal equal protection guarantees apply with greater force, and the scrutiny of the challenged classification is stricter, because the interest at stake is life itself.

In Argument XVI, *supra*, appellant explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on violent criminal acts under section 190.3, subdivision (b), and other aggravating factors, and the disparate treatment of capital defendants as set forth in this argument. The procedural protections outlined in these arguments, but denied capital defendants, are especially important in insuring reliable and accurate fact-finding in capital trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

G. Conclusion

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

XX.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

The United States is one of the few nations which regularly uses the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) As the Canadian Supreme Court recently noted, the death penalty has been essentially abolished in 108 countries, including all the major democracies except the United States, India and Japan. (*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because the international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment's determination of evolving standards of decency, appellant raises this claim under that amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to

the states under the Supremacy Clause of the federal Constitution. (U.S. Const. art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR as "the supreme law of the land. . . ." (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties in the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant would constitute "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. While this Court has previously rejected international law claims directed at the death penalty in California (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511), there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should apply to the United States (see *United States v. Duarte-Acero*, *supra*, 208 F.3d at p.1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.). Appellant asks the Court to reconsider its prior rejection of international law claims concerning the death penalty, and to find that his death sentence violates international law.

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to use as a punishment for exceptional crimes such as treason, is uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky*, *supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn).) Indeed, *all* the nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of April 2005) at <http://www.amnesty.org> or

<http://www.deathpenaltyinfo.org>.)

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment, because our Founding Fathers looked to the nations of Western Europe as models on the laws of civilized nations, and as sources for the meaning of terms in the Constitution. (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J., quoting 1 Kent's Commentaries 1); *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.)

"Cruel and unusual punishment" as defined in the Constitution is not limited to acts which violate the standards of decency existing in the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) Thus, if the standards of decency as perceived by the civilized nations of Europe have evolved, what the Eighth Amendment requires has evolved with them. The Eighth Amendment thus prohibits forms of punishment that are not recognized by several of our states and the civilized nations of Europe, or that are used by only a handful of countries around the world – including totalitarian regimes with "standards of decency" antithetical to ours. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violates Eighth Amendment in part on the views of "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31.)

No other nation in the Western world still uses or accepts the death penalty, and the Eighth Amendment does not permit our nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring

nations are enemies].) California's use of death as a regular punishment violates the Eighth and Fourteenth Amendments, and appellant's death sentence should therefore be set aside.

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XXI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS OCCURRING AT THE GUILT AND PENALTY PHASES

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of those errors nevertheless undermines confidence in the integrity of the guilt and penalty phase proceedings, and warrants reversal of appellant's conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) (en banc) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

This trial was infected with gross unfairness from the outset, as demonstrated by the trial court's denial of appellant's motion for separate trials on these unrelated homicide charges. (Argmt. III.) The trial court's refusal to exclude the evidence obtained by the police in violation of appellant's right to counsel (Argmt. II), or to allow appellant to fully present the evidence supporting his theory of the case (Argmt. IV), and the court's refusal to give defense-requested jury instructions necessary to the

defense theory of the case (Argmt. V), further undermined the fairness and reliability of the guilt determination. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Appellant's convictions must therefore be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative errors occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing cumulative effect of errors on penalty determination].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be

harmless at the guilt phase but prejudicial at the penalty phase].)

In addition to the guilt phase errors enumerated above, the trial court: erroneously admitted clearly insufficient aggravating evidence concerning an incident in which appellant purportedly committed an assault with a deadly weapon (Argmt. X); failed to properly instruct the jury on the elements of assault with a deadly weapon (*id.*); refused to limit the prosecutor's presentation of unduly inflammatory victim impact evidence (Argmt. XI); failed to fully and appropriately instruct the jurors on their consideration of penalty phase evidence (Argmts. XII [Victim Impact Evidence], XIV [Lingering Doubt], XVII [Required Burden of Proof], XVIII [Scope of Jury's Sentencing Discretion], XIX [Application of Sentencing Factors]; and failed to perform its statutory duty to reweigh the evidence supporting the jury's penalty verdict (Argmt. XV). Thus, the jury was allowed to considered inadmissible and/or unduly inflammatory evidence in making its penalty determination without necessary instructions on how to consider that or any other aggravating evidence, and the trial court failed to determine whether, in its independent judgment, the weight of the evidence supported the jury's determination. The "negative synergistic effect" of those multiple errors "render[ed the degree of overall unfairness to [appellant] more than that flowing from the sum of the individual errors." (*People v. Hill, supra*, 17 Cal.4th at p. 847 [discussing the cumulative effect of incidents of prosecutorial misconduct].) Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, did not effect the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S.1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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CONCLUSION

For all the reasons stated above, the judgment in this case must be reversed.

DATED: March 20, 2006

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

WILLIAM HASSLER
Deputy State Public Defender

Attorneys for Appellant
Cisco James Hartsch

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(e))

I, WILLIAM HASSLER, am the Deputy State Public Defender assigned to represent appellant CISCO HARTSCH in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 78,531 words in length.

ATTORNEY'S NAME
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Cisco Hartsch* No. S074804

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Office of the Attorney General
ATTN: FELICITY SENOSKI
110 West A Street, Suite 1100
San Diego, CA 92101

Riverside County Superior Court
4050 Main St.
Riverside, CA 92201

Cisco James Hartsch
P.O. Box P-19601
San Quentin State Prison
Tamal, CA 94964
(Hand Delivered on March 21, 2006)

Riverside County District Attorney
4075 Main Street
Riverside, CA 92201

John Acquilina, Esq.
3895 Twelfth St.
Riverside, CA 92501

Each said envelope was then, on March 20, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on March 20, 2006, at San Francisco, California.

DECLARANT