IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOHN ANTHONY GONZALES, MICHAEL SOLIZ, Defendants and Appellants.	No. SO75616 Los AngelesCounty Superior Court No. KA033736

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

The Honorable Robert W. Armstrong, Judge

APPELLANT'S OPENING BRIEF

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STATUTES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	**No. SO75616**
Plaintiff and Respondent,	)	
	)	
vs.	)	**Los AngelesCounty**
	)	**Superior Court**
	)	**No. KA033736**
JOHN ANTHONY GONZALES,	)	
MICHAEL SOLIZ,	)	
	)	
	)	
Defendants and Appellants.	)	
	)	

INTRODUCTION

Appellant's murder convictions and death sentences were the products of a fundamentally unfair trial. Critical errors throughout the guilt and penalty phases undermine reliability in the outcomes and require reversal.

The case involves two separate incidents: a market robbery and the shooting of the market owner, Lester Eaton; and the shootings of Elijah Skyles and Gary Price purportedly in retaliation for a prior gang murder. The trial court erroneously denied a motion to sever the separate crimes. Tried together, the evidence of the Eaton crimes, which showed that appellant Soliz and co-appellant Gonzales had operated jointly, improperly and unfairly bolstered the disputed evidence that they had committed the Sklyes/Price crimes together, rather than by a single gunman.

Numerous other errors tainted the guilt determinations on the Skyles and Price counts. The jury heard allegations that these crimes were racially motivated even though that inflammatory allegation had been dismissed prior to trial. The prosecution presented evidence of threats to witnesses, making appellant and Gonzales appear more dangerous, even though no evidence connected either defendant to any of the threats. The trial court denied a continuance which might have allowed the defense to rebut surprise testimony that defendants had acted in tandem in committing the Skyles/Price shootings, evidence never provided in discovery and highly prejudicial to the defenses presented by both appellant and Gonzales that the shooter acted alone.

Although eyewitnesses identified appellant as the shooter, the reliability of the identification testimony was open to challenge. The confession by Gonzales that he had shot Skyles and Price, without any participation by appellant, strongly contradicted the eyewitness testimony. But efforts to corroborate Gonzales's confession were overly restricted by unfair trial court rulings such as prohibiting expert testimony to show the detectives used improper procedures in conducting the photographic line-ups and unfairly limiting the cross-examination of a gang expert.

Despite the prosecution's evidence showing that the shootings of Skyles and Price followed immediately from an argument, the trial court erroneously failed to instruct on the lesser offense of voluntary manslaughter. These circumstances demonstrate that the first-degree murder convictions cannot stand.

Even more egregious errors occurred in the penalty phase. The first penalty phase ended in a hung jury as to appellant with the jury favoring life for all three murders. In the penalty retrial, the trial court prohibited any

jury voir dire on racial bias, even though the Skyles/Price crimes involved Hispanic defendants charged with killing African-Americans. The trial court also precluded defense counsel from exploring the willingness of jurors to consider the concept of lingering doubt, even though that concept formed the core of appellant's penalty defense.

Appellant's lingering doubt defense rested principally on the testimony of Gonzales. But Gonzales's credibility was irreparably harmed by critical errors by the trial court. The trial court interrupted Gonzales's testimony at one point to take "judicial notice" that his testimony was physically impossible. It is indisputable that the matter was not a proper subject for judicial notice. Instead, the judge served as an unsworn expert witness for the prosecution, not subject to cross-examination, with the devastating result of telling the jurors that Gonzales had lied. The improper attacks on Gonzales's credibility continued when the trial court permitted the prosecutor to engage in a series of misconduct with the prosecutor compelling Gonzales to describe every major prosecution witness as liars. The trial court further extinguished whatever force would have been left of appellant's lingering doubt defense when the trial court refused to instruct on lingering doubt, despite earlier assurances that such an instruction would be given and the use of such an instruction in the original penalty phase which resulted in the jury being unable to reach a penalty determination.

The trial court also committed other key instructional errors. The trial court refused to instruct on mercy and refused other requested instructions that would have clarified many of the deficiencies in penalty instructions given. The trial court also inexplicably failed to give basic instructions necessary for a proper understanding and application of criminal law.

These multiple errors undermine any reliability in the penalty determinations. Appellant's convictions and death sentences should be reversed.

* * * * *

STATEMENT OF THE CASE

An Information filed March 20, 1997 in the County of Los Angeles charged appellant Michael Soliz and John Gonzales with the following crimes: count 1 alleged the murder (Pen. Code, § 187) of Lester Eaton on January 27, 1996 with a special circumstance allegation that the murder occurred during the commission of a robbery (Pen. Code § 190.2, subd. (a)(17)); count 2 alleged second degree robbery (Pen. Code, § 211) of Lester Eaton; count 3 alleged second degree robbery (Pen. Code, § 211) of Betty Eaton with enhancements alleged as to both counts 2 and 3 that the crimes were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and as to counts 1, 2 and 3 that both defendants personally used a firearm (Pen. Code, §12022.5, subd. (a)); count 4 alleged the murder (Pen. Code, § 187) of Elijah Skyles on April 14, 1996 with a special circumstance allegation that he was intentionally killed because of his race (Pen. Code, § 190.2, subd. (a)(16)); count 5 alleged the murder (Pen. Code, § 187) of Gary Price on April 14, 1996 with special circumstance allegations that the victim was intentionally killed because of his race (Pen. Code, § 190.2, subd. (a)(16)) and multiple murders (Pen. Code, § 190.2, subd. (a)(3)) as to counts 1, 4 and 5, and enhancements that counts 1, 4 and 5 were for the benefit of a criminals street gang (Pen. Code, § 186.22, subd. (b)(4)), that a principal was armed with a firearm in the commission of the offenses alleged in all five counts (Pen. Code, § 12022, subd. (a)(1) and that appellant Soliz personally used a firearm in the commission of the crimes alleged in counts 4 and 5 (Pen. Code, § 12022.5, subd. (a)). (CT 384-387.)

Soliz and Gonzales were arraigned on March 20, 1997 with Joseph Borges appointed to represent Soliz and John Tyre appointed to represent

Gonzales. Both defendants entered pleas of not guilty on all counts and denied the special circumstance and enhancement allegations. (CT 389-390.)

Motions filed on behalf of both defendants for a change of venue (CT 391-394, 431-456), for severance of defendants or separate trials (CT 388-402, 457-475), and for severance of counts (CT 478-484) were all denied by the trial court. (CT 537-538; RT 29-30, 33.) Although the trial court while denying separate trials of the defendants did order the use of dual juries because of an *Aranda/Bruton*[1] problem with a statement by Gonzales, counsel for appellant Soliz subsequently stipulated to admission of the Gonzales statement waiving any *Aranda/Bruton* objection and the parties agreed to a single jury. (RT 28-29, 84-95.) The court also denied a motion to suppress the statement by Gonzales. (CT 403-408; RT 801-811.) The court granted in part a motion to set aside the information pursuant to Penal Code section 995 resulting in striking the special circumstance allegations that the murders were because of the victims' race. (CT 409-415, 421-430, 537-538; RT 25-27)

The case was assigned to the Honorable Robert W. Armstrong for trial and jury voir dire commenced on January 22, 1998. (CT 598.) On February 5, 1998, the jurors and alternates were sworn with opening arguments and the presentation of evidence starting on February 9, 1998. (CT 608-609, 613-615.) The prosecution rested on February 20, 1998 and, following the denial of a motion for acquittal, the defense presented its evidence and rested that same day. (CT 645-648)

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[1] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

Jury deliberations commenced on the morning of February 24, 1998. (CT 652-653.) Later that day, the jury announced it had reached verdicts on counts 1-3 which were ordered sealed. (CT 652-653.) On February 25, 1998 the jury reached verdicts on the remaining counts. The jury found the defendants guilty on all counts and found the special circumstance allegations and enhancements true. (CT 767-781.)

The penalty phase commenced on March 2, 1998 with both the prosecution and defendant Gonzales presenting all their evidence that day. (CT 789.) Soliz presented his penalty phase evidence on March 3, 1998 and jury deliberations began that day as well. (CT 795-796.) On March 9, 1998, the jury returned verdicts of life in prison without possibility of parole for Gonzales on counts 4 and 5, and announced that it could not reach a verdict as to Gonzales on count 1 or on any of the counts as to Soliz. (CT 827-829.) The court declared a mistrial as to the hung counts and excused the jury. On March 19, 1998, the court sentenced Gonzales to life in prison without possibility of parole on counts 4 and 5 with credits for time served. (CT 842-843.)

Jury voir dire for the penalty retrial commenced on October 13, 1998. (CT 871-872.) The jurors and alternates were sworn on October 22, 1998. (CT 889-890.) The presentation of evidence concluded on November 3, 1998 and jury deliberations began that afternoon. (CT 911-912.) The jury returned penalty verdicts on November 3, 1998 imposing the death penalty on Gonzales for count 1, life without possibility of parole on Soliz for count 1, and the death penalty on Soliz for counts 4 and 5. (CT 954, 956-957.)

Both defendants filed motions for new trials (CT 965-966, 977-978, 982-983) which the court denied on December 18, 1998. (CT 1012-1013,

1018-1021.) The court also denied the motions for modification of the verdicts. (CT 1013, 1021.) The court sentenced Gonzales to death on count 1 plus 10 years for the firearm use, to state prison for the mid-term of three years plus four years on the firearm use enhancement on counts 2 and 3, with the sentences on counts 2 and 3 stayed pursuant to Penal Code section 654, with the death sentence on count 1 to run consecutive to the life without possibility of parole sentences already imposed on Gonzales for counts 4 and 5. (CT 1012-1017.) The court sentenced Soliz to life without possibility of parole on count 1, the mid-terms of three years plus four years for the firearm enhancements on counts 2 and 3 with those sentences stayed pursuant to Penal Code section 654, and to death on counts 4 and 5 with two consecutive 10 year enhancements for personal use of a firearm. (CT 1018-1023.)

This appeal from those convictions and sentences is automatic.

* * * * *

STATEMENT OF THE FACTS

A. The Guilt Phase

1. The Eaton Market Crimes

Lester and Betty Eaton owned and operated a small market in Hacienda Heights. (RT 948.) Betty Eaton testified that on the evening of January 27, 1996, a man came into the store, pointed a gun at her, and asked where they kept the money. (RT 954-955.) Betty Eaton described the man as Hispanic, 18-20 years of age, with a bandanna covering his face and a silk stocking or skull cap on his head. (RT 955-956.) When Betty attempted to get her husband's attention, she noticed that a second person had come into the store and had a gun pointed at Lester. (RT 957.) She described the second man as also Hispanic, in his late teens or early 20's, and not wearing a bandanna or any covering on his head. (RT 966-967.) She testified that the man who assaulted her husband was the heavier of the two intruders. (RT 967.)

The next thing Betty knew, Lester had been pinned up against the wall by the second man. She did not see the man strike her husband but assumed he had because she noticed Lester bleeding from a cut on his forehead. A struggle followed with Lester and the second man ending up on the floor where the struggle continued. Betty then heard two gunshots.

Realizing that her husband had been shot, Betty panicked and ran out the store. She noticed a blue van in the parking lot. Betty went to a nearby house and called 9-1-1. (RT 963-965.) When she returned to the market, officers now present at the scene accompanied her inside. She found the cash register on the floor with the cash tray missing. The tray had contained at least $100, some checks and some food stamp coupons. (RT 975-976.) Her husband's wallet had also been taken and his shotgun kept in the store

and a Colt pistol he wore in a holster on his hip were missing. (RT 974-975.)

Deputies later drove Betty to the location of Turnbull Canyon Road and Clark Avenue where she saw a blue van. This van appeared be the same van she had observed parked outside the market when she ran out following the shooting. (RT 973.) Personal items kept by Lester Eaton in his wallet were later discovered scattered along the road. (RT 1140, 1148-1149.)

Deputy Ryan found Lester Eaton on the floor by the meat counter. Lester Eaton had blood on him and a bullet wound in the back. He appeared to be deceased. (RT 852.) Paramedics arrived about five minutes later and pronounced Lester Eaton dead. (RT 854.) The medical examiner found that Eaton had five gunshot wounds: two shots to the head, one to the chest and two superficial wounds. (RT 1192-1208.) The two shots to the head and one to the chest were all probably fatal wounds. (RT 1211-1212.)

Lynn Reeder, one of the two homicide detectives assigned to this crime, observed Lester Eaton's body on the floor with blood underneath the victim's rights shoulder and right side of his head. (RT 869.) The left pocket of Lester Eaton's trousers had been pulled inside out. (RT 869.) The left lens of the victim's eyeglasses was out and later found on the floor in the meat cutting room with blood on it. (RT 870-871.) The absence of any shell casings at the scene caused the detectives to believe the murder weapon to be a revolver because an automatic or semi-automatic ejects the shell casings after the bullet is fired. (RT 896-898.)

A Chevy Astro van matching the description of the van observed in the market parking lot was found parked in a lot of a commercial building a few blocks from the market. (RT 899.) The van had been reported stolen

on January 26, 1996. (RT 1048.) Detective Reeder observed a cash tray on the floorboard of the van. (RT 900.) Other items found in the van included a live bullet, a Raider's jacket, a map showing the location of the market, some food stamp coupons and additional paper items. (RT 900-901, 1035, 1274.) Fingerprints on two documents found in the van were identified as from Gonzales. (RT 1293.)

Dorine Ramos testified that in the early evening of January 26, 1996, she was walking to the store when a car containing her friend Rosemary approached. (RT 1053.) Rosemary offered Dorine a ride to the store. (RT 1054.) Rosemary's boyfriend, Randy Irgoyen, known to Dorine as Bird, was driving the car. (RT 1055-1056.)

Bird knew of Dorine's interest in buying a car so they first drove to the area around La Puente Park where Bird showed Dorine a car for sale. (RT 1057, 1058.) Dorine indicated she really wanted a van so Bird then showed her a blue Astro van that Bird said could be purchased cheaply. (RT 1060-1063.) After Dorine indicated she was not interested in that van, they drove to a house a few blocks from the park. (RT 1065.)

Bird went into the house and later came out with a group of about 10 men ranging in ages from late teens to late 20's. (RT 1065, 1067.) All of the men had similar hair lengths which Dorine described as "cholo," "baldy," or as very short haircuts. (RT 1069.)

The men were on Dorine's side of the car, about 32-33 feet away, and Dorine could hear them talking. (RT 1070-1071.) She heard two of the men in particular talking about doing a "jale" which is Spanish slang for doing a job. (RT 1071.) Dorine originally thought that meant working but she then heard the men talking about needing a "cuete" which is Spanish slang for a gun. (RT 1070, 1075.) At that point she realized they were not

talking about working. (RT 1076.) Dorine identified the two speakers as defendants Soliz and Gonzales. (RT 1074.) The men also mentioned something about a van picking them up. (RT 1084-1085.)

Dorine described Soliz as wearing a white shirt, black sweater, Levi's or dark pants, and having a tattoo on his neck and very short hair. (RT 1077.) Dorine described Gonzales as wearing a white shirt, sweater, dark pants or Levi's, and also having very short hair. (RT 1078.) Both men had handkerchiefs and dark beanies in their pockets. (RT 1078-1079.)

Dorine later saw a Honda Prelude drive up and park across the street. Bird approached that car, had a conversation with the two occupants and then handed a gun to the driver. (RT 1086.) Dorine heard the driver yell out that he was going to get another cuete (gun) and that he would be back. (RT 1087.) Bird gave bandannas to both Soliz and Gonzales and they put them on so as to cover the lower part of their faces. (RT 1089.) When the Honda returned, Soliz and Gonzales entered the car and they drove off. (RT 1091-1092.) Dorine estimated the time then as 6:20 or 6:30 in the evening. (RT 1092.) Dorine left the house with Bird and Rosemary about five minutes after the Honda left. (RT 1093.) As they left, they passed by the location where the van had been located and Dorine noticed that the van was gone. (RT 1093.)

Dorine later saw news reports about the robbery that night, including reports showing the van suspected of being used in the robbery. (RT 1096-1097.) Recognizing the van as the one she had seen by the park, Dorine contacted the police a few days later. (RT 1096-1097.) Dorine identified the Raider's jacket found in the van as the jacket worn by Gonzales that night. (RT 1095.)

Richard Alvarez, who also uses the name Richie Rich, received a telephone call from Gonzales on the night of the market robbery to come pick up Gonzales. (RT 1158.) Alvarez testified he picked up Gonzales, who was accompanied by Soliz and another person known to Alvarez as Clumsy, at 7th and Turnbull. (RT 1159-1160.) Alvarez denied ever telling the detectives that he followed the blue van driven by Clumsy with Gonzales and Soliz also inside the van. (RT 1163.) After being granted immunity, Alvarez testified that he visited Gonzales at jail after his arrest in this case. Alvarez authenticated the voices on a tape (People's Exh. 20) of the visit as Gonzales and his own. (RT 1238-1239.) Alvarez explained that the reference to Kimberly referred to on the tape was to a friend of his who had told him that his name had been mentioned in court in connection with this case which caused him to be nervous. (RT 1239-1241.) In the taped conversation, Alvarez discussed whether he should leave town. (RT 1247.)

Detective West testified that he interviewed Richard Alvarez on October 3, 1996. (RT 1250.) Alvarez told the detective that he received a phone call at home from Gonzales who told him to go to Jennifer's house. (RT 1253.) Alvarez went to Jennifer's house and met with Gonzales, Soliz and Clumsy. Those three then left in a blue van driven by Clumsy with Alvarez following in his car. (RT 1254.) They drove to a closed business on Turnbull Canyon Road where Alvarez waited as the other three drove off in the van. (RT 1254-1255.) They returned a short time later, parked the van, got into his car and Alvarez drove them back to Jennifer's house where they remained the rest of the evening. (RT 1256.)

2. The Skyles/Price Shootings

At about 12:45 am on April 14, 1996, John Curly, a detective with the City of Covina Police Department, responded to a report of an assault

with a deadly weapon at the Shell gas station located at the intersection of San Bernardino Road and Azusa Avenue. (RT 1307-1308.) At the scene, Curly observed two victims on the ground who appeared to have suffered gunshot wounds. (RT 1309.) He described both victims as black males about 15-17 years of age. (RT 1309.) The victims were on the ground about 15 feet from the pay phone on the east portion of the gas station. (RT 1309.)

Curly checked the victims for vital signs and found none for either person. (RT 1310.) When paramedics arrived at the scene they also could not find any signs of life and pronounced the victims dead. (RT 1310-1311.) Curly identified photographs of the scene introduced as defense exhibits as substantially similar to the lighting conditions that existed the night of the shootings. (RT 1332-1335.)

Joe Holmes, the homicide detective assigned to investigate these shootings along with his partner, David Castillo, identified the victims as Elijah Skyles and Gary Price. (RT 1340-1341.) Sklyes was wearing a long sleeved black and white checkered shirt or jacket, red pants and a red belt with a "P" on the belt buckle. (RT 1342-1343.) Red clothing is consistent with affiliation with the Bloods gang as is the P on the buckle which may stand for "Piru," a street in the Compton/Willowbrook area from where the Bloods gang originated. (RT 1343-1344.) Price had on a blue windbreaker and blue baggy pants commonly worn by gang members. (RT 1343-1344.) Blue clothing is consistent with affiliation with the Crips gang. (RT 1344.)

Holmes recovered 11 expended shell casings from a nine mm weapon. (RT 1386.) An autopsy performed on Skyles showed nine gunshot wounds, mostly nonfatal wounds. (RT 1843, 1849-1856.) The fatal wound was a shot that entered on the left side of his back that passed

through the left lobe of the lung, the heart and the liver. (RT 1844-1845.) The medical examiner concluded the shot came from behind with the victim kneeling with the shooter standing over him. (RT 1847.) Price had seven gunshot wounds, including two fatal wounds to the head and one to the abdomen. (RT 1860, 1863-1864, 1872.)

Vondell McGee was the cousin of Gary Price and had been a friend of Elijah Skyles for over a year. (RT 1435-1436.) Price had just turned 18 and Skyles was 15 at the time of their deaths. (RT 1436.)

On the night of the shootings, McGee had just got off work at a Chuck E Cheese establishment up the street from the gas station. Skyles and Price met him when he got off work around 12:30-12:40 in the morning and the three of them stopped at the gas station to talk. (RT 1436-1437.) Price and Skyles were on foot while McGee had a bike. (RT 1437.) While at the gas station, McGee observed a tan or beige 1989 or 1991 Honda Accord containing about five Hispanics pass by after looking at the trio at the station. (RT 1441.) McGee remained at the station talking to Skyles and Price for about five minutes, then gave them some change to use the phone and left on his bike for his nearby home. (RT 1443-1444.)

Within about a minute or two after leaving Skyles and Price, McGee heard gunfire. When he reached home, McGee attempted to page Price. (RT 1445.) McGee then returned to the gas station where he found Skyles and Price dead near the telephone. (RT 1446.) McGee described photographs depicting the scene (Def. Exhs. A-J) as generally depicting the lighting conditions as they existed the night of the shooting. (RT 1453-1455.)

Carol Mateo was driving east on San Bernardino Road near Azusa on April 14, 1996 at about 12:40-12:45 in the morning. Her husband, Jose,

was in the back seat and her brother Jeremy Robinson was in the front passenger seat. (RT 1456-1458.) As they approached the intersection at Azusa, they heard several loud popping sounds. (RT 1458.) Initially believing something wrong with her car, she slowed down but continued through the intersection. (RT 1459.) Then her brother screamed, "Oh shit. Look. Look over there at the gas station. That guy's shooting those guys." (RT 1460.) Looking in that direction, Carol Mateo saw two black kids falling down as a man shot them. (RT 1460, 1462.)

Carol Mateo described the shooter as male, Hispanic, about 5'7" to 5'8", medium build and with very short hair. (RT 1465.) Before the jury, she identified Soliz as the shooter. (RT 1466.)

Mateo said that after the shooting stopped, the shooter looked in her direction for about three to five seconds, put his hands in his pockets, then ran to a beige Honda Accord. (RT 1467.) Mateo estimated the distance from her car to the shooter as 50 feet. (RT 1513.) She drove off but then turned around when she realized that the street was pitch black and unsafe. (RT 1470.) She pulled in by the Chuck E Cheese and called 9-1-1. (RT 1471.) Mateo then saw a Honda she believed to be the same car as the one involved in the shooting pull in the driveway. (RT 1471.) Mateo said the people in front looked like the guys that did the shooting. (RT 1472.) She testified that she saw Gonzales twice that night: first at the gas station standing outside the Honda before the car drove away; and second when the Honda came by Chuck E Cheese. (RT 1472-1473.) Mateo testified she saw the second person directly behind the vehicle. (RT 1493.) She was concerned at the time about getting away. (RT 1493.) Mateo could not recall whether she told Detective Holmes about seeing a second man. (RT 1493, 1534.) Mateo acknowledged that she may have testified at the

preliminary hearing that she never saw another person outside the car and that her memory at the time of trial was not as solid. (RT 1554-1555.)

Carol Mateo later picked Soliz out of a photographic line-up as the shooter. (RT 1476-1478.) She described Soliz as looking "identical" to the shooter. (RT 1478.)

Mateo had never seen anything so dramatic before. (RT 1483.) When she first saw the shooting, she was in the middle of the intersection. (RT 1487.) At that point, her focus was on the victims. (RT 1495.) She saw the shooter for only three to five seconds. (RT 1491, 1507, 1510.) She saw the shooter run to the vehicle but she took her eyes off of him to look down the road since she was still driving. (RT 1496, 1521.) She did not focus at all on the shooter's clothing. (RT 1520.) She does not know if she was ever shown a photograph of Gonzales. (RT 1523-1524.) When she saw the Honda the second time, she observed two people in the front seat and could not see the back seat. (RT 1499.) She believed it was the same car as involved in the shooting, and believed the shooter was in the car but she was upset and on the telephone at the time. (RT 1499.)

Jeremy Robinson, Carol Mateo's brother, testified that as they drove by the gas station he heard shots fired. (RT 1569-1570.) Looking in the direction of the shots, he saw two black males on the ground while another man stood over them shooting. (RT 1571-1572.) He described the shooter as Mexican, probably about 22 years old, medium build, with a bald or shaved head, and wearing tan or beige pants and a white shirt. (RT 1574-1575.)

Robinson testified that he did not see the man who did the shooting in court. (RT 1575.) Then he indicated that he saw someone in court that looked "familiar" and identified Soliz as "looking like" the shooter. (RT

1575-1576.) Robinson acknowledged that he testified at the preliminary hearing that he did not get a good look at the shooter and reaffirmed that point on cross-examination at trial. RT 1589.) He also admitted that he did not identify Soliz at the preliminary hearing as the shooter. (RT 1589, 1605.)

Robinson was seated in the right rear passenger seat and had a right hand view as they drove by the scene of the shooting. (RT 1592.) He estimated the vehicle's speed as about 15 miles per hour as they passed by and said they never came to a standstill. (RT 1592.) Robinson saw the shooter run to a beige, four-door Honda Accord. (RT 1578.) Robinson did not see anyone else outside the Honda. (RT 1590.) Robinson selected Soliz in a photographic line-up as looking like the person who did the shooting. (RT 1583.)

Alejandro Garcia Mora worked at the Shell gas station at the time of the shootings. (RT 1608.) At about 12:40 in the morning, while on the telephone in the office, he heard several shots coming from the area of the bathrooms and pay phones. (RT 1609, 1611.) Looking in the direction of the shots, he saw two Hispanic men running to a gray, 4-door Honda. (RT 1612-1613.) Both men got into the rear of the car, each on a different side. (RT 1612.)

The man who got into the left side or the driver's side appeared to be about his age of 22. (RT 1613.) He could not tell the age of the other man. (RT 1613.) The man who entered the left side carried something black, like a bag, about the size of a handgun. (RT 1616.) That man was bald or had very short hair. (RT 1616.) When the car passed by the office, he could see there were two people in the front, and three in back including a woman. (RT 1618.)

Garcia picked a photograph of Soliz out of a series of photos in folders as looking like the person he saw get in the left side of the car. (RT 1624.) That photograph appeared most like the person he saw at the shootings. (RT 1624.) At the time of the photographic line-up, he wrote that "number 2 resembles the person that ran to the car after the shots. I didn't take time – I didn't took [sic] time to look at his face." (RT 1628.) He never got a look at the man's face, and only saw the person from the side. (RT 1629.) Of the people in the line-up, number 2 had the shortest hair and he picked him for that reason. (RT 1629.) He was not shown any photographs of Gonzales. (RT 1652.)

Detective Holmes took statements from Carol Mateo, Jeremy Robinson, and Alejandro Garcia Mora. A photograph of Gonzales was not included in any of the photographic folders shown to these witnesses. (RT 1657-1658.) According to Holmes, Mateo never told him that she saw two people outside the car after the shooting. (RT 1656.) None of those witnesses told Holmes they saw more than one person outside the car. (RT 1810.) Detective Castillo did say that Jeremy Robinson said he only saw one person outside the car. (RT 1810-1811.)

Judith Mejorardo testified to knowing Gonzales who also goes by the names of "Speedy" or "Rebel." (RT 1660, 1664.) She also knows Soliz who sometimes uses the name of "Jasper." (RT 1665.) Her brother Augustin, is also known as "Listo" (RT 1666, 1668) although she denied knowing him by that name. (RT 1669-1670.) Her brother owned the car depicted in People's Exhibit 45, a Honda Accord. (RT 1671, 1680.) She identified Gonzales as belonging to the Puente gang but said she did not know if Soliz belonged to that gang. (RT 1672.) She also did not know if her brother belonged to that gang. (RT 1671.) She knows a person named

Clumsy, whose true name is Mike, and he claims to belong to the Perth Street gang. (RT 1673.)

She denied any recall of whether she was present at a shooting in April 1996. (RT 1676-1677.) The trial court granted permission to the prosecutor to treat Mejorado as a hostile witness.[2] (RT 1678.) When shown a transcript of her preliminary testimony, she continued to deny any recall of being present at the shootings. (RT 1678.) The prosecutor then read her preliminary hearing testimony where she acknowledged being present at the gas station. (RT 1679.)

After continuing to deny any recall of the incident, the prosecutor read her preliminary hearing testimony where she testified she was picked up in her brother's car. (RT 1682.) She had testified at the preliminary hearing that Clumsy was driving because her brother was too drunk to drive. (RT 1684.) Mejorado sat in the middle of the front seat. (RT 1684.)

Mejorado testified at the preliminary hearing that she heard others in the car point out three blacks and she saw them standing in front of the gas station. (RT 1693.) Mejorado testified at trial that she could have told the officers anything because they had threatened to take away her little daughter. (RT 1695.) She felt scared by this threat and would have said anything. (RT 1707.) Holmes also threatened to throw her brother in jail. (RT 1735.) She was told that is what you said before and that is what you have to say on the stand in court. (RT 1735.) She was told by the prosecutor that if she said what she had told the detectives before, no charges would be brought against her brother. (RT 1735.) So that is what

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[2] The trial court later expanded on this ruling by finding that Mejorado had feigned a lack of recollection. (RT 1691.)

she did at the preliminary hearing. (RT 1735.) She claimed that whatever she said were things she might have heard on the street. (RT 1735.) She was also threatened with arrest. (RT 1740.) She did not want to testify at trial and expressed concern about her brother because he is in jail and this might cause him trouble. (RT 1723.) At trial, on cross-examination, she claimed that to her recollection she did not actually see the incident. (RT 1742.) At trial, she denied being in the car when a shooting occurred. (RT 1766.) She is aware that one of the defendants confessed to the shooting and that the confession differed from her preliminary hearing testimony. (RT 1768-1769.) She said her preliminary hearing testimony was based on the "murder book" that contained her prior statements that she read before the hearing and that her testimony was based on the book rather than her memory. (RT 1743-1744, 1761.)

According to Mejorado's preliminary hearing testimony, Clumsy drove off and then made a U-turn. When their car returned to the gas station, Mejorado saw two blacks standing by the phone. (RT 1702-1704.) She testified at the preliminary hearing that both Jasper and Speedy got out of the car and went to talk to the guys by the phone booth. (RT 1709.) She had told the detectives that Speedy stayed closer to the car when he got out. (RT 1710.) She previously testified that both Jasper and Speedy were talking to the guys by the phone. (RT 1713.) In her preliminary hearing testimony, she described the talking as "loud." (RT 1716.) Then she heard gunshots. (RT 1728.) Looking out the rear of the car, she could only see a hand holding a gun as it fired. (RT 1729.) She did not see the shooter. (RT 1730.) Then both Jasper and Speedy got back into the car. (RT 1730.) The person who had fired the gun got into the back seat on the driver's side. (RT 1730-1731.) She thinks that was Jasper and she identified Jasper in

court as Soliz. (RT 1731-1732.) She testified in the trial that she told the detectives that she did not know who did the shooting but that she told them it was Jasper when they recorded her statement because she was forced into the position. (RT 1776.) She said she did not know what to say, felt pressured and just picked a name. (RT 1776.) The pressure came from the detectives' threats to put her brother in jail and take away her little girl. (RT 1777.) She did her best to keep her brother out of jail and then later had to go along with her statements because she could not take them back. (RT 1777.) She testified at trial that she did not know who fired the gun that killed those black men. (RT 1778.)

David Castillo, homicide investigator Holmes' partner, said that Holmes did not threaten to arrest Mejorado's brother or threaten to take away her child "in his presence." (RT 1792-1793.) Castillo testified that Mejorado told them that she had been picked up at her house by Mike Gonzales (Clumsy), Michael Soliz, John Gonzales and her brother Augustin in his car. (RT 1793.) She described her brother as intoxicated that night. (RT 1794.) She went along because she did not want her brother driving that night due to his intoxication. (RT 1795.)

According to Castillo, Mejorado told the officers that as they drove by the Shell gas station, Jasper and Speedy said they knew the individuals standing outside the station. She saw three male blacks in that area. (RT 1796.) Clumsy turned the car around and returned to the gas station where Jasper and Speedy got out of the car. (RT 1797-1798.) Speedy stayed back and Jasper approached the two male blacks left at the station. (RT 1799.) Mejorado heard an argument between them followed by some shots. (RT 1799-1800.) She turned and saw a male pointing a gun and firing. That person returned to the car and entered the left or driver's side. (RT 1800.)

She identified that person as Jasper and said Speedy entered on the right side after the shots. (RT 1800.) They told her "you didn't see nothing" and "you don't know nothing." An argument ensued in the car because her brother was upset for involving his sister. (RT 1801.) They drove to a house in La Puente where Jasper, Speedy and Clumsy got out of the car and she drove her brother home. (RT 1801.)

Castillo testified that Augustin Mejorado's car was processed for fingerprints and shell casings but only prints belonging to Augustin were found. (RT 1803.) Judith Mejorado initially told the officers she did not know who got out of the car and did not know who did the shooting. (RT 1807.) Mejorado did not say that they drove back to the area by Chuck E Cheese. (RT 1813-1814.) Castillo acknowledged that a report of the interview of Mejorado indicated that Mejorado was confused as to the positions of Jasper and Speedy in the back seat of the car. (RT 1820.) But Castillo claimed this confusion concerned their seating arrangement before the shooting. (RT 1828.)

3. The Confession by Gonzales

Salvador Berber, who goes by the nicknames of "Psycho" and "Cyclone," identified himself as a member of East Side Puente. (RT 1888.) He identified Speedy in court as Gonzales who is also known as "Rebel." (RT 1886.) He identified Soliz in court as Jasper and indicated he also knew Richie Rich. (RT 1886.) Berber indicated familiarity with a clique of the Puente gang known as Perth Street. (RT 1888.)

Berber had known Speedy about 10 years and indicated that both Speedy and Jasper, whom he had known for about eight years, claim to be in the Perth gang. (RT 1889.) Berber had known Listo about two years and Listo also claims to be in the Perth gang. (RT 1889.)

Berber testified that he speaks Spanish and indicated that cuete means gun and jale is slang for a murder or a robbery but literally means a job. (RT 1890.) Berber said that following his arrest in July 1996, Speedy told him about a robbery and murder he had done at the Hillgrove Market. (RT 1890.) Speedy first told Berber about this while both were on the streets before their arrests when Berber talked to Speedy about buying a gun from Speedy. (RT 1891.) Speedy had a .38 gun that Berber wanted to buy and Speedy told Berber he had another .38 he used in a robbery and another .38 that he obtained in the robbery from the man Speedy murdered.[3] (RT 1891-1892.) Speedy said he did the robbery with Jasper. (RT 1892.)

Following Berber's arrest, he decided to provide information from Gonzales to detectives in hope of obtaining leniency on his case. Berber had a prior robbery conviction and understood that he faced 10-17 years in prison. (RT 1893.) He told detectives what Speedy had told him. (RT 1893.) Berber testified that the detectives did not make him any promises of leniency in his case but Berber hoped he would be helped. (RT 1895, 1897.) While in jail, Berber ran into Speedy who repeated his earlier statements about the market robbery and murder. (RT 1895.) Berber told the detectives about the conversation and agreed to ride in a sheriff's transport van while wired so that his conversation with Speedy could be recorded. (RT 1896.)

Berber testified that he rode in the sheriff's van with Speedy on September 25, 1996. (RT 1897.) During that trip, Speedy made admissions

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[3] Bruce Harris, a supervisor of the sheriff's firearms identification section, testified that the rounds recovered from the body of Lester Eaton and the round recovered from the floor of the market came from the same weapon, either a .38 or .357. (RT 2049, 2050-2053.)

about the Hillgrove Market robbery and murder and Speedy acknowledged that he killed the old man. (RT 1898.) Speedy also implicated Jasper, Richie and Clumsy who he said drove the van. (RT 1899.) Speedy also talked about the double murder of two young black men at a gas station in Covina. (RT 1899.) Speedy said he caught those men at a phone booth and killed them, again acknowledging that he was the shooter. (RT 1899.) Speedy said he used a nine mm in those shootings.[4] (RT 1899.) Speedy explained that they were in Listo's car coming from a party. Listo's sister, Clumsy and Jasper were also in the car. (RT 1899-1900.) Speedy also talked about unrelated crimes and other matters during the trip that lasted about two hours. (RT 1900.) Portions of the tape were played for the jury with transcripts of the tape also provided. (RT 1902-1905.) In the taped conversation, Gonzales disclosed that he personally shot Lester Eaton in the market and Elijah Skyles and Gary Price at the gas station. (People's Exh. 58 at pp. 2, 7, 11.) Gonzales also disclosed that Soliz never even got out of the car at the gas station. (People's Exh. 58 at p. 3.) Berber also testified that Gonzales said that Soliz never got out of the car. (RT 1951.)

4. Gang Evidence

Gabriel Urena testified that though not in a gang himself, he hung around with members of the Puente gang, including Raymond Flores and Billy Gallegos. (RT 1977-1978.) On the evening of March 31, 1996, Urena was riding in a car with Flores and Gallegos when Gallegos was shot and killed. (RT 1979.) The shooting occurred when a car occupied by a

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[4] Patricia Fant, a firearms examiner, testified that the live nine mm round found in the van recovered near the Hillgrove Market came from the same magazine as the shell casings found at the scene of the shootings at the gas station. (RT 2016, 2029, 2030.)

couple of young black men pulled up alongside of them in La Puente. (RT 1980-1981.)

The occupants in the other car threw some gang signs at the occupants of the car containing Urena. (RT 1984.) The signs included an "N" which Urena interpreted as standing for neighborhood as in Neighborhood Crips, a black gang in the area. (RT 1984.) Urena could not be positive but he recalled they might have also shouted "Neighborhood Crips." (RT 1985.) Urena then heard gunshots and ducked down in the car. (RT 1985.) Gallegos died from a gunshot wound to the head. (RT 1986, 1993-1995.)

Scott Lusk, a gang detective, testified that Puente is an Hispanic street gang also known as Puente Trece or Puente 13. (RT 2055, 2064, 2067.) Perth Street is a clique or subset of the Puente gang. (RT 2068-2069.) In Lusk's opinion, both Gonzales and Soliz were members of Puente at the time of the crimes in this case. (RT 2073, 2077-2078.) Lusk also identified Michael Gonzales (Clumsy) as a Puente member at those times. (RT 2079-2080.)

Lusk discussed three cases that resulted in convictions of persons Lusk believed to be Puente members. (RT 2081-2087.) When four people not associated with the Puente gang showed up at a party in La Puente Park, a fight broke out with David Calvillo and Michael Ortega shooting at the four people. (RT 2082-2083.) That incident resulted in convictions of Calvillo and Ortega for attempted murder in 1991. (RT 2083.) Jose Torres was convicted of robbery relating to an attack on a pizza delivery man that resulted in the man being beaten, the theft of pizza, his money and car stereo. (RT 2084.) In April 1997, Augustin Mejorado and Caesar

Montiveros committed a string of six armed robberies over a two-hour period that resulted in robbery convictions. (RT 2085-2086.)

Lusk testified that although the purposes of these various crimes was partly personal gain, they also served to enhance the reputations of the members within the gang. (RT 2088.) These types of violent crimes also serve to enhance the reputation of the gang in the community which causes others to fear and be intimidated by the gang. (RT 2089.)

Lusk offered the opinion that the Skyles and Price shootings constituted retaliation for the Gallegos shooting by a black gang. (RT 2093-2095.) Lusk testified that it did not matter whether or not Skyles and Price actually belonged to a gang; they were the right ages, the right race, with the right style of dress in a gang area. (RT 2093.) In Lusk's opinion, Puente had retaliated for the murder of one of their own. (RT 2095.)

Based on his view that Gonzales, Soliz, Michael Gonzales and Richard Alvarez were all Puente members, Lusk also opined that the market robbery and murder were done at least in part to enhance gang reputation. (RT 2123-2124.) Lusk said such "group" crimes are a way to introduce people who have not been involved in the gang for long to armed robbery and the proceeds are shared by the group. (RT 2124.)

Lusk testified that gang members sometimes take credit for an actual shooting to enhance their ranking in the gang when the person really served only as a backup. (RT 2098.) However, Lusk could not cite any specific instances as a gang expert where someone else confessed to a crime by another gang member in this scenario. (RT 2113.)

B. The Penalty Phase[5]

Because of the penalty retrial, the prosecution repeated much of the guilt phase evidence presented to the original jury in order to establish the circumstances of the crime to the new penalty jury.

Deputy Jerome Ryan testified that he responded to a radio broadcast of a robbery at the Hillgrove Market on the evening of January 27, 1996.) (RT 3246-3247.) Upon entering the store, Ryan observed the cash register on the floor and a man down on the floor by the meat counter. (RT 3250.) The man appeared to have suffered gunshot wounds and appeared to be dead. (RT 3251.) Paramedics soon arrived and confirmed that the man was dead. (RT 3253.) A photo showed the victim on the floor with blood near his head and shoulder and a pocket of his pants pulled out. (RT 3259-3262.) There appeared to have been a struggle in the area around the body. (RT 3268.)

Lynn Reeder, a homicide investigator, testified that he found blood drops going from the counter area back into the meat cutting area. The victim had an empty holster on his belt. (RT 3277.) No expended shell casings were recovered at the scene. (RT 3305.) Reeder felt that the absence of shell casings pointed to the use of a revolver, rather than a semi-automatic pistol which automatically ejects the casings upon firing. (RT 3306-3307.) A 1993 Chevy Astro van located a few blocks away from the

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[5] The original penalty phase resulted in a hung jury on all counts as to Soliz and on count 1 as to Gonzales while that jury returned verdicts of life without possibility of parole for Gonzales on counts 4 and 5. (RT 2769-2771.) This factual statement is based on the evidence presented in the penalty phase retrial.

scene contained a cash tray from a cash register, a Raider's jacket, and a live 9 mm round. (RT 3307-3310.)

Betty Eaton and her husband for 43 years owned the Hillgrove Market. (RT 3336.) Betty and her husband Lester were in the market by the meat department on the night of the crimes. (RT 3338.) Betty Eaton heard a voice demanding the money and looked up to see a person with a bandanna covering his face holding a gun on her. (RT 3342.) The person appeared to be Hispanic, in his late teens, with a cap on his head, and about 5'6"-5'8". (RT 3343.)

Betty Eaton turned to her husband and saw that another man had a gun on him. (RT 3344.) That man cracked her husband over the head and pressed Lester Eaton up against the sink. (RT 3345.) She described this assailant as 5'10"-5'11" and did not recall if he had something covering his face but did say that he did not have anything on his head such as a cap. (RT 3347.) Her husband had a Colt pistol in his holster but she did not see him reach for the weapon. (RT 3346.) She heard two gunshots and saw that the man had been "tangling" with her husband and that both her husband and the other man were on the floor. (RT 3349-3350.) After the shots, Betty Eaton fled out of the store. (RT 3351.) As she exited, she saw a dark colored van in front of the store. (RT 3351.) She believes that the van had its lights on and the motor running. (RT 3352.) The second man who attacked her husband was much heavier than the man who held a gun on her. (RT 3353.) She identified a blue van found at Turnbull Canyon Road as appearing to be the same van she observed in front of the store. (RT 3359.) She also identified various items found in the van as coming from the cash register at the store: a cash drawer, food stamps, charge slips and some receipts. (RT 3360-3362.) She would not recognize either person

involved in the crimes if she saw them again. (RT 3364.) She thinks that some food stamps, some checks and about $100 cash was missing from the cash register. (RT 3357.) Her husband's pistol and a shotgun he kept in the back room were also missing. (RT 3358.)

Betty Eaton testified that her husband worked long days in the store, seven days a week. (RT 3365.) The Eatons planned to retire and hoped to move to the mountains after selling the market. (RT 3366-3367.) Lester Eaton loved the outdoors, and especially enjoyed fishing and hunting. (RT 3367.) He often helped people short on cash by letting them obtain items in the market on credit even though he did not get repaid many times. (RT 3368.) Betty Eaton never saw him refuse credit to anyone in the store. (RT 3368.) He was involved in sponsoring youth activities such as sports teams and school bands. (RT 3369.) The Eatons had four children and nine grandchildren which were Lester's pride and joy. (RT 3371-3372.) One of the grandchildren, Thomas, lived with the Eatons and Lester was like a father figure to Thomas. (RT 337-1-3371.) After Lester's death, Thomas had difficulties adjusting and he was sent to Georgia to live with his father. (RT 3370-3371.) Lester's death had an adverse financial impact as Betty tried to keep the market open while unsuccessfully trying to sell the market. (RT 3372.) Betty described her difficulties coping with the loss of her husband including always thinking about the way he died. (RT 3373.)

1. Aggravation Evidence Relating to Gonzales

Martin Espinosa worked at a gas station in West Covina on March 11, 1990, when two teenagers entered the office around closing. (RT 4083-4085.) The older one, a Filipino, had a gun and the younger one, an Hispanic, had a knife. They asked for the money, the youngest one took the money and they both ran. (RT 4085-4086.) Cruz Garica, a West Covina

police officer, investigated the gas station robbery and interviewed two suspects including Gonzales who was 13 at the time. (RT 4091-4092.) Gonzales confessed to being involved in the robbery with his cousin and admitted taking $50 which they used on food and videos. (RT 4093-4095.) Gonzales took full responsibility for the crime and appeared to be remorseful. (RT 4099.)

On January 4, 1998, during a search of jail cells, a deputy found a four-inch metal sharpened metal shank in an envelope addressed to Gonzales inside the single-man cell occupied by Gonzales. (RT 4106-4108.) The deputy testified that when a stabbing object in found in the possession of a jail inmate, the inmate is usually sent to the hole or into segregation and suffers a loss of privileges such as visiting. (RT 4112.) The deputy did not believe that happened to Gonzales for this incident. (RT 4112.) The case against Gonzales for this incident was dismissed because Gonzales already faced a lengthy sentence. (RT 4112-4113.)

2. Aggravation Evidence Relating to Soliz

On October 16, 1997, a deputy in Los Angeles County jail observed a fire caused by burning newspaper in the area outside some of the cells. (RT 4115, 4117.) The deputy saw paper thrown into the fire from Soliz's cell. (RT 4118-4119.) While the deputy attempted to put out the fire, Soliz threw a milk carton and orange at him. (RT 4122.)

On January 10, 1998, a search of Soliz's jail cell turned up five razors, including one "altered razor." (RT 4124-4125.) Inmates are not allowed to have any metal in their cells. (RT 4125.) Inmates are provided razors when they shower and shave but they are supposed to be returned when done. (RT 4125.) The deputy testified that the altered razor could be used as a slashing or stabbing device. (RT 4126-4127.) Inmates are

allowed to have pencils but have nothing to sharpen the pencils. An inmate could use an altered razor for that purpose. (RT 4128.) Possession of any razor, altered or unaltered, in the cell is a rules violation. (RT 4130.)

On July 31, 1998, another deputy found two altered razors , some disposable razors, and one flat unsharpened metal piece in the single-man cell occupied by Soliz. (RT 4131-4132.) The deputy testified that altered razors are commonly used by inmates as weapons. (RT 4133.) The metal object was about five to six inches long and a couple of inches wide. The deputy testified that it appeared that it "could have been honed into a stabbing device." (RT 4134.) The deputy acknowledged that Soliz had been in the jail facility for about 20 months and he had no knowledge of any reports of violence by Soliz during that period. (RT 4135.)

The prosecution introduced into evidence documents establishing that Soliz had a conviction on November 11, 1992 for unlawful driving or taking of a vehicle. (RT 4138.) The defense stipulated to the conviction. (RT 4138.)

3. Mitigation Evidence Relating to Soliz

Irene Arzola, the mother of Soliz, described him as "her baby." (RT 4146.) She said they were very close and that he liked to fish, ride bikes, had lots of pets, was artistic and enjoyed swimming and listening to music. (RT 4146.) Soliz has two sisters and two brothers. He was very good with animals. (RT 4147.) He was not violent unless hit in which case he would fight back. (RT 4147.) She raised Soliz by herself. (RT 4147.)

When Soliz was around 11 or 12, she started working and his brothers and sisters cared for him, but he was often home alone. (RT 4148-4149.) She used to "drink and party" but became a born-again Christain and was fairly strict with him. (RT 4149.) When asked by the prosecutor if

she did her best to raise him right, she said she was not a good parent. (RT 4153.) His gang involvement started around the age of 15 while still in high school. Soliz went to prison after his mother got married and she noticed changes in him upon his release such as his hair style and clothing that made his gang involvement more evident. (RT 4150.) She asked him about his gang involvement but he would not discuss it. (RT 4151.) She loves her son and prays for him daily. She wants him to live because he has the potential to do good things in prison and she has seen a side of him that others have not; that he is good, compassionate and helps others. (RT 4151.) Soliz has a daughter, Adrienne, who was three at the time of trial, that he visited frequently when he was out of prison. (RT 4157.)

Danny Lara spent much of his childhood together with Soliz, his cousin. (RT 4159.) They are extremely close and spent lots of time together. (RT 4160.) He respects Soliz very much and does not consider him violent. (RT 4160.) Instead, Soliz would always walk away from trouble. (RT 4161.) Although he was aware of Soliz's gang involvement, he said that only his appearance changed, but that Michael remained the same person, unaggressive and respectful of others. (RT 4161.) If anyone needed help, Soliz would be there and he "absolutely" would have value in prison and hoped that his life was spared. (RT 4162.)

Steve Lara, appellant's cousin, testified that he is a couple of years younger than appellant and they were "very close" growing up. (RT 4166.) Lara learned much about life from appellant who provided a "good ear" when Lara needed to talk about something. (RT 4166.) Lara said that appellant was instrumental in keeping him from joining a gang while ganglife "overcame" appellant. (RT 4166-4167.) Lara testified that appellant ended up in a gang because of his friends and lifestyle but that his

life was never about being in a gang. (RT 4170.) Lara described appellant as someone who could be a leader but under "scared circumstances" would be a follower. (RT 4171.) While appellant has made mistakes, he has a heart and soul, and is a good person you can talk to and who has a positive impact on people. (RT 4167-4168.)

Appellant's brother, Tony Diaz, testified that appellant played a major role in bringing him to accept Christ and get involved with his church. (RT 4174-4176.) He became aware of appellant's involvement in a gang and tried to stop his gang involvement but Diaz also acknowledged that he had been a "bad influence" on his brother by encouraging appellant "to party" and Diaz felt lots of guilt about that. (RT 4176.) Diaz did not condone what appellant did but he knows that appellant can change, that he is a person capable of loyalty and love and could help others in prison because he is always willing to give. (RT 4177-4178.)

Michael Landerman had gone to school with appellant's older brother Bart and had worked with appellant for about two to three years where they became close friends. (RT 4182-4183.) Landerman described appellant as very helpful when he interacted with others and that appellant had helped Landerman learn his job and progress. (RT 4183-4184.) Landerman said that he had seen appellant about 10 times since appellant left the job. (RT 4187.) He did not know anything about appellant's involvement in a gang. (RT 4188.)

Luz Jauregui described appellant as her fiancé who she still intended to marry. (RT 4196-4197.) She had known appellant for about seven years and had been his girlfriend for three years. (RT 4196.) She said that appellant had done a lot for her, that he is a very caring person who understands her and supported her. (RT 4197.) She also described

appellant as an angel. (RT 4198.) Jauregui tried to get appellant out of the gang and she did not believe that he was involved with the gang at the time of the Skyles/Price shootings. (RT 4198-4199.)

Nancy Cowardin testified in appellant's behalf as an expert (with a master's degree in education and Ph.d in educational psychology) in education with a particular emphasis in learning handicaps. (RT 4319.) She gave appellant an IQ test, several academic measures covering reading, math and spelling, tested him for processing skills in relation to his visual and auditory processing of information, examined his moral reasoning skills and assessed him for attention deficits. (RT 4319-4320.) Appellant had developed good academic skills, except in math, and above average intellectual abilities. (RT 4330-4331.) She found no attention deficits. (RT 4320.) Cowardin described appellant's moral reasoning as at an adult level and indicated that he knew right from wrong. But good moral reasoning does not always translate into good moral actions. Appellant exhibited an element of distractibility or limited awareness, meaning he could be easily distracted and miss some of the content of events going on around him. (RT 4322-4323.) If distracted, someone else would take the lead and it would be easier for appellant to follow rather than come to a decision on his own because he had missed some of the content. (RT 4323.) Cowardin presented specific examples of the moral reasoning examination which indicated appellant consistently demonstrated a pro-life approach and concern for humanity, a "morality and conscience orientation" as opposed to a punishment orientation, and a strong orientation to keeping promises. (RT 4324-4328.) Appellant had indicated there had been many broken promises in his life and Cowardin found appellant's strong conventional morality noteworthy because there had been little opportunity to interact

with role models sharing his orientation. (RT 4328-4329.) Cowardin acknowledged that appellant would have known that possessing altered razor blades in jail was wrong, as were armed robbery, joining a gang and stealing a car. (RT 4339.) Cowardin had experience with incarcerated juveniles and inmates in prison and thought that appellant would have much to offer by sharing his experiences and helping others in prison. (RT 4334-4335.)

4. Testimony of John Gonzales

Gonzales testified for the first and only time in the penalty retrial. Gonzales in his testimony took responsibility for all three killings in this case.

Gonzales said that prior to the market robbery, he and appellant were alone at a house and claimed that Dorine Ramos did not tell the truth when she claims to have seen outside a house on Perth Street. (RT 4217, 4236.) Gonzales discussed doing a robbery with him doing the talking and appellant just listening. (RT 4217-4218.) While he planned to commit a robbery, he had no plan to murder anyone. (RT 4206.)

Clumsy (Michael Gonzales) drove a stolen van to the market while Richard Alvarez waited nearby in a getaway car. (RT 4222, 4226, 4227, 4229-4230.) Gonzales entered the market first and he is unsure what appellant did in the market. (RT 4224, 4231.) He recalls appellant having a nine mm handgun in the van after the robbery but he does not remember seeing appellant with a gun in the market. (RT 4219, 4223-4225.) Gonzales was supposed to be the only one with a gun and appellant did not need one as his job was only to get the money. (RT 4231, 4238.)

When Eaton told Gonzales to put the gun away before someone got hurt, Gonzales looked away then turned back to Eaton and saw him

reaching for his gun. (RT 4207.) Eaton was bigger than Gonzales and they wrestled to the ground. (RT 4207-4208.) While on the ground wrestling, Gonzales's gun went off. (RT 4208, 4238.) Gonzales said this happened in the heat of the moment and described it as an accident. (RT 4208, 4240-4241.) Gonzales said he was not aiming and his mind went "blank" and he just kept shooting. (RT 4208, 4240-4241.) He does not remember the other shots and described it all as a "blur." (RT 4241, 4246.) After shooting Eaton, Gonzales ran, grabbing the cash tray on his way out. (RT 4242.) Appellant ran out too and they took off in the van, then went to where Richard Alvarez waited and he drove them away. (RT 4243.) Gonzales had taken Eaton's wallet and threw the wallet out the car window. (RT 4244-4245.)

Gonzales felt "messed up" after the shooting which he described as a robbery that went "bad." (RT 4208, 4247.) After the shooting, Gonzales drank some beers and smoked some marijuana to erase the bad feelings that he did not want to think about. (RT 4247.) He explained that he bragged about the shooting in the taped conversation with Berber because he did not want to be perceived as a coward by a fellow gang member. (RT 4209, 4253.) But inside he felt bad. (RT 4209.)

The shootings of Skyles and Price occurred when Gonzales got out of the car to talk to them. When driving by, Gonzales thought he recognized them. Gonzales wanted to talk to them about a gang related killing a few weeks earlier. (RT 4209.) The victim had been his friend Billy Gallego, or Weasel, a member of Ballista, a clique of Puente 13. (RT 4264-4265.) Word on the street indicated that Gallego had been shot by Neighborhood Crips. (RT 4265.) Gonzales testified that Dep. Lusk had been incorrect in claiming that an attack on a Battista member was necessarily an attack on

Puente 13 and the Perth Street clique. (RT 4267.) But Gonzales wanted to try to resolve the situation before it escalated and felt he needed to talk to Skyles and Price whom he described as gang members. (RT 4287.)

Clumsy was driving the car and Gonzales said he knew them and wanted to go talk to them. (RT 4271-4272.) He does not recall appellant saying anything and testified that Judith Mejorado was lying when she claimed that appellant said he also knew them. (RT 4273.)

Gonzales testified that appellant never got out of the car at the scene of the Sklyes/Price shootings. (RT 4210, 4274, 4281, 4282, 4297.) Gonzales explained that he had obtained the nine mm handgun from appellant a few weeks earlier. (RT 4269-4270.) Gonzales had placed the gun on the outside of the vehicle by the lights and Gonzales grabbed the gun when he got out of the car to talk to Skyles and Price. (RT 4282-4283.) Gonzales did not intend to fire the gun but felt he needed it for protection. (RT 4287.) Appellant did not encourage him to get the gun. (RT 4287.)

Gonzales was just attempting to get information from them and the conversation started pleasantly but then they started arguing. (RT 4290.) Skyles and Price asked Gonzales where he was from and he asked the same of them. Then they said "fuck Puente" and made a move which Gonzales interpreted as them reaching for a gun. (RT 4210, 4291.) Gonzales in reaction started shooting and shot both Skyles and Price. (RT 4210, 4291.) When cross-examined about why he shot them 11 times, Gonzales explained that he just pulled the trigger and the gun kept firing. (RT 4304.)

When questioned by the prosecutor about the process for converting a semi-automatic weapon to automatic, Gonzales explained it involved removing a spring. (RT 4305.) The trial court interrupted the testimony to take "judicial notice" of his own experience that Gonzales's explanation

was a "physical impossibility." (RT 4306.) Gonzales concluded his testimony by reiterating that he shot Skyles and Price because he thought one of them was going for a gun and that he just kept firing. (RT 4306.)

* * * * *

I.

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SEVER COUNTS RESULTED IN PREJUDICIAL ERROR

A. Introduction

Prior to trial, appellant moved to sever counts 4 and 5 (the Skyles/Price shootings) from his trial on counts 1-3 (The Eaton crimes). (CT 476-484.) Appellant Gonzales also moved to sever these counts from his trial. (CT 398-404.) The defense claimed that prejudice would result from joinder because counts 4 and 5 involved evidence of gang retaliation and racially-motivated killings that would taint deliberations on counts 1-3 which had no similar, inflammatory-type allegations.

Following opposition from the prosecution (CT 508–518), and a hearing, the trial court denied the severance motion. The trial court's entire analysis on this issue consisted of the following cursory statement: "Oh, the counts are related and are appropriately together. That motion is denied." (RT 33.)

The court's simplistic and incomplete analysis ignored the substantial risk of prejudice to appellant by joining the counts. This error violated appellant's rights to a fair trial, reliable guilt and penalty determinations, and due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments and article I, sections 1, 7, 15, 16, and 17 of the California Constitution. Reversal is required.

B. The Trial Court Abused Its Discretion by Denying the Severance Motion

Penal Code section 954 permits the consolidation for trial of two or more different offenses of the same class of crimes, but "in the interest of

justice and for good cause shown," the court may order the offenses to be "tried separately or divided into two or more groups and each of said groups tried separately." (Pen. Code, § 954.) In this case, the offenses involving the Eaton crimes (counts 1-3) and the Skyles/Price crimes (counts 4-5) were of the same class, and accordingly joinder was *permissible* under the statute. *(People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

The trial court in this case determined that the counts were "related and appropriately together." (RT 33.) But the trial court erred by not further considering potential prejudice.

A ruling on a motion to sever is reviewed for abuse of discretion. (*People v. Gutierrez* (2002) 28 Cal.4th 1043, 1120; *People v. Bean* (1988) 46 Cal.3d 919, 934, 940.) The proper exercise of discretion requires that the trial court review fully all applicable law and facts. "A district court by definition abuses its discretion when it makes an error of law." (*Koon v. United States* (1996) 518 U.S. 81, 100; *United States v. Sprague* (9th Cir. 1988) 135 F.3d 1301, 1304.) Similarly, to exercise judicial discretion, a trial court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; *United States v. Morales* (9th Cir. 1997) (en banc) 108 F.3d 1031, 1035.) By merely determining that the charges were properly joined in appellant's case without considering the potential prejudice, the trial court abused its discretion by failing to apply the correct law and facts in an informed and reasoned process. The trial court's cursory analysis of this motion makes meaningful appellate review impossible because the court failed to specify what factors were considered in reaching its conclusion.

Even when joinder is statutorily permissible under section 954, if the defendant can make a clear showing of prejudice, severance may still be required. (*People v. Jenkins* (2000) 22 Cal.4th 900, 947; People v. *Bradford, supra*, 15 Cal.4th at p. 1315; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447.) "[S]everance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial." (*People v. Bean, supra,* 46 Cal.3d at p. 935.) As explained in *United States v. Burkley* (D.C. Cir. 1978) 591 F.2d 903, 919, cert. denied, 440 U.S. 966 (1979):

> The fear is that when two or more crimes are tried together and the evidence in one is greater than that of the other, the jury may infer that because the defendant appears to have committed at least one of the crimes, he has a propensity to commit crime or at least crimes of the nature charged. The jury may treat this assumed criminal disposition of the defendant as evidence that he committed the other crime(s) with which he is charged.

The unfairness is most acute when, as in the present case, the crimes are of the same type, for then it is almost impossible for the jury to avoid "the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." (*United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 488, cert denied, 475 U.S. 1023 (1986.) In such cases, as in the present one, the trial court abuses its discretion unless it considers fully the substantial danger of prejudice requiring the charges be tried separately where: "(1) evidence of the crimes to be jointly tried would not be cross-admissible in separate trials; (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, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on

several charges might well 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. Catlin* (2001) 26 Cal.4th 81, 110, quoting *People v. Bradford, supra,* 15 Cal.4th at p. 1315.)

The propriety of a ruling on a motion to sever counts is judged by the information available to the trial judge at the time the motion was heard. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1285.)[6] The evidence before the court at the time of the pretrial motion amply demonstrated the need for severance. The trial court improperly permitted the prosecution to join two dissimilar murder cases, one of which included inflammatory allegations of racial motive and gang retaliation, and transformed two relatively weak cases against appellant into stronger cases merely by the joinder that prejudicially affected proper consideration of the individual charges.

1. Cross-Admissibility

The Eaton crimes involved a robbery-murder of a market. The Skyles/Price shootings involved allegations of racially based gang revenge killings. The only real similarity between the two crimes was that both

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[6] Even if it is found that the trial court did not abuse its discretion in denying severance on the basis of the pretrial motion, reversal is still required when it is shown that the "joinder substantially prejudiced defendant and denied him a fair trial." (See, e.g., *People v. Grant* (2003) 113 Cal.App.4th 579, 583; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083; *People v. Johnson* (1988) 47 Cal.3d 576, 590.) As this Court stated in *Williams, supra*, "[T]he joinder laws should never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (36 Cal.3d at p. 448.) Appellant will establish in this section that the trial court abused its discretion in denying the pretrial severance motion but, as further explained below, will also show that denial of severance resulted in an unfair trial further requiring reversal.

appellant Soliz and co-appellant Gonzales were alleged to have committed all the crimes.

In the pretrial opposition to the motion to sever counts, the only item of cross-admissibility that the prosecutor could point to was ballistics evidence connecting a live round of ammunition found in the Eaton robbery-murder getaway van to an expended shell casing found at the Skyles/Price shooting site. (CT 515.)

But this limited item of potential cross-admissibility could have been presented in an isolated fashion in separate trials without exposing the jury to all the prejudicial facts and allegations of each of the otherwise separate crimes. In separate trials of the Eaton and Skyles/Price counts, the juries could have learned that a common gun connected the defendants to each of the crimes without being exposed to the inflammatory allegations that are further discussed below. Thus, cross-admissibility was an inadequate basis for allowing joinder in light of the substantial prejudice that resulted.

2. Inflammatory Charges

The Eaton counts involved robbery/murder allegations relating to a holdup of a market. The Skyles/Price counts involved much more inflammatory allegations of racially motivated gang revenge killings. (CT 481.) Prejudice from joinder can arise when one of the cases involves charges "unusually likely to inflame the jury against the defendant." (*People v. Sapp* (2003) 31 Cal.3d 240, 258; *People v. Bradford, supra,* 15 Cal.4th at p. 1315.)

The admission of gang evidence or a defendant's participation in a criminal street gang is always potentially inflammatory and creates a risk that the jury will improperly infer the defendant is guilty because he has a criminal disposition. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Because of this potential prejudice, the trial court should carefully scrutinize such evidence before admitting it. (*Ibid.*) But the gang evidence in appellant's case relating to the Skyles/Price counts was especially prejudicial because it included the added element of a racial motive: the killing of black gang members by Hispanic gang members in retaliation for a prior killing of one of the Hispanic gang members by a black gang. The cross racial nature of the crime created a substantial "risk of racial prejudice infecting" the trial. (*Turner v. Murray* (1986) 476 U.S. 28, 35.) Evidence is prejudicial if it uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

This alleged racial motive relating to the Skyles/Price counts, and not present in relation to the Eaton counts, created a serious risk of prejudice. The inflammatory nature of the Skyles/Price counts weighed heavily in favor of severance of the counts.

3. Combining Weak Cases

The principal concern encountered in joining a strong case with a weak case or joining two weak cases together is the risk that the jury will aggregate all of the evidence and convict on all the charges in a joint trial while separate trials might result in more favorable results for the defense. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453.) "Joinder . . . will make it difficult not to view the evidence cumulatively. The result might very well be that the two cases would become in the jurors' minds, one case which would be considerably stronger than either viewed separately." (*Id.* at pp. 453-454.)

Based on the presentation at the time of the severance hearing, the evidence relating to the Eaton crimes as to appellant was circumstantial and

weak. According to the prosecutor's opposition, the evidence consisted of a witness who had observed appellant a half-hour before the crimes talking about pulling a "job" and observed appellant wearing clothing similar to that worn by one of the assailants. (CT 517.) Even the evidence relating to appellant's role in the Skyles/Price shootings was conflicting with two eyewitnesses identifying appellant as the shooter (CT 517) while co-appellant Gonzales had provided a surreptitiously recorded statement admitting that he was the shooter. (CT 501.)

The improper joinder of the offenses served to bolster the evidence against appellant when considered cumulatively. The weaknesses of the cases should have been a factor favoring severance.

4. Charges Carrying the Death Penalty

Both the Eaton counts, as a robbery/murder, and the Skyles/Price counts, as a potential double murder, carried the possibility of the death penalty. But while the joinder itself did not turn the matter into a capital case, the trial court should have also considered the potential death sentences as a factor in favor of severance. (*People v. Bradford, supra,* 15 Cal.4th at p. 1315.) When any of the joined cases is a capital offense, "the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a non-capital case." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 454.) "Clearly, joinder should never be a vehicle for bolstering either one or two weak cases against one defendant, particularly where conviction in both will give rise to a possible death sentence." (*Ibid.*)

Because these charges involved the death penalty, the trial court should have applied a higher degree of scrutiny. This factor weighs in favor of severance.

5. The Failure to Grant the Severance Motion Requires Reversal

The trial court failed to give adequate consideration to the relevant factors that would have shown an unreasonable risk of prejudice from joinder of the dissimilar counts. Full and fair review of appellant's motion would have resulted in severance of the counts. The failure to grant the motion requires reversal.

C. Joinder Resulted in an Unfair Trial

Even assuming that the trial court did not err in denying the severance motion, this Court must still consider whether the joinder resulted in undue prejudice and deprived appellant of his federal constitutional rights to a fair trial and due process. (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8; *Bean v. Calderon, supra,* 163 F.3d at p. 1084; *People v. Mendoza* (2000) 24 Cal.4th 130, 162.) As the evidence developed at trial, the denial of the severance motion resulted in a fundamentally unfair trial because while evidence supported the verdicts on the counts relating to the Eaton market robbery crimes, the evidence on the Skyles/Price shootings was conflicting and subject to doubt. Review of the actual trial reveals that the prosecutor improperly commingled the evidence from the separate crimes to bolster the charges against appellant.

The greatest risk of prejudice from improper joinder of separate crimes is that the jury will use evidence of one crime to convict the defendant of the other crime. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453.) This risk of unfair prejudice is increased when the prosecutor argues to the jury that they should use evidence of one crime to convict the defendant of the other crime. (*People v. Grant, supra,* 113 Cal.App.4th at

pp. 589-591; *Bean v. Calderon, supra,* 163 F.3d at p. 1084.) That is precisely what occurred in this case.

During final argument, the prosecutor argued that evidence showing that appellant and Gonzales had committed the Eaton crimes together showed that they had acted together, with the requisite intent, to murder Skyles and Price. As the prosecutor told the jury: "They knew what each was about. They knew what each was going to do." (RT 2309.)

This improper reliance on the Eaton evidence filled an evidentiary gap in the Skyles/Price crimes because there was conflicting evidence of whether appellant or Gonzales shot Skyles and Price. Eyewitnesses identified appellant as the shooter but in circumstances hardly convincing. Carol Mateo and her brother Jeremy Robinson identified appellant as the shooter but their identifications were made from a distance of about 50-60 feet, late at night, from a moving car after seeing the shooter for only three to five seconds. (RT 1456-1467, 1513, 1569-1570.) Mateo and Robinson were never shown photos of co-appellant Gonzales, although as the judge noted, appellant and Gonzales "could be twins." (RT 29, 1652-1658.) Robinson was unable to identify appellant in court as the shooter. (RT 1575.) The gas station attendant also identified appellant as the shooter but acknowledged he only saw the shooter from the side and never saw his face. (RT 1624, 1628-1629.) Although Judith Mejorado claimed to have been an occupant in the car with appellant and Gonzales at the time of the shootings, and provided a statement to police saying she "thinks" that appellant was the shooter because she thought the shooter got back into the car where appellant was positioned, she also told the detectives that she could not see the face of the shooter. (RT 1730, 1763.) Mejorado testified at trial, however, that she had repeatedly told the detectives that she did not know

who did the shooting. (RT 1776.) Mejorado also testified that she was coerced into identifying appellant as the shooter because she was frightened by threats from the detectives that they would take away her little daughter and put her brother into jail. (RT 1695, 1707, 1735, 1736, 1739, 1740, 1742, 1767, 1773.) Insisting that she really did not know the identity of the shooter, Mejorado said she identified appellant because of the pressure and would have told them anything. (RT 1695, 1707, 1711, 1734.) Mejorado explained that her preliminary hearing testimony, used at trial to impeach her trial testimony that she did not know the identity of the shooter, was based on her coerced statements to the detectives, with her statement provided to her immediately prior to the preliminary hearing testimony. (RT 1735, 1743, 1745, 1761.)

Contradicting this questionable identification evidence was the surreptitiously recorded statement by Gonzales to another inmate where Gonzales admitted shooting Skyles and Price and that appellant had played no part in the killings. (People's Exh. 58 at pp. 2, 3, 7.) In light of this conflicting evidence, an important consideration in determining the culpability of the non-shooter was whether he acted with the intent or purpose of encouraging or facilitating the murders. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560.) The prosecutor's improper use of the Eaton evidence to show such intent resulted in substantial prejudice.

Unable to base his argument on independent evidence relating to the Skyles/Price counts, the prosecutor instead argued that both appellant and Gonzales were guilty because of their joint involvement in the Eaton crimes

and their status as fellow gang members. As the prosecutor stated to the jury:

> Now I have another chart that I prepared and – one moment (pause) – That I prepared so – sort of map out my rebuttal. And it just summarizes what I am about to tell you. These are the facts that I submit to you the evidence in this case has established with respect to the Skyles/Price murder.
>
> First of all, both defendants, Soliz and Gonzales, are crimies. And when I say crimies, I don't simply mean fellow gangsters or home boys in the same gang. They're that. There's no question about that. But they go beyond being fellow gangsters.
>
> Counsel for Mr. – or – Gonzales told you several times, well, there's never been any evidence that there was discussion in the car about what was going to happen when they got out, and, if there was, Judith Mejorado would have testified about it, so how can you possibly know that either one of those two men knew the other was going to commit a murder when he got out of the car, depending on which one you believe got out of the car.
>
> Well, ladies and gentlemen, I'll tell you why. These are people who commit crimes together. That would be –
>
> *If you looked at this crime in isolation just as the one situation, you might be able to say how would they know what the other was going to do.*
>
> But, ladies and gentlemen, you're talking about people who robbed a market together. You're talking about people who walked into the Hillgrove Market with guns and pointed them in the faces of the two people that owned that market. You're talking about two people who killed a 67-year-old man because he had the audacity to stand up to the people who came into his store.

> So you're talking about two people who are not only members of the same gang, but they're people who at the time of the Skyles/Price murder had already committed another murder together: the Hillgrove Market robbery murder. They knew what each was about. They knew what each was going to do.

(RT 2307-2309, emphasis added.)

Chart used by the prosecutor in closing argument referred to appellant and Gonzales as "crimies." (Supp. II, CT 237.) Again, the prosecutor misled the jury by implying that because appellant and Gonzales had committed the Eaton market crimes in association, the same must be true of the Sklyes/Price shootings.

The prosecutor's argument is compelling proof of the prejudice from joinder in this case. The prosecutor expressly conceded the deficiencies in the Skyles/Price evidence standing alone. It was only when improperly commingled with the unrelated Eaton evidence that the requisite intent could be proved.

This improper use of other crimes evidence violated the prohibition against use of propensity evidence. (Evid. Code, § 1101, subd. (a); *People v. Thompson* (1980) 27 Cal.3d 303, 316.) Such evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Falsetta* (1999) 21 Cal.4th 903, 915.) A conviction that rests on evidence that a defendant committed some other crime and was a person of bad character violates due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564.)

The due process violation in appellant's case is similar to that which resulted in reversal in *Bean v. Calderon, supra.* In *Bean,* the defendant was jointly tried and convicted of the murders of Beth Schatz and Eileen Fox. The murders occurred three days apart in the Sacramento area and involved intruders entering the homes of elderly women. In reversing the conviction for the Fox murder, the court held that the cases were not cross-admissible and not similar enough to establish a common method of operation. The prosecutor had also improperly urged the jury in argument to consider the murders in concert. The unfair argument was exacerbated by the failure of the trial court to instruct the jury to not consider the evidence on one murder charge in determining the other murder charge. The appellate court also noted that the evidence that defendant had murdered Schatz was strong, including defendant's admission, while the evidence of his culpability on the Fox charge was weak. As the court stated, "After careful examination of the record we conclude the joinder of Schatz and Fox indictments deprived Bean of a fundamentally fair trial on the Fox charges." (*Bean v. Calderon, supra,* 163 F.3d at p. 1083.)

Similarly, in appellant's case, the prosecution joined murder charges bearing no substantial relationship to each other. As in *Bean,* the prosecutor urged the jury to consider the Eaton evidence in order to convict appellant on the Skyles/Price counts. Also like in *Bean,* the trial court here gave no limiting instruction directing the jury not to consider the Eaton evidence in relation to the Skyles/Price counts. Instead, the jury was able to view the evidence cumulatively when the cases standing alone would have been weak. Adding to the prejudice was the inflammatory nature of the Skyles/Price allegations. The prosecution contended that Skyles and Price

were killed because of their race in retaliation for black gang members killing an Hispanic gang member a few weeks earlier.

These circumstances establish that joinder was improper and resulted in a fundamentally unfair trial. The convictions must be reversed.

* * * * *

II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY MISTAKENLY TELLING THE JURY THAT APPELLANT HAD BEEN CHARGED WITH RACIALLY MOTIVATED MURDERS

A. Factual Background

The original information included two separate special circumstance allegations that both appellants murdered Elijah Skyles and Gary Price and that Skyles and Price were "intentionally killed because of race" within the meaning of Penal Code section 190.2, subdivision (a)(16). (CT 385-386.) Appellant filed a motion to set aside the information claiming, among other things, that probable cause had not been established to support the racially motivated special circumstances. (CT 421-430.) The court granted the motion as to the racially motivated special circumstances and ordered those allegations stricken. (CT 538.)

Immediately prior to the commencement of the jury selection process, with only the prosecutor present and in the absence of defense counsel, the trial judge mentioned that he would be reading "this information to the prospective jurors to acquaint them with the nature of the case." (RT 116.) The judge indicated he was using the information filed March 20, 1997, and assumed there had been no amendments. (RT 116.) The prosecutor pointed out there had been an amended information filed and he would have to check on the date of that filing. (RT 117.) The judge directed the prosecutor to check on that because he did not want to read the "wrong information." When the judge attempted to continue to discuss this matter, the prosecutor interrupted to request that they wait for defense counsel because that "might be more appropriate." (RT 117.) The judge

agreed saying, "Oh, that's right." (RT 117.) The prosecutor stated he would check on whether the judge had the right information and that he would consult with defense counsel. (RT 117.)

When defense counsel arrived, the prosecutor stated that he had provided copies to the court and to defense counsel of the amended information which the prosecutor described as filed August 21, 1997, and as "the controlling information in this case." (RT 121.) The amended information had actually been filed on June 30, 1997, and did not contain the race motivated special circumstance allegations that had been ordered stricken. (CT 544-548.)

However, when the trial judge told the prospective jurors "what the case is about," he summarized the information telling them the charges included offenses with special circumstances that the Skyles and Price murders were committed for racial reasons. (RT 124-126.) As soon as the prospective jurors left the court, counsel for Gonzales objected that the trial judge had included the racial motivation allegations that had been stricken in his recitation to the panel and counsel moved to excuse the entire panel. (RT 132.) Appellant's counsel joined in this motion. (RT 133.) The trial judge denied the motion and stated:

> I will correct the matter, of course, when we actually get to the voir dire of the jurors and will point out to them that this is not a factor. And I don't think that that is going to be so prejudicial, because when they actually start – when we get refined down to the people who are going to try the case, I will clean that up. [¶] But I'm sorry. I was referring to the other information. I didn't realize that this had been granted. But I don't think that it rises to sufficient prejudice to excuse the panel, so the motion to excuse is denied.

(RT 133.) The trial judge failed to inform the prospective panel or jurors of the error in any subsequent proceedings.

B. The Error Resulted in an Unfair Trial

It is indisputable that the trial court erred by telling the prospective jurors of the dismissed charges. This clear error resulted in prejudice to appellant.

Under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution, appellant was entitled to a fair trial, reliable guilt and penalty determinations and due process free from inflammatory and irrelevant allegations.

Because of the uniqueness and severity of the death penalty, the ultimate sanction may be imposed only if procedures designed to insure reliability in capital case determinations are followed. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189, 196-206; *Proffitt v. Florida* (1976) 428 U.S. 242, 247, 253.) A central theme of capital jurisprudence "has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." (*Barclay v. Florida* (1983) 463 U.S. 939, 960 (conc. opn. of Stevens, J.).) The trial court failed to follow applicable procedural protections in appellant's case.

It has long been recognized that a preliminary hearing serves the critical purpose of weeding out groundless claims so as to avoid an unnecessary trial on charges lacking sufficient evidentiary support. (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150; *Mills v. Superior Court* (1986) 42 Cal.3d 951, 956.) This weeding out process is especially important as to special circumstance allegations which perform the constitutionally mandated

narrowing function of determining whether an accused will be subject to the death penalty or not. (*People v. Crittenden* (1994) 9 Cal.4th 83, 155.)

In this case, in partially granting the motion to set aside the information, the superior court found that insufficient evidence supported the special circumstance allegations that the murders of Skyles and Price were racially motivated. The prosecution did not challenge that ruling. But the trial court informed all of the prospective jurors of these allegations despite the dismissal.

This failure to follow procedural protections resulted in prejudicial error. The inflammatory nature of the unfounded allegations – casting appellant as a racist – unfairly skewed the guilt determination making the convictions unreliable.

Appellant had a liberty interest in standing trial only on charges supported by sufficient evidence to support a probable cause finding. (Pen. Code, § 995, subdivision (a)(2)(B); *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Exposing the eventual jurors to information that the charges included the race-based special circumstances implied that sufficient evidence supported those allegations. Disclosing these unsubstantiated charges was especially prejudicial because of the racial nature of the special circumstance allegations.

The United States Supreme Court has held that it is federal constitutional error to admit evidence of racist beliefs that have no relevance to the proceedings in a capital case. (*Dawson v. Delaware* (1992) 503 U.S. 159, 165 [admission of evidence of membership in a racist prison gang required reversal]; Cf. *Barclay v. Florida, supra,* 463 U.S. at p. 949 [evidence of racial hatred and racial basis for killing admissible where evidence showed racism was an element of the circumstances of the

crime].) While upholding the presentation of racist allegations in *Barclay*, the Court recognized that the Eighth Amendment would be violated where consideration of such allegations was "wholly arbitrary." (*Id.* at pp. 950-951.)

The trial court acted in an arbitrary and capricious manner in this case because the race-based special circumstances had been stricken. This error rendered the convictions unreliable. The inflammatory but unfounded allegations posed a substantial likelihood of causing the jurors to be biased against appellant. Remarks that infect a trial with unfairness make the resulting conviction a denial of due process. (*Donnelly v. De Christoforo* (1974) 416 U.S. 637, 643.)

The erroneous disclosure of the stricken allegations was compounded by the admission of evidence supposedly supporting the allegations. Without objection, the prosecution introduced evidence that Skyles and Price were killed because of their race.[7] (RT 2093-2094.) In closing argument, the prosecutor told the jury that Skyles and Price were killed because they "happened to be black." (RT 2235.)

So despite the finding of insufficient evidence to support the race-based special circumstance allegations, the jury heard the allegations and received evidence on those allegations. This impropriety created the substantial likelihood that any doubts about appellant's guilt, such as those that might have emanated from the confession of Gonzales which

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[7] Defense counsel's failure to object to this inadmissible evidence constituted ineffective assistance of counsel. However, claims of ineffective assistance are raised more properly by way of a habeas petition. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

exonerated appellant, were overridden by concerns about the alleged racism of the defendants.

Such a fundamentally unfair trial violated appellant's federal constitutional rights. The State cannot show that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The legally insufficient racial motive allegations improperly brought before the jury constituted highly inflammatory and prejudicial material reasonably likely to skew the guilt determination. Even under the standard for state law error, it is reasonably probable that a different verdict would have resulted absent the highly prejudicial allegations. (*People v. Watson* (1956) 46 Cal. 2d 818, 836.) Reversal is required, at least as to counts 4 and 5 relating to the Sklyes and Price shootings.

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III.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

After the trial court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC Nos. 8.11, 8.20; RT 2366-23698), and first degree felony murder (CALJIC Nos. 8.21, 8.21.1, 8.27; RT 2369-2371), the jury found appellant guilty of murder in the first degree (for all three killings. (RT 2420, 2424, 2426). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[8]

Count 1 of the amended information alleged that "[o]n or about January 27, 1996, in the County of Los Angeles, the crime of MURDER, in violation of PENAL CODE SECTION 187(A), a Felony, was committed by JOHN ANTHONY GONZALES and MICHAEL SOLIZ, who did

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[8] Appellant is not contending that the information was defective. On the contrary, as explained below, count 1 of the information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony murder in violation of Penal Code section 189.

unlawfully, and with malice aforethought murder LESTER EATON, a human being." (CT 540.) Count 4 alleged that "[o]n or about April 14, 1996, in the County of Los Angeles, the crime of MURDER, in violation of PENAL CODE SECTION 187(A), a Felony, was committed by JOHN ANTHONY GONZALES and MICHAEL SOLIZ, who did unlawfully, and with malice aforethought murder ELIJAH SKYLES, a human being." (CT 541.) Count 5 alleged that "[o]n or about April 14, 1996, the crime of MURDER, in violation of PENAL CODE SECTION 187(A), a Felony, was committed by JOHN ANTHONY GONZALES and MICHAEL SOLIZ, who did unlawfully, and with malice aforethought murder GARY PRICE, a human being." (CT 542.)

Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("did unlawfully, and with malice aforethought murder") establish that appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[9]

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[9] The amended information also alleged one felony-murder special circumstance and a multiple murder special circumstance. (CT 540, 542.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Also, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony murder. A conviction under the felony murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61). A multiple murder special circumstance requires only two or more convictions for first or

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[10] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[11]

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to

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second murder. (Pen. Code, §190.2, subd. (a)(3).)

[10] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[11] In 1996, when the murder at issue allegedly occurred, Penal Code section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree; and all other kinds of murders are of the second degree.

try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto* (1883) 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined,

includes murder in the first degree and murder in the second degree.[12] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore

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[12] This statement alone should preclude placing any reliance on *People v. Soto, supra,* 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford, supra,* 15 Cal.4th at p. 1344, citations omitted), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another crime and be included within it.

required to construe [Penal Code] *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, italics added, fn. omitted.)

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.3d 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at p. 472, expressly held that the first degree felony-murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart*, *supra*, 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford*,

supra, 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[13]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson, supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under

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[13] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.)[14]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen. Code, § 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1027-1028, 1035 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., Amend. XIV; Cal.

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[14] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., Amends.VI & XIV; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., Amends. VIII & XIV; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1927-1028, 1035.) Appellant's convictions for first degree murder must be reversed.

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IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE OF THREATS AGAINST WITNESSES DESPITE THE LACK OF EVIDENCE TYING THE DEFENDANTS TO THE THREATS

A. Factual Background

The prosecutor asked Detective Castillo whether Judith Mejorado told him why she was concerned about her brother. (RT 1830.) Counsel for Gonzales objected on the grounds of relevance.[15] (*Ibid.*) The trial court overruled the relevance objection stating, "I think it could go to the totality of the witness's statement." (*Ibid.*) Detective Castillo testified that Mejorado was concerned for her brother's safety because of "the people involved in this incident." (*Ibid.*)

Salvador Berber testified, again over defense objection, that as part of his plea agreement he had been relocated out of Los Angeles County. (RT 1920.) The defense relevance objection was overruled because the trial court found it appropriate that the jury know all the circumstances of the plea agreement. (*Ibid.*)

In the penalty retrial, Berber testified that he no longer lived in La Puente. (RT 4019.) The prosecution then asked Berber what would happen

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[15] In light of co-counsel's objection, the failure of appellant's counsel to object does not constitute a waiver of this issue. A defendant is excused from the necessity of making a timely objection or a request for admonition if either would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) The trial court denied co-counsel's objection so further objection by appellant's counsel clearly would have been futile.

if he went back to La Puente. After the trial court overruled the defense objection, Berber testified, "they'd kill me." (*Ibid.*)

B. The Evidence of Threats to Witnesses and Others Should Have Been Excluded

No evidence connected any of the perceived threats to appellant or Gonzales. This lack of nexus rendered the evidence of threats irrelevant and rendered the trial unfair in violation of appellant's constitutional rights to a fair trial, confrontation, reliable guilt and penalty determinations and due process. (U.S. Const., Amends. VI, VIII, IX; Cal. Const., art. I, §§ 7, 15, 16, 2.

It is apparent that the prosecutor sought to infer that appellant and Gonzales were dangerous because the witnesses feared for their safety or the safety of their families. But without any showing that the suggested threats are attributable to appellant or Gonzales, such evidence should have been inadmissible. (*People v. Williams, supra,* 16 Cal.4th at p. 200; *People v. Hannon* (1977) 19 Cal.3d 588, 599.) Appellant's case is unlike *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246, or *People v. Slocum* (1975) 52 Cal.App.3d 867, 887, where specific evidence tied the defendants to threats against witnesses and efforts to suppress evidence. In this case, no evidence tied either appellant or Gonzales to threats against Berber, Mejorado or any other witness. Under these circumstances, the only apparent purpose for eliciting the irrelevant information about the fears of the witnesses was to imply without proper foundation that appellant and Gonzales were dangerous.

In *People v. Weiss* (1958) 50 Cal.2d 535, 554, this Court stated that evidence of an anonymous threat not connected to the defendant "should at once be suspect as . . . an endeavor to prejudice the defendant before the

jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretenders." (See also *People v. Mason* (1991) 52 Cal.3d 909, 971.)

Evidence of perceived threats, unconnected to appellant, constitutes not only a violation of state law, but violated federal constitutional rights to due process and a fair trial as well. Such unfounded evidence renders a trial fundamentally unfair. (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 969-972.) In *Dudley,* the record suggested the "strong possibility that the prosecutor intended to get the threat testimony before the jury under a pretext." (See *People v. Mason, supra,* 52 Cal.3d at p. 972, fn. 17.)

A similarly improper purpose is evident in appellant's case as well. Berber and Mejorado may have suspected that their testimony put them at risk but the prosecution had no evidence showing that appellant or Gonzales, or anyone acting on their behalf, had made any threats to the witnesses. Without that essential connection, the evidence served no legitimate purpose. Instead, the prosecutor used the unsupported and inflammatory evidence to lead the jury to the "inescapable conclusion" that the threats were made by or on behalf of the defendants on trial. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 781.) Because the prosecution did not prove that the defendants made any threats or authorized any third persons to do so, the evidence should not have been admitted. (*Ibid.*) The trial court erred by admitting such irrelevant and prejudicial evidence.

C. The Erroneous Admission of This Evidence Resulted in Prejudice

The improper admission of threats to witnesses unconnected to a defendant amounts to an "evidential harpoon." (*Dudley v. Duckworth, supra,* 854 F.2d at p. 970, quoting *Keyser v. State* (Ind. 1981) 160 Ind. App.

566, 312 N.E.2d 922, 924.) "[S]uch evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant." (*Ibid.*) Such evidence is "highly prejudicial" because threats tend to establish guilty knowledge or an admission of guilt by the defendants. (*Dudley v. Duckworth, supra,* 854 F.2d at p. 970.)

When the prejudicial effect of such evidence is weighed against its lack of necessity, the prejudice is of such magnitude that it results in a denial of fundamental fairness. (*Id.* at p. 972.) Such federal constitutional error cannot be considered harmless under *Chapman*. Unsupported evidence of threats improperly made the defendants appear more culpable and more dangerous. The question of responsibility for the Skyles/Price shootings was a close call pitting the questionable eyewitness identifications against the admission by Gonzales that he committed those crimes alone. The innuendo that the defendants played a role in threatening witnesses made both defendants appear guilty and tainted the guilt determination on counts 4 and 5.

Even under the *Watson* standard, there is a "reasonably probability" of a different result absent the prejudicial error. "[A]n allegation that the defendant has attempted to suppress adverse evidence, if not entirely refuted, may not only destroy the credibility of the witness but at the same time utterly emasculate whatever doubt the defense has been able to establish on the question of guilt." (*People v. Hammon* (1977) 19 Cal.3d 588, 603.) The convictions under counts 4 and 5 should be reversed.

Prejudice is even more probable in the penalty determinations. The improper evidence made appellant appear dangerous as a continuing threat to the safety of others and more deserving of the death penalty. This is not

a case with overwhelming aggravating evidence. The penalty determination was a closely decided issue. The original penalty phase ended in a hung jury. The additional improper testimony by Berber in the penalty phase about threats skewed the penalty decision. This unsupported inference rendered the penalty determination unreliable. Because there is a "reasonable possibility" of a more favorable result absent the error, appellant's death sentences must be vacated. (*People v. Hernandez* (2003) 30 Cal.4th 835, 877; *People v. Brown* (1988) 46 Cal.3d 432, 448; *Chapman v. California, supra,* 386 U.S. at p. 24.)

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V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY EXCLUDING EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION PROCEDURES

A. Factual Background

During the guilt phase, appellant's counsel stated his intent to call Detective Lusk as a defense witness. (RT 2150.) The prosecutor requested an offer of proof. (RT 2151.) Appellant's counsel proffered that he would examine Det. Lusk about "investigatory procedures with mug show ups."[16] (RT 2151.) Questioning the relevance of such evidence, the prosecutor described Det. Lusk as a "homicide detective with no contact with this homicide investigation." (RT 2151.) Appellant's counsel explained that the detective's lack of involvement with this particular investigation did not matter; the detective would be called as an expert on homicide investigations and questioned about "general investigatory procedures," including following proper policies and procedures. (RT 2151.) The defense sought to establish that the photographic line-ups in this case were not prepared properly. (RT 2151-2152.)

According to the trial court, that was a question for the jury, with the judge asserting "that would be invading the province of the jury for him to express such an opinion." (RT 2152.) The court further stated:

> You can argue that. You can show the jurors how these particular mug shots were improperly prepared and how they triggered a response in the witnesses. That's all argument. [¶] But for a witness to say that this is an unduly suggestive mug shot is an opinion and invades the province of the jury, and

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[16] The parties referred to photographic line-ups throughout this case as "mug show ups."

> it's not admissible. I would not allow that question to be asked. [¶] So if that's what you intend to ask Detective Lusk , save yourself the trouble, because I won't allow it. . . .But I certainly will allow you to argue it– . . . – so it will be before the jury.

(RT 2152.)

B. The Trial Court Erred by Excluding the Expert Testimony

The prosecution's case against appellant on the Skyles/Price murder charges relied extensively on the eyewitness testimony of Carol Mateo, Jeremy Robinson and Alejandro Mota identifying appellant as the shooter. As elaborated on previously, the circumstances surrounding the identifications raised a number of reliability concerns.[17] Appellant's counsel sought to further raise doubts about the eyewitness identifications by establishing the impropriety of the photographic line-up procedures through an expert. It is clear from the trial court's ruling that no such testimony would be permitted.

Appellant should have been permitted to show that proper procedures were not followed. An identification procedure that is unduly suggestive may be found constitutionally unreliable. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107 *People v. Desantis* (1992) 2 Cal.4th 1198, 1222.) The trial court's ruling excluding expert testimony on

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[17] Carol Mateo and her brother, Jeremy Robinson, made their identifications from a distance of about 50 feet, late at night, from a moving car after seeing the suspect for only three to five seconds. (RT 1456-1467, 1513, 1569-1570). Jeremy Robinson was unable to identify appellant in court as the shooter. (RT 1575.) Alejandro Mora, the gas station attendant, acknowledged that he only saw the shooter from the side and never saw his face. (RT 1624, 1628-1629.)

the importance of following proper procedures in preparing photographic line-ups unfairly precluded appellant from presenting a critical aspect of his defense.

Contrary to the trial court's statement, appellant was not seeking to present evidence that would invade the province of the jury. The defense sought to show that the reliability of a photographic line-up depends on following proper procedures. The use of expert testimony to establish potential inaccuracies in eyewitness identification is well established. (*People v. McDonald* (1984) 37 Cal.3d 351, 377.) Although *McDonald* involved use of an expert on psychological factors affecting the accuracy of eyewitness identification, the rationale of *McDonald* refuting claims that such expert testimony would invade the province of the jury is just as applicable here to the need for expert testimony to establish proper police procedures to ensure reliable identifications.

Like the expert witness in *McDonald*, the expert here would not have testified that the particular identifications were unreliable but simply informed the jury of certain procedures which if not followed may impair the accuracy of eyewitness identifications. (*Id.* at p. 366.) "Such evidence falls within the broad statutory description of 'any matter that has any tendency in reason to bear on the credibility of witnesses.'" (*Ibid.*, quoting Evid. Code, § 780.) Factual testimony by an expert is admissible if it complies with the general statutory requirements that the witness be "qualified" by his special knowledge (Evid. Code, § 720) and that this evidence is relevant to the issues. (Evid. Code, § 351.) To the extent it involves opinion testimony, such testimony is admissible under Evidence Code section 801 if "sufficiently beyond common experience that the

opinion of an expert would assist the trier of fact." (*People v. McDonald, supra,* 37 Cal.3d at p. 367.)

Statistically significant differences have been found between experts and jurors as to their knowledge and experience concerning the influence of lineup fairness. (Kassin & Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors* (1992) 22 J. Applied Psychol. 1241.) Research has also shown that expert testimony relating to eyewitness identifications enhances the quality of jury determinations. (Penrod & Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking* (1989) 52 Law & Contemp. Probs. 52; Vidmar & Schuller, *Juries and Expert Evidence: Social Framework Testimony* (1989) 52 Law & Contemp. Probs. 133.)

The expert testimony offered in appellant's case would have assisted the jury in their task of assessing the reliability of the eyewitness identifications. As in *McDonald*, the expert testimony in question did not seek to take over the jury's role in judging credibility. (*People v. McDonald, supra,* 37 Cal.3d at p. 370.) As is true of all expert testimony, the jury would have remained free to reject it entirely after considering the expert's opinion, reasons, qualifications and credibility. (*Id.* at p. 371.) An instruction to this effect is commanded by Penal Code section 1127b in any criminal trial involving expert testimony.[18] (See CALJIC No. 2.80.)

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[18] Penal Code section 1127b provides in pertient part: "When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows:

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reason stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion

Establishing that the homicide investigators failed to follow proper procedures in this case would have supported an argument that the photographic line-ups were unduly suggestive and therefore unreliable. But the trial court's illogical ruling that defense counsel could *argue* that but not question an expert about the procedures skipped an essential evidentiary step. Closing arguments in a criminal case must be supported by facts and reasonable inferences from facts in evidence. Counsel are prohibited from arguing facts not in evidence. (*People v. Kirkes* (1952) 39 Cal.2d 719; *People v. Villa* (1980) 109 Cal.App.3d 360.) Defense counsel's reasonable attempt to establish a failure to follow proper procedures would not have invaded the province of the jury as to whether or not the photographic line-ups were reliable but instead would have provided the necessary evidentiary support for such an argument.

The trial court's ruling excluding expert testimony about photographic line-up procedures violated appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution to a fair trial, to present a defense, to reliable guilt and penalty determinations, and to due process. The ruling similarly violated appellant's state constitutional rights. (Cal. Const., art. I, §§ 7, 15, 17.)

A criminal defendant's right to present a defense by calling and examining witnesses on his or her behalf is a fundamental right guaranteed by the Sixth Amendment and by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Taylor v. Illinois* (1988) 484 U.S. 400, 407-409; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v.*

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of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable."

Texas (1967) 388 U.S. 14, 19; *In re Eichorn* (1998) 69 Cal.App.4th 383, 391.) This right is also guaranteed by the California Constitution. (Cal. Const., art. I., § 15; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787.)

A criminal defendant's due process and Sixth Amendment right to present a defense under the United States Constitution includes the right to present all relevant and material evidence favorable to his or her theory of defense. (*Washington v. Texas,supra,* 388 U.S. at p. 23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Jennings* (1991) 53 Cal.3d 334, 372; see also *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 596-600 [where the court found in a rape case that the trial court had improperly excluded evidence that the victim had falsely accused another person of rape on another occasion]; *People v. Taylor* (1980) 112 Cal.App.3d 348, 362-366 [where the appellate court held that the trial court in a murder case had improperly excluded evidence of statements by the victim that he was suicidal]; *People v. Reeder* (1978) 82 Cal.App.3d 543, 550-557 [where the appellate court held that it was error to exclude evidence that the co-defendant disliked the defendant, where it was offered to establish that the co-defendant had committed the offense, and that he was falsely accusing the defendant].)

Where, as here, the excluded evidence is crucial to the defense and bears directly on the defendant's legal and moral culpability, the erroneous exclusion of the evidence also precludes the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-38), and deprives the defendant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S.

862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

In light of the critical nature of the eyewitness identifications and the defense theory that the identifications were unreliable, the trial court erred in excluding the relevant expert testimony that would have assisted the jury in determining the reliability issue. Because this error infringed on appellant's federal constitutional rights to a fair trial, to present a defense, to reliable guilt and penalty determinations, and to due process, the error requires reversal unless the State can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

No such showing can be made in appellant's case because the reliability of the eyewitness identifications was so essential to the murder verdicts relating to the killings of Mr. Skyles and Mr. Price. Expert testimony that improper procedures affecting the fairness of the photographic lineups were used may have resulted in different verdicts, especially when considered in conjunction with the admission from Gonzales contradicting the identifications of appellant as the shooter. Even when considered as a state law violation, reversal is required under *Watson* because there is a reasonable probability that a difference verdict would have resulted.

* * * * *

VI.

THE COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, RELIABLE GUILT AND PENALTY DETERMINATIONS AND DUE PROCESS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT REFUSED TO GRANT A CONTINUANCE TO ENHANCE THE TAPES OF GONZALES' ADMISSIONS TO BERBER

A. Factual Summary

The surreptitiously recorded conversation between Gonzales and Salvador Berber where Gonzales admitted being the actual shooter in all three killings constituted a critical piece of appellant's defense. In the tape, Gonzales admitted not only shooting Lester Eaton, as contended by the prosecution, but he also countered the prosecution's theory on the Skyles/Price shootings that appellant shot them because Gonzales instead admitted that he also shot Skyles and Price. According to Gonzales, as captured on tape, Soliz had nothing to do with the Skyles/Price killings.

Appellant's theory of defense and his reliance on the Gonzales-Berber tape was seriously undermined during the cross-examination of Berber in the guilt phase. Appellant's counsel asked Berber whether Gonzales made any physical gestures when he described shooting Skyles and Price. (RT 1955). Then the following colloquy took place:

Q. At what point was it that he indicated that he had a gun when he was shooting them?
A. When he told me he had a gun.
Q. Explain that a little more clearly to the jury so they understand it. When he told you he had a gun –
A. That was the time in the – you can't hear it on the tape – that he said him and Jasper were struggling for the

gun to, I guess, see who were gonna shoot the black kids.

Q. Him and Jasper?

A. Yes.

Q. Where was Jasper at this time? This is on the tape, Mr. Berber?

A. You can't – it's not on the tape. That's why I didn't mention it before. You can't hear it. It's at one of the times where –

Mr. Borges: You know, I'm going to object and move to strike, your honor.

The Court: This is part of the conversation. It's responsive to your question.

Mr. Borges: Okay.

Q. Let [sic] go back here, Mr. Berber. When did the conversation take place?

A. At the same time that the tape was rolling, I guess we were in the van.

Q. That he and Jasper were fighting over a gun?

A. Well, not – I guess not beating each other fighting, but they were struggling like saying who was gonna shoot who or something. I remember him saying that.

Q. This was when you were in the van?

A. Yes.

Q. This was when the conversation was being taped, right?

A. Yes.

Q. Have you ever mentioned this to anyone before today, Mr. Berber?

A. Yes.

Q. Who is that you mentioned this to?

A. Um, I think it was Willie West and then Reeder.

Q. Mr. Berber, you've read the transcripts – I've read the edited version, and you've read the total transcript of – the 53-page transcript, both of them, haven't you?

A. Yes.

Q. There's never been anything in any of those transcripts about Mr. Gonzales and Mr. Soliz fighting over a gun, is there?
A. No. You can't hear it, no.

(RT 1955-1957.)

At that point, the trial court took the lunch recess. (RT 1957.) Following the lunch break, and out of the presence of the jury, appellant's counsel brought up Berber's testimony about the "struggle" for the gun. (RT 1958.) The court requested that the reporter read back that testimony. (RT 1959.) After the read back, appellant's counsel pointed out that Berber's testimony had been "nonresponsive to the question" and that counsel had moved to strike that testimony. (RT 1959.) Appellant's counsel also indicated that he had never heard any allegation about a struggle for the gun between Gonzales and appellant, that no discovery had been provided by the prosecution of such a statement from Berber, and that Berber's allegation came as a "total surprise." Because of the critical nature of Berber's surprise testimony, appellant's counsel moved for a continuance to allow an expert to listen to the tapes and determine whether further conversations could be heard through enhancement. (RT 1959.) In the event of the court's unwillingness to grant a "short continuance" to obtain such expert services, appellant's counsel moved that Berber's statement be stricken. (RT 1959.)

The prosecutor stated that he had never asked Berber about the unintelligible portions of the tape and Berber's testimony was the first time he heard about the gun struggle allegation. (RT 1960.) The trial court indicated that appellant's counsel had "exacerbated the difficulty by asking all of the follow-up questions rather than having – asking the original answer be stricken as nonresponsive, which I would have done." (RT

1960.) But appellant's counsel had moved to strike the original answer and the follow-up questions occurred only *after* the trial court denied that request. (RT 1956.)

The trial court then denied the continuance request. (RT 1960.) The judge speculated that he did not think that enhancement would bring out anything. The court did agree to instruct the jury to disregard that portion of the testimony. (RT 1960.)

Immediately following a short inquiry into a potential problem with one of the jurors, appellant's counsel again brought up the issue of Berber's surprise testimony. (RT 1967.) While appellant's counsel was in the process of explaining that an admonition may be insufficient, the court interrupted and an exchange occurred between the trial court and the prosecutor as to whether Berber's testimony was nonresponsive. (RT 1968-1970.) Characterizing Berber's testimony as "a nonresponsive ejaculation," the trial court reaffirmed that the answer should be stricken. (RT 1970.)

Believing that an admonition would be insufficient, appellant's counsel moved for a mistrial based on the surprise information coming before the jury.[19] (RT 1970.) The trial court treated the mistrial motion with disdain:

> The Court: Do you really think that this – that this little piece of – this evidence rises to that solemnity that you should abort the entire trial based on that moment?
>
> Mr. Borges: I think that I should make a record on that basis, yes, judge.
>
> The Court: You should make a record but you don't mean this seriously.

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[19] Counsel for Gonzales joined in the mistrial motion. (RT 1970.)

Mr. Borges: I'm making a motion for a mistrial, your honor.
The Court: The motion for mistrial is denied.

(RT 1970-1971.)

B. Standard of Review

The trial court's denial of a motion for continuance to permit counsel to secure further evidence is reviewed for abuse of discretion. (*People v. Roybal* (1998) 19 Cal.4th 481, 504; *People v. Jones* (1998) 17 Cal.4th 279, 318; *People v. Mickey* (1991) 54 Cal. 3d 612, 660.) Although the trial court has broad discretion to determine whether good cause exists to grant a continuance of trial, that discretion must be exercised in conformity with applicable law. (Pen. Code, § 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012; *People v. Mickey, supra,* 54 Cal.3d at p. 660.) This discretion may not be exercised in a manner as to deprive the defendant of a reasonable opportunity to prepare his defense. (*Jennings v. Superior Court of Contra Costa County* (1967) 66 Cal.2d 867, 875-876; *People v. Murphy* (1963) 59 Cal.2d 818, 825.) "[W]hen a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion."] (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333; see also *United States v. Bogard* (9th Cir. 1988) 846 F.2d 563, 566 ["The concept of fairness, implicit in the right to due process, may dictate that an accused be granted a continuance in order to prepare an adequate defense. Denial of a continuance warrants reversal, however, only when the court has abused its discretion."].)

C. The Trial Court Abused its Discretion by Denying the Continuance

By denying the motion for a continuance, the trial court violated appellant's constitutional rights to a fair trial, effective counsel, confrontation, reliable guilt and penalty determinations and due process. (U.S. Const., Amends. VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 17.) A district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. (*United States v. Morales, supra,* 108 F.3d at p. 1035.) To exercise judicial discretion, a trial court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (*In re Cortez, supra,* 6 Cal.3d at pp. 85-86.)

The trial court failed to exercise its discretion properly because it failed to make an informed and intelligent assessment of the surprise testimony. In the court's cavalier attitude, the "little piece of evidence" about a struggle for the gun between appellant and Gonzales lacked any significance. A fully informed evaluation of the surprise testimony would have led to the conclusion that it had a major impact on appellant's theory of defense as to the Skyles/Price shootings.

Relying on the taped statements by Gonzales, appellant sought to show that Gonzales alone was responsible for those shootings and that appellant played no part. Neither the tape nor any other discovery provided to appellant's counsel gave any indication or even a hint of evidence that both Gonzales and appellant tried to shoot Skyles and Price. If believed, Berber's statement that Gonzales and appellant had struggled over the gun to see who would shoot Skyles and Price made appellant complicit in the crime. Contrary to the effort by the trial judge to minimize this evidence,

the surprise testimony had a devastating effect on appellant's theory of defense.

That is why an admonition was inadequate. "It has been truly said: 'You can't unring a bell.'" (*People v. Hill, supra,* 17 Cal.4th at p. 845, quoting *People v. Wein* (1958) 50 Cal.2d 383, 423 (dis. opn. of Carter, J.).) The surprise and improper testimony in appellant's case did not relate to some minor point; it substantially undermined appellant's theory of the defense as to the Skyles/Price shootings. It is unrealistic to expect that the jury could readily disregard such damaging testimony. The failure of the trial court to grant the motion to strike and admonish the jury *immediately after* the original improper response exacerbated the damage. Although the trial judge later stated he would have granted a motion to strike and blamed appellant's counsel for making matters worse by asking follow-up questions, counsel did so only because the trial court denied the original objection and motion to strike. (RT 1956.) Because of the trial court's error, the jury heard the damaging testimony repeated as defense counsel attempted to refute Berber's claim.

The significance of Berber's testimony and the surprise element of his accusation made it essential that appellant's counsel have a reasonable opportunity to investigate that new evidence. Counsel reasonably sought a short continuance to retain an expert to enhance the tape to ascertain whether the alleged conversation could be recovered from the tape. The trial court had no basis for concluding without any inquiry that the tape could not be enhanced to determine if Gonzales actually made the purported statement. If no such conversation about a struggle for the gun could be heard on the tape even after enhancement, Berber's claim would have been seriously undermined. By failing to recognize the critical nature of

Berber's accusation, the trial court acted in an uninformed manner making the denial of the continuance motion an abuse of discretion.

Appellant's theory of defense on the Skyles/Price charges depended on Gonzales's admission to shooting Skyles and Price and his statement that appellant was not involved. Berber's surprise testimony significantly undermined this theory of defense. Because the denial of a continuance deprived appellant of a reasonable opportunity to counter the damaging testimony and present evidence supporting appellant's theory of defense, the abuse of discretion implicated appellant's rights to a fair trial, confrontation and effective counsel as guaranteed by the Sixth Amendment and to fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment. (*Crane v. Kentucky* (1986) 476 U.S. 683, 645 [the Constitution guarantees a "meaningful opportunity to present a complete defense"]; *Davis v. Alaska* (1974) 415 U.S. 308, 319 [a defendant's constitutional right to present evidence in his defense is "paramount"]; *Chambers v. Mississippi, supra,* 410 U.S. at p. 295 [the absence of proper confrontation calls into question the integrity of the fact-finding process]; *Spencer v. Texas, supra,* 385 U.S. at pp. 563-564 [the due process guarantee requires fundamental fairness in a criminal trial].) By denying the defense an opportunity to refute the claim that Gonzales implicated appellant in the Skyles/Price shootings, the error also violated the Eighth Amendment guarantees of reliability in the guilt and penalty determinations. (*Beck v. Alabama, supra,* 447 U.S. at p. 637; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

D. Denial of the Continuance Resulted in Prejudice

Because the denial of the continuance violated appellant's federal constitutional rights, the error is subject to harmless error analysis.

(*Chapman v. California, supra,* 386 U.S. at p. 24. That is, reversal is required unless the State establishes there is no reasonable possibility that the error contributed to the verdict. (*Id.* at p. 23; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) The State cannot meet that burden here.

If the jury believed the admission by Gonzales that he alone shot Skyles and Price and that appellant had no involvement, or at least had a reasonable doubt about appellant's guilt based on Gonzales's admission, appellant would not have been convicted of the double murders. Berber's surprise testimony about another purported statement by Gonzales, not captured on the tape, that implicated appellant constituted significant evidence contradicting the theory of the defense. The continuance request would have allowed the defense a reasonable opportunity to counter this damaging testimony. The improper denial of the continuance motion cannot be considered harmless. Appellant's murder convictions on Counts 4 and 5 and death sentence must be reversed.

* * * * *

VII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING THE MISTRIAL MOTION FOLLOWING THE IMPROPER TESTIMONY OF A KEY PROSECUTION WITNESS

A. Introduction

As indicated in the preceding argument regarding the denial of a continuance, Salvador Bender's testimony that Gonzales told him that appellant and Gonzales "struggled" over the gun to see who would shoot Skyles and Price constituted significant evidence. This evidence contradicted the statements by Gonzales on the tape that appellant had nothing to do with those shootings. Berber's testimony came as a complete surprise because defense counsel received no discovery indicating any such statement by Gonzales. (RT 1959.) Berber's testimony was also improper because his answer was nonresponsive to the question before him and instead volunteered by Berber.

Appellant's counsel immediately objected and moved to strike Berber's improper response. (RT 1956, 1959.) The trial court denied the objection. Appellant's counsel then sought to refute Berber's surprise testimony through further cross-examination. This effort resulted in Berber repeating his damaging testimony. (RT 1955-1957.)

Immediately following the lunch recess, appellant's counsel moved for a continuance to seek enhancement of the tape to determine whether the purported conversation about a struggle for the gun was actually made by Gonzales. The trial court denied the continuance. Failing to recognize that appellant's counsel had objected to the original response and moved to strike it, the trial judge stated that he would have stricken the response if

counsel had so requested. (RT 1960.) The court did agree at that point to admonish the jury to disregard the statement.[20] (RT 1960, 1970.)

Believing that a tardy admonition would be insufficient, appellant's counsel moved for a mistrial. (RT 1970.) The trial court denied the mistrial motion expressing the view that Berber's improper testimony was insignificant. (RT 1970-1971.)

B. Standard of Review

The denial of a motion for mistrial is reviewed under the abuse of discretion standard. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Price* (1991) 1 Cal.4th 324, 428.) The court should grant a mistrial where it judges the error incurable by admonition or instruction. (*People v. Wharton* (1991) 53 Cal.3d 522, 565; *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

The exercise of discretion in this case was flawed because the trial court operated under an erroneous view of the facts. (*United States v. Morales*, *supra,* 108 F.3d at p. 1035 [a court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts]; *In re Cortez*, *supra,* 6 Cal.3d at pp. 85-86 [to exercise judicial discretion, a trial court must know and consider all material facts and all legal principles essential to an informed, intelligent,

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[20] The trial court gave the following admonition: "Before we reconvene as to the testimony of this witness, the jury is instructed that the answer of the witness to Mr. Borges' question about the gun where he referred to Jasper or Mr. Soliz engaging in a struggle with Mr. Gonzales over the gun is stricken from the record, and the jury is to disregard that. [¶] When the court strikes any testimony, then it's to be disregarded entirely; you're not to discuss it in your deliberation; you're to treat it as though you never heard it." (RT 1972.)

and just decision].) The court incorrectly viewed an admonition as sufficient and a mistrial unnecessary because it failed to recognize the significance of Berber's improper testimony and the irreparable damage to appellant's theory of defense. This resulted in an unfair trial with the jury exposed to damaging and unreliable testimony.

As with the denial of the continuance motion, by denying the motion for a mistrial, the trial court deprived appellant of his federal constitutional rights to obtain a fair trial, the effective assistance of counsel, confrontation, reliable guilt and penalty determinations, and due process in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Spencer v. Texas, supra,* 385 U.S. at pp. 563-564 [the due process guarantee requires fundamental fairness in a criminal trial]; *Chambers v. Mississippi, supra,* 410 U.S. at p. 295 [the absence of proper confrontation calls into question the integrity of the fact-finding process]; *Crane v. Kentucky, supra,* 476 U.S. at p. 645 [the Constitution guarantees a "meaningful opportunity to present a complete defense"]; *Davis v. Alaska, supra,* 415 U.S. at p. 319 [a defendant's right to present evidence in his defense is "paramount"]; *Beck v. Alabama, supra,* 447 U.S. at p. 637 (heightened requirement under the Eighth Amendment to reliability to the guilt determination in a capital trial].) The erroneous ruling also violated appellant's similar rights under the California Constitution. (Cal. Const., art. I, § 7, 15, 16, 17.)

C. The Necessity for a Mistrial

The trial court erred in two significant ways: (1) it failed to strike the damaging and inadmissible testimony promptly; and (2) it failed to recognize the prejudicial nature of the inadmissible testimony.

Immediately following Berber's inadmissible testimony which Berber volunteered in a nonresponsive manner during cross-examination, appellant's counsel objected and moved to strike. The trial court overruled the objection. This left the jury exposed to damaging and inadmissible testimony which appellant attempted to blunt by cross-examining Berber about his surprise testimony. In the course of this cross-examination, Berber again repeated his damaging testimony implicating appellant in a struggle for the gun to see who would shoot Skyles and Price.

It was only after the lunch recess and further discussion with trial counsel that the court finally realized that Berber's testimony about the struggle for the gun should have been excluded. The trial court agreed to admonish the jury to disregard the testimony but pointed out that appellant's counsel had exacerbated the situation by further cross-examining Berber about his surprise testimony. Of course, it was really the trial court's failure to sustain the original objection and grant the motion to strike that had compounded the problem. But the court's statement that counsel had "exacerbated the difficulty by asking all of the follow-up questions" (RT 1960) is instructive as recognition that an admonition at that point would not be effective.

But the trial court concluded that an admonition would suffice anyway because it viewed the surprise testimony as insignificant. This constituted an abuse of discretion because the court operated under an erroneous view of the material facts. (See *United States v. Morales*, *supra,* 108 F.3d at p. 1035; *In re Cortez*, *supra,* 6 Cal.3d at pp. 85-86.) Appellant's entire defense as to the Skyles/Price shootings centered on unreliable eyewitness identification and that it had been Gonzales that actually shot Skyles and Price and that appellant played no role in the

shootings. Berber's surprise testimony that appellant had attempted to get the gun to perform the shootings himself strongly contradicted that theory of defense.

The testimony became embedded in the jury's memory because of the trial court's own error in failing to strike the damaging testimony immediately which led to the jury hearing the prejudicial claim repeated. As argued *supra*, the court further erred in denying the defense a short continuance to obtain an expert to enhance the tape to show that Gonzales made no such statement implicating appellant in the shootings.

In light of the potential prejudice and the reasonable likelihood that an admonition would be ineffective to cure the harm, the denial of the mistrial motion resulted in a fundamentally unfair trial. The error further implicated appellant's federal constitutional rights by unfairly impairing his theory of defense without allowing an adequate opportunity for an effective cross-examination and by exposing the jury to unreliable claims unsupported by admissible evidence.

D. Reversal Is Required

The guilt and special circumstance determinations relating to counts 4 and 5 were close calls pitting questionable eyewitness identification against the admission by Gonzales that he was solely responsible for those shootings. Berber's surprise testimony implicating appellant in the shootings constituted inadmissible and unreliable statements that seriously skewed the determinations. Because it cannot be shown that the verdicts were not attributable to Berber's erroneous testimony, the denial of the mistrial motion cannot be considered harmless error. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Reversal of the murder convictions on counts 4 and 5 is required. Due to the invalidity of these murder convictions, the multiple murder special circumstance must also be vacated. So must appellant's death sentence which resulted from his murder convictions on the Skyles/Price charges.

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VIII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY LIMITING THE CROSS-EXAMINATION OF THE GANG EXPERT

A. Introduction

The identity of the shooter was the only issue in dispute in relation to the killings of Elijah Skyles and Gary Price. The prosecution claimed that appellant was the shooter based on the eyewitness identification testimony. However, appellant and Gonzales look alike,[21] all of the eyewitnesses picked appellant from a photographic line-up process that did not include photographs of Gonzales,[22] and the circumstances at the crime scene rendered the eyewitness identifications unreliable.[23] Although Mejorado identified appellant as the shooter in her preliminary hearing testimony, at trial she stated that testimony had been coerced by threats to take away her child and to jail her brother and that she did not actually know the identity of the shooter. (See Arg. I.)

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[21] The trial judge described appellant and Gonzales as looking "like twins." (RT 29.)

[22] RT 1652-1658.

[23] Carol Mateo and her brother, Jeremy Robinson, made their identifications from a distance of about 50 feet, late at night, from a moving car after seeing the suspect for only three to five seconds. (RT 1456-1467, 1513, 1569-1570). Jeremy Robinson was unable to identify appellant in court as the shooter. (RT 1575.) Alejandro Mora, the gas station attendant, acknowledged that he only saw the shooter from the side and never saw his face. (RT 1624, 1628-1629.)

The prosecution's theory that appellant was the shooter was directly contradicted by Gonzales's surreptitiously recorded admissions to a colleague that Gonzales shot all of the victims – Lester Eaton, Elijah Skyles and Gary Price. As to the Skyles/Price shootings, Gonzales said that appellant did not even get out of the car and that appellant did nothing to assist or encourage the crimes.

The prosecution acknowledged that Gonzales had told the truth in claiming responsibility for the Eaton killing. But the prosecution sought to discredit Gonzales's admission that he also shot Skyles and Price. Scott Lusk, a gang expert, testified for the prosecution that gang members will often take "credit" for crimes they did not actually commit in order to enhance their reputation within the gang and to intimidate others in the community. (RT 2098.) So the prosecution took the position that Gonzales had been truthful in taking responsibility for the Eaton shooting but that he had lied and embellished his role in the Skyles/Price shootings.

Defense counsel for appellant and Gonzales established that Lusk could not cite any other specific example where someone took credit for a killing committed by someone else. (RT 2099, 2113.) Appellant's counsel also sought to contrast Gonzales's admission of responsibility for the shootings with the absence of any such admission by appellant. First, counsel established through Lusk that appellant's conversations with visitors while in jail had been secretly recorded. (RT 2131.) Then counsel sought to cross-examine Lusk to establish that appellant did not "take credit" or admit responsibility for the shootings in any of his taped conversations. (RT 2132.) But the prosecutor advanced a flurry of objections complaining that Lusk had not listened to the tapes so it was an "inappropriate inquiry," that it constituted hearsay and that it was "self-

serving." (RT 2132.) The trial judge speculated that appellant had no reason to be "bragging" in the secretly recorded conversations so the judge found the tapes irrelevant and sustained the objection.[24] (RT 2132-2134.)

Appellant's counsel later asked Lusk whether appellant had taken credit for either of the two crimes. (RT 2137.) The prosecutor objected on hearsay grounds and the trial court sustained the objection. (RT 2137.)

After the prosecution rested, appellant's counsel indicated that he wanted to recall Sgt. Holmes as part of the defense case. (RT 2147.) The prosecutor expressed concern in light of some of the questions to Deputy Lusk that defense counsel would seek to ask Sgt. Holmes if appellant made admissions in the jail tapes and requested an offer of proof. (RT 2148.) The prosecutor objected to such questioning as hearsay and irrelevant. (RT 2148.) Appellant's counsel explained that the gang expert had testified that it is common for gang members to take credit for crimes to enhance their reputation and the defense wanted to show that appellant never took credit for either crime, unlike Gonzales. (RT 2148-2149.) After initially proposing that the defense could introduce all the other tapes, the trial court then countered that the statements on the tapes were hearsay, not admissions, and would be self-serving making them inadmissible. (RT 2150.)

These improper restrictions on cross-examination violated appellant's federal constitutional rights to present a defense, to confront the witnesses against him, to reliable guilt and penalty determinations and to

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[24] Using that same logic, Gonzales had no reason to be bragging on the secret tapes that he committed the Skyles/Price shootings.

due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments.

B. The Trial Court Improperly Restricted Cross-examination

"The [federal] Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky, supra,* 476 U.S. at p. 645 , quoting *California v. Trombetta,* (1984) 467 U.S. 479, 485.) *Crane* ruled that an essential component of procedural fairness is an opportunity to be heard and present evidence. Indeed, the United States Supreme Court has repeatedly upheld federal constitutional challenges to state evidentiary rulings restricting criminal defendants from introducing evidence important to the defense. (See, e.g., *Davis v. Alaska, supra,* 415 U.S. at p. 319 [holding that a defendant's constitutional right to present evidence in his defense is "paramount"].)

In *Chambers v. Mississippi, supra,* 410 U.S. 284, the Court held that the state's hearsay rule "may not be applied mechanically to defeat the ends of justice." (*Id.* at p. 298.) A state trial court's overly restrictive limits on cross-examination denying a criminal defendant an opportunity to present evidence supporting his defense is unconstitutional. State law cannot diminish a defendant's federal constitutional rights to present relevant evidence supporting his theory of defense. (*Miller v. Anglisker* (2nd Cir. 1988) 848 F.2d 1312, 1323.) "The exclusion of significant defense evidence implicates constitutional values." (*Perry v. Rushen* (9th Cir. 1983) 713 F.2d 1447, 1452.)

The trial court in appellant's case excluded significant defense evidence. The identity of the shooter constituted the only issue in relation to the Skyles/Price crimes. While the eyewitnesses identified appellant as

the shooter, questionable aspects of each of those identifications exposed substantial issues about their reliability. The eyewitness identifications were contradicted by the admission by Gonzales to a colleague that he shot Skyles and Price. Gonzales "bragging" to a colleague and taking credit for the killings was consistent with the prosecution's evidence that often these types of crimes are committed to enhance the gang member's reputation. But the admission by Gonzales conflicted with the prosecution's theory pointing to appellant as the shooter so the prosecution adopted an alternative view that in this instance Gonzales was exaggerating his role and falsely taking credit. In the cross-examination at issue, appellant sought to reinforce the reliability of Gonzales' confession by contrasting Gonzales' admission with the absence of any admissions by appellant. A showing that appellant did not "brag," "take credit" or otherwise admit responsibility for the Skyles/Price shootings constituted a critical aspect of appellant's defense that he played no part in those killings and that only Gonzales was responsible, as demonstrated by Gonzales' admission.

The trial court's ruling restricting the cross-examination infringed on appellant's ability to present this defense theory. The right to confront and cross-examine the witnesses against an accused is a fundamental principle of our criminal justice system. (U.S. Const., Amend. VI; Cal. Const., art. I, § 15.) This means of testing the accuracy and reliability of testimony is such a critical component of a fair trial that the absence of proper confrontation "calls into question the ultimate 'integrity of the fact-finding process.'" (*Chambers v. Mississippi, supra,* 410 U.S. at p. 295, quoting *Berger v. California* (1969) 393 U.S. 314, 315.) This Court has recognized that a criminal defendant is entitled to wide latitude to fully explore any critical issue. (*People v. Melton* (1988) 44 Cal.3d 713, 737.) While a trial

court has latitude to impose reasonable limits on cross-examination, this "discretion is limited, however, by the requirements of the Sixth Amendment." (*United States v. Garcia* (11th Cir. 1994) 13 F.3d 1464, 1468; *United States v. Cooks* (5th Cir. 1995) 52 F.3d 101, 103.) In capital proceedings, where the United Stated States Supreme Court has "demanded that fact finding procedures aspire to a heightened standard of reliability" (*Ford v. Wainwright* (1986) 477 U.S. 399, 411), overly restrictive cross-examination also implicates the reliability requirement of the Eighth Amendment and due process guarantee of the Fourteenth Amendment. This heightened requirement of reliability in capital cases applies in both the guilt and penalty determinations. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

The trial court's ruling restricting appellant from establishing the absence of any evidence that he had not admitted the Skyles/Price shooting does not withstand scrutiny in light of these constitutional imperatives for a full and fair cross-examination. The precise basis for the trial court's ruling is not entirely clear but the arguments against admission of this evidence advanced by both the prosecutor and trial court are all inadequate.

First, the prosecutor complained that the gang expert had not listened to the tapes so the cross-examination was "an inappropriate inquiry." (RT 2132.) But a tape of the surreptitiously recorded conversation between appellant and Luz Jauregui was in evidence. (See Exh. 24; RT 1268; CT 645.) "It is not improper, of course, to ask an expert whether the expert has considered matters in evidence that may be relevant to the weight to be given to the expert's opinion. Except as to statutory limitations on inquiry about learned treatises, 'an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as

to ... (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.'" (*People v. Coddington* (2000) 23 Cal.4th 529, 607, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, quoting Evid. Code, § 721, subd. (a).)

It has long been established that a hypothetical question may be posed to an expert based on facts in evidence. (*McCann v. Children's Home Soc. of California* (1917) 176 Cal.359, 368; Kennedy and Martin, *Cal. Expert Witness Guide* (2d ed. 1997) §15.30, p. 460.) Even the requirement imposed on direct examination that a hypothetical must be based on facts in evidence is relaxed on cross-examination to test the credibility of an expert witness. (*People v. Busch* (1961) 56 Cal.2d 868, 874.) The cross-examiner must be afforded wide latitude (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 796) and questions need only be "fair in scope and fairly relate to the state of the evidence in the case." (*Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 799.)

These rules make clear that the tape in evidence provided a legitimate evidentiary basis for cross-examining the expert about appellant failing to seek to enhance his gang reputation by claiming responsibility for the shootings. Contrary to the prosecutor's further objection, appellant's taped statements also were not inadmissible as "self-serving" or hearsay. The tape was introduced by the prosecution and admitted into evidence. At least some portions of the tape were played for the jury.[25] (RT 1629.) Pursuant to Evidence Code section 356,[26] the defense was entitled to inquire

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[25] The record on appeal is unclear as to whether the jury heard the entire tape or the prosecution only played portions of the tape.

[26] Evidence Code section 356 provides in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence by one

as to the entire conversation. (*People v. Arias* (1996) 13 Cal.4th 92, 156.) "The purpose of [section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*Ibid; People v. Pride, supra,* 3 Cal.4th at p. 235.) Since appellant's taped statements had been introduced as admissions, the rules of evidence allowed appellant to show other portions of the same conversation, "even if they are self-serving." (*People v. Arias, supra,* 13 Cal.4th at p. 156.)

The final purported basis for excluding the evidence was the trial court's speculation that appellant had no reason to be "bragging" in the tapes. (RT 2132.) But that is an argument that goes to the weight of the evidence, not admissibility. Under the applicable rules of evidence and case law, appellant should have been allowed to explore with the gang expert the fact that he had not admitted involvement in the shootings, unlike Gonzales.

In appellant's case, the gang expert had offered his opinion why someone like Gonzales might "brag to another" and falsely take credit for a shooting he did not actually commit. (RT 2098.) This opinion was based on the surreptitious taping of Gonzales admitting the shootings. Consistent with the defense theory of the case, appellant should have been allowed to show, based on the surreptitious taping of his conversation while in jail

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party, the whole on the same subject may be inquired into by the adverse party ...."

which was in evidence, that he had not claimed responsibility and had not sought to enhance his gang reputation. It is especially noteworthy that in closing argument, the prosecutor argued that in that same conversation with Luz Jauregui appellant had admitted his involvement in the market robbery. (RT 2216.) If the trial court had permitted a proper cross-examination, defense counsel would have been able to question the expert about whether his opinion that Gonzales may have exaggerated his role in the Skyles/Price shootings was changed upon considering that appellant had implied involvement in the market robbery but made no admissions about culpability for the shootings. By denying such an opportunity on cross-examination, the trial court substantially interfered with appellant's ability to present an effective defense and engage in meaningful cross-examination.

C. Prejudice Resulted From the Error

Such a violation of the right of confrontation is subject to *Chapman* harmless-error analysis. (*Delaware v. Van Arsdall* (1986) 475 U.S.673, 684.) "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Ibid.*)

The presence of harmful error is determined by reviewing the overall strength of the prosecution's case, the circumstances surrounding the challenged testimony, including the extent of cross-examination otherwise allowed, the importance of the testimony to the prosecution's case, and its corroboration or contradiction at trial. (*Ibid*; *United States v. Cooks, supra,* 52 F.3d at p. 104.) Review of these factors establishes that the error here cannot be considered harmless.

The prosecution's case as to the actual shooter in the Skyles/Price killings depended on the eyewitness testimony. But that testimony was weak and largely unreliable. It was also contradicted by Gonzales's admission of being the shooter. The prosecution sought to counter that admission by presenting the gang expert's opinion testimony that Gonzales may have been exaggerating his role. Appellant's defense sought to reinforce the admission and contrast the statements by Gonzales acknowledging culpability by showing that appellant had made no similar admissions. The trial court's improper restrictions of cross-examination precluded that showing by the defense. This restriction on a critical issue in the case cannot be considered harmless. Appellant's convictions on counts 4 and 5 must be reversed.

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IX.

THE FIRST DEGREE MURDER CONVICTIONS ON COUNTS 4 AND 5 MUST BE REVERSED DUE TO INSUFFICIENCY OF THE EVIDENCE

A. Introduction

Appellant was convicted in counts 4 and 5 of the first degree murders of Elijah Skyles and Gary Price. (CT 754-755.) These convictions were obtained in violation of appellant's federal constitutional rights to reliable guilt determinations under the Eighth Amendment and due process under the Fourteenth Amendment because insufficient evidence established the requisite elements that the killings were willful, deliberate and premeditated.

B. Insufficiency of the Evidence

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case from 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.) A conviction cannot stand if review of the evidence does not establish substantial evidence from which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1980) 443 U.S. 307, 318; *People v. Johnson* (1980) 26 Cal.3d 557, 575-577.)

To be "substantial," the evidence must "reasonably inspire confidence" (*People v. Morris* (1988) 46 Cal.3d 1, 19) and must be "credible and of solid value." (*People v. Green, supra,* 27 Cal.3d at p. 55.) A reasonable inference may not be based on suspicion or speculation. (*People v. Morris, supra,* 46 Cal.3d at p. 21.)

In appellant's case, the prosecution failed to present substantial evidence to establish the essential elements of premeditation and deliberation. "Deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (CALJIC No. 8.20; *People v. Perez* (1992) 2 Cal.4th 1117, 1123.) "Premeditated" means "considered beforehand." (*Ibid.*) The intent to kill "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." (*Id.* at p. 1124.)

In *People v. Anderson* (1968) 70 Cal.2d 15, this Court established guidelines for reviewing findings of first degree murder based on premeditation and deliberation. The Court identified three categories of evidence which might sustain a finding of premeditated murder: (1) facts about the defendant's behavior before the killing that show prior planning; (2) facts about any prior relationship or conduct with the victim from which the jury could infer motive; and (3) facts about the manner of the killing from which the jury could infer the defendant intentionally killed the victim according to a preconceived plan. (*Id.* at pp. 26-27; *People v. Miller* (1990) 50 Cal.3d 954, 992.) A finding of premeditation and deliberation is not supported by evidence that "points to a random attack which was explosive rather than calculated." (*People v. Anderson, supra,* 70 Cal.2d at p. 30.)

In appellant's case, there was no evidence of prior planning. Appellant and Gonzales were on their way home from a party when they saw Skyles and Price and commented that they knew them. A conversation with Skyles and Price erupted into an argument followed quickly by the shootings. Nothing was said by appellant or other occupants of the car before or after the shootings to indicate this was a planned attack.

The only evidence of motive came from a gang expert whose opinion was based on speculation. The gang expert believed that Skyles and Price were killed in retaliation for the murder of Puente gang member Billy Gallegos a few weeks earlier when he was shot by two black gang members from the Neighborhood Crips gang. Although there was some evidence that Skyles and Price may have been wearing "gang clothing," that evidence made little sense. One of the victims wore blue clothing associated with the Crips while the other wore red clothing associated with the Bloods, another black gang well known as rivals of the Crips and such gang members are unlikely to associate together. More importantly, the same gang expert testified that Skyles and Price were <u>not</u> gang members and no evidence indicated they had any involvement in the Gallegos killing. As this Court has recognized, "the basis for an expert's opinion testimony must be reliable." (*People v. Gardeley* (1996) 14 Cal.4th 604, 618.) "For the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*Ibid.*) No other evidence substantiated the expert's speculation about the motive for the killing. In Gonzales's surreptitiously recorded statement where he claimed "credit" for the killings, no revenge motive was ever mentioned. Thus, the evidence of motive was not substantial and essentially amounted to speculation.

As to the third element from *Anderson*, the manner of killing, the evidence showed the shootings resulted from a spur of the moment argument rather than a preconceived plan. Rather than supporting a finding of premeditation, the evidence of an argument with the victims was more

consistent with a killing during a sudden quarrel, in the heat of passion or due to rash impulse than a deliberate and premeditated killing.

These circumstances show that sufficient evidence of premeditation and deliberation was lacking to sustain the first degree murder convictions. The convictions must be reversed.

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X.

REVERSAL IS REQUIRED DUE TO THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER

A. Introduction

Counts 4 and 5 charged appellant and Gonzales with the murders of Elijah Skyles and Gary Price. (CT 385-386.) The jury received instructions in relation to those murder allegations on only first and second degree murder. (CT 696-707.) The trial court committed prejudicial error in failing to instruct sua sponte on the lesser-included offense of voluntary manslaughter.

Judith Mejorado provided the evidence supporting a theory of voluntary manslaughter. Mejorado testified that she had been riding in the car with appellant and Gonzales on the night of the shooting.[27] (RT 1683-1685.) As the car passed by a gas station, she saw three black males. Appellant and Gonzales said they knew those people and the car was turned around and driven back to the station. (RT 1693-1694.) According to Mejorado, both appellant and Gonzales got out of the car and approached Skyles and Price to talk to them, with Gonzales staying closer to the car.[28] (RT 1708-1710.)

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[27] At trial, Mejorado for the most part claimed no recollection of the events of that night. The prosecution used her preliminary hearing testimony to establish what she said occurred that night.

[28] By the time the car drove back to the gas station, the third male had already departed. (RT 1702.)

Mejorado heard all four men talking but could not generally make out what they were saying. (RT 1711-1714.) She testified in the preliminary hearing that the conversation was loud but not an argument. (RT 1716.) But in rebuttal, the prosecutor impeached her with the testimony of the officer who took her statement. (RT 1709, 1794.) The officer testified that Mejorada said she heard all four voices arguing. (RT 1799.) Mejorado said she heard one of the males blacks say, "No, I didn't mean to do you that way. I'm sorry. I didn't mean to do you that way." (RT 1799.) Then she heard several shots. (RT 1800.)

The prosecution theorized that the Skyles/Price shootings were retaliation for an earlier gang killing. A gang expert identified appellant and Gonzales as members of the Puente gang. (RT 2072-2081.) Two weeks prior to the Sklyes/Price shooting, a Puente gang member, Billy Gallegos, was killed by two black members of the Neighborhood Crips gang. (RT 1879-1989, 2000-2004, 2092.) Skyles and Price were black and wearing gang-type clothing on the night of the shooting. (RT 1093-1094, 1342-1344.)

Mejorado had stated that there was no discussion between the occupants in the car about shooting anyone or why they wanted to talk to Skyles and Price. (RT 1812.)

Under these circumstances, the evidence of premeditation and deliberation was hardly overwhelming. The evidence from Mejorado indicating that an argument preceded the shootings would have supported a theory that the shootings occurred in the heat of passion or upon a sudden quarrel. The trial court should have instructed on voluntary manslaughter.

B. Instructional Error

The trial court's refusal to instruct on the lesser-included offense of voluntary manslaughter violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments of the federal Constitution and article I, sections 1, 7, 15, 16 and 17 of the California Constitution guaranteeing the rights to present a defense, to a fair trial, to a reliable guilt determination, and to due process and equal protection.

It is well established that in criminal cases, even in the absence of a request, the trial court is required to instruct on the general principles of law relevant to issues raised by the evidence. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Consistent with this obligation, trial courts "must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118.) "'Trial courts have a sua sponte duty to instruct regarding lesser included offenses because neither the defendant nor the People have a right to incomplete instructions.'" (*People v. Barton* (1995) 12 Cal.4th 186, 204, quoting *People v. Eilers* (1991) 231 Cal.App.3d 288, 296.) A trial court also has a duty to instruct on defenses if the defendant is relying on such a defense or there is substantial evidence supporting such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Barton, supra,* 12 Cal.4th at p. 195; *People v. Sedeno* (1974) 10 Cal.3d 703, 716.) Substantial evidence is evidence sufficient to "deserve consideration by the jury" or evidence that a reasonable jury could find persuasive. (*People v. Flannel* (1979) 25 Cal.3d 668, 684; *People v. Barton, supra,* 12 Cal.4th at p. 201, fn. 8.)

The trial court failed to meet these duties by neglecting to instruct the jury on voluntary manslaughter. Any doubts concerning the sufficiency

of the evidence should have been resolved in favor of the defendants. (*People v. Ratliff* (1986) 41 Cal.3d 675, 694; *People v. Sears* (1970) 2 Cal.3d 180.)

The evidence supported an instruction that the shootings occurred in the heat of passion or upon a sudden quarrel. A killing in the heat of passion or upon a sudden quarrel negates the malice element of murder and reduces a crime to voluntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th. 142, 163.) Appellant was entitled to instructions defining voluntary manslaughter, explaining "sudden quarrel or heat of passion and provocation" and distinguishing murder from manslaughter. (CALJIC Nos. 8.37, 8.40, 8.42, 8.43, 8.44 and 8.50.)

It makes no difference that none of the parties requested such instructions or focused their arguments on a theory of voluntary manslaughter. When supported by substantial evidence, the trial court is obligated to instruct on lesser offenses regardless of the trial theories or tactics pursued by the parties. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.) The obligation to instruct on "lesser included offenses may exist even in the face of inconsistencies presented by the defense itself." (*Id.* at p. 163.) "A trial court's sua sponte duty to instruct on lesser included offenses arises, however, not from the arguments of counsel but from the evidence at trial." (*People v. Barton, supra,* 12 Cal.4th at p. 203.) As stated in *Breverman*:

> We have noted the danger of all-or-nothing verdict choices as a basis for the instructional rule. However, we have never intimated that the rule is satisfied once the jury has *some* lesser offense option. so that the court may limit its sua sponte instructions to those offenses or theories which seem strongest on the evidence, or on which the parties have openly relied. On the contrary, as we have expressly indicated, the

> rule seeks the most accurate possible judgment by "ensur[ing] that the jury will consider the *full range of possible verdicts*" included in the charges, regardless of the parties' wishes or tactics. [Citation omitted.] The inference is that *every* lesser included offenses, or theory thereof, which is supported by the evidence must be presented to the jury.

(*People v. Breverman, supra,* 19 Cal.4th at p. 155, emphasis in original text.)

Substantial evidence supported the theory that the Skyles/Price shootings occurred in the heat of passion or upon a sudden quarrel. There was no evidence of a preconceived plan to shoot Skyles and Price. Mejorado said that no discussion occurred in the car about shooting anyone when appellant and Gonzales saw Skyles and Price. Instead, an argument ensued between the four persons when appellant and Gonzales got out of the car. The argument may have focused on suspicions that Skyles and Price were involved in the killing of Gallegos two weeks earlier. Or the argument may have involved a completely unrelated matter. But according to Mejorado, an argument precipitated the shootings. The jury could have found that passions were aroused in the heat of the quarrel or argument leading to the shootings. Such a finding would have negated the malice element of murder. (See *People v. Barton, supra,* 12 Cal.4th at pp. 201-202.) The failure to instruct on voluntary manslaughter constituted error.

C. Prejudice

This Court has held that in a noncapital case, error in failing to instruct fully on all lesser included offenses and theories supported by the evidence must be reviewed for prejudice under the *Watson* standard of a reasonable probability the defendant would have obtained a more favorable

outcome had the error not occurred.[29] (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) However, this is a capital case.

A capital defendant has a federal constitutional right to instruction on lesser included offenses. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.) The Sixth Amendment to the United States Constitution also grants a criminal defendant "the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523.) Murder instructions which fail to inform a jury that it may not find the defendant guilty of murder if heat of passion is present are incomplete instructions on the element of malice when substantial evidence supports a theory of heat of passion. (*People v. Breverman, supra,* 19 Cal.4th at pp. 189-190 (dis. opn. of Kennard, J.) Such error, at least in a capital case, requires reversal unless the prosecution shows that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The prosecution cannot make such a showing in this case. The evidence supporting the first degree murder allegations was hardly overwhelming. Indeed, there was really no evidence of premeditation and deliberation. The evidence established that appellant and Gonzales were on their way home from a party when they spotted Skyles and Price. No evidence pointed to any plan to assault Skyles and Price. Judith Mejorado told the police that no discussion occurred between appellant and Gonzales about Skyles and Price other than that they thought they knew them. According to Mejorado, an argument involving all four – appellant,

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[29] *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Gonzales, Skyles and Price – occurred followed by the shooting. Under these circumstances, it is reasonably possible that a properly instructed jury would have found that the killings occurred in the heat of passion or during a sudden quarrel. The failure to instruct on voluntary manslaughter cannot be considered harmless.

The failure to provide adequate instructions led to unreliable murder verdicts. Proper instructions might have led to reduced verdicts of voluntary manslaughter.

Even under the less stringent *Watson* standard, there is a reasonable probability that appellant would have obtained a more favorable result if the trial court had instructed the jury fully. Reversal of the murder convictions in counts 4 and 5 is required.

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XI.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S NEW TRIAL MOTION BASED ON NEWLY DISCOVERED EVIDENCE

A. Introduction

John Gonzales did not testify in the guilt phase or the original penalty phase. In the guilt phase, the prosecution played a recording of a surreptitiously taped conversation between Gonzales and Salvador Berber where Gonzales admitted being responsible for all of the shootings. (People's Exh. 58.) The prosecution contended that Gonzales had told the truth in claiming responsibility for shooting Lester Eaton but that he had exaggerated his role in regard to the shootings of Elijah Skyles and Gary Price who, the prosecution claimed, had been shot by appellant. (RT 4420-4421.) By finding appellant had personally used a firearm in relation to the Sklyes/Price shootings and returning a verdict of life without possibility of parole for Gonzales for those shootings (while unable to agree on the penalty for Gonzales on the Eaton killing or as to appellant for any of the crimes), the original jury apparently accepted the prosecution's theory.

Gonzales then testified in the penalty retrial. Although Gonzales continued to take responsibility for all of the shootings and absolve appellant of any role, as he had done in the surreptitiously recorded conversation, his testimony differed in some aspects from the taped conversation. In his penalty retrial testimony, Gonzales explained that he had not intended to kill Skyles and Price. (RT 4287.) He had armed himself only for protection. (RT 4287.) The conversation with Skyles and Price turned heated when Gonzales responded to their question about where he was from and they replied, "Fuck Punete." (RT 4210, 4291.) When

Gonzales observed one of them make a move he interpreted as reaching for a gun, Gonzales starting shooting in reaction and shot both Skyles and Price. (RT 4210, 4291. 4306.)

Following the penalty verdicts after the retrial, appellant moved for a new trial on various grounds including the "newly discovered evidence" of Gonzales's testimony. (CT 977-981.) Defense counsel pointed out that Gonzales had been unavailable in the guilt phase because he exercised his Fifth Amendment right to remain silent. (CT 980.) Defense counsel argued that this testimony probably would have resulted in different guilt verdicts as to the Skyles and Price charges. The prosecutor contended that the testimony was cumulative of the taped evidence that the jury heard. (CT 993-994.) The trial court denied the motion for a new trial. (RT 4539.)

The trial court erred in denying the new trial motion. Contrary to the prosecutor's assertion, the testimony by Gonzales in the penalty retrial differed fundamentally from the taped conversation heard by the jury in the guilt phase. The taped conversation tended to support the prosecution's theory that the shootings of Skyles and Price were unprovoked. The penalty retrial testimony by Gonzales indicated that the shootings of Skyles and Price involved no planning or premeditation, that Gonzales had armed himself only for protection, and that the shootings were provoked by an argument and Gonzales's belief that Sklyes and Price were reaching for weapons. This testimony would have supported guilt phase instructions on voluntary manslaughter based on a heat of passion, sudden quarrel or imperfect self-defense. The testimony would have also reinforced appellant's guilt defense that he had not been involved in the shootings of Sklyes and Price. As Gonzales testified, he had acted alone without any aid or encouragement from appellant and the eyewitnesses had mistakenly

identified appellant as the shooter. The testimony was not cumulative and would probably have made a difference in the guilt phase verdicts. Appellant should have been granted a new trial.

This erroneous denial by the trial court of appellant's meritorious new trial motion was an abuse of discretion which deprived him of his right to due process and a fundamentally fair trial (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, §§ 7, 15, 17; *Estelle v. Williams* (1976) 425 U.S. 501, 505; *Holbrook v. Flynn* (1986) 475 U.S. 560; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; his right to a reliable guilt adjudication (U.S. Const., Amend. VIII; *Beck v. Alabama, supra,* 447 U.S. at p. 638; and his right to present a defense (U.S. Const., Amend. VI; *Crane v. Kentucky, supra,* 476 U.S. at pp. 690-691.) A denial of a motion for new trial is a proper matter for appellate review and appellant's conviction should be reversed. (Pen.Code, §§ 1237, subd. (a), 1466, subd. (2)(a).)

B. Gonzales Provided New, Material Evidence of Appellant's Innocence, or At Least of His Guilt of a Lesser Charge Which Was Not Cumulative and Which Directly Contradicted the Prosecution's Strongest Evidence

A motion for new trial "is particularly important to a defendant who has been found guilty of a capital offense." (*People v. Edgmon* (1968) 267 Cal.App.2d 759, 766.) In addressing a motion for new trial claim, this Court has held that "[t]rial courts have a constitutional duty to insure that defendants be accorded due process of law, and this duty may not be limited by statute." (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.)

Penal Code section 1181, subdivision (8) provides the trial court with the statutory power to grant a new trial after independently weighing whether the evidence presented is: (1) newly discovered and material in

nature; (2) not merely cumulative; (3) such that a different verdict would probably result and that the new evidence could not have been produced at the previous trial; and (4) admissible in a court of law. (See also 6 Witkin, Cal. Crim. Law 3d (2000 Suppl.) Crim Judgm, §§ 91, 98, pp. 20, 122; *People v. Beyea* (1974) 38 Cal.App.3d 176; 202.) The test on appeal for denial of a motion is whether the trial court abused its discretion. (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1482.) As stated in *People v. Love* (1959) 51 Cal.2d 751, 757-758.)

> "'... [The question of whether a motion for new trial is to be granted] should be determined by [the trial] court with a full realization of the responsibility involved, and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial.' [Citations.] Distrust or disfavor of the motion does not mean 'that when the trial court has exercised its discretion and granted a new trial that such action is looked upon with either distrust or disfavor. In fact, it has been said that one of the most prolific causes of miscarriages of justice is the reluctance of trial judges to exercise the discretion with which they are clothed to grant a new trial when the circumstances show that justice would be thereby served. ... It is recognized that despite the exercise of diligent effort, cases will sometimes occur where, after trial, new evidence most material to the issues and which would probably have produced a different result is discovered. It is for such cases that the remedy of a motion for a new trial on the ground of newly discovered evidence has been given.' [Citations.]"

The exculpatory evidence provided by Gonzales in the penalty retrial was newly discovered and could not with reasonable diligence have been produced at the guilt phase. In a joint trial with multiple defendants, each

defendant has a right to remain silent and cannot be called as a witness by the prosecution or by a co-defendant. (See *People v. Hardy* (1992) 2 Cal.4th 86, 157.) Because Gonzales chose not to testify in the guilt phase, his testimony was unavailable to appellant.

The prosecution claimed that the testimony was cumulative because the guilt phase jury had heard the taped statements of Gonzales. But the taped statements heard by the guilt phase jury included only a limited discussion of the Skyles and Price shootings and provided no indication of provocation. Gonzales stated: "I ran up on 'em. Cause the tintos[30] was right there by the phone. They were right here by the phone and we were here. I got out the car and I went like that. And I ran up on 'em. They were like, 'No, no, no.' I let them motherfuckers have it." (People's Exh. 58 at p. 2.) The taped statement also barely mentioned appellant, with Gonzales merely saying that appellant did not get out of the car. (*Id.* at p. 3.)

In contrast, Gonzales's penalty retrial testimony completely exculpated appellant. Gonzales testified that not only did appellant never leave the car, he also did nothing to encourage Gonzales. (RT 4210, 4274, 4281, 4282, 4287, 4297.) Gonzales contradicted Judith Mejorado who had testified that appellant said he knew Sklyes and Price. Gonzales testified that appellant never said anything and that Gonzales was the one who told the driver he knew them and wanted to talk to them. (RT 4271-4273.) Gonzales testified that appellant never said anything to Skyles and Price. (RT 4292.) Gonzales also testified that the eyewitnesses were wrong when

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[30] Berber testified that "tintos" is Spanish slang for black persons. (RT 1907.)

they identified appellant as the shooter (RT 4275) and that Mejorado had lied when she claimed that appellant got out of the car. (RT 4272.) Where, as here, "the newly discovered evidence contradicts the strongest evidence introduced against the defendant," the denial of appellant's motion warrants reversal. (*People v. Martinez* (1984) 36 Cal.3d 816, 823 [defendant entitled to new trial after newly discovered evidence corroborated appellant's innocent explanation for his palm print being on a burglarized tool].)

Gonzales's testimony also differed from the taped statement because he testified that when he approached Sklyes and Price he had no intention to use the gun but only retrieved the gun because he felt he needed protection. (RT 4287.) His discussion with Sklyes and Price turned tragic when they made a derogatory comment about his gang affiliation and made movements which Gonzales interpreted as reaching for weapons. (RT 4210, 4291.) Gonzales in reaction started shooting. (RT 4210, 4291, 4304.)

Gonzales explained that his penalty retrial testimony differed from the taped statements because in talking to Berber he had tried to make himself look tough to a fellow gang member. (RT 4253.) With Berber, he had engaged in a lot of "bragging" to make himself look like a "crazy guy" or "vato loco" and put a lot of drama into his "tall tale." (RT 4250, 4253.)

These fundamental differences between the taped statement and the penalty retrial testimony show that the testimony was not cumulative. In contrast to the isolated reference on the tape that appellant never left the car, in his testimony Gonzales repeatedly emphasized that not only did appellant not leave the car but he also played no role in the shootings. He testified that the eyewitnesses had mistakenly identified appellant, rather than himself, as the shooter. And unlike the taped statement, Gonzales

testified that the shootings had not been premeditated but occurred from the heat of passion or the belief that he was acting in self-defense. This testimony would have supported jury instructions on voluntary manslaughter, based either on heat of passion or imperfect self-defense. (See *People v. Breverman, supra,* 19 Cal.4th at p. 163; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1086-1087.)

Thus, Gonzales's testimony constituted material evidence. It is probable that this testimony before a guilt phase jury would have either resulted in appellant's acquittal or, even if the jury believed appellant played a role because of the conflicting evidence that two people exited the car and spoke to Skyles and Price, would have resulted in a conviction on a lesser charge of voluntary manslaughter. Because the testimony was material, and not cumulative, and probably would have resulted in a different verdict, the trial court erred in denying the new trial motion. Even newly discovered evidence that is cumulative may call for a new trial if it establishes the reasonable probability of a different result on retrial. (*People v. Shepherd* (1936) 14 Cal.App.2d 513, 518.)

To the extent the court relied on the penalty retrial jury's apparent rejection of Gonzales's testimony, that does not constitute a proper basis for denying the new trial motion. While it is true that the penalty retrial jury sentenced appellant to death even after hearing Gonzales's testimony, multiple errors unfairly tainted his credibility and interfered with the jury's ability to rely on his testimony.

The most egregious error seriously affecting the credibility determination occurred when the trial judge took "judicial notice" that a portion of Gonzales's testimony was a "physical impossibility." (RT 4306; see Arg. XIV.) In essence, the judge, serving as an unsworn witness for the

prosecution without any opportunity for cross-examination, told the jury that Gonzales had lied.

Gonzales's credibility suffered further unfair damage when the prosecutor compelled Gonzales to answer an improper series of questions characterizing each major prosecution witness as a liar. This constituted prosecutorial misconduct that had a prejudicial effect on Gonzales's credibility. (See Arg. XV.)

Attempting to assess the credibility of Gonzales based on the penalty verdicts is also misguided because, in addition to the errors addressed above which directly affected his credibility, the penalty retrial jury was precluded from giving effect to Gonzales's testimony which contradicted the guilt phase verdicts. The trial court erroneously refused to instruct on lingering doubt. (See Arg. XVII.) The juror questionnaires expressly stated that both defendants had been found guilty of the first-degree murders of Lester Eaton, Elijah Sklyes and Gary Price. (See e.g., RT 1578.) Each questionnaire included an instruction stating: "If you are selected as a juror in this case, you will **not** re-decide whether or not the defendants are guilty of these three murders. You will decide **only** what punishment each should receive." (*Ibid.*, emphasis in original text.) Question 88 of the questionnaire stated: "Do you understand that if selected as a juror, you will **not** decide whether the defendants are guilty or not guilty, but only what punishment they should receive for the murder or murders they have already been convicted of?" (*Ibid.*, emphasis in original text.) The trial court also repeatedly emphasized this point in the jury voir dire. The judge instructed prospective jurors that the case had been tried previously with both defendants convicted of the first-degree murders of Sklyes and Price. (RT 2865-2866, 2962.) On various occasions during the voir dire, the judge told

the jurors that although there would be evidence relating to the crimes, guilt had already been decided. (See e.g., RT 2988, 3044, 3111, 3121-3122.) As the judge instructed the jurors further during the voir dire, jurors would have to operate on the premise that the defendants had been found guilty of three murders with special circumstances. (RT 3007.) When one prospective juror expressed hesitation about imposing the death penalty if the case involved self-defense, the judge stated that if a defendant acted in self-defense he would not be guilty but that was not an issue here because jurors would have to assume the defendants were guilty of first degree murders with special circumstances. (RT 3057.) The prosecutor and defense counsel also corroborated the judge's repeated instructions that guilt had already been determined. (RT 2928, 2931, 2950, 2979.) And in closing argument, the prosecutor reminded the jurors that both defendants had been convicted of the first-degree murders of Skyles and Price. (RT 4394, 4395.)

Under these circumstances, there is no reliable way to determine whether the penalty retrial determination serves as a meaningful assessment of Gonzales's credibility. That credibility determination should come in a new guilt phase trial without the evidentiary errors which occurred in the penalty retrial that improperly weakened the credibility of Gonzales.

The denial of the new trial motion violated appellant's federal constitutional rights to present a defense (*Crane v. Kentucky, supra,* 476 U.S. at pp. 690-691), a reliable guilt determination (*Beck v. Alabama, supra,* 447 U.S. at p. 638), and a fundamentally fair trial (*Estelle v. Williams, supra,* 425 U.S. at p. 505) as required by the Sixth, Eighth and Fourteenth Amendments. Gonzales's testimony, unavailable in the guilt

phase, constituted substantial evidence of appellant's innocence or guilt only of a lesser offense. Appellant is entitled to a new trial.

* * * * *

XII.

APPELLANT'S RETRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A PENALTY VERDICT VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

After three and one-half days of penalty phase deliberations, the trial court dismissed the original jury in this case upon finding that the jury could not unanimously agree on penalty verdicts as to appellant.[31] (RT 2756, 2765, 2769-2770.) The jury indicated that the final votes on appellant had been 11-1 for LWOP on count 1 and 7-5 for LWOP on both counts 4 and 5. (RT 2769.) In the penalty retrial, a second jury returned verdicts against appellant of LWOP on count 1 and death sentences on counts 4 and 5.[32] (RT 4519-4521.)

Allowing the penalty retrial under these circumstances constituted federal constitutional error. An overwhelming majority of the jurisdictions that allow the death penalty to be imposed do not permit the penalty phase to be retried after a jury has been unable to reach a unanimous verdict as to the penalty. As one of the few remaining jurisdictions that permits a penalty retrial following a hung jury, California's death penalty scheme is an anomaly and is contrary to the "evolving standards of decency that mark

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[31] The original jury did agree on penalty verdicts of life without possibility of parole (LWOP) as to Gonzales on counts 4 and 5. (RT 2770-2771.) The jury could not agree on a penalty verdict as to Gonzales on count 1 and the trial court declared a mistrial on that count. (RT 2769.)

[32] In the penalty retrial, the second jury returned a death sentence against appellant Gonzales on count 1. (RT 4520.)

the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The penalty retrial following the hung jury violated appellant's federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as state constitutional protections in article I, sections 1, 7, 15, 16, and 17 of the California Constitution.[33]

B. Standard of Review

Analysis of a claim that a death penalty scheme violates the cruel and unusual punishment prohibition of the Eighth Amendment involves two inquiries: (1) "Objective indicia that reflect the public attitude toward a given sanction" (*Gregg v. Georgia, supra,* 428 U.S. at p. 173), including the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" (*Enmund v. Florida* (1982) 458 U.S. 782, 788); (2) "informed by [these] objective factors to the maximum possible extent" (*Coker v. Georgia* (1977) 433 U.S. 584, 592), the Court "bring[s] its own judgment to bear on

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[33] Despite the lack of objection at trial on this ground, the California Supreme Court has consistently considered "as applied" challenges, such as this one, to California's death penalty scheme on their merits without requiring objection below. (*People v. Hernandez, supra,* 30 Cal.4th at p. 863; *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Davenport* (1995) 11 Cal.4th 1171, 1225; *People v. Garceau* (1993) 6 Cal.4th 140, 207; *People v. Roberts* (1992) 2 Cal.4th 271, 323.) A reviewing court also may consider on appeal a claim raising a pure question of law on undisputed facts. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Wade v. Taggart* (1959) 51 Cal.2d 736, 742.)

the matter" (*Enmund v. Florida, supra,* 458 U.S. at pp. 788-789) to determine whether the sanction "comports with the basic concept of human dignity at the core of the Amendment." (*Gregg v. Georgia, supra,* 428 U.S. at p. 182.)

C. Analysis

The death penalty is barred altogether currently in 12 states[34] and in the District of Columbia and Puerto Rico. The death penalty is authorized under federal law and in 38 state jurisdictions currently. However, In the vast majority of these jurisdictions, 28 of the 38 states, if the jury is unable to agree unanimously on a penalty phase verdict, there is no penalty retrial and the defendant is instead sentenced to life imprisonment or life imprisonment without possibility of parole (LWOP).[35] A penalty retrial

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[34] The death penalty is prohibited in the following jurisdictions: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The death penalty is also prohibited in the District of Columbia and Puerto Rico. (See Death Penalty Information Center website at www.deathpenaltyinfo.org/article.php?did=121&scid=11#without [as of 8/12/04].)

[35] Ark. Stat. Ann. § 5-4-603(c) (1993); Col. Rev. Stat. § 18-1.3-1201(2)(b)(II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id. Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720, § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp 1994); La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7) (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NJ Stat. Ann. § 2C:11-3(c)(3)(c) (West Supp. 1995); NM Stat. Ann. § 31-20A-3 (1994); NY Crim. Proc. Law § 400.27(10) (WESTLAW 1995); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, §

following a hung jury is also prohibited under federal law.[36] Delaware has a fairly unique procedure which requires a unanimous jury finding of at least one aggravating circumstance or a life sentence results,[37] although the judge makes the ultimate penalty determination otherwise. Similarly, Florida utilizes a procedure where the jury makes only a recommendation on sentencing and the judge actually decides between life and death.[38] Montana also employs a procedure where the judge determines the penalty upon a jury finding of at least one aggravating factor.[39]

California, under the 1977 death penalty statute, followed the more enlightened trend and prohibited a penalty retrial following a hung jury. (See *People v. Kimble* (1988) 44 Cal.3d 480, 511.)[40] However, under the harsher 1978 death penalty statute, California reverted into the minority ranks and now permits such penalty retrials. (Pen. Code, §190.4, subd. (b).)

9711(c)(1)(v) (Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); SD Codified Laws Ann. §23A-27A-4 (1988); Tenn. Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994).

The New York and Kansas death penalty statutes were declared unconstitutional in 2004. (See www.deathpenaltyinfo.org/state/ [as of May 12, 2005].)

[36] 18 USCA § 3593(e) (West Supp. 1995); 21 USCA § 848(1) (West Supp. 1995).

[37] 11 Del. Code § 4209(d)(1) and (2) (2003).

[38] Fla. Stat. Ann. § 921.141(2) and (3).

[39] Mont. Code Ann. § 46-18-305 (2003).

[40] See former Cal. Pen. Code, § 190.4, subd. (b).

This position is followed in only a few other jurisdictions.[41] Statutes in Connecticut and Kentucky are silent about the consequences of a hung jury in the penalty phase of a capital case, but case law suggests that penalty retrials are permissible. (*State v. Daniels* (Conn. 1988) 542 A.2d 306; *State v. Ross* (Conn. 2004) 849 A.2d 648, 726, fn. 68; *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672; *Dillard v. Commonwealth* (Ky. 1999) 995 S.W.2d 366, 374.)

Thus, of those jurisdictions that rely on jury determinations of penalty in a capital case, California stands with only six other states that permit penalty retrials following a hung jury. This demonstrates an emerging national consensus prohibiting penalty retrials following a hung jury.

This consensus is borne out of recognition that concern for fundamental fairness and human dignity require that a capital defendant should only be "forced to run the gauntlet once" on death. (*Green v. United States, supra,* 355 U.S. at p. 190.) Normally, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," (*Richardson v. United States* (1984) 486 U.S. 317, 324) and this general rule has been held applicable to capital case penalty proceedings. (*Sattazahn v. Pennsylvania* (2003) 123 S.Ct. 732, 738-739.) But most states allowing the death penalty have recognized that one penalty trial is enough. Even if double jeopardy does not apply, it is still indisputable that death is a penalty different from all others. (*Gregg v. Georgia, supra,* 428 U.S. at p. 188 (joint opinion of Stewart, Powell and Stephens, JJ.).) No capital defendant should be subject

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[41] Ala. Code § 13-A-5-46(g) (2002); Ariz. Crim. Code § 13-703.01L (2002); Ind. Code § 35-50-2-9(f) (2002); Nev. Rev. Stat. 175.556 (2003).

to repeated attempts by the State to sentence him to death "thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity." (*United States v. Scott* (1978) 437 U.S. 82, 95.) Such penalty retrials also take a tremendous toll on the other trial participants – defense counsel, the prosecutors, the trial judge and court personnel, and the families and friends of the victims and defendants.

Compelling a capital defendant to endure the ordeal of a second full blown trial over life or death is constitutionally inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 101.) Appellant's death penalty should be reversed.

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XIII.

THE TRIAL COURT'S RESTRICTIONS ON VOIR DIRE IN THE PENALTY RETRIAL INTERFERED WITH APPELLANT'S RIGHT TO AN IMPARTIAL JURY

A. Introduction

In the penalty retrial, the trial court restricted the jury voir dire to questioning to determine whether the prospective jurors were "death qualified." Appellant's attorney sought to expand the questioning to general voir dire beyond the *Hovey*[42] questioning. (RT 3023.) As appellant's attorney explained, such general voir dire questioning had been permitted in the original trial once the death qualification portion of the voir dire was completed. (RT 3023.)

But the trial court refused to allow such questioning, explaining that the penalty retrial voir dire involved the "narrow issue" of determining cause and the attorneys could otherwise rely on the questionnaires. (RT 3023.) When appellant's attorney complained that the trial court was not asking some questions that needed to be explored such as general voir dire questions, the trial court stated unequivocally that no such questions beyond the *Hovey* death qualifications would be allowed. (RT 3024-3025.)

The trial court also prohibited appellant's counsel from questioning the prospective jurors on the concept of lingering doubt. (RT 3028, 3031.) Counsel for Gonzales also noted on the record that the trial court had not permitted general voir dire. (RT 3032.)

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[42] See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

Following selection of the jury, counsel for Gonzales complained that the trial court had limited the attorneys from questioning prospective jurors on certain issues. Counsel noted in particular that he would have wanted to explore potential racial issues but was not able to because of the court's ruling.[43] (RT 3180.) Counsel pointed out the victims were African-American and he wanted to know whether that would affect jurors.[44] (RT 3181.)

The trial court said the complaint came a "little late." (RT 3181.) Despite its earlier rulings restricting the scope of voir dire, the trial court claimed that such an inquiry would have been permitted if raised earlier. (RT 3181.) When counsel reiterated that some of the jurors needed follow-up questions on racial issues, the trial court repeated that this issue should have been raised previously. While noting that there were some African-

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[43] The jury questionnaire used in the penalty retrial did not contain any questions concerning racial bias. (See, e.g., CT 3290-3314.)

[44] In the first trial, which resulted in a hung jury on the penalty determinations, the court permitted questioning on racial bias. The prosecutor questioned a prospective juror about the O.J. Simpson case and whether that jury was impartial. (RT 630-632.) The court asked a prospective juror about whether her impartiality would be affected by allegations concerning an Hispanic gang. (RT 645-648.) The defense questioned a prospective juror about the O.J. Simpson case, the use of the "race card" in that case, and whether the fact that two of the victims in this case were African-American would interfere with the ability to be fair and impartial. (RT 734-736.) A prospective juror who was a member of the NAACP was questioned whether he would be biased because two of the victims in this case were African-American. (RT 227-229.) And similar questions were posed to other prospective jurors as to whether the race of the victims would affect their impartiality. (RT 227-229, 323-326, 548-551.)

Americans on the panel, the court could not recall if any were seated as actual jurors. (RT 3182.)

Counsel for Gonzales sought a mistrial due to the restrictions on voir dire. (RT 3182.) Appellant's counsel joined in the mistrial motion. (RT 3183.) The trial court denied the motion for a mistrial. (RT 3182.)

The trial court erred by restricting the voir dire. This error violated appellant's Sixth Amendment right to an impartial jury, his Eighth Amendment right to a reliable penalty determination and his Fourteenth Amendment right to due process, as well as article I, sections 1, 7, 15, 16 and 17 of the California Constitution. Reversal of the death sentences is required.

B. The Trial Court Erred by Restricting Voir Dire

The Sixth and Fourteenth Amendments to the United States Constitution require the impartiality of any jury in a criminal case. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472.) Because of the Eighth Amendment requirement of reliability in a death sentence (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305), the right to an impartial jury in a capital case is especially deserving of protection. (*Morgan v. Illinois* (1992) 504 U.S. 719.)

As further recognized in *Morgan*, "part of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." (*Id.* at p. 729.) "Voir dire plays a critical function in assuring the criminal defendant that his right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

Reviewing courts generally afford broad discretion in structuring and conducting voir dire. "That discretion is not boundless, however. A defendant's fourteenth amendment right to due process imposes the limitation that the court must ask sufficient questions during voir dire that 'fundamental fairness' is guaranteed." (*Britz v. Thieret* (7th Cir. 1991) 940 F.2d 226, 232.) An adequate voir dire is essential to guarantee the constitutional right to an impartial jury. (*Morgan v. Illinois, supra*, 504 U.S. at p. 729 .)

The voir dire in this case failed to insure impartial jurors. By limiting voir dire to the death-qualification process, the trial court prohibited general voir dire that might have demonstrated bias on the part of jurors and provided grounds for challenges for cause.[45]

In particular, the trial court restricted voir dire in such a way that none of the eventual jurors were questioned about potential racial bias. The trial court also expressly prohibited appellant's counsel from conducting any voir dire on the important concept of lingering doubt. Each of these restrictions will be reviewed separately.

1. Racial Bias

Following jury selection, counsel moved for a mistrial because the trial court had precluded counsel from conducting any voir dire on potential racial issues in the case. In denying the mistrial motion, the trial court claimed that counsel had waived the issue by failing to request such questioning earlier when the court would have permitted it. (RT 3181-3182.)

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[45] This Court recently recognized the need for thorough voir dire and the impropriety of relying solely on the juror questionnaires in the death qualification process. (*People v. Stewart* (2004) 33 Cal.4th 425, 448-455.)

The trial court's claim of waiver is specious. The trial court in unequivocal terms made clear that voir dire would be restricted to the death-qualification process. (RT 3023- 3024.) Appellant's counsel specifically sought to conduct a more general voir dire. (RT 3023-2024.) The trial court ruled that such questioning would not be allowed. (RT 3024-3025.) Counsel for Gonzales similarly noted on the record that he was not being allowed to conduct a general voir dire. (RT 3032.) The trial court never requested a proffer as to what questioning was desired nor did the court ever give any indication that it would make any exceptions to the ruling restricting voir dire to the death-qualification process. Under these circumstances, no waiver occurred.

The inadequacy of the voir dire is clear. Violent crimes perpetrated against members of other racial groups often raise a reasonable possibility that racial prejudice will influence the jury. (*Rosales-Lopez v. United States, supra,* 451 U.S. at p. 192; *Turner v. Murray, supra,* 476 U.S. at p. 36, fn. 8 ["it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence"].) The present case involved allegations of such interracial violence with the Hispanic defendants accused of killing two African-Americans. Adding to the volatile mix was the capital nature of the proceedings. As recognized in *Turner v. Murray, supra,* 476 U.S. at p. 35: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Based on these considerations, the Court in *Turner* held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." (*Id.* at pp. 36-37.)

The United State Supreme Court reaffirmed *Turner* in *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424, where the Court stated: "the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice." (See also *Ham v. South Carolina* (1973) 409 U.S. 524, 526-527.) California cases have also recognized the importance of jury voir dire on racial bias where the defendant and victim are members of different races. (*People v. Holt* (1997) 15 Cal.4th 619, 660-661; *People v. Wilborn* (1999) 70 Cal.App.4th 339, 343, 347; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312, 1317.)

By precluding *any questioning* beyond the standard death-qualification inquiries, the trial court failed to ensure that an adequate voir dire took place. Once the omission of the critical racial prejudice inquiry was brought to the trial court's attention, the court should have granted the mistrial motion given the penalty at stake. The inadequate voir dire violated appellant's rights to an impartial jury, reliable penalty determination and due process.

2. Lingering Doubt

The trial court erred further by expressly prohibiting appellant's counsel from conducting any voir dire on the concept of lingering doubt. It is well established that a capital defendant has the right to have penalty phase jurors consider any residual or lingering doubt as to his guilt. (*People v. DeSantis, supra,* 2 Cal.4th at p. 1238; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Terry* (1964) 61 Cal.2d 137, 145-147.) Indeed, the defense of "'residual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" (*Lockhart v. McCree*

(1986) 476 U.S. 162, 181, quoting *Grigsby v. Mabry* (8th Cir. 1985) (en banc) 758 F.2d 226, 248 (dis. opn. of Gibson, J.).)

> A comprehensive study of jurors in capital cases concluded:
>
> "Residual doubt" over the defendant's guilt is the most powerful "mitigating fact." . . . [T]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.

(Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1563.)

Other jury studies have resulted in similar findings: "The existence of some degree of doubt about the guilt of the accused was the more recurring explanatory factor in the life recommendation cases studied." (William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases* (1988) 15 Am. J. Crim. L. 1, 28.)

Given the critical importance of lingering doubt, appellant was entitled to voir dire jurors to ensure they all would consider such a defense. Since the trial judge in appellant's penalty retrial had also presided over the original penalty phase trial, he was well aware that appellant's counsel had made lingering doubt a cornerstone of his argument for why a life sentence should be imposed. As appellant's counsel explained, lingering doubt constituted "the whole thrust" of his defense. (RT 4191.) The penalty retrial defense focused primarily on the defense attempting to show that appellant was not the actual killer of Skyles and Price.

Although eyewitnesses had identified appellant as the shooter, the identification evidence was hardly overwhelming. Carol Mateo identified

appellant as the shooter but her identification occurred from a distance of about 50-60 feet, late at night, from a moving car after seeing the shooter for only three to five seconds. (RT 1460, 1462, 1466, 1467, 1513 .) Mateo's brother, Jeremy Robinson, who was riding in the car with his sister and observed the shooting, testified at trial that he did not see the shooter in court although he picked appellant as "looking like" the shooter. (RT 1569-1570, 1575-1576.) Mateo and Robinson were never shown photos of co-appellant Gonzales, although as the judge noted, appellant and Gonzales "could be twins." (RT 29, 1652, 1658.) The gas station attendant, Alejandro Mora, also identified appellant as the shooter but acknowledged he only saw the shooter from the side and never saw his face. (RT 1624, 1628, 1629.) Mora also was never shown photographs of Gonzales for identification purposes. (RT 1652.) Although Mejorado identified appellant as the shooter in her preliminary hearing testimony, at trial she stated that her testimony had been coerced by threats to take away her child and to jail her brother and that she did not actually know the identity of the shooter. (RT 1695, 1707, 1711, 1730, 1734-1736, 1739, 1740, 1763, 1767, 1773-1734, 1776.)

Contradicting this questionable identification evidence was the surreptitiously recorded statement by Gonzales to another inmate where Gonzales admitted shooting Skyles and Price and that appellant had played no part in the killings. (RT 1899, 1951; People's Exh. 58.) Based on this evidence, the penalty retrial defense focused on creating a lingering doubt whether appellant was the actual shooter or even culpable at all in the Skyles/Price killings.

Under these circumstances, the trial court erred in prohibiting appellant's counsel from conducting any voir on lingering doubt. It is an

abuse of discretion for a trial court to refuse to probe the jury adequately for bias or prejudice about material matters on request of counsel. (*United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1297; *People v. Cash* (2002) 28 Cal.4th 703, 719.)

It is not enough to simply establish that jurors will "follow the law." When it is determined that the questions posed by counsel are important to an informed exercise of the right to challenge prospective jurors, such questions must be permitted. (*Darbin v. Nourse* (9th Cir. 1981) 664 F.2d 1109, 1114.) When a juror's response to general questions whether he or she will follow the law provided by the court "is merely a predictable promise that cannot be expected to reveal some substantial overtly held bias against particular doctines[,] . . . a reasonable question about the potential juror's willingness to apply a particular doctrine of law should be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial." (*People v. Williams* (1981) 29 Cal.3d 392, 410.)

In the present case, appellant was entitled to ascertain whether jurors would apply the doctrine of lingering doubt or whether bias or prejudice against this doctrine would substantially impair their performance as jurors. The trial court's prohibition against such questioning violated appellant's constitutional rights to an impartial penalty jury.

In *Cash*, this Court found reversible error where the trial court refused to permit voir dire on the issue of prior murders. (*People v. Cash, supra,* 28 Cal.4th at p. 719.) Because the issue of prior murders constituted a "fact or circumstance that was present in the case" and could have great significance to prospective jurors, the court erred in precluding questioning on this topic. (*Id.* at pp. 720-721.)

As noted in *Cash,* this Court has endorsed particularized death-qualifying voir dire in a variety of situations. A prosecutor may properly inquire whether a prospective juror: would impose death in a felony murder case (*People v. Pinholster* (1992) 1 Cal.4th 865, 916-917); on a defendant who did not personally kill the victim (*People v. Ochoa* (2001) 26 Cal.4th 398, 431); on a young defendant or one who lacked a prior murder conviction (*People v. Ervin* (2000) 22 Cal.4th 48, 70); or only in extreme cases unlike the case being tried (*People v. Bradford, supra,* 15 Cal.4th at p. 1320); see *People v. Cash, supra,* 28 Cal.4th at p. 721.)

In this case, defense counsel should have been allowed to ascertain whether prospective jurors would apply the concept of lingering doubt. This was not a situation where defense counsel sought to give a detailed account of facts or circumstances so that it would require prospective jurors to prejudge the case. (See, e.g., *People v. Jenkins, supra,* 22 Cal.4th at pp. 990-991 [no error in refusing to allow counsel to give detailed account of the facts to determine if prospective juror would impose death sentence under those facts].) Here, counsel properly sought to establish that the defense of lingering doubt would be considered by the jurors. The trial court erred in refusing such inquiry.

3. Reversal Is Required

"A voir dire procedure that effectively impairs the defendant's ability to exercise his challenges intelligently is ground for reversal, irrespective of prejudice." (*Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 661.) By absolutely barring any voir dire beyond the death qualification process, the trial court improperly restricted the questioning and violated appellant's rights to ensure an impartial jury and reliable death sentence. The trial court created the risks that racial prejudice or the inability to apply the

critical concept of lingering doubt would result in a death sentence in violation of appellant's due process right to an impartial jury. (*People v. Cash, supra,* 28 Cal.4th at p. 723.)

Because the trial court's error makes it impossible to determine from the record whether any of the actual jurors held disqualifying views, the error cannot be dismissed as harmless. (*Ibid.*) The refusal to question the jurors on racial bias and their willingness to consider lingering doubt requires automatic reversal because appellant was not "sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment." (*Morgan v. Illinois, supra,* 504 U.S. at p. 739; *Turner v. Murray, supra,* 476 U.S. at pp. 36-37; *People v. Wilborn, supra,* 70 Cal.App.4th at pp. 347-348.)

* * * * *

XIV.

THE TRIAL JUDGE'S IMPROPER TESTIMONY AS AN EXPERT WITNESS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL

A. Factual Background

Neither appellant nor Gonzales testified in the guilt phase or the original penalty phase. The original penalty phase ended in a hung jury with the jurors split 11-1 in favor of life on the Eaton murder as to appellant and 7-5 in favor of life on the Skyles/Price murders. (RT 3027; CT 809.)

It was undisputed that Gonzales shot and killed Mr. Eaton with appellant convicted on an aiding and abetting theory. However, the identity of the actual shooter of Mr. Skyles and Mr. Price was highly disputed. As elaborated on previously (see Arg. I), eyewitnesses identified appellant as the shooter in the Skyles/Price killings but this eyewitness identification evidence was weak and unreliable: two of the witnesses identified appellant as the shooter based on seeing him from a distance of around 50-60 feet from a moving car at night after viewing the shooter for only three to five seconds; the other eyewitness saw only a brief glimpse of the side of the shooter's face; although the trial judge described appellant and Gonzales as looking like "twins,"none of the eyewitnesses who picked appellant out of a photo lineup ever viewed a photographic lineup display containing a photo of Gonzales. The woman in the car with appellant and Gonzales told detectives she thought appellant was the shooter but at trial she explained that she did not really know the identity of the shooter and had only identified appellant because of threats from the detectives to arrest her brother and take away her daughter.

In contradiction to the eyewitness testimony, Gonzales had been surreptitiously taped talking to a friend where he admitted not only the shooting of Mr. Eaton but also confessed to shooting Mr. Skyles and Mr. Price. Salvador Berber, the person to whom Gonzales confided, testified briefly in the guilt phase about the admissions by Gonzales. (RT 1890-1892, 1898-1900.) Portions of the tape were played for the jury with transcripts also provided. (RT 1902-1905.) In the taped conversation, Gonzales disclosed that he personally shot Lester Eaton in the market and Elijah Sklyes and Gary Price at the gas station. (People's Exh. 58 at pp. 2, 7, 11.) According to Gonzales, appellant did not even exit the car at the gas station. (People's Exh. 58 at p. 3.)

At the penalty retrial, Gonzales did testify and elaborated on the circumstances surrounding the killings. The prosecution took the position throughout the trial that Gonzales had been truthful in admitting that he shot Lester Eaton but that he had falsely "bragged" that he also personally killed Elijah Skyles and Gary Price in order to enhance his gang reputation. Despite the taped confession by Gonzales admitting that he personally killed all three victims, the prosecution argued that appellant had actually killed Skyles and Price. Thus, when Gonzales took the stand in the penalty retrial and testified under oath that he killed Skyles and Price, his credibility was a critical factor for appellant's lingering doubt defense that he had not been involved in the Skyles/Price killings. Gonzales testified that appellant did not encourage him to get a gun when Gonzales confronted Skyles and Price and that appellant never told him to kill anybody. (RT 4287, 4304.) According to Gonzales, appellant never got out of the car and never said anything to Skyles and Price. (RT 4292.)

In cross-examination of Gonzales, the prosecution sought to attack his credibility by questioning him about the details of the Skyles/Price killings. The prosecutor asked Gonzales why he had shot Skyles and Price eleven times. (RT 4304.) Gonzales responded that he just kept shooting because the semi-automatic nine mm handgun had been converted to a fully automatic gun. (RT 4304-4305.) By pulling the trigger once, the gun continued to fire multiple rounds. (RT 4305.) In response to further questioning about this claim, Gonzales testified that the gun had been converted to an automatic by removing the spring behind the trigger. (RT 4305.)

At this point the trial judge interrupted Gonzales's testimony and provided the following statement to the jury:

> The Court will take judicial notice of the fact that you cannot render a semi-automatic fully-automatic by any manipulation with the spring behind the trigger. That is a physical impossibility with that weapon. The Court knows from its own experience.

(RT 4305.)

When the testimony of Gonzales resumed, he testified that he shot Skyles and Price because he thought one of them was going for a gun. (RT 4306.) He explained that he shot them so many times because he just kept pulling the trigger and "it just happened." (RT 4306.) The testimony of Gonzales then concluded and defense counsel asked to approach the bench where the following colloquy occurred:

> MR. TYRE: Before we start that, first of all I'm objecting to the Court editorializing about the gun. I understand the Court may have knowledge of that, but no one called the Court to testify in this case, and for the Court to offer its own

interjection as, "as expert," I am objecting to. I'm just indicating that for the record.

MR. BORGES: I'll join in that, your honor.

THE COURT: I'm sorry, but when you have something as basic as that, it's as though you would say that you could render it automatically – make it fully automatic by putting a piece of chewing gun in the magazine.

MR. TYRE: I understand.

THE COURT: It was just nonsense, and its so obviously palpably untrue.

MR. BORGES: I wasn't aware of that, Judge.

MR. TYRE: I wasn't either.

(RT 4308.)

In closing argument, the prosecutor called Gonzales a "liar" (RT 4421) and urged the jury not to believe the testimony by Gonzales that he shot Skyles and Price. (RT 4422.) The prosecutor told the jury that it was appellant who pulled the trigger 11 times. (RT 4405.) During jury deliberations, the only testimony that the jury requested be read back was the testimony of Gonzales. (RT 4509-4516.)

Following the verdicts, appellant's counsel moved for a new trial on various grounds, including the trial judge's improper comments before the jury in the penalty retrial. (RT 4539.) According to appellant's counsel, his conversations with jurors following the verdict had revealed that the judge's comments about the nine mm gun had influenced the jury and destroyed Gonzales's credibility. (RT 4539.) Counsel for Gonzales corroborated this

information stating that his conversations with the jurors established that the issue of credibility became very important and the jurors had indicated the judge's attack of Gonzales's credibility had affected them a great deal. (RT 4542.) The court conceded it was "probably error" to comment on the gun based on his personal experience. (RT 4540). As the court acknowledged, in a sense the judge became an "uncross-examined expert witness," which the court did not intend. While again conceding that the court had probably erred, the trial judge denied the new trial motion by viewing the error as "harmless" under the totality of the circumstances. (RT 4540.)

B. The Judge's Comments Violated Appellant's Statutory and Constitutional Rights

As the trial judge conceded, his comments on Gonzales's testimony regarding converting the nine mm gun into an automatic placed the judge in the role of an expert witness against the defense, without being subject to cross-examination. This improper conduct violated appellant's rights to confront and cross-examine the witnesses against him, to a fair trial before an impartial jury, to a reliable penalty determination and to due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The improper comments also violated appellant's state constitutional and statutory rights under article I, sections 7, 15 and 17, and article VI, section 10 of the California Constitution and Evidence Code section 703.

1. State Constitutional Violation

A judge may comment on the evidence and the testimony and credibility of any witness but only as is "necessary for the proper determination of the cause." (Cal. Const., art. VI, § 10.) The trial court's power to comment on evidence is subject to strict limitations. (*People v.*

Cook (1983) 33 Cal.3d 400, 407, overruled in part by *People v. Rodriguez* (1986) 42 Cal.3d 730; *People v. Brock* (1967) 66 Cal.2d 645, 650.) "The danger of judicial comment is that the jury is likely to place too much reliance on the judge's opinion of how to resolve a factual issue." (*People v. Cook, supra,* 33 Cal.3d at p. 407.) As noted in *People v. Robinson* (1947) 73 Cal.App.2d 233, 237, "The right ... to comment on the evidence is a most potent one .... The point need not be labored that the members of the jury are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses ...." Similarly, as stated by the United States Supreme Court, "'The influence of the trial judge on the jury is necessarily and properly of great weight,' ... and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

For these reasons, appellate courts have cautioned that a trial court choosing to comment to the jury must exercise that power extremely carefully "with wisdom and restraint and with a view to protecting the rights of the defendant." (*People v. Shannon* (1968) 260 Cal.App.2d 320, 331; see also *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 886.) In summarizing the permissible limits of judicial comments, this Court stated "the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 766.) In particular, the judge must not engage in partisan advocacy. (*People v. De Moss* (1935) 4 Cal.2d 469, 476-477.)

In appellant's case, the trial court exceeded any permissible bounds for judicial comment. Indeed, the judge's participation went beyond mere

comment. The judge, in effect, testified against the defense as an expert witness attacking the credibility of the key witness supporting appellant's lingering doubt defense.

2. Due Process Violation

By actively presenting evidence against the defense, the judge abandoned his role as a neutral, unbiased arbiter. The judge's improper participation in the prosecution violated fundamental fairness for the due process guarantees of both the state and federal Constitutions require a full and fair opportunity to be heard before an impartial judge in a fair trial. (*Tumey v. Ohio* (1927) 273 U.S. 510, 535; *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245.) In reversing a contempt citation where the judge had also acted as prosecutor by obtaining the indictment, the United States Supreme Court emphasized that the appearance of impartiality must be preserved: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." (*In re Murchison* (1955) 349 U.S. 133, 136.)

3. Confrontation Clause Violation

a. Violation of Evidence Code Sections on Judicial Notice

In addition to the due process violation, the judge's actions also violated appellant's state and federal rights to confront the witnesses against him. (U.S. Const, Amend. VI; Cal. Const., art. I, §15.) Although the judge purported to take "judicial notice" of the falsity of Gonzales's testimony regarding the process for converting a gun into an automatic, he really became an expert witness supporting the prosecution. It is indisputable that the issue of how a gun is converted from a semi-automatic into an

automatic weapon is not a proper subject for judicial notice as a matter of "generalized knowledge . . . so universally known" that it cannot reasonably "be the subject of dispute." (Evid. Code, § 451, subd. (f).) Nor was the subject "not reasonably subject to dispute" and "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h); *People v. Barnett* (1998) 17 Cal.4th 1044, 1122.) As counsel for both appellant and Gonzales pointed out, neither one of them had any knowledge of the process for making a gun into an automatic. (RT 4308.) Rather, refuting Gonzales's claim as to how he purportedly converted the gun was a subject sufficiently beyond common experience that called for the testimony of an expert witness. (Evid. Code, § 801, subd. (a).)

b. Violation of Right to Cross-Examine

Under the guise of "judicial notice," the judge became an unsworn expert witness for the prosecution, without being subject to cross-examination.

"The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination.*" (*Davis v. Alaska, supra,* 415 U.S. at pp. 315-316, quoting 5 J. Wigmore, Evidence (3d ed. 1940) § 1395, p. 123, emphasis in original; *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 678.) The judge's actions violated appellant's rights of confrontation and cross-examination because appellant had no opportunity to cross-examine the judge on his unsworn testimony.

4. Evidence Code Section 703 Violation

The judge's action also violated the statutory prohibition against serving as a witness. Evidence Code section 703, subdivision (b), provides: "Against the objection of a party, the judge presiding at the trial of an action

may not testify in that trial as a witness. Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge." (See *People v. Connors* (1927) 77 Cal.App. 438, 450-457.) Strong policy considerations support the prohibition against judges serving as witnesses, particularly the likelihood that the judge may unfairly influence the factfinder and the jury will give the judge's testimony undue weight. (See Abramson, *Canon 2 of Code of Judicial Conduct* (1996) 79 Marq. L. Rev. 949, 977-978.) In *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, a judge who had presided over an earlier personal injury action testified in a related case that the expert witness used by the defense had not been a persuasive witness with the judge inferring that the defense had failed to present an adequate case. The appellate court found that allowing the judge to testify was error and in reversing the judgment against the insurance company stated:

> We think it prejudicial to one party for a judge to testify as an expert witness on behalf of the other party with respect to matters that took place before him in his judicial capacity. In such instance the judge appears to be throwing the weight of his position and authority behind one of two opposing litigants. The Evidence Code absolutely prohibits the judge presiding at the trial of an action to testify as a witness over the objection of a party.

(*Id.* at p. 883.)

5. Substantial Errors Occurred

The judge's action in providing unsworn testimony as an expert witness against the defense, over objection, violated appellant's statutory and constitutional rights. The judge exceeded the permissible bounds for judicial comment allowed under the state Constitution, the judge violated

due process by acting as a witness for the prosecution, the judge violated the statutory provisions for permissible judicial notice and instead became an unsworn witness against the defense with no opportunity for cross-examination and the judge violated the statutory prohibition against serving as a witness.

C. Reversal Is Required

Reversal is mandated under Evidence Code section 703. That section provides that if a judge testifies over the objection of a party, "the judge *shall declare a mistrial.*" (Evid. Code, § 703, subd. (b), emphasis added.) This mandate is a legislative recognition of the inherent prejudice flowing from a judge testifying. Both appellant's counsel and counsel for Gonzales objected to the judge's testimony and moved for a new trial. The motion for a new trial should have been granted for this egregious error. (See *People v. Oliver* (1975) 46 Cal.App.3d 747, 752 [where judge attacked the credibility of defense witnesses but then granted a new trial the appellate court noted that if the new trial motion had been denied, reversal of the judgment would have been required due to the judge's improper and unjustified comments].) Appellant has a state created liberty interest protected by the Due Process Clause in enforcement of the statutory mandate to ensure a fair trial and impartial judge. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

In addition, reversal is required because prejudice resulted from the state and federal constitutional violations. By participating in the prosecution and attacking the credibility of Gonzales, the judge violated due process by failing to remain fair and impartial, violated the right of confrontation by providing unsworn testimony against the defense with no opportunity for cross-examination, and violated the right to a reliable

penalty determination by giving undue weight to the prosecution's theory of the case.

The trial judge acknowledged his error but claimed it was harmless. But for such federal constitutional error to be harmless, the prosecution must show beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

That burden cannot be met in this case because Gonzales's testimony played such a critical role in the penalty retrial. It is clear from the outcomes of the various counts that whether or not the death penalty was imposed depended on a determination of which defendant was the actual shooter for the different crimes. If the jury believed Gonzales when he testified in the penalty retrial that he shot and killed Skyles and Price and that appellant played no role in those crimes, appellant would not have been sentenced to death. Under these circumstances, Gonzales's credibility was the central issue in the penalty retrial. The judge attacked that credibility by serving as an expert witness and indicating to the jury that Gonzales had testified falsely. The jury asked for a read-back of that testimony, the only witness whose testimony the jury requested be re-read. That request demonstrates the importance of Gonzales's testimony. But during the read-back the jury would have also again heard the judge's improper comments during the course of Gonzales's testimony, which would have exacerbated the prejudice.

The judge's error, tainting the credibility of the key witness supporting appellant's lingering doubt defense, is reasonably likely to have influenced the jury's penalty determination. The error cannot be considered harmless. Reversal is required even if no federal constitutional error occurred because there is a reasonable possibility that the jury would have

rendered a different verdict had the error not occurred. (*People v. Brown, supra,* 46 Cal.3d at p. 448.) The death sentences for appellant must be reversed.

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XV.

REVERSAL IS REQUIRED FOR THE PROSECUTOR'S REPEATED MISCONDUCT DURING THE PENALTY RETRIAL

A. Factual Background

Gonzales did not take the stand in the original guilt or penalty phases but he did testify in the penalty retrial. By taking responsibility for all of the shootings, Gonzales
became a crucial witness supporting appellant's lingering doubt defense.

Gonzales admitted that he shot Lester Eaton after he and Eaton struggled over a gun. After the initial gunshot, Gonzales "went blank" and "just kept shooting." (RT 4207-4208.)

Gonzales also testified that he shot Elijah Skyles and Gary Price at the Shell gas station. Gonzales explained that appellant never even got out of the car at the gas station with Gonzales instead acting alone. As Gonzales explained, he approached Skyles and Price and began arguing with them. When Gonzales thought he saw one of them reach for a weapon, Gonzales shot them both. (RT 4209-4210.)

The prosecutor cross-examined Gonzales by repeatedly, and improperly, asking Gonzales whether the prosecution witnesses, whose testimony differed from his, had lied during their testimony. The following excerpts show the repeatedly improper line of questioning:

Doreen Ramos

Q. When you and Mr. Soliz went into the market that night you had bandannas on, right?
A. Nope.
Q. You didn't have bandanna on?

A. I didn't.
Q. Mr. Soliz have one on?
A. Can't recall.
Q. Do you remember Dorine Ramos testifying in here that she saw you and Mr. Soliz before the robbery playing with bandannas and putting them on your face?
A. Yes.
Q. Your testimony is that you didn't have a bandanna that night?
A. Yeah, I didn't have one.
Q. Did you have one earlier that evening when Dorine Ramos saw you?
A. No.
Q. So Dorine Ramos wasn't telling the truth when she came in here?
A. No.

(RT 4233-4234.)

Q. Did you have a hat on that night, a kind of a beanie?
A. No, I had a hooded sweater. A red hooded sweater.
Q. How about Jasper? Did he have a beanie to cover the top of his head?
A. He had a cap on.

(RT 4235.)

Q. So your testimony is Ms. Ramos wasn't telling the truth when she said she saw beanie caps hanging out of your pockets that night?
A. No. She wasn't telling the truth. We were never on Perth.
Mr. Borges: I'm sorry. I didn't hear the last statement.
The witness: We were never on Perth.
Q. You were never anywhere near Perth Street that night?
A. No.
Q. So Miss Ramos is just making all that up what she saw that night?
A. Yeah.

Q. But you're telling the truth here today?
A. Yes.

(RT 4260.)

Q. So Dorine Ramos was lying when she talked about what she saw the night of the robbery murder?
A. Yes.

(RT 4260.)

Betty Eaton

Q. You heard that Mrs. Eaton originally told both the police officers, both the patrol officers that interviewed her at the scene and the detectives who interviewed her back at Industry Station, that the two men that came into the store were wearing bandannas that night? You remember that?
A. Yeah. Yes.
Q. So Mrs. Eaton told the officers initially that both the men who robbed the store had bandannas across their face, correct?
A. Yes.
Q. Your testimony here today is that Mrs. Eaton wasn't telling the truth to those officers?
A. Yes.

(RT 4234-4235.)

Q. Mrs. Eaton was lying to the police when she told them what she saw the night of the murder?
A. Not really lying, cuz that's what she thought she saw.

(RT 4250.)

Deputy Esquivel

Q. Were you rehabilitating yourself when Deputy Esquivel came into your cell and found that jail-made shank in the envelope with your name on it?
A. Didn't find it in my cell.

Q. Oh. Was he lying when he took that stand?
A. Pretty much – yes. Yes.

(RT 4260.)

Q. Deputy Esquivel was lying when he said he found that shank in your cell?
A. Yes.
Q. You're telling the truth, though, today?
A. Yes.
Q. Is your testimony to this jury, Mr. Gonzales, that that shank that Deputy Esquivel found or said he found in the cell was not your shank?
A. It wasn't mine.
Q. And your testimony is he never found it in your cell that day?
A. Never found it in my cell.
Q. So your testimony is that he came here into this court and lied about finding that shank in your cell belonging to you?
A. Yes.
Q. You don't know anything about that shank?
A. Don't know nothing about it.

(RT 4260-4261.)

Judith Mejorado

Q. Did you and Jasper say anything to each other about that?
A. I said, "Let's go talk to them. I think I know them."
Q. Jasper said that too, didn't he?
A. No, I don't recall.
Q. You don't recall Jasper saying anything?
A. I don't think he said nothing, to tell you the truth.
Q. You heard about Miss Mejorado's statements to the police when she was first interviewed and her testimony during the preliminary hearing where she said both you guys talked about going back and talking to those guys. You remember that?
A. Yes.
Q. Was she lying to the police when she said that?
A. Yes.

Q. Was she lying at the preliminary hearing when she said that testimony under oath?
A. Yes.
Q. But you're the one telling the truth now?
A. Yes.
Q. Who got out of the car when Clumsy stopped the car that night?
A. I did.
Q. Jasper get out of the car?
A. No.
Q. Jasper never got out of the car?
A. Never stepped out of the car.
Q. You heard about Miss Mejorado's statement to the police when she was first interviewed and also her testimony during the preliminary hearing when she said both you guys got out of the car. Remember that?
A. Yes.
Q. She told that to the police when she was interviewed in November of '96, right?
A. Yes.
Q. And she testified at the preliminary hearing under oath in March of '97, when you were sitting right at the counsel table, and she said the same thing, didn't she?
A. Yes.
Q. So she was lying when she told the police that both of you got out of the car that night?
A. Yes.
Q. But you're telling the truth now?
A. Telling the truth.

(RT 4272-4274.)

Q. All right. And had Judith told the police that Jasper was the guy that got back in on the left side of the car after the shooting, she wasn't telling the truth?
A. No.
Q. And when she testified at the preliminary hearing and said the same thing under oath, she wasn't telling the truth?
A. No.
Q. You're the one telling the truth today.

A. Yes.

(RT 4276.)

Carol Mateo

Q. Okay. You heard about the identification made by Ms. Mateo . . .
A. That's wrong.
Q. . . . of Jasper?
A. All the witnesses you guys had were wrong. I don't know where you got them from, but they're wrong.
Q. So Carol Mateo was lying when she testified here in court that this was the man she saw?
Mr. Borges: Your honor, that's an incorrect statement. I'd object. He said she was wrong, not that she was lying.
The Court: Before he said two or three times that she was lying. So in cross-examination I think counsel is entitled to pick up that portion of it.
Mr. Sortino:
Q. Carol Mateo was lying when she came in here to court and said Michael Soliz was the man she saw pulling the trigger?
A. Yes.
Q. And she was lying when she said the same thing at the preliminary hearing?
A. Yes.
Q. And she was lying when she picked his picture of the six-packs and told the police officers that was the guy who did the shooting?
A. Yes.

(RT 4275-4276.)

Jeremy Robinson

Q. Jeremy Robinson wasn't telling the truth when he picked Jasper's picture out of the six-pack and said that looked like the guy that did the shooting?

A Yes.

(RT 4276.)

Alejandro Mora

Q. And Alejandro Mora Garcia, when he picked Jasper's picture out of the six-pack and said that looked like the guy that got into the driver's side of the car, he wasn't telling the truth either?
A. I don't know if he ever picked him.
Q. Well assuming he did, was he not telling the truth, too?
A. If he picked him, he wasn't telling the truth.

(RT 4276.)

The prosecutor then concluded his cross-examination of Gonzales with another improper question about a conspiracy to lie:

Q. All those other people, they all conspired together to lie against you and Japser?
Mr. Tyre: Objection, argumentative, your Honor.
The Court: Sustained.
Mr. Sortino: Thank you, your Honor. I have nothing further of this witness.

(RT 4276-4277.)

B. Legal Analysis

1. The Issue Is Cognizable on Appeal

The record is somewhat equivocal as to whether defense counsel properly objected to the prosecution's improper line of questioning. During the cross-examination of Gonzales, when the prosecutor asked whether Carol Mateo was lying, appellant's counsel objected that Gonzales said "she was wrong, not that she was lying." (RT 4275.) The trial court overruled

the objection stating that Gonzales had "said two or three times that she was lying" so the court considered this a proper subject for cross-examination.

The record does not support the trial court's conclusion for in his direct examination, Gonzales never testified that anyone had lied. (RT 4204-4216.) The only responses from Gonzales about witnesses lying had been elicited in the prosecutor's cross-examination of Gonzales.

But based on the court's erroneous ruling, it is clear that any further objections to the improper line of questioning would have been futile. (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 237.) If the trial court believed it was proper to ask Gonzales whether Carol Mateo had lied, "then it must have believed that the prosecutor's entire line of 'were they lying' questions . . . were also proper." (*Ibid.*) In *Zambrano*, the appellate court found that defense counsel had failed to object on proper grounds but that in the context of the trial court's ruling it was clear that the questioning would have been permitted anyway even with a specific, proper objection.[46] The same is true in appellant's case.

A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Hill, supra,* 17 Cal.4th at p. 820.) Under the circumstances indicating that the trial court would have overruled any objection or request for admonition, the futility exception applies and this issue is cognizable on appeal. (*People v. Zambrano, supra,* 124 Cal.App.4th at p. 237.)

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[46] While reaching the merits of the issue despite the lack of a proper objection, the appellate court in *Zambrano* also held that the failure to object properly did not constitute ineffective assistance of counsel because at the time of that trial, no California cases had held that a "were they lying" line of cross-examination constituted prosecutorial misconduct. (*People v. Zambrano, supra,* 124 Cal.App.4th at p. 238.)

2. The Prosecutor Committed Misconduct by Asking Repeatedly on Cross-examination Whether Prosecution Witnesses Had Lied

A prosecutor violates the federal Constitution by engaging in a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Smithey* (1999) 20 Cal.4th 936, 960; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristofore, supra,* 416 U.S. at pp. 642-643.) A prosecutor commits misconduct under state law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Smithey, supra,* 20 Cal.4th at p. 960, citations omitted.) A prosecutor is held to a higher standard than that imposed on other attorneys and "while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*People v. Pitts, supra,* 223 Cal.App.3d at p. 691; *People v. Hill, supra,* 17 Cal.4th at p. 820.) The prosecutor's improper questioning in this case resulted in fundamental unfairness that infected the integrity of the penalty determination.

This Court has recognized that a lay witness's opinion about the veracity of another person's statements is inadmissible and irrelevant on the issue of credibility. (*People v. Melton, supra,* 44 Cal.3d at p. 744.) Such opinion testimony invades the province of the jury as the ultimate fact finder, is not helpful to a clear understanding of the witness's testimony, is not "properly founded character or reputation evidence," and does not bear on "any of the other matters listed by statute as most commonly affecting credibility." (*Ibid;* see also Evid. Code, § 780.) For these reasons, the

Melton Court concluded, "such an opinion has no 'tendency in reason' to disprove the veracity of the statements." (*People v. Melton, supra,* 44 Cal.3d at p. 744; Evid. Code, §§ 210, 350, 780 & 800.)

Cross-examination has two purposes: (1) to test the credibility, knowledge and recollection of the witness; and (2) to elicit additional evidence. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.) The cross-examination of Gonzales in this case served neither of these purposes. "[A] proper attack on a witness's credibility does not consist solely of berating the witness; it requires presenting or eliciting additional evidence which bears on the witness's credibility." (*People v. Zambrano, supra,* 124 Cal.App.4th at p. 240.) The cross-examination in this case served only to berate Gonzales and force him to repeatedly opine, without foundation or relevance, that each of the key prosecution witnesses were liars. The questions did not clarify the prior testimony by Gonzales; he had already testified in a manner different in material respect from the prosecution witnesses. The prosecutor made no attempt to inquire into facts or circumstances surrounding Gonzales's testimony or to develop independent evidence. Instead, the prosecutor sought only to elicit inadmissible opinion evidence.

The federal courts that have considered this type of "were they lying" questioning have found misconduct. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214; *United States v. Sullivan* (1st Cir. 1996) 85 F.3d 743; *United States v. Boyd* (D.C. Cir. 1995) 312 U.S. App.D.C. 35, 54 F.3d 868; *United States v. Richter* (2d Cir. 1987) 826 F.2d 206.) State jurisdictions have also found such questioning constitutes misconduct. (*State v. Flanagan* (N.M. App. 1990) 801 P.2d 675, 679, 111 N.M. 93; *State v. Casteneda-Perez* (Wash. App. 1990) 810 P.2d 74, 61 Wn.App. 35;

State v. Singh (Conn. 2002) 793 A.2d 226, 239, 259 Conn. 693, 712; *Commonwealth v. Martinez* (Mass. 2000) 726 N.E.2d 913, 923, 431 Mass. 168, 177; *Burgess v. State* (S.C. 1998) 495 S.E.2d 445, 447, 329 S.C. 88, 91; *State v. Emmett* (Utah 1992) 839 P.2d 781, 787; *People v. Adams* (NY 1989) 539 N.Y.S. 200, 148 A.D.2d 964; *People v. Riley* (Ill. 1978) 63 Ill. App.3d 176, 184-185, 379 N.E.2d 746, 753; *Knowles v. State* (Fla. 1993) 632 So.2d 62, 65-66.)

These courts have found the line of questioning improper for a multitude of reasons, many of which were summarized in *State v. Singh, supra,* 793 A.2d at pp. 236-238: the questions infringe on the jury's right to make credibility determinations; the questions are misleading because they suggest that the only explanation for the discrepancy between the testimony of the person being examined and the other witness's testimony is that one of them is lying; and the questions are misleading or call for a conclusion because they suggest that the person being examined knows what another witness was thinking and the motivation for their testimony; these types of questions create the risk that the jury will conclude that in order to acquit the defendant, it must find that the witnesses lied; and by linking the defendant's acquittal with the conclusion that the witnesses lied, the prosecutor distorts the burden of proof because an acquittal based on reasonable doubt does not require a jury finding that the prosecution witnesses lied. As recognized in *State v. Casteneda-Perez, supra,* 810 P.2d at p. 77:

> The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order, to acquit the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony. Since jurors would be reluctant to make such a harsh evaluation of police

> testimony, they would be inclined to find the defendant guilty. While such a prosecutorial tactic would be totally unavailing in a bench trial, we cannot be confident it would not be effective with some jurors. With the prosecutor persistently seeking to get the witnesses to say that the officer witnesses were lying, and doing so with the trial court's apparent approval, it is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the police witnesses.

In appellant's case, the prosecutor did not limit the improper line of questioning to challenging the veracity of just law enforcement witnesses; Gonzales was forced to describe every major prosecution witness as a liar. This Court has recognized that asking clearly improper questions constitutes misconduct. (*People v. Smithey, supra,* 20 Cal.4th at pp. 960-961.) Although the appellate court in *Zambrano* noted in dicta that there may be situations where a limited form of this line of questioning is permissible,[47] in this case, as in *Zambrano,* the questions served no legitimate evidentiary purpose and were abusive. (*People v. Zambrano, supra,* 124 Cal.App.4th at pp. 240-242.) The prosecutor did not merely ask "one or two questions . . . to clarify a witness's testimony." (*Id.* at p. 242.) In this case, the prosecutor propounded questions whether other witnesses had lied in their testimony at least 19 times. The line of questioning extended to the testimony of seven major prosecution witnesses, including the wife of one murder victim, a law enforcement officer, three eyewitnesses to the gas station shootings, the woman in the car with appellant and Gonzales at the gas station, and the

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[47] The court in *Zambrano* suggested that such questions may be appropriate when necessary to clarify specific testimony. (*People v. Zambrano, supra,* 124 Cal.App.4th at p. 242.)

woman who claimed seeing appellant and Gonzales preparing to go rob the market.

None of the questions were designed or intended to elicit relevant factual information. None of the questions sought to clarify any prior testimony. The only purpose of the line of questioning was to force Gonzales to characterize each major prosecution witness as a liar and in so doing to improperly attack the credibility of Gonzales himself. This abusive line of questioning resulted in a fundamentally unfair penalty phase and significantly undermined the integrity and reliability of the penalty determination. Such misconduct violated appellant's federal constitutional rights to due process and a reliable penalty determination.

3. The Prosecutorial Misconduct Resulted in Significant Prejudice

The improper attack on Gonzales's credibility had a major effect on the penalty determination. It is obvious from the pattern of the jury verdicts that determining the identity of the actual shooter was the decisive factor in the death verdicts. The penalty retrial testimony of Gonzales, if believed, would have spared appellant's life for Gonzales took full responsibility for the Skyles/Price shootings. Appellant's lingering doubt defense depended entirely on the testimony of Gonzales and his credibility. It is evident that the jury considered Gonzales's testimony significant for that was the only testimony that the penalty retrial jury requested be read back during deliberations. (RT 4510, 4513; *People v. Williams* (1971) 22 Cal.App.3d 34, 40 [a jury request for re-reading of particular testimony related to the error, in combination with other factors in a close case, demonstrates the

prejudicial nature of the error].) In these circumstances, the error relating to the testimony of Gonzales cannot be considered harmless.[48]

This was a closely decided case. The original penalty phase resulted in a hung jury with a majority of jurors favoring life verdicts (11-1 for life in the Eaton murder; 7-5 for life in the Skyles/Price murders). Because the prosecution's case, without the prosecutorial misconduct, "did not convince the jury the first time," the misconduct in the penalty retrial probably was a deciding factor in the death verdict and therefore prejudical error. (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188.)

Even despite the prejudicial error, the penalty retrial jury had a difficult time reaching a verdict. In the penalty retrial, the jurors deliberated for two days before reaching verdicts. (RT 4503, 4517.)

Given the critical nature of Gonzales's testimony and closeness of the case, the error cannot be considered harmless. Confidence in the reliability of the penalty determination is sufficiently undermined that reversal is required.

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[48] The error concerning the cross-examination was exacerbated by other related errors affecting Gonzales's credibility such as the improper judicial expert testimony and affecting the lingering doubt defense such as the failure to give the requested lingering doubt instruction. Even if the cross-examination error standing alone is insufficient to warrant reversal, the cumulative effect of these errors mandates reversal as is further argued below. (See Arg. XXV.)

XVI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY IMPROPERLY ADMITTING EVIDENCE RELATING TO JAIL INCIDENTS AND IMPROPERLY INSTRUCTING THE JURY ON THIS "OTHER CRIMES" EVIDENCE

A. Procedural Background

Prior to the commencement of the penalty retrial, appellant's counsel questioned some discovery provided by the prosecution regarding items allegedly found in the jail cells of appellant and his co-defendant. (RT 3186.) The prosecutor indicated that he intended to introduce into evidence in the penalty retrial that razor blades had been found in appellant's cell.[49] (RT 3186-3187.) Disputing the admissibility of this evidence, claiming that razor blades in and of themselves are not relevant, appellant's counsel requested a hearing pursuant to Evidence Code section 402.[50] (RT 3188.) The trial court agreed that if there is a question about admissibility, a 402 hearing should be held, although the judge indicated "tentatively" that the items were probably admissible. (RT 3189.)

Even though no 402 hearing had been held and the admissibility of this disputed evidence had yet to be determined, the prosecutor in his opening statement told the jury that they would learn what appellant had been doing in jail while in custody in this case – possessing altered razor

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[49] The prosecutor also alleged that a "shank" (jail-made weapon) had been found in the co-defendant's cell.

[50] Pursuant to Evidence Code section 402, subsection (b), a court may determine the admissibility of evidence outside the presence of the jury.

blades which inmates use to make slashing devices. (RT 3231-3232.) Appellant's counsel immediately requested a side bar conference where he objected that the prosecutor had violated the agreement not to mention this evidence pending a determination of its admissibility at a 402 hearing. (RT 3232-3233.) The prosecutor denied any such agreement. (RT 3233.) The trial court indicated that the jury would be reinstructed that the statements of counsel are not evidence. (RT 3233.) The court also stated that the purpose of a 402 hearing would be to determine whether the items could be "attributed directly to defendants" and, if not, the jury would be instructed to disregard the mention of this evidence. (RT 3233.) But upon hearing from the prosecutor that the defendants were in single-man cells so there would be no problem tying them to the contraband, the trial court found that the prosecution would "pass" a 402 hearing. (RT 3234.) Appellant's counsel then objected that the court had prejudged the matter and pointed out that the penalty determination centers on how the defendants would do in prison so this constituted crucial evidence and moved for a mistrial. (RT 3234-3235.) The trial court denied the mistrial motion. (RT 3235.)

During the prosecution's presentation of evidence in the penalty retrial, the trial court called a bench conference to again discuss the admissibility of this evidence with the judge indicating that he had been concerned about the possibility of the contraband belonging to someone else. (RT 4038.) But based on the prosecution's representation that the defendants had been housed in single-man cells, the judge ruled out that possibility which resulted in findings that a 402 hearing was unnecessary and the evidence admissible. (RT 4038.) The trial court also allowed the prosecution to introduce evidence that appellant had been observed by

deputies in the jail throwing objects into a fire started by jail inmates outside their cells. (RT 4041.)

B. Evidence Relating to the Jail Incidents

Forrest Anderson testified that he worked as a deputy in the main jail on January 10, 1998, when he conducted a search of appellant's single-man cell. (RT 4124.) According to Anderson, jail inmates are prohibited from possessing any metal in their cells and cells are searched before the initial placement of an inmate in a particular cell. (RT 4125.) In searching appellant's cell, Anderson found five Bic-type disposable razors, one altered razor and an aluminum food tray. (RT 4125.) The "altered razor" consisted of a blade unattached to a plastic handle. (RT 4126.) These razors can be used as slashing devices by attaching or melting them onto a toothbrush handle, comb or piece of wood. (RT 4127.) On cross-examination, he testified that some inmates have shaved heads but he could not remember if appellant did at the time. (RT 4127.)

Anderson stated that inmates are allowed to have pencils in their cells but not allowed to have anything to sharpen the pencils, and acknowledged that they may use razors to sharpen the pencils. (RT 4128.) He also recalled that appellant had been disciplined for having pruno, which is an alcoholic drink made in jail by inmates from fruit. (RT 4129.) Anderson did not know if inmates use the altered razors to cut up fruit for pruno. (RT 4129.) Anderson did not know of any other incidents in the jail involving appellant. (RT 4128.)

Another deputy, Richard Torres, testified that while on duty in the jail on July 31, 1998, he conducted a search of the single-man cell belonging to appellant and found five disposable razors, two altered razors and one flat unsharpened piece of metal. (RT 4131-4133.) Like Anderson,

Torres testified that altered razors are sometimes used as weapons by fastening the razor to a pencil, toothbrush or other plastic and using the razor as a slashing device. (RT 4133.) Torres could not recall if appellant had a shaved head and he did not know how inmates sharpen their pencils, although inmates are permitted to have pencils. (RT 4135.) It is not uncommon for inmates to possess altered or disposable razors. (RT 4136.) Appellant had been in the jail for 20 months and Torres had no knowledge of any reports of violence involving appellant. (RT 4135.)

Glen Eads testified that while working as a deputy in the main jail on October 16, 1997, a fire broke out in the hallway outside four cells, one of which housed appellant. (RT 4114-4116, 4118.) The fire was fueled by burning newspaper, toilet paper, and a smouldering mattress from one of the cells. (RT 4117-4118.) Eads observed inmates, including appellant, throwing papers into the fire to keep it going. (RT 4118-4119.) As Eads, assisted by another deputy, put out the fire, inmates threw apples and oranges at them. (RT 4120.) Eads observed appellant throw a milk carton and orange at him. (RT 4122.)

C. The Trial Court Erred by Admitting Evidence Relating to the Jail Incidents

At the penalty phase of a capital case, the jury is directed to consider evidence "of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, subd. (b).) This Court has consistently held "that evidence of other criminal activity introduced in the penalty phase pursuant to . . . section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People* v. *Phillips*

(1985) 41 Cal.3d 29, 72; *People* v. *Pensinger, supra,* 52 Cal.3d at p. 1259; *People* v. *Grant* (1988) 45 Cal.3d 829, 850.)

To decide whether such evidence is admissible, the trial court should, outside the presence of the jury, "conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity." (*People* v. *Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25; Evid. Code, § 402.) Appellant's counsel objected to admission of the jail evidence and requested such a 402 hearing in this case. While initially agreeing to the necessity for such a hearing, the trial court ultimately found the evidence admissible without a 402 hearing and without the showing required of the prosecution. The court erred because the prosecution made no effort to tie the jail incidents to the violation of any particular criminal statute and presented insufficient evidence to establish an implied threat of use of force or violence. The improper admission of this evidence violated appellant's federal constitutional rights to a fair jury trial, reliable penalty determination and due process. (U.S. Const., Amends. VI, VIII, XIV; see also Cal. Const., art. I, § 7, 16, 17.)

Because evidence of other crimes is so prejudicial in the penalty phase of a capital trial, allowing the penalty jury to consider inadmissible evidence of this nature violates the due process right of fundamental fairness. (*McKinney v. Rees, supra,* 993 F.2d at pp. 1385-1386.) Admission of the improper evidence also violated appellant's Eighth Amendment right to a reliable penalty determination. (*Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585, quoting *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the

sentencing process"].) *Zant v. Stephens, supra,* 462 U.S. at pp. 878-879, fn. 17, also makes clear that a State may limit the prosecution to presenting evidence of specific, limited aggravating factors. Introduction of evidence outside those specific limits violated the state-created liberty interest requiring such evidence to meet the mandate of Penal Code section 190.3. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *People v. Boyd* (1985) 38 Cal.3d 762, 773.)

1. Lack of Violation of Any Penal Statute

"[A] threat of violence which is not in itself a violation of a penal statute is not admissible under factor (b)." (*People v. Pensinger, supra,* 52 Cal.3d at p. 1259; *People v. Boyd, supra,* 38 Cal.3d at p. 776.) In analyzing factor (b) in *People v. Phillips, supra*, 41 Cal.3d at p. 72, this Court said, "The only reasonable interpretation is that the statute limits admissibility to evidence that demonstrates the commission of an actual crime, a requirement easily verified under the definitional guidelines established by legislative bodies in this and other jurisdictions."

In appellant's case, the prosecution in seeking admission of the disputed evidence made no effort to tie most of the jail incidents to violation of any particular penal statute. This deficiency alone should have prohibited introduction of the disputed evidence relating to jail incidents.

Over thirty-five years ago, this Court stated that "[i]t is now settled that a defendant during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt. [Citations.]" (*People v. Stanworth* (1969) 71 Cal.2d 820, 840.) *Stanworth* makes clear that such an instruction is "vital to a proper consideration of the evidence, and the court should so instruct *sua sponte*." (

Id. at p. 841; *People v. Polk* (1965) 63 Cal.2d 443, 452; see also *People v. Robertson* (1982) 33 Cal.3d 21, 53.) This Court adopted the reasonable doubt standard for other crimes evidence presented in a capital case because of "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination." (*Id.* at p. 54.)

Where the prosecution fails to specify a violation of a particular penal statute, as here, the reasonable doubt instruction becomes meaningless. That is, the jury is unable to determine beyond a reasonable doubt if the prosecution has established the commission of an actual crime. As this Court instructed in *Robertson*, "the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the *Polk-Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty." (*People v. Robertson, supra,* 33 Cal.3d at p. 55, fn. 19.)

Instead of following these long established directives, the prosecution in this case failed to allege that the jail incidents, with one exception,[51] constituted commission of any actual crimes. Once defense counsel challenged the evidence, the prosecutor, as the proponent of the aggravating evidence, had the burden of notifying the court of the evidence as to each element of the criminal activity at issue. (See *People* v. *Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25; Evid. Code, § 403.) Had the trial court conducted a 402 hearing, and *fully considered* the admissibility of the

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[51] The only specified crime related to the throwing of a milk carton and orange which the prosecution identified as an assault.

challenged evidence, the foundational deficiencies for the proffered evidence would have been apparent and the jury would never have heard the damaging allegations. The evidence should have been excluded.

2. Lack of Implied Threat of Use of Force or Violence

The prosecution's evidence of possession of razor blades also suffered from another deficiency: mere possession of razors does not establish proof beyond a reasonable doubt of an implied threat of use of force or violence, a necessary element of factor (b) evidence.

This Court has held that a "defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.) Like appellant's case, *Tuilaepa* involved the simple possession of razor blades. The holding in *Tuilaepa* should be reconsidered because the cases relied on do not support the conclusion that possession of an item that is not necessarily a deadly weapon, accompanied by no evidence of an intent to use the item as a weapon, is sufficient for admission under factor (b).

Tuilaepa relies on *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187, *People v. Lucky* (1998) 45 Cal.3d 259, 291-292, *People v. Harris* (1981) 28 Cal.3d 935, 962-963, and *People v. Mason, supra,* 52 Cal.3d at pp. 956-957. None of those cases support expansion of factor (b) to permit evidence of the type challenged in appellant's case.

Ramirez involved possession of a concealed knife in a CYA facility. Noting that the knife constituted a "classic instrument of violence . . . normally used *only for criminal purposes*," the Court found sufficient

evidence of an implied threat of violence. (*People v. Ramirez, supra,* 50 Cal.3d at pp. 1186-1187, citations omitted, emphasis added.)

Lucky involved possession of two shanks – six to eight-inch-long pieces of straightened and sharpened bedspring. The only issue raised in *Lucky* was whether the requisite "knowing possession" had been established, not whether the evidence supported a finding of implied threat of violence. (*People v. Lucky, supra,* 45 Cal.3d at pp. 291-292.)

In *Harris,* this Court determined that possession of a wire garrotte and jail-made knife clearly involved an implied threat of violence. (*People v. Harris, supra,* 28 Cal.3d at pp. 962-963.) As in *Ramirez*, such weapons are "classic instrument[s] of violence" that are "normally used only for criminal purposes."

In contrast, possession of razor blades does not necessarily equate with possession of a deadly weapon. Unlike a garrote or jail-made knife, razor blades are possessed for innocent purposes such as sharpening pencils, shaving heads or cutting up fruit. This Court has recognized that mere possession of a gun is not a crime of violence. (*People v. Cox* (2003) 30 Cal.4th 916, 973.) However, in *Tuilaepa*, the Court held that mere possession of razor blades by a jail inmate could be considered under factor (b) and that the availability of an "innocent explanation" merely raises an evidentiary conflict for the trier of fact and does not render the evidence inadmissible per se, citing *People v. Mason, supra,* 52 Cal.3d at pp. 956-957.)

Mason involved possession by a jail inmate of a razor blade, a straightened and sharpened heavy-duty paper clip attached to a ballpoint pen, and telephone cord. The defendant claimed he was unaware of the presence of the razor blade, that the pen with the paper clip extending from

it was a tattoo needle rather than a stabbing instrument, and that he stole the telephone cord as a prank, not to obtain a garrotte. (*Id.* at p. 956.) This Court in *Mason* noted in previous cases, citing *Ramirez* and *Harris*, that evidence beyond mere possession of a deadly weapon had not been required to show an implied threat of violence. (*Id.* at p. 957.) But that comparison ignores that *Ramirez* and *Harris* had involved possession of "classic instruments of violence" that are "normally used only for criminal purposes." And the reliance in *Tuilaepa* on *Mason* ignores that in the latter case more was involved than mere possession; Mason had killed a jail inmate so his possession of items which could be used for violent purposes was supported by other evidence that implied a threat of use of force or violence.

In appellant's case, the prosecution established only mere possession of razor blades, not classic instruments of violence used only for criminal purposes. No other evidence indicated that appellant posed a threat to use the items to commit acts of violence in the jail.

In *People v. Roberts, supra,* 2 Cal.4th at p. 332, the defendant possessed an unsharpened piece of metal hidden in a toilet in his cell. Even though he admitted the metal was for a weapon, this Court stated:

> There may be doubt whether the crime involved conduct making its commission admissible under the statute. We need not resolve this issue now, however, because any error in admitting the evidence was harmless given the strength of the other evidence properly admitted in aggravation.

(*Id.* at p. 332.)

The doubt expressed in *Roberts* is even more apparent in appellant's case. This Court should reconsider *Tuilaepa* and find that mere possession

of items such as razor blades unaccompanied by any evidence of an intent to use the items to commit acts of force or violence is insufficient to admit the evidence under factor (b).

The evidence relating to the fire incident in the jail hallway also lacked a sufficient showing of an implied threat of use of force or violence. Although the throwing of items at the deputy putting out the fire involved use of force, the mere burning of some papers and a smouldering mattress was an annoyance, not the use of force or violence. Evidence of the fire should have also been excluded.

3. Allowing Use of the Jail Incidents as Factor (b) Evidence Would Render the Aggravating Factor Unconstitutionally Overbroad

A finding that certain conduct is an aggravating factor under Penal Code section 190.3 pertains to the jury's determination at the sentencing stage of who, among the defendants eligible for the death penalty, will actually be sentenced to death. (*People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 148; *Zant* v. *Stephens, supra,* 462 U.S. at p. 878.) Conduct by the defendant which violates a penal statute and involves the use or threat to use violence has been found by this Court to be a relevant consideration in that determination. (See *People* v. *Phillips, supra,* 41 Cal.3d at p. 64.)

However, for appellant's conduct to be considered properly as an aggravating factor would require a showing that he violated a penal statute and that the criminal activity posed at least an implied threat of use of force or violence. Because the ambiguous nature of the jail incidents does not necessarily lead to that conclusion, such a finding would amount to an

overbroad, invalid application of the "other criminal activity" aggravating factor. In a weighing state like California,

> "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence."

(*Sochor* v. *Florida* (1992) 504 U.S. 527, 532.)

Mere possession of items prohibited in a jail, such as the razors or unsharpened metal in this case, unaccompanied by any use or threat to use them as weapons, may be sufficient to find guilt of a criminal offense. However, such possession standing alone does not necessarily imply a threat of violence pursuant to Penal Code section 190.3, subdivision (b). (See *People* v. *Roberts*, *supra,* 2 Cal.4th at p. 332.) Therefore it is inappropriate to urge such conduct as a factor militating for a sentence of death.

An overbroad application of Penal Code section 190.3, subdivision (b) that permits finding mere possession of "potentially" deadly weapons to be used as an aggravating factor would not meaningfully assist the jury's determination at the sentencing stage who, among the defendants eligible for the death penalty, will actually be sentenced to death. (See *Zant* v. *Stephens, supra,* 462 U.S. at p. 878.) Rather, the broad reach of such an aggravating factor would "inject into the individualized sentencing determination the possibility of 'randomness'. . . ." (*People* v. *Bacigalupo* (1993) 6 Cal.4th 457, 477, citations omitted.) It would also invite "'the jury to be influenced by a speculative or improper consideration' . . . ." (*Ibid.*, citations omitted.) Thus, permitting the introduction of other criminal activity evidence that merely demonstrated a defendant possessed a

"potentially" deadly weapon in jail would cause factor (b) to be an overbroad and invalid aggravating factor.

4. Admission of Evidence of Unadjudicated Criminal Activity at the Penalty Phase Is Unconstitutional

The admission of unadjudicated criminal activity at the penalty phase of a capital case denies the defendant his rights to a fair and impartial jury, a reliable capital penalty determination, equal protection, and a fair penalty trial conducted in accordance with due process of law. (U.S. Const., Amends. VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16, and 17.) Appellant acknowledges that this Court has held otherwise, in *People* v. *Balderas* (1985) 41 Cal.3d 184, 204-205, and subsequent cases, but suggests that these holdings should be reconsidered.

Both the state and federal Constitutions guarantee the right to a fair and impartial jury. (*People* v. *Garceau, supra,* 6 Cal.4th at p. 173.) A jury which has already convicted a defendant of capital crimes at the guilt phase cannot make a fair and impartial determination of whether the defendant committed the uncharged crimes presented at the penalty phase. (*United States* v. *Carranza* (1st Cir. 1978) 583 F.2d 25, 27; *Government of Virgin Islands* v. *Parrott* (3d Cir. 1977) 551 F.2d 553, 554.) Therefore, the use of uncharged crimes as evidence in aggravation violates the right to an impartial jury, a reliable penalty determination, and due process of law. (See *State* v. *Bartholomew* (Wash. 1984) 683 P.2d 1079, 1086; *State* v. *McCormick* (Ind. 1979) 397 N.E.2d 276, 278-281.)

Moreover, when evidence of uncharged crimes is introduced as aggravation, the defendant is in effect being tried for the prior crimes (see *State* v. *Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-955; *State* v. *McCormick*,

supra, 397 N.E.2d at p. 280-281) in a proceeding which lacks an impartial jury, the requirement that the jury be instructed as to all elements of the crime, and the requirement of jury unanimity; all of which are available in other criminal trials to insure the reliability of the proceedings. Thus, the capital defendant forced to defend against unadjudicated crimes in the penalty phase is denied the equal protection of the laws, due process in having the jury determine every material element of the crime and the fair and reliable proceeding which the Eighth Amendment and the guarantee of due process demand. Hence evidence of such crimes should be excluded. (*Ibid.*; *State* v. *Bartholomew*, *supra*, 683 P.2d at p. 1086.)

5. The Trial Court Erred by Admitting the Evidence

Even assuming that the admission of evidence of uncharged crimes is constitutional in general, the failure here to allege that the jail incidents violated any particular penal statute and the absence of any evidence of an implied threat of use of force or violence other than mere possession should have rendered the evidence admissible. The trial court erred by admitting the challenged evidence.

D. The Trial Court Incorrectly Instructed on the Other Crimes Evidence

The trial court compounded the evidentiary error of improperly admitting the evidence relating to jail incidents by giving an invalid instruction on the other crimes evidence. The court provided the following instruction:

> Evidence has been introduced for the purpose of showing defendant Michael Soliz has committed the following criminal activity which involved express or implied use of force or violence or the threat of force or violence:

> One, the October sixteenth, 1997 starting of a fire in Men's Central Jail and the assault against deputies attempting to put out that fire;
>
> Two, the January tenth, 1998 possession of disposable razors and altered razors inside the Men's Central Jail, and;
>
> Three, the July thirty-first, 1998 possession of disposable razors, altered razors and a piece of unsharpened metal inside the Men's Central Jail.
>
> Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal activity and that it did involve the express or implied use of force or violence or the threats of force or violence.

(RT 4498-4499.)

Other than the reference to an assault, this instruction failed to specify any alleged violations of particular criminal statutes. As this Court instructed in *Robertson*, "the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the *Polk-Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty." (*People v. Robertson, supra,* 33 Cal.3d at p. 55, fn. 19.) Mere references to possession of razors, possession of unsharpened metal, and starting a fire fail to designate specific penal violations.

As a result, the jury received no instruction on the law supposedly violated. Without an instruction performing the minimal task of informing

the jury on the applicable law on the particular charge or allegation, a defendant's due process right to a jury determination "is little more than a matter of constitutional theory." (*Cole v. Young* (7th Cir. 1987) 817 F.2d 412, 425.) The instruction in appellant's case provided no law relating to a particular penal violation to which the jury could make a valid and reliable determination as to whether the evidence established beyond a reasonable doubt that appellant had committed that violation. Under these circumstances, the reasonable doubt standard becomes impossible to apply.

When the jury is never told the criminal offense that a defendant supposedly committed, "the matter is in effect taken out of its hands entirely" and "[t]he result is the same as if the trial court had directed a verdict, which would be constitutionally impermissible." (*Ibid.*) Here, the defective instruction left the jury applying the reasonable doubt standard to an unspecified crime. This Court has recognized that "the reasonable doubt standard ensures reliability of factor (b) evidence. (*People v. Balderas, supra,* 41 Cal.3d at p. 205, fn. 32.) The failure to specify a crime allegedly violated, nullified the reasonable doubt standard and rendered the evidence here unreliable.[52]

And even though the instruction did at least specify an assault in correlation to one of the jail incidents, the instruction failed to specify the elements of that alleged criminal violation. Although this Court has held that a trial court has no sua sponte duty to instruct on the elements of "other

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[52] The trial court also presented a defective reasonable doubt instruction in appellant's case. Although the court defined reasonable doubt, the court omitted the essential portions of CALJIC No. 2.90 which explain the presumption of innocence and allocate the burden of proof to the prosecution. (See Arg. XIX.)

crimes" (*People v. Davenport* (1985) 41 Cal.3d 247, 281-282), that holding must be reconsidered.

It is highly irrational to require a reasonable doubt standard without similarly requiring a trial court to instruct sua sponte on the elements of the alleged crime. Without that requirement there is no real opportunity to apply the reasonable doubt standard and this critically important protection loses all meaning. No rational jury can find all the elements of the alleged crime are established beyond a reasonable doubt without instruction on those elements. (*People v. Boyd, supra,* 38 Cal.3d at p. 778.) But that is the current state of the law in California. It needs to be reconsidered.

Reconsideration is also necessary because recent decisions of the United States Supreme Court controlling application of the reasonable doubt requirement make clear that California's death penalty scheme as to other crimes evidence is constitutionally deficient. In a series of decisions, *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) __ U.S. __, 124 S.Ct. 2531, the United States Supreme Court has held that any fact increasing the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In *Ring,* the Supreme Court held that aggravating factors under Arizona's capital sentencing scheme operated as "the functional equivalent of an element of a greater offense" which under the Sixth Amendment must be found by a jury. (*Ring v. Arizona, supra,* 536 U.S. at p. 609, quoting *Apprendi v. New Jersey, supra,* 530 U.S. at p. 494, fn. 19.) As stated in *Apprendi*, "the relevant inquiry is not one of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's finding." (*Ibid.*)

Like the aggravating factors under Arizona's capital sentencing scheme, factor (b) evidence in California exposes the defendant to a greater punishment than that authorized by the jury's guilt finding. That is, without the additional finding of at least one aggravating factor, a defendant cannot be sentenced to death in California.[53] Under *Apprendi, Ring,* and *Blakely*, that factor is subject to the reasonable doubt standard.

While California purports to already require that standard of proof in relation to factor (b) evidence, the standard is not properly applied if, as in appellant's case, the jury is not instructed on the element of the crime that must be established. As stated in *Apprendi*, the reasonable doubt standard that protects a defendant's rights to due process and a fair jury trial (see *In re Winship, supra,* 397 U.S. at p. 364), means that a defendant is entitled to a jury determination *of every element of the crime* beyond a reasonable doubt. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 477; *United States v. Gaudin, supra,* 515 U.S. at p. 510.) Where a jury receives no instructions on any of the elements, the reasonable doubt standard cannot be applied validly and any resulting finding is invalid.

The failure of the trial court to specify particular criminal violations or, in relation to the assault charge, the failure to instruct on the elements, rendered the aggravating evidence invalid. Thus, even assuming proper

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[53] In *People v. Cox, supra,* 30 Cal.4th at p. 972, this Court found *Apprendi* and *Ring* inapplicable to the finding required in California that aggravation outweighs mitigation, a finding that the Court described as a "free weighing" of the totality of the circumstances without any burden of proof. Whatever the merits of the *Cox* decision on that point, it did not decide the issue presented here: that the reasonable doubt standard applicable to the determination of factor (b) evidence requires the jury to find every element of the alleged crime.

admission of the challenged evidence, the instructional errors resulted in an unreliable penalty determination.

E. The Improper Use of Other Crimes Evidence Resulted in Prejudice

This Court must determine whether the jury's consideration of an invalid aggravating factor as part of the weighing process constituted harmless error. (See *Sochor* v. *Florida, supra,* 504 U.S. at p. 532.) Adding an invalid aggravating factor to "death's side of the scale," may render the penalty determination unreliable in violation of the Eighth Amendment. (See *Stringer* v. *Black* (1992) 503 U.S. 222, 232.)

Such unreliablity is particularly likely when the improperly considered factor relates to other crimes evidence, a type of evidence which this Court long ago recognized "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk, supra*, 63 Cal.2d at p. 450; *People v. Robertson, supra,* 33 Cal.3d at p. 54.)

In appellant's case, the prosecutor used the improper evidence to persuade the jury to issue a death verdict. In closing argument, the prosecutor pointed to the evidence of appellant having razors in his cell and the rule against having any metal in a cell. (RT 4398.) He then argued, this shows an intent to disobey the rules. (RT 4399.) That argument misled jurors because disobeying rules is not a statutorily authorized aggravating factor. (See *People v. Boyd, supra,* 38 Cal.3d at pp. 772-776.) The prosecutor argued that the razors can be made into slashing devices so as to create weapons to harm others. (RT 4399.) Despite the lack of any evidence of an intent to use the razors as weapons, the prosecutor told the

jurors that appellant's possession of the razors "posed" a threat of violence and indicated the "kind of person he is." (RT 4444.)

Under these circumstances, there is a reasonable possibility that consideration of this aggravating factor affected the verdict (*People* v. *Brown, supra,* 46 Cal.3d at p. 447), and it cannot be considered harmless beyond a reasonable doubt as not contributing to the sentence rendered. (*Chapman* v. *California, supra,* 386 at p. 24.) Appellant's death sentence must be reversed.

* * * * *

XVII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN THE PENALTY RETRIAL BY REFUSING TO INSTRUCT THE JURY ON LINGERING DOUBT

A. Factual Summary

As stated above, appellant's counsel characterized lingering doubt as "the whole thrust" of his penalty retrial defense. (RT 4191.) The evidence established unequivocally that Gonzales was the actual killer of Mr. Eaton. Although eyewitnesses identified appellant as the shooter in the Skyles/Price crimes, the identification evidence was weak and countered by the surreptitiously recorded statement by Gonzales where he admitted killing Skyles and Price and stated that appellant played no part in those crimes. (RT 1899, 1951; People's Exh. 58.) In the penalty phase, appellant's counsel sought to spare his client's life by showing that he was not the actual killer of any of the victims or at least creating a "lingering doubt" on this important issue, and that appellant may not be guilty at all of the Skyles/Price crimes.

In the original penalty trial, the trial court instructed the jury on lingering doubt. (CT 817.)[54] That trial resulted in a hung jury with the jury

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[54] Defendant's Special Instruction No. 1 stated: "The adjudication of guilt is not infallible and lingering doubt you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that some time in the future, facts may come to light that have not yet been discovered."

A second lingering doubt instruction was also proposed: "You may consider as a mitigating factor any 'lingering doubt' that you may have concerning the defendant's guilt. Lingering or residual doubt is defined as

unable to agree on the penalty as to appellant for counts 1, 4 and 5. (CT 809.) A post-trial inquiry of the jurors by the trial judge revealed that the jurors had split 11-1 in favor of a life sentence for appellant on count 1, and 7-5 in favor of life on counts 4 and 5. (RT 2769.)

In the penalty retrial, the trial court initially indicated that a lingering doubt instruction would not be given. (RT 3027.) Appellant's counsel expressed "dismay" with that announcement pointing out that his basis for agreeing to a joint trial had been to use the Gonzales confession on tape to show that appellant did not kill anyone. (RT 3027-3028.) As appellant's counsel explained, he intended to present evidence in the penalty retrial showing that the wrong person may have been convicted of being the shooter of Skyles and Price and the whole defense centered on this lingering doubt theory as to the actual killer. (RT 3028.) The trial judge then backed off saying he may have "misspoken" when he indicated he would not give the lingering doubt instruction and, upon further reflection, agreed with appellant's counsel that the defense was "probably entitled" to the instruction. (RT 3028.)

Relying on that indication from the trial court, appellant's counsel gave an opening statement in the penalty retrial focusing on lingering doubt. Appellant's counsel told the jury that the "key bit of evidence" will be the confession of Gonzales. (RT 3241.) As counsel explained, that evidence will show that Gonzales confessed to all three murders and the jury "will be able to consider that evidence under the concept called lingering doubt." (RT 3241.) While counsel conceded that the first jury had convicted

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that state of mind between beyond a reasonable doubt and beyond all possible doubt." (CT 937.)

appellant beyond a reasonable doubt, he told the penalty retrial jurors that they would be able to use the Gonzales confession to examine whether the first jury made a mistake. (RT 3241-3242.) Counsel informed the jury he would ask them not to impose the death penalty on appellant because the evidence would show that he never killed anyone. (RT 3242.)

But as the penalty trial neared conclusion, the trial court switched direction again. While noting that appellant's counsel had proposed a lingering doubt instruction and referred to it in his opening statement, the court now felt that such an instruction was inappropriate. (RT 4190.) Appellant's counsel complained that this came as a "complete surprise" at this stage of the proceedings saying that it should have been obvious that lingering doubt had been the whole thrust of appellant's defense in the penalty retrial. (RT 4191.) The trial court indicated that counsel could argue appellant's lack of involvement but the court would instruct the jury that statements of counsel are not evidence and the jury must follow the court's instructions. (RT 4191.) The court repeated there would be no lingering doubt instruction, reasoning that it had been made clear to the jurors when impaneled that the issue of guilt had been decided and their only decision was whether to impose a sentence of life without possibility of parole or death. (RT 4191-4192.)

During the conference on penalty retrial jury instructions, the court noted that appellant's counsel had proposed a lingering doubt instruction as given to the previous jury. (RT 4350.) The court explained that the instruction was appropriate in the original case because that jury made the guilt determination and could have felt that guilt was proved only beyond a reasonable doubt but not beyond all possible doubt. (RT 4351.) If so, the court reasoned, that doubt could carry over to the penalty phase. But the

court concluded that the instruction was inappropriate for the subsequent jury that would have no guilt instructions and would not know whether the original jury convicted appellant as an aider and abettor or as a principal. As the court stated, it would be impossible for this jury that did not participate in the guilt phase to fathom the collective state of mind of the original jury that found appellant guilty. (RT 4351.)

While noting that Gonzales testified in the penalty retrial, unlike in either phase of the original trial, the trial court claimed that did not add anything to what both juries heard from the previously played taped statements by Gonzales: that Gonzales stated he was the shooter of Skyles and Price and that appellant never got out of the car. (RT 4342.) Contending that the standard instructions adequately allowed the jury to take into consideration appellant's alleged role in the Skyles/Price crimes, the court refused to give the requested lingering doubt instruction. (RT 4353-4354.)

B. The Trial Court Erred in Refusing to Instruct on Lingering Doubt

The trial court's refusal to instruct on lingering doubt violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments of the federal Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution to present a defense, to a fair trial, to a reliable penalty determination and to due process and equal protection. It is clear under the circumstances of this case that appellant was entitled to a lingering doubt instruction.

In refusing the requested instruction, the trial court cited *People v. Nicolaus* (1991) 54 Cal.3d 551 and *People v. Ghent* (1987) 43 Cal.3d 739 for why giving the lingering doubt instruction was appropriate in the

original penalty trial and inappropriate in the penalty retrial. (RT 4351, 4353.) The trial court stated that these cases found the "catchall provision" of factor (k) in CALJIC No. 8.85 sufficient to cover any potential mitigation. (RT 4353.) But neither of these cases had anything to do with whether a defendant is entitled to a lingering doubt instruction. These cases involved claims that an instruction based on factor (d) of Penal Code section 190.3, which requires a jury to consider as mitigation any "extreme mental or emotional condition," misled the jury into believing any lesser disturbance could not be considered. (*People v. Nicolaus, supra,* 54 Cal.3d at p. 586; *People v. Ghent, supra,* 43 Cal.3d at p. 776.) In both cases, this Court held that the "catchall" factor (k) permitted the jury to consider a mental condition that might not be "extreme." (*Ibid.*)

Even assuming that the reasoning of *Nicolaus* and *Ghent* have some general application to whether a lingering doubt instruction is required, the catchall factor (k) provision was inadequate in this case. Factor (k) permits as mitigation: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (See CALJIC No. 8.85; RT 4495.) In addition, the trial court defined mitigation as "any fact, condition or event which does not constitute a justification *or an excuse for the crime in question . . .*" (RT 4500.) The deficiency with these instructions as applied here is that appellant's lingering doubt defense went far beyond merely extenuating the gravity of the crime; he actually was offering a legal excuse for the crime. That is, by relying on the Gonzales testimony, appellant sought to show that he did not commit the crimes against Skyles and Price. Gonzales testified that he shot those victims and that appellant never even got out of the car. This evidence, if believed, did not lessen the seriousness of appellant's crime; it showed that he was not

guilty at all. Under these circumstances, there is a reasonable likelihood that appellant's jury interpreted the factor (k) portion of CALJIC No. 8.85 and the court's definition of mitigation as not applying to the lingering doubt defense. This left the jury with no instruction to guide them into considering the lingering doubt evidence as mitigation.

The trial court also justified the decision to refuse the requested lingering doubt instruction because this was a penalty retrial. The court stated that such an instruction was proper only with the jury that made the guilt determination. (RT 4190, 4351.) According to the trial court, the penalty retrial jury had "absolutely nothing" to do with the guilt determination and its role was limited to deciding the penalty of life without parole or a death sentence. (RT 4191-4192.)

Under the trial court's flawed reasoning, not only would a lingering doubt instruction be inappropriate in a penalty retrial, but any evidence or argument presenting a lingering doubt would be prohibited. That is not the law. This Court has recognized in the context of a penalty retrial that a capital defendant has the right to have the penalty phase jurors consider any residual or lingering doubt as to his guilt.[55] (*People v. DeSantis, supra,* 2 Cal.4th at p. 1238.) More recently, this Court similarly held that when a capital case proceeds to a penalty retrial after the original penalty trial

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[55] The United States Supreme Court has held that there is no federal constitutional right to an instruction on a lingering doubt defense in a capital case. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 172, 174; see also *id.* at pp. 187-188 (conc. opn. of O'Connor, J.) However, the Supreme Court will revisit that issue next term having granted certiorari in *Oregon v. Guzek* (2005) __ U.S. __, 2005 WL 40838, which presents the question whether a capital defendant has a right under the Eighth and Fourteenth Amendments to offer evidence and argument in support of a residual doubt claim as to whether the jury should impose the death penalty.

results in a hung jury, "it is proper for the jury to consider lingering doubt." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

However, this Court has held that a lingering doubt instruction is not necessarily required. (*Id.; People v. DeSantis, supra,* 2 Cal.4th at pp. 1239-1240; *People v. Cox* (1991) 53 Cal.3d 618, 677-678.) These holdings should be reconsidered.

It is well established that in criminal cases, even in the absence of a request, the trial court is required to instruct on the general principles of law relevant to issues raised by the evidence. (*People v. St. Martin, supra,* 1 Cal.3d at p. 531. A trial court must charge the jury "on any points of law pertinent to the issue, if requested." (Pen. Code, § 1093, subd. (f).) A trial court also has a duty to instruct on defenses if the defendant is relying on such a defense. (*People v. Barton, supra,* 12 Cal.4th at p. 95; *People v. Sedeno, supra,* 10 Cal.3d at p. 716.) As this Court has stated:

> It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case.

(*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [citations omitted].)

As recognized by the United States Supreme Court, jurors "are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) "It is quite simply a hallmark of our legal system that juries be

carefully and adequately guided in their deliberations." (*Gregg v. Georgia, supra,* 428 U.S. at p. 193 [opn. of Stewart, Powell and Stephens, JJ.].)

In this case, appellant sought to present a penalty defense of lingering doubt. But with the trial court's refusal to instruct on this defense, the jury had no basis for applying lingering doubt in the penalty determination. This instructional error deprived appellant of a fair opportunity to present his defense.

" 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." (*Mathews v. United States* (1988) 485 U.S. 58, 63.) In *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099, the Ninth Circuit found that under clearly established Supreme Court law, "the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. This is so because the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." The Supreme Court has held that it "presumes that jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.) The arguments of counsel are insufficient to cure the failure to instruct. As the Supreme Court explained in *Boyde v. California* (1990) 494 U.S. 370, 384: "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter

[the Supreme Court has] often recognized, are viewed as definitive and binding statements of the law."

This case law demonstrates that in presenting a defense it is insufficient to rely on the arguments of counsel; adequate instructions to the jury are necessary. California recognizes a right to present a lingering doubt defense. The failure to instruct the jury on this defense constituted error.

The error rose to the level of federal constitutional error by denying appellant his due process rights: (1) to instructions on the theory of the case (*United States v. Sotelo-Murillo* (9th Cir. 1989) 887 F.2d 176, 180 [a criminal defendant's right to an instruction on his theory of the case "implicates fundamental constitutional guarantee"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201 [criminal defendant's right to have the jury instructed on his theory of the case is "basic to a fair trial"]); (2) to a fair opportunity to defend against the state's accusations (*Chambers v. Mississippi, supra,* 410 U.S. at p. 294 ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]); and (3) to fundamental fairness in the process by which the jury determined his penalty (*Albright v. Oliver* (1994) 510 U.S. 266, 283 (conc. opn. of Kennedy, J.) [due process "ensure[s] fundamental fairness in the determination of guilt at trial"]; *Spencer v. Texas, supra,* 385 U.S. at pp. 563-564 ["the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"].) Because state law recognizes a right to present a lingering doubt defense, appellant also had a state-created liberty

right in adequate instruction on that defense.[56] (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Even assuming that it is not error to fail to instruct on lingering doubt generally, the particular facts of this case required such an instruction. This Court has recognized that a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20; *People v. Thompson* (1988) 45 Cal.3d 86, 134-135 [acknowledging the propriety of an appropriately phrased instruction to consider lingering doubt regarding defendant's intent to kill].) This is such a case.

Appellant's counsel made lingering doubt the main thrust of his penalty defense. The original penalty phase, when the trial court instructed on lingering doubt, resulted in a hung jury. Led to believe by the trial court that a lingering doubt instruction would also be given in the penalty retrial, appellant's counsel emphasized the concept of lingering doubt in his opening statement and in the presentation of his penalty phase defense. Substantial evidence supporting the lingering doubt defense was presented through the testimony of Gonzales. Gonzales testified that he alone killed Skyles and Price and that appellant never even left the car. Under these circumstances, substantial evidence supported the lingering doubt instruction and appellant's counsel's reliance on this defense made such an instruction imperative.

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[56] The arbitrariness of application of the lingering doubt doctrine is demonstrated by the denial of the requested instruction in appellant's case while other capital defendants had the benefit of the instruction. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 129, fn. 28; *People v. Snow* (2003) 30 Cal.4th 43, 125.)

As stated above, because the particular lingering doubt evidence presented in this case actually amounted to a "legal excuse," the factor (k) portion of CALJIC No. 8.85, which applies to evidence reducing culpability but not amounting to a "legal excuse," did not cover appellant's evidence. For the same reason, the instruction defining mitigation did not suffice. The testimony by Gonzales showed that Gonzales was the actual killer and that appellant did not commit any crimes in relation to the Skyles/Price killings. It has long been established that mere presence at the scene or failure to take steps to prevent a crime do not establish aiding and abetting. (*Pinell v. Superior Court* (1965) 232 Cal.App.2d 284, 287; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911; see also CALJIC No. 3.02.) Under these circumstances, the jury was left without any adequate instruction to guide them in considering lingering doubt in the penalty retrial.

Prospective jurors were repeatedly told by the trial court that they would not redecide guilt. (RT 2866, 3044, 3057, 3111.) While the defense presented evidence of a lingering doubt, no jury instruction authorized the jurors to consider this concept in determining the appropriate penalty. The trial court erred under these circumstances in failing to instruct the jurors on lingering doubt.

C. Reversal Is Required

This error requires reversal. "The right to have a jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that the failure to instruct where there is evidence to support the instruction can never be considered harmless error." (*United States v. Escobar de Bright, supra,* 742 F.2d at p. 1201, quoting *Chapman v. California, supra,* 386 U.S. at p. 23.) The trial court's failure to instruct on

lingering doubt, which constituted appellant's theory of the case, is reversible per se.

Reversal is also required under the harmless error analysis for federal constitutional error. Under *Chapman*, "[t]he question to be asked is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction." (*Id.* at p. 23, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) Reversal is required unless the reviewing court concludes "beyond a reasonable doubt" that the error "did not contribute to the jury's verdict." (*Chapman v. California, supra,* 386 U.S. at p. 24.) The essential inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

The failure to instruct on the critical defense of lingering doubt cannot be considered harmless. In the original penalty trial, where the jury properly received instruction on lingering doubt, the trial resulted in a hung jury. A similar result or even a life verdict was reasonably likely if this jury had been given a lingering doubt instruction. This requires reversal even if the error is not considered a federal constitutional violation. (*People v. Brown, supra,* 46 Cal.3d at p. 448 [applying "reasonable possibility" test to state law error in the penalty phase].)

The defense of "'residual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" (*Lockhart v. McGee, supra,* 476 U.S. at p. 181, quoting *Grigsby v. Mabry, supra,* 758 F.2d at p. 248 (dis. opn. of Gibson, J.).) "Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty." (*Tarver*

v. Hopper (11th Cir. 1999) 160 F.3d 710, 715) As stated in a comprehensive study of jurors in capital cases:

> "Residual doubt" over the defendant's guilt is the most powerful "mitigating fact." . . . [T]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.

(Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1563.) "The existence of some degree of doubt about the guilt of the accused was the more recurring explanatory factor in the life recommendation cases studied." (William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases* (1988) 15 Am. J. Crim. L. 1, 28.)

"Furthermore, the American Law Institute, in a proposed model penal code, similarly recognized the importance of residual doubt in sentencing by including residual doubt as a mitigating circumstance." (*Tarver v. Hopper, supra,* 169 F.3d at p. 716.) Model Penal Code section 210.6, subsection (1)(f) provides that a death sentence is prohibited in the case of a person found guilty of murder "if it is satisfied that: . . . although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." (ALI, Model Penal Code and Commentaries (1980) §210.6(1)(f).) This Court has previously considered Model Penal Code provisions in relation to issues in a capital case. (*People v. Robertson, supra,* 33 Cal.3d at p. 59.)

United States Supreme Court holdings in cases like *Lockett v. Ohio, supra,* 438 U.S. at p. 604 and *Eddings v. Oklahoma* (1982) 455 U.S. 104,

110 guarantee not only the right of a capital defendant to offer any mitigating evidence, but also require *appropriate jury instructions* allowing the jury to "give effect to the mitigating evidence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 314, 319.) "[I]n the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that [appellant] did not deserve to be sentenced to death based upon his mitigating [lingering doubt] evidence." (*Id.* at p. 326.)

The failure to give an adequate instruction guiding the jury in considering the critical concept of lingering doubt undoubtedly affected the fairness and reliability of the penalty determination. The hung jury in the original penalty trial, and the known factor that the majority of those jurors leaned toward a life verdict, demonstrates the closeness of the penalty determination in this case. In addition, the aggravating evidence against appellant was fairly minimal: a conviction for taking a vehicle, and jail-related incidents involving burning a mattress and trash in the hallway, throwing objects at the guards trying to put out the fire and two incidents of possession of razor blades. (RT 4496, 4498.)

Under these circumstances, it is likely that adequate consideration of the lingering doubt defense would have made a difference. Without any instruction, the jury had no proper guidance on whether or how to apply the evidence raising a lingering doubt. It cannot be shown that such an error was harmless. Reversal is required.

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XVIII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY THAT MERCY COULD BE CONSIDERED AS A BASIS FOR RETURNING A VERDICT OF LIFE WITHOUT POSSIBILITY OF PAROLE

A. Introduction

The trial court instructed the jury in the penalty phase retrial that: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial that it warrants death instead of life without parole." (CT 926-927; CALJIC No. 8.88.) Pursuant to CALJIC No. 8.85, the trial court also instructed on the factors in aggravation and mitigation to be considered in the penalty determination including factor (k): "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CT 922, see Pen. Code, § 190.3, subd. (k).)

Recognizing that the standard instruction covers only sympathy for the defendant, but not the separate concept of mercy, defense counsel proposed the following instruction: "After considering the aggravating and mitigating factors that are applicable in this case, you may decide to impose the penalty of life without possibility of parole in exercising mercy on behalf of the defendant." (CT 939.) The trial court refused to give this proposed instruction. (CT 934, 939.)

The trial court erred. The requested instruction, which constituted an accurate statement of the law, sought to inform the jury that mercy could be considered in determining whether or not to impose the death penalty. It is well established that mercy is a proper consideration for the penalty determination in a capital case. This error violated appellant's rights to a fair jury trial, present a defense, reliable penalty determination and due process as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, and 17 of the California Constitution.

B. The Trial Court Erred by Refusing to Instruct on Mercy

A defendant in a capital case is entitled to due process, a fair jury trial and procedural safeguards guiding the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia, supra,* 428 U.S. at p. 189.) The Eighth and Fourteenth Amendments to the United States Constitution mandate that a capital case jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant offers as a basis of a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110.) These cases guarantee not only the right of a capital defendant to offer any mitigating evidence, they also require appropriate jury instructions allowing the jury to "give effect to the mitigating evidence." (*Penry v. Lynaugh, supra,* 492 U.S. at pp. 314, 319; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 395-399.)

A criminal defendant is also entitled upon request to instructions which either relate the particular facts of his case to any legal issue or pinpoint the crux of his defense. (*People v. Saille* (1991) 54 Cal.3d 1103,

1119; *People v. Hall* (1980) 28 Cal.3d 143, 158-59; *People v. Sears, supra,* 2 Cal.3d at p. 190; see *Penry v. Johnson* (2001) 532 U.S. 782, 797.) The special instruction at issue in this case is not cumulative or argumentative, nor does it contain incorrect statements of law. (See *People v. Mickey, supra,* 54 Cal.3d at p. 697.) It was offered to address particular aspects of appellant's theory of the case and was thus appropriate. (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Andrian* (1982) 135 Cal. App.3d 335, 338.)

The trial court's refusal to give appellant's requested instruction violated his right to present a defense (U.S. Const., Amends. VIII, XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi, supra,* 410 U.S. 284, his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const. art. 1, § 17; *Beck v. Alabama, supra,* 447 U.S. at p. 638), and a fair trial secured by due process of law. (U.S. Const., 14th Amend.; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams, supra,* 425 U.S. at p. 503.) In addition, the errors violated appellant's right to trial by a properly instructed jury (U.S. Const., Amends. VI, XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky, supra,* 450 U.S. at p. 302; *Duncan v. Louisiana* (1968) 391 U.S. 145) and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

This Court has acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. In *People v. Lewis* (1990) 50 Cal.3d 262, 284, the Court advised that in death penalty cases trial courts "should allow evidence

and argument on emotional albeit relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." This statement expressly recognizes that mercy plays a legitimate role in a jury's decision not to impose the ultimate penalty. The United States Supreme Court has also acknowledged the role of mercy in death penalty systems which comply with federal constitutional requirements. The capacity to show mercy is personal to the jurors; it is their part of a "reasoned moral response" to mitigating evidence. (*Penry v. Lynaugh, supra,* 492 U.S. at p. 328.)

In this sense, mercy is a consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of the murder and not withstanding what a jury thinks the defendant deserves. (See *People v. Lanphear* (1984) 36 Cal.3d 164, 169 [trial counsel's plea for "mercy" and "compassion" relevant only to whether death was an appropriate penalty for this individual notwithstanding his culpability in the commission of the murder].)

Without instructional guidance, however, there is a substantial likelihood in this case that the jury excluded any consideration of mercy – even when the concept was implicated by the evidence and arguments of counsel. The jury could have been misled into believing mitigating evidence relating to mercy must be ignored, a belief which conflicts with a capital jury's "obligation to consider all of the mitigating evidence introduced by the defendant." (See *California v. Brown* (1987) 479 U.S. 538, 542-43, 546.) Jurors must be permitted to take into account all evidence the defense offers in support of his argument that death is not

appropriate. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304-305.) Moreover, this Court has also said that California has an independent interest in the reliability of its death penalty system. (*People v. Chadd* (1981) 28 Cal.3d 739, 751-753.)

These protections required express instruction on the concept of mercy as a proper consideration for the penalty determination. Although the jury did receive an instruction based on factor (k) that any sympathetic aspects of defendant's character could be considered, none of the instructions given in this case told the jurors that mercy could be considered. The refusal to give the instruction on mercy constituted state and federal constitutional error.

C. The Refusal to Instruct on Mercy Resulted in Prejudice

Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California, supra,* 494 U.S. at p. 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605.) "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The prosecution cannot show that the error was harmless beyond a reasonable doubt. An instruction on mercy would have allowed the jury to override any finding that aggravation outweighed mitigation and to decide that appellant's life should be spared. If even only one juror had been convinced that mercy should be granted, the outcome would have been

different. The refusal to instruct on mercy cannot be consider harmless error. Appellant's judgment of death must be reversed.

* * * * *

XIX.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY IN THE PENALTY PHASE WITH CRITICAL GUIDELINES ON HOW THE JURY SHOULD EVALUATE THE EVIDENCE

A. Introduction

In the penalty retrial, the trial court gave a very limited set of jury instructions. (RT 3210-3217, 4491-4503.) At the beginning of the penalty retrial, the judge gave the standard pre-trial admonitions. (RT 3210-3217; CALJIC No. 0.50.) At the conclusion of the case, the judge gave the standard penalty phase instructions. (RT 4491-4503; CALJIC No. 8.84.1 [duty of jury – penalty proceedings]; CALJIC No. 8.85 [penalty trial – factors for consideration]; CALJIC No. 8.86 [penalty trial – conviction of other crimes – proof beyond a reasonable doubt]; CALJIC No. 8.87 [penalty trial – other crime activity – proof beyond a reasonable doubt]; CALJIC No. 8.88 [penalty trial – concluding instruction].)

The *only* other instruction given apart from those basic penalty phase instructions was a definition of reasonable doubt in relation to the other crimes evidence. (RT 4497.) However, the trial court did not give the full reasonable doubt instruction from CALJIC 2.90, instead omitting the first paragraph which sets out the presumption of innocence and specifies that the prosecution bears the burden of proof. [57]

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[57] The court also omitted the portion of that instruction requiring unanimity. (See CALJIC No. 2.90.)

The trial court expressly told the jury: "You will now be instructed as to *all of the law* that applies to the penalty phase of this trial." (RT 4491, emphasis added; CALJIC No. 8.84.1.) We must presume that the jurors followed that directive and applied only those limited instructions. (*Richardson v. Marsh* (1987) 481 U.S. 200, 211; *People v. Bonin* (1988) 46 Cal.3d 659, 699.) It is also important to recognize that since this jury served only for the penalty phase, it did not have the benefit of any instructions normally given in any guilt phase trial.

As a result critical instructions, including the presumption of innocence, allocation of the burden of proof, determining the credibility of witnesses, evaluating conflicting evidence and considering the sufficiency of the evidence, were not given in the penalty phase. These omissions left the jury without any legal guidance in making key determinations.

The omission of critical instructions in the penalty phase resulted in an unfair, arbitrary and unreliable determination of the appropriate punishment in violation of appellant's federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the presumption of innocence, a fair jury trial, a reliable penalty determination and due process of law. This omission also violated appellant's rights under article I, sections 7, 15 and 17 of the California Constitution.

As more fully established below, this instructional error requires reversal.

B. The Error in Failing to Instruct the Jury Adequately

The United States Supreme Court has stated repeatedly the importance of ensuring that jurors in criminal cases are instructed adequately on the applicable law. "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

(*Gregg v. Georgia, supra,* 428 U.S. at p. 193 [opn. of Stewart, Powell, and Stevens, JJ.].) "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States, supra,* 326 U.S. at p. 612.) "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky, supra,* 450 U.S. at p. 302.)

This Court has also recognized the necessity of complete instructions on the applicable law. A trial court must instruct sua sponte on those general principles of law which are " . . . closely and openly connected with the facts before the court, and which are necessary for a jury's understanding of the case." (*People v. Sedeno, supra,* 10 Cal.3d at p. 715.) A trial court has a sua sponte duty to instruct on the "general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885.)

This includes the duty to instruct on those general principles relating to the evaluation of evidence. (See *People v. Rincon-Pineda, supra,* 14 Cal.3d at pp. 883-884 [credibility of witnesses]; *People v. Yrigouyen* (1955) 45 Cal.2d 46, 49 [circumstantial evidence]; *People v. Reeder* (1976) 65 Cal.App.3d 235, 241 [expert testimony].)

Normally, in the penalty phase of a capital case, the trial court can fulfill its duty either by instructing which guilt phase instructions apply at the penalty phase (see, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1256-1257) or by reinstructing the jury on all applicable principles of law. In *People v. Babbitt, supra,* 45 Cal.3d at p. 718, fn. 26, this Court stated that "[t]o avoid any possible confusion in future cases, trial courts should

expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." As indicated in the Use Note, CALJIC No. 8.84.1 was adopted in response to the *Babbitt* decision and utilizes a different procedure "less likely to result in confusion to the jury." That is, this instruction directs the jurors to disregard all instructions given in other phases of the trial, but it is contemplated that CALJIC No. 8.84.1 will be "followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." (CALJIC No. 8.84.1, Use Note.)

The trial court in appellant's case omitted the language in CALJIC No. 8.84.1 "to disregard all instructions given in other phases of the trial." That, of course, made sense because this penalty phase jury had not served in the guilt phase. But that meant that the trial court *needed* to instruct on applicable principles of law generally provided in the guilt phase of criminal trials. The trial court in appellant's case, however, took a different tack that was guaranteed to result in juror confusion and violate due process. (See *Estelle v. McGuire, supra,* 502 U.S. at pp. 70-72 [due process implicated if jurors misunderstood instructions].) Other than a definition of reasonable doubt, the trial court did not instruct the jury on the legal principles regarding the evaluation of the evidence that applied in the penalty phase.

This Court has held that no prejudicial error occurred where trial courts failed to reinstruct on general principles of law necessary for a reliable penalty phase determination where the *same jury* served in both the guilt and penalty phases and the trial courts did not direct the jurors in the penalty phases to disregard the instructions given in the guilt phase. (See *People v. Sanders* (1995) 11 Cal.4th 475, 561; *People v. Wharton, supra,* 53 Cal.3d at p. 600; *People v. Williams* (1988) 45 Cal.3d 1268, 1321.)

However, those cases have no application here where the penalty jury never received *any instructions* necessary for evaluating the evidence, other than the standard penalty phase instructions. This left the penalty phase jury without proper guidance on the applicable legal principles for evaluating the evidence and presents, contrary to due process, a "reasonable likelihood" that the jurors evaluated the penalty evidence in whatever fashion and for whatever purpose the individual jurors desired. (*Boyde v. California, supra,* 494 U.S. at p. 380 [due process violated if reasonable likelihood that jury applied instructions erroneously].)

This Court has also held that failure to instruct on the general principles for evaluating evidence is harmless where no prejudice is shown. (*People v. Carter* (2003) 30 Cal.4th 1166, 1218-1222.) In appellant's case, however, substantial prejudice occurred because of the omitted instructions.

This instructional error was particularly egregious as to the presumption of innocence and the prosecution's burden of proof. The prosecution presented "other crimes" evidence as aggravation including allegations of assault and possession of razor blades. (RT 4125-4128, 4131-4133, 4114-4122.) Appellant was entitled to a presumption of innocence on those charges. The presumption of innocence is a basic component of a fair trial. (*Estelle v. Williams, supra,* 425 U.S. at p. 503.) But the trial court failed to instruct on that portion of CALJIC No. 2.90, which informs jurors of the presumption of innocence, providing only the portion defining reasonable doubt. In addition to omitting the presumption of innocence, which is a core concept of criminal law, the trial court also omitted the directive stating that the prosecution bears the burden of proof. A judge has a specific duty to instruct on the burden of proof. (Evid, Code,

§ 502.)[58] That requirement includes specifying which party bears the burden of proof. (*Ibid.*; CALJIC No. 2.90.) These omissions left the jury with inadequate guidance on a fundamental principle of American criminal law.

The "jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278.) A verdict based on a defective definition of reasonable doubt cannot stand. (*Id.* at p. 281.) Neither can verdicts obtained without specifying that the defendant is presumed innocent and that the prosecution bears the burden of proof on the other crimes evidence.

These circumstances demonstrate that appellant's jury made critical determinations about the aggravation evidence without guidance on the applicable legal principles. The instructional error also extended to the evaluation of other evidence in the penalty phase.

A trial court is required to "inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." (Penal Code § 1127.) CALJIC No. 2.20, which specifies that jurors are the exclusive judges of the credibility of witnesses and provides the standards for assessing credibility, was not given

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[58] Evidence Code § 502 provides:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

to appellant's jury in the penalty phase. This omission takes on special significance because the judge directly interfered with the critical credibility assessment of Gonzales's testimony by taking improper "judical notice" of the physical impossibility of his testimony. (See Arg. XIV.)

Nor was the jury instructed that the testimony of one witness may be sufficient for proof of a fact, although such an instruction should be given sua sponte in every criminal case. (*People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 884; *People v. Pringle* (1986) 177 Cal.App.3d 785, 788-790.) Again, this omission has special significance because jurors may have been confused as to whether they could rely on the sole testimony of Gonzales establishing appellant's lingering doubt defense.

It has also long been established that CALJIC No. 2.01 or a similar instruction on the sufficiency of circumstantial evidence must be given sua sponte where the prosecution's case rests substantially on circumstantial evidence. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 175.) No such instruction was given in the penalty phase of this case.

Similarly, no instruction was given on weighing conflicting testimony, although the trial court has a sua sponte duty to do so when, as here, conflicting testimony has been presented. (*People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 884.) Appellant's case presented a substantial question regarding conflicting testimony pitting the testimony of Gonzales against that of the eyewitnesses' testimony.

Appellant had a federal constitutional right to a properly instructed jury in the penalty phase. Federal due process principles also prohibit depriving appellant of crucial protections afforded under California law such as full and complete jury instructions. (*Hicks v. Oklahoma, supra,*

447 U.S. at p. 346.) The trial court's failure to instruct on essential legal principles necessary for a fair and reliable penalty determination constituted error.

C. Reversal Is Required for the Multiple Instructional Errors

Aggravation evidence presented pursuant to Penal Code section 190.3, subdivisions (b) and (c), pertaining to other crimes evidence and prior convictions respectively, must be established beyond a reasonable doubt *by the prosecution* and the jury must be so instructed. (*People v. Davenport, supra*, 41 Cal.3d at p. 280; *People v. Robertson, supra,* 33 Cal.3d at p. 53.) The prosecution presented such alleged aggravation here, but the trial court failed to specify the presumption of innocence or to allocate the burden of proof to the prosecution.

That error is structural as a verdict by a jury based on a defective reasonable doubt instruction cannot stand. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 281-282.) In appellant's case, the jury made critical findings as to alleged aggravating factors without proper guidance on the burden of proof and presumption of innocence. Any such findings were invalid rendering the resulting death sentence unreliable.

But even if the reversible per se standard does not apply, the instructional errors in appellant's penalty phase were so numerous and prejudicial, that reversal is still required.

As recognized by this Court, errors relating to the reasonable doubt instruction as to other crimes evidence in a capital case are "especially serious because that type of evidence 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (*People v. Davenport, supra,* 41 Cal.3d at pp. 280-281, quoting

People v. Robertson, supra, 33 Cal.3d at p. 54, quoting *People v. Polk, supra,* 63 Cal.2d at p. 450.) The omission of an instruction on the presumption of innocence and allocating the reasonable doubt burden of proof was especially egregious here because some of the alleged aggravation relating to the other crimes evidence was disputed with appellant contending that the razor blades had been possessed for innocent purposes.

A jury properly instructed on the presumption of innocence and the legal definition of proof beyond a reasonable doubt might have rejected this alleged aggravating evidence. In addition to the omissions on the burden of proof, the jury also did not receive any instructions to guide their credibility determination or to weigh the sufficiency of the circumstantial evidence presented on these allegations. For example, CALJIC No. 2.01, relating to the sufficiency of circumstantial evidence, tells jurors that if there are two reasonable interpretations of the evidence, one of which points to the defendant's innocence, jurors must adopt that interpretation. Appellant was deprived of that potential benefit because the penalty phase jurors received no such instruction.

The lack of instructions on evaluating the evidence is likely to have further harmed appellant because the penalty phase jury had to weigh conflicting evidence and make credibility findings regarding potential mitigation but lacked proper legal guidance on how to make those determinations. For example, the testimony of Gonzales constituted crucial evidence requiring critical credibility determinations and resolution of conflicting evidence. This evidence could have been crucial to the lingering doubt defense but, again, the jury had no guidance on how to evaluate this evidence properly. Due to the lack of proper instructions

guiding the jury on the evaluation of evidence and the weighing of conflicting testimony, the jury could not make an adequate assessment of the potential mitigating evidence.

The trial court failed to instruct on the principles guiding expert testimony. (See CALJIC No. 2.80.) When the opinion of any expert is received in evidence, the trial court is required to instruct on guidelines for evaluating expert testimony, including the following:

> Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

(Pen. Code, §1127b.) Appellant's jury heard significant opinion evidence from the gang expert, Detective Lusk, supporting the prosecution's theory that Gonzales had exaggerated his role in the Skyles and Price shootings (RT 4069, 4072.) Lusk also offered opinion testimony that those shootings were in retaliation to a prior murder of fellow gang member. (RT 4060-4068.) Without the necessary instruction, the jury may have felt bound by the expert's opinion. This would have caused the jury to accept, without adequate evaluation, that appellant was responsible for the shootings and the shootings were premeditated retaliation rather than a heat of passion response. Such findings would have made death verdicts more likely. Proper instruction on expert testimony was necessary for a fair and reliable penalty determination.

Findings critical to the penalty determination were made without adequate legal guidance. There is a reasonable likelihood that at least some of the jurors accepted alleged aggravation evidence and may have rejected mitigation evidence because of the lack of complete and adequate instructions. Under these circumstances, appellant was deprived of his federal constitutional right to a jury fully instructed on the applicable legal principles and prejudice from that error is likely. Even assuming that the failure to define reasonable doubt is not structural error, the omission of numerous crucial instructions from the penalty phase cannot be considered harmless error. There is a reasonable possibility that these instructional errors contributed to the penalty verdicts. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at p. 448.) Confidence in the reliability of the outcome is sufficiently undermined that reversal is required.

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XX.

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to CALJIC No. 8.85 [Penalty Trial - Factors For Consideration], the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (RT 4493-4496), and pursuant to CALJIC No. 8.88 [Penalty Trial - Concluding Instruction], the standard instruction regarding the weighing of these aggravating and mitigating factors. (RT 4499-4502.) These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional.

First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the introduction of evidence under Penal Code section 190.3, subdivision (b) violated appellant's federal constitutional rights to due process, equal protection and a reliable penalty determination. Even if this evidence were permissible, the failure to instruct on the requirement of jury unanimity with regard to such evidence denied appellant his federal constitutional rights to a jury trial and to a reliable penalty determination. Third, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Fourth, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fifth, the restrictive adjectives used in the

list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Sixth, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Seventh, and finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

A. The Instruction on Penal Code Section 190.3, Subdivision (a) and Application of that Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Penal Code section 190.3, subdivision (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "[t]he circumstances of the first-degree murders of which the defendant was previously convicted and the existence of any special circumstances previously found to be true." (RT 4493-4494.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

However, an analysis of how prosecutors actually use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever

"common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

As applied in California, however, section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that – from case to case – reflect starkly opposite circumstances. Thus, prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[59] or because the defendant killed with a

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[59] See, e.g., *People v. Morales*, Cal.Sup.Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera,* No. S004569, RT 160-161 (same).

single execution-style wound;[60]

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[61] or because the defendant killed the victim without any motive at all;[62]
- because the defendant killed the victim in cold blood,[63] or because the defendant killed the victim during a savage frenzy;[64]
- because the defendant engaged in a cover-up to conceal his crime,[65] or because the defendant did not engage in a cover-up

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[60] See, e.g., *People v. Freeman,* No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson,* No. S004761, RT 3026-3027 (same).

[61] See, e.g., *People v. Howard,* No. S004452, RT 6772 (money); *People v. Allison,* No. S004649, RT 968-969 (same); *People v. Belmontes,* No. S004467, RT 2466 (eliminate a witness); *People v. Coddington,* No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent,* No. S004309, RT 2553-2555 (same); *People v. Brown,* No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain,* No. S004370, RT 31 (revenge).

[62] See, e.g., *People v. Edwards,* No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband,* No. S005233, RT 3650 (same); *People v. Hawkins,* No. S014199, RT 6801 (same).

[63] See, e.g., *People v. Visciotti,* No. S004597, RT 3296-3297 (defendant killed in cold blood).

[64] See, e.g., *People v. Jennings,* No. S004754, RT 6755 (defendant killed victim in savage frenzy).

[65] See, e.g., *People v. Stewart,* No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson,* No.

and so must have been proud of it;[66]

- because the defendant made the victim endure the terror of anticipating a violent death,[67] or because the defendant killed instantly without any warning;[68]
- because the victim had children,[69] or because the victim had not yet had a chance to have children;[70]
- because the victim struggled prior to death,[71] or because the victim did not struggle;[72]
- because the defendant had a prior relationship with the

S004763, RT 1141 (defendant lied to police); *People v. Miranda,* No. S004464, RT 4192 (defendant did not seek aid for victim).

[66] See, e.g., *People v. Adcox,* No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams,* No. S004365, RT 3030-3031 (same); *People v. Morales,* No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[67] See, e.g., *People v. Webb,* No. S006938, RT 5302; *People v. Davis,* No. S14636, RT 11, 125; *People v. Hamilton,* No. S004363, RT 4623.

[68] See, e.g., *People v. Freeman,* No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis,* No. S004767, RT 2959 (same).

[69] See, e.g., *People v. Zapien,* No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[70] ee, e.g., *People v. Carpenter,* No. S004654, RT 16,752 (victim had not yet had children).

[71] See, e.g., *People v. Dunkle,* No. S014200, RT 3812 (victim struggled); *People v. Webb,* No. S006938, RT 5302 (same); *People v. Lucas,* No. S004788, RT 2998 (same).

[72] See, e.g., *People v. Fauber,* No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera,* No. S004569, RT 160 (same).

victim,[73] or because the victim was a complete stranger to the defendant.[74]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a death sentence is the use of the circumstances-of-the-crime aggravating factor to embrace facts which cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[75]

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[73] See, e.g., *People v. Padilla,* No. S014496, RT 4604 (prior relationship); *People v. Waidla,* No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[74] See, e.g., *People v. Anderson,* No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters,* No. S004712, RT 4264 (same).

[75] See, e.g., *People v. Deere,* No. S004722, RT 155-156 (victims were young, ages 2 and 6); *People v. Bonin,* No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp,* No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter,* No. S004654, RT 16,752 (victim was 20), *People v. Phillips, supra,* 41 Cal.3d at p. 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa,* No. S006284, XL RT 49 (victim was an adult "in her prime");

- **The method of killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[76]
- **The motive for the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[77]
- **The time of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of

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People v. Kimble, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton,* No. S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-4716 (victim was "elderly").

[76] See, e.g., *People v. Clair,* No. S004789, RT 2474-2475 (strangulation); *People v. Kipp,* No. S004784, RT 2246 (same); *People v. Fauber,* No. S005868, RT 5546 (use of an axe); *People v. Benson,* No. S004763, RT 1149 (use of a hammer); *People v. Cain,* No. S006544, RT 6786-6787 (use of a club); *People v. Jackson,* No. S010723, RT 8075-8076 (use of a gun); People v. Reilly, No. S004607, RT 14,040 (stabbing); *People v. Scott,* No. S010334, RT 847 (fire).

[77] See, e.g., *People v. Howard,* No. S004452, RT 6772 (money); *People v. Allison,* No. S004649, RT 969-970 (same); *People v. Belmontes,* No. S004467, RT 2466 (eliminate a witness); *People v. Coddington,* No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent,* No. S004309, RT 2553-2555 (same); *People v. Brown,* No. S004451, RT 3544 (avoid arrest); *People v. McLain,* No. S004370, RT 31 (revenge); *People v. Edwards,* No. S004755, RT 10,544 (no motive at all).

- the night, late at night, early in the morning, or in the middle of the day;[78]
- **The location of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[79]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

In an effort to counter the overly-broad application of this factor, the defense requested a jury instruction that circumstances beyond the elements of murder itself must be present to constitute aggravation.[80] (CT 946.) The

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[78] See, e.g., *People v. Fauber,* No. S005868, RT 5777 (early morning); *People v. Bean,* No. S004387, RT 4715 (middle of the night); *People v. Avena,* No. S004422, RT 2603-2604 (late at night); *People v. Lucero,* No. S012568, RT 4125-4126 (middle of the day).

[79] See, e.g., *People v. Anderson,* No. S004385, RT 3167-3168 (victim's home); *People v. Cain,* No. S006544, RT 6787 (same); *People v. Freeman,* No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus,* No. S004723, RT 7340-7341 (city park); *People v. Carpenter,* No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois,* No. S017116, RT 2970 (remote, isolated location).

[80] The proposed instruction stated: "In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact

trial court denied the requested instruction. (CT 934.) This left the jury with inadequate guidance on application of the aggravating factor.

The circumstances-of-the-crime aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentences must be vacated.

B. The Instruction on Penal Code Section 190.3, Subdivision (b) and Application of that Sentencing Factor Violated Appellant's Constitutional Rights to Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination

1. Introduction

Factor (b), which tracks Penal Code Section 190.3, 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

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that was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree."

or attempted use of force or violence or the express or implied threat to use force or violence." Pursuant to that factor, the prosecution in this case presented evidence of four prior acts of alleged violence. (RT 4114-4122, 4124-4128, 4131-4136.)

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed. (RT 4494.) The jurors were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that appellant did in fact commit the acts alleged. (RT 4498-4499.) Although the jurors were told that all 12 must agree on the final sentence (RT 4502), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation.

(RT 4499.) Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide, if any, and the special circumstance allegations.

As established above, the unadjudicated crimes evidence should not have been admitted. (See Arg. XVI.C.4.) But even assuming the evidence was constitutionally permissible, the aspect of Penal Code section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both

the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. The Failure to Require a Unanimous Jury Finding on the Unadjudicated Acts of Violence Denied Appellant's Sixth Amendment Right to a Jury Trial and Requires Reversal of his Death Sentence

Even assuming, arguendo, that the evidence of the prior unadjudicated offenses was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to Penal Code section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based

on the vote of five of six seated jurors. (*Brown v. Louisiana* (1980) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[81]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1980) 497 U.S. 639, 649.) In light of *Walton,* it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Lines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent, supra,* 43 Cal.3d at p. 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent, supra,* 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v.*

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[81] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama, supra,* 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the State seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged act of violence, there is no need to reach this question here.

Arizona, supra, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 612 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exists]"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring.*

Here, the error cannot be deemed harmless because, on this record, there is no way to determine if all 12 jurors would have agreed that appellant committed the alleged prior offenses. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Decliner* (1985) 163 Cal.App.3d 284, 302 [same].)[82]

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[82] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra,* 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

3. Absent a Requirement of Jury Unanimity on the Unadjudicated Acts of Violence, the Instructions on Penal Code Section 190.3, Subdivision (b) Allowed Jurors to Impose The Death Penalty on Appellant Based on Unreliable Factual Findings That Were Never Deliberated, Debated Or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida, supra,* 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi,* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio, supra,* 438 U.S. at pp. 605-606; *Gardner v. Florida, supra,* 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the State has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the

act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (RT 4499.)

Thus, as noted above, members of appellant's jury were permitted individually to rely on this – and any other – aggravating factor any one of them deemed proper as long as all the jurors agreed on the ultimate punishment. Because this procedure totally eliminated the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana, supra,* 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia, supra,* 435 U.S. 223; *Brown v. Louisiana, supra,* 447 U.S. 323.)

In *Johnson v. Louisiana, supra,* 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of nine to three. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous agreement reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas, J.).)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions

with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia, supra,* 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana, supra,* 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson, Ballew,* and *Brown,* the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana, supra,* 406 U.S. at p. 388, (dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi, supra,* 486 U.S. at p. 586 [harmless error analysis inappropriate when trial court introduces

evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

C. The Failure to Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those inapplicable factors from the instruction. (RT 4493-4496.) Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter, supra,* 21 Cal.4th at p. 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was

evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright, supra,* 477 U.S. at p. 411, 414; *Beck v. Alabama, supra,* 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

D. Failing to Instruct That Statutory Mitigating Factors Are Relevant Solely as Mitigators Precluded the Fair, Reliable and Evenhanded Application of the Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – in

this case factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens, supra*, 462 U.S. at p. 879.)

The defense requested an instruction clarifying that the absence of mitigating factors in the all-inclusive instruction given by the trial court could not be considered as an aggravating factor.[83] (CT 942.) The trial court denied the proposed instruction. (CT 934.) The absence of this instruction left the jury likely to misapply the standard instruction. Failing to provide appellant's jury with guidance on this point was reversible error.

E. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); RT 4494), and "substantial" (see factor (g); RT 4495), acted as a barrier to the

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[83] The proposed instruction stated: "Although a number of possible mitigating factors have been listed in these instructions, you cannot consider the absence of any such factors in this case as an aggravating factor. Aggravating factors are limited to those that have been listed for you in these instructions."

consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

F. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violated Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland, supra,* 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* at p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (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. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the State's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170, subd. (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.) Since providing more protection to noncapital than to capital defendants violates the Equal Protection Clause of the Fourteenth Amendment (see generally *Myers v. Yls* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral" (*People v.*

Hawthorne (1992) 4 Cal.4th 43, 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[84] California's failure to require such findings renders its death penalty procedures unconstitutional.

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[84] See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code, art. 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat., § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

G. Even if the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants Like Appellant Violates Equal Protection

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas (*1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights . . . It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles* (1958) 356 U.S. 86, 102 . . . ." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a

fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument XXIII appellant explains why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. That argument applies here as well with regard to the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on violent criminal acts under Penal Code section 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants as set forth in this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California, supra,* 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

H. Conclusion

For all the reasons set forth above, appellant's death sentences must be reversed.

* * * * *

XXI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. As discussed here, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument XXIII.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

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A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (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, supra*, 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[85]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...." (*People v. Fairbank* (1997)

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[85] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code. § 190.3, subd. (b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3, subdivision (b) in Arguments XIX and XX.

16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, *supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Ring v. Arizona, supra,* 536 U.S. 584, and *Blakely v. Washington, supra,* 124 S. Ct. 2531.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior

conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona, supra,* 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)[86] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

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[86]Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[87] Only

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[87]See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne, supra*, 4 Cal.4th at p. 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is

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(Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[88] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (RT 4500; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[89]

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[88]In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

[89] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen Code, 190.2, subd. (a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow, supra,* 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2551 (dis. opn. of Breyer, J.).)

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prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona, supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona, supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered.[90] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow, supra,* 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death

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[90]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra,* 46 Cal.3d at p. 448.)

sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto, supra*, 30 Cal.4th at p. 263, emphasis added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating

factors are not sufficiently substantial to call for leniency"]; accord *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[91]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington, supra*, 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors

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[91]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[92]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi, Ring and Blakely* are: (1) What is the maximum sentence that could be imposed

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[92] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin, supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto, supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring v. Arizona, supra,* 536 U.S. at p. 606, quoting with approval *Apprendi v. New Jersey, supra,* 530 U.S. at p. 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California, supra,* 524 U.S. at p. 732 ["the death

penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State and Federal Constitutions Require That the Jurors Be Instructed That They May Impose a Sentence of Death Only if They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the

substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the reliability guarantee of the Eighth Amendment.

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker

substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

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As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kramer, supra,* 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra,* 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]*n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra,* 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a

reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 833 A.2d 363, fn. 37, 266 Conn. 171, 238, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the

sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes, supra*, 52 Cal.3d at p. 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it

were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida, supra,* 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code, §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by

the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[93]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

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[93] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra,* 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof,

jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated the Sixth, Eighth And Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors

that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo, supra*, 1 Cal.4th at p. 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia, supra,* 435 U.S. at pp. 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[94]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin*

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[94] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

v. Florida (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[95]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana*, *surpa*, 447 U.S. at p. 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at p. 732; accord *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584;

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[95] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

Gardner v. Florida, *supra*, 430 U.S. at p. 359; *Woodson v. North Carolina*, *supra,* 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[96] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158, subd. (a).) Since capital

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[96] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k). In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).

defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Y1st*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will

> cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely

the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof was the trial court's rejection of the defense's requested instructions. This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8th Cir. 1992) 957 F.2d 1495, 1501, rev'd on other grounds (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that

the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize

different standards. Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed on the Presumption of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams, supra,* 425 U.S. at p. 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. VIII & XIV; Cal. Const., art. I, §

17), and his right to the equal protection of the laws. (U.S. Const., Amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other subsections of this argument demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

* * * * *

XXII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, CALJIC No. 8.88 [Penalty Trial – Concluding Instruction], read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant for each count of first degree murder.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

> You will soon retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(RT 4499-4503.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. The flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., Amend. XIV), to a fair trial by jury (U.S. Const., Amends. VI and XIV), and to a reliable penalty determination (U.S. Const., Amends. VI, VIII and XIV) and require reversal of his sentence. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at pp. 383-384.)

A. The Instructions Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright, supra,* 486 U.S.

at pp. 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* [(1972) 408 U. S. 238] . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

> In analyzing the word "substantial," the *Arnold* court concluded: Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[97]

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[97] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 202.)

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold's* analysis. While *Breaux, Arnold,* and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra,* 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux,* uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold.* The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating

circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra,* 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII and XIV), the death judgment must be reversed.

B. The Instructions Failed to Inform the Jurors That The Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, Not Simply an Authorized Penalty, for Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to

inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia,* "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular

case. (See *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The inappropriate language in the standard instruction would have been somewhat ameliorated by penalty instructions proposed by the defense. These instructions would have clarified that jurors retain substantial discretion as to whether to impose the death penalty, even where aggravation outweighs mitigation.[98] The trial court denied the requested instructions. (CT 934.) This left the jury with only the standard instructions challenged here.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (RT 4501.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was

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[98] The defense proposed the following instructions:

"The law of California does not require that you ever vote to impose the penalty of death. After considering all of the evidence in the case and the instructions given to you by the court, it is entirely up to you to determine whether you are convinced that the death penalty is the appropriate punishment under all of the circumstances of the case." (CT 947.)

"You may decide to impose the penalty of life without possibility of parole even if you find that there are not mitigating factors present." (CT 940.)

prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346) and must be reversed.

C. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[99] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra,* 494 U.S. at p. 377.)

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[99] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates all the jury's findings," can never be harmless. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the

prosecution theory of a case while minimizing or ignoring that of the defense. (See e.g., *People v. Moore* (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; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[100]

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing

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[100] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas, supra,* 388 U.S. at p. 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra,* 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

> lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan,* the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest,

much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentences is required.

D. The Instructions Failed to Inform the Jurors That Appellant Did Not Have to Persuade Them the Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes, supra,* 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, did not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to appraise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

* * * * *

XXIII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack of Intercase Proportionality Review Violates the Eighth Amendment Protection Against the Arbitrary and Capricious Imposition of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida, supra,* 463 U.S. at p. 954 (plurality opinion, alterations in original) quoting *Proffitt v. Florida, supra,* 428 U.S. at p. 251 (opinion of Stewart, Powell, and Stevens, JJ.).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the

proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (*See Gregg v. Georgia, supra*, 428 U.S. at p. 198; *Proffitt v. Florida, supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam, supra,* 28 Cal.4th at p. 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris,* 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these

> factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*.

(*Tuilaepa v. California, supra,* 512 U.S. at p. 995 (dis. opn. of Blackmun, J.).)

The time has come for Pulley v. Harris, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia, supra*, 408 U.S. at p. 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[101]

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[101]See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris, supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments following this one. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment rights not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentences.

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(comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

XXIV.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 101.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century civilized European nations as models. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty. In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, *The Death Penalty, Abolitionist and Retentionist Countries* (as of March 2005), Amnesty International webcite, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty International, April 2005.) The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving

standard of decency moving to abolish capital punishment worldwide. (See *Ring v. Arizona, supra,* 536 U.S. at p. 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2004, ninety-seven per cent of all known executions took place in China, Iran, Viet Nam and the United States. (*Ibid.*) While most nations have abolished the death penalty in law or practice, this nation continues to join a handful of nations with the highest numbers of executions. The United States has executed more than 940 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty International, *About the Death Penalty,* Amnesty International webcite, *supra.*) As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment . . . Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past.

(April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[102]

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[102]Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit:

> The cases of Derrick Jamison and the other 118 individuals released from death row since 1973 demonstrate that no judicial system is infallible. However sophisticated the system, the death penalty will always carry with it the risk of

The continued use of capital punishment in California and the United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *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, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at pp. 389-390 [dis. opn. of Brennan, J.].)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International, imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, *International Law*, Amnesty International website, *supra*.)

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lethal error . . .
(*Ibid*; in February 2005, Derrick Jamison became the 119th wrongfully convicted person to be released from death row on the grounds of innocence.)

Additional support for this position is also evident by the adoption of international and regional treaties providing for the abolition of the death penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 439-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[103]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which

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[103] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Once again, however, defendant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-781; see also *id.* at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray, supra,* 477 U.S. at p. 534 [holding that even issues settled under

state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

* * * * *

XXV.

APPELLANT'S CONVICTIONS AND DEATH SENTENCES MUST BE REVERSED DUE TO CUMULATIVE ERRORS

Assuming that none of the errors in this case standing alone are prejudicial, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the convictions and sentences 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. 1978) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams, supra,* 22 Cal.App.3d at pp. 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

A. Guilt Phase Errors

Multiple errors in the guilt phase occurred which, even if insufficient standing alone to establish prejudice, are cause for reversal when the combined effect is considered. Reversal is especially compelled on counts 4 and 5 relating to the Skyles and Price shootings.

The trial court improperly denied the motion to sever the Eaton crimes from the Sklyes/Price crimes. The evidence presented at trial indicated that appellant and Gonzales had acted together to commit the Eaton crimes. However, the evidence as to whether appellant or Gonzales was the shooter in the Skyles/Price crimes was contradictory as was the evidence as to whether only one person committed those crimes. By trying the cases together, the evidence of the joint commission of the Eaton crimes unfairly prejudiced the guilt determination on the Sklyes/Price crimes. The prosecutor took advantage of this situation by encouraging the jurors to commingle the evidence relating to the separate crimes.

Further prejudice resulted from the trial court erroneously instructing the jurors that appellant had been charged with a racial motive special circumstance. That allegation had actually been dismissed. The court failed to correct this mistake by an admonition and, as a likely effect, at least some jurors developed bias against appellant because of the inflammatory racial allegation.

Numerous errors relating to the presentation of evidence resulted in substantial prejudice. The jury heard evidence of threats against witnesses with the implication that the threats came from appellant and/or Gonzales although no evidence connected any alleged threats to the defendants. The trial court improperly restricted defense efforts to challenge the reliability of the critical eyewitness identification testimony. The trial court denied a continuance despite surprise testimony, previously undisclosed, which implicated both defendants in the Skyles/Price shootings. The trial court improperly restricted the cross-examination of the gang expert when appellant sought to corroborate Gonzales's confession as the shooter by showing that appellant had never made any statements implicating himself

as the shooter. And the trial court committed instructional error by failing to instruct on the lesser offense of voluntary manslaughter.

These combined errors resulted in a fundamentally unfair trial. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting convictions a denial of due process. (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643. Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].) The cumulative prejudice resulting from these errors sufficiently undermines confidence in the guilt determinations that reversal is required.

B. Penalty Phase Errors

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466

[error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Numerous critical errors in the penalty phase resulted in unreliable penalty determinations. The trial court improperly restricted jury voir dire preventing appellant from exploring potential racial bias and jurors' views regarding the concept of lingering doubt despite appellant's known reliance on this defense.

Appellant's lingering doubt defense, which depended substantially on the testimony of Gonzales and the jurors' evaluation of his credibility, suffered irreparably from evidentiary errors during the penalty phase. Contrary to numerous statutory and constitutional principles, the trial judge in effect became an unsworn expert witness for the prosecution, without any opportunity for cross-examination, when he told the jury that Gonzales had provided false testimony. Gonzales's credibility was further eroded, again improperly, when the prosecution compelled Gonzales to repeatedly describe virtually every major prosecution witness as a liar. The final blow to the lingering doubt defense came when the judge reversed direction and refused to instruct the jury on this concept despite his earlier indications that such an instruction would be permitted and despite permitting such an instruction in the original penalty phase which resulted in a hung jury.

Substantial errors also occurred in relation to the prosecution's presentation of factor (b) aggravation evidence of other crimes of violence. The prosecution failed to tie the alleged acts of violence to specific penal

violations, failed to establish the implied use of force or violence, and the trial court gave a faulty jury instruction relating to this evidence.

In addition to the lingering doubt instruction error, other significant instructional error occurred. The trial court refused to instruct on mercy and improperly denied other requested penalty instructions that would have overcome some of the deficiencies in the standard instructions. The trial court also failed to give basic criminal jury instructions that were necessary to provide the jury with proper guidance in evaluating the evidence.

These combined errors resulted in fundamentally unfair penalty determinations. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger, supra,* 481 U.S. at p. 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

* * * * *

XVI.

APPELLANT JOINS IN THE ARGUMENTS SUBMITTED BY CO-APPELLANT JOHN GONZALES

Pursuant to California Rules of Court, rule 13(a)(5), appellant Michael Soliz joins in the arguments submitted by co-appellant John Gonzales to the extent those arguments inure to the benefit of Mr. Soliz.

CONCLUSION

For the reasons stated above, appellant's convictions and sentences should be reversed.

Dated: June 13, 2005

Respectfully submitted,

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Attorneys for Appellant Soliz

CERTIFICATION

I hereby I certify that I conducted 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, excluding tables and certificates, contains approximately 83,556 words.

Dated: June 13, 2005

Jay Colangelo
Assistant State Public Defender

DECLARATION OF SERVICE

Re: ***People v. John Anthony Gonzales, Michael Soliz*** **No. S075616**
Los Angeles Co. No. KA033736

I, Pat Johnson, declare that I am over 18 years of age, and not a party to the within cause; my business address is 801 K Street, Suite 1100, Sacramento, CA 95814. A true copy of the attached:

APPELLANT'S OPENING BRIEF

was served on each of the following, by placing same in envelopes addressed, respectively, as follows:

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Each said envelope was then, on June 14, 2005, sealed and deposited in the United States Postal Service mailbox at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on June 14, 2005, at Sacramento, California.

Pat Johnson
Declarant