SUPREME COURT COPY

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent v. JOHN ANTHONY GONZALES, and Michael Soliz Defendants and Appellants,	No. S075616 (Los Angeles Superior Court No. KA033736-01)

AUTOMATIC APPEAL FROM THE JUDGEMENT OF DEATH
OF THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ROBERT W. ARMSTRONG, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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STATEMENT OF JURISDICTION

This appeal is from a final judgment imposing a sentence of death and is therefore automatic pursuant to Penal Code section 1239, subdivision (b).

INTRODUCTION AND OVERVIEW OF THE CASE

Appellant John Gonzales [hereinafter referred to as "appellant"] was sentenced to death for the first degree murder of Lester Eaton. (C.T. 1028-1034) His case is unusual because the penalty phase was tried twice. At the first penalty trial, the jury was unable to reach a unanimous verdict. The vote was 8 to 4 in favor of a life sentence and a mistrial was declared. (R.T. 2765-2769) Appellant's motion to bar the death penalty and prevent a penalty phase retrial was denied. (R.T. 2782-2783) A death verdict was returned by a different jury after a second penalty trial.

Appellant's case raises the issue of whether a retrial of the penalty phase after the first jury is hung violates the Eighth Amendment's evolving standards of decency. (Trop v. Dulles (1958) 356 U.S. 86, 100-101.) In twenty seven states out of the thirty six states that have the death penalty and in federal death penalty cases, the jury's inability to produce a unanimous penalty phase verdict results in the defendant being sentenced to life without parole. (Jones v. United States (1999) 527 U.S. 373, 419.)

A. The Eaton Murder (Death) And The Skyles And Price Murders (LWOP)

Lester Eaton was shot during a robbery of his market in Hacienda Heights on January 27, 1996. Mr. Eaton carried a gun in a holster

that he wore while working at the market. On the night of the robbery, Mr. Eaton resisted the robbery by reaching for his own gun. Appellant grabbed Mr. Eaton and wrestled him to the floor. (R.T. 947-963; 974-975) During the struggle on the floor, appellant's gun went off, shooting Lester Eaton, who died from his wounds. (R.T. 4207-4208) Appellant received a death sentence for this murder.

Elijah Skyles and Gary Price were shot by a single gunman while standing near a public telephone at a Shell Gas Station in the City of Covina on April 14, 1996. Several eyewitnesses identified Michael Soliz as the gunman. (R.T. 1456-1468) Other evidence established that appellant had accompanied Soliz to the gas station in a car that was parked near the scene of the shooting. (R.T. 1789-1802) Appellant stood next to the car while Soliz fire the shots that killed Skyles and Price. (R.T. 1472) Despite a jury instruction that mere presence at the scene of the crime does not amount to aiding and abetting, appellant was convicted of the first degree murders of Skyles and Price. (C.T. 748-749) The jury at the first penalty trial returned verdicts of life without possibility of parole for these two murders. (C.T. 805-806) The jury at the second penalty trial was allowed to consider the Skyles and Price convictions as aggravating factors when considering the death penalty for the Eaton murder. (C.T. 920-921)

Appellant will challenge the Skyles and Price murder convictions on this appeal on the grounds that evidence of his mere presence at the scene is insufficient to sustain his convictions. (In re Michael T. (1978) 84 Cal. App.3d 907, 911.) Appellant will also argue that the two murder investigations should have been tried separately and appellant was prejudiced by the prosecutor's improper final argument that the jury should use evidence of appellant's guilt in the Eaton case in order to convict appellant of the Skyles and Price murders. (People v. Grant, (2003) 113 Cal. App.4th 579, 589-591.)

B. The Penalty Trial Errors

Several important legal issues arose in connection with the penalty phase retrial. The trial court failed to relieve appellant's counsel for a conflict of interest after appellant's family gave court clothes to counsel for delivery to the jail. The clothes contained heroin. (R.T. 2802-2810) This created a conflict of interest between appellant and his counsel. Counsel, by delivering the clothes with the heroin, was facing potential criminal prosecution. The prosecution also announced that if heroin smuggling charges were filed against appellant, his counsel would be a prosecution witness against appellant. By not relieving trial counsel, appellant was denied his Sixth Amendment right to conflict free counsel

during the penalty trial that resulted in a death verdict. (Holloway v. Arkansas (1978) 435 U.S. 475, 483-484.)

During the penalty phase retrial appellant testified over the objection of his counsel. He admitted shooting Lester Eaton during the market robbery, but testified that the gun went off unintentionally during a struggle that occurred when Mr. Eaton was reaching for his own gun. Appellant testified that he intended to rob the market, not to commit murder. He expressed his remorse for the death of Lester Eaton and apologized to Mr. Eaton's wife, Betty Eaton, and to the Eaton family. (R.T. 4204-4212)

The prosecutor engaged in misconduct on cross examination by asking appellant if various prosecution witnesses were lying when their testimony was in conflict with his testimony. (R.T. 4233-4236; 4260-4261; 4271-4277) (People v. Zambrano (2004) 124 Cal. App.4th 228.) During appellant's testimony, the trial judge told the jury that part of appellant's testimony about altering a weapon was physically impossible, implying to the jury that appellant had lied in his testimony. (R.T. 4305) (People v. Patubo (1937) 9 Cal.2d 543, 541-542.) These were unfair attacks upon appellant's credibility in a case where his credibility meant the difference between life and death.

C. The Jury Instructions And Deliberations

A jury instruction on lingering doubt was given at the first penalty trial (C.T. 817) where the jury was unable to agree on a death verdict. (R.T. 2765-2774) However, at the second penalty trial, the trial judge refused to give an instruction on lingering doubt (R.T. 4350-4354) and the outcome was a death verdict. (C.T. 952) The refusal to instruct on lingering doubt deprived appellant of his right to an instruction on what recent studies have concluded is "the most powerful 'mitigating' fact." Stephen P. Garvey, Aggravation And Mitigation In Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998).

The jury deliberated on the penalty for the Eaton murder for three days. During deliberations the jury ask for a rereading of appellant's testimony. (C.T. 914) They also asked for clarification of the meaning of the mitigating factor of "whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct." (R.T. 4506-4508) From these jury requests, it is clear that the jury was focusing on the unintended nature of the shooting of Lester Eaton, as described in appellant's testimony, and Lester Eaton's conduct in reaching for a gun to shoot appellant. This demonstrates how tenuous the death verdict was in this case and underscores why appellant's death sentence

must be reversed.

STATEMENT OF THE CASE

On March 20, 1997 an information was filed in the Los Angeles Superior Court charging appellant John Gonzales and Michael Soliz with the commission of five felony offenses. Count 1 alleged the murder of Lester Eaton on January 27, 1996. (Pen. Code §187, subd. (a).). It was further alleged as a special circumstance that the murder was committed during the commission of a robbery. (Pen. Code §190.2, subd. (a)(17).). Count 2 alleged the crime of the robbery of Lester Eaton. (Pen. Code §211.) Count 3 alleged the crime of the robbery of Betty Eaton. (Pen. Code §211.) It was further alleged as to Count 1, 2, and 3, that the crimes were committed for the benefit of a criminal street gang (Pen. Code §186.22, subd. (b)(1)), and that both defendants personally used firearms. (Pen. Code §12022.5, subd. (a).) (C.T. 383-385)[1]

Count 4 alleged the murder of Elijah Skyles on April 14, 1996. (Pen. Code §187, subd. (a).) It was further alleged as a special circumstance that the victim was killed because of his race. (Pen. Code

[1] This brief uses the following abbreviations: Clerk's Transcript ("C.T."); Reporter's Transcripts ("R.T."); Supplemental Clerk's Transcript ("Supp. C.T."); Supplemental Reporter's Transcript ("Supp. R.T.").

§190.2, subd. (a)(16).) Count 5 alleged the murder of Gary Price on April 14, 1996. (Pen. Code §187, subd. (a).) It alleged two special circumstances that the victim was killed because of his race (Pen. Code §190.2, subd. (a)(16).) and multiple murder. (Pen. Code §190.2, subd. (a)(3).) It further alleged as to Counts 4 and 5 that the crimes were committed for the benefit of a criminal street gang. (Pen. Code §186.22, subd. (b)(1); that as to Counts 4 and 5, Michael Soliz personally used a firearm (Pen. Code §12022.5, subd. (a)); and that as to all counts a principal was armed with a firearm. (Pen. Code §12022, subd. (a)(1).) (C.T. 386-387)

Both appellant and Soliz were arraigned and entered pleas of not guilty. John Tyre was appointed to represent appellant. Joseph Borges was appointed to represent Michael Soliz. The prosecution was represented by Deputy District Attorney Douglas Sortino. (C.T. 389-390)

Appellant filed a motion for a change of venue (C.T. 391-397), a motion for a severance of counts and for a severance of defendants (C.T. 398-404), a motion to suppress his tape recorded statements (C.T. 403-408), and a motion to dismiss under Penal Code section 995. (C.T. 409-415). On June 20, 1997 the court granted the motion to dismiss the special circumstances allegation that the murders in Counts 4 and 5 were committed because of the race of the victim. The court denied the motions

for change of venue and for severance. (C.T. 537-538). On February 6, 1998 the motion to suppress appellant's tape recorded statements was denied. (C.T. 611-612)

On January 22, 1998 jury selection began before the Honorable Robert W. Armstrong. (C.T. 596-599). The guilt phase of the trial began on February 9, 1998. (C.T. 613-617). On February 11, 1998, appellant's motion to have the jury view the crime scene was taken under submission, but was never ruled upon. (C.T. 619-622; 629-632). On February 20, 1998 the prosecution rested. Appellant's motion for judgement of acquittal under Penal Code section 1118.1 was argued and denied. (C.T. 645-648). The jury began deliberating on February 23, 1998. (C.T. 649-650). On February 24, 1998 the jury reached verdicts on Counts 1, 2 and 3 and the court ordered the verdicts sealed. (C.T. 652-653). On February 25, 1998 the jury reached verdicts on all counts. (C.T. 745-756)

Appellant was found guilty of three counts of first degree murder involving Lester Eaton, Elijah Skyles, and Gary Price (Counts 1, 4, and 5) and two counts of robbery involving Lester Eaton and Betty Eaton. (Counts 2 and 3). The special circumstances of murder during the commission of a robbery and multiple murder were found to be true. The gang allegations were found to be true on all counts. The jury found

appellant personally used a firearm during the murder of Lester Eaton and during the two robberies, and that a principal was armed with a firearm on all counts. (C.T. 745-750). Michael Soliz was also found guilty of three counts of first degree murder and two counts of robbery. The jury found to be true the same two special circumstances, the gang allegation and the principal armed allegation on all counts, and that Soliz personally used a firearm during the murders of Eaton, Skyles and Price and during the robberies. (C.T. 751-756)

On March 2, 1998 the penalty phase of the trial began. On March 3, 1998 the jury began deliberations. (C.T. 789-796). On March 9, 1998 the jury returned verdicts in the case of appellant on Counts 4 and 5, the murders of Skyles and Price, and determined the penalty to be life without possibility of parole on each count. The jury was unable to reach a verdict in the case of appellant on Count 1 for the murder of Lester Eaton, and was unable to reach any verdicts in the case of Michael Soliz on Counts 1, 4, and 5 for the murders of Eaton, Skyles and Price. The Court declared a mistrial on those counts where the jury could not agree. (C.T. 827-829) The jury advised the Court that the jury's vote on the penalty for appellant on the Lester Eaton murder was 8 votes for life without parole and 4 votes for death. (R.T. 2765-2769.)

On March 19, 1998 the Court sentenced appellant on Counts 4 and 5 to life without possibility of parole on each count consecutively. The Court also imposed a concurrent 8 year sentence for the gang allegation and the principal armed allegations. The Court continued the sentencing on Counts 2 and 3 for the two robberies until the conclusion of the penalty retrial on Count 1. (C.T. 847-851)

Also on March 19, 1998 a motion to dismiss the death penalty and bar retrial of the penalty phase on Count 1, the Eaton murder, was denied. (C.T. 838-842). On April 3, 1998 the issue of defense counsel John Tyre having a conflict of interest requiring his removal as counsel for appellant was raised. The Court determined there was no conflict and Mr. Tyre remained as counsel for appellant. (R.T. 2802-2809)

On October 13, 1998 jury selection began on the second penalty trial. (C.T. 871-872). On October 26, 1998 the second penalty trial began. (C.T. 891-894). On November 3, 1998 both sides rested; the case was argued; and the jury began deliberations. (C.T. 911-912). During deliberations, the jury sent two notes to the Court. The first note asked for clarification of a mitigating factor listed in the jury instructions of "whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct." (R.T. 4506-4508; C.T. 913; 921-922)

The second note requested a re-reading of appellant's testimony. (R.T. 4509-4511; C.T. 914) On November 5, 1998 the jury returned a verdict of death on Count 1 in the case of appellant. The jury returned a verdict of death on Counts 4 and 5 and a verdict of life without possibility of parole on Count 1 in the case of Michael Soliz. (C.T. 950-957)

Appellant filed a motion for new trial and a motion to reduce the death penalty to life without possibility of parole. (C.T. 958-971). On December 18, 1998 the court denied the motion for new trial and motion to reduce the penalty. (C.T. 1012-1014). The Court on December 18, 1998 sentenced appellant to death on Count 1 for the murder of Lester Eaton. A 10 year sentence was imposed for the use of a firearm and two sentences of 7 years were imposed for the robberies in Counts 2 and 3. The sentences on the robberies were stayed pursuant to Penal Code section 654. (C.T. 1012-1017; 1028-1034)

Michael Soliz was sentenced to death on Counts 4 and 5 for the murders of Elijah Skyles and Gary Price and to life without possibility of parole on Count 1 for the murder of Lester Eaton. The Court imposed two 10 year consecutive sentences for two use of a firearm enhancements, and two 7 years sentences for the robberies in Counts 2 and 3. The sentences on the robberies were stayed pursuant to Penal Code section 654.

(C.T. 1018-1024; 1035-1041)

This appeal is an automatic appeal of a judgment of death. (Cal. Const., art VI, §11; Pen. Code §1239, subd. (b).)

STATEMENT OF THE FACTS

I. THE GUILT TRIAL

A. The Hillgrove Market Robbery And The Murder Of Lester Eaton

The Hillgrove Market is located on Clark Avenue in Hacienda Heights. The market is owned by Betty and Lester Eaton. At around 7:30 p.m. on night of January 27, 1996, Betty and Lester were working alone in the market. It was a Saturday night and the next day the Super Bowl was scheduled. Their son Rene Eaton had just left the store to pick up a pizza. Lester Eaton was working behind the meat counter. (R.T. 947-950).

About five minutes after Rene left, a young man entered the store and said "Where do you keep the money?" At first Betty Eaton thought it was a joke. She looked up and saw a man with a bandanna across his face pointing a gun at her. The bandanna covered his face from the nose down and he had a silk stocking or skull cap on his head. He appeared to be Hispanic, between 18 and 20 years of age. She put her hands up and pointed toward the register for the money, trying to get her husband's

attention. (R.T. 954-956).

At the same time a second person came through the swinging gate at the meat counter and pointed a gun at Lester Eaton. The second person came in very fast, right behind the first person. Lester Eaton, who was talking on the phone at the time, said "Put that thing down before somebody gets hurt." This second person and Lester began to struggle. Lester was pinned against the sink. Betty Eaton saw blood coming from Lester's forehead, apparently from being hit on the head. (R.T. 957-959).

During the struggle, Lester Eaton fell to the floor and Betty heard two gunshots. Suspecting that her husband had been shot, Betty Eaton ran out the front door of the market. (R.T. 960-963). A blue van was parked in front of the market. The tail lights of the van were on and the van was pointed east toward Turnbull Canyon Road. Betty Eaton ran from the market to the closest house she could find. She pounded on the door and was allowed to enter, where she called 911. After dialing 911, she immediately went back to the market. The police had already arrived and they stopped her from going inside. She noticed that the blue van that had been parked in front of the store was now gone. (R.T. 964-967).

At trial, Betty Eaton described the second man who struggled with her husband as a Hispanic. He was in his late teens or his early

twenties. He was not wearing a bandanna over his face and he did not have anything on his head. Mrs. Eaton recalled that the heavier of the two men was the one who shot her husband. (R.T. 966-967). But on the night of the robbery, she gave the reverse description of the shooter.

Deputy Woodrow West interviewed Betty Eaton at the Industry Sheriff's Station five hours after the incident on the night of the robbery. Betty Eaton at that time said that the robber who approached her had the heavier build and the robber who shot her husband had the lighter build of the two. (R.T. 1006-1007).

This discrepancy between the build and weight of the robber who shot Lester Eaton raised an important question concerning whether it was Gonzales or Soliz who fired the gun that killed Lester Eaton. Betty Eaton could not identify either of the two robbers. (R.T. 981). When she was first interviewed at the Hillgrove Market after the shooting she was shaken and upset. She told Deputy Philip Johnson that both robbers wore bandannas and head coverings, completely covering their faces except for their eyes (R.T. 993-994) and she was unsure of the height and weight of the suspects. (R.T. 998).

Other evidence in the case established that Michael Soliz was heavier than appellant. Doreen Ramos saw both appellant and Michael

Soliz on the night of the robbery. Ramos testified that Michael Soliz was stockier or heavier than appellant. (R.T. 1083). Thus, Betty Eaton's trial testimony, that the man who shot her husband was the heavier person, was closer to a description of Michael Soliz. However, her description on the night of the incident, that the shooter had a lighter build, was closer to a description of appellant.[2]

Later that night, Betty Eaton was driven by the police to the corner of Clark Street and Turnbull Canyon Road. There she observed the blue van that had been parked in front of the market at the time of the robbery. Before the robbery, Lester Eaton had a pistol that he wore in a holster on his hip. After the robbery, the pistol and his shotgun were missing. Lester Eaton's wallet and money were also gone. Approximately

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[2] Neither the eyewitnesses nor the physical evidence ever established whether it was appellant or Michael Soliz who shot and killed Lester Eaton during the robbery. The prosecution relied upon appellant's tape recorded statements to Salvador Berber in the Sheriff's van to prove that appellant shot Lester Eaton. (R.T. 1897-1902; Peo. Exh. 57) In those statements, appellant told Berber that shot Eaton during the market robbery and that he shot Skyles and Price at the gas station. (Ibid.) The prosecutor conceded that appellant's confession to shooting Skyles and Price was a false confession, but argued that appellant's confession to shooting Lester Eaton was true. (R.T. 2232-2234) However, there was at least a lingering doubt about whether appellant's confession to shooting Lester Eaton was true. Based upon Betty Eaton's trial testimony that the heavier suspect shot her husband and evidence that Soliz was heavier than appellant, there is a strong inference that appellant's confession to shooting Lester Eaton was also a false confession.

$100.00 was taken from the cash register. The plastic tray from the cash register was missing. (R.T. 972-976)

Betty Eaton testified that she would not be able to recognize either of the two men if she saw them again. (R.T. 981). After the incident she told the deputies that the second person was older than the first person. (R.T. 983-984). Several days after the robbery, Mrs. Eaton found a bullet on the floor near the meat counter. She turned the bullet over to the Sheriff's Department. (R.T. 987-989; Peo. Exh. 10)

Deputy Jerome Ryan arrived at the Hillgrove Market at approximately 7:43 p.m. in response to a 911 radio broadcast. He entered the market and found Lester Eaton lying on the floor behind the meat counter. Lester Eaton was dead. There was a bullet wound in Mr. Eaton's back and there was blood on Mr. Eaton and on the floor. (R.T. 849-855).

Deputy Lynn Reeder was one of two homicide investigators assigned to investigate the robbery and murder. (R.T. 863-866). When he arrived at the market he found Lester Eaton's body lying on the floor. Mr. Eaton had a gun holster on his belt, but the holster was empty. On a shelf, there was a pair of eyeglasses with a missing lens. The lens was on the meat cutting room floor. At the check out counter, the cash register had been thrown on the floor. The cash tray from inside the register was

missing. There was no money in the register and several items had been thrown about on the floor. (R.T. 870-872).

Photographs of the crime scene at the Hillgrove Market were taken by Sheriff's Department forensic identification specialist Martin Mutuc. When coroner's investigators were removing the body of Lester Eaton, Martin Mutuc recovered an expended bullet that had been on the floor underneath the body. (R.T. 930-932; Peo. Exh. 7). There were no shell casings on the floor, indicating that the weapon used was possibly a revolver and not a semi-automatic pistol. (R.T. 895-898). On the following day, business cards from Lester Eaton's wallet were found in a storm drain on Turnbull Canyon Road by Richard Varella, a family friend who was out for a walk. (R.T. 1139-1141). A further search along Turnbull Canyon Road and Vallecito Drive led to the discovery of Lester Eaton's wallet, money clip, licences, business cards and family photographs. They were scattered along the road. They were found by Kenneth Eaton, the son of Lester Eaton. There was no money in the money clip when it was found. (R.T. 1146-1149).

A blue van, similar to the one seen by Betty Eaton in front of the market was located. It was parked in a parking lot of some closed businesses at the corner of Turnbull Canyon Road and Clark Street. This

location was three blocks east of the market. The vehicle was a 1993 Chevy Astro van. Inside the van on the floorboard was a cash register drawer and a live bullet. The passenger side window was broken and there was shattered glass inside the van. The van was impounded. (R.T. 898-902; 1020-1033). The van had been reported stolen two days before the robbery. (R.T. 1048-1051).

Donald Keir, a forensic identification specialist and fingerprint expert, collected evidence from the van on January 29, 1996 at the Industry Sheriff Station. (R.T. 1270-1273). He recovered the cash register tray, the live bullet and a Raider's jacket. Inside the cash register tray there were various food coupons and paperwork. (R.T. 1274-1277). One of the items of paper had the words "Heavy Metal 102.7" written on it. (Peo. Exh. 28). The right thumb print of appellant appeared on this paper. Another item of paper was an insurance policy. (Peo. Exh. 29). The right middle and right ring fingerprints of appellant were found on the insurance policy. A latent thumb print found on the cash register tray was determined not be belong to either appellant or Michael Soliz. (R.T. 1292-1295).

Doreen Ramos testified that on January 27, 1996, while walking to the store, she accepted a ride from her friend Rosemary and Rosemary's boyfriend, Randy Irigoyen, also known as Bird. Knowing that

Ms. Ramos wanted to buy a car, Bird drove her to a residence where she was shown a 1993 Chevy Astro van. (Peo. Exh. 11). This was the van recovered at Turnbull Canyon Road after the market robbery. (R.T. 905-910; 1052-1063). Bird offered to sell the van, but Doreen Ramos declined to buy the van. Next, Bird drove the women to another residence a couple of blocks away. (R.T. 1061-1065).

It was about 6:00 p.m. when Bird, Doreen Ramos and Rosemary arrived at this residence. Ms. Ramos and Rosemary remained in the vehicle while Bird left the vehicle to join several men in front of the residence. (R.T. 1065-1070). Doreen Ramos identified appellant and Michael Soliz as two of the men standing in the front yard of the residence talking to Bird. According to Doreen Ramos, appellant and Michael Soliz told Bird that they needed a "cuete," which is Spanish slang for gun. They also said they were going to do a "jale" with a cuete. Jale is Spanish slang for job. (R.T. 1071-1076).

Doreen Ramos described Michael Soliz as stockier or heavier than appellant. At one point, she heard Michael Soliz say he was going to pick up the van. When a Honda Prelude drove up in front of the residence, Bird handed the driver a gun. As the driver drove away, the driver said he would go get another gun. While this was occurring, Michael Soliz and

appellant were standing on the front lawn of the residence. Appellant was overheard saying "Hurry up." (R.T. 1083-1089).

According to Ms. Ramos, Bird gave appellant and Soliz each a bandanna. Appellant and Soliz were laughing and were wrapping the bandannas around the lower part of their faces. A few minutes later, the Honda Prelude returned to the residence. Appellant and Soliz entered the car and drove off. (R.T. 1089-1091). Appellant was carrying a Raider's jacket. (R.T. 1093-1095; Peo. Exh. 11). Later that night, Doreen Ramos saw a news program about a robbery and murder at the Hillgrove Market. The van shown in the news program was the same van she had seen that night. Three days later, she contacted the police. (R.T. 1095-1099).

Richard Alvarez has known appellant for several years. Alvarez's brother is married to appellant's sister. Alvarez testified that appellant and Michael Soliz were both members of the Perth Street gang. Appellant was also known as "Speedy" and "Rebel." Soliz was also known as "Jasper." (R.T. 1154-1156). Alvarez identified a photograph of Michael Gonzales as a person he knew by the name of "Clumsy." (R.T. 1157-1158; Peo. Exh. 18).

On the night of the robbery at the Hillgrove Market, appellant telephoned Richard Alvarez and asked to be picked up. After the call,

Alvarez drove to Seventh Avenue and Turnbull Canyon Road where he met appellant, Michael Soliz and Michael Gonzales. Alvarez gave all three a ride back to his friend Jennifer's house. This occurred sometime between 7:00 p.m. and 8:00 p.m. (R.T. 1159-1160).

On March 15, 1997, Richard Alvarez visited appellant at the Los Angeles County Jail, where appellant was incarcerated. The conversation between Alvarez and appellant was secretly tape recorded by the Sheriff's Department. The tape was played for the jury. (R.T. 1165-1170; Peo. Exh. 20). In the middle of the testimony, the court appointed a lawyer to represent Richard Alvarez. Thereafter, Mr. Alvarez asserted his privilege against self-incrimination and refused to answer questions. The Court granted the prosecutor's request for use immunity for the witness and Richard Alvarez's testimony continued. (R.T. 1176-1187; 1225-1231).

Alvarez was questioned further concerning the tape recorded jail conversation with appellant. He explained that he told appellant that Kimberly had told him that his name had been mentioned at the preliminary hearing. Richard Alvarez was concerned because he did not want to be identified as a participant in the Hillgrove Market robbery and murder. Mr. Alvarez denied that he had waited for the three men at Turnbull Canyon Road. He only picked them up. (R.T. 1238-1245).

Deputy Woodrow West was the second homicide investigator assigned to the investigation of the Lester Eaton murder. (R.T. 1001-1002). On October 3, 1996, Deputy West interviewed Richard Alvarez at the Industry Sheriff's station. At first, Richard Alvarez denied knowing anything about the case. When Deputy West accused him of lying, Alvarez told him the following: Sometime between 6:00 p.m. and 7:00 p.m. on the night of the Hillgrove Market robbery, Richard Alvarez received a phone call from appellant. Appellant wanted Alvarez to pick him up at Jennifer's house. When Alvarez arrived at Jennifer's house, he met appellant, Michael Soliz and Michael Gonzales. (R.T. 1252-1253).

Alvarez said that he followed those three to a location on Turnbull Canyon Road in Hacienda Heights. He was told to wait at that location in his car, while the three men drove away in a blue van. Michael Gonzales was driving the van and the other two were passengers. They were gone for a short time. When they returned, they parked the van and all three entered Richard Alvarez's car. He then drove them back to Jennifer's house, where they remained for the rest of the evening. (R.T. 1254-1257). In court, Richard Alvarez denied making these statements to Deputy West during the October 3 interview. (R.T. 1161-1165).

On October 19, 1996, the San Gabriel Valley Tribune

Newspaper ran a news article describing the Hillgrove Market robbery and murder. The article stated that appellant had been arrested and the District Attorney's Office had been quoted as saying there were two more suspects outstanding in the murder. On December 15, 1996, Luz Jauregui visited Michael Soliz in the Los Angeles County Jail where he was incarcerated. The conversation between Jauregui and Soliz was tape recorded by the Sheriff's Department. The tape recording was played for the jury. During the conversation, they discuss the newspaper article about appellant's arrest and the fact that two other suspects had not been found. Michael Soliz stated "Damn, they got one of 'em right here." (R.T. 1267-1269; Peo. Exh. 24).

Lee Bockhacker was the deputy medical examiner who conducted the autopsy of Lester Eaton on January 13, 1996. Lester Eaton had five gunshot wounds. A gunshot wound to the top of Lester Eaton's head was the wound that caused his instantaneous death. The bullet traveled straight down, passing through the brain and lodging at the base of the skull. (R.T. 1189-1195). A second gunshot entered the right temple. The powder burns at the entrance of the wound indicated that the gun was fired from 6 to 19 inches away. The bullet traveled in a downward direction, passing through the head and exiting through the side of the neck.

(R.T. 1196-1201).

A third gunshot wound was on the left side of the lower chest. The bullet passed through the diaphragm and the lung, and exited through the back of the chest. Because of the injury to the lung, this wound was also a fatal wound. Gunshot wounds four and five were superficial wounds to the right chest area. (R.T. 1202-1207).

B. The Shell Gas Station Shooting And The Murders Of Elijah Skyles And Gary Price

At approximately 12:45 a.m. on April 14, 1996, Covina Police Officer John Curly responded to a call concerning an assault with a deadly weapon. He was directed to a Shell Gas Station at the corner of San Bernardino Road and Azusa Avenue in the City of Covina. When he arrived at the gas station, he found two black males, approximately 15 to 17 years of age, lying on the ground next to each other. There were both dead. They had both been shot numerous times. They were identified as Elijah Skyles and Gary Price. (R.T. 1307-1311; 1339-1341).

Deputy Joe Holmes was one of two homicide investigators assigned to investigate the case. When he arrived at the Shell Gas Station at 1:45 a.m., Officer Curly had already secured the crime scene. Elijah Skyles and Gary Price were lying side by side, next to a public telephone and a trash receptacle, and near a wooden fence. (R.T. 1339-1342). Elijah Skyles

was wearing a black and white checkered jacket, red pants and a red belt with a letter P on the buckle. The clothing was consistent with clothing worn by Blood street gang members. Gary Price was wearing blue pants, a dark blue jacket and a black belt with the letter R on it. The blue clothing was consistent with clothing worn by Crips street gang members. (R.T. 1342-1344).

Detective Holmes found eleven 9 millimeter shell casings around the bodies. He also found four bullets and bullet fragments. They were placed in envelopes and sent to the crime lab. (R.T. 1360-1364). Detective Holmes attended the autopsies of Skyles and Price. One bullet was removed from the body of Gary Price. Four bullets were removed from the body of Elijah Skyles. (R.T. 1375-1376).

Vondell McGee was with Gary Price and Elijah Skyles just before they were killed. Gary Price was his cousin. Elijah Skyles was a friend. Price was 18 years old. Skyles was 15 years old. Shortly after midnight, Vondell McGee left his work at the Chuck E. Cheese Restaurant. He met Skyles and Price on the street as he was riding his bicycle home. (R.T. 1435-1437).

While McGee was standing on the north side of San Bernardino Road between the corner and the Shell Gas Station driveway, he

saw a car drive into the gas station and immediately drive out onto San Bernardino Road. There were five people, both males and females, in the car. They were all Hispanic. As the car drove by, he could see the heads of the people in the car turn in his direction. (R.T. 1438-1441). The car was a Honda Accord. (R.T. 1442; Peo. Exh. 45).

After talking for five minutes, McGee gave Skyles and Price some coins to use the telephone. They wanted to make a phone call. McGee then rode his bicycle southward on Azusa Avenue toward his home. As he was passing a shopping center, he heard 10 or 12 gunshots. (R.T. 1442-1444). At first he ran for cover. Then he went home. When Gary Price did not respond to his page, Vondell McGee returned to the Shell Gas Station. He saw Gary Price and Elijah Skyles lying side by side on the ground near the public telephone. They were both dead. (R.T. 1445-1447).

At approximately 12:40 a.m. on the morning of April 14, 1996, Carol Mateo was driving her Ford Fiesta eastbound on San Bernardino Road in the lane closest to the center line. Her husband Jose was in the back seat and her brother Jeremy Robinson was in the front passenger seat. As she passed the intersection at Azusa Avenue, she heard several popping sounds. (R.T. 1456-1458).

She slowed down, thinking there was something wrong with

her car. At the same time, her brother Jeremy screamed at her to look at the gas station, saying "The guy's shooting another person on the ground." (R.T. 1459-1460; 1570-1573). Carol Mateo's car at that time was in front of the driveway of the Shell Gas Station on San Bernardino Road near the south end of the lot. When she looked at the gas station, she saw two young black men falling and another man shooting them. They were all standing next to a public telephone. (R.T. 1461-1462).

Carol Mateo identified Michael Soliz as the person who was shooting. She described him as Hispanic, 5' 7" or 5' 8" tall, short hair, medium build and approximately 20 years old. He was standing only about 4 or 5 feet away from the two individuals he was shooting. She could see both of the two young black men fall to the ground. The one wearing a flannel checkered shirt tried to crawl away, but Soliz walked up to him and shot him while he was on the ground. After Michael Soliz stopped firing, he looked in her direction for about five seconds. Then he ran to his car. The car was a Honda Accord. (R.T. 1463-1467). Mrs. Mateo testified that she saw appellant standing next to the Honda at the time of the shooting. (R.T. 1472).

Carol Mateo drove her vehicle past the gas station, looking for a telephone to call 911. She drove east on San Bernardino Road; made a

u-turn; drove past the gas station again; and then went north on Azusa Avenue to a telephone at the Chuck E. Cheese Restaurant. While using the telephone, a car containing Michael Soliz and appellant drove into the Chuck E. Cheese driveway and then drove out again. (R.T. 1469-1472).

Jeremy Robinson was sitting in the back seat of the car driven by his sister Carol Mateo on the night of the shooting. (R.T. 1568-1570). After hearing gunshots coming from the Shell gas station parking lot, he saw a man holding a gun and shooting two black men who were on the ground. (R.T. 1571-1573). He described the shooter as a 22 year old Mexican, possibly 5' 8" tall, with a shaved head and a medium build. Although he was not able to see the shooter's face, Jeremy Robinson identified Michael Soliz as a person who "looks like" the shooter. (R.T. 1574-1577). On cross-examination, however, Robinson admitted that at the preliminary hearing he testified that he could not make any identification. (R.T. 1605).

Alejandro Garcia was working at the Shell gas station on the night of the shooting. He was working in the office, speaking on the telephone, when at about 12:40 a.m., he heard around five gunshots coming from the back lot of the station. (R.T. 1607-1610). He looked in the direction of the shooting and saw two Hispanic men running to a gray

Honda. They both entered the backseat. The man entering the Honda on the driver's side was bald, very short and appeared to be about 22 years old. He was carrying a black bag in his hand. The bag was the same size as a gun. (R.T. 1610-1616).

After the two men entered the car, the car left the gas station. Alejandro Garcia did not get a good look at the man who entered the driver's side of the car, and could not identify anyone in court. (R.T. 1619-1620). However, when the police showed Mr. Garcia a photo spread during their investigation, Garcia selected the photograph of Michael Soliz as the photo among the six photos that looked the most like the person he saw that night. On his photographic admonition card, Garcia wrote that Soliz's photograph "resembles the person that ran to the car after the shots. I didn't take time to look at his face." (R.T. 1621-1624; 1628-1629).

Detective Joe Holmes showed photo spreads to the eyewitnesses of the Shell gas station shooting. Carol Mateo identified the photograph of Michael Soliz. Jeremy Robinson said he recognized the photograph of Michael Soliz. Alejandro Garcia said he recognized the photograph of Michael Soliz. (R.T. 1650-1652). When Detective Holmes interviewed the three witnesses, all three eyewitnesses told him they only saw one suspect outside of the car. The first time any of the witnesses said

there was a second suspect outside of the suspect's car at the time of the shooting was during the courtroom testimony. (R.T. 1656-1657). None of the witnesses were shown photo spreads with a photograph of appellant because he was not a known suspect at the time. (R.T. 1652-1653).

Judith Mejorado is the sister of Augustine Mejorado, who is the owner of the Honda Accord that was involved in the Shell gas station shooting. (R.T. 1666-1671; Peo. Exh. 45 and 50). Ms. Mejorado knew both appellant, who went by the nicknames Speedy and Rebel, and Michael Soliz, who used the nickname Jasper. Her brother Augustine Mejorado had two nicknames, Augie and Listo. (R.T. 1660-1669). She also knew a fourth person, Michael Gonzales, who used the nickname Clumsy. (R.T. 1672-1673).

At trial Judith Mejorado testified that she did not recall being present at a shooting at a gas station in April of 1996 in the City of Covina. The trial judge stated that her testimony was close to being contemptuous. After she persisted in testifying that she did not recall, the trial judge stated she could be examined by the prosecutor as a hostile witness. (R.T. 1675A - 1678). At the conclusion of her testimony, the trial judge made a finding that Judith Mejorado had feigned her failure of recollection. (R.T. 1779). As a consequence of this, most of her testimony was presented through the

reading of her preliminary hearing testimony and testimony concerning her pre-trial interviews with law enforcement officers investigating the Skyles and Price homicide case.

At the preliminary hearing, Judith Mejorado testified as follows: In April of 1996, she was present at a shooting at a Shell gas station on Azusa Avenue in the City of Covina. She arrived at the gas station in her brother Augie's four door Honda Accord. (R.T. 1679-1682). Michael Gonzales was driving the car. Judith Mejorado was sitting in the middle of the front seat. Her brother, Augustine Mejorado, was also sitting in the front passenger seat. Michael Gonzales was driving because her brother was too drunk to drive. Michael Soliz and appellant were sitting in the back seat. (R.T. 1683-1685).

Ms. Mejorado saw three black guys standing in the driveway in front of the Shell gas station. Michael Gonzales drove the vehicle into the gas station, through the parking area, and then back out onto the street. Initially, he drove away from the gas station, but he made a u-turn and again drove into the gas station. (R.T. 1695-1699). As the vehicle entered the gas station a second time, Ms. Mejorado saw two black guys standing next to a public telephone. Michael Gonzales stopped the car in front of the telephone. (R.T. 1700-1704).

After the car stopped, Michael Soliz and appellant got out of the car and went to the telephone area to talk to the two black guys. Appellant stayed closer to the car. (R.T. 1701-1710). Judith Mejorado heard Michael Soliz, appellant and the black guys all talking at the rear of the vehicle, near the telephone. It was loud talking, like an argument. (R.T. 1711-1717).

At that point, Judith Mejorado heard loud gunshots interrupting the conversation. The gunshots were coming from the rear of the car. It happened very fast. She heard only one gun. When she looked back, she could see a person holding the gun and she could see sparks coming from the gun, but she could not see who was actually shooting the gun. Right after the shooting, Michael Soliz and appellant got back into the backseat of the car. At the preliminary hearing, Judith Mejorado testified that after Soliz entered the car, she realized that the man she saw holding the gun was Michael Soliz. (R.T. 1727-1732).

At trial, Judith Mejorado testified that she had no recollection concerning what happened that night. She explained that her testimony at the preliminary hearing consisted of things she might have heard on the street and what the prosecutor told her to say. The prosecutor told her that as long as she testified to what she told Detective Holmes, no charges

would be brought against her brother Augie. (R.T. 1734-1736).

Deputy David Castillo was the second homicide investigator assigned to the Skyles and Price murder case. In November of 1996, he interviewed Judith Mejorado at the Industry Sheriff's Station. (R.T. 1789-1790). Judith Mejorado said that one night she was picked up by her brother, Augustine Mejorado, in her brother's car. Michael Gonzales was driving. She and her brother were in the front seat. Appellant and Michael Soliz were sitting in the back seat. (R.T. 1793-1795). Judith Mejorado then gave Deputy Castillo the following description of what occurred.

As the vehicle was traveling northbound on Azusa Avenue, the car passed a Shell gas station. Three black males were standing near the gas station. Michael Gonzales drove into the gas station and then drove out onto San Bernardino Road. Michael Soliz and appellant said they knew those people. Michael Gonzales made a u-turn and returned to the gas station. The car stopped near the public telephone. Michael Soliz and appellant got out of the car and walked toward the two black males. (R.T. 1796-1798). Appellant stayed back while Michael Soliz approached the two black males. (R.T. 1799).

Judith Mejorado heard an argument between appellant, Soliz and the two black men. She could hear all four voices. One of the black males

stated "No, I didn't mean to do you that way. I'm sorry. I didn't mean to do you that way." (R.T. 1800-1802). Ms. Mejorado then heard several shots. When she turned to look out the back window, she saw a man pointing a gun and firing it. The same man entered the driver's side rear passenger door of her brother's car. According to Judith Mejorado, it was Michael Soliz who had fired the gun. Appellant entered the right rear passenger side of the car at about the same time. Once inside the car, they both said, "You didn't see nothing. You don't know nothing." They drove from the gas station to La Puente to drop off appellant, Michael Gonzales, and Michael Soliz. Judith Mejorado then drove her brother home. (R.T. 1800-1802).

On March 29, 1997, Augustine Mejorado visited appellant at the Los Angeles County Jail. The conversation was tape recorded by the Sheriff's Department. The tape recording was played for the jury. (R.T. 1837-1839); Peo. Exh. 51). During the conversation, appellant indicated that he did not like some of the testimony that Augustine's sister Judith Mejorado gave at the preliminary hearing. Augustine asked "what do you want her to do?" Appellant responded by saying "I want her just to lie . . . Try to clean her shit up . . . They might bring you . . . you were in the car, but you were drunk . . . change it around. That's it . . . like saying 'I wasn't

even there.' " (Peo. Exh. 52).

Lisa Scheinin was the deputy medical examiner who conducted the autopsy of Elijah Skyles. Mr. Skyles had nine gunshot wounds. Gunshot wound one entered the back and passed through the lung and the heart. This was a fatal wound and was the cause of death. (R.T. 1840-1847). Gunshot wound two was to the left arm. Gunshot wound three was to the side of the body near the hip. Gunshot wound four was to the front of the left thigh. Gunshot wound five was to the right ankle. (R.T. 1848-1851). Gunshot wound six was to the left knee. Gunshot wound seven was to the right hand. Gunshot wound eight was to the right thigh. Gunshot wound nine was to the left cheek. Only gunshot wound one was fatal. The rest were non-fatal wounds. (R.T. 1852-1856).

Lisa Scheinin also described the autopsy of Gary Price which was performed by Dr. Stephen Scholtz. Gary Price had seven gunshot wounds. Two bullets went through his head and entered the brain. They were "through and through" shots. Either one of them alone would have been fatal because they involved injury to the brain. (R.T. 1857-1861). A third gunshot wound was on the left side of the back. A fourth wound was on the right arm. A fifth gunshot wound was found on the right buttocks. The bullet entered the lower abdomen, causing injury to the intestine. This

wound could have been fatal because it could have caused peritonitis. There were two additional non-fatal wounds to the thigh and to the hip. (R.T. 1862-1868). The cause of death was the two gunshot wounds to the head and the single gunshot wound to the abdomen. Four bullets were recovered from Skyles and five bullets were recovered from Price. (R.T. 1869-1872; Peo. Exh. 39).

C. The Testimony Of Salvador Berber And His Tape Recorded Conversation With Appellant

Salvador Berber was a member of the East Side Puente street gang. His nickname was Psycho, but he was also known as Cyclone. Berber had known appellant for ten years and Michael Soliz for eight years. Appellant's nicknames were Speedy and Rebel. Soliz's nickname was Jasper. Appellant and Soliz were known by Berber to be members of the Perth street gang. Salvador Berber also knew Richard Alvarez, known as Richie Rich, and Augustine Mejorado, known as Listo. (R.T. 1885-1891).

In July of 1996, Salvador Berber was arrested for robbery. Before he was arrested, Berber had asked to buy a gun from appellant. Appellant told Berber he had a .38 handgun for sale that was used in a robbery and he had another .38 handgun that he had obtained from a robbery. According to Berber, appellant told him that one of the guns was stolen from a murdered man and the other gun was used to murder the man.

Appellant stated that Jasper was with him at the time of the robbery. (R.T. 1890-1892).

After his own arrest on robbery charges, Salvador Berber was facing a 10 to 17 year sentence because he had a prior conviction for robbery. He decided to talk to the Sheriff's detectives about what appellant had told him in order to bargain for leniency in his own case. Initially, Berber was unsuccessful in his negotiations with the detectives. After his arraignment, Berber was transported to the Los Angeles County Jail where he saw appellant who had been arrested on some criminal charge. While in the jail, appellant again made statements to Berber about a robbery and murder he had been involved in. (R.T. 1893-1895).

Thereafter, Salvador Berber spoke to Detectives West and Reeder. Berber agreed to ride in a Sheriff's transport van with appellant and to allow his conversation with appellant to be secretly tape recorded. Although no promises of leniency were made beforehand by the detectives, Berber was still hopeful for leniency in his own case. (R.T. 1896-1897).

On September 25, 1996, Salvador Berber and appellant were both placed in a Sheriff's transport van and driven from the Los Angeles County Jail to the Pomona Courthouse. During the ride in the van, appellant told Berber that he had killed an old man. Appellant said that

Jasper (Soliz) and Richie Rich (Alvarez) were with him at the time. Appellant told him that Clumsy (Michael Gonzales) drove the van that was used in the robbery. (R.T. 1897-1898).

Berber testified that during the trip in the van, appellant also talked about the double murder of the two young black men that occurred at a gas station in Covina. Appellant told Berber that he caught them at a phone booth and killed them. He shot them with a 9 mm handgun. He said they were coming from a party and they were driving in Listo's (Augustine Mejorado) car and Listo's sister (Judith Mejorado) was also in the car. (R.T. 1899-1902).

The conversation in the van lasted an hour and a half to two hours. Parts of the tape recorded conversation cannot be heard because the road noise in the vehicle was too loud. The tape recorded conversation in the van between Salvador Berber and appellant was played for the jury. (R.T. 1900-1903; Peo. Exh. 57). Berber explained that on the tape, references to the words "terrones" and "tintos" referred to "someone black" or "a black person." (R.T. 1905-1906).

On the tape Berber and appellant discussed the fact that Jasper (Soliz) was in jail and would probably do a year in custody. Berber asked if appellant thought Soliz's fingerprints were on the van. Appellant

said that they (the police) were trying to get Jasper on the terrones (blacks). He stated that "We used . . . Listo's car" and that it involved Listo, Listo's sister, Jasper, Clumsy and appellant. Appellant then stated: "By the telephone, telephone pole. Yeah, I got off. I ran up on 'em. Cause the tintos (blacks) was right there by the phone. They were right here by the phone and we were here. I got out of the car and I went like that. And I ran up on 'em. They were like, 'No, no, no' I let the motherfuckers have it . . . one tried to run for – the one, the one in the back sat there like standing like this. One was standing like that . . . They were – that's it. They were through. I was close. Boom, boom, boom." (Peo. Exh. 58, p. 2-3).

Appellant disputed the notion that the police had found Soliz's fingerprints on the telephone pole. Appellant stated, "he didn't get out. It was just me – the only one that got out." After the shooting, appellant stated that he got in the car and apologized to Listo's sister, Judith, saying "Sorry, Judith you had to see that." Appellant said Judith asked him if he killed them and he said "yeah." He said Listo got angry and when they arrived at Puente, Listo kicked them out of the car. (Peo. Exh. 58, p. 3-4).

On the tape Salvador Berber said he would have bought both .38 handguns that appellant had for sale. Appellant responded by saying he

sold one and "That's what we killed the old man with." The other gun was "left at Curley's pad." Appellant said "that was the old man's cuete (gun)." Appellant then stated "I done about three – two niggers and that old man – about four motherfuckers when I got out this time." (Peo. Exh. 58, p. 5-7).

Appellant described the market robbery to Salvador Berber during the tape recorded conversation. He said it was at a meat market in Hacienda Heights by Turnbull and Seventh. He said when they entered the store, they walked past the cash register and could not find it at first. They stole between $200 and $300 and took the cash tray. Clumsy was driving the van. There was a woman in the store who ran out of the store when the shooting started. Appellant said the newspapers reported that her son had just left the store to get some pizza. Richie Rich had parked his car a half block away and they switched from the van to Richie Rich's car after the robbery. Appellant said that the grocer had reached for a gun, but he wrestled with the grocer and took his gun away from him. As he was hitting the grocer, he tried to shoot him, but the gun's cylinder had popped open and it would not fire. When the grocer was on the ground, appellant somehow got the gun to work and he shot the grocer. (Peo. Exh. 58, p. 7-11).

After the van ride, Salvador Berber and appellant were both returned to the Los Angeles County Jail. Before the van ride, Berber had not received any promises from the detectives concerning his own pending case. Deputy District Attorney Douglas Sortino was the prosecutor handling his case. Mr. Berber was charged with robbery and a prior robbery conviction was also alleged. He was facing 14 years in prison requiring him to serve 80% of the sentence. Salvador Berber was given a plea bargain agreement that required him to testify in this case. In exchange for his testimony, Berber was given a suspended sentence and placed on five years probation. His prior strike conviction was stricken and he was relocated outside of Los Angeles County. (R.T. 1916-1920).

On cross examination, Salvador Berber testified that before riding in the van, the detectives had directed him to try and get appellant to say something on tape about the three murders. (R.T. 1921-1922). The Court advised the jury that the tape recording of the conversation in the van presented by the prosecutor was an edited version. The entire tape, which was an hour and a half to two hours long, was available as a defense exhibit. The unedited tape contained conversation unrelated to the case and several blank spaces, as long as twenty minutes, where there was nothing on the tape except road noise. (R.T. 1923-1928; 1934-1935; Def. Exh. T).

D. The Gang Evidence And The Murder Of Billy Gallegos As A Possible Motive For The Shootings Of Skyles And Price

On March 31, 1996, Billy Gallegos was shot and killed while driving a Honda Accord on Sunset Avenue in the City of La Puente. Raymond Flores was sitting in the front passenger seat. Gabriel Urena was sitting in the back seat. (R.T. 1979-1981). Gabriel Urena testified that Billy Gallegos was a member of the Ballista clique of the Puente street gang. Urena was an associate of the gang. In 1996, Gabriel Urena was 15 years old and Billy Gallegos was 16 years old. (R.T. 1976-1979).

At approximately 6:00 p.m. on the day of the shooting, a red car containing two black men in their twenties pulled next to the driver's side of Gallegos's car. One of the two black men wore a jersey with University of North Carolina printed on the front. (R.T. 1980-1982). The two black men yelled "Where you from?" The occupants of Gallegos's vehicle yelled back "Puente." The two black men yelled "Neighborhood Crips" and gave the gang sign for the Neighborhood Crips street gang. (R.T. 1983-1984; 2000-2003).

The right front passenger of the red car produced a handgun and began shooting. Gabriel Urena ducked down, but Billy Gallegos was shot in the head. Raymond Flores was shot in the back. The car carrying Gallegos, Urena and Flores crashed into a wall. (R.T. 1985-1989; 2003-

2004). Billy Gallegos was transported to a hospital after the shooting, where he died of a gunshot wound to the head. (R.T. 1993-1995).

Detective Scott Lusk was a homicide investigator for the Los Angeles County Sheriff's Department. Previously he had worked for eight years in Operation Safe Streets, a Sheriff's unit assigned to investigate crimes committed by street gangs in an area that included the City of La Puente. (R.T. 2554-2557). In the City of La Puente, there is a Hispanic street gang known as Puente. In 1996, there were approximately 100 members and numerous associates in the gang. (R.T. 2064-2066). There are three cliques within the gang: Perth Street, Dial, and Ballista. (R.T. 2069-2071).

Detective Lusk testified that in his opinion, both appellant and Michael Soliz were members of the Puente street gang and were part of the Perth street clique. Both appellant and Soliz admitted to Detective Lusk that they were Puente gang members and both have several Puente gang tatoos. (R.T. 2072-2081). Detective Lusk estimated that Puente street gang members have committed a couple of hundred crimes, including thefts, assaults, robberies, attempted murders, and murders. (R.T. 2082-2083). By way of example, he summarized three criminal cases where crimes were committed by Puente gang members: an attempted murder in 1990 by

Michael Ortega and David Calvillo; a robbery in 1995 by Jose Torres; and six robberies in 1997 by Augustino Mejorado and Caesar Montivaros. (R.T. 2081-2087).

Detective Lusk testified that in his opinion the robbery and murder of Lester Eaton at the Hillgrove Market in January of 1996 was a crime that was committed to enhance the individual's reputation within the gang and the gang's reputation within the gang hierarchy. The crimes were particularly violent crimes and would cause the perpetrator to be viewed as a "vato locos" or a crazy guy who would use violence to get whatever he wants. As his reputation spreads, he would gain more respect and more fear. (R.T. 2087-2089).

Detective Lusk also testified that in his opinion, the murders of Elijah Skyles and Gary Price on April 14, 1996 were in retaliation for the murder of Billy Gallegos two weeks earlier on March 31, 1996. (R.T. 2089-2092). The two gangs, Puente and Neighborhood Crips, were at war with each other. (R.T. 2092). Detective Lusk's opinion would be the same even if Skyles and Price were not members of the Neighborhood Crips gang. Skyles and Price were wearing gang type clothing and once they were targeted and approached by the shooter, they would be shot even if they were not gang members. (R.T. 2093-2094). In his opinion, the murders of

Skyles and Price were committed in order to enhance the reputation of the people who committed it within the gang and the reputation of the gang among other gangs. (R.T. 2095).

Detective Lusk finally stated that in his opinion, there is a reason why a person who was providing backup for a shooting committed by another gang member might brag to other gang members and take credit for the shooting. The reason a gang member would take credit for a shooting he did not commit might be to increase his reputation and ranking in the gang by making him appear more intimidating. (R.T. 2098). On cross examination, Detective Lusk admitted that the Sheriff's Department had no information establishing that Price and Skyles were gang members or establishing that Price and Skyles were involved in the shooting of Billy Gallegos. (R.T. 2118-2121).

E. Other Evidence in the Case

Patricia Fant was a firearms examiner for the Los Angeles County Sheriff's Department. She explained that in a revolver, the shell casings remain in the cylinder of the gun and are not ejected from the pistol upon firing it. However, in a semi-automatic pistol, the shell casings are ejected from the pistol after it is fired and are left on the ground around the shooter. (R.T. 2015-2024).

Patricia Fant made a comparison of the eleven expended shell casings found on the ground at the Skyles and Price murder scene (Peo. Exh. 38), with the live 9 mm bullet found in the getaway van used in the Lester Eaton robbery and murder. (Peo. Exh. 26). She formed the opinion that all of the eleven shell casings were fired from the same gun. She also formed the opinion that the live 9 mm bullet had markings indicating that it had been in the same magazine as the other eleven expended shell casings. The live round had been placed in the magazine and was removed without being fired. (R.T. 2026-2031). The eleven expended shells and the one live round were all 9 mm rounds. (R.T. 2036).

Ms. Fant also made a comparison of one of the coroner's bullets removed from Lester Eaton during the autopsy (Peo. Exh. 23C) with the expended bullet found by Mrs. Eaton at the Hillgrove Market after the murder. (Peo. Exh. 10). She determined that they had the same general rifling characteristics and could have been fired from the same gun. However, she could not say they were definitely fired from the same gun. (R.T. 2034-2035; 2039-2040).

Bruce Harris was a firearm's examiner for the Los Angeles County Sheriff's Department. He determined that two of the coroner's rounds removed from Lester Eaton during the autopsy (Peo. Exh. 23A and

23C) could have been fired from the same gun. However, he could not make a positive determination because there were not enough markings on the bullets to compare. (R.T. 2048-2052). When he compared one of the Eaton autopsy bullets (Peo. Exh. 23C) with the expended bullet recovered by Martin Mutuc at the Hillgrove Market (Peo. Exh. 7), he determined that they were fired from the same gun, probably a revolver. (R.T. 2053-2054).

Prior to the preliminary hearing in this case, the attorney for Michael Soliz made a motion for a lineup. The attorney for appellant joined in the motion. The Court granted the motion and a lineup was scheduled at the Los Angeles County Jail. (1-16-96 Supp. R.T. 19-25; Supp C.T. 340-351). Deputy David Vasquez was the sheriff's deputy assigned to conduct the two lineups. The lineups were scheduled for March 4, 1997. However, neither lineup was held. Deputy Vasquez testified that both Michael Soliz and appellant refused to stand in the lineups. (R.T. 1641-1647). Carol Mateo and Jeremy Robinson, eyewitnesses in the Skyles and Price case, both testified that they went to the Los Angeles County Jail to attend a lineup, but no lineups were conducted. (R.T. 1480; 1588).

II. THE FIRST PENALTY TRIAL

A. The Prosecution Witnesses

Joy Mitchell was the mother of Gary Price. Gary Price was

18 years old at the time he was killed. She learned of her son's death when his father called her on the telephone. His death took a part out of her life. She went to the gas station on the night of his death and was told by the detective that her son was dead. She misses her son and thinks of him everyday. (R.T. 2441-2443).

Gary Price, Sr. was the father of Gary Price, one of the two men killed at the gas station. He had a pie business, known as Y.J. & Son. His son worked with him in the business for six years. His son would cook, sell and deliver pies to various businesses. (R.T. 2447-2449). The business had advertisement fliers that said "The Pie Man and Son." After his son's death, he started drinking and using drugs. He could not continue operating his business without his son. He is still not over his son's death. His son was an outgoing, humorous and pleasant guy, who loved to dance. (R.T. 2450-2453).

Neidra Hagan was the mother of Elijah Skyles. Elijah Skyles was 15 years old when he was killed. He was her only son. He had a good heart and wanted to live in peace. Her son was very close to Gary Price. The two of them never got into trouble. Her son was a happy child. He loved to entertain people and he loved sports. After learning of her son's death, she has not been the same. (R.T. 2456-2459). She used to drive past

the cemetery where her son was buried every day to take her two year old daughter to school. After eight months, she could no longer drive by the cemetery because it made her too sad. (R.T. 2461-2465).

Betty Eaton was married to Lester Eaton for 43 years. They were married in 1953. They have four children and nine grandchildren. Her husband started the Hillgrove Market in 1952. She helped her husband run the business. She is still running the market after her husband's death, but the market is up for sale. (R.T. 2463-2465).

It is difficult for Betty Eaton to continue working at the market where her husband was shot. She thinks of her husband every time she enters the market. Lester Eaton was 67 years old when he was killed, but he was in excellent health. He had plans for retiring and selling the business in order to spend more time with his grandchildren. One twelve year old grandchild was especially troubled over the death of his grandfather. Mr. Eaton would extend credit to people in the community who could not afford to pay for their groceries. (R.T. 2463-2469)

Betty Woodbury was a friend of Betty and Lester Eaton for 36 years. Lester Eaton was a friendly person who would give free sandwiches to homeless people, candy to children and would give credit to people who were unable to pay for groceries. (R.T. 2470-2473).

Diane Hacker was the daughter of Lester Eaton. She has worked in her father's store since she was 14 years old. Her father taught her how to manage the store and helped her in her career. Her father was a quiet man who frequently gave money to poor people. Her father also had a good relationship with her two children. (R.T. 2474-2477). When she heard her father had been shot, she immediately went to the market. When she learned her father was dead, she collapsed at the scene. (R.T. 2478-2479).

Kenneth Eaton was the son of Lester Eaton. His father was in excellent health at the time of his death. He learned of his father's death when he received a phone call from his brother. Kenneth was in a state of shock when he learned of the death. It left a big void in his life. He thinks of his father every day and wonders why this had to happen. He misses his father. (R.T. 2480-2484).

It was stipulated that on October 5, 1995, appellant pleaded guilty to the felony crime of possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). With that stipulation, the prosecutor withdrew as an exhibit, a copy of the California Department of Corrections file related to appellant. (R.T. 2597). In the case of Michael Soliz, the prosecutor introduced into evidence a copy of a Department of Corrections file indicating that on January 7, 1992, Michael

Soliz was convicted of a felony charge of unlawful driving or taking an automobile. (R.T. 2485).

B. Appellant's Defense Witnesses

Edna Gonzales was the mother of appellant. Appellant was born on May 24, 1976. His full name is John Anthony Speedy Gonzales. While he was young, Mrs. Gonzales worked full time with the La Puente School District. Her husband worked long hours. When her son was 12 years old, his grades in school began to decline. She testified that her husband refused to see their son in jail. (R.T. 2490-2494).

Mrs. Gonzales identified and described various photographs of her son taken at different stages of his life. When her son was 14 years old, he was shot in front of their house in a gang related shooting. He was hospitalized after being shot in the kidney. (R.T. 2495-2498). She and her husband have four other children in addition to appellant. As parents, they taught the children right from wrong, took them to church, and encouraged them to finish school. (R.T. 2498-2501).

Frank Gil has known appellant for nine years. They played basketball and football together. Mr. Gil has a three year old son. Despite the fact that appellant had joined a gang, appellant always told Mr. Gil's son to stay away from gangs and take care of his family. (R.T. 2501-2505).

Sam Ortega was the first cousin of appellant. He considers himself a second father to him. When appellant was growing up, he would spend weekends with Mr. Ortega. He was very close with Mr. Ortega's own son. When appellant was 13 years old, he joined a gang. After that, appellant seemed to be more withdrawn. (R.T. 2508-2512).

William Marmolejo has known appellant all of his life. He was like a big brother to appellant. Appellant would help him when he coached the Special Olympics for handicapped children. Appellant received a participation medal for his help in the Special Olympics. (R.T. 2518-2520). William Marmolejo has a brother named Fernando. Appellant looked up to Fernando. When Fernando became involved in the Perth street gang, he encouraged appellant to join the gang. Appellant was 16 years old at the time. (R.T. 2521-2524).

Valerie Gonzales was the older sister of appellant. She is 26 years old. When appellant was 16 years old, he would play with her 3 year old daughter and walk her daughter to school. She urged the jury to give her brother a life sentence. (R.T. 2527-2530).

Francis Ontivaros was the sister of appellant. She has a daughter with Downs Syndrome. She identified a picture of appellant with her daughter. He helped take care of her daughter. He would take her to

the bus and later pick her up. He was a good uncle. Even after appellant joined a gang, he was always respectful to her. She testified that her brother was a good person with a kind heart. (R.T. 2531-2535).

David Gonzales was the older brother of appellant. David was not a gang member, but in 1989 he was convicted of robbery and sent to prison. That same year, appellant joined a gang. Appellant was 12 years old. David tried to talk him out of joining. He and appellant were always very close and appellant was always respectful. He urged the jury to give appellant a life sentence. (R.T. 2536-2542).

David Gonzales, Jr. was in the third grade in school. Appellant was his uncle. David Jr. and appellant would spend time playing and talking together. Appellant would ask him how he was doing in school and would encourage him to get good grades in school. (R.T. 2557-2560).

Kimberly Gonzales was the sister-in-law of appellant. She was married to his older brother, David Gonzales. Before appellant went to jail, he helped her with her children. In 1989, her husband David went to prison. That same year, appellant joined a gang. (R.T. 2561-2564). During that time, Kristine Ontiveros was living with appellant's mother. Kristine's brothers were Perth street gang members and they encouraged appellant, who was only 13 years old, to join the gang. Kimberly Gonzales asked the

jury to return a life verdict because appellant is not a cold-hearted person. (R.T. 2565-2568).

Michael Keith was the Program Coordinator for a drop-out recovery clinic in the La Puente School District. He counsels students who miss school. He knows appellant. He met him eight or nine years ago, when appellant was having problems in school. Michael Keith testified that appellant was a likable and intelligent person, who would do very well in a structured environment. (R.T. 2632-2637).

C. Michael Soliz's Defense Witnesses

Irene Arzola was the mother of Michael Soliz. Her son was born on December 27, 1973. She identified various photographs of Michael Soliz at different ages in his life. Michael has a daughter, Adrienna, and a son, Isaac. Michael never had a father figure when he was growing up, because his father left when Michael was 12 years old. (R.T. 2569-2573). Mrs. Arzola testified that Michael is very close to his brother and sister and he is a very good father to his children. She asked the jury to give him a life sentence. (R.T. 2574-2579).

Anthony Diaz was the half-brother of Michael Soliz. He was very close to Michael when they were growing up. He urged the jury to return a life sentence, because Michael was redeemable. (R.T. 2584-2590;

2629-2631). Steven Lara was a cousin of Michael Soliz. Michael is older and Michael helped him when he was growing up, acting as a mentor. Michael is artistic and creative. Unfortunately, Michael did not have a lot of family support when he was growing up. (R.T. 2598-2602).

Daniel Lara was a cousin of Michael Soliz. They were very close when they were growing up. He never knew Michael to drink alcohol or carry a weapon. (R.T. 2610-2612). Bart Lara was the older brother of Michael Soliz. Bart testified that Michael Soliz basically grew up without a father and Bart tried to take care of Michael. Bart also testified that in his opinion, Michael Soliz is a great person and he loves him. (R.T. 2613-2617).

Michael Landerman worked with Michael Soliz at Sunset Wire and Steel for a year and a half. Michael was a hard worker, who never used alcohol or drugs. Landerman testified that he believed the jury should return a life verdict, because Michael Soliz was kind hearted and a good person. (R.T. 2621-2627). Luz Jauregui was the girlfriend of Michael Soliz. He has been her boyfriend for three years. She testified that she did not want to see him dead. (R.T. 2627-2628).

III. THE SECOND PENALTY TRIAL

A. The Prosecution Witnesses

1. Recalling Guilt Phase Witnesses

At the second penalty trial, the prosecution recalled almost all of the original guilt phase witnesses in order to prove the facts of the three murders. Since this testimony has already been summarized in the summary of the guilt trial evidence, only an abbreviated summary of the guilt phase witnesses who were recalled during the second penalty trial will be set forth in this section of the brief.

i. The Murder Of Lester Eaton

Betty Eaton testified that on January 27, 1996, her husband Lester Eaton was shot and killed during a robbery at the Hillgrove Market in Hacienda Heights. A male Hispanic, wearing a bandanna across his face, entered the store, pointed a gun at her, and demanded money. (R.T. 3335-3343). A second man entered the store and pointed a gun at Lester Eaton. The second robber struck her husband on the head and the two began struggling on the floor. Betty Eaton heard two gunshots and then ran from the market. (R.T. 3343-3351). She saw a dark colored van waiting outside the market with the motor running. (R.T. 3351-3352)

Approximately $100.00 was taken during the robbery, along

with the cash register tray, food stamps, her husband's pistol and his shotgun. (R.T. 3356-3358). Sheriff's deputies who arrived at the market after the robbery found Lester Eaton lying on the floor behind the meat counter. He was dead. (R.T. 3251-3254; 3274-3277). The medical examiner testified that Lester Eaton had two gunshot wounds to the head and three gunshot wounds to the chest. The head wounds and one chest wound were all fatal wounds. (R.T. 3450-3466).

The van used in the robbery was found abandoned in a parking lot at the corner of Turnbull Canyon Road and Clark Avenue. Inside the van, deputies found the cash register tray from the market and a live 9mm bullet. (R.T. 3307-3309). Also inside the van, deputies found two pieces of paper. One had "Heavy Metal" written on it. The other was an insurance policy. Both contained the fingerprints of appellant. (R.T. 3499-3501; 3509-3510).

Doreen Ramos testified that Randy Irigoyen, also known as Bird, had offered to sell her the van used in the robbery. This occurred a couple of hours before the robbery at a residence in the City of La Puente. She decided not to buy the van. (R.T. 3513-3526). Ms. Ramos went with Bird to another residence a few blocks away. At that residence, Ms. Ramos saw Bird talking to appellant and Michael Soliz. (R.T. 3535-3535).

Doreen Ramos heard appellant and Michael Soliz both tell Bird that they were going to do a jale (job) and they needed cuetes (guns). She heard Michael Soliz being called by the name "Jasper." (R.T. 3536-3537). She also heard Bird tell appellant and Soliz that the driver of a Honda parked at the residence would get the van and the cuetes. A short time later, Bird handed bandannas to appellant and Soliz. Both appellant and Soliz jokingly put the bandannas over their faces. (R.T. 3540-3546).

Appellant and Soliz got into the Honda and drove away from the residence. Doreen Ramos went home. Later that night Ms. Ramos saw a news story on the television about the market robbery and murder. She recognized the van in the television news story as the van Bird had shown her earlier. She then called the police to tell them what she knew. (R.T 3547-3550).

ii. The Murders of Elijah Skyles and Gary Price

Carol Mateo testified that on April 14, 1996, as she drove past a Shell gas station on the corner of San Bernardino Road and Azusa Avenue in the City of Covina, she saw Michael Soliz shoot Elijah Skyles and Gary Price. (R.T. 3723-3729). She heard the gunshots and saw Skyles and Price fall to the ground. As one of the boys tried to crawl away, Soliz walked closer and shot him again on the ground. (R.T. 3724; 3730-3731). After the

shooting, Michael Soliz ran to a Honda parked at the gas station. Carol Mateo identified a second man standing next to the Honda as appellant. (R.T. 3733-3736). Appellant and Soliz left the gas station in the Honda. (R.T. 3738-3790).

Alejandro Garcia, who worked at the Shell gas station, heard the shooting, but did not see it. Moments after the shooting, he saw two male Hispanics entering a Honda. He could not identify anyone in court, but when interviewed by the police, he selected the photograph of Michael Soliz as someone who resembled one of the two men he saw run to the car after the shooting. (R.T. 3699-3711). Jeremy Robinson was a passenger in Carol Mateo's car on the night of the shooting. He saw the shooting. He testified that Michael Soliz "looks like" the person who did the shooting. (R.T. 3762-3770).

Vondell McGee, the cousin of Gary Price, spoke with Elijah Skyles and Gary Price just minutes before the shooting at the Shell gas station. He gave them money to use the public telephone. McGee testified that Skyles was 15 years old and Price was 18 years old. McGee was down the street when he heard the shots. When he returned to the gas station after the shooting, Elijah Skyles and Gary Price were laying on the ground. They were both dead. (R.T. 3672-3688).

Sheriff's Deputies found eleven 9mm shell casings around the two bodies. (R.T. 3604). The medical examiner determined that Gary Price had been shot seven times. Two of the gunshot wounds were to the head. They were the cause of death. (R.T. 3906-3911). It was also determined that Elijah Skyles had been shot nine times. One of the bullets passed through his lung, heart, liver and abdomen. These injuries were the cause of death. (R.T. 3916-3929). A ballistics expert determined that the eleven shell casings found at the Shell gas station had been in the same gun magazine as the single live 9mm bullet found in the van used in the Hillgrove Market robbery. (R.T. 3969-3978).

Judith Mejorado again testified as a reluctant witness at the penalty re-trial. This time she asserted her Fifth Amendment privilege and was granted use immunity. (R.T. 3813; 3817-3819). When Judith Mejorado testified she had no recollection of the Shell gas station shooting, the prosecutor presented her former testimony and former statements to law enforcement officers. (R.T. 3822-3826). On those former occasions, Judith Mejorado stated that she was in her brother Augustine's car on the night of the shooting. Michael Gonzales, known as Clumsy, was driving. Judith and her brother were in the front seat. Appellant and Michael Soliz were in the back seat. As they passed the Shell gas station, appellant and Soliz said

they knew the three black males at the gas station and they told Clumsy to go back to the station. (R.T. 3824-3829; 3875-3881).

Judith Mejorado stated that when they arrived back at the gas station, there were now only two black males standing by the telephone. Appellant and Michael Soliz both got out of the car. Appellant stood next to the car. Soliz approached the two black males. (R.T. 3830-3833; 3880-3883). At the preliminary hearing, Mejorado said both appellant and Soliz argued with both black males. (R.T. 3834-3838). When interviewed by Deputy David Castillo, Mejorado said the argument was between Michael Soliz alone and one black male. (R.T. 3882-3883).

Mejorado stated that moments later she heard gunshots. When she turned to look in that direction, she saw Michael Soliz firing the gun. After that, appellant and Soliz re-entered the back seat of her brother's car. Michael Soliz had the gun with him when he entered the car. Appellant and Soliz both told her that she did not see anything and told the driver to take off. (R.T. 3839-3851; 3883-3884).

Gabriel Urena testified that on March 31, 1996, he was riding in a car driven by Billy Gallegos in the City of La Puente when Billy Gallegos was shot and killed by the occupants of another car. Raymond Flores, who was in the car with Urena and Gallegos, was also shot. (R.T.

3937-3945). The driver and passenger of the other car identified themselves as Neighborhood Crips, black gang members, just prior to the shooting. Urena, Gallegos and Flores had claimed Puente street gang membership before the shooting. (R.T. 3949-3954).

Scott Lusk, a gang expert, testified that appellant and Michael Soliz were members of the Puente street gang. (R.T. 4054-4056). On the night Elijah Skyles and Gary Price were killed, Skyles and Price were wearing a type of clothing that was similar to that worn by black street gang members. (R.T. 3602-3604). In Deputy Lusk's opinion, the Skyles and Price murders were committed in retaliation for the Billy Gallegos murder. (R.T. 4066-4068). His opinion would not change if in fact Skyles and Price were not gang members, because the way they were dressed on the night of the shooting made them look like black gang members. (R.T. 4068).

iii. Salvador Berber's Testimony

Salvador Berber testified that appellant told Berber that he had shot and killed the owner of a market during a robbery that he committed with Michael Soliz. Berber testified that appellant also said that he shot and killed two black kids at a phone booth at a gas station, while he was with Michael Soliz, Judith Mejorado and Judith's brother. (R.T. 3993-3937); 4001-4005).

After Salvador Berber was himself arrested for robbery, he contacted Sheriff's Deputies about appellant's statements in an effort to get leniency on his own robbery case. Sheriff's deputies arranged for Salvador Berber and appellant to ride in a Sheriff's van from jail to court. During the ride, Berber asked appellant about the three murders and the conversation was secretly tape recorded. The tape recording was played for the jury. (R.T. 3997-4005; 4008-4016; Peo. Exh. 156).

During the ride in the van, appellant said that Michael Soliz (Jasper) went inside the market with him during the robbery. Appellant shot the market owner. A lady at the market ran from the market. He took the market owner's gun. Michael Gonzales (Clumsy) drove the getaway van. The van was abandoned on Turnbull Canyon Road. Richard Alvarez (Richie) drove them away in his car after they "ditched" the van. Appellant also talked about the two other murders involving two black kids. Appellant told Berber that he was the one who shot the two black kids at the telephone booth at the gas station. He was at the gas station with Michael Soliz (Jasper), Augustine Mejorado (Listo) and Judith Mejorado, Listo's sister. Appellant said he used a 9mm handgun in that murder. (R.T. 4001-4005; Peo. Exh. 156).

After the van ride, Salvador Berber entered into a plea

bargain. He pleaded guilty to robbery. He agreed to testify against appellant. Instead of being sentenced to 14 years in prison for robbery, he was given 5 years probation. (R.T. 4017-4019). Salvador Berber admitted that sometimes gang members brag about crimes they did not commit. (R.T. 4023-4024). Gang expert, Scott Lusk, testified that a gang member might claim to have committed a murder that he did not actually commit. A gang member might make such a false claim in order to enhance his reputation within the gang. (R.T. 4068).

iv. Other Guilt Evidence

On October 19, 1996, a newspaper article in the San Gabriel Valley Tribune reported the arrest of appellant in the case involving the robbery and murder of Lester Eaton. The article mentioned that there were two more suspects outstanding. (R.T. 3567). On December 15, 1996, Luz Jauregui visited Michael Soliz in the jail. Their conversation was tape recorded by the Sheriff's deputies. The tape was played for the jury. During the conversation, when Luz Jauregui talked about the newspaper article, Michael Soliz told her they have one of the suspects right here. (R.T. 3568-3570; Peo. Exh. 124).

On March 4, 1997, Detective Joe Holmes scheduled two lineups to be conducted at the Los Angeles County Jail involving appellant

and Michael Soliz. Eyewitnesses in the Skyles and Price case were present at the jail for the lineup. However, the lineups did not occur because appellant and Michael Soliz declined or refused to stand in the lineups. (R.T. 3791-3794).

2. Appellant's Prior Robbery At Age 13

On March 11, 1990, Martin Espinoza was working at a Shell gas station on South Glendora Avenue in the City of West Covina. At the end of his shift, when he was counting the money, two young Hispanic teenagers entered the office and demanded money. One appeared to be 16 years old and the other appeared to be 13 years old. The older one carried a gun and the younger one carried a knife. Martin Espinoza backed away and the young men took the money and ran away. Espinoza then called the police. (R.T. 4085-4087).

Appellant was later arrested for the robbery and taken to the West Covina police station. Officer Cruz Garcia, Jr. questioned appellant after advising him of his Miranda rights. Appellant told Officer Garcia that he and his cousin had robbed the Shell gas station. His cousin had the gun. Appellant was given $50.00 from the stolen money and he spent it. He was 13 years old at the time. (R.T. 4091-4097). During the police interview,

appellant appeared remorseful and was cooperative. (R.T. 4098-4099).[3]

3. Misconduct in the Jail

On January 4, 1998, Deputy Sheriff Arnolufo Esquivel conducted a cell search of the Los Angeles County Jail cell occupied by appellant. During the search, Deputy Esquivel recovered a metal shank that was 4 inches in length. A shank is a jail made knife. (R.T. 4105-4107). It is illegal for inmates to possess shanks in the jail. Criminal charges were filed against appellant for possessing the shank, but the case was dismissed. There was no evidence the shank was ever used. (R.T. 4108-4113; Peo. Exh. 161).

On October 16, 1997, Deputy Sheriff Glen Eads was involved in putting out a fire at the Los Angeles County Jail. The fire was in the area of the last four cells in Module 3100, Row B. Mattresses and paper were burning. The inmates were very hostile. They were throwing paper on the fire to keep it burning. (R.T. 4114-4119). While Deputy Eads was putting

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[3] Neither Martin Espinoza nor Officer Cruz Garcia could identify appellant after the passage of 8 years. (R.T. 4090, 4098). West Covina Police Officer James O'Brian testified that the fingerprints on the fingerprint card prepared in connection with the arrest made in the 1990 gas station robbery case belonged to appellant. (R.T. 4100-4104). Later, in his own testimony, appellant admitted that he committed the 1990 gas station robbery with his cousin and that he had a knife. (R.T. 4257-4258).

out the fire, several inmates in jail cells near the fire, including Michael Soliz, were throwing apples, oranges and milk cartons at him. (R.T. 4120-4122).

On January 10, 1998, Deputy Forrest Anderson searched the cell of Michael Soliz at the Los Angeles County Jail and found five razors. One of the razor blades had been separated from the plastic handle. Inmates use these separated razor blades to make slashing devices by attaching them to a toothbrush or a comb. Possession of a razor in the cell by an inmate is forbidden. (R.T. 4123-4129).

On July 31, 1998, Deputy Richard Torres searched the cell of Michael Soliz at the jail and found various altered razors, disposable razors, and one unsharpened metal piece. He testified that the altered razors are commonly made into slashing devices by attaching them to a toothbrush or a pencil. (R.T. 4130-4133).

4. Prior Felony Convictions

It was stipulated that appellant was convicted on October 5, 1995 of the felony of possession of a controlled substance in violation of Health and Safety Code section 11377. (R.T. 4136-4137). It was stipulated that Michael Soliz was convicted on November 10, 1992 of the felony of unlawfully driving or taking a vehicle in violation of Vehicle Code 10851.

(R.T. 4137-4138; Peo. Exh. 162).

5. Victim Impact Evidence

Betty Eaton testified that she had been married to Lester Eaton for 43 years. Her husband worked at the Hillgrove Market seven days a week, but had plans to retire and sell the store. (R.T. 3366). Her husband liked hunting and fishing. On many occasions, her husband would extend credit to customers who could not afford to pay. Her husband never refused credit to anyone. Her husband sponsored Little League teams and a high school band. They had four children and nine grandchildren. (R.T. 3367-3370).

After Lester Eaton's death, a grandchild living with them became so upset, he had to be sent back to live with his father. Mr. Eaton's death has caused financial problems for her and her family. The market has not been profitable since his death. Betty Eaton thinks of her husband every day and is totally devastated by his death. (R.T. 3371-3373).

B. The Defense Witnesses

1. The Testimony Of Appellant

Outside the presence of the jury, defense counsel John Tyre advised the Court that appellant wanted to testify at the second penalty trial. Tyre had advised appellant that it would not be appropriate for him to

testify, but he cannot keep him off the stand. Tyre stated that if appellant does testify, it would be over his defense counsel's objection. The Court advised appellant that he should follow his lawyer's advice, but if he wished to testify, he had that right and his lawyer could not stop him from testifying. (R.T. 4192-4194). Ignoring his lawyer's advice, appellant testified at the second penalty trial.

On direct examination, appellant testified he was 22 years old. He joined the Perth street gang around 1989. In 1991, when he was 15 years old, he was shot. When he went to the Hillgrove Market in La Puente on the night Lester Eaton was shot, he intended to commit a robbery, not a murder. (R.T. 4204-4206).

When he entered the market, he was holding a gun. He demanded money from Lester Eaton. Mr. Eaton started reaching for his own gun. Appellant grabbed Mr. Eaton and began wrestling with him. Mr. Eaton was much bigger than appellant, and as they were wrestling, appellant's gun just went off. According to appellant, "I went blank and I just kept shooting." His plan was to get the money and leave. After the shooting, he felt remorse. (R.T. 4207-4208). Although it appeared on the tape recording that he was bragging to Salvador Berber about the shooting, appellant testified that he spoke that way so he would not to look like a

coward. He actually felt bad about shooting Lester Eaton. (R.T. 4209).

Appellant thought he knew the two black men that were shot at the Shell gas station on Azusa Avenue. On the night of the shooting, he wanted to talk to them about the shooting death of his friend Billy Gallegos. (R.T. 4200; 4264-4265). When he arrived at the Shell gas station, he got out of the car and went to talk to the two black men. Michael Soliz was there, but he never got out of the car. While appellant alone was talking to the two black men, they began arguing. Appellant thought one was reaching for something and he quickly shot them both. After the shooting, he felt remorse. (R.T. 4209-4210).

Appellant apologized to Betty Eaton and her whole family. He identified a series of photographs of himself as a child with his family and at school. (R.T. 4211-4214). While in jail he writes frequently to his mother and he writes poetry. He testified that he feels he should not get the death penalty, even though he knows he deserves it. If sentenced to prison for the rest of his life, he would try to rehabilitate himself and educate himself. (R.T. 4215-4216).

Appellant was cross-examined at length by the prosecutor Douglas Sortino. On cross-examination, appellant admitted that Michael Soliz was with him during the Hillgrove Market robbery. Appellant had a .38

revolver handgun. Soliz had a 9mm handgun. Michael Gonzales, known as Clumsy, was driving the van. Appellant took Mr. Eaton's shotgun when he left the market. (R.T. 4217-4225; 4237-4239).

Appellant admitted that the van used in the robbery was stolen and was abandoned after the robbery. Richard Alvarez, also known as Richie Rich, waited for them down the street to drive them away after they abandoned the van. Alvarez was not told ahead of time that they planned to rob a market. The plan was to just get the money. Appellant only hit Mr. Eaton after Eaton had reached for his gun. (R.T. 4226-4232).

The prosecutor then began a lengthy series of questions in which he asked appellant whether other witnesses were lying when the witnesses' testimony was different from his testimony. Appellant testified he was not wearing a bandanna when he entered the market. Doreen Ramos testified she saw appellant putting a bandanna around his face. Mr. Sortino asked "So, Doreen Ramos wasn't telling the truth when she came in here?" Appellant answered no. (R.T. 4233-4234).

Mrs. Eaton told the police that the two men who robbed her were wearing bandannas across their faces. Mr. Sortino asked, "Your testimony here today is that Mrs. Eaton wasn't telling the truth to those officers?" Appellant answered yes. (R.T. 4235).

Appellant testified that in the market, he wore a hooded sweater and Michael Soliz wore a baseball hat with a bill. Mr. Sortino asked, "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?" Appellant answered "No. She wasn't telling the truth." Mr. Sortino asked, "So Ms. Ramos is just making all that up, what she saw that night?" Appellant answered yes. (R.T. 4235-4236).

Appellant denied having a shank in his cell at the Los Angeles County Jail, stating that Deputy Esquivel "Didn't find it in my cell." Mr. Sortino asked "Was he lying when he took the stand?" Appellant answered, "Pretty much yes." Mr. Sortino asked if Doreen Ramos was lying when she talked about what she saw on the night of the robbery. Appellant answered yes. (R.T. 4259-4260).

Mr. Sortino asked if Mrs. Eaton was lying when she told the police what she saw on the night of the murder. Appellant answered, "Not really lying, that's what she thought she saw." (R.T. 4260). Mr. Sortino asked if Deputy Esquivel was lying when he said he found a shank in the cell. Appellant said yes. Mr. Sortino asked if appellant was telling the truth. Appellant answered yes and repeated that the shank was not his and was not found in his cell. Mr. Sortino then asked "So your testimony is that

he came in here to court and lied about finding the shank in your cell belonging to you?" Appellant answered yes. (R.T. 4260-4261).

Turning to the gas station shooting, appellant testified that initially he just wanted to talk to Elijah Skyles and Gary Price about the murder of Billy Gallegos which had occurred a few weeks earlier. He repeated that he shot the two young men. (R.T. 4264-4267). He testified that he was the one in the car that said he wanted to talk to them. Michael Soliz did not do anything. (R.T. 4271-4272).

Mr. Sortino asked appellant if Judith Mejorado was lying when she testified at the preliminary hearing and when she told the police that both appellant and Soliz talked about going back to the gas station to talk to the two black guys. Appellant answered yes to both questions. (R.T. 4272-4273). Appellant testified that he alone got out of the car and Michael Soliz never got out of the car. Mr. Sortino asked appellant if Judith Mejorado was lying when she told the police both appellant and Soliz got out of the car that night. Appellant answered yes. Mr. Sortino asked appellant if Judith Mejorado was lying under oath when she testified that both appellant and Soliz got out of the car. Appellant said yes. (R.T. 4273-4274).

Mr. Sortino asked appellant if all of the identifications of

Michael Soliz as the shooter were wrong. Appellant answered that all of the witnesses were wrong. Mr. Sortino asked if Carol Mateo was lying when she testified in court that Michael Soliz was the man she saw doing the shooting.[4] Appellant answered yes. Mr. Sortino asked appellant if Carol Mateo was lying when she testified at the earlier trial to the same effect. Appellant answered yes. Mr. Sortino asked if she was lying when she said the same thing at the preliminary hearing. Appellant answered yes. (R.T. 4275).

Mr. Sortino asked if Carol Mateo was lying when she picked Michael Soliz's photograph out of a photospread and told the police he was the one who did the shooting. Appellant answered yes. Mr. Sortino asked if Jeremy Robinson wasn't telling the truth when he picked Michael Soliz's picture out of a photospread and said he looked like the shooter. Appellant answered yes. Mr. Sortino asked appellant if Alejandro Garcia wasn't telling the truth when he picked Soliz's picture out of a photospread. Appellant said he wasn't telling the truth. (R.T. 2476).

Mr. Sortino asked appellant if Judith Mejorado wasn't telling

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[4] Joseph Borges, counsel for Soliz objected because appellant said she was wrong, not that she was lying. The Court overruled the objection saying "Before he said two or three times that she was lying. So in cross-examination, I think counsel is entitled to pick up on that portion of it. (R.T. 4275)

the truth when she told the police that Soliz was the guy who got in on the left side of the car after the shooting. Appellant said no she wasn't. Mr. Sortino asked if Ms. Mejorado wasn't telling the truth when she testified at the preliminary hearing and said the same thing under oath. Appellant answered no she wasn't. Mr. Sortino asked appellant if all of the other people had conspired to lie against him and Soliz. The Court sustained an objection to that question. (R.T. 4276).

Joseph Borges, counsel for Michael Soliz, cross-examined appellant further concerning the Skyles and Price case. Appellant repeated that he alone shot Skyles and Price and that Michael Soliz never got out of the car. Appellant denied that he was trying take the heat for or cover up for Michael Soliz. (R.T. 4277-4282). He explained that he only wanted to talk to the two young black men because he thought they were gang members who knew something about the Billy Gallegos murder. He started arguing with them. They moved. He thought they had something. He reacted to their moving by shooting. He testified that Michael Soliz never even spoke to the two black men. (R.T. 4283-4293) In response to Mr. Borges's question, appellant admitted that he did not testify at the last trial in this case. (R.T. 4296-4298)

The prosecutor, Douglas Sortino, asked further questions on re-cross examination. Appellant admitted that the gun used to shoot Skyles and Price was the same gun Michael Soliz had before the Hillgrove Market robbery. When asked why he shot Skyles and Price 11 times, appellant testified that a spring in the firing pin had been removed from the 9mm semi-automatic handgun, making it fire fully automatic. One pull on the trigger made the gun fire repeatedly. (R.T. 4304-4305).

The Court interrupted the testimony and stated in front of the jury that the Court would take judicial notice of the fact that you cannot convert a semi-automatic handgun to fire fully automatic by any manipulation of a spring behind the trigger. The Judge stated that he knew from his own personal experience that it would be physically impossible to alter a gun in the manner described by appellant. (R.T. 4306).[5] Appellant then testified that he thought one of the black men was going for a gun and so he kept pulling the trigger and could not stop. He did not know how many times he fired the gun and he denied shooting them after they fell to the ground. (R.T. 4307).

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[5] Both defense counsel objected to the Judge's comments about the gun, stating that the Judge was not a witness and it was improper for the Judge to interject and testify as an expert. The Court impliedly overruled the objection, stating that appellant's testimony was just nonsense and was palpably untrue. (R.T. 4308-4311).

2. Appellant's Family Witnesses

David Gonzales, Jr. was 9 years old and was in the third grade. Appellant was his uncle. He frequently talked to him on the telephone. They talked about how David was doing in school. Appellant told him to be good and to stay out of trouble. He loves appellant. (R.T. 4200-4203).

Valerie Gonzales was the older sister of appellant. In 1996, at the time of the shootings in this case, appellant was only 19 years old. As a boy, he liked to play football. When he was 14 years old, he joined a gang. While in the gang, he was shot and was taken to the hospital. (R.T. 4355-4357). Valerie and her seven year old daughter visit appellant in the jail every week. Appellant writes letters to them and he wrote a poem to his mother. (R.T. 4358-4360; Def. Exh. VVV).

Francis Ontiveros was another older sister of appellant. She has two children. One was a daughter who has Downs Syndrome. The daughter was six years old. While Francis was at work, appellant would take care of her daughter. Her daughter loves and misses him. Recently her mother was ill in the hospital. Appellant sent her flowers. Francis loves her brother. (R.T. 4364-4368). On cross-examination, she testified that her husband is a Puente 13 gang member and appellant had been arrested at her

home by Sheriff's deputies. (R.T. 4371).

William Marmolejo was a neighbor of appellant. He played sports with appellant when they were growing up. William's brother, Fernando Marmolejo, was a Puente gang member. Fernando was responsible for encouraging appellant to join the gang. Appellant was very young at the time. (R.T. 4372-4375). William Marmolejo believes appellant should receive a life sentence because he believes appellant was pushed into the crime. Appellant has a good side. For example, he helped watch his disabled daughter in the Special Olympics. (R.T. 4375-4377).

Edna Gonzales was the mother of appellant. When he was a child, he was a good son. He received good grades in school and was close to his mother. In Junior High School, his life started "going down". Edna Gonzales took a job working in a cafeteria at the La Puente School District. It was during this time that appellant decided to join a gang. (R.T. 4378-4380). His relationship with his parents and brothers and sisters was very good. Edna visits appellant every week. Appellant writes her letters, including a poem. Although her son has done terrible things and deserves to be punished, she expressed the hope he would receive a life sentence. She loves her son. She concluded her testimony by apologizing to Mrs. Eaton and the other two families. (R.T. 4381-4383).

3. Michael Soliz's Family Witnesses

Irene Arzola was the mother of Michael Soliz. She raised Michael by herself. They lived in La Puente. Michael had two brothers and two sisters. Michael never finished school. When he was 15 years old he became involved with a gang. (R.T. 4145-4149). Michael always treated her well. They were very close. She testified that she would like to see him live. (R.T. 4151-4152). Mrs. Arzola identified several photographs of Michael Soliz. Michael has a three year old daughter, Adrianna, and a four year old son, Isaac. (R.T. 4155-4158).

Steve Lara was a cousin of Michael Soliz. He testified that although Michael had made mistakes, he was basically a good person. (R.T. 4165-4169). Danny Lara was also a cousin of Michael Soliz. He testified that Michael Soliz was a good person and he hopes that his life will be spared. (R.T. 4159-4162). Tony Diaz was an older brother of Michael Soliz. He testified that Michael Soliz encouraged him to join the church when Michael was 12 years old. He believes that Michael is capable of showing loyalty. He is teachable and can learn from his experience. (R.T. 4174-4178).

Michael Landerman worked with Michael Soliz at Sunset Wire and Steel for about two or three years. He testified that Michael Soliz

was very helpful and helped him learn his job. (R.T. 4182-4185). Luz Jauregui has known Michael Soliz for seven years. He has been her boyfriend for three years. They plan to be married. She testified that Michael is a caring person, who has supported and helped her. They love each other very much. (R.T. 4195-4199).

Nancy Cowardin was a psychologist who administered several tests to Michael Soliz in April of 1998. She testified that Michael has above average intellectual abilities and knows right from wrong. He appreciated pro social behavior and has the ability to help other young people. In prison he could help other inmates learn to read and write. (R.T. 4318-4335).

ARGUMENTS

PRE-TRIAL ISSUES

I. THE COURT ERRED IN DENYING A SEVERANCE OF THE EATON MURDER FROM THE SKYLES AND PRICE MURDERS.

A. Factual Background

Before trial, appellant filed a written motion to sever his case from that of the co-defendant Michael Soliz and to sever the Eaton murder charge from the Skyles and Price murder charges. (C.T. 398-402). Appellant argued that the two murder cases occurred at different times and at different locations. The Eaton case was a market robbery-murder. The Skyles and Price case was a gang shooting. Appellant also argued that it was unfair to join the weak Skyles and Price case with the stronger Eaton murder case and that the improper joinder would deny appellant his right to a fair trial. (C.T. 398-399)[6].

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[6] Admittedly, appellant's severance motion was poorly drafted. The prosecutor responded to the motion as though it was only requesting a severance of defendants, and not a severance of counts. (C.T. 499, 508.) However, the severance motion argued that the evidence would show that Michael Soliz shot Skyles and Price, and appellant had no involvement in the crimes "except for his getting out of the car." (C.T. 399.) Thus, the motion implies that a severance of defendants would result in a de facto severance of the two murder cases, because all of the prosecution's evidence on the Skyles and Price murder case related solely to Michael Soliz, and would not be admissible against appellant at a separate trial.

Similar motions for a severance of the two murder cases and for a severance of defendants were filed on behalf of the co-defendant Michael Soliz. (C.T. 465-484). Soliz argued that the admission of appellant's extrajudicial statements at a joint trial would violate Soliz's constitutional right to confront the witnesses and thus a severance was required under Bruton v. United States (1968) 391 U.S. 123. (C.T. 469). Soliz also argued that joining the Eaton murder with the Skyles and Price murders would be prejudicial and that a severance was required based upon Williams v. Superior Court (1984) 36 Cal.3d 441. He argued that the two murder cases were entirely separate crimes, having no relationship to one another, and were not cross-admissible. Finally, he argued that the Skyles and Price murder case was extremely inflammatory, involving murders committed for the benefit of a criminal street gang and because of race; that the prosecution was joining a strong case with a weak case; and that the case involved the death penalty requiring a higher degree of scrutiny to ensure that the defendants receive a fair trial. (C.T. 480-481).

The prosecutor filed a written opposition to the motion to sever the two defendants (C.T. 499-507), and to the motion to sever the two murder cases. (C.T. 508-518). The prosecutor argued that the proper solution to the Bruton issue was for the court to use dual juries rather than

separate the trials. Such a solution was authorized under People v. Harris (1989) 47 Cal.3d 1047, 1066-1067. (C.T. 502-503). In opposing severance of the two murder cases, the prosecutor argued that "Based upon the ballistics evidence connecting the live round found in the Eaton robber-murder getaway van to the expended shell casings found in the Skyles-Price double murder scene, it is clear that at least one weapon used during the Eaton robbery-murder was the weapon used to kill victims Skyles and Price." (C.T. 515). He also argued that neither of the two murder cases was especially inflammatory; that there was no weak case-strong case distinction between the two cases; and that the absence of cross-admissibility, by itself, does not justify a severance. (Pen. Code §954.1) (C.T. 515-516).

On March 20, 1997, the Court held a hearing on the severance motion. The prosecutor advised the court that the statements of appellant could not be redacted to remove references to Michael Soliz. Rather than a severance, the prosecutor asked for the court to order dual juries. Counsel for appellant stated that he was aware of the Court policy to use dual juries and then stated that he would "submit" the motion. After submitting, he stated that he would still request a separate trial apart from the co-defendant because the appearance of the co-defendant at a joint trial might have some

prejudicial effect upon his client. (R.T. 27-29). The trial court then denied the severance motions and ordered that the case would proceed with two juries. The ruling was made without prejudice to the ability of either defendant to raise the severance issue on the trial date in the event that "some other reasons appear." (R.T. 29-30).

At a status conference on January 20, 1998, counsel for Michael Soliz advised the court that he was withdrawing his Bruton objection and was requesting a single trial with a single jury. Counsel for appellant joined in the request. (R.T. 84-87). The prosecutor stated that the tape recorded statements of appellant admitting that he personally killed all three murder victims, was reliable concerning his involvement in the crimes, except for the statement that he pulled the trigger and killed Elijah Skyles and Gary Price. The prosecutor stated that appellant was only an aider and abettor in the Skyles and Price murders. The evidence shows that he did not pull the trigger. If there were separate juries, the prosecutor would make the same argument to both juries. (R.T. 88-89).

In explaining his position, counsel for Michael Soliz stated that since the case was a death penalty case, he wanted to argue to the jury that it was appellant, and not Michael Soliz, who actually killed Skyles and Price. Such an argument might avoid a death verdict for Michael Soliz.

(R.T. 93-95). Appellant and Michael Soliz both personally waived their constitutional right of confrontation to allow the tape recorded statements of appellant to be admitted before a single jury. (R.T. 102-106). The court then accepted the waivers and ordered that a single jury would try the case. (R.T. 106-107). The court found that the waivers were valid and were entered into it for strategic reasons. (R.T. 108).

B. Joinder Of The Eaton Murder With The Skyles And Price Murders Resulted In A Violation Of Appellant's Federal Constitutional Right To Due Process Of Law.

The Court must reverse appellant's his convictions and death sentence on the grounds that it was error to deny his motion for severance of the Eaton murder from the Skyles and Price murders. The two murder cases were entirely separate from one another. The cases were not cross-admissible. The Skyles and Price case was a weak case in comparison with the Eaton murder case. On the Eaton murder case, the evidence established that appellant and Michael Soliz robbed the Hillgrove Market. During the course of the robbery, appellant shot and killed Lester Eaton, who resisted the robbery. On the Skyles and Price case, the evidence established that Michael Soliz shot and killed Elijah Skyles and Gary Price at a Shell gas station approximately three months after the Eaton murder. Appellant had

been riding in a car with Soliz just prior to the shooting. Appellant was standing next to the car at time that Soliz fired the fatal shots.

The central issue for the jury to decide in the Skyles and Price murder case was whether appellant aided and abetted Michael Soliz in the commission of the murders by his mere presence at the scene. In his final argument to the jury, the prosecutor improperly argued that the jury could use evidence of appellant's participation with Soliz in the Eaton robbery and murder, as evidence that appellant was guilty of aiding and abetting Soliz in the murders of Skyles and Price. (R.T. 2307-2309). Because it is highly probable that the jury used the evidence concerning the Eaton murder in order to convict appellant as an aider and abettor in the Skyles and Price murders, appellant was denied his federal constitutional right to due process of law and his convictions should be reversed. (United States v. Lane (1985) 474 U.S. 438, 446; Williams v. Superior Court (1984) 36 Cal.3d 441, 453-454; People v. Grant (2003) 113 Cal. App.4th 579, 589; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1083-1086).

Penal Code section 954 provides that: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . " Because all three murders were of the same class of crimes, the initial joinder met this aspect of the

statute. (People v. Sapp (2003) 31 Cal.4th 240, 257.) However, section 954 also provides that "the court in which a case is triable, in the interest of justice and for good cause shown, may in its discretion order that the different offenses . . . may be tried separately." A denial of a severance motion under this part of the statute is reviewed for an abuse of discretion. (People v. Gutierrez (2002) 28 Cal.4th 1043, 1120; People v. Mayfield (1997) 14 Cal.4th 668, 720.)

"The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring the charges be separately tried . . . Refusal to sever may be an abuse of discretion 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; People v. Bradford (1997) 15 Cal.4th 1229, 1315.)

Even if a trial court did not abuse its discretion in denying a pretrial motion for severance, the court must nevertheless reverse the judgement if the "defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process." (People v. Mendoza (2000) 24 Cal.4th 130, 162; People v. Arias (1996) 13 Cal.4th 92, 127.) The United States Supreme Court has stated that "Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." (United States v. Lane (1986) 474 U.S. 438, 446 n.8; Sandoval v. Calderon (9th Cir. 2001) 241 F.3d 765, 772; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1084.)

Error involving misjoinder affects substantial rights and requires reversal if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." (United States v. Lane, supra, 474 U.S. at 449.) The "principal concern lies in the danger that the jury here would aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges." (William v.

Superior Court (1984) 36 Cal.3d 441, 453; People v. Bean (1988) 46 Cal.3d 919, 940.)

In appellant's case, the prosecutor joined two murder cases together that were not similar or cross-admissible. The Eaton murder occurred during the robbery of a market. The Skyles and Price murders were a gang revenge shooting at a gas station. There was strong evidence establishing that appellant participated in the market robbery and shot Lester Eaton. In the Skyles and Price case, all of the witnesses identified Michael Soliz as the person who shot the two victims. Appellant merely stood by and watched the shooting. Defense counsel for appellant argued that appellant's mere presence at the scene did not constitute aiding and abetting in the Skyles and Price murders. The prosecutor urged for the jury to find appellant guilty of the Skyles and Price murders because the evidence showed that appellant and Soliz had earlier killed Lester Eaton. Nothing in the jury instructions prevented the jury from using the Lester Eaton murder evidence to convict appellant of the Skyles and Price murders. Thus, appellant suffered the same type of prejudicial error that resulted in due process reversals in Bean v. Calderon (9th Cir. 1998) 163 F.3d 1077, 1084-1086 and People v. Grant (2003) 113 Cal. App.4th 579, 587-594.

In Bean v. Calderon, supra, the defendant was tried and convicted for the murders of Beth Schatz and Eileen Fox. The murders occurred three days apart and involved intruders entering the homes of elderly women in the Sacramento area. The Court reversed the defendant's conviction on the Fox murder for improper joinder. First, the two murder cases were not cross-admissible and were not similar enough to establish a common modus operandi. Second, the prosecutor repeatedly urged the jury in final argument to consider both murders in concert. Third, the Court did not instruct the jury that it could not consider the evidence on one murder charge in determining the defendant's guilt on the other. The Court even stated to the jury that the offenses showed considerable similarity. Fourthly, there was strong evidence that the defendant had murdered Schatz, including the defendant's admission, while the evidence that he murdered Fox was weak, consisting primarily of evidence of his fingerprint on sunglasses found at the scene of the murder. In setting aside the conviction, the Court stated: "After careful examination of the record we conclude that joinder of the Schatz and Fox indictments deprived Bean of a fundamentally fair trial on the Fox charges." (Bean v. Calderon, supra, 163 F. 3d at 1083.) The Court also stated that "substantial disparity between the Schatz evidence and the Fox evidence prompts us to conclude that the

strong evidence of Bean's guilt in the Schatz crimes tainted the jury's consideration of Bean's complicity in the Fox offenses." (Id. at 1085.) Finally, the Court stated "As the joinder of the Schatz and Fox charges did in fact prejudice Bean's trial on the latter counts, we conclude that Bean's due process rights were violated." (Id. at 1084.)

In People v. Grant, supra, 113 Cal. App.4th 579, the Court of Appeal followed the approach taken in Bean v. Calderon supra, 163 F.3d 1073 and found that the improper joinder of two criminal charges denied the defendant his right to a fair trial and his constitutional right to due process of law under the Federal Constitution. In Grant, the defendant was charged with burglary and receiving stolen property. Both counts involved computer equipment stolen from a school on different occasions. On the burglary charge, the evidence established that a school had been broken into; a computer had been removed; and the defendant's car had been suspiciously parked outside of the school at the time of the burglary. The evidence on the receiving stolen property charge consisted of evidence of the defendant's possession of computer equipment in his home that had been stolen from another school three years earlier.

The Court found a federal due process violation based on several factors. First, the evidence on the burglary and receiving stolen

property charges was not cross-admissible. There were no common features or similarity rendering evidence of one charge admissible at a separate trial of the other. Second, the prosecutor urged the jury to draw the impermissible inference that the defendant was guilty of the burglary count based upon evidence that he knowingly possessed stolen computer equipment at his home, which was the evidence on the separate receiving stolen property count. Third, the trial court refused to give a limiting instruction cautioning the jury to decide the counts separately and not use evidence of one crime as proof of the other. Fourth, the evidence on the burglary charge was weak in comparison with the evidence on the receiving stole property count. However, the evidence on both counts was similar, because both involved computer equipment stolen from schools after school hours. In reversing the convictions on both counts for a federal due process violation, the Court stated: "Where, as here, the evidence on two counts is considerably similar, and is considerably stronger on one count than the other, it is highly probable that the jury will draw the impermissible conclusion that 'because he did it before, he must have done it again.'" (People v. Grant, supra, 113 Cal. App.4th at 593, citing Bean v. Calderon, supra, 163 F.3d at 1085.) That inference violated due process.

1. The Evidence On The Eaton Murder And The Skyles And Price Murders Was Not Cross-Admissible.

"[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (People v. Bradford (1997) 15 Cal.4th 1229, 1315-1316; People v. Balderas (1985) 41 Cal.3d 144, 171-172.) Evidence Code section 1101, subdivision (a) prohibits admission of evidence of a person's bad character to prove the conduct of that person on a specific occasion. However, Evidence Code section 1101, subdivision (b) provides that evidence of a person's bad character, including other crimes evidence is admissible when offered to prove some fact other than a person's disposition to commit such an act, when the evidence is relevant to prove some fact such as identity, intent, motive, or common plan. (People v. Ewoldt (1994) 7 Cal.4th 380, 393; People v. Balcom (1994) 7 Cal.4th 414, 423.)

In appellant's case, the robbery and murder of Lester Eaton at the Hillgrove Market and the gang revenge killing of Skyles and Price at the Shell gas station were not cross-admissible crimes. There was no similarity between the two crimes making one crime relevant to prove a disputed fact or issue in the second crime. The Eaton murder had robbery as the motive. The murder occurred when the robbery victim resisted. The Skyles and

Price murders were a gang revenge killing. Skyles and Price were killed in retaliation for an earlier murder of Billy Gallegos by rival Black gang members. Skyles and Price appeared to be members of the rival gang that had murdered Gallegos.

During final argument, the prosecutor argued that evidence of appellant's involvement in the Lester Eaton robbery and murder with Michael Soliz proved that appellant had prior knowledge that Michael Soliz intended to murder Skyles and Price. (R.T. 2309). He argued that because appellant and Soliz had already committed the Eaton robbery and murder together, that "They knew what each was about. They knew what each was going to do." (Id.) Because appellant did not shoot Skyles and Price, the issue at trial was whether appellant had knowledge of Michael Soliz's plan to kill Skyles and Price and whether appellant committed an act with the intent or purpose of encouraging or facilitating the commission of those murders. (People v. Beeman (1984) 35 Cal.3d 547, 560.)

Before a prior crime such as the robbery and murder of Lester Eaton can be admitted on the issue of appellant's knowledge and intent to aid and abet in the Skyles and Price murders, there must be evidence that the two crimes were substantially similar. Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the

charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (People v. Ewoldt, supra, 7 Cal.4th at 402-403.) On the issue of identity, the uncharged crime must be highly similar to the charged crime, so that the similarity is so distinctive as to be like a signature. (People v. Ewoldt, supra at 403.)

A lesser degree of similarity is required to establish relevance on the issue of intent. However, the uncharged crime must be sufficiently similar to the charged crime to support the inference that the defendant probably harbored the same intent in each instance. (People v. Ewoldt, supra, at 402, citing People v. Robbins (1988) 45 Cal.3d 867, 879.) In People v. Hayes (1990) 52 Cal.3d 577, 616-617 the Court upheld the admission of evidence of an uncharged subsequent robbery to prove that the defendant intended to rob the victim in the charged murder count. There were striking similarities between the two crimes, namely, luring the victims to a hotel room, assaulting them, and binding them with coat hanger wire. These similarities made it reasonable to infer that the defendant had the same robbery intent in both crimes. (Id. at 617.)

If there is no similarity between the prior crime and the present crime, the prior crime is irrelevant and inadmissable on the issue of intent. (People v. Thompson (1980) 27 Cal.3d 303, 314, 321; People v.

Guerrero (1976) 16 Cal.3d 719, 725-729.) In Thompson, evidence of a prior restaurant robbery was not similar and was not admissible in the trial of a later murder occurring at a residence. The prosecutor argued that the prior restaurant robbery was relevant to prove the defendant's intent to commit robbery at the time of the murder, bringing the case within the felony murder rule. The Court held that it was error to admit the evidence of the prior restaurant robbery. The lack of similarity between the restaurant robbery and the residential murder made evidence of the prior robbery irrelevant on the issue of the defendant's intent at the time of the murder.

In the Guerrero case, the defendant was charged with the murder of a 17 year old girl by striking her in the head after giving her a ride in his car. The prosecution offered evidence that on a prior occasion the defendant and two friends had raped another 17 year old girl and had threaten her with a wrench. This evidence was offered to prove that at the time of the murder the defendant harbored an intent to rape which would bring his case within the felony murder rule. The Court reversed the murder conviction and held that the evidence of the uncharged rape was not properly admitted to show the defendant's intent to commit rape at the time of the murder. Because of a lack of similarity between the prior rape and

the facts and circumstances surrounding the charged murder, the Court concluded that "the evidence of the Lopez rape is inadmissible to show intent to rape Miss Santana [the alleged murder victim]." (People v. Guerrero, supra, 16 Cal.3d at 729.)

In appellant's case the market robbery and murder of Lester Eaton was not similar to the gang revenge murders of Skyles and Price. Appellant's participation and the market robbery indicated that on this occasion he harbored an intent to steal. The fact that he had an intent to steal at the time of the Eaton murder was not relevant to prove that three months later appellant had knowledge of Michael Soliz's plan to murder Skyles and Price and that appellant had the intent to aid Soliz in the Skyles and Price murders. The facts of the two murder cases are too dissimilar to raise an inference that the commission of one crime was relevant to prove appellant's intent at the time of the commission of the second crime. Thus, there was no cross-admissibility between the two murder cases. This factor weighed in a favor of separating the two cases for trial.

2. The Prosecutor Urged The Jury To Draw Impermissible Inferences During Closing Arguments.

The greatest risk of prejudice from the improper joinder of

separate crimes is the risk that the jury will use evidence of one crime to convict the defendant of the other crime. (Williams v. Superior Court (1984) 36 Cal.3d 441, 453.) The risk of 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 (2003) 113 Cal. App.4th 579, 589-591; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1084.) The fact that the prosecutor in the Grant and Bean cases made such arguments to the jury was found to be a strong reason for concluding that the defendant had suffered prejudice and was denied due process as a result of the joinder of two unrelated crimes. (People v. Grant, supra 113 Cal. App.4th at 589-591; Bean v. Calderon, supra 163 F.3d at 1084.)

In appellant's case the prosecutor made the same type of argument. He argued that the jury should find appellant guilty of the Skyles and Price murders because the evidence showed that appellant had committed the robbery and murder of Lester Eaton. The prosecutor argued:

> "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." (R.T. 2307-2309)

In the chart used by the prosecutor during his closing argument it states "Soliz and Gonzales are crimies." (Supp. II, C.T.327). The implication was that since appellant and Soliz both committed the robbery and murder of Lester Eaton together, they were both guilty of the

Skyles and Price murder, even though only Michael Soliz fired the fatal shots. This argument was an effort to convict appellant of the Skyles and Price murder based upon evidence that appellant had a general disposition to commit crimes. It was an improper argument that violated appellant's federal constitutional right to due process of law.

Evidence Code section 1101, subdivision (a) expressly prohibits the use of other crimes evidence as evidence of a defendant's guilt of a charged crime if the only theory of relevance is that the defendant has a propensity or disposition to commit the charged crime and this propensity is circumstantial proof that the defendant behaved accordingly on the occasion of the charged offense. (People v. Thompson (1980) 27 Cal.3d 303, 316; People v. Kelley (1967) 66 Cal.2d 232, 238.) Evidence of a defendant's bad character or his propensity to commit crime in general is not excluded because it is irrelevant. Rather, "it 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; see also People v. Falsetta (1999) 21 Cal.4th 903, 915; People v. Alcala (1984) 36 Cal.3d 604, 631.) "Regardless of its probative value, evidence of other crimes always involves a risk of serious prejudice." People v. Thompson, supra,

27 Cal.3d at 318; People v. Griffin (1967) 66 Cal.2d 459, 466.) Convicting a defendant of a crime based solely on evidence that he had committed some other crime and was a person of general bad character would be a violation of the defendant's federal constitutional right to due process of law. (See, Estelle v. McGuire (1991) 502 U.S. 62, 70; Spencer v. Texas (1967) 385 U.S. 554, 563-564; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378.) The prosecutor's argument in appellant's case encouraged the jury to do just that.

3. The Court Gave No Cautionary Or Limiting Instruction Telling The Jury Not To Use Evidence Of The Eaton Murder To Convict Appellant Of The Skyles And Price Murders.

In cases where the prosecutor has improperly argued to the jury that evidence of one crime should be used to convict the defendant of a second crime, the courts have looked to the jury instructions to see if the harm done by the prosecutor's argument was lessened by a cautionary jury instruction. (People v. Grant (2003) 113 Cal. App.3d 579, 591-592; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1084.) For example, in Bean v. Calderon, supra, where the Court found that joinder of two murder cases resulted in a violation of the defendant's federal constitutional right to due process, the Court noted that the prosecutor repeatedly encouraged the jury

"to consider the two sets of charges in concert." (Id. at 1084) The Court stated that "The general instructions the trial court issued availed little in ameliorating the prejudice arising from joinder." (Id. at 1084) "[T]he instructions here did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other." (Id.)

In appellant's case, as noted above, the prosecutor encouraged the jury to use evidence of appellant's guilt in the robbery and murder of Lester Eaton in order to convict appellant of the murder of Skyles and Price. Nowhere in the jury instructions is there any cautionary instruction to the jury preventing the jury from using the evidence of one murder as proof of appellant's guilt in the second murder case.

An example of a cautionary instruction is CALJIC No. 2.50 which states that "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes." In appellant's case, rather than cautioning the jury concerning the limited use of the evidence, the jury was instructed pursuant to CALJIC No. 2.27 that "Testimony by one witness which you

believe concerning any fact is sufficient for the proof of that fact." (C.T. 676) This instruction would appear to authorize the use of evidence of one murder as proof the appellant committed the other murders.

Because no cautionary jury instruction was given in appellant's case, there was nothing to prevent the jury from using evidence of the Lester Eaton murder case as proof of appellant's guilt of the Skyles and Price murders. Since this was reasonably probable, the absence of any cautionary jury instruction weighs in favor of finding a due process violation based upon the improper joinder of the Eaton murder with the Skyles and Price murders.

4. The Skyles And Price Murder Case Was A Weaker Case Joined With The Stronger Eaton Murder Case.

In determining whether joinder of two separate murder cases has prejudiced the defendant, the court must consider whether "a weak case has been joined with a strong case, so that the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges." (People v. Bradford (1997) 15 Cal.4th 1229, 1315.) The principal concern that exists in joining a strong case with a weak case or two weak cases is the danger that the jury would aggregate all of the evidence and convict on both charges in a joined trial, whereas, in separate

trials, there might not be convictions on both charges. (Williams v. Superior Court (1984) 36 Cal.3d 441, 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." (Williams v. Superior Court, supra, 36 Cal.3d at 453-454.)

In appellant's case, the evidence establishing appellant's guilt on the Skyles and Price murders was weak evidence. Prosecution witnesses placed appellant at the scene of the shooting, but all of the eyewitnesses identified Michael Soliz as the shooter. Although the prosecutor argued to the jury that appellant was backup for Michael Soliz during the shooting, appellant's only act was his mere presence at the scene of the shooting, a fact which does not constitute aiding and abetting. (In re Michael T. (1976) 84 Cal. App.3d 907, 911 ["Mere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and a failure to prevent it does not amount to aiding and abetting."].)

In contrast, the evidence of guilt in the Lester Eaton robbery murder case was much stronger. The vehicle used during the robbery was later abandoned and appellant's fingerprints were found on papers inside

the vehicle, near the cash register drawer which was taken from the market during the robbery. Richard Alvarez testified that he picked up appellant and Soliz and drove them away from the abandoned van shortly after the robbery. Finally, Salvador Berber testified that appellant admitted shooting a market owner during a robbery. Thus, the evidence against appellant on the Lester Eaton robbery murder case was clearly stronger than the evidence on the Skyles and Price murder case.

The joinder of a weak case with a strong case is an additional factor supporting the conclusion that appellant was prejudiced by the joinder of the Eaton murder case with the Skyles and Price murder case. Where the evidence on one count is considerably stronger than the evidence on another count, "it is highly probable that the jury will draw the impermissible conclusion that because he did it before, he must have done it again." (People v. Grant, supra, 113 Cal. App.4th at 593; Bean v. Calderon, supra, 163 F.3d at 1085.)

5. The Skyles And Price Murder Case Involved Inflammatory Evidence.

Prejudice from joinder of two cases can also arise when one of the cases involves charges that are "unusually likely to inflame the jury against the defendant." (People v. Sapp, (2003) 31 Cal.3d 240, 258; People

v. Bradford, (1997) 15 Cal.4th 1129, 1315.) In Calderon v. Superior Court, (2001) 87 Cal. App.4th 933, 941 the Court in evaluating this factor in a severance argument noted that the execution-style murder in one of the counts in that case clearly qualified as a charge that might inflame the jury.

In appellant's case, the execution-style slaying of Skyles and Price, two teenage boys, ages 15 and 18, by Michael Soliz, was a highly inflammatory charge. Because of the inflammatory nature of the execution-style murders of Skyles and Price, the joinder of that case with the Lester Eaton murder may well have resulted in the jury concluding that appellant should also be held responsible for the inflammatory murders of Skyles and Price, based on his mere association with Michael Soliz, because appellant had killed Lester Eaton and was a person of general bad character.

The Skyles and Price murder charges were also inflammatory because the two victims were Black and the two defendants were Hispanic. Given the cross racial nature of the crime, there was a "risk of racial prejudice infecting" the trial. (Turner v. Murray (1986) 476 U.S. 28, 35.) Therefore, this factor, the inflammatory nature of one of the crimes, appears to weigh in favor of finding that joinder of the two murder cases was prejudicial and improper.

6. Since The Case Was A Capital Case, A Higher Degree Of Scrutiny Is Required.

Another factor to be considered by the court in evaluating whether a severance of counts should have been granted is whether any of the charges carries the death penalty or joinder of them turns the matter into a capital case. (People v. Bradford, supra, 15 Cal.4th 1229, 1315.) When one of the two 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 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." (Id.)

In appellant's case, appellant was initially charged with the death penalty on both the Lester Eaton murder and the Skyles and Price murders. The special circumstance alleged on the Eaton murder was robbery murder. A second special circumstance was alleged, namely, that appellant had committed multiple murders. Ultimately, the jury found both special circumstances to be true and appellant was sentence to death on the Lester Eaton murder charge. Because the death penalty is involved in this case, the court must apply a higher degree of scrutiny. This factor weighs in favor of finding that it was error to join the two murder cases.

7. The Gang Allegation, Common To Both Murder Cases, Does Not Justify The Prejudicial Joinder.

The gang allegation alleged and found by the jury on all five counts in this case does not cure the prejudice that resulted from the joinder of the two murder cases. The jury found that all of the crimes related to the Eaton robbery and murder case and to the Skyles and Price murder case were committed "for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of Penal Code section 186.22(b)." (C.T. 745-749). Although the gang allegation was common to both the Eaton case and to the Skyles and Price case, the presence of the gang allegation did not require that the two cases be joined.

The gang allegation could be proven separately in each murder case without relying upon the facts on the other case. The gang allegation required proof of a "pattern of criminal gang activity" which can be established by proof of "two or more" predicate offenses committed "on separate occasions, or by two or more persons." (Pen. Code §186.22, subd. (e)). The predicate offenses may be established by proof of the charged offenses in the case or by proof of earlier offenses committed by fellow gang members. (People v. Gardeley (1996) 14 Cal.4th 605, 625.)

In appellant's case, the prosecution established the pattern of criminal gang activity by presenting evidence of three gang crimes committed by fellow gang members. Detective Scott Lusk, a gang expert, testified concerning the facts of these three gang crimes. (R.T. 2081-2088). This brief testimony could have easily been presented twice, once in a separate trial involving the Eaton murder case, and the second occasion at the severed trial involving the Skyles and Price murder case.[7]

Furthermore, since appellant and Soliz were charged with two robberies and a murder in the Eaton case and two murders in the Skyles and Price case, the necessary predicate gang offenses could have been proven at separate trials based on evidence of the charged offenses themselves. The charges in the Eaton case would have established three predicate gang offenses committed by two or more persons and the charges in the Skyles and Price case would have established two predicate gang offenses committed by two or more persons. (See, People v. Zermeno (1999) 21 Cal.4th 927, 931; People v. Loeun (1997) 17 Cal.4th 1, 9-10.) Thus, joinder

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[7] Detective Lusk's testimony establishing the three predicate gang crimes was brief. He testified that: (1) in September of 1990 Puente gang members Michael Ortega and David Cavillo committed an attempted murder; (2) in November of 1995 Puente gang member Jose Torres robbed a pizza delivery man; and (3) in April of 1997, Puente gang members Augustine Mejorado and Ceasar Montivaros were convicted of six armed robberies. (R.T. 2081-2088)

of the Eaton murder case with the Skyles and Price murder case was not necessary for the prosecution to prove the gang allegation on all five counts.

On the other hand, the existence of the gang allegation increases the potential prejudice inherent in the joinder of these two separate murder cases. In Williams v. Superior Court, (1984) 36 Cal.3d 441, 450, the Court found that the gang related nature of two separate murder charges was a factor that weighed in favor of severing the two murder cases. The Court stated "In fact, the one factor they suggest--evidence of common gang membership--might very well mitigate against admissibility of one offense in the trial of the other, since it is arguably of limited probative value, while creating a significant danger of unnecessary prejudice." (William v. Superior Court, supra, 36 Cal.3d at 450 citing People v. Cardenas (1982) 31 Cal.3d 897 and People v. Perez (1981) 114 Cal. App.3d 470, 477.)

In Calderon v. Superior Court (2001) 87 Cal. App.4th 933, 940-941 the Court ordered the severance of a murder case from two separate counts of attempted murder occurring on a different occasion in a case where a gang allegation was alleged under Penal Code section 186.22, subdivision (e). The Court noted that the street gang enhancement could be proved in each case separately without proof of any crimes charged in the

other case. In Calderon, the Court stated that the gang allegation "points up the problem of prejudice the joinder presents" because there was a danger the jury would convict Calderon "as an aider and abettor of the July 1 murder and attempted murder merely because he is a member of the same gang as Rivera." (Id. at 940-941.)

Thus, the gang allegation in this case is not a basis for upholding the joinder of the Eaton case with the Skyles and Price case. The risk of the jury convicting appellant of the Skyles and Price murder based upon evidence of his involvement in the Eaton murder was not lessened by the gang allegation. The risk was increased. The gang allegation did not make the two crimes similar or cross-admissible. If anything, the gang allegation increased the prejudice associated with joinder and is a further basis for finding that appellant's constitutional right to due process was violated in this case.

8. The Prejudicial Joinder Requires Reversal Of The Convictions And Death Sentence.

At a minimum, appellant urges the Court to reverse his murder convictions on the Skyles and Price case, Counts Four and Five. Based upon the prosecutor's final argument and the lack of any cautionary instruction to the jury, it is reasonably probable that the jury convicted

appellant of the Skyles and Price murders based upon evidence related to his involvement in the Lester Eaton murder. Since the Skyles and Price murders were the weaker of the two cases and it was a close question concerning whether appellant aided and abetted Soliz in the Skyles and Price killings or whether he was not guilty because he was merely present at the scene, the Court should reverse the convictions on Counts Four and Five. Indeed, this was the approach taken by the Court in Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1083-1086, where the weaker of the two murder cases was reversed for prejudicial joinder and a violation of federal due process of law.

Appellant also urges the court to reverse his convictions on Counts One, Two, and Three, the convictions for the two robberies and the murder in the Lester Eaton case. Improper joinder of offenses may result in reversal of all of the improperly joined offenses if the defendant can show prejudice in both of the improperly joined cases. This was the approach taken in People v. Grant (2003) 113 Cal. App.4th 579, 593-594.

In Grant, the court reversed both a burglary conviction and a receiving stolen property conviction based upon a finding that the improper joinder violated the defendant's right to due process of law. In that case, the prosecutor urged the jury to infer the defendant was guilty of the

burglary charge, because the evidence showed that he was in possession of stolen property, similar to the missing property in the burglary case, and vice versa. There was nothing in the jury instructions preventing the jury from doing so. Under these circumstances the Court held the defendant was denied his right to a fair trial on both charges. The Court stated that "[f]or all these reasons, it is reasonably probable that joinder affected the jury's verdict on both counts." (People v. Grant, supra, 113 Cal. App.4th at 594.)

In appellant's case, the prosecutor expressly argued to the jury that appellant was guilty of the Skyles and Price murders because he committed the Eaton murder with Michael Soliz. But the prosecutor did not stop there. In the chart he used in final argument he set forth the prosecutor's main reasons for convicting Gonzales and Soliz. The first reason at the top of the chart states: "Soliz and Gonzales are crimes." Next to that statement is the word: "PUENTE." (Supp. II, C.T. 327). Puente is the name of the street gang to which appellant and Soliz belonged. Although the chart focuses only on the Skyles and Price murder case, the logic of this argument applies equally to the Lester Eaton murder case.

In other words, the prosecutor was arguing that if Soliz and appellant committed crimes together on one occasion, then they must have committed crimes together on the second occasion. Because this argument

urged the jury to infer guilt of one crime from evidence of the commission of a separate crime, the improper inference of guilt could have been drawn by the jury in both directions. Thus, appellant was equally prejudiced on the Lester Eaton murder case from the improper joinder with the Skyles and Price murder case, based upon the prosecutor's improper argument and the chart used during his argument. The court should therefore reverse all five convictions and the death sentence on Count One for the Lester Eaton murder conviction.

If the Court disagrees and only reverses the Skyles and Price murder convictions in Counts Four and Five, that reversal should nevertheless warrant a reversal of appellant's death sentence on Count One, the Lester Eaton murder count. At appellant's retrial on the penalty phase on Count One, the jury was told repeatedly that appellant had already been convicted on Counts Four and Five of the first degree murders of Skyles and Price. (R.T. 2826-2829; 2863-2869). The jury was also told that the special circumstance allegation of multiple murder had been found in appellant's case by virtue of his conviction of three counts of murder. Finally, the prosecutor vigorously argued for the jury to impose the death penalty on appellant for the Lester Eaton murder because appellant had also been convicted of the first degree murders of Skyles and Price. (R.T. 4387-

4389; 4430-4439). In fact, the Skyles and Price murder convictions were probably the most compelling reason for the jury to return a verdict of death upon appellant in the Lester Eaton case.

If the first degree murder convictions on the Skyles and Price murders are now reversed because of a denial of appellant's constitutional right to due process of law based upon the improper joinder of counts, then appellant's death sentence on the Eaton murder should also be reversed. Reversal of appellant's death sentence is required because there is a reasonable possibility that the death verdict on the Eaton case was imposed by the jury because of the cumulative nature of the Skyles and Price murder convictions, which have now been rendered invalid. (Johnson v. Mississippi (1988) 486 U.S. 578, 584-585; People v. Brown(1988) 46 Cal.3d 432, 448.)

At appellant's penalty phase trial, the jury was instructed to weigh the aggravating and mitigating circumstances and to return a judgement of death if each of the jurors was "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (C.T. 926-927). Among the aggravating factors the jury was to consider was "The 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." (C.T. 921). The jury was also instructed that both defendants had previously been convicted of the first degree murder of Lester Eaton; the special circumstance of murder during the commission of a robbery; the first degree murders of Gary Price and Elijah Skyles; and the special circumstance of multiple murder. (C.T. 920).

California's death penalty law is a weighing system requiring the jury to weigh the aggravating circumstances against the mitigating circumstances in order to determine whether to impose the death penalty rather than life imprisonment. (People v. Bacigalupo (1993) 6 Cal.4th 457, 470; People v. Brown, (1983) 40 Cal.3d 512, 541-545; Alan v. Woodford (9th Cir. 2004) 366 F.3d 823, 857.) Thus, when an appellate court has invalidated one or more aggravating factors, the jury's decision to impose the death penalty is called into serious question. There is a real risk that the jury's decision to impose the death penalty rather than life imprisonment may have turned on the weight it gave to an invalid aggravating factor. Therefore, the United States Supreme Court has held that a death sentence must be reversed in any case where the jury considered an invalid aggravating factor unless from all of the circumstances of the case, the jury's consideration of the invalid aggravating factor was "harmless beyond a reasonable doubt" under the standard set forth in Chapman v. California,

(1967) 386 U.S. 18, 23. (Sochor v. Florida, (1992) 504 U.S. 527, 532; Sanders v. Woodford, (9th Cir. 2004) 373 F.3d 1054, 1060.)

If the court reverses the appellant's first degree murder convictions in the Skyles and Price case, then the jury considering appellant's death sentence in the Lester Eaton murder case would have considered an aggravating circumstance that was later rendered invalid by this Court's reversal of those murder convictions. The jury's consideration of the invalid murder convictions was not harmless beyond a reasonable doubt in this case. The most serious aggravating factor for the jury to consider on whether to impose the death penalty for the murder of Lester Eaton was the fact that appellant had also been convicted of two counts of first degree murder in the Skyles and Price case. Because the jury was instructed that appellant had already been convicted of those two murders, appellant was unable to effectively argue that he was merely present at the scene and was not criminally responsible for the murders of Skyles and Price. Appellant was substantially prejudiced by the jury's consideration of the invalid aggravating circumstance of his first degree murder convictions of the Skyles and Price murders. Therefore, if the court reverses the Skyles and Price murder convictions for improper joinder and a violation of due

process, then the court must also reverse appellant's death sentence on the Lester Eaton murder.

9. The Pre-trial Severance Motion Adequately Raised The Issue Of The Severance Of The Two Murder Investigations

The motion for severance filed by appellant's trial counsel appears to have been interpreted by the prosecutor as only requesting a separate trial from the co-defendant Michael Soliz and not requesting a severance of the Eaton murder case from the Skyles and Price murder case. (C.T. 499, 508). Counsel for the co-defendant Michael Soliz filed two separate motions for severance, one for a severance of defendants (C.T. 457), and a second for a severance of the two murder cases. (C.T. 476). The prosecutor briefed both the severance of defendants issue and the severance of murder counts issue. At the hearing on the severance motions, the court denied the severance motions of both defendants, but stated that it would order two juries to hear the evidence to prevent the Soliz jury from hearing the confession of appellant as required by People v. Aranda, (1965) 63 Cal.2d 518. During the hearing, the court and counsel only discussed the severance of defendants issue. The severance of counts issue was left to the court's consideration of the briefs. (R.T. 27-30)

An examination of appellant's severance motion does establish that counsel for appellant argued in his motion that the court should sever the Eaton murder case from the Skyles and Price murder case. The motion is entitled "Motion For Separate Trials/Severance." (C.T. 398). In the motion, counsel argued that the two murder cases were totally different and that the Skyles and Price case was a weak case. The motion states:

> 1. Both these murders are totally different in time, acts, and allegations. One possibly shows that a motive was gang related. The other one shows it might have been financially related. The acts of Mr. Soliz, if joined with Mr. Gonzales would detrimentally effect his ability to receive a fair trial.
>
> 2. The gang acts supposedly done by Mr. Soliz in the murders of the two young black gentlemen appears, from the D.A.'s arguments not to involve Mr. Gonzales, except for his getting out of the car. To join them based upon a very weak allegation if (sic) unfair and unduly prejudiced (sic) against Mr. Gonzales. (C.T. 398-399).

The language of the motion was legally sufficient to preserve for appeal the severance of counts issue because this is a death penalty case. In a death penalty case, Penal Code section 1239, subdivision (b) imposes "a duty upon this court to make an examination of the complete record of the proceedings . . . to the end that it be ascertained whether defendant was given a fair trial." (People v. Easley (1983) 34 Cal.3d 858, 863; People v.

Stanworth (1969) 71 Cal.2d 820, 833.) Thus, a technical insufficiency in the form of an objection will be disregarded and the entire record will be examined to determine if a miscarriage of justice resulted. (People v. Frank (1985) 38 Cal.3d 711, 729 n.3.) For example, in People v. Bob (1946) 29 Cal.2d 321, 325, this Court found that a defendant's trial objection that a statement was "secondary evidence" was sufficient to raise an objection that the evidence was "hearsay." In light of the foregoing language in the appellant's severance motion and the holdings in the Frank and Bob cases, the Court must find that appellant's severance motion filed by trial counsel did preserve for appeal appellant's severance of counts argument.

II. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE TAPE RECORDED CONVERSATION BETWEEN APPELLANT AND SALVADOR BERBER IN THE SHERIFF'S VAN

A. Factual Background

Before trial, appellant filed a motion to suppress his tape recorded statements to Salvador Berber while appellant was being transported to court in a Sheriff's van. (R.T. 403-408). The motion stated that appellant had been subjected to custodial interrogation by Salvador Berber without being advised of his constitutional rights under Miranda v. Arizona (1966) 384 US 436. The motion also stated that appellant had been questioned in the absence of his counsel in violation of Massiah v. United States (1964) 377 U.S. 201. (C.T. 405-408).

The prosecutor filed an opposition to the motion to suppress. (C.T. 485-492) In the opposition, the prosecutor summarized the facts. (C.T. 486-487) Both counsel stipulated that the facts set forth in the prosecutor's opposition were the correct facts upon which the court could make a ruling. (R.T. 804). The facts were as follows: On September 25, 1996, appellant was transported from the Men's Central Jail to the Pomona Superior Court in a Sheriff's Van. Unknown to appellant, the van was wired to record conversations between him and another inmate, Salvador Berber, who had been placed in the van. Appellant had previously admitted

his participation in the Eaton robbery-murder and the Skyles-Price double murder to Berber, who had advised Sheriff's Detectives of the admissions. Berber, who was pending trial in his own robbery case, had agreed to ride with appellant in the hope that appellant would repeat his admissions on tape. During the ride to and from Pomona Superior Court, appellant and Berber engaged in a conversation during which appellant made several incriminating statements about his participation in both the Eaton robbery-murder and the Skyles-Price double murder. (C.T. 486-487)

At the time of the September 25, 1996 statements, appellant had not been charged with any offenses arising from either the Lester Eaton murder or the Skyles and Price murders. Appellant was a sentenced prisoner who was serving his sentence in the Los Angeles County Jail. Earlier, on July 9, 1996, appellant had pleaded guilty to the felony offense of possession of methamphetamine. (C.T. 487) Appellant had received a sentence of 16 months as a result of that guilty plea. (C.T. 1108) It was undisputed that appellant was represented by an attorney in the criminal case charging him with possession of methamphetamine. (C.T. 405)

The prosecutor argued that Miranda warnings were not required because appellant was being questioned by an inmate and not a law enforcement officer. (Illinois v. Perkins (1990) 496 US 292, 296; People v.

Webb (1993) 6 Cal.4th 496, 526; People v. Williams (1988) 44 Cal.3 1127, 1141-1142; People v. Guilmette (1991) 1 Cal. App. 4th 1534, 1539; 1540.) The prosecutor also argued there was no violation of appellant's right to counsel because appellant had not been charged with the murders and the Sixth Amendment right to counsel is "offense-specific." (McNeil v. Wisconsin (1991) 501 US 171, 175; Maine v. Moulton (1985) 474 US 159, 170; People v. Webb (1993) 6 Cal. 4th 494, 527.) (C.T. 488-491)

At the hearing on the motion to suppress, appellant argued that his statements should be suppressed under Miranda because there was an agency relationship between Salvador Berber and the Sheriff's Department. Since appellant was in custody and was not advised of his constitutional rights under Miranda, the statements were inadmissible. (R.T. 801-803) The prosecutor argued that the Miranda decision did not apply because no police officer was involved in the questioning of appellant. He also argued there was no violation of the right to counsel because appellant had not been charged with any of the murders and therefore he had no Massiah right to counsel on the murder charges. Appellant had been charged, convicted and sentenced in a drug case. (R.T. 804-805)

The court denied the motion to suppress the evidence. The

court found that Miranda did not apply because appellant had been questioned by another inmate and not a law enforcement officer. Even though the fellow prisoner was acting as an agent of the police, this constituted a mere strategic deception and did not require suppression of the evidence. (R.T. 805-807)

Appellant now argues on appeal that the trial court erred in denying the motion to supress his tape recorded statements. The statements were obtained in violation of appellant's privilege against self-incrimination under Miranda and in violation of his right to counsel under Massiah. The failure to supress this evidence was reversible error. The Court should reverse both appellant's convictions and death sentence.

B. Appellant's Statements Were Obtained In Violation Of His Federal And State Constitutional Privilege Against Self Incrimination Under Miranda

In Miranda v. Arizona (1966) 384 U.S. 436, 444, the United States Supreme Court held that a person questioned by the police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Statements obtained in violation of this rule cannot be used to

establish guilt. (Miranda v. Arizona, supra, 384 U.S. at 444; Dickerson v. United States (2000) 530 U.S. 428, 439-440; People v. Neal (2003) 31 Cal.4th 63, 79-80; People v. Storm (2002) 24 Cal.4th 1007, 1021.)

The Miranda advisements are required only when a person is subjected to "custodial interrogation." (Miranda v. Arizona, supra, 384 U.S. at 444; Rhode Island v. Innis (1980) 446 U.S. 291, 301; People v. Micky (1991) 54 Cal.3d 612, 648.) A defendant who is in jail serving a sentence is in custody for purposes of Miranda and statements obtained from the defendant through police interrogation without Miranda warnings are inadmissible in evidence. (Mathis v. United States (1968) 391 U.S. 1, 4-5; People v. Woodberry (1968) 265 Cal. App.2d 351, 354-356; Jackson v. Giurbino (9th Cir. 2004) 364 F.3d 1002, 1008-1009.)

In Illinois v. Perkins (1990) 496 U.S. 292, the Supreme Court considered whether a suspect's rights were violated when, without Miranda warnings, he was tricked into making incriminating statements to an undercover officer posing as a fellow inmate. The Court concluded that Miranda warnings are not necessary in such a case because the ingredients of a police-dominated atmosphere and compulsion are not present when an incarcerated person speaks freely to a person that he believes is a fellow inmate. (Id. at 296-297). The Court stated that "Where the suspect does

not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced." (Id. at 299; accord People v. Webb (1993) 6 Cal.4th 494, 526; People v. Williams (1988) 44 Cal.3d 1127, 1141; People v. Guilmette (1991) 1 Cal. App.4th 1534, 1540.)

The Perkins decision did not fully address all of the concerns raised in the Miranda decision. Miranda was not concerned solely with police coercion. It dealt with any police tactic that may operate to compel a suspect in custody to make incriminating statements without full awareness of his constitutional rights. (See Miranda v. Arizona, supra, 384 U.S. at 468.) "The purpose of [the Miranda] admonitions is to combat what the Court saw as inherently compelling pressures at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of foregoing it." (Estelle v. Smith (1981) 451 U.S. 454, 467, quoting Miranda v. Arizona, supra at 467.) When appellant was questioned by a fellow inmate, he was effectively tricked into waiving his Fifth Amendment privilege against self incrimination.

In Rhode Island v. Innis (1980) 446 U.S. 291, the Court held that interrogation under Miranda need not amount to actual questioning and may instead be the "functional equivalent" of such questioning. In Innis,

two police officers exchanged comments in the suspect's presence about the danger that some child might happen upon the missing murder weapon if it were not found. The suspect broke into the conversation to tell the officers where the gun was. Under the facts of the Innis case, the Court found no interrogation. However, the Court stated that the "functional equivalent" of interrogation would include "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (Id. at 300.)

When law enforcement officers use another inmate in order to question a defendant in the jail, the police are engaging in actions that are reasonably likely to elicit an incriminating response from the defendant within the meaning of the Innis case. When law enforcement officers use another inmate in a jail to question a suspect, the other inmate becomes the agent of the law enforcement officers. (See Stapleton v. Superior Court (1968) 70 Cal.2d 97, 103 [Private investigator became agent of the police]; Raymond v. Superior Court (1971) 19 Cal. App.3d 321, 325 [Defendant's 12 year old son became agent of the police].) Although a private citizen is not required to advise another individual of his rights before questioning, if the private citizen is an agent of the police or there is evidence of

complicity on the part of law enforcement officials in the interrogation process, then the Miranda decision applies to the interrogation. (In re Deborah C. (1981) 30 Cal.3d 125, 130-134; In re Eric J. (1979) 25 Cal.3d 522, 526-528; People v. Mangiefico (1972) 25 Cal.App.3d 1041, 1049.) In appellant's case, Salvador Berber was clearly acting as an agent of law enforcement when he questioned appellant concerning the murders. Because appellant was not advised of his Miranda rights, his tape recorded statements in the van should have been suppressed.

Several cases decided prior to Illinois v. Perkins, supra, applied this agency theory when law enforcement officers used another inmate to interrogate a suspect in the jail. (See Holyfield v. State (Nev. 1985) 711 P.2d 834 [police use of jail inmate to question defendant in city jail required suppression of defendant's statements in the absence of Miranda warnings]; State v. Perkins (Mo. 1988) 753 S.W. 2d 567 [Miranda violated where defendant was questioned by his brother, who was acting as a police agent, and defendant was not advised of his rights]; Chalker v. State (1987) 184 Ga. App. 596; 362 S.E. 2d 152 [defendant's statements suppressed where defendant was custodially interrogated by his girlfriend, who was acting as an agent of the police, in the absence of a warning concerning his Miranda rights]; Commonwealth v. Bordner (1968) 432 Pa.

405, 247A.2d 612 [Miranda violated by police use of defendant's mother to interrogate her son in custody without warning him of his Miranda rights].) Since this agency argument was never considered by the Court in Illinois v. Perkins, supra, appellant urges the Court to consider it now. Salvador Berber was clearly an agent of law enforcement when he questioned appellant concerning the murders. Since appellant was in custody, the questioning constituted custodial interrogation within the meaning of Miranda. The failure of Berber to advise appellant of his constitutional rights under Miranda required the Court to suppress appellant's statements under the Fifth Amendment of the United States Constitution.

Appellant's statements should also have been suppressed under the California Constitution. Article I, Section 24 of the California Constitution states that the "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Article I, Section 15 of the California Constitution states "Persons may not ... be compelled in a criminal case to be a witness against themselves." In the past, this Court has held that the state Constitutional privilege against self incrimination may afford greater protection to an individual than the protections under the United States Constitution. (People v. Houston (1986) 42 Cal.3d 595, 609.)

In Boehm v. State (Nev. 1997) 944 P.2d 269, the Nevada Supreme Court held that conversations between the defendant and a cell-mate, who was wired and deliberately placed in the defendant's cell as a police agent, were the functional equivalent of express custodial interrogation. Since the defendant had not been advised of his rights under the Miranda decision, the statements were inadmissible in evidence. The Court noted that its earlier decision in Holyfield v. State (Nev. 1985) 711 P.2d 834 had been overruled in its interpretation of federal law by Illinois v. Perkins (1990) 496 U.S. 292. The Court nevertheless ordered suppression of the statements of the defendant on the grounds that the defendant's right against self incrimination as guaranteed by the Nevada Constitution had been violated. (Id. at 271.) Appellant urges the Court to reach a similar conclusion with respect to appellant's statements under the California Constitutional privilege against self incrimination.

If the Court finds a violation of the California Constitutional privilege against self incrimination, the remedy should be suppression of the evidence. In two cases this Court has held that evidence obtained in violation of either the state or federal constitutional privilege against self incrimination may not be suppressed unless exclusion is compelled by the federal Constitution. (People v. Markham (1989) 49 Cal.3d 63; People v.

May (1988) 44 Cal.3d 309.) This result was held to be mandated by Article I, Section 28, subdivision (d) of the California Constitution, commonly referred to as the "truth-in-evidence law" and Proposition 8. Proposition 8 provides in part that "Except as provided by statute hereafter enacted by a two-thirds vote of the membership of each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding ..." (See also In re Lance W. (1985) 37 Cal.3d 873, 879.)

Appellant urges the Court to reconsider its holdings in Markhan and May in light of the Court's subsequent decision in Raven v. Deukmejian (1990) 52 Cal.3d 336. In Raven, the Court declared unconstitutional a ballot measure purporting to amend the California Constitution. The ballot measure, Proposition 115, enacted Article I, Section 24 of the California Constitution which required California courts in criminal cases to interpret 13 constitutional rights under the California Constitution in a manner consistent with the Constitution of the United States. The Court held that this section of Proposition 115 affected a constitutional revision rather than a mere amendment and was thus invalid. Revisions of the California Constitution may only be accomplished by convening a constitutional convention or by obtaining a legislative

submission of the measure to the voters. (Raven v. Deukmejian, supra, 52 Cal.3d at 349-356.)

In Raven, the Court noted that Article I, Section 24, resulted in California courts no longer having authority to interpret the state Constitution in a manner more protective of defendant's rights than those extended by the federal Constitution as construed by the United States Supreme Court. (Raven v. Deukmejian, supra 53 Cal.3d at 352.) This had the improper effect of causing a fundamental change in our state governmental plan by vesting a critical portion of the state judicial power in the United States Supreme Court. (Id. at 355.) Because Proposition 8 makes a similar fundamental change in California's governmental plan by vesting critical portions of the state judicial power in the United States Supreme Court, it should also be declared unconstitutional under Raven v. Deukmejian, supra. This would restore the exclusionary rule for statements obtained in violation of the California Constitutional privilege against self incrimination and the Court could find that it was error to admit appellant's statements in this case under the California Constitution.

C. Appellant's Statements Were Obtained In Violation Of His State And Federal Constitutional Right To Counsel Under Massiah

In Massiah v. United States (1964) 377 U.S. 201, 206-207, the United States Supreme Court held that once an adversary criminal proceeding has been initiated against the accused, and the defendant's constitution right to the assistance of counsel has attached, any incriminating statement the government deliberately elicits from the defendant in the absence of counsel is inadmissible at trial against the defendant. (See also Maine v. Moulton (1985) 474 U.S. 159, 160; In re Wilson (1992) 3 Cal.4th 945, 950.) In order to prevail on a Massiah claim involving the use of a jailhouse inmate, the defendant must demonstrate that both the government and the informant took some action, beyond mere listening, that was designed to deliberately elicit incriminating remarks from the defendant. (Kuhlmann v. Wilson (1986) 477 U.S. 436, 459; People v. Gonzalez (1990) 51 Cal.3d 1179, 1240.)

"[T]he essential inquiry is whether the government intentionally created a situation likely to induce the accused to make incriminating statements without the assistance of counsel." (People v. Frye (1998) 18 Cal.4th 894, 993.) To prevail on his claim, "the defendant must show (1) that the informant acted as a government agent at the behest of the police in accordance with a preexisting agreement and with the expectation of receiving a benefit or advantage, and (2) that the informant deliberately

elicited incriminating statements." (People v. Frye, supra, 18 Cal.4th at 993; In re Neely (1993) 6 Cal.4th 901, 915.)

The leading case on the use of a jailhouse inmate to question an in-custody defendant is United States v. Henry (1980) 447 U.S. 264. In that case, officers contacted an informant who had previously been paid for information, and who was in the same jail as defendant Henry. Henry had been indicted on bank robbery charges and was awaiting trial. The officers placed the informant in the same cell as Henry, and instructed the informant "To be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." (Id. at 266.) The informant obtained incriminating statements from Henry and testified against Henry at his trial. The informant was paid for his information. (Id. at 266-267.)

The issue in Henry was whether the officers had "deliberately elicited" the incriminating statements. The Supreme Court found three factors important: (1) the informant was paid for his information; (2) the informant was ostensibly only a fellow inmate; and (3) the conversation occurred while Henry was in custody and under indictment. (United States v. Henry, supra, 447 U.S. 264, 270.) Applying these factors, the Court held that Henry's statements to the informant should not have been admitted at

trial. The Court stated that "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." (Id. at 274.)

The Supreme Court also ruled that Henry had not waived his right to the assistance of counsel when he spoke with the jailhouse informant. It was undisputed that Henry was unaware that the informant was working for the Government. The Court stated that "the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government." (United States v. Henry, supra, 447 U.S. at 273.)

In a later case, the United States Supreme Court stated that the Sixth Amendment right to counsel under Massiah is "offense specific" and does not attach until a prosecution is commenced by way of a formal charge. (McNeil v. Wisconsin (1991) 501 U.S. 171, 175; Texas v. Cobb (2001) 532 U.S. 162, 163-164; People v. Webb (1993) 6 Cal.4th 494, 527.) Thus, even after an accused has counsel with regard to a particular charged offense, he may be questioned by police following Miranda advisements with respect to any uncharged offense. "Incriminating statements

pertaining to those uncharged offenses, as to which the Sixth Amendment right has not yet attached, are admissible at a subsequent trial of those offenses." (People v. Slayton (2001) 26 Cal.4th 1076, 1079; People v. Bradford (1997) 15 Cal.4th 1229, 1313.)

In denying appellant's motion to suppress his tape recorded statements made to Salvador Berber in the Sheriff's van, the trial court stated that appellant's case was controlled by People v. Webb (1993) 6 Cal.4th 494. The Court stated that appellant's talking to a fellow inmate who was a police informant was a mere strategic deception that did not violate appellant's constitutional rights. (R.T. 805-807) In the Webb case, the defendant had been arrested on narcotics charges and had counsel appointed to represent him on those charges, when his girlfriend, acting as a police informant, questioned him in the jail concerning his involvement in a murder. (People v. Webb, supra, 6 Cal.4th at 524-525.) The Court found no Massiah violation because the defendant in Webb had not been charged with the murder and thus his Sixth Amendment right to counsel under Massiah did not apply. (Id. at 526-528.)

In appellant's case, it is true that appellant had not been formally charged with murder at the time that he was being questioned in the Sheriff's van by Salvador Berber. However, appellant was in custody

on drug charges and had counsel appointed to represent him on those charges. Where the prosecutor and the Sheriff's Department know that a defendant has counsel in connection with one criminal charge, they should be required to communicate with the defendant through that counsel. It should be a violation of a defendant's Sixth Amendment right to counsel for a prosecutor to use the police or a jailhouse informant to contact the defendant for the purpose of interrogating him in the absence of his counsel, where he has counsel, even in cases where the questioning relates to charges that have not yet been filed against the defendant.

The California Rules of Professional Conduct governing attorneys prohibit a lawyer from communicating with another party in a case without the consent of the party's lawyer. (Leoni v. State Bar (1985) 39 Cal.3d 609, 617; Crane v. State Bar (1981) 30 Cal.3d 117, 121; Mitton v. State Bar (1969) 71 Cal.2d 525, 534.) Rule 2-100 of the Rules of Professional Conduct of the California State Bar provides that "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Jorgensen v. Taco Bell Corp. (1996) 50 Cal.App.4th 1398, 1400; United States vs. Lopez (9th Cir. 1993) 4 F.3d

1455, 1458.) This rule applies to prosecutors. (People v. Manson (1976) 61 Cal.App.3d 102, 164 ["The deputy district attorney is no less a member of the State Bar than any other admitted lawyer."].)

"This rule is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice." (Mitton v. State Bar, supra, 71 Cal.2d at 534.) "The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist." (Ibid)

In People v. Sharp (1983) 150 Cal.App.3d 13, the Court reversed a defendant's bank robbery conviction because the prosecutor had directed the Sheriff's Department to conduct a lineup with the defendant in the absence of his counsel with witnesses on the charged bank robbery and with witnesses on other robbery charges that had not yet been filed against the defendant. The Court noted that under federal law, the right to counsel only applied to lineups conducted after the defendant had been formally charged, but the California Constitution gave the defendant the right to

counsel at preindictment lineups. (People v. Sharp, supra, 150 Cal.App.3d at 17 citing People v. Bustamante (1981) 30 Cal.3d 88.) Since the prosecutor knew that the defendant was represented by counsel on the bank robbery charge, his directing the Sheriff to conduct the lineup without the presence of defense counsel, resulted in the obtaining of evidence through a violation of the prosecutor's professional ethical responsibilities, which interfered with the defendant's right to the effective assistance of counsel. (People v. Sharp, supra, at 18-19.)

Former Rule 7-103, in effect at the time of the Sharp case, provided that "A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel." The Court noted that the rule had been interpreted in a formal ethics opinion by the Standing Committee on Professional Responsibility and Conduct of the State Bar. "They concluded that a district attorney may not communicate with a criminal defendant he knows to be represented by counsel, even if that communication is limited to an inquiry into conduct for which the defendant has not been charged." (People v. Sharp, supra, 150 Cal.App.3d at 18.) "Such contact intrudes upon the function of defense counsel and

impedes his or her ability to negotiate a settlement and properly represent the client, whose interests the rule is designed to protect." (Ibid.)

Based upon this ethical rule and the Sharp case, it was improper for the prosecutor's agents, the deputy sheriffs, to use a jailhouse informant to communicate directly with the appellant on a subject of controversy in the absence of his counsel, because the prosecutor and the sheriff's deputies were on notice that appellant had an attorney on the drug case. The Sixth Amendment right to counsel does not attach until the defendant is indicted for purposes of receiving court appointed defense counsel. (See United States v. Gouveia (1984) 467 U.S. 180, 188.) But if a defendant already has an attorney before being formally charged with a crime, he should be entitled to exercise his Sixth Amendment right to counsel even before he is charged with a crime. Exercising the Sixth Amendment right to counsel in those circumstances means simply that the defendant is entitled to deal with the prosecution and the police through the counsel that he already has. A defendant should not be tricked into waiving his right to use the counsel he already has by the prosecutor's or law enforcement's use of another inmate to question the defendant. Using this analysis, appellant's statements in the Sheriff's van should have been

suppressed for violation of appellant's Sixth Amendment constitutional right to counsel under Massiah and Henry.

If the Court finds that there has been no violation of appellant's federal constitutional right to counsel, he urges the Court to find a violation of his constitutional right to counsel under the California Constitution. Article I, Section 15 provides that "The defendant in a criminal case has the right ... to have the assistance of counsel for the defendant's defense." This Court has held that the California Constitution is not dependent upon the United States Constitution and may afford greater protection to its citizens beyond those rights guaranteed under the federal Constitution. (People v. Bustamante (1981) 30 Cal.3d 88, 97-99; People v. Houston (1986) 42 Cal.3d 595, 609-610.)

In a recent case decided by this court concerning a defendant's right to counsel under the Massiah case, the Court declined to discuss any state constitutional issue, because the defendant had not raised such a claim. (People v. Slayton (2001) 26 Cal.4th 1076, 1080 n.3.) Appellant does raise a right to counsel issue under the California Constitution. He urges the Court to adopt the language in People v. Sharp (1983) 150 Cal.App.3d 13, 18, and find as a matter of state Constitutional law "that a district attorney may not communicate with a criminal defendant

he knows to be represented by counsel, even if that communication is limited to an inquiry into conduct for which the defendant has not been charged." Appellant urges the Court to find that his state Constitutional right to counsel was violated by the prosecutor's use of a jailhouse informer to interrogate appellant in the absence of his counsel. He asks the Court to find that it was error for the trial court to refuse to suppress the tape recorded statements appellant made in the Sheriff's van to Salvador Berber. Suppression of the evidence was the required remedy based upon the same arguments appellant has made in connection with the violation of his state Constitutional privilege against self incrimination in the preceding argument. (See Raven v. Deukmejian (1990) 52 Cal.3d 336, 351-355.)

D. The Admission Of Appellant's Statements Was Prejudicial

The erroneous admission of appellant's tape recorded statements in the Sheriff's van was prejudicial. Appellant's convictions and death sentence should be reversed. Because the error affected appellant's constitutional privilege against self incrimination and constitutional right to counsel, the Court must reverse unless the error is "harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 U.S. 18, 24; People v. Johnson (1993) 6 Cal.4th 1, 32.) In Yates v. Evatt (1991) 500 U.S. 391, 402-403, the United States Supreme Court explained that "The Chapman

test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Appellant's statements to Salvador Berber were an admission to all the crimes charged against him. He admitted the Hillgrove Market robbery and the murder of Lester Eaton. He also admitted that he shot and killed Skyles and Price.

In the Eaton murder prosecution, without appellant's statements, there were no eyewitnesses placing appellant at the scene of the crime. Betty Eaton could not identify the two robbers. The prosecution had evidence that appellant's fingerprints were on papers found inside of the abandoned get away van. Richard Alvarez testified that he drove appellant away from the abandoned van on the night of the robbery. This evidence against appellant on the Eaton murder was not overwhelming. Thus, his tape recorded statements must have been used by the jury to convict him. Therefore, the evidence was not harmless beyond a reasonable doubt.

In the Skyles and Price case, the evidence against appellant was very weak. All of the eyewitnesses identified Michael Soliz as the person who fired the fatal shots. The evidence showed only appellant's presence at the scene. Although the prosecutor argued to the jury that appellant's admission that he shot Skyles and Price was mere bragging, the admission of the statements into evidence may have been used by the jury to

implicate appellant in the crime. Thus, appellant's statements were not harmless beyond a reasonable doubt in the Skyles and Price case.

Finally, the tape recorded statements were prejudicial to appellant on the issue of whether he should receive the death penalty. In final argument, the prosecutor argued that appellant showed no remorse for his crime because appellant could be heard on the tape laughing about Lester Eaton's death. (R.T. 4440) The prosecutor also argued that appellant's testimony on the witness stand during the penalty trial showed that his demeanor was of a person who was cold blooded, calculating, and without remorse. (R.T. 4441)

Appellant's decision to testify was motivated by his desire to explain and lessen the prejudicial impact of the tape recorded conversation. During his testimony, appellant said that he felt bad about the shootings; that he had a conscience; and that his bragging on the tape about the crimes was his way of not looking like a coward in front of another gang member. (R.T. 4209-4210). Thus, the tape recorded statements were prejudicial on the issue of whether appellant should receive the death penalty and appellant's convictions and death sentence should be reversed.

III. THE COURT ERRED IN DENYING A MOTION FOR THE APPOINTMENT OF A SECOND COUNSEL

A. Factual Background

Prior to trial, appellant made a motion for the appointment of a second attorney. (C.T. 1168-1172) The motion was brought pursuant to Pen. Code § 987 (d) and Keenan v. Superior Court (1982) 31 Cal.3d 442. The motion stated that it was made "on the grounds that such appointment is necessary to ensure the defendant of his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I Section 15 of the California Constitution." (C.T. 1169) The motion requested that the Court appoint Pamela Dibello as second counsel. (C.T. 1172).

The motion was supported by a declaration of John Tyre, appellant's court appointed defense counsel. The declaration stated: "I am representing John Gonzales in the above numbered case and it has become evident after the preliminary hearing that there are both serious issues for the guilt and penalty phases of this trial. It is therefore necessary for the Court to allot funds to cover the cost of a second attorney to handle different parts of both phases of this trial." (C.T. 1170) The application was filed in the confidential file pursuant to Penal Code section 987.9, subdivision (a), and is currently a part of the confidential file on this appeal. (C.T. Vol. 5.)

The Court denied the motion. In denying the motion, the Court stated: "The Court has read and considered defense counsel's application for appointment of second counsel and it is ordered denied. The application fails to provide any specific or compelling reasons requiring the assistance of additional counsel. See: People v. Moore (1988) 47 Cal.3d 63, 76-77; People v. Burgener (1986) 41 Cal.3d 505, 522-524; Keenan v. Superior Court (1982) 31 Cal.3d 424." (C.T. 1172) The trial court erred in denying this motion for the appointment of a second counsel.

B. The Federal And State Constitutional Right To Counsel Requires The Appointment Of Two Qualified Trial Attorneys To Represent The Defendant In Every Case Where The Death Penalty Is Sought

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." (Powell v. Alabama (1932) 287 U.S. 45, 69.) The right to counsel is designed to assure fairness in the adversary criminal process. (United States v. Morrison (1981) 449 U.S. 361, 364.) Thus, the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in any case where a defendant is charged with a serious crime. (Gideon v. Wainwright (1963) 372 U.S. 335.)

The California Constitution also guarantees the defendant in a criminal case the right to counsel. (Maxwell v. Superior Court (1982) 30 Cal.3d 606, 612; People v. Chacon (1968) 69 Cal.2d 765, 773-774.) Article I, Section 15 of the California Constitution provides that "The defendant in a criminal case has the right ... to have the assistance of counsel for the defendant's defense." The rights guaranteed by the California Constitution are not dependent upon the United States Constitution and may afford greater protections to an accused defendant in a criminal case. (Raven v. Deukmejian (1990) 52 Cal.3d 336, 353-354; People v. Bustamante (1981) 30 Cal.3d 88, 97-99.)

Appellant contends that these constitutional provisions require the courts to appoint two qualified attorneys to represent a defendant in a capital case. The American Bar Association has adopted Guidelines for Capital Cases which require the appointment of two counsel. Guideline 2.1 states that "In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant." (A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 2.1 (1989 Ed.).) Death penalty cases have become so specialized that defense counsel have duties and functions that are different from those of counsel in ordinary criminal cases. In the

Commentary to Guideline 2.1 there is a summary of those duties and functions:

> As described in the commentary to Guideline 1.1 and in the performance Guidelines of section 11, counsel must be an advocate for life as well as a defensive tactician. Trial counsel must: obtain the investigative resources necessary to prepare thoroughly for both the guilt and penalty phases of the trial, Guidelines 8.1; 11.4.1; and 11.5.1 (b) (9); conduct extensive research in search of precedent helpful to the client; conduct thorough crime and life-history investigations in preparation for both phases of trial, Guideline 11.4.1; integrate the defense theory and strategy used during the guilt phase with the projected affirmative case for life at the penalty phase, Guideline 11.7.1; prepare witnesses for both phases of trial; and present all reasonably available mitigating evidence helpful to the defendant for purpose of convincing the judge or jury not to impose a sentence of death, Guideline 11.8. Preparation for the penalty phase, as well as the adjudication phase, must begin immediately after counsel has been appointed to represent the defendant. (Ibid.)

Under current California law, a defendant is entitled to the appointment of a second attorney to assist in his defense only if he can make a "specific, compelling" showing for the appointment of a second attorney. (Keenan v. Superior Court (1982) 31 Cal.3d 424, 429; People v. Jackson (1980) 28 Cal.3d 264, 288.) This is similar to the United States Supreme Court's approach to the right to counsel prior to Gideon v. Wainwright (1963) 372 U.S. 335. Prior to Gideon, the Supreme Court would only find a constitutional violation of the right to counsel in a case where the state court failed to appoint counsel to represent an indigent

defendant in a felony criminal prosecution, if the circumstances of the case showed fundamental unfairness in the trial. (Betts v. Brady (1942) 316 U.S. 455.) In Gideon, the Court found the "fundamental unfairness" test to be an uncertain and variable test, and overruled Betts v. Brady, supra. Thereafter, in all felony criminal prosecutions in state courts, an indigent defendant was entitled to the appointment of counsel. (Gideon v. Wainwright, supra, 372 U.S. at 342-344.)

A similar approach should be taken on the issue of the right to two defense counsel in a capital case. The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to ensure that every safeguard designed to guarantee the defendant a full defense be observed. (Gardner v. Florida (1977) 430 U.S. 349-357; Gregg v. Georgia (1976) 428 U.S. 153, 187.) "Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime." (Keenan v. Superior Court, supra, 31 Cal.3d at 431.)

Any capital case involves both factual and legal complexities. The right of a defendant to obtain a second trial attorney should not turn

upon the adequacy of the showing of necessity made by his first counsel in an application for the appointment of second counsel. The right to the appointment of a second attorney should exist in every capital case. Appellant urges the Court to find that the failure to appoint second counsel in his case violated his right to counsel under both the state and federal constitutions.

C. The Appellant Made An Adequate Showing Of Need For The Appointment Of A Second Attorney And The Court Abused Its Discretion In Denying The Motion

The leading case on the appointment of second counsel in a capital case is Keenan v. Superior Court (1982) 31 Cal.3d 442. In Keenan, this Court stated that in a capital case the appointment of a second attorney "is not an absolute right ... and the decision as to whether an additional attorney should be appointed remains in the sound discretion of the trial court." (Keenan v. Superior Court, supra, 31 Cal.3d at 430.) Among the factors used by the trial court in exercising its discretion is the severity and finality of the death penalty and the importance and complexity of pre-trial preparation in the particular case. (Keenan v.Superior Court, supra at 431-432.)

In Keenan, the defendant's attorney was appointed seven weeks prior to the scheduled trial date and the defendant's motion for a

continuance was denied. In the application for appointment of a second attorney, defendant's counsel stated that he would have to interview 120 witnesses, that he anticipated extensive scientific and psychiatric testimony, that the defendant was charged with five other pending criminal cases and the prosecution intended to offer evidence related to these cases at his trial. Counsel also stated that he intended to make numerous pre-trial motions as a part of the defense effort and that appellate review of some of those motions may be necessary, requiring the assistance of another qualified attorney.

The Court held that based upon this showing, the trial court abused its discretion in denying the motion for the appointment of a second counsel. (Keenan v. Superior Court, supra, at 434.) "[A] second attorney is justified under the facts of this particular case, e.g., the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the extensive pre-trial motions, as to some of which review would be sought in the event of adverse rulings." (Ibid.) Finally, the Court stated that "under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required." (Ibid.)

In appellant's case, the declaration of appellant's counsel in support of the motion simply stated that "there are both serious issues for the guilt and penalty phases of this trial" and it was "necessary for the Court to allot funds to cover the cost of a second attorney to handle different parts of both phases of this trial." (C.T. 1170) Although a similar application made by the same defense counsel, John D. Tyre, was found to be insufficient in People v. Staten (2000) 24 Cal.4th 434, 446-448, the Staten case is distinguishable. In Staten, the defendant was charged with two counts of first degree murder for the murder of his mother and father with special circumstance allegations of multiple murder and murder for financial gain. The murders occurred on a single occasion and constituted a single murder investigation.

In appellant's case, appellant was charged in two separate murder investigations with three counts of first degree murder. Appellant was charged with the April 1996 robbery and murder of Lester Eaton at the Hillgrove Market. He was also charged with the April 1996 gang related murders of Elijah Skyles and Gary Price. Sixty-four witnesses were called during the course of the trial. The penalty phase was tried twice. The expert witnesses consisted of medical experts, fingerprint experts, ballistics experts and a gang expert. Appellant's case was sufficiently complex to

require the appointment of a second attorney to represent appellant. The failure to grant the motion for a second attorney was an abuse of discretion and appellant's convictions should be reversed.

D. A Violation Of The Constitutional Right To Counsel Requires Automatic Reversal

The United States Supreme Court has stated that the Sixth Amendment right to the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." (Holloway v. Arkansas (1978) 435 U.S. 475, 489; Chapman v. California (1967) 386 U.S. 18, 23.) Thus, "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." (Holloway v. Arkansas, supra, 435 U.S. at 489 citing Gideon v. Wainwright (1963) 372 U.S. 335; Hamilton v. Alabama (1961) 368 U.S. 52; White v. Maryland (1963) 373 U.S. 59.)

"Some constitutional violations, however, by there very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category." (Satterwhite v. Texas (1988) 486 U.S. 249, 256.) "The right to have the

assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Glasser v. United States (1942) 315 U.S. 60, 75-76.)

Appellant has argued that the denial of his motion for the appointment of a second attorney resulted in a violation of his federal and state constitutional right to counsel. If the Court finds that a constitutional violation has occurred, then appellant's convictions should be automatically reversed.

E. The Appellant Suffered Actual Prejudice From The Denial Of His Motion For A Second Counsel

In Chapman v. California (1967) 386 U.S. 18, 24, the United States Supreme Court held that "before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." If the Court does not apply the automatic reversal rule of Holloway v. Arkansas (1978) 435 U.S. 475, 490-491, then the Court must apply the constitutional error standard of review under the Chapman case. If the denial of appellant's motion for second counsel is viewed as a partial denial of appellant's constitutional right to counsel, then appellant's convictions and death sentence must be reversed unless the error is harmless beyond a reasonable doubt. (Satterwhite v.

Texas (1988) 486 U.S. 249, 257; Milton v. Wainwright (1972) 407 U.S. 371, 372-373.)

There is evidence in the record that appellant suffered prejudice as a result of the denial of his request for second counsel. Before the preliminary hearing, the attorney for the co-defendant Michael Soliz made a motion for a lineup. Appellant's attorney joined in the motion. The Court granted the motion and a lineup was scheduled at the Los Angeles County Jail. (1-16-96 Aug. R.T. 19-25; Supp. C.T. 340-351). When the lineups were arranged in the jail, appellant and Michael Soliz both refused to participate in the lineups. (R.T. 1641-1647). During the guilt trial, Carol Mateo and Jeremy Robinson, eyewitnesses in the Skyles and Price case, both testified that they attended a lineup at the Los Angeles County Jail, but the lineups were not conducted. (R.T. 1480; 1588).

At the time of the lineup motion, appellant had only one attorney representing him. Appellant's attorney filed no written lineup motion and merely joined in the lineup request made by the co-defendant at a hearing prior to the preliminary hearing. Without a second attorney to assist him in sharing the work, appellant's counsel either failed to explain the importance of the lineup to appellant or failed to learn from appellant that he objected to participating in a lineup. By requesting a lineup without

doing either, appellant's counsel made a lineup motion that resulted in obtaining evidence of guilt for the prosecution. In the prosecutor's final argument, the prosecutor argued to the jury that the refusal of appellant and Michael Soliz to participate in the lineup was evidence of a consciousness of guilt. (R.T. 2231; 2326). If appellant had a second counsel, this problem in communication between appellant and counsel could have been avoided.

The lack of a second attorney also harmed the appellant during the penalty phase. During the penalty retrial, appellant's counsel advised the Court outside the presence of the jury that appellant wanted to testify. Counsel advised the Court that he had told appellant that it would not be appropriate for him to testify, but could not prevent appellant from taking the witness stand. Counsel advised the Court that if appellant did testify during the penalty phase, it would be over defense counsel's objection. Although the trial judge urged appellant to follow the advice of his attorney, appellant ignored his lawyer's advice and testified during the second penalty trial. (R.T. 4191-4194)

In his testimony, appellant stated that he personally shot and killed Elijah Skyles and Gary Price. (R.T. 4209-4210) The testimony was contradicted by the eyewitnesses who saw Michael Soliz shoot Skyles and Price. Even the prosecutor argued to the jury that appellant did not shoot

Skyles and Price. (R.T. 4420-4422; 4429-4431) Nevertheless, the prosecutor argued that appellant deserved the death penalty for the murder of Lester Eaton (R.T. 4432-4434), and that the jury should impose the death penalty because of appellant's cold-blooded demeanor while testifying during the penalty phase. (R.T. 4441-4442)

It is clear from the record that the attorney-client relationship between appellant and defense counsel John Tyre had broken down. If the Court had granted appellant's motion for a second attorney, it would have been possible for appellant to consult with the second attorney concerning his decision to testify. Consulting with a second attorney may have resulted in appellant being persuaded not to testify at the penalty trial. Thus, on this record, the error in refusing to appoint a second attorney cannot be viewed as harmless beyond a reasonable doubt.

IV. THE COURT ERRED IN DENYING A MOTION FOR THE APPOINTMENT OF A SECOND INVESTIGATOR

A. Factual Background

Prior to trial, appellant applied to the Court for the appointment of a penalty phase investigator. He requested the appointment of Joel A. Sikler and an authorization for $5,000.00 to pay for his services at a rate of $50.00 per hour. A penalty phase investigator is an investigator who specializes in the investigation and preparation of the defense evidence to be presented at the penalty phase of a capital trial. (C.T. 1177-1184)

The motion was entitled "Motion for Authorization of Funds for Defense Expert Examination Investigator for Penalty Phase." It was filed in the confidential court file pursuant to Penal Code section 987.9. (C.T. 1177-1178) Attached to the motion was the declaration of defense counsel John Tyre. The declaration stated that appellant was indigent; that appellant was charged with three counts of murder in a capital case; that the investigative files provided to the defense by the prosecution were voluminous; and that the funds requested were "reasonably necessary for the preparation and presentation of the defense in this case." (C.T. 1179-1180)

The trial court denied the motion. In a written order, the Court stated: "The motion for defense expert examination expert has been read, considered and denied. The Court has already appointed one investigator in the case at the standard rate of $25.00 per hour. There is no

good cause why a second investigator should be appointed at twice the authorized rate or why the current investigator cannot perform the necessary work." (C.T. 1184)

B. The Denial Of The Motion For A Penalty Phase Investigator Resulted In A Violation Of Appellant's State And Federal Constitutional Rights To The Effective Assistance Of Counsel And To Due Process Of Law.

The denial of the motion for a second investigator violated appellant's constitutional right to the effective assistance of counsel and to due process under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 15 of the California Constitution. (Ake v. Oklahoma (1985) 470 U.S. 68, 76-77; Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319-320.) "[T]he right to counsel encompasses the right to effective counsel which in turn encompasses the right of an indigent and his appointed counsel to have the services of an investigator." (Puett v. Superior Court (1979) 96 Cal.App.3d 936, 938-939.) "[T]he effective assistance of counsel guarantee of the Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendants." (Mason v. State of Arizona (9th Cir. 1974) 504 F.2d 1345, 1351.)

Penal Code section 987.9 provides in part: "In the trial of a capital case ... the indigent defendant through the defendant's counsel, may request the Court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense ... The

fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing."

The right to court appointed investigative services is dependent upon a showing that such services are reasonably necessary. (Corenevsky v. Superior Court, supra, 36 Cal.3d at 320; Puett v. Superior Court, supra, 96 Cal.App.3d at 939). However, in the early stages of a criminal case, it is often difficult for counsel to demonstrate a clear need for funds, and therefore, a trial court should "view with considerable liberality a motion for such pre-trial assistance." (Corenevsky v. Superior Court, supra, at 320; Mason v. State of Arizona, supra, 504 F.2d at 1352.)

In appellant's case, the denial of a motion for a second investigator was particularly unfair. Appellant was charged with three first degree murders. The prosecutor was seeking the death penalty. The three murders arose out of two separate murder investigations. In the first murder investigation involving the murder of Lester Eaton, the prosecutor had two experienced homicide investigators, Deputy Woodrow West (R.T. 1001-1003) and Deputy Lynn Reeder. (R.T. 863-864) The prosecutor also had two experienced homicide investigators in the Skyles and Price murder

investigation, Deputy Joe Holmes (R.T. 1339-1340) and Deputy David Castillo. (R.T. 1789-1791) Thus, the prosecutor had four homicide investigators to assist him in the preparation of his case. Appellant only had one court appointed guilt phase investigator, Larry DeLosh. (C.T. 1151-1153)

In Ake v. Oklahoma (1984) 470 U.S. 68, a defendant charged with murder gave notice of an insanity defense and requested the appointment of a psychiatrist at state expense to determine the defendant's mental state at the time of the crime. The motion was denied. At trial, the prosecutor presented a psychiatrist as a prosecution witness who testified that the defendant was dangerous to society. There was no testimony concerning the defendant's sanity at the time of the crime. The jury convicted the defendant on all counts. At the penalty phase proceeding, the prosecutor asked for the death penalty, relying upon the prosecutor's psychiatric testimony concerning the defendant's likely future dangerousness. The defendant had no expert to rebut this testimony and the jury returned a verdict of death.

The United States Supreme Court reversed Ake's conviction and death sentence on the grounds that he had been denied his constitutional right to due process under the Fourteenth Amendment. The Court held that when a defendant makes a preliminary showing that his sanity at the time of the crime is likely to be a significant factor at trial, the Constitution requires

the State to provide the defendant with access to a psychiatrist's assistance, if the defendant cannot otherwise afford one. (Ake v. Oklahoma, supra, 470 U.S. at 74.) If the prosecutor at the penalty phase of a capital case presents psychiatric evidence on the defendant's future dangerousness, it violates due process if the State refuses to provide an indigent defendant with access to a court appointed defense psychiatrist to assist in the preparation of the sentencing phase of the trial to allow the defendant to rebut the prosecution's evidence on future dangerousness. (Ake v. Oklahoma, supra at 83-84.)

The trial court's denial of appellant's motion for a penalty phase investigator deprived appellant of "The Fourteenth Amendment's due process guarantee of fundamental fairness." (Ake v. Oklahoma, supra, at 76.) In Ake, the Court stated that "Mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." (Ake v. Oklahoma, supra, at 77.) By denying appellant's motion for a second investigator, the trial court was allowing the prosecutor to have four experienced investigators and appellant to have only one investigator. Furthermore, the ruling deprived the appellant of the services of an experienced penalty phase investigator.

In death penalty murder cases, the assistance of a penalty phase investigator is no longer a luxury, it is a constitutional necessity. In two recent cases the United States Supreme Court reversed death sentences on ineffective assistance of counsel claims based on trial counsel's failure to uncover and present voluminous mitigating evidence that could have avoided a death sentence if the evidence had been presented during the trial. (Wiggins v. Smith (2003) 539 U.S. 510, 522; Williams v. Taylor (2000) 529 U.S. 362, 396.) In both cases, the Court cited the American Bar Association Standards for Criminal Justice and found that counsel had not "fulfilled their obligation to conduct a thorough investigation of the defendant's background." (Wiggins v. Smith, supra, 539 U.S. at 522 citing 1 A.B.A. Standards for Criminal Justice 4-4.1, Commentary p. 4-55 (2nd ed. 1980)).

More recent Guidelines of the American Bar Association relating to death penalty cases provide that "Counsel should conduct independent investigations relating to the guilt / innocence phase and to the penalty phase of a capital trial." (A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1 (1989 ed.).) The same Guideline provides that counsel should seek information concerning "any mitigating factors." Counsel should interview witnesses familiar with aspects of the client's "life history" in order to develop any possible mitigating reasons why the client should not be

sentenced to death. Counsel should interview "members of the victims family opposed to having the client killed." The Guidelines suggest that the interviews should be conducted by an "investigator or mitigation specialist." Finally, the Guidelines state that an appropriate investigation should:

> Collect information relevant to the sentencing phase of the trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influence. (Ibid.)

In appellant's case, the Court only afforded appellant one investigator to conduct the investigation of both the guilt phase of two murder investigations and the penalty phase. In addition to appellant's testimony at the second penalty trial, the jury heard from only five defense witnesses who gave only brief testimony. These witnesses consisted of appellant's mother, Edna Gonzales (R.T. 4378-4383), appellant's two sisters, Valerie Gonzales (R.T. 4355-4360) and Francis Ontiveros (R.T. 4364-4371), appellant's nine year old nephew David Gonzales, Jr. (R.T. 4200-4203), and a neighbor, William Marmolejo. (R.T. 4372-4377).

Without the assistance of an experienced penalty phase investigator and mitigation specialist, the appellant was not able to present adequate mitigation to avoid the death penalty. Therefore, this Court should find that the trial court erred in denying the motion for a second investigator and reverse appellant's death sentence.

GUILT PHASE ISSUES

V. THE EVIDENCE IS INSUFFICIENT TO CONVICT APPELLANT OF THE FIRST DEGREE MURDERS OF SKYLES AND PRICE

A. Factual Background

Michael Soliz shot and killed Elijah Skyles and Gary Price. Carol Mateo was an eyewitness to the shooting as she drove past the Shell gas station on the night of the shooting. According to Carol Mateo, appellant was merely present at the gas station at the time of the shooting, standing next to a car. (R.T. 1463-1467; 1472.)

Judith Mejorado told the police that she was in a car with appellant and Michael Soliz when it drove by the gas station where Skyles and Price were standing. Appellant and Soliz both said they knew Skyles and Price and asked the driver to go back to the station. At the gas station, appellant and Soliz got out of the car. Judith Mejorado could hear the voices of people arguing. When she heard gunshots, she looked and saw Michael Soliz firing a gun. After the firing stopped, appellant and Soliz re-entered the car and told her "you didn't see nothing." The car then left the gas station. (R.T. 1796-1802)

Detectives Scott Lusk, a gang expert working for the Los Angeles County Sheriff's Department, testified that both appellant and Michael Soliz were members of the Puente Street gang. (R.T. 2072-2081) It was his opinion that the murders of Elijah Skyles and Gary Price were in

retaliation for the murder of Billy Gallegos two weeks earlier. Gallegos was a Puente gang member who was killed by two black gang members from the Neighborhood Crips gang. Although Skyles and Price were not gang members, they were both wearing gang clothing. (R.T. 2089-2094) However, neither Skyles nor Price was involved in the murder of Billy Gallegos. (R.T. 2118-2121)

During final argument, the prosecutor argued to the jury that Skyles and Price were shot and killed by Michael Soliz. He argued that appellant was guilty of aiding and abetting by "backing up" Michael Soliz during the crime. (R.T. 2195-2199; 2223-2226; 2231-2234) The prosecutor argued that the murder was premeditated and deliberate because it had been planned ahead as a payback shooting for what happened to Billy Gallegos, who had been murdered by black gang members two weeks earlier. (R.T. 2235-2239)

Counsel for appellant argued to the jury that appellant did not aid and abet in the shooting because he never got out of the car. Counsel also argued that if appellant got out of the car, the only thing he did was stand by the car. Appellant did not do anything to aid and abet in the shooting of Skyles and Price. (R.T. 2281-2283; 2287-2289) The prosecutor, in his rebuttal argument, argued that the jury should not look at the Skyles and Price murder in isolation. He argued the jury should consider that appellant had committed the Hillgrove Market robbery and

murder along with Michael Soliz three months earlier and appellant and Soliz were Puente gang members with a motive to seek revenge against black gang members for the murder of Billy Gallegos. (R.T. 2307-2309) The jury found appellant guilty of the first degree murders of both Elijah Skyles and Gary Price. (R.T. 2416-2419)

B. The Evidence Fails To Establish That Appellant Aided And Abetted In The Crimes

Appellant urges the Court to reverse his convictions on Counts 4 and 5 for the first degree murders of Elijah Skyles and Gary Price. There is no substantial evidence establishing that appellant aided and abetted in the commission of these crimes. 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.)

The standard of review for sufficiency of the evidence is set forth in Jackson v. Virginia (1980) 443 U.S. 307, 318. A Court must review the record "to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Id. at 318.) This Court has stated that in reviewing for sufficiency, a Court "must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a

reasonable doubt." (People v. Johnson (1980) 26 Cal.3d 557, 576.) The standard of review is the same when the prosecution relies on circumstantial evidence. (People v. Maury (2003) 30 Cal.4th 342, 396.) In People v. Morris (1988) 46 Cal.3d 1, 21, this Court stated that "A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence ..."

Appellant was convicted of the murders of Skyles and Price under an aiding and abetting theory. Under California law, in order for a person to be convicted of a crime under an aiding and abetting theory, the person must "act with knowledge of the criminal purpose of the perpetrator and with the intent or purpose of committing or of encouraging or facilitating commission of the offense." (People v. Beeman (1984) 35 Cal.3d 547, 560; see also People v. Croy (1985) 41 Cal.3d 1, 15 n. 5; Pen. Code §31.) "Mere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (In re Michael T. (1978) 84 Cal.App.3d 907, 911.) Finally, mere association with another person who has committed a crime is insufficient to establish aiding and abetting. (People v. Reyes (1974) 12 Cal.3d 486, 500.)

In People v. Zermeno (1999) 21 Cal.4th 927, the defendant was convicted of assaulting another person with a deadly weapon. The jury found that the crime was committed for the benefit a criminal street gang. The issue on appeal was whether the defendant's companion had committed a separate criminal offence for purposes of the gang allegation by aiding and abetting in the assault. The defendant and his companion were both gang members and during the assault the companion positioned himself between the defendant and the victim's two friends, telling the victim's friends to just "Let them fight." A gang expert testified that the defendant's companion was "protecting the back" of the defendant. The Court found on this evidence that the companion was also criminally liable for the assault as an "aider and abettor." (Id. at 931-932.)

Appellant's case is different from the Zermeno case. Appellant did not position himself between Soliz and the victims's friends. Appellant made no statements to bystanders to keep them from helping the victims. Appellant simply got out of the car and stood next to it watching while Michael Soliz talked to Skyles and Price. Although Judith Mejorado heard the voices of all four arguing before the shooting, she could not recall any particular statement that appellant made prior to the shooting while he was standing next to the car. Appellant had no weapon. Appellant did not approach or threaten Skyles and Price. He was merely present at the scene

watching the actions of Michael Soliz. He did nothing to aid, promote, encourage or instigate the commission of the crimes.

Appellant's case is similar to the case of In re Michael T. (1978) 84 Cal.App.3d 907. In that case a juvenile was declared a ward of the court for committing the crimes of murder and intimidating a witness. The evidence at trial established that the juvenile had warned two persons standing near a liquor store to get out of the way because there was going to be a shooting at the store. After the shooting, the juvenile stated "We got the guy." The juvenile was seen associating with the individual who actually shot the victim and the juvenile was heard discussing the murder with him. There was also evidence that the juvenile had threatened to kill a potential witness if he appeared in court.

The Court of appeal found that the evidence was insufficient and reversed the finding that the juvenile had committed the crime of murder. The Court noted that in order for the juvenile to be an aider and abettor in the murder, he must have counseled, encouraged or assisted in the commission of the crime with knowledge that the crime was being committed. The Court stated that: "Mere presence at the scene of the crime which does not itself assist in its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (In re Michael T., supra, 84 Cal. App.3d at 911.) The

Court held that the juvenile's mere presence at the scene did not support the finding that the juvenile aided in the murder.

The prosecutor in appellant's case argued to the jury that appellant was guilty of aiding and abetting Soliz in the shootings of Skyles and Price because appellant and Soliz were members of the same gang. Two federal criminal cases have found that a conviction based upon gang membership violates the defendant's constitutional right to due process because the conviction rests upon insufficient evidence. (United States v. Garcia (9th Cir. 1998) 151 F.3d 1243; Mitchell v. Prunty (9th Cir. 1997) 107 F.3d 1337.) These cases hold that "Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting." (Mitchell v. Prunty, supra, 107 F.3d at 1342; United States v. Garcia, supra, 151 F.3d at 1246.)

In United States v. Garcia, supra, the Ninth Circuit reversed a defendant's conviction of conspiracy to commit assault for insufficient evidence based upon facts similar to appellant's case. In Garcia, the defendant was associated with the Bloods gangs. He attended a party at which there were members of the rival Crips gang. The defendant and his gang members began insulting the members of the rival gang. The insults escalated into a fight between the two rival gangs. During the fight, another member of the defendant's gang began shooting and several members of the

rival gang were shot. There was no evidence that the defendant possessed a gun or fired a gun during the fight. The prosecution presented evidence from a gang expert who testified that generally gang members have a basic agreement to back one another up in fights and this agreement required no advance planning or coordination.

The Ninth Circuit found that this evidence was insufficient to convict the defendant of conspiracy to commit assault. (United States v. Garcia, supra, 151 F.3d at 1246.) The Court relied upon an earlier Ninth Circuit case which held that membership in a gang cannot serve as proof of aiding and abetting. (Id. at 1246, citing Mitchell v. Prunty, supra, 107 F.3d at 1342.) In reversing the conviction the Ninth Circuit in Garcia stated:

> Finally, as the Mitchell panel warned, allowing gang membership to serve as evidence of aiding and abetting "would invite absurd results. Any gang member could be held liable for any other gang member's act at any time as long as the act was predicated on the common purpose of fighting the enemy." Mitchell, 107 F.3d at 1341. Similarly, allowing a general agreement among gang members to back each other up to serve as sufficient evidence of a conspiracy would mean that any time more than one gang member is involved in a fight, it would constitute an act in furtherance of the conspiracy and all gang members could be held criminally responsible – whether they participated in or had knowledge of the particular criminal act, and whether or not they were present when the act occurred. Indeed, were we to accept "fighting the enemy" as an illegal objective, all gang members would probably be subject to felony prosecutions sooner rather than later, even though they had never personally committed an improper act. This is contrary to the fundamental principles of our system of justice. "There can be no conviction for guilt by association ..." Melchor-Lopez, 627 F.2d at 891. (United States v. Garcia, supra at 1246.)

In Mitchell v. Prunty, supra, the defendant Mitchell and the victim Judaban were members of rival gangs. After Mitchell had shouted obscenities, Judaban and his cohorts entered Mitchell's apartment and engaged in a fist fight with Mitchell and his gang members. After the fight, one of Mitchell's gang members shot Judaban who was standing on the street outside of Mitchell's apartment. Judaban fell to the ground and was run over by a car. The car was driven by one of Mitchell's gang members and Mitchell himself was a passenger in the car at the time that the car ran over and killed Judaban. On this evidence, the jury found Mitchell guilty of second degree murder.

The Ninth Circuit held that the evidence was insufficient to convict. (Mitchell v. Prunty, supra, 106 F.3d at 1340-42.) There was no evidence that Mitchell aided or assisted a fellow gang member in shooting Judaban. Likewise, there was no evidence that Mitchell said or did anything to cause the driver of the vehicle to run over and kill Judaban with the car. Mitchell was merely a passenger in the car and did nothing to help to bring about Judaban's death. Finally, the prosecutor argued that Mitchell aided and abetted the killing by fanning the fires of gang warfare that culminated in the death. The Ninth Circuit rejected this argument stating:

> The state's argument smacks of guilt by association. Except in West Side Story, gang members do not move in lock-step formation. Gang movements are, in fact, often more chaotic than concerted. See Jeffrey J. Mayer, Individual

> Moral Responsibility and The Criminalization of Youth Gangs, 28 Wake Forest L. Rev. 943, 949-50 (1993) (describing most gangs as disorganized and decrying "efforts to prosecute ... gang members on the basis of social ties," as opposed to "traditional legal principles," as a "panic response"). Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting. To hold otherwise would be to invite absurd results. Any gang member could be held liable for any other gang member's act at any time so long as the act was predicated on the "common purpose of fighting the enemy." (Mitchell v. Prunty, supra at 1342.

A similar result was reached in United States v. Andrews (9th Cir. 1996) 75 F.3d 552. In Andrews, the defendant's sister and co-defendant got into a scuffle with the victims, and then left to tell Andrews, the defendant, about the incident. The sister enlisted Andrews' assistance in her plan, which she told him was to get a particular victim and trash the victim's car. After arming themselves with rifles, Andrews and his sister both returned to the scene of the earlier altercation. When the victim they sought stepped out of his car with raised hands, Andrews approached and shot him. His sister then approached the car and began firing into it, killing another victim and wounding two more. (Id. at 554.)

The Ninth Circuit reversed Andrews' conviction for aiding and abetting his sister in the murder and attempted murder of the three victims she shot. The Court noted that a conviction under an aiding and abetting theory requires evidence establishing the defendant "specifically

intended to facilitate the commission of [the co-defendant's] crimes." (United States v. Andrews, supra, 75 F.3d at 555.) The Court then concluded that there was no evidence that Andrews "knowingly and intentionally aided, counseled, commanded, induced, or procured [his sister] to shoot the people in the car." (Id. 555.) In particular, Andrews did not give his sister the rifle, drive her to the scene, encourage her to shoot the other victims, or in any other obvious way assist her in shooting the victims in the car. There was no evidence that Andrews shared his sister's intent to hurt anyone other than the first victim. Thus, the Court concluded that Andrews' sister had "acted impulsively and on her own" in killing and harming her victims, and that Andrews' conviction for aiding and abetting was not supported by sufficient evidence. (United States v. Andrews, supra, 75 F.3d at 556 ["Allowing the jury to infer that Paula's actions here were the natural and probable consequence of Ivan's knowing actions would take the natural and probable consequences doctrine to an extreme, inconsistent with more fundamental principles of our system of criminal law."]; see also United States v. Randolph (9th Cir. 1996) 93 F.3d 656, 667 [insufficient evidence that Randolph aided and abetted his associates in their assault upon the victim].)

Respondent may argue that the evidence is sufficient under People v. Durham (1969) 70 Cal.2d 171. However, Durham is

distinguishable. In the Durham case, the defendants Durham and Robinson had committed a series of armed robberies as they traveled from Ohio to California during the three weeks leading up to the murder. In one of those robberies, a person was shot with the same gun that Robinson later used in the murder. When their vehicle was stopped in Los Angeles by the police, the two defendant's were in a stolen vehicle. After being stopped, Robinson shot and killed one of the police officers. Durham was talking to the other police officer at the time of the shooting and was ordered to the ground. Both defendants were convicted of the first degree murder of the police officer. Durham argued on appeal that the evidence failed to establish that he aided and abetted in Robinson's murder of the police officer.

The California Supreme Court affirmed Durham's murder conviction, finding that the evidence showed that "he was a party to a compact of criminal conduct which included within its scope the forcible resistance of arrest and that he was also present for the purposes of assisting in its commission." (People v. Durham, supra, 70 Cal.2d at 181.) The jury could have found that Durham and Robinson had been engaged in a joint expedition to rob and resist arrest; that Durham knew that Robinson had used a gun in robberies; and that he knew Robinson was armed when he emerged from the vehicle. Thus, "Robinson's act was, and was known by

Durham to be, a reasonable and probable consequence of the continuing course of action undertaken by the defendants." (Id. at 185.)

Durham's case is different from appellant's case. In Durham, the two defendant's were engaged in a joint expedition involving a series of robberies and shootings during a three week period leading up to the murder. At the time they were stopped by the police, they were then committing a crime by driving a stolen vehicle. Durham's criminal liability for aiding and abetting arose out of those identifiable crimes that he had been jointly committing with Robinson. Robinson's shooting of the police officer was the natural and probable consequence of the string of crimes that Durham had aided and abetted in the commission. In every case cited by the Court in Durham in support of this theory of aiding and abetting, the defendants were jointly engaged in the commission of some identifiable crime. (See People v. Kauffman (1907) 152 Cal. 331 [Defendant and five others involved in a plan to burglarize the safe at a cemetery, when a police officer is killed.]; People v. Wheaton (1923) 64 Cal. App 58 [Defendant and four men plan a series of burglaries and one defendant kills a police officer during a traffic stop.]; People v. Lapierre (1928) 205 Cal. 470 [Defendant and two others engaged in a series of burglaries and one defendant kills a police officer.]; see also People v. Ellenberg (1958) 165 Cal.App.2d 495, 500 [Killing by co-defendant in commission of a robbery.]; People v.

Brigham (1989) 216 Cal.App.3d 1039, 1054 ["If the principal's criminal act charged to the aider and abettor is a reasonably foreseeable consequence of any criminal act of that principal, knowingly aided and abetted, the aider and abettor of such criminal act is derivatively liable for the act charged."].).

Appellant's case is different. Appellant and Michael Soliz were at a party earlier that evening. They were being driven home when their car passed a Shell gas station and they saw Skyles and Price. There was no evidence that they were looking for Skyles and Price that evening. They came upon them unexpectedly. There was no evidence that appellant and Soliz went out that night for the purpose of shooting Skyles and Price or committing any crime at all.

After their car stopped at the gas station, Michael Soliz got out of the car to talk to Skyles and Price. Soliz was carrying a gun. There was no evidence that Soliz had to retrieve the gun from the car just prior to talking with Skyles and Price. Michael Soliz simply had the gun on his person when he left the car. At some point during his conversation with Skyles and Price, Soliz shot them both.

Appellant, according to the pre-trial statements of the eyewitnesses, never got out of the car on the night of the shooting. At trial, the eyewitnesses and Judith Mejorado testified that appellant got out of the

car and was standing next to the car when Michael Soliz spoke with and shot Skyles and Price. According to the evidence, appellant did not do anything except stand there. Although Judith Mejorado heard appellant's voice, she could not recall what, if anything, he said or whether he was even talking to Skyles or Price.

There was no independent crime being committed by appellant and Michael Soliz when Soliz approached Skyles and Price to talk to them. Thus, the aiding and abetting theory discussed in the Durham case does not apply to the facts of appellant's case. The only basis for claiming that appellant and Soliz were on a joint expedition is the evidence that they were members of the same street gang. Based upon the federal cases cited above, evidence of gang membership alone is insufficient to convict appellant of aiding and abetting Michael Soliz. Since the evidence supporting the prosecution's theory of aiding and abetting in this case is insufficient to convict, the Court must reverse appellant's convictions on Counts 4 and 5 for the murders of Elijah Skyles and Gary Price.

C. The Evidence Fails To Establish The Necessary Premeditation And Deliberation For First Degree Murder

Appellant's convictions of the murders of Elijah Skyles and Gary Price in Counts 4 and 5 were found to be first degree murders. (C.T. 748-749) In order to support convictions for first degree murder, there must be evidence in the record that the killings were willful, deliberate and

premeditated. The word willful, means intentional. The word 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. The word premeditated, means considered beforehand. (People v. Perez (1992) 2 Cal.4th 1117, 1123.)

Appellant contends that the evidence is insufficient to establish premeditation and deliberation and that the convictions, if affirmed, should be reduced to second degree murder. The standard of review on appeal is the federal constitutional standard. "Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from the evidence in light of the legal definition of premeditation and deliberation." (People v. Perez, supra, 2 Cal.4th at 1124.) Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Court must review the entire record in a light most favorable to the judgment below to determine whether it discloses substantial evidence, that is, evidence which is reasonable, credible and of solid value, from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. (Jackson v. Virginia (1979) 443 U.S. 307, 317-320; People v. Johnson (1980) 26 Cal.3d 557, 578.)

In People v. Anderson (1968) 70 Cal.2d 15, the Court established guidelines for reviewing findings of first degree murder based on premeditation and deliberation. In that decision, 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 that the defendant intentionally killed the victim according to a preconceived plan. (People v. Anderson, supra, 70 Cal.2d at 26-27; People v. Miller (1990) 50 Cal.3d 954, 992.) "The goal of Anderson was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (People v. Perez, supra, 2 Cal.4th at 1125; People v. Anderson, supra, 70 Cal.2d at 27.) A finding of premeditation and deliberation is not supported by evidence which "points to a random attack which was explosive rather than calculated." (People v. Anderson, supra, 70 Cal.2d at 30.)

In People v. Anderson, supra, the defendant lived with the family of the ten year old victim. He killed the victim in a brutal assault involving over 60 knife wounds all over the child's body. Although there

was no question the defendant was the perpetrator, there were no eyewitnesses to the crime and there was no explanation of what led up to the murder. The defendant did not testify or confess. There was, however, evidence of the defendant's subsequent efforts to conceal the crime. On this record, the Court concluded that the evidence was insufficient to demonstrate that the murder was premeditated or deliberate. The first degree murder conviction was therefore reduced to second degree murder.

In appellant's case there was no evidence of planning activity. The defendants were simply at a party and were being driven home on the night of the shooting when their car happened to pass by a gas station where Skyles and Price were seen. Appellant and Soliz commented that they knew them and asked the driver to return to the gas station. There was no evidence that Michael Soliz retrieved a firearm just prior to speaking with Skyles and Price. Rather, the record supports the inference that Michael Soliz was simply carrying a gun that evening. Once the car stopped at the gas station, Michael Soliz exited the car, walked over to Skyles and Price, and began talking with them. Soliz argued with Skyles and Price and then shot them both. The conversation and argument lasted about a minute, before the shooting occurred. Thus, there is a complete absence of prior planning activity in this case.

There was evidence of motive established by the gang expert's testimony. The gang expert gave his opinion that the murders of Skyles and Price were payback or revenge for the murder of Puente gang member Billy Gallegos which occurred three weeks earlier when he was shot by two black gang members from the Neighborhood Crips gang. However, the same gang expert testified that Skyles and Price were not gang members and there was no evidence that they had been involved in the murder of Billy Gallegos. They were simply wearing red and blue clothing which might have been viewed as gang clothing. There was no testimony from Judith Mejorado that either appellant or Soliz discussed the Billy Gallegos murder on the night of the shooting of Skyles and Price. Thus, the expert opinion testimony from the gang expert on the motive for the shooting of Skyles and Price is in reality just speculation.

In People v. Morris (1988) 46 Cal.3d 1, 20-21, this Court held that a criminal conviction cannot be sustained on evidence that is mere speculation concerning different scenarios that may have occurred. In Morris, the Court reversed a robbery/murder special circumstance finding for insufficient evidence. The victim's unclothed body was found, shot to death, in a gay bathhouse. There was no evidence that any personal property was taken from the victim's possession at the time of the murder. However, a credit card, lent to the victim by a third person, was used three

days after the murder by the defendant, or someone looking like him. The Court held that the evidence was insufficient to show that any property was taken from the victim by force or fear, a necessary element of the crime of robbery and of the special circumstances allegation.

In appellant's case the only evidence of motive consisted of the speculation of a gang expert. Generally, an expert may render opinion testimony on the basis of facts given in a hypothetical question. However, the "hypothetical question must be rooted in facts shown by the evidence." (People v. Gardeley (1996) 14 Cal.4th 604, 618.) This Court has stated that "The basis of an expert's opinion testimony must be reliable." (Id. at 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." (Id.) Without some evidence showing that Michael Soliz's motive in shooting Skyles and Price was revenge, the expert's opinion thereon is speculative evidence of motive that alone cannot sustain a finding of premeditation and deliberation for first degree murder.

On the third element, the manner of the killing, there was evidence that Skyles and Price were both shot multiple times at close range with a semi-automatic handgun. Both died at the scene. Because there was evidence that Michael Soliz was arguing with Skyles and Price just prior to

the shooting, the most reasonable inference from the record is that the killings were the result of an unconsidered or rash impulse, which is more consistent with a conviction for second degree murder. (People v. Perez, supra, 2 Cal.4th at 1125; People v. Anderson, supra, 70 Cal.2d at 27.) Therefore, if the Court affirms the Skyles and Price murder convictions, they should be reduced to second degree murders.

D. Reversal Of The Skyles And Price Murder Convictions Would Require A Reversal Of The Death Sentence On The Eaton Murder, Because The Skyles And Price Murder Convictions Were The Most Significant Aggravating Factors In Support Of The Death Penalty

If the Court reverses appellant's murder convictions on the Skyles and Price case, the Court must also reverse appellant's death sentence on the Lester Eaton murder case. The most significant aggravating factor in support of the death penalty for the first degree murder of Lester Eaton was the fact that appellant had been convicted of two counts of first degree murder in the Skyles and Price case.

In the prosecutor's opening statement at the penalty trial, he told the jury that in determining whether appellant should receive the death penalty for the Lester Eaton murder, the jury should consider appellant's participation in the murders of Elijah Skyles and Gary Price. (R.T. 3220-3223) The prosecutor again emphasized this point in his final argument to the jury. He argued that appellant should receive the death penalty because

of his commission of three murders. He stated that although the jury was only deciding the punishment for appellant for the murder of Lester Eaton, in considering the penalty, the jury should also consider the facts concerning the double murders of Elijah Skyles and Gary Price. (R.T. 4387-4389)

It would violate the Eight Amendment to uphold a death sentence which was based in part on evidence of a defendant's record of a criminal conviction which was later overturned on appeal. Johnson v. Mississippi (1988) 486 U.S. 578, 584-590.) In Johnson, the defendant was convicted of murder in Mississippi and was sentenced to death. One of the aggravating circumstances supporting the death sentence was evidence that the defendant had been convicted in New York of the crime of second degree assault with intent to commit rape. While the defendant's death sentence was on appeal, the New York Court of Appeals reversed the defendant's assault conviction. The United States Supreme Court vacated the death sentence, holding that it violated the Eighth Amendment's prohibition against cruel and unusual punishment to allow the defendant's death sentence to stand where it was based in part on the vacated New York conviction. (Johnson v. Mississippi, supra, 486 US at 584-590.)

The prosecution did present evidence of other aggravating

circumstances. There was evidence appellant committed a robbery at the age of 13 (R.T. 4085-4099), that he possessed a shank in the jail (R.T. 4105-4108), and that appellant had a prior felony conviction for the crime of possession of a controlled substance. (R.T. 4136-4137) These aggravating factors were minor when compared to appellant's two first degree murder convictions involving the murders of Skyles and Price. Appellant did not receive the death penalty for the robbery, the shank, or the prior drug conviction. It was the first degree murder convictions of Skyles and Price that must have convinced the jury to vote for death in Eaton case.

The Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. (Gardner v. Florida (1997) 430 U.S. 349, 363-364; Woodson v. North Carolina (1976) 428 U.S. 280, 305.) The consideration of murder convictions that were subsequently reversed would make the determination of death unreliable. Therefore, a reversal of the Skyles and Price murder convictions must result in a reversal of appellant's death sentence for the Eaton murder.

VI. THE COURT ERRED IN INSTRUCTING ON THE LAW OF AIDING AND ABETTING THAT THE CRIME OF MURDER IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE COMMISSION OF THE CRIME OF SIMPLE ASSAULT

A. Factual Background

Appellant was convicted of the first degree murders of Elijah Skyles and Gary Price on an "aiding and abetting" theory. Carol Mateo identified Michael Soliz as the person who shot and killed Skyles and Price at a Shell gas station on April 14, 1996. (R.T. 1456-1467). She testified that appellant was standing next to a car in the parking lot of the gas station at the time of the shooting. (R.T. 1472). Judith Mejorado was inside of the car that drove appellant and Michael Soliz to the parking lot where the shooting occurred. She also saw Michael Soliz shoot and kill Skyles and Price. (R.T. 1727-1732; 1800-1802). Ms. Mejorado saw appellant standing near the car while Michael Soliz approached Skyles and Price. (R.T. 1799). No witness testified that appellant said or did anything to assist or encourage Michael Soliz in the shooting of Skyles and Price.

The prosecutor argued that appellant was guilty of aiding and abetting in the murders of Skyles and Price because he was backing up Soliz at the time of the shooting. (R.T. 2195-2199; 2223-2226; 2231-2234). Counsel for appellant argued that there was no evidence of aiding and abetting because the original statements of the eyewitnesses stated that only one person got out of the car and shot the two victims. (R.T. 2281-2283).

Appellant's counsel also argued that even if the evidence showed that appellant got out of the car, he merely stood by the car. He did not shoot Skyles and Price and he did nothing to aid and abet in the shooting. (R.T. 2287-2289).

The jury was instructed pursuant to CALJIC 3.02 concerning an aider and abettor's liability for the natural and probable consequences of his actions. The instruction provided as follows:

> One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.
>
> Therefore, you may find the defendant guilty of the crime of murder as charged in Counts 4 and 5, even if he did not intend to commit murder, if you are satisfied beyond a reasonable doubt that:
>
> 1. The crime of assault was committed;
> 2. That the defendant aided and abetted that crime;
> 3. That a co-principal in that crime committed the crime of murder; and
> 4. The crime of murder was a natural and probable consequence of the commission of the crime of assault.
>
> The crime of assault is defined elsewhere in these instructions. (C.T. 690).

The jury was also instructed on the legal definition of the crime of simple assault in CALJIC 9.00. The instruction provided:

> In order to prove an assault, each of the following elements must be proved:

1. A person willfully committed an act which by its nature would probably and directly result in the application of physical force on another person; and

2. At the time the act was committed, the person had the present ability to apply physical force to the person of another.

"Willfully" means that the person committing the act did so intentionally.

To constitute an assault, it is not necessary that any actual injury be inflicted. However, if any injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed. (C.T. 691)

Finally the jury was instructed concerning the requirement in the crime of assault that there be a present ability to commit injury. The instruction, taken from CALJIC 9.01, stated:

A necessary element of an assault is that the person committing the assault has the present ability to apply force to the person of another. This means that at the time of the act which by its nature would probably and directly result in the application of physical force on the person of another, the perpetrator of the act must have the physical means to accomplish that result. If there is this ability, "present ability" exists even if there is no injury. (C.T. 692).

It was error for the Court to instruct the jury that the crime of murder is the natural and probable consequence of the commission of the crime of simple assault. Such an instruction is in conflict with this Court's holding in People v. Prettyman (1996) 14 Cal.4th 248, 267. The instruction also violated appellant's federal constitutional rights to due process and to a jury trial because it allowed the jury to convict appellant of aiding and abetting a

murder without evidence proving his guilt beyond a reasonable doubt. (In re Winship (1970) 397 U.S. 358, 364; Tot v. United States (1943) 319 U.S. 463, 467.) The erroneous jury instruction requires the Court to reverse appellant's convictions of the murders of Skyles and Price. Appellant's death sentence should also be reversed because the Skyles and Price murder convictions were the most aggravating factors presented to the jury at appellant's penalty trial.

B. Under California's Aiding And Abetting Law, A Jury May Not Be Instructed That Murder Is The Natural And Probable Consequence Of The Commission Of A Simple Assault

Murder is not a natural and probable consequence of simple assault as a matter of law unless the assault is committed with a deadly weapon or by means of force likely to produce great bodily injury. (People v. Prettyman (1996) 14 Cal.4th 248, 267; People v. Gonzales (2001) 87 Cal.App.4th 1, 9; People v. Butts (1965) 236 Cal.App.2d 817, 836.) Jury instructions in appellant's case which allowed the jury to find appellant guilty of the murders of Skyles and Price based on a theory that he aided and abetted a simple assault were erroneous under the Prettyman case.

"[A]n aider and abettor is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice, aids, promotes, encourages or instigates, the

commission of the crime." (People v. Prettyman, supra, 14 Cal.4th at 259; People v. Beeman (1984) 35 Cal.3d 547, 561.) An aider and abettor "is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets." (People v. Croy (1985) 41 Cal.3d 1, 12 n. 5.) "Thus, under Croy, a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (People v. Prettyman, supra, 14 Cal.4th at 261.)

In Prettyman, this Court held that a trial court has a duty to instruct sua sponte on the elements of the target crimes a defendant may have aided and abetted when the jury is considering the natural and probable consequences doctrine. The Court explained that identifying the target crime would "facilitate the jury's task of determining whether the charged crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that, the prosecution contends, the defendant knowingly and intentionally aided and abetted." (People v. Prettyman, supra, 14 Cal.4th at 267.)

The Court noted that "an instruction identifying and describing potential target offenses is necessary to minimize the risk that the

jury, generally unversed in the intricacies of criminal law, will indulge in unguided speculation." ((People v. Prettyman, supra, 14 Cal.4th at 267, citing People v. Failla (1966) 64 Cal.2d 560, 564.) At trial, the jury must be convinced beyond a reasonable doubt that "the defendant aided and abetted the commission of a criminal act, and that the offense actually committed was the natural and probable consequence of that act." (People v. Prettyman, supra, 14 Cal.4th at 268.) The Court noted that "a conviction may not be based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified 'nefarious' conduct." (People v. Prettyman, supra, 14 Cal.4th at 268.)

The Court recognized that the natural and probable consequences doctrine does not apply in every case. "Murder, for instance, is not the 'natural and probable consequence' of 'trivial' activities." (People v. Prettyman, supra, 14 Cal.4th at 269.) The Court stated that a trial court should only instruct on the natural and probable consequences doctrine when "(1) the record contains substantial evidence that the defendant intended to encourage or assist a confederate in committing a target crime, and (2) the jury could reasonably find that the crime actually committed by the defendant's confederate was a 'natural and probable consequence' of the specifically contemplated target offense." (People v. Prettyman, supra, 14 Cal.4th at 269.)

In Prettyman, the Court gave an example demonstrating that murder is not the natural and probable consequence of simple assault. The Court stated: "If, for example, the jury had concluded that defendant Bray had encouraged co-defendant Prettyman to commit an assault on [the victim] but that Bray had no reason to believe that Prettyman would use a deadly weapon such as a steel pipe to commit the assault, then the jury could not properly find that the murder . . . was a natural and probable consequence of the assault encouraged by Bray. (People v. Butts [(1965)] 236 Cal.App.2d [817, 836].) If, on the other hand, the jury had concluded that Bray encouraged Prettyman to assault [the victim] with the steel pipe, or by means of force likely to produce great bodily injury, then it could appropriately find that Prettyman's murder of [the victim] was the natural and probable consequence of that assault. Therefore, instructions identifying and describing the crime of assault with a deadly weapon or by means of force likely to produce great bodily injury (§245) as the appropriate target crime would have assisted the jury in determining whether Bray was guilty of . . . murder under the 'natural and probable consequences' doctrine." (People v. Prettyman, supra, 14 Cal.4th at 267.)

In Prettyman, the Court found the error in failing to identify and define the target offense was harmless error. The Court viewed the instructional error as creating an ambiguity, constituting federal

constitutional error only if there was a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. (People v. Prettyman, supra, 14 Cal.4th at 272; Estelle v. McGuire (1991) 502 US 62, 72.) The error was harmless in Prettyman for three reasons. The only target offense shown by the evidence was assault with a deadly weapon. The natural and probable consequences doctrine was not argued by either the prosecution or the defendant. Finally, the prosecution's theory that the defendant had assisted or encouraged the perpetrator to commit murder was amply supported by the evidence. (Id. at 274.)

In People v. Hickles (1997) 56 Cal.App.4th 1183, 1195-1198, the Court found reversible error based on the trial court's failure to instruct on the target crime where the natural and probable consequences doctrine was the prosecution's theory of murder. In Hickles, the defendant and another man went to a motel room to confront the victim, a former roommate who had been evicted and had caused the telephone service to be interrupted. The other man shot the victim. The defendant who was present at the time of the shooting was prosecuted for murder. The prosecutor argued that the defendant was guilty of murder under either one of two theories. He was guilty of murder if he and the other man planned to kill the victim. He was also guilty of murder if the two men intended to

assault the victim and "rough him up," because the natural and probable consequences of that conduct was the murder.

In Hickles, unlike in Prettyman, the evidence could have supported a jury's determination that the defendant aided and abetted a murder, an assault with a deadly weapon, a simple assault, and even an argument. Without an instruction defining the target crime, the Court in Hickles found reversible error because the jury might have "viewed murder as a natural and probable consequence of simple assault or even an argument, perhaps on a generalized view that things can get out of hand in such altercations." (People v. Hickles, supra, 56 Cal.App.4th at 1197-1198.) In reversing the conviction, the Court stated that "there is at least a reasonable likelihood the jury could have misapplied the natural and probable consequences instruction to allow conviction based upon a target offense that either was not criminal or could not properly be found to have murder as a natural and probable consequence." (People v. Hickles, supra, 56 Cal.App.4th at 1198.)

Thus, in appellant's case it was error under California law for the jury to be instructed that murder is a natural and probable consequence of simple assault. (People v. Prettyman, supra, at 267; People v. Hickles, supra, at 1197-1198.) The erroneous instruction allowed the jury to find appellant guilty of the murders of Skyles and Price based on a theory that he

aided and abetted Michael Soliz's simple assault upon them. Therefore, the Court must reverse appellant's murder convictions involving Skyles and Price.

C. The Jury Instruction Violated Appellant's Federal Constitutional Rights To Due Process And To A Jury Trial Because It Allowed The Jury To Convict Appellant Of Aiding And Abetting A Murder Without Evidence Proving His Guilt Beyond A Reasonable Doubt

The jury instruction that murder is a natural and probable consequence of simple assault also violated appellant's federal constitutional rights. The instruction violated the Due Process Clause of the Fourteenth Amendment because it lessened the burden of proof required for appellant's conviction of the murders of Skyles and Price. (In re Winship (1970) 397 US 358, 364.) The instruction also violated appellant's Sixth Amendment constitutional right to have the jury determine every element of the charged criminal offense beyond a reasonable doubt. (Sullivan v. Louisiana (1993) 508 US 275, 280; Ulster County Court v. Allen (1979) 442 US 140, 156.)

The Due Process Clause of the Fourteenth Amendment requires the prosecution to prove every element of a criminal offense beyond a reasonable doubt. (In re Winship, supra, 397 US at 364.) If the jury in a criminal case is not properly instructed that a defendant is presumed innocent until proven guilty beyond a reasonable doubt, the

defendant has been deprived of due process. (Middleton v. McNeil (2004) 541 US 433, 437; Taylor v. Kentucky (1978) 436 US 478, 485-486.) Any jury instruction that "reduces the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." (Cool v. United States (1972) 409 US 100, 104.)

The Sixth Amendment to the Federal Constitution "gives 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 US 506, 522-523; Sullivan v. Louisiana (1993) 508 US 275, 277.) A judge "may not direct a verdict for the State no matter how overwhelming the evidence." (Sullivan v. Louisiana, supra, 508 US at 277.) "The prohibition against directed verdicts for the prosecution extends to instructions that effectively prevent the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt." (People v. Flood (1998) 18 Cal.4th 470, 491; see also Estelle v. McGuire (1991) 502 US 62, 72; Boyde v. California (1990) 494 US 370, 380.)

To satisfy due process, a jury instruction containing a presumption or an inference must satisfy the rational connection test of Tot v. United States (1943) 319 US 463, 467. The test requires a rational

connection between the basic fact and the presumed or inferred fact. As explained by the United States Supreme Court in Tot, "A statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of one from proof of the other is arbitrary because of lack of connection between the two in common experience . . . [w]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." (Tot v. United States, supra, 319 US at 467-468; see also United States v. Gainey (1965) 380 US 63; United States v. Romano (1965) 382 US 136; Leary v. United States (1969) 395 US 6; Turner v. United States (1970) 396 US 398; Barnes v. United States (1973) 412 US 837; People v. Roder (1983) 33 Cal.3d 491, 497; People v. Henderson (1980) 109 Cal.App.3d 59.)

These56 federal due process principles were summarized by the United States Supreme Court in Ulster County Court v. Allen (1979) 442 US 140, 156, where the Court states: "Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of one element of the crime – that is, an ultimate or elemental fact – from the existence of one or more evidentiary or basic facts. (Citations) The value of these evidentiary

devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strengths of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nevertheless, in criminal cases, the ultimate test of any device's constitutional validity remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."

In the Ulster County case, the Court considered the constitutionality of an instruction given in a criminal case which provided that the presence of a firearm in an automobile was presumptive evidence of the firearm's illegal possession by all persons in the vehicle. The Court concluded that the jury instruction described only a proper permissive inference and that there was a rational connection between the basic facts that the prosecution proved and the ultimate fact that was inferred. (Ulster County Court v. Allen, supra, 442 US at 165.)

Shortly thereafter, the Supreme Court in Sandstrom v. Montana (1979) 442 US 510 held that a jury instruction in a murder case violated due process when it informed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Court found that the instruction was a mandatory presumption that could be

interpreted by the jury as a conclusive presumption of intent or as shifting the burden of persuasion on the issue of intent to the defendant. The Court held that under either interpretation the instruction was incompatible with the principles of In re Winship (1970) 397 US 358, since it improperly relieved the prosecution of its burden of proving all elements of the offense beyond a reasonable doubt. (Sandstrom v. Montana, supra, 442 US at 521-524.)

In appellant's case, the jury instructions on aiding and abetting allowed the jury could convict appellant of the crimes of murder involving Elijah Skyles and Gary Price, even if appellant did not intend to commit the murder and did not assist in the act of murder. According to the instruction, appellant could be found guilty of murder if the jury found beyond reasonable doubt that:

1. The crime of assault was committed;
2. That the defendant aided and abetted that crime;
3. That a co-principal in that crime committed the crime of murder; and
4. The crime of murder was a natural and probable consequence of the commission of the crime of assault. (C.T. 690).

Under this jury instruction, the issue was no longer whether appellant aided, promoted, encouraged or instigated the commission of the crime of murder by helping or assisting Michael Soliz in the shooting of Skyles and Price. The instruction permitted the jury to convict appellant of

two counts of capital murder if it was proven beyond a reasonable doubt that appellant aided and abetted Michael Soliz in the commission of the crime of simple assault..

This jury instruction violated appellant's constitutional right to due process because it permitted the jury to convict appellant of murder under an aiding and abetting theory that did not require proof beyond a reasonable doubt that appellant actually aided and abetted in the crime of murder. The instruction "undermine[d] the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts [appellant's guilt of murder] beyond a reasonable doubt." (Ulster County Court v. Allen, supra, at 156; In re Winship, supra, at 364; People v. Roder, supra, at 497.)

There is no rational connection between the basic fact of simple assault and the presumed or inferred fact of murder. (See People v. Prettyman (1996) 14 Cal.4th 248, 267; People v. Butts (1965) 236 Cal.App.2d 817, 836.) In Prettyman, this Court relied upon the Butts case in support of its conclusion that a jury could not properly find that murder was a natural and probable consequence of simple assault. In Butts, the defendants Otwell and Butts were involved in a fight with a group of strangers. Although the altercation began as a fistfight, Otwell eventually pulled a knife and fatally stabbed one of the persons he was fighting. Butts

was convicted of involuntary manslaughter on a theory of aiding and abetting Otwell. The Court reversed Butts' conviction because there was "no evidence that [he] advised and encouraged the use of a knife, that he had advanced knowledge of Otwell's wrongful purpose to use a knife or that he shared Otwell's criminal intent to resort to a dangerous weapon." (People v. Butts, supra, 236 Cal.App.2d at 836.) The Court stated that: "The evidence shows Butts' awareness of participation in a fistfight, not a knife fight. Thus there is no substantial evidence on which to base a finding of guilt of aiding and abetting in a homicide." (People v. Butts, supra, at 837.)

The natural and probable consequences jury instruction given in appellant's case violated appellant's federal constitutional right to due process of law. The jury instruction allowed the jury to convict appellant of one crime (murder) based upon evidence that he aided and abetted another crime (simple assault). It removed from the jury's consideration the issue of whether appellant in fact helped, aided or encouraged Michael Soliz in committing the murders of Skyles and Price. It allowed the jury to convict appellant of two counts of capital murder without the jury ever finding appellant's guilt beyond a reasonable doubt.

D. The Jury Instruction Was Prejudicial And Requires Reversal Of The Skyles And Price Murder Convictions And Reversal Of Appellant's Death Sentence

Appellant has argued that the jury instruction violated his federal constitutional rights. The Court must therefore apply a standard of review for federal constitutional error. Under that standard, the Court must reverse the murder convictions on the Skyles and Price murder case and appellant's death sentence unless the constitutional error was "harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 US 18, 24; People v. Flood (1998) 18 Cal.4th 470, 494.) To be harmless beyond a reasonable doubt, the constitutional error must not have contributed at all to the jury's final verdict. (Yates v. Evatt (1991) 500 US 391, 403-405; People v. Flood, supra, 18 Cal.4th at 493-495.)

The standard of review for non-constitutional error is whether it is reasonably probable that the trial's outcome would have been different in the absence of the trial court's instructional error. (People v. Prettyman (1996) 14 Cal.4th 248, 274; People v. Watson (1956) 46 Cal.2d 818, 836.) In Prettyman, the Court held that a trial court's failure to identify and describe target crimes when instructing on the natural and probable consequences rule is subject to the standard of review for non-constitutional error. (People v. Prettyman, supra, 14 Cal.4th at 270-274.) Nevertheless, in Prettyman, the Court acknowledged that the failure to instruct the jury on all

of the elements of aiding and abetting is federal constitutional error. (People v. Prettyman, supra, 14 Cal.4th at 271; citing People v. Beeman (1984) 35 Cal.3d 547, 550-551; People v. Croy (1985) 41 Cal.3d 1, 12-16.) Because appellant's claim is that the jury instruction permitted the jury to find appellant guilty of murder without finding all of the elements of aiding and abetting, the standard of review in this case should be for federal constitutional error. However, under either standard, the appellant can demonstrate prejudicial and reversible error.

In reviewing the case for prejudicial error, the Court should determine "whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." (Estelle v. McGuire (1991) 502 US 62, 72; Boyd v. California (1990) 494 US 370, 380; People v. Prettyman, supra, at 272.) In Prettyman, this Court found no reasonable likelihood that the erroneous jury instruction was used in an unconstitutional manner because the parties made no reference to the natural and probable consequence doctrine in their arguments to the jury. The Court also found that the only target offense shown by the evidence was an assault with a deadly weapon and the prosecution's theory that the defendant aided and abetted the perpetrator in the actual murder was amply supported by the evidence. (People v. Prettyman, supra, at 273-274.)

By contrast, in People v. Hickles (1997) 56 Cal.App.4th 1183, the Court found reversible error in the trial court's failure to instruct the jury on the target crime in the natural and probable consequences theory of aiding and abetting. In Hickles, the defendant and another man went to the motel room of the victim, a former roommate who had been evicted and caused the telephone service to be interrupted. The other man shot the victim. The prosecutor argued to the jury that the defendant could be guilty of murder under either of two theories. The first was that he and the other man planned to kill the victim. The second was that the two men intended to assault the victim and rough him up, the natural and probable consequence of which was the murder.

In finding reversible error in Hickles, the Court noted that the evidence at trial that could have supported a jury's determination that the defendant knowingly and intentionally aided and abetted a murder, an assault with a deadly weapon, a simple assault, or even an argument. Without an instruction identifying the target crime, there was a danger that the jury might have erroneously "viewed murder as a natural and probable consequence of simple assault or even an argument, perhaps on a generalized view that things can get out of hand in such altercations." (People v. Hickles, supra, at 1197-1198.) In reversing the conviction, the Court stated that "there is at least a reasonable likelihood the jury, could

have misapplied the natural and probable consequences instruction to allow conviction based upon a target crime that either was not criminal or could not properly be found to have murder as a natural and probable consequence." (People v. Hickles, supra, at 1198.)

In appellant's case, the prosecutor argued to the jury that appellant was guilty of the crimes of murdering Skyles and Price because he aided and abetted Michael Soliz in the shooting by backing up Soliz during the commission of the crime. (R.T. 2197-2199; 2223-2225; 2226; 2232-2234). This was a difficult argument for the prosecutor in light of the jury instructions on aiding and abetting which stated that "Mere presence at the scene of a crime which does not itself assist the commission of a crime does not amount to aiding and abetting." (C.T. 689). California case law on aiding and abetting likewise states that "Mere presence at the scene of the crime which does not itself assist in its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (In re Michael T. (1978) 84 Cal.App.3d 907, 911.)

In addition to the weak backing up theory of aiding and abetting, the prosecutor also had available an alternate theory of aiding and abetting in the jury instructions for the jury to consider if the backing up argument was rejected. The alternate aiding and abetting theory permitted the jury to find appellant guilty of the murder of Skyles and Price if the jury

found that appellant aided and abetted Michael Soliz in the commission of a simple assault; that Soliz committed the crimes of murdering Skyles and Price; and that "The crime of murder was a natural and probable consequence of the commission of the crime of assault." (C.T. 690). Because the prosecutors's backing up theory of aiding and abetting was so weak, the jury may well have relied upon the natural and probable consequences theory in convicting appellant of the murders of Skyles and Price.

Although there was no evidence in the record that Michael Soliz actually committed a simple assault upon Elijah Skyles or Gary Price, there was evidence in the record that appellant and Soliz were both gang members and that gang members often banded together in order to commit crimes, including "simple assaults." (R.T. 2060; 2081). This testimony was presented by a gang expert, Los Angeles County Deputy Sheriff Scott Lusk. (R.T. 2054-2056). Because of this testimony, one interpretation of the evidence was that appellant thought that Michael Soliz intended to only commit a simple assault upon Skyles and Price on the night of the shooting. If the jury had so found, then there is a reasonable likelihood that the jury used the erroneous natural and probable consequences jury instruction to convict appellant of murder based upon a conclusion that he aided and abetted Michael Soliz in the crime of simple assault.

Judith Mejorado was in the car with appellant and Michael Soliz on the night of the shooting. She had picked up her brother, Augustine Mejorado, and his friends appellant and Michael Soliz that evening. They were all driving home when appellant and Michael Soliz unexpectedly saw Skyles and Price standing at a gas station. (R.T. 1793-1796). According to Mejorado, appellant and Soliz both said they knew those people and asked the driver to drive into the gas station. (R.T. 1796-1798). Mejorado's testimony established that appellant and Soliz wanted to confront Skyles and Price. However, it left unanswered whether the intended confrontation was for the purpose of murder, assault with a deadly weapon, simple assault, or just an argument.

There was no evidence that Michael Soliz retrieved a handgun before getting out of the automobile. Rather, it appears as though Mr. Soliz merely had a gun in his pocket at the time that he got out of the car. There was likewise no evidence in the record establishing that appellant was aware that Michael Soliz was armed with a handgun that night. More importantly, there was no evidence establishing that appellant knew ahead of time that Michael Soliz intended to shoot Elijah Skyles and Gary Price. According to Judith Mejorado, when Michael Soliz approached Skyles and Price, she heard talking at first. (R.T. 1711-1717). The talking then

developed into an argument which ended with Michael Soliz shooting Skyles and Price. (R.T. 1800-1802).

The prosecution offered expert testimony from the gang expert that the murders of Elijah Skyles and Gary Price were in retaliation for the earlier murder of Billy Gallegos. (R.T. 2089-2092). Gallegos had been killed by a rival Black gang. (R.T. 2092). However, this theory was undercut by Detective Lusk's testimony that the Sheriff's Department had no information establishing that Skyles and Price were gang members or establishing that Skyles and Price were involved in the shooting of Billy Gallegos. (R.T. 2118-2121). If Skyles and Price were not gang members and they were not involved in the shooting of Billy Gallegos, then the expert's opinion is not supported by the facts of the case. The gang revenge motive is just speculation.

Based upon the evidence, the jury could reasonably have concluded that when appellant got out of the car with Michael Soliz, he believed that Soliz was confronting Skyles and Price in order to engage in a fistfight. This would constitute only a simple assault. Thus, under the natural and probable consequences jury instructions it was possible for the jury to find appellant guilty of murder based upon his aiding and abetting Michael Soliz in the crime of simple assault upon Skyles and Price. On these facts, there is a reasonable likelihood that the jury applied the

challenged instruction in a way that violates the Constitution. (Estelle v. McGuire, supra, 502 US at 72.) The error in giving a jury instruction that murder can be a natural and probable consequence of the commission of the crime of assault was not harmless beyond a reasonable doubt in this case. Therefore, appellant's murder convictions in the Skyles and Price case should be reversed.

Appellant's death sentence for the murder of Lester Eaton should also be reversed if the Court reverses his convictions of the murders of Skyles and Price. During appellant's penalty phase trial, the critical issue was whether or not appellant should receive the death penalty or life without possibility of parole as a sentence for his conviction of the first degree murder of Lester Eaton. In the prosecutor's arguments to the jury at the penalty phase, he emphasized that the most important aggravating factor in support of the death penalty for the Eaton murder was the fact that appellant had also been convicted of two counts of first degree murder involving Elijah Skyles and Gary Price. (R.T. 4387-4389; 4411; 4432-4437). He argued that in the Skyles and Price murder, appellant backed up Michael Soliz in an incredibly vicious shooting. Two defenseless young men were shot 11 times. He argued that they were ambushed and executed just like Lester Eaton and this was only three months after the first crime. According to the prosecutor, Skyles and Price never had an opportunity to

do anything in their lives. Their lives were taken away from them by appellant and Michael Soliz. (R.T. 4435-4440).

The United States Supreme Court has held that a death sentence must be reversed in any case where the jury considered an invalid aggravating factor unless from all of the circumstances in the case, the jury's consideration of the invalid aggravating factor was "harmless beyond a reasonable doubt" under the standard set forth in Chapman v. California (1967) 386 US 18, 23. (Sochor v. Florida (1992) 504 US 527, 532; Sanders v. Woodford (9th Cir. 2004) 373 F.3d 1054, 1060.) The standard of review for non-federal constitutional violations occurring during the penalty phase of a capital case is that the death sentence must be reversed if there is a reasonable possibility that the jury would have rendered a different verdict had the error or errors not occurred. (People v. Brown (1988) 46 Cal.3d 432, 448; People v. Robertson (1983) 33 Cal.3d 21, 63.) Under either standard, the jury's death verdict must have been influenced by their consideration of appellant's murder convictions in the Skyles and Price case. A reversal of the Skyles and Price murder convictions should automatically reverse any death penalty based upon those convictions as aggravating factors. (Johnson v. Mississippi (1988) 486 U.S. 578, 584-585.)

Reversal of appellant's death sentence is also appropriate because the error occurred in a close case. (People v. Vargas (1973) 9

Cal.3d 470, 480.) Appellant was only facing a possible death sentence on one count of first degree murder in a case where his conviction was based upon the felony murder rule. The evidence established that Lester Eaton was shot during a struggle over a gun during the course of his resisting a robbery of his market. (R.T. 3350). Furthermore, the jury at the penalty phase retrial deliberated over a three day period before returning a verdict of death. (R.T. 4503-4523). The length of these deliberations are further indication of the closeness of the case. (People v. Cardenas (1982) 31 Cal.3d 897, 907.)

During the jury deliberations at the second penalty phase, the jury requested a re-reading of appellant's testimony. (R.T. 4509-4511). The jury also sent a note to the judge asking for clarification of the meaning of the mitigating circumstance of whether or not the victim was a participant in the defendant's homicidal act or consented to the homicidal conduct. (R.T. 4506-4508). From the jury note, it appears as though the jury was considering whether Lester Eaton's conduct in reaching for his own gun during the robbery was a mitigating circumstance which might warrant a sentence of life without possibility of parole. Appellant testified that he went to the Hillgrove Market to commit robbery, not murder. (R.T. 4206) Lester Eaton's act of reaching for his own gun may have been viewed by

the jury as conduct of the victim that precipitated the defendant's homicidal act.

Based upon all of these circumstances, the Court should find that the erroneous natural and probable consequences jury instruction requires reversal of appellant's murder convictions in the Skyles and Price case. The jury's consideration of the invalid Skyles and Price murder convictions during the penalty phase was not harmless beyond a reasonable doubt. It may have been a factor in causing the jury to return a death verdict. (Sochor v. Florida (1992) 504 US 527, 540; Stringer v. Black (1992) 503 US 222, 230; People v. Brown (1988) 46 Cal.3d 423, 447-448.) Thus, the Court should also reverse appellant's death sentence on the Lester Eaton murder.

VII. THE COURT FAILED TO SUA SPONTE INSTRUCT ON VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE ON THE SKYLES AND PRICE MURDER CHARGES

A. Factual Background

Appellant was charged in Counts 4 and 5 with the murders of Elijah Skyles and Gary Price. (C.T. 386-387) The jury was only instructed on first and second degree murder. (C.T. 696-707) Appellant was found guilty of first degree murder on both counts. Those convictions must be reversed because the trial court failed to sua sponte instruct the jury on the lesser included offense of voluntary manslaughter. The theory of voluntary manslaughter that applied in this case was voluntary manslaughter based "upon a sudden quarrel or heat of passion." (Pen. Code §192, subd. (a).)

The evidence establishing a sudden quarrel was provided by Judith Mejorado. She had been driving with appellant and Michael Soliz on the night of the shooting. As the car passed a Shell gas station, she saw three Black males. Appellant and Soliz said they knew those people. The car was driven back to the station. Appellant and Soliz got out of the car. Soliz approached Skyles and Price to talk to them. Appellant stayed behind by the car. (R.T. 1683-1685; 1695-1710; 1789-1799)

Judith Mejorado heard an argument between all four men: appellant, Soliz, Skyles and Price. She could hear all four voices. She described it as loud talking, like an argument. One of the Black men, either Skyles or Price, stated "no, I didn't mean to do you that way." (R.T. 1711-

1717; 1800-1802) Ms. Mejorado next heard several shots being fired. She turned to look out the back window of the car and saw Michael Soliz shooting Skyles and Price. (R.T. 1727-1732; 1800-1802)

The evidence establishing provocation was provided by the gang expert, Detective Scott Lusk. He testified that appellant and Michael Soliz were both members of the Puente street gang. (R.T. 2072-2081) It was his expert opinion that the shootings of Skyles and Price were in retaliation for the murder of Puente gang member Billy Gallegos two weeks earlier. (R.T. 2089-2092) Gallegos had been killed by two Black members of the Neighborhood Crips gang. (R.T. 1879-1989; 2000-2004; 2092) On the night that Skyles and Price were shot, they were both wearing gang type clothing. (R.T. 2093-2094) Elijah Skyles wore red clothing that was similar to clothing worn by the Bloods street gang. Gary Price wore blue clothing that was similar to the clothing worn by members of the Crips street gang. (R.T. 1342-1344)

B. The Court Had A Sua Sponte Duty To Instruct The Jury On Voluntary Manslaughter Based Upon A Sudden Quarrel Or Heat of Passion

It is true that appellant did not request jury instructions on the lesser included offense of voluntary manslaughter. However, under the facts of this case, the trial court was under a duty to sua sponte instruct the jury that voluntary manslaughter was a lesser included offense within the charged counts alleging the murders of Elijah Skyles and Gary Price. The

failure of the Court to instruct on voluntary manslaughter based on a sudden quarrel or heat of passion was reversible error. (People v. Breverman (1998) 19 Cal.4th 142; People v. Barton (1995) 12 Cal.4th 186; People v. Brooks (1986) 185 Cal.App.3d 687.)

"Murder is the unlawful killing of a human being with malice aforethought." (Pen. Code §187, subd. (a).) Manslaughter is "the unlawful killing of a human being without malice." (Pen. Code §192.) The offense is voluntary manslaughter when the killing is "upon a sudden quarrel or heat of passion." (Pen. Code §192, subd. (a).) A defendant who kills "upon a sudden quarrel or heat of passion" lacks malice, and the crime is reduced from murder to voluntary manslaughter because heat of passion negates the malice element of the crime of murder. (People v. Lasko (2000) 23 Cal.4th 101, 109-110; People v. Rios (2000) 23 Cal.4th 450, 459-460.) Thus, voluntary manslaughter is a lesser included offense within the crime of murder. (People v. Breverman (1998) 19 Cal.4th 142, 154; People v. Barton (1995) 12 Cal.4th 186, 200-201.)

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [citations] The general principles of law governing the case are those principles closely and openly connected with the facts before the Court, and which are necessary for the jury's understanding of the case." (People v. Sedeno (1974) 10 Cal.3d 703,

715; People v. St. Martin (1970) 1 Cal.3d 524, 531.) "That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present." (People v. Breverman, supra, 19 Cal.3d at 154; People v. Barton, supra, 12 Cal.4th at 194-195.)

A trial court's duty to sua sponte instruct the jury on lesser included offenses arises only when there is substantial evidence of the lesser offenses. (People v. Breverman, supra, 19 Cal.4th at 162; People v. Barton, supra, 12 Cal.4th at 201; People v. Flannel (1979) 25 Cal.3d at 668, 684-685.) "Substantial evidence in this context is 'evidence from which a jury composed of reasonable [persons] could ... conclude that the lesser offense, but not the greater, was committed.'" (People v. Breverman, supra, at 162; People v. Flannel, supra, 25 Cal.3d at 684; People v. Carr (1972) 8 Cal.3d 287, 294.)

In People v. Breverman, supra, the defendant was charged with murder after shooting at a group of men standing in front of his house. The group of men were using baseball bats and other implements to vandalize the defendant's car. The men were also challenging the defendant to fight and trespassing on the defendant's property a short distance from the front door of the house. The defendant fired several shots through a window pane in the front door, then came outside and fired further shots towards the fleeing men, killing one of them.

The jury in Breverman was instructed on self defense and voluntary manslaughter premised on the theory of unreasonable belief in self defense based on People v. Flannel (1979) 25 Cal.3d 668. The defendant was convicted of second degree murder. This Court held that the trial court erred when it failed to sua sponte instruct the jury on the sudden quarrel or heat of passion theory of voluntary manslaughter, and remanded the case to the Court of Appeal to determine whether the error was reversible under People v. Watson (1956) 46 Cal.2d 818, 836.

In Breverman, the Court found that there was substantial evidence of a sudden quarrel or heat of passion in addition to the evidence of unreasonable self defense. A sizeable group of men were trespassing on the defendant's property and acting in a menacing manner. There were challenges to the defendant to fight, followed by the use of weapons to damage the defendant's vehicle parked in the driveway of his residence. The actions of the mob outside were causing fear and panic among the defendant and other occupants of the house. The Court held that this was substantial evidence of a sudden quarrel or heat of passion upon which the trial court was required to sua sponte instruct. The duty to instruct on the sudden quarrel or heat of passion theory of voluntary manslaughter was in addition to the requirement to instruct on the unreasonable self defense theory of voluntary manslaughter. The Court stated: "We therefore conclude that the trial court erred in this case when it failed to instruct, even

absent a defense request, on heat of passion as a theory of voluntary manslaughter." (People v. Breverman, supra, 19 Cal.4th at 163-164.)

The issue of whether there was substantial evidence of heat of passion was also raised in People v. Barton (1995) 12 Cal.4th 186, 201-202. In Barton, the defendant was charged with murder after he shot and killed a motorist who had threatened the defendant's daughter with serious injury by trying to run her off the road. The defendant was convicted of voluntary manslaughter at a trial where the defendant objected to instructions on manslaughter as a lesser included offense. The defendant argued that since he testified that the shooting was accidental, the jury should have been limited to either murder or acquittal.

This Court disagreed with the defendant's argument and found there was substantial evidence, some of it offered by the prosecution and some by the defense, from which the jury could reasonably find that the defendant killed the victim in a sudden quarrel or heat of passion. (People v. Barton, supra, 12 Cal.4th at 202.) The evidence was that shortly before the victim was killed, the defendant was told by his daughter that the victim had tried to run her car off the road and had spat on the window of her car. When the defendant and his daughter confronted the victim, the victim called the defendant's daughter a "bitch" and assumed a "fighting stance," challenging the defendant. When the defendant told his daughter to call the

police, the victim tried to drive away. The defendant engaged in a heated argument with the victim just before shooting him. (Ibid.)

Appellant's case had similar substantial evidence of a sudden quarrel and heat of passion. Judith Mejorado overheard a loud argument just before the shooting. She heard what sounded like four voices engaged in a loud argument. This would constitute sufficient evidence alone to submit to the jury the question of whether the killing of Skyles and Price was the result of a "sudden quarrel," and was thus manslaughter and not murder. Although Judith Mejorado did not know the nature of the quarrel, a gang expert testified that in his opinion, Skyles and Price had been killed in retaliation for the murder of Billy Gallegos two weeks earlier. From that testimony, it could reasonably have been inferred that the sudden quarrel was over the murder of Billy Gallegos and possibly the heated accusation that Skyles and Price has been involved in the murder. In light of that evidence, it was error for the trial court to fail to instruct on the lesser included offense of voluntary manslaughter.

C. There Was Adequate Provocation For The Sudden Quarrel Based Upon The Prosecution's Evidence Concerning The Earlier Murder Of Billy Gallegos

There was adequate provocation in appellant's case to require the trial court to instruct on voluntary manslaughter. The prosecution presented evidence that fellow gang member Billy Gallegos had been shot and killed two weeks earlier by two Black gang members affiliated with the

rival Neighborhood Crips gang. The gang expert testified that Skyles and Price, who were dressed as Black gang members, were probably killed in retaliation for the murder of Gallegos. A reasonable inference from this evidence was that before the shooting, Michael Soliz had a heated argument with Skyles and Price over Gallegos' murder. Soliz must have concluded, based on that argument, that Skyles and Price were involved in the Gallegos murder. If the Court had instructed on voluntary manslaughter based upon a sudden quarrel or heat of passion, the jury may have concluded that the shootings of Skyles and Price were voluntary manslaughter and not murder.

Voluntary manslaughter based upon heat of passion requires a showing of adequate provocation. (People v. Steele (2002) 27 Cal.4th 1230, 1252; People v. Lee (1999) 20 Cal.4th 47, 59.) "Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation." (People v. Lee, supra, 20 Cal.4th at 59.) "[P]rovocation and heat of passion must be affirmatively demonstrated" for voluntary manslaughter. (People v. Steele, supra, 27 Cal.4th at 1252.)

"The heat of passion requirement for manslaughter has both an objective and a subjective component." (People v. Steele, supra at 1252.) The defendant must actually and subjectively kill under the heat of passion and the circumstances giving rise to the heat of passion are also viewed objectively to determine if the "circumstances were sufficient to arouse the passions of the ordinary reasonable man." (People v. Steele, supra, at 1252-

1253; see also People v. Breverman (1998) 19 Cal.4th 142, 163; People v. Wickersham (1982) 32 Cal.3d 307, 326-327; People v. Logan (1917) 175 Cal. 45, 49.) "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" (People v. Gutierrez (2002) 28 Cal.4th 1083, 1143-1144; People v. Wickersham, supra, 32 Cal.3d at 326.)

"The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim. [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim." (People v. Lee, supra, at 59; accord In re Thomas C. (1986) 183 Cal.App.3d 786, 798; People v. Spurlin (1984) 156 Cal.App.3d 119, 125-126.) However, the provocation may not be based upon the "predictable conduct by a resisting victim" in cases where the defendant is committing a felony. (People v. Balderas (1985) 41 Cal.3d 144, 196-197; People v. Jackson (1980) 28 Cal.3rd 264, 306.)

The killing "upon a sudden quarrel or heat of passion" must also occur "suddenly as a response to the provocation, and not belatedly as revenge or punishment." (People v. Daniels (1991) 52 Cal.3rd 815, 868.) "Hence, the rule is that, if sufficient time has elapsed for the passions of an ordinary reasonable person to cool, the killing is murder, not manslaughter." (People v. Daniels, supra, 52 Cal.3d at 868.) [defendant not entitled to requested instructions on voluntary manslaughter when he killed two police

officers coming to arrest him two years and three months after he was shot by police officers during a bank robbery rendering him a paraplegic].)

There is no specific type of provocation required for voluntary manslaughter and "verbal provocation may be sufficient." (People v. Berry (1976) 18 Cal.3d 509, 515; People v. Valentine (1946) 28 Cal.2d 121, 138-139.) Furthermore, "provocation sufficient to reduce murder to manslaughter need not occur instantaneously, but may occur over a period of time." (People v. Wharton (1991) 53 Cal.3d 522, 569; see also People v. Borchers (1958) 50 Cal.2d 321, 329 [adequate provocation from defendant's paramour, who taunted him with admissions of infidelity and other "long continued provocatory conduct"]; People v. Berry, supra, 18 Cal.3d at 515 [adequate provocation from a two week period of provocative conduct by defendant's wife that could "arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition."].)

"The key element in not the duration of the source of provocation but whether or not defendant's reason was, at the time of the act, so disturbed or obscured by some passion ... to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from passion rather than from judgment." (People v. Wharton, supra, 53 Cal.3d at 569-570, quoting People v. Rich (1988) 45 Cal.3d 1036, 1112.)

Adequate provocation existed in appellant's case based upon the recent murder of Billy Gallegos and the belief that Skyles and Price had been involved in the murder. Indeed, the facts of appellant's case are similar to the case of People v. Brooks (1986) 185 Cal.App.3d 687. In Brooks, the Court found substantial evidence of provocation and heat of passion. The defendant's brother had been stabbed to death. Two hours after the death of his brother, the defendant confronted and argued with the person he suspected had killed his brother. During the argument, the defendant shot and killed this person. The defendant was convicted of second degree murder. The conviction was reversed for failure to instruct on voluntary manslaughter as a lesser included offense. The Court found that "murder of a family member is legally adequate provocation for voluntary manslaughter." (People v. Brooks, supra, 185 Cal.App.3d at 693.)

Although Billy Gallegos was not a family member of either appellant or Michael Soliz, he was a fellow gang member and thus a friend. The murder of a close friend is comparable to the murder of a family member. Both would cause a reasonable person to have a strong emotional response. If the murder of a family member is legally adequate provocation for voluntary manslaughter, then the murder of a close friend should also be legally adequate provocation. Furthermore, even though appellant and Soliz did not actually see Skyles and Price murder Gallegos, a sudden disclosure of facts giving rise to their belief that Skyles and Price were

involved in the murder, may constitute adequate provocation, even if the disclosure is untrue. (People v. Brooks, supra, at 694.)

Thus, the evidence established both a sudden quarrel or heat of passion and adequate provocation. Under the facts of this case, voluntary manslaughter was a lesser included offense to the Skyles and Price murder charges. The trial court erred in failing to sua sponte instruct the jury on voluntary manslaughter.

D. Appellant Was Denied His Federal Constitutional Right To Due Process And To A Jury Trial Because The Trial Court's Failure To Instruct On The Lesser Included Offense Of Voluntary Manslaughter Resulted In An Incomplete Definition Of The Malice Element Of Murder

The trial court's failure to instruct the jury on voluntary manslaughter based upon heat of passion also violated appellant's constitutional right to due process of law and to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution. "The Sixth Amendment to the federal Constitution 'gives 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.)

In appellant's case, the failure of the trial court to instruct on the lesser included offense of voluntary manslaughter resulted in an incomplete definition of the malice element of murder. This Court in People v. Breverman (1988) 19 Cal.4th 142, 169-170 n. 18 and 19, deferred

ruling on this constitutional issue because the defendant had not clearly raised and briefed the issue. Appellant now raises the claim that the failure to instruct on the heat of passion theory of voluntary manslaughter in a murder prosecution violates a defendant's federal constitutional rights to a jury trial and to due process of law because it leaves the jury with an incomplete definition of the malice element of the crime of murder and prevents the jury from determining the additional circumstance of heat of passion that would make the defendant factually innocent of murder. (See People v. Breverman, supra, 19 Cal.3d at 187-191 (Kennard, J., Dissenting).)

In California, murder is defined as "the unlawful killing of a human being ... with malice aforethought." (Pen. Code § 187.) One who intentionally kills in the "heat of passion," however, lacks malice and is not guilty of murder. He is only guilty of voluntary manslaughter. (Pen. Code § 192.) For the purposes of murder, malice may be either express or implied. It is express when there is a deliberate intention unlawfully to take away a life. It is implied, when there is no provocation, or the circumstances of the killing show an abandoned and malignant heart. (Pen. Code § 188.) Accordingly, murder is proven by showing an unlawful killing plus either intent to kill or an intent to do a dangerous act with conscious disregard of its danger. (People v. Saille (1991) 54 Cal.3d 1103, 114.)

"[W]hen the intentional killing results from a sudden quarrel or heat of passion induced by adequate provocation," the killer lacks malice and the only crime committed is voluntary manslaughter. (People v. Saille, supra, 54 Cal.3d 1102, 1114.) "The presence of heat of passion establishes the absence of malice even when one of the mental states necessary for murder is present." (People v. Breverman (1998) 19 Cal.4th 142, 188.) Thus, to establish the absence of malice in a murder prosecution, it is not necessary to prove the absence of the mental states used to define malice. The absence of the malice element of murder may be shown by proving an additional elemental fact, namely, that the defendant even though intending to kill, acted in the heat of passion.

In order to make a finding on each elemental fact needed to convict a person of the crime of murder, the jury must be fully instructed on all of the elements of the crime. In California, given the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger plus the absence of heat of passion. Where, as in appellant's case, there is sufficient evidence of heat of passion to support a voluntary manslaughter verdict, murder instructions that fail to inform the 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. (People v. Breverman, supra, 19 Cal.4th at 189-190 (Kennard, J., Dissenting).)

Appellant's argument is supported by the United States Supreme Court decision in Mullaney v. Wilbur (1975) 421 U.S. 684. In Mullaney, the defendant was convicted of murder in a state criminal prosecution in Maine. In the state of Maine, the law of murder and manslaughter was identical to the law in California. Murder was defined as an unlawful killing with malice aforethought. Manslaughter was defined as an intentional killing without malice. Murder and manslaughter were composed of common elemental facts, with the exception that manslaughter required proof of the additional fact of "heat of passion on sudden provocation." The state of Maine, however, placed the burden of proving the presence of heat of passion upon the defendant.

The United States Supreme Court stated that one requirement of due process is that the state had the burden of proving beyond a reasonable doubt every elemental fact necessary to establish the crime. (Mullaney v. Wilbur, supra, 421 U.S. at 685.) The Court held that it violated due process to place the burden of proving the absence of heat of passion on the defendant. Given the structure between murder and manslaughter as defined in Maine state law, due process required the state courts to treat the absence of heat of passion as a part of the definition of murder requiring the state to prove beyond a reasonable doubt that the defendant did not act in the heat of passion, just as the state must prove

every other element of the crime. (Mullaney v. Wilbur, supra, 421 U.S. at 698.)

It is fundamentally unfair in a case such as this to instruct the jury on the elements of the crime of murder, but fail to inform the jury that appellant may not be convicted of murder if the killing occurred upon a sudden quarrel or heat of passion. The state cannot omit an instruction on voluntary manslaughter and thereby prevent the jury from determining the additional circumstances of heat of passion that would make the defendant factually innocent of murder. It is manifestly unjust to permit the state to use the jury's ignorance of the elements of voluntary manslaughter to convict a defendant of murder when the jury, had it known of voluntary manslaughter, could have found the additional circumstance of heat of passion that would have made the defendant liable only for the lesser crime. Such a procedure violates due process by failing to ensure fundamental fairness in the determination of guilt at trial. (People v. Breverman, supra, 19 Cal.4th at 191 (Kennard, J., Dissenting) citing United States v. Valenzuela-Bernal (19820 458 U.S. 858, 872 ["Due Process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice."]; Spencer v. Texas (1967) 385 U.S. 554, 563-564 ["the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial."]; Albright v. Oliver (1994) 510 U.S. 221, 283

[Due process "ensures fundamental fairness in the determination of guilt at trial."].)

E. Appellant Was Denied His Federal Constitutional Rights Under The Eight Amendment And The Due Process Clause Of The Fourteenth Amendment To A Reliable Determination Of Guilt In A Capital Case By The Failure To Instruct On Voluntary Manslaughter As A Lesser Included Offense.

The trial court's failure to instruct the jury on voluntary manslaughter based upon heat of passion violated appellant's constitutional right to a reliable determination of guilt in a capital case. Both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee to the defendant in a capital case the right to a reliable determination of guilt. (Beck v. Alabama (1980) 447 U.S. 625, 638.)

In Beck, the Supreme Court reversed a defendant's murder conviction and death sentence because an Alabama statute, limited to capital cases, prohibited the jury from considering a lesser noncapital offense, necessarily included within the capital charge, and supported by the evidence. By not providing the jury with a third option of convicting on a lesser included offense, the statute encouraged the jury to convict for an impermissible reason, namely, its belief that the defendant was guilty of some serious crime and should be punished. The Court held that this introduces "a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." (Beck v. Alabama, supra

477 U.S. at 643; see also People v. Breverman (1988) 19 Cal.3d 142, 166-167.)

In appellant's case, no lesser included offense jury instructions on voluntary manslaughter were given on the Skyles and Price murder charges. The jury convicted appellant of two counts of first degree murder in that case. Although appellant was sentenced to life in prison without possibility of parole for those convictions, the prosecution had originally sought the death penalty. Thus, during the guilt trial on the Skyles and Price murder charges, it was a capital prosecution and the constitutional requirement to instruct on lesser included offenses under the Beck case applied to appellant's case. The failure of the trial court to instruct the jury on the lesser included offense of voluntary manslaughter deprived appellant of his constitutional right to a reliable determination of guilt. Appellant's murder convictions on the Skyles and Price case must therefore be reversed for violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

The jury received instructions on the lesser included offense of second degree murder. The jury rejected that option when it returned verdicts of first degree murder on the Skyles and Price charges. However, a rejection of a second degree murder theory does not mean that the jury ever considered or rejected a heat of passion theory of voluntary manslaughter. Heat of passion reduces an intentional and unlawful killing from murder to voluntary manslaughter by negating the element of malice. (People v.

Breverman, supra, 19 Cal.3d at 154; People v. Barton (1995) 12 Cal.4th 186, 201-202.)

Finally, appellant's first degree murder convictions in the Skyles and Price case were used by the prosecutor during the penalty trial on the Lester Eaton case. The first degree murder convictions for the Skyles and Price murders were the most significant aggravating factor argued by the prosecutor in support of the death penalty for the Eaton murder. If the murder convictions in the Skyles and Price case were unconstitutional under Beck v. Alabama, supra, then their use as aggravating factors at the penalty trial would render the appellant's death penalty for the Eaton murder unconstitutional. (Johnson v. Mississippi (1988) 486 U.S. 578, 585; Gardner v. Florida (1977) 430 U.S. 349, 363-364.)

F. The Failure To Instruct On Voluntary Manslaughter Was Prejudicial

In deciding whether there is substantial evidence of the lesser included offense of voluntary manslaughter, "the Courts should not evaluate the credibility of witnesses, a task for the jury." (People v. Flannel, supra, 25 Cal.3d at 684.) Generally, it is left to the jury to determine whether "the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." (People v. Berry, supra, 18 Cal.3d at 515; People v. Valentine, supra, 28 Cal.2d at 138-139.) In the Berry case, this

Court stated that: "In the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion." (People v. Berry, supra, at 515 quoting People v. Logan (1917) 175 Cal. 45, 48-49.)

Appellant suffered prejudice from the failure to instruct on the heat of passion theory of voluntary manslaughter because, under the jury instructions given, the jury was never called upon to determine whether Michael Soliz shot and killed Skyles and Price while acting upon a sudden quarrel or heat of passion. Since appellant's guilt was based upon a theory that he aided and abetted Soliz, if the jury had found that Soliz's crimes were no more than manslaughter, appellant would only have been guilty of aiding and abetting voluntary manslaughter and not murder.

This Court has stated that "it is reversible error to refuse a manslaughter instruction in a case where murder is charged, and the evidence would warrant a conviction of manslaughter." (People v. Edwards (1985) 36 Cal.2d 768, 773-774.) In People v. Berry, supra, 18 Cal.3d 509, 518, the Court found reversible error under People v. Watson (1956) 46 Cal.2d 818, 836 and reversed a murder conviction for failure to instruct on voluntary manslaughter where there was evidence of heat of passion that the jury was never called upon to consider.

Reversal is also required under the standard of review for federal constitutional error. Since the failure to instruct on heat of passion led to an incomplete instruction on the malice element of the crime of murder, appellant was denied his constitutional right to have a jury determine all of the elements of the crime beyond a reasonable doubt. The Court must reverse a conviction for federal constitutional error unless the error is "harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 U.S. 18, 24.) Because the jury never considered the effect of the evidence of a sudden quarrel and heat of passion, and were never told that evidence of heat of passion negates the malice element of the crime of murder, the error in failing to instruct the jury was not harmless. Thus, the Court should reverse appellant's murder convictions on Counts 4 and 5 and appellant's death sentence on Count 1.

VIII. THE COURT FAILED TO SUA SPONTE INSTRUCT THE JURY PURSUANT TO PENAL CODE SECTION 1111 ON ACCOMPLICE TESTIMONY

A. Factual Background

The trial court failed to sua sponte instruct the jury concerning two important cautionary instructions on accomplice testimony. The first instruction states that "A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense." (CALJIC 3.11.) The second instruction provides in part that "The testimony of an accomplice ought to be viewed with distrust [and should be examined] with care and caution and in light of all the evidence in the case." (CALJIC 3.18.)

These two jury instructions should have been given in response to the testimony of prosecution witness Richard Alvarez. (R.T. 1154-1188; 1225-1248) Alvarez testified, pursuant to a grant of immunity, that he acted as a getaway driver in the Hillgrove Market robbery. He was an accomplice in the Eaton murder and the market robbery. Thus, the failure of the trial court to give the two cautionary jury instructions concerning accomplice testimony requires reversal of appellant's conviction and death sentence on the Lester Eaton murder and the robbery convictions involving Lester and Betty Eaton.

Richard Alvarez testified that on the night of the Hillgrove Market robbery, appellant telephoned him and asked him to pick him up. After receiving the call, Alvarez drove to Seventh Avenue and Turnball Canyon Road where he met appellant, Michael Soliz and Michael Gonzales. This occurred some time between 7pm and 8pm. Alvarez then drove all three back to his friend Jennifer's house. (R.T. 1159-1160) In the middle of his testimony, the Court appointed a lawyer to represent Alvarez. After consulting with an attorney, Alvarez asserted his privilege against self incrimination and refused to answer any questions. Alvarez was then given use immunity and resumed his testimony. (R.T. 1176-1187; 1225-1231).

While appellant was in jail awaiting trial on the Lester Eaton murder, Richard Alvarez visited him. The Los Angeles County Sheriff's Department secretly tape recorded the conversation between Alvarez and appellant. The tape recording was played for the jury. (R.T. 1165-1170; Peo.Exh. 20). Alvarez testified that during the jail visit he told appellant that his name had been mentioned during appellant's preliminary hearing. This caused him some concern because he did not want to be identified as a participant in the Hillgrove Market robbery and murder. During his trial testimony, Alvarez denied that he had driven the robbers before the robbery and waited during the robbery at Turnball Canyon Road. He testified that he only picked them up afterwards. (R.T. 1238-1245).

After Alvarez finished his testimony, the prosecution called Deputy Woodrow West. Deputy West testified that he interviewed Richard Alvarez at the Industry Sheriff's Station on October 3, 1996. At first, Alvarez denied knowing anything about the Hillgrove Market robbery and murder case. After Deputy West accused him of lying, Alvarez told him the following: Some time between 6pm and 7pm on the night of the robbery, Alvarez received a call from appellant. Appellant wanted Alvarez to pick him up at Jennifer's house. When he arrived at Jennifer's house he met appellant, Michael Soliz and Michael Gonzalez. (R.T. 1252-1253).

Alvarez told Deputy West that he followed those three to a location on Turnball Canyon Road in Hacienda Heights. He was told to wait at that location in his car, while the three men drove away in a blue van. Michael Gonzales was driving the van. Appellant and Soliz were passengers. They were gone for only a short period of time. When they returned, they parked the van and all three men entered Richard Alvarez's car. He then drove them back to Jennifer's house where they remained for the rest of the evening. (R.T. 1254-1257). In his testimony at the trial, Richard Alvarez denied making these statements to Deputy West. (R.T. 1161-1165).

The trial court not only failed to give the two cautionary jury instructions concerning accomplice testimony, but compounded the error by

instructing the jury that the testimony of one witness is sufficient to prove any fact. The Court instructed the jury: "You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." (C.T. 676; CAJIC 2.27.)

B. The Trial Court Had A Sua Sponte Duty To Instruct The Jury That The Testimony Of An Accomplice Must Be Corroborated And Must Be Viewed With Distrust

Penal Code section 1111 provides that: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Section 1111 also provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

"[W]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice, the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice." (People v.

Zapien (1993) 4 Cal.4th 929, 982; People v. Bevins (1960) 54 Cal.2d 71, 76.) If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. (People v. Hayes (1999) 21 Cal.4th 1211, 1271; People v. Robinson (1964) 61 Cal.2d 373, 394.)

In either case, the trial court must also instruct the jury, sua sponte, "(1) that the testimony of the accomplice witness is to be viewed with distrust (citations), and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated." (People v. Zapien, supra, 4 Cal.4th at 982; People v. Gordon (1973) 10 Cal.3d 460, 466 n. 3.) "Testimony," as used in Penal Code section 1111, includes "all out of court statements of accomplices . . . used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police." (People v. Brown (2003) 31 Cal.3d 518, 555; People v. Williams (1997) 16 Cal.4th 153, 245.)

"The reason most often cited in support of these instructions is that an accomplice is inherently untrustworthy because he or she 'usually testif[ies] in the hope of favor or the expectation of immunity." (People v. Tobias (2001) 25 Cal.4th 327, 331; People v. Coffey (1911) 161 Cal. 433, 438.) In addition, "an accomplice may try to shift blame to the defendant in an effort to minimize his or her own culpability." (People v. Tobias, supra,

25 Cal.3d at 331; *see also* People v. Guiuan (1998) 18 Cal. 4th 558; People v. Brown, supra, 31 Cal.4th at 555.)

In appellant's case, Richard Alvarez was clearly an accomplice within the meaning of Penal Code section 1111. According to Detective West, Alvarez admitted driving the robbers both to and from a vicinity near the Hillgrove Market on the night of the robbery. The jury could have found that he aided and abetted in the robbery and was thus an accomplice to the robbery and to the murder under the felony murder rule. It was clear error for the trial court to fail to instruct the jury that accomplice testimony must be corroborated and such testimony must be viewed with distrust.

C. The Failure Of The Trial Court To Instruct The Jury Concerning These Two Cautionary Jury Instructions On Accomplice Testimony Also Violated Appellant's Federal Constitutional Rights.

Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, a defendant may not be convicted of a crime unless all of the elements of the crime have been found by a jury beyond a reasonable doubt. (Apprendi v. New Jersey (2000) 530 US 466, 477; Ring v. Arizona (2002) 536 US 584,602; Blakely v. Washington (2004) 124 S.Ct. 2531; In re Winship (1970) 397 US 358; Beck v. Alabama (1980) 447 US 625.) The failure of the trial court to instruct that accomplice testimony must be corroborated and viewed with distrust violated appellant's federal

constitutional rights because the jury never found beyond a reasonable doubt that the testimony of Richard Alvarez was corroborated and the jury was never cautioned to view Richard Alvarez's testimony with distrust.

The error in this case also violated appellant's Eight and Fourteenth Amendment Constitutional right to a reliable, individualized capital sentencing determination. (Monge v. California (1998) 524 US 721, 732; Johnson v. Mississippi (1988) 486 US 578, 584.) The accomplice corroboration requirement and the accomplice cautionary instruction are intended to increase the reliability of jury findings in criminal cases. Where guilt in a criminal case is based in whole or in part on the testimony of an accomplice, and the jury is never required to find corroboration or to view the testimony with caution, the jury's findings are not reliable. A death sentence entered after such unreliable findings would violate the Eighth and Fourteenth Amendments.

D. Appellant Suffered Prejudice Because Of The Absence Of The Cautionary Instructions On Accomplice Testimony

The standard of review for the failure to instruct on the law of accomplices is whether there is a reasonable probability that the defendant would have received a more favorable result if the trial court had given the required instructions. (People v. Lewis (2001) 26 Cal. 4th 334, 371; People v. Watson (1956) 46 Cal.2d 818, 837.) The standard of review for federal constitutional error is that the Court must reverse the conviction unless the

error is harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 US 18, 24; People v. Hill (1998) 17 Cal. 4th 800, 844.) Appellant contends there is sufficient prejudice in the record to require reversal under either standard of review.

This Court stated that "A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record." (People v. Lewis (2001) 26 Cal. 4th 334, 370.) "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (People v. Hayes (1999) 21 Cal.4th 1211, 1271.) The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (People v. Fauber (1992) 2 Cal. 4th 792, 834.)

The testimony of Richard Alvarez was not the only evidence the prosecution offered in support of the Hillgrove Market robbery and murder charges. There was other corroborating evidence. The prosecution presented testimony from Doreen Ramos concerning her observations of appellant and Michael Soliz possibly planning a robbery. Appellant's fingerprints were on papers found in the blue van used during the robbery. Finally, there was appellant's tape recorded statements made to Salvador Berber in which appellant admitted involvement in the market robbery and

murder. Under the Lewis case approach, the failure to instruct on the accomplice corroboration requirement would be harmless.

However, under California law it was for the jury to decide whether Richard Alvarez was an accomplice and whether his testimony had been corroborated. (People v. Zapien (1993) 4 Cal. 4th 929, 982.) Under the Federal Constitution, the jury must determine whether a defendant's guilt of every element of the crime has been proven beyond a reasonable doubt. United States v. Gaudin (1995) 515 U.S. 506, 522-523.) Accomplice corroboration is not an issue for the trial judge or the appellate court to decide. The failure to present the issue to the jury in appellant's case means the jury never decided the accomplice corroboration issue. If the jury never decided that issue, then appellant's conviction occurred at the trial where the jury did not find every aspect of appellant's guilt beyond a reasonable doubt in violation of his Sixth Amendment Constitutional right to a jury trial. (See Apprendi v. New Jersey (2000) 530 US 466, 490; Gaudin v. United States (1998) 515 US 506, 522-523; People v. Flood (1998) 30 Cal. 4th 100, 101.) The fact that the appellate court can now find corroboration evidence in the record does not cure the error that the jury failed to decide whether it believed the accomplice testimony was corroborated.

The failure to instruct that the testimony of an accomplice must be viewed with distrust is reviewed in a manner different from the accomplice corroboration requirement. The failure to give the view with distrust instruction is not harmless if there is sufficient corroborating evidence in the record. (People v. Lewis, supra, 26 Cal.4th at 370-371.) In People v. Gordon (1973) 10 Cal.3d 460, 471-473, the Court reviewed all of the evidence in the case to determine whether it was harmless error to fail to give an instruction requiring the jury to view the testimony of an accomplice with distrust. In Gordon, the error was harmless because the prosecutor had advised the jury that the accomplice would not be telling the whole truth and the jury would only be getting "a half-truth story" from the witness.

In appellant's case, the prosecutor did not advise the jury in any way that Richard Alvarez's testimony should be viewed with distrust or needed to be corroborated. In his opening statement, the prosecutor told the jury that Richard Alvarez would be testifying that he followed the blue van driven by Michael Gonzales with appellant and Michael Soliz also inside. He was told to wait at the corner while the three left to commit the robbery. They later returned, ditched the van, and used Richard Alvarez's vehicle as a getaway vehicle. (R.T. 832-835) In his final argument, the prosecutor argued that Alvarez told the police that he was asked by appellant, Michael

Soliz and Michael Gonzales to wait at the corner of Turnball and Clark while they left in the blue van. Later, they came back and the van was abandoned. Alvarez then drove them away from the location. (R.T. 2212-2214)

Although the prosecutor called Deputy West to present Alvarez's prior inconsistent statements, Deputy West's testimony did not concede that Alvarez's statements should be viewed with distrust. Indeed, the prosecution did not want the jury to view Alvarez's statements to Deputy West with distrust. Those statements were argued by the prosecutor as the true version of the facts.

At one point in the trial, appellant asked the Court to advise the jury that Alvarez had been given immunity. The Court refused to so instruct the jury, leaving it to counsel's questioning. (R.T. 1225-1231) During the instructions at the end of the case, the jury was instructed that the testimony of one witness was sufficient to prove any fact. (C.T. 676) Thus, nothing done by the prosecutor or the Court alerted the jury that Alvarez's testimony should be viewed with distrust and examined with care and caution because he was an accomplice.

The failure to instruct on accomplice testimony was reversible in appellant's case because the prosecution's evidence of appellant's guilt on the Lester Eaton murder was not overwhelming. The prosecution

presented a tape recording of appellant bragging to Salvador Berber that he murdered Lester Eaton, Elijah Skyles, and Gary Price. However, the prosecutor argued to the jury that appellant's confession that he shot Skyles and Price was false. He argued that appellant was merely bragging because the evidence showed that Michael Soliz murdered Skyles and Price. (R.T. 2316-2318; 2324-2327). If properly instructed on accomplice testimony, there was a chance that the jury might have concluded that Alvarez's testimony was not credible and appellant's confession to the murder of Lester Eaton was also false.

Betty Eaton, the only eyewitness to the robbery and murder, could not identify appellant or Michael Soliz as the robbers. Doreen Ramos, who saw appellant and Soliz possessing guns and holding bandanas up their faces, did not actually prove that appellant and Soliz committed the Hillgrove Market robbery later that night. Although she had seen the blue van used in the robbery earlier that night when it was shown to her by Richard Irygoin, she never saw appellant and Soliz inside the blue van. Finally, appellant's fingerprints on papers found inside the blue van after the robbery did not place appellant inside the Hillgrove Market at the time murder. The witness placing appellant inside the market at the time of the robbery and murder was Richard Alvarez, an accomplice testifying under a grant of immunity.

In appellant's case, Richard Alvarez's accomplice testimony, which was critical to the prosecution's case against appellant, was not submitted to the jury with careful instructions cautioning them concerning his credibility. (See Banks v. Dretke (2004) 504 U.S. 668, 701-702.)[8] The failure of the trial court to sua sponte instruct the jury concerning the accomplice corroboration requirement and that the testimony of an accomplice must be viewed with caution was reversible error in appellant's case under both the Watson and Chapman standards of review. Therefore, the Court should reverse appellant's convictions and death sentence on the Lester Eaton murder and the two market robbery convictions.

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[8] In Banks, the United States Supreme Court stated: "This Court has long recognized the 'serious questions of credibility' informers pose. On Lee v. United States, 343 US 747, 757 (1952). *see also* Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L. J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable ..."). We have therefore allowed defendants 'broad latitude to probe [informants'] credibility by cross examination' and have counseled submission of the credibility issue to the jury 'with careful instructions'. On Lee, 343 US at 757; accord, Hoffa v. United States, 385 US 293, 311-312 (1966). See also 1 A.K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal §15.02 (5th ed. 2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits on special caution appropriate in assessing informant testimony)." (Banks v. Dretke (2004) 504 US 668, 701-702.)

IX. THE PROSECUTOR ENGAGED IN MISCONDUCT IN HIS FINAL ARGUMENT TO THE JURY IN THE GUILT PHASE OF THE TRIAL

The prosecutor engaged in misconduct in his final argument to the jury in the guilt phase of the trial in three areas. First, he improperly argued for the jury to find appellant guilty of the Skyles and Price murders because he had committed the Eaton murder. (R.T. 2307-2309; 2316-2318). Second, he argued that appellant's counsel John Tyre had conceded appellant's guilt on the Eaton murder during the defense final argument, when in fact no such concession was made. (R.T. 2289). Third, the prosecutor attacked defense counsel by arguing that defense photographs taken at night at the Skyles and Price murder scene were deceptive. (R.T. 2304-2306). These improper arguments deprived appellant of a fair trial and due process of law as guaranteed by Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 15, of the California Constitution.

A. Prosecutorial Misconduct In Final Argument Is A Violation Of Both State And Federal Law

Prosecutorial misconduct involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (People v. Cole (2004) 33 Cal 4th 1158,1202; People v. Farnam (2002) 28 Cal.4th 107,167.) A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with

such unfairness as to make the conviction a denial of due process." (People v. Cole, supra, 33 Cal.4th at 1202; People v. Valdez (2004) 32 Cal.4th 73, 122; accord, Darden v. Wainwright (1986) 477 US 168, 181; Donnelly v. DeChristoforo (1974) 1416 US 637, 643.) Article I Section 15 of the California Constitution also guarantees the right to due process of law. This Court has recognized that the right to due process under the California Constitution guarantees to a defendant the right to "a fundamentally fair decision-making process." (People v. Ramos (1984) 37 Cal.3d 136, 153.)

The general rule is that to preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. (People v. Cole, supra 33 Cal.4th at 1201; People v. McDermott (2002) 28 Cal.4th 946,1001.) However, a defendant will be excused from the requirement of making a timely objection and a request for admonition if either would have been futile. (People v. Hill (1998) 17 Cal.4th 800, 820; People v. Arias (1996) 13 Cal.4th 92, 159.) Furthermore, the failure to request the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct or the trial court immediately overrules an objection to alleged misconduct such that the defendant had no opportunity to make such a

request. (People v. Cole, supra, 33 Cal.3d at 1201; People v. Hill, supra, 17 Cal.4th at 820-821.)

The standard of review for prosecutorial misconduct under California law is whether there is a reasonable probability that the defendant would have received a more favorable result absent the misconduct. (People v. Stansbury (1993) 4 Cal.4th 1017, 1057; People v. Watson (1956) 46 Cal.2d 818, 836.) However, if the court finds that the prosecutorial misconduct in final argument violated appellant's federal constitutional right to due process and to a fair trial, the conviction must be reversed unless the error is "harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 US 18, 24.)

B. The Arguments Of The Prosecutor Were Both Misconduct And Prejudicial

1. Urging The Jury To Find Appellant Guilty Of The Skyles And Price Murders Because He Committed The Eaton Murder

In the prosecutor's rebuttal argument to the jury he referred to a chart summarizing the evidence in the Skyles and Price murder case. At the top of the chart it stated that "Soliz and Gonzales are crimies." (R.T. 2307; Supp. II C.T. 327). By "crimies," the prosecutor meant that appellant and Soliz were "fellow gangsters or homeboys in the same gang . . . These are people who commit crimes together." (R.T. 2307-2308) He then argued that the Skyles and Price murders should not be looked at in

isolation and that the jury should convict appellant of those murders based upon evidence that he had committed the Eaton murder. The prosecutor argued:

> If you look at this crime in isolation just as the one situation, you might be able to say how would they know what the other one 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 two people who own 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. (R.T. 2308)
>
> . . . .
>
> 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 murders 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. (R.T. 2309)

Appellant has previously argued that joinder of the Skyles and Price murders with the Lester Eaton murder resulted in a violation of appellant's federal constitutional right to due process of law. The greatest risk of prejudice from improper joinder of separate crimes is the risk that the jury will use evidence of one crime to convict the defendant of the other crime. (Williams v. Superior Court (1984) 36 Cal.3d 441, 453.) The risk of 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 (2003) 113 Cal.4th 579, 589-591; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1084.)

In the Grant and Bean cases the Courts found that the defendant had suffered prejudice and was denied due process of law when the prosecutor argued that the jury should use evidence of one crime in order to convict the defendant of another crime. (People v. Grant, supra at 589-591; Bean v. Caulderon, supra, at 1084.) Convicting a defendant of a crime based solely on evidence that he had committed some other crime and was a person of general bad character is a violation of the defendant's federal constitutional right to due process of law. (See, Estelle v. McGuire (1991) 502 US 62, 70; Spencer v. Texas (1967) 385 US 554, 563-564; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378.)

The argument made by the prosecutor was extremely prejudicial to appellant's right to a fair trial on the Skyles and Price murder charges. Appellant's guilt on the Skyles and Price case was vigorously contested during the trial. At most, the evidence showed that appellant merely stood by while Michael Soliz fired the fatal shots which resulted in the deaths of Skyles and Price. Under California law, mere presence at the scene of the crime which does not assist in its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting in the crime. (In re Michael T. (1976) 84 Cal.3d 907, 911.) The question of appellant's criminal involvement in the Skyles and Price murders was a close case, making the prosecutor's

improper arguments reversible error. See (In re Wilson (1992) 3 Cal.4th 945, 956-958; People v. Cardenas (1982) 31 Cal.3d 897, 903; People v. Vargas (1973) 9 Cal.3d 470, 480.)

The prosecutor's resort to this improper argument was an implied concession that the case against appellant on the Skyles and Price murders was very weak. Initially, the only argument the prosecutor could make was that appellant "backed up" Michael Soliz while Soliz shot Skyles and Price. In recognition of the weakness of that argument, the prosecutor attempted to shore up his case against appellant by arguing that the jury should convict appellant on the Skyles and Price murders because three months earlier appellant had murdered Lester Eaton.

The record shows that appellant's trial counsel did not object to the prosecutor's improper argument concerning using evidence of one crime to convict appellant of another crime. However, prior to the start of the trial, appellant objected to the joinder of the two murder cases claiming that appellant's joint trial and association with the co-defendant Michael Soliz would prejudice appellant's right to a fair trial. (R.T. 27-29) The Court, however, denied the motion for a severance. Based upon that pre-trial ruling, appellant should be excused from the necessity of making a timely objection because the objection would have been futile. Because both murder cases had been ordered tried together, an admonition would not

have cured the harm caused by the misconduct. (See, People v. Hill (1998) 17 Cal.4th 800, 820.)

The serious prejudice caused to appellant's right to a fair trial on the Skyles and Price murder charges requires the Court to reverse those two murder convictions. Appellant's death sentence on the Lester Eaton murder should also be reversed. At the penalty trial, appellant's two first degree murder convictions in the Skyles and Price case were used as aggravating factors by the prosecutor in support of his case for the death penalty. (Clemons v. Mississippi (1990) 494 US 738, 746.)

2. Arguing That Defense Counsel Had Conceded Appellant's Guilt On The Eaton Murder

In his rebuttal argument, the prosecutor began by stating that he would focus primarily on the Skyles and Price double murder because both defense counsel had essentially conceded their clients were guilty of the Hillgrove Market robbery murder. (R.T. 2298) When the prosecutor concluded his remarks, counsel for appellant objected to the closing argument outside the presence of the jury. He objected that the prosecutor had argued that defense counsel had conceded appellant's guilt in the Hillgrove Market robbery murder, when in fact defense counsel had not conceded the issue. He argued that it was improper for the prosecutor to make that argument. (R.T. 2330)

The Court stated that the jury would be instructed that

counsel's arguments were not evidence. The Court agreed that there was no express concession of guilt. However, the Court found that the prosecutor could argue there was a "tacit admission" or implied concession. Appellant's counsel complained that by focusing most of his attention on the Skyles and Price murder case during his closing arguments, he had not conceded his client's guilt on the Hillgrove Market robbery murder. The Court overruled the objection and found there was no prosecutorial misconduct. (R.T. 2330-2332)

The prosecutor's argument that appellant's counsel conceded his client's guilt was misconduct and is reversible error on the Lester Eaton murder conviction and the two robbery convictions. Because appellant objected in the trial court, the issue of prosecutorial misconduct in final argument is preserved for appellate review. (People v. Hill (1998) 17 Cal.4th 800, 820.) The prosecutor's argument was misconduct because it mis-characterized the closing arguments of appellant's counsel and improperly suggested to the jury that defense counsel believed appellant was guilty.

In Donnelly v. Christoforo (1974) 416 U.S. 637, the prosecutor committed prosecutorial misconduct in his final argument similar to that in appellant's case. In De Christoforo, the prosecutor referred to defense counsel by saying "They said they hope that you find

him not guilty. I quite frankly think they hope that you find him guilty of something a little less than first degree murder." The Court noted that the argument was misconduct because it falsely suggested that the defendant had already admitted guilt to the prosecutor in an unsuccessful attempt to plead guilty to a lesser charge. (Id. at 642)

Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mis-characterizing the evidence is misconduct. (People v. Hill, supra, 17 Cal.4th at 823; People v. Avena (1996) 13 Cal.4th 394, 420.) A prosecutor's vigorous presentation of the facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." (People v. Purvis (1963) 60 Cal.2d 323, 343.) The prosecutor in appellant's case violated this principle when he mis-characterized the closing argument of appellant's counsel.

Appellant's counsel chose to devote most of his final argument to discussing the Skyles and Price murder case. He may have chosen to do so because he thought appellant had the greatest likelihood of a not guilty verdict on those two charges. However, his choice in focusing on the Skyles and Price murder case was not an implied admission that appellant was guilty of the Lester Eaton murder case. The prosecutor's argument in that respect was a gross mis-characterization of defense counsel's argument. It was misconduct and the trial court should have

sustained appellant's objection and admonished the jury to disregard the argument.

It is also well settled that a prosecutor may not "express a personal opinion or belief in the defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence produced at trial." (People v. Bain (1971) 5 Cal.3d 839, 848; People v. Kirkes (1952) 39 Cal.2d 719, 723-724.) In Bain, the prosecutor in a rape case stated in his final argument that he personally believed the defendant was not innocent and he would not have signed the complaint if he had not been personally convinced of the defendant's guilt. He also asked the jury to give credence to his belief in the defendant's guilt from the inception of the case, because he, as a black man, understood black defendants.

This Court states that "This tactic was a way of persuading the jury that the defendant's story was a sham that could not convince any other black person." (People v. Bain, supra, 5 Cal.3d at 849.) The Court found the prosecutor's remarks were reversible error. The case was presented to the jury on the basis of the victim's and the defendant's testimony, which were in sharp conflict. "In these circumstances, there is grave danger that misconduct of counsel may tip the scales of justice." (People v. Bain, supra at 849.)

In appellant's case, the prosecutor attempted to cleverly avoid the Bain case by ascribing a personal opinion of the defendant's guilt to defense counsel. This was even more harmful than if the prosecutor had expressed his own opinion that the defendant was guilty. By arguing that defense counsel believed the defendant was guilty, the prosecutor was suggesting that appellant told his defense counsel that he was guilty and that was the reason that appellant's counsel conceded guilt on the Lester Eaton robbery murder case. Such an argument was prosecutorial misconduct.

The misconduct was not harmless under either the Watson or Chapman standards of review. The prosecutor did not have overwhelming evidence of appellant's guilt on the Lester Eaton murder case. Although the prosecutor presented a tape recording of appellant admitting all three murders to Salvador Berber, the prosecutor argued to the jury that the confession was false on the Skyles and Price murders and should only be considered true as to the Lester Eaton murder. (R.T. 2232-2234) Because of the danger of false confessions, as highlighted by the prosecutor's own argument, the jury, absent the prosecutor's improper argument, may have rejected the entire tape recorded confession made to Salvador Berber as being false.

Other evidence connecting appellant to the Lester Eaton murder was also less than conclusive. Doreen Ramos testified that

appellant and Michael Soliz were seen acquiring guns and masks on the afternoon of the robbery. She saw appellant and Soliz associating with a person who had earlier offered to sell the blue van used in the market robbery. However, she never saw appellant or Soliz actually riding in the blue van. Appellant's fingerprints were located on papers found in the abandoned blue van after the robbery. However, this evidence more closely associated appellant to the theft of the van, and not necessarily to the robbery and murder that occurred at the market. The strongest evidence connecting appellant to the Lester Eaton robbery murder was the testimony of Richard Alvarez. He placed appellant in the van on the night of the robbery, but Alvarez was an immunized witness and an alleged accomplice in the crime. Under California law, the testimony of an accomplice is viewed with distrust. (See, People v. Gordon (1973) 10 Cal. 3d 460, 464 n.3)

The nature of the misconduct committed by the prosecutor in telling the jury that defense counsel conceded guilt on the Lester Eaton murder was such that it implied to the jury that appellant's guilt on the Lester Eaton murder had been stipulated to by defense counsel. It suggested that the jury no longer needed to decide whether appellant was guilty of the Lester Eaton murder, because guilt had already been accepted by defense counsel. Thus, the arguments of the prosecutor denied appellant

his constitutional right to a fair trial. The Court should reverse appellant's conviction and death sentence on the Lester Eaton murder and the two robbery convictions.

3. Improper Attacks Upon Defense Counsel

In his closing arguments, the prosecutor argued that defense counsel had presented misleading and deceptive photographs in evidence concerning the scene of the Skyles and Price murders. (R.T. 2304-2306) He argued that defense photographs taken at the scene of the Skyles and Price murders had been taken during the trial and did not actually show what a person would see if they were standing at the scene on the night of the murders. He argued: "These photographs are misleading and they're deceptive in terms of what a person standing in that position could see. They do not accurately show distances. They do not accurately show what you would see based upon those lighting conditions." (R.T. 2305) He argued that using the photographs to impeach the eyewitnesses was "simply misleading, and it's not accurate." (R.T. 2306) This argument was prosecutorial misconduct.

"The unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct." (People v. Bain (1971) 5 Cal.3d 839, 847.) In Bain, the prosecutor's unsupported claim that defense counsel assisted the defendant in fabricating a defense was

found to be prosecutorial misconduct. (Ibid.) "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (People v. Hill (1998) 17 Cal.4th 800, 832; People v. Wash (1993) 6 Cal.4th 212, 265.) "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum (citation), it is never excusable." (People v. Hill, supra at 832.) Recently, this Court has held that it is prosecutorial misconduct for a prosecutor to characterize defense counsel as liars or accuse counsel of lying to the jury. (People v. Young (2005) 34 Cal.4th 1149, 1193; People v. Cummings (1993) 4 Cal.3d 1233, 1302.)

In appellant's case when the prosecutor called the defense evidence misleading and "deceptive," it was an implied assertion that defense counsel had presented false evidence and a fabricated defense to the jury. This was misconduct because there was no basis in the record for concluding that the defense photographs were deceptive. The Skyles and Price murders occurred at nighttime. During the trial, a defense investigator took photographs at the Shell gas station after dark in order to obtain photographic evidence showing the lighting at the gas station at night. The prosecutor objected that the photographs were inadmissible because they

were taken two years after the murder. However, the Court allowed counsel to use the photographs during the trial. (R.T. 1320-1324)

The photographs were used during the cross-examination of Covina Police Detective John Curly, who was one of the first law enforcement officers to arrive at the scene of the Skyles and Price shooting. (R.T. 1307-1309) On cross-examination, when Detective Curly was shown defense photographs A through J, he testified that the photographs looked substantially the same as the night of the shooting as far as the lighting in the area appeared. (R.T. 1337-1338) Vondell McGee was with Skyles and Price at the Shell gas station shortly before the shooting occurred. (R.T. 1435-1437) When he was shown defense photographs A through J, he likewise testified that the lighting in the photographs looked about the same as the lighting on the evening of the shooting. (R.T. 1453-1455) Thus, there was no basis in the record for the prosecutor to argue that the defense photographs were misleading or deceptive.

The prosecutor's disparaging remarks against defense counsel concerning the misleading and deceptive photographs were extremely prejudicial to appellant's right to a fair trial on the Skyles and Price murder charges. At trial, Carol Mateo, Jeremy Robinson, and Alejandro Garcia all testified that two people got out of the suspect car. Michael Soliz was

identified as the person shooting Skyles and Price and appellant was identified as merely standing by the suspect vehicle. Based on this evidence, the prosecutor argued at length to the jury that appellant aided and abetted in the murders of Skyles and Price because he acted as back-up for Soliz during the murders. (R.T. 2195-2199; 2223-2226; 2231-2234).

However, on the night of the Skyles and Price murders, Carol Mateo, Jeremy Robinson, and Alejandro Garcia all told Detective Joe Holmes that they saw only one person get out of the vehicle and approach Skyles and Price. They identified that person as Michael Soliz. The first time that any of the witnesses stated there was a second suspect outside of the suspect's vehicle at the time of the shooting was during their courtroom testimony at trial. (R.T. 1650-1652; 1656-1657).

Thus, the defense photographs showing how the Skyles and Price murder scene looked at night were an important part of appellant's defense. The photographs showing the Shell gas station at night raised a reasonable doubt concerning whether the eyewitnesses actually saw appellant get out of the suspect vehicle at the time of the shooting. As argued by appellant's counsel during closing arguments to the jury, if appellant did not get out of the vehicle then he was not guilty of aiding and

abetting in the murders because he was not backing up Michael Soliz at the time of the shooting. (R.T. 2287-2289)

The prosecutor's misconduct in final argument went right to the heart of appellant's defense to the Skyles and Price murder charges. The evidence against appellant on those charges was extremely weak. It was a close case on whether appellant was guilty of these two serious murder charges. Attacking defense counsel and accusing them of presenting deceptive photographs was extremely prejudicial and is reversible error under either the Watson or Chapman standards of review. The Court should reverse appellant's convictions on the Skyles and Price murder charges. The Court must also reverse the death sentence on the Lester Eaton case because the Skyles and Price murder convictions were used as an aggravating factor at appellant's penalty trial on the Eaton murder.

X. APPELLANT'S CONVICTIONS SHOULD BE REVERSED BASED UPON THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS

Appellant urges the Court to reverse his convictions based upon the cumulative effect of the guilt phase errors. This Court has stated that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (People v. Hill (1998) 17 Cal.4th 800, 844 citing People v. Purvis (1963) 60 Cal.3d 323, 348, 353.) This is sometimes referred to as "cumulative prejudice." (People v. Hill, supra, at 844.)

It was error to try the Eaton murder along with the Skyles and Price murders. The two murder cases were totally separate homicide investigations. The prosecutor's misconduct in final argument was directly related to the error in denying the severance motion. The prosecutor improperly urged the jury to convict appellant of the Skyles and Price murders based upon evidence that appellant committed the Eaton murder. The denial of the severance and the prosecutorial misconduct in final argument combined together to violate appellant's constitutional right to due process and a fair trial on the Skyles and Price murder charges.

Any error related to the Skyles and Price murder charges must be viewed as prejudicial. The question of appellant's guilt on the Skyles and Price charges was a close one, as demonstrated by appellant's argument

that the evidence was insufficient to convict. At trial, appellant argued that he was merely present at the scene of the shootings and did not aid and abet Michael Soliz in the shooting of Skyles and Price. The prosecutor argued that appellant was "backing up" Soliz during the shooting. Under either version of the case, the facts remained the same. Appellant merely stood by while Soliz shot and killed Skyles and Price.

Cumulative error further affected the Skyles and Price murder charges based upon jury instruction errors. The jury was erroneously instructed that it could find appellant guilty of aiding and abetting in the murders of Skyles and Price under a theory that murder is the natural and probable consequence of the crime of simple assault. This lessened the prosecution's burden of proof on the Skyles and Price murder charges. The trial court also failed to instruct the jury that voluntary manslaughter was a lesser included offense within the Skyles and Price first degree murder charges. These instructional errors, together and in combination with the other errors, undermine the validity of appellant's murder convictions in the Skyles and Price case.

A cumulative error approach is also appropriate in reviewing appellant's conviction in the Lester Eaton murder case. Appellant's conviction in that case was affected by the erroneous denial of his motion to suppress his tape recorded statements to Salvador Berber and the failure to

give cautionary jury instructions on accomplice testimony. Finally, all of appellant's convictions were prejudicially affected by the denial of appellant's pre-trial motions for a second counsel and a second investigator.

JURY SELECTION ISSUES

XI. THE COURT MISLED DEFENSE COUNSEL ON THE SCOPE OF ATTORNEY CONDUCTED VOIR DIRE, RESULTING IN THE DENIAL OF AN OPPORTUNITY TO QUESTION THE JURY ON THE RACIAL ASPECTS OF THE CASE

Appellant's death sentence must be reversed because the trial court did not allow appellant's counsel to voir dire the penalty phase jury on the issue of racial bias. The United States Supreme Court has held that a capital defendant accused of an interracial crime is entitled to have perspective jurors informed of the race of the victim and questioned on the issue of racial bias. (Turner v. Murray (1986) 476 U.S. 28, 36-37.) Where a trial judge refuses to question perspective jurors in a capital case on racial prejudice, it results in a denial of the defendant's federal constitutional right to an impartial jury and requires automatic reversal of a defendant's death sentence. (Id. at 36-38.)

A. Factual Background

At the end of the first penalty trial, the jury was unable to reach a verdict on the death penalty in appellant's case. (R.T. 2765-2769) At the second penalty trial, the jury returned a death verdict in the case of appellant for the murder of Lester Eaton. (R.T. 4520-4523) Appellants, John Gonzales and Michael Soliz, are Hispanic. (C.T. 1097) Two of the murder victims, Elijah Skyles and Gary Price, are African-American. (R.T. 1309) The third murder victim, Lester Eaton, is Caucasian. (Peo. Exh. 1D)

At the first penalty trial, the Court permitted counsel to voir dire the jury on racial bias. However, at the second penalty trial, the Court refused appellant's request to voir dire the jury on racial bias.

At the first penalty trial, the jurors were given a jury questionnaire. (R.T. 126) The Court conducted the death qualifying jury selection first and allowed counsel to question the jurors on their attitudes concerning the death penalty. (R.T. 221-590) Once the death qualifying questions had been completed, the Court advised counsel that on the following day the first 12 jurors would be placed in the jury box and the Court would begin general voir dire. The Court indicated that it would allow counsel the right to question the jurors individually. However, the Court did not want counsel to repeat questions that were already answered in the questionnaire or to repeat the death qualifying Hovey[9] questions. (R.T. 591-596) On the following morning, the Court again stated that despite Proposition 115[10] , the Court would allow counsel a reasonable length of time to question the jurors. (R.T. 598-600)

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[9] Hovey was a reference to this Court's decision in Hovey v. Superior Court (1980) 28 Cal.3d 1, 80 which discussed the death qualification voir dire process in capital cases.

[10] Proposition 115, adopted in 1990, eliminated the right of attorneys to conduct voir dire in criminal cases (People v. Boulerice (1992) 5 Cal. App.4th 463, 469) by changing Code of Civil Procedure section 223 to read: "In a criminal case, the court shall conduct the examination of prospective jurors." After appellant's trial, section 223 was amended in 2000 to provide that "counsel for each party shall have the right to examine, by oral and direct questioning, any and all prospective jurors."

During jury selection at the first trial, the prosecutor questioned a juror about the O.J. Simpson[11] jury and whether she believed that jury was impartial. (R.T. 630-632) The Court asked one juror whether she could be fair or impartial in a case where there was an allegation concerning a Hispanic street gang. (R.T. 645-648) The Court asked one juror whether she would be biased against the defendants because they are affiliated with a gang. (R.T. 681-683) The Court asked another juror whether she would be biased based upon her past contact with gangs. (R.T. 694-696) Mr. Tyre then asked a juror whether the fact that two black men were victims in this case would interfere with the juror's ability to be fair and impartial. The juror was also questioned about his knowledge of the O.J. Simpson case and the fact that the race card had been played during that trial. (R.T. 734-736)

Also during the first trial, counsel for appellant was able to ask questions concerning racial prejudice during the death qualifying part of the voir dire. Mr. Tyre asked a juror who was a member of the NAACP whether he would be prejudice because two of the victims in the case were African-American. (R.T. 227-229) He was also able to ask another juror

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[11] The O.J. Simpson case involved a black athlete and movie star who was accused of murdering his ex-wife and her male companion, both of whom were white. A jury in the criminal case acquitted Simpson of the double murder, but a separate civil jury found Simpson civilly liable for the murders. (See, Rufo v. Simpson (2001) 86 Cal. App.4th 573, 581-583.)

whether he could be fair sitting on a case where two of the victims were African-American. (R.T. 247-249) Another juror was asked by Mr. Tyre whether he agreed with the verdict in the O.J. Simpson case. (R.T. 293-296) A juror was asked by Mr. Tyre whether he would view the case harsher because two of the victims were African-American. (R.T. 323-326) Finally, Mr. Tyre was able to ask a juror whether the juror would feel stronger in favor of the death penalty just because two of the victims were African-American. (R.T. 548-551)

After the first penalty jury was unable to reach a unanimous verdict, the Court declared a mistrial. The case then proceeded to a second penalty trial before a new jury. Jury selection at the second penalty trial was very different from the jury selection at the first trial.

Jury selection at the second penalty trial began with the jurors filling out questionnaires. (R.T. 2870-2873) Once the questionnaires were completed, the Court advised counsel that over the next two days, the Court would be focusing on death qualification and challenges for cause. The Court stated it would allow some time for questioning by counsel, with the understanding that the questions would be focused based upon the questionnaire. The Court stated the jurors would not be asked where they were employed or asked questions that had been previously answered in the questionnaire. However, the Court stated that where the answers were

ambiguous or equivocal concerning the penalty, the Court would allow counsel to ask questions in an attempt to rehabilitate the jurors. (R.T. 2907-2910)

In the middle of the jury selection process, counsel for appellant Soliz asked the Court whether counsel would have an additional opportunity to conduct general voir dire of the jury pool after the death qualification process had been completed. The Court responded no. The Court stated that once the death qualifying questions were completed, the jurors who were selected would be ordered back and placed in the jury box when the parties returned on the following day. Counsel for appellant, Mr. Tyre, asked whether defense counsel would be able to question the jurors when they returned. The Court responded no. The Court indicated that once the jury had completed death qualification, then the parties would begin using their peremptory challenges. (R.T. 3023-3024)

Mr. Borges, counsel for Soliz, stated that was not how it was done at the first trial. He reminded the Court that at the first trial, after death qualifying had been completed, the jurors were brought back and counsel were able to conduct general voir dire of the jury. The Court acknowledged that was the procedure used at the first trial. However, since this was a retrial of the penalty only, the Court had limited attorney voir dire to only death qualifying or Hovey questions. Mr. Borges stated that he

wanted to ask general voir dire questions of the jury and he had not asked those questions up to that point in time. The Court stated "That's what the questionnaire serves the purpose of. I'm not going to allow general voir dire." (R.T. 3023-3025)

The Court then asked counsel for appellant whether he had additional questions for the current panel. Mr. Tyre asked the Court a clarifying question. He wanted to confirm whether the Court had earlier ruled that it would not allow Mr. Borges to ask general voir dire questions of the jury. The Court stated "Right." Mr. Tyre then stated that based on the Court's ruling, he did not have any further questions of the jury, because the Court had already asked the death qualifying Hovey questions. (R.T. 3031-3033)

After the death qualifying questions were completed, the jury returned on the following day to allow counsel to use their peremptory challenges. (R.T. 3155-3156) The Court allowed no further general voir dire questioning of the jury by either the Court or counsel. Mr. Sortino, the prosecutor, used 14 peremptory challenges. Mr. Tyre, counsel for appellant, used 9 peremptory challenges. Mr. Borges, counsel for Mr. Soliz, used 9 peremptory challenges. Both sides then accepted the panel and the twelve jurors were sworn. (R.T. 3156-3166) The Court selected three alternate jurors. (R.T. 3167-3170) The jury was then excused and was

ordered to return the following Monday. (R.T. 3171-3172) It was at this point that counsel for appellant objected that he had not been allowed to conduct general voir dire on the issue of race and he made his motion for a mistrial. (R.T. 3180-3182) An examination of the jury questionnaire used at the second penalty trial indicates that there were no questions concerning racial bias in the questionnaire. (See e.g. C.T. 3290-3314).

Counsel for appellant objected that he had not been allowed to question the jury concerning racial bias. Counsel noted that the Court had limited counsel's questions to only those issues involving the death penalty qualification. Defense counsel was prevented from questioning the jurors concerning other issues, such as, racial issues, which existed in the case because the victims, Skyles and Price, were African-American and the defendants were Hispanic. The Court stated that it was too late to bring this issue to the Court's attention because the jury had already been selected. The Court said that if defense counsel had raised the racial issue earlier, it would have addressed the issue because there were African-American jurors sitting on the panel. The Court stated that counsel's failure to say anything during voir dire on this issue had effectively waived the issue. Appellant moved for a mistrial. The co-defendant, Michael Soliz, joined in the motion. The Court denied the motion for a mistrial. (R.T. 3180-3182)

The mistrial motion was made after the jury had been selected and sworn, but prior to any opening statements.

B. Appellant's Objections And Motion For A Mistrial Were Timely Made And The Issue Is Preserved For Appeal

When the trial court denied appellant's motion for a mistrial based upon the lack of jury questioning on the issue of racial bias, the Court stated that the issue had been waived because trial counsel had failed to raise it during voir dire. (R.T. 3180-3182) However, during the middle of the voir dire process, the Court made it very clear that the Court would not allow defense counsel to conduct general voir dire questioning of the jury. Counsel were limited to asking questions related to death qualifying the jury. (R.T. 3023-3025; 3032-3033) When the issue was raised at the end of the voir dire after the jury was sworn, the issue was not waived because the trial had not started. It was not too late for the Court to reverse its earlier ruling and allow jury selection to be reopened for further questioning on the issue of racial bias.

In People v. Crowe (1973) 8 Cal.3d 815, the trial judge mistakenly announced that preemptory challenges had been completed by the defense and waived by the prosecution. The jury was sworn and the judge declared a 10 minute recess, during which the mistake was discovered. When the judge asked defense counsel if he wished to exercise

any more preemptory challenges, the defense attorney declined to do so. After his conviction, the defendant argued on appeal that by prematurely swearing the jury, the defendant was denied the right to exercise all ten of his preemptory challenges. He claimed that once the jury had been sworn, the Court could not allow further preemptory challenges based upon People v. Young (1929) 100 Cal.App. 18, 20.

The California Supreme Court rejected the argument and affirmed the defendant's conviction. The Court stated that if defense counsel believed that the trial judge had erred and had selected an unfair jury, then counsel should have articulated those views at the time. If defense counsel had done so, "The court might then have been able to fashion some means of remedying the error; if no workable remedy appeared the court could have declared a mistrial." (People v. Crowe, supra, 8 Cal.3d at 832.) The Court's premature swearing of the jury in the Crowe case did not constitute grounds for reversal. (Ibid.)

Under the Crowe decision, it was not too late for the Court in appellant's case to fashion some remedy even after the jury had been sworn. By the time the jury had been sworn in this case, appellant had used nine preemptory challenges and the co-defendant Soliz had used nine preemptory challenges. Since this was a two-defendant capital case, the

defense was entitled to 30 preemptory challenges. (Code Civ. Proc. §231, subd. (a)) If the Court had reopened jury selection to allow further questioning on racial bias, the defense would have had 12 unused preemptory challenges available to it.

The appellant had a federal constitutional right to have the jury questioned on racial bias. (Turner v. Murray (1986) 476 U.S. 28.) Counsel for appellant was clearly surprised when the trial court changed the procedure and cut off all general voir dire questioning by counsel at the second penalty trial. Furthermore, the trial court was firm in its insistence during the middle of jury selection that no counsel would be able to conduct general voir dire of the jury. Thus, when counsel for appellant raised the issue of questioning the jurors on racial prejudice after the jury had been sworn, it was done at a time when the Court was able to reopen voir dire and correct the error. Therefore, the objection was timely and the issue was preserved for appeal.

C. The Denial Of An Opportunity To Question The Jury About Racial Bias Requires Reversal Of The Death Sentence For A Violation Of Appellant's Constitutional Right To A Fair And Impartial Jury

A defendant in a capital case is entitled to have potential jurors questioned concerning racial prejudice when the defendant is accused

of an interracial crime. (Turner v. Murray, supra, 476 U.S. at 36-37. A trial court's failure to question potential jurors on racial prejudice after a defense request, will require automatic reversal of any death sentence. (Turner v. Murray, supra, at 37.) In Turner, a black defendant was charged with capital murder for fatally shooting the white owner of a jewelry store during the course of a robbery. During voir dire, the State trial judge refused the defendant's request to question the perspective jurors on racial prejudice. The defendant was convicted and sentenced to death. On appeal, he argued that the trial judge's refusal to question perspective jurors on racial prejudice deprived him of his federal constitutional right to a fair trial. The United States Supreme Court agreed and reversed the death sentence.

The Court noted that in a capital case, the jury is called upon to make a highly subjective, unique and individualized judgment concerning whether to impose the death penalty. (Turner v. Murray, supra, 476 U.S. at 33-34.) Because of the wide range of discretion entrusted to the jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. (Turner v. Murray, supra, at 35.) The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. (Id. at 35.) This risk of racial prejudice infecting the capital sentencing

proceeding is unacceptable in light of the ease at which the risk can be minimized. (Id. at 36.)

The Court in Turner stated that "By refusing to question perspective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury." (Turner v. Murray, supra at 36.) The Court 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 36-37.) The Court also stated that a defendant may not complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry. (Id. at 37.) Finally, the Court held that because of the inadequacy of the voir dire in the case, the defendant's death sentence had to be vacated. (Id. at 37.) The decision was based upon the Sixth and Fourteenth Amendment constitutional rights to an impartial jury and to due process under the United States Constitution. (Id. at 36 n. 9, citing Ristaino v. Ross (1976) 424 U.S. 589, 595 n. 6.)

The Turner case was recently reaffirmed by the United States Supreme Court in Mu'min v. Virginia (1991) 500 U.S. 415, 424 where the Court stated that "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." The United States Supreme Court has recognized the importance of voir dire concerning racial bias in a series of cases beginning in 1931. (See Aldridge v. Unites States (1931) 283 U.S. 308; Ham v. South Carolina (1973) 409 U.S. 524; Ristaino v. Ross (1976) 424 U.S. 589; Rosales-Lopez v. United States (1981) 451 U.S. 182.) In the Ham case, for example, the Supreme Court held that: "Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure those essential demands of fairness, (citation), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, (citation), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." (Ham v. South Carolina, supra, 409 U.S. at 526-527.)

Several California cases have likewise held that a trial court must question the jury on racial bias in cases where the defendant and the 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.) Furthermore, Article I, Section 16 of the California Constitution declares in part that

"Trial by jury is an inviolate right and shall be secured to all ..." This provision of the California Constitution has been interpreted to guarantee to a defendant in a criminal case the right to an impartial jury. (People v. Wheeler (1978) 22 Cal.3d 258, 265.) Thus, the failure of the trial court to question the perspective jurors on racial bias violated appellant's federal and state constitutional rights to an impartial jury.

D. The Constitutional Violations In This Case Require Automatic Reversal Of The Death Sentence

The standard of review in a capital case where the defendant is accused of an interracial crime and the trial judge refuses upon the defendant's request to question the perspective jurors on racial bias, is automatic reversal. (Turner v. Murray (1986) 476 U.S. 28, 37.) In Turner, the Court stated that "The inadequacy of voir dire in this case requires that petitioner's death sentence be vacated." (Id.) The Court declined to conduct a harmless error analysis. Rather, the Court stated that "Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding." (Id.)

The failure to question the jury on racial bias also led to reversal of the judgment in the non-capital case of Ham v. South Carolina (1973) 409 U.S. 524. In Ham, an African-American defendant claimed that

he had been framed on a charge of marijuana possession by law enforcement officers who were out to get him because of his civil rights activities. The defendant requested that potential jurors be questioned concerning possible racial prejudice against African-Americans. The trial judge refused to ask any of the proposed questions. The Supreme Court found reversible error in the refusal to question perspective jurors on racial prejudice because racial issues were inextricably bound up with the conduct of the trial. (See also Ristaino v. Ross (1976) 424 U.S. 589, 595.)

The California Supreme Court applied the automatic reversal standard of review in the recent case of People v. Cash (2002) 28 Cal.4th 703, 723. In Cash, the Court reversed a sentence of death because the trial court had erred in prohibiting defense counsel from inquiring during voir dire whether perspective jurors would automatically vote for the death penalty if the defendant had previously committed two murders. On appeal, the defendant could not identify a particular biased juror because the trial court had denied any voir dire concerning the prior murders. By absolutely barring any voir dire on the subject of the prior murders, "the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due

process right to an impartial jury." (People v. Cash, supra, 28 Cal.4th at 723, citing Morgan v. Illinois (1992) 504 U.S. 719, 739. Because the trial court's error made it impossible for the court to determine from the record whether a juror with a disqualifying view on the death penalty was ultimately seated, reversal of the death sentence was automatic. (People v. Cash, supra at 723, citing Morgan v. Illinois, supra, at 739; accord People v. Wilborn (1991) 70 Cal.App.4th 339, 347-348.)

Appellant's death sentence must likewise be reversed. The standard of review is automatic reversal. The trial court's refusal to question the jury on racial bias under the facts of this case violated appellant's constitutional right to an impartial jury. (Turner v. Murray, supra, 476 U.S. at 36-37.) Reversal is automatically required because the appellant was not "sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment." (Morgan v. Illinois, supra, 504 U.S. at 739; People v. Cash, supra, 28 Cal.4th at 723.

XII. THE COURT VIOLATED THE WITHERSPOON AND WITT CASES WHEN IT EXCUSED JUROR 8763 FOR CAUSE

Prospective Juror 8763 was erroneously excluded from the jury based upon the prosecutor's improper challenge for cause. The record does not establish that the juror's views on capital punishment "would prevent or substantially impair the performance of his duties as a juror" within the meaning of Wainwright v. Witt (1985) 469 U.S. 412 and Witherspoon v. Illinois (1968) 391 U.S. 510. The improper exclusion of Juror 8763 resulted in a violation of appellant's federal constitutional right to due process of law under the Fourteenth Amendment of the United States Constitution and requires automatic reversal of his death sentence. (Wainwright v. Witt, supra, 469 U.S. at 424; Gray v. Mississippi (1987) 481 U.S. 648, 659-667.)

A. Factual Background

Juror 8763 had filled out a juror questionnaire (C.T. 3290-3314) and was questioned in court concerning her answers on the questionnaire. (R.T. 3093-3101) The Court noted that in the juror's answer to question 92, the juror stated "Even though I believe that a person should be punished for his crime, I don't know if I could agree to putting a person to death. I still believe that only God should judge and decide that." On question 99, the juror was asked to comment on whether "Anyone who kills another person during the commission of a robbery should, automatically

and regardless of the evidence, receive the death penalty." The juror responded on the questionnaire that she both agreed and disagreed with that statement. The Court then stated "So we don't really know what your answer was." (R.T. 3096)

The Court also noted that in response to question 97, concerning whether the juror would be able to vote to impose the death penalty, the juror's response was that "Only God should be a judge of whether or not a person should receive a death penalty or not." The Court next asked "Do you feel that if it were a proper case for the death penalty to be imposed, that you as a juror could not go along with that because you feel that as a human being you have no right to make a decision which only divinity should decide?" The juror responded "That's right. That's my feeling." (R.T. 3097)

In determining whether the juror would never impose the death penalty, the Court asked the next question: "So if you were selected as a juror in this case, then regardless of what evidence you heard, no matter how horrible the crime, no matter how bad the defendants were portrayed, you know now that you would go back into the jury room and vote for only life imprisonment without possibility of parole, you would never vote for death? Is that right?" In response to that question, the juror stated that she could vote for the death penalty. The juror stated "I would not like to vote for death, but if the circumstances should occur and I feel that, that person

probably would be put to death, then I guess as a last resort, and if all evidence is against him, then, yes, I guess I would vote for death." (R.T. 3097)

The Court asked if she still felt as she stated on the questionnaire "that human beings should not decide the question of whether a person is to be executed." The juror responded "I still feel that way, you know. But I'm a just person." (R.T. 3098) The juror volunteered that she used to work at a women's prison and that she would dream about the people in the prison. She stated "I just don't want that on my conscience if I vote a person's death." (R.T. 3098)

The Court asked whether the juror would dream about the fact that she had voted for a person to spend the rest of their life in prison. The juror responded that she had not had that type of dream yet. The juror also commented that sometimes she would dream about things before they would happen, and then "it happened." Finally, the juror stated "I just prefer that not be on my conscience." (R.T. 3098-3099)

In response to questions by Mr. Borges, the juror stated that she understood that the questions were designed to achieve a fair and impartial jury. When asked by Mr. Borges whether she would consider all of the evidence presented both for and against the death penalty, the juror made no response. (R.T. 3099-3100) The juror agreed with Mr. Borges that she could not decide the case now because she had not heard any of the

evidence. When Mr. Borges asked if she could put aside her personal beliefs and consider the evidence for and against the death penalty, the juror responded "I don't know, to be honest. It's really hard and difficult for me to do that, and I have pondered that since I've been asked that question." The juror finally added: "And I still truly believe that only God should allow a person – or put a person to death. I don't feel in true judgment that it's up to me to do that." (R.T. 3100-3101)

The prosecutor challenged the juror for cause. The trial court accepted the challenge and excused the juror stating "Allright. We really do, as I've told other jurors, appreciate your candor and your sincerity in this matter, but in view of your strong beliefs on the subject, you are excused from this jury." (R.T. 3101)

B. The Juror's Views On Capital Punishment Did Not Prevent Or Substantially Impair Her Duties As A Juror Because She Stated She Could Vote For The Death Penalty In A Proper Case

In Witherspoon v. Illinois (1968) 391 U.S. 510, the defendant was convicted of murder and sentenced to death. An Illinois statute allowed a challenge for cause if a prospective juror had "conscientious scruples against capital punishment, or that he is opposed to the same." Pursuant to that statute, nearly half of the panel was excused in the defendant's case, although only 5 of the 47 challenged jurors had expressly stated that under no circumstances would they vote to impose capital

punishment. In the Witherspoon case, the United States Supreme Court reversed the death penalty.

The Court noted that a person opposed to the death penalty can make the discretionary judgment concerning whether to impose the death penalty as well as one who favors it. In a nation in which less than half the people believe in the death penalty, exclusion of all opposed to it crosses the line of neutrality. The Court stated that "The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law." (Witherspoon v. Illinois, supra, 391 U.S. at 523.) The Court also stated: "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venireman for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Witherspoon v. Illinois, supra at 522-523.)

In the later case of Wainwright v. Witt (1985) 469 U.S. 412, the United States Supreme Court modified its holding in the Witherspoon case. In the Witt case, the Court adopted a new standard of review, namely, "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (Wainwright v. Witt, supra, 469 U.S. at 424.) The Court noted

that under the new standard, it is no longer required that a juror's bias be proved with "unmistakable clarity." (Id.) Because voir dire examination frequently does not result in an unmistakably clear response from a prospective juror, there may be situations where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law. In such cases, deference must be paid to the trial judge who sees and hears the juror. (Id. at 425-426.)

"A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (Citation) On appeal, [the Court] will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (People v. Cunningham (2001) 25 Cal.4th 926, 975; People v. Jenkins (2000) 22 Cal.4th 900, 987.)

In People v. Kaurish (1990) 52 Cal.3d 648, 699, this Court made the important distinction that neither Witherspoon nor Witt "requires that jurors be automatically excused if they merely express personal opposition to the death penalty." The test is whether the juror's attitude will "prevent or substantially impair" the performance of his duties. (Wainwright v. Witt, supra, 469 U.S. at 424.) "A prospective juror personally opposed to the death penalty may nonetheless be capable of

following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (People v. Kaurish, supra, 52 Cal.3d at 699.)

In People v. Heard (2003) 31 Cal.4th 946, 959-966, the Court reversed a death sentence on the grounds that the trial court erred in excluding a prospective juror for cause based upon the juror's views concerning the death penalty. The Court asked the juror: "Do you think that if there were past psychological factors that they might weigh heavily enough that you probably wouldn't impose the death penalty?" The juror responded "Why yes, I think they might." The trial court found that the juror's admission that she would use psychiatric problems in the defendant's background to vote for a sentence of life without possibility of parole, was grounds for challenging the juror for cause. This Court held that excusing the juror for cause was error because consideration of psychological factors was an appropriate factor to be used by the jury in determining whether to impose the death penalty. (People v. Heard, supra, 31 Cal.4th at 965.) The record did not establish that the juror would automatically vote for life without parole no matter what the evidence in the

case showed and thus excluding the juror in the Heard case violated the defendant's constitutional rights. (People v. Heard, supra at 964.)

More recently in People v. Stewart (2004) 33 Cal.4th 425, this Court reversed a death sentence on the grounds that the trial court erroneously excused five prospective jurors for cause based upon their answers in a jury questionnaire. In the questionnaire, the jurors were asked: "Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you ... To ever vote to impose the death penalty?" Jurors who answered yes to the question on the questionnaire were excused for cause. This Court held it was error to dismiss the five jurors for cause without first conducting any follow-up questioning. Relying upon its earlier decision in People v. Kaurish (1990) 52 Cal.3d 648, 699, the Court stated that a prospective juror may not be excluded for cause simply because his conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror to impose the death penalty. (People v. Stewart, supra, 33 Cal.4th at 446-447.)

California's death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted. The circumstance that a juror's conscientious opinions or

beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs would "substantially impair" the performance of the juror's duty under the Witt standard. (People v. Stewart, supra, at 447.) Even if a juror has beliefs about the death penalty that would make it very difficult for the juror to impose it, such a juror might have the ability to put aside personal reservations and properly weigh and consider the aggravating and mitigating evidence and reach a decision on the appropriateness of the death penalty. Such a juror would not be disqualified from sitting on a capital case. In the Stewart case, the affirmative answers by the jurors to the question of whether their personal beliefs about the death penalty would make it difficult for them to impose the death penalty did not establish grounds for removing the five prospective jurors. Thus, it was error to excuse the jurors and the Court reversed the death sentence. (People v. Stewart, supra, at 454-455.)

Appellant's case is very similar to the Stewart case. For religious reasons, Juror 8763 believed that only God should make the determination of who should receive the death penalty. (R.T. 3097; 3101) However, these generalized religious feelings on the part of the prospective juror did not prevent her from voting for the death penalty in an appropriate case. In her own words, the juror stated "I would not like to vote for death, but if the circumstances should occur and I feel that the person probably

would be put to death, then I guess as a last resort, and if all the evidence is against him, then, yes, I guess I would vote for death." (R.T. 3097)

Despite the fact that the prospective juror had strong religious feelings against the death penalty, the record does not support a finding that the juror's views would "prevent or substantially impair" the performance of the juror's duties within the meaning of Wainwright v. Witt, supra. Even with her strong religious views, it is clear that the juror would be willing to put aside her personal reservations against the death penalty and consider imposing the death penalty in an appropriate case. Based upon this record, it was error for the trial court to excuse Juror 8763 for cause.

C. The Constitutional Violation In This Case Requires Automatic Reversal Of The Death Sentence

The trial court erroneously excused Juror 8763 for cause based on her religious beliefs regarding the death penalty. The record does not support the conclusion that the juror's views regarding capital punishment would "prevent or substantially impair" the performance of the juror's duties within the meaning of Wainwright v. Witt (1985) 469 U.S. 412, 424.) The controlling decisions of the United States Supreme Court have established that this type of error is not subject to a harmless error analysis. Rather, the error must be considered reversible per se with regard to any ensuing death penalty judgment. (Gray v. Mississippi (1987) 481 U.S. 648, 664-666, 668; Davis v. Georgia (1976) 429 U.S. 122, 123.) The California Supreme Court has also recognized that the erroneous exclusion

of a prospective juror based upon her views regarding the death penalty requires automatic reversal of the defendant's death sentence. (People v. Stewart (2004) 32 Cal.4th 100, 120; People v. Heard (2003) 31 Cal.4th 946, 951; People v. Ashmus (1991) 54 Cal.3d 932, 962.) Based upon this authority, the Court must reverse appellant's death sentence.

PENALTY PHASE ISSUES

XIII. APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHT TO COUNSEL WAS VIOLATED BECAUSE HIS COUNSEL HAD A CONFLICT OF INTEREST THAT RESULTED IN A BREAKDOWN OF THE ATTORNEY CLIENT RELATIONSHIP DURING THE PENALTY TRIAL

A. Factual Background

While the jury was deliberating at the end of the first penalty trial, appellant's brother David Gonzales and his wife Kimberly Gonzales delivered clothing to John Tyre, appellant's trial counsel, for use by appellant during the remainder of the trial. Fifteen vials of heroin had been sewn into the lining of the clothing. Kimberly Gonzales personally handed the clothes to John Tyre in the courtroom. A sheriff's deputy in the courtroom observed the delivery of the clothes to Mr. Tyre. After receiving the clothes, Mr. Tyre left the courtroom in the company of a Sheriff's deputy and carried the clothes to the Sheriff's department lockup in the courthouse. There, the clothes were searched and the heroin was discovered. (R.T. 2738-39; 2780-83; 2802-09; Supp. II, C.T. 23)

The jury returned verdicts of life without possibility of parole on the Skyles and Price murders. They were unable to reach a verdict on the penalty for the Lester Eaton murder and a mistrial was declared. (R.T. 2765-2774) At the sentencing hearing on the Skyles and Price murders, the Court raised the issue of whether the heroin incident had caused defense

counsel John Tyre to have a conflict of interest and whether he should be relieved as counsel for appellant. (R.T. 2778-2780) The Court asked the prosecutor if he intended to introduce evidence at the re-trial concerning the attempted importation of drugs into the jail. (R.T. 2780)

The prosecutor stated that there was enough evidence to charge appellant with the crime of importing a controlled substance into the jail,[12] because the importation would not make any sense unless appellant knew the drugs were coming. (R.T. 2780-2781) However, he would not introduce the evidence at the penalty re-trial because it did not involve violence and occurred after the murders. But the evidence would be used to impeach defense penalty phase witnesses, Kimberly Gonzales and David Gonzales, if they testified at the re-trial. The clothing was given to John Tyre by Kimberly Gonzales, a sister-in-law, who testified at the first trial. The prosecutor stated that David Gonzales, the defendant's bother, was also involved in the smuggling. (R.T. 2781-2782)

The Court then asked "What about Mr. Tyre?" The prosecutor responded by saying that "I think Mr. Tyre is a witness in that case to the extent charges are filed. He was the unknowing or unwitting mule, if you will, that the clothes were handed to. I believe Mr. Gonzales

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[12] Penal Code § 4573 makes it a felony to bring a controlled substance into a jail or prison. (People v. Fenton (1993) 20 Cal.App.4th 965.) Health and Safety Code § 11350 makes it a felony to possess heroin.

and his family has placed Mr. Tyre right in the middle of that investigation." (R.T. 2782) The Court then stated: "I certainly agree with that ... it would have put him in a very embarrassing situation had he had unobserved custody of the clothing." (R.T. 2782)

The Court sentenced appellant on the Skyles and Price murders and denied a motion to bar re-trial of the penalty phase. (R.T. 2783-2788) After denying the motion to bar re-trial, the Court stated that "very probably Mr. Tyre is going to be relieved" as counsel for appellant. But, the Court decided to let the new judge, handling the re-trial, rule on the conflict of interest issue. Judge Armstrong did not intend to preside over the re-trial. (R.T. 2788).

The case was transferred from Judge Armstrong's court and reassigned to Judge Piatt for all further proceedings. At the reassignment hearing, Mr. Tyre advised the master calendar Judge that he had a possible conflict of interest and he would be filing a motion on that issue in the near future. (R.T. 2796-2801).[13]

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[13] Defense counsel John Tyre filed a written motion advising the Court that he had a possible conflict of interest. The motion requested an evidentiary hearing to determine if defense counsel should be relieved as attorney of record. (Supp. II, C.T. 234-235). In the motion, Mr. Tyre states that "John Gonzales has a right to be represented by a conflict free attorney." (Id. at 234). Mr. Tyre then explains that someone gave clothes to defense counsel who carried them to the Sheriff's Department office in the courthouse. The clothes were searched and cocaine, methamphetamine, and heroin were found secreted in the clothes. Defense counsel was always in the company of a Sheriff's deputy, but "he did physically carry the clothes."

The final hearing on the conflict of interest issue was held on April 2, 1998 before Judge Piatt. Mr. Tyre told the Court there may be a legal conflict in the case depending upon whether the Court allowed the prosecutor to use the heroin smuggling evidence to impeach defense witnesses during the second penalty trial. The prosecutor stated that the family of appellant gave street clothes to Mr. Tyre to pass on to appellant to wear during the trial. A large quantity of narcotics was found secreted in the waistband of the clothes which were intended for appellant. The prosecutor stated that although Mr. Tyre was unaware that the narcotics were in the clothing, he intended to cross-examine those family members involved in the smuggling about the narcotics if they were called as defense witnesses. Cross-examination on the incident would be appropriate impeachment. (R.T. 2802-2805).

Mr. Tyre explained that he was part of the chain of custody involving the clothes. He received the clothes while he was in court and his receipt was observed by Sheriff's personnel. The Court stated that it did not know how Mr. Tyre could possibly be called as a witness. Mr. Tyre moved to exclude the evidence under Evidence Code section 352. He argued that

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(Id. at 235). Mr. Tyre states that he believes the evidence is irrelevant and he would like to continue to represent appellant if the Court denies the motion to bar re-trial of the penalty phase. If there is no re-trial of the penalty phase, the issue is moot. He asks for a ruling first on the motion to bar the re-trial, and then, if necessary, for "a ruling on potential evidence so that a conflict may be declared if necessary." (Id. at 235).

the mention of his name in association with the incident might have some effect on the jury and their attitude toward him. The Court agreed and ruled that it would not permit the evidence to be presented with the mention of Mr. Tyre's name. The evidence would be limited to the fact that the clothes were brought to the lockup and things were found in them. (R.T. 2806-2807).

The prosecutor stated he agreed with the Court's ruling. However, he stated: "My only concern is that to the extent Mr. Tyre has information about who contacted him about the clothes the night before, who handed the clothes to him, that may become relevant in terms of, if those people testify — and they did testify at the prior penalty phase in the case ... [T]his is an investigation that is ongoing, the Sheriff's department is investigating this, and what the outcome will be, I do not know." (R.T. 2807-2808)

The prosecutor argued that it was his belief that appellant's sister-in-law gave the clothes to Mr. Tyre. She and her husband, who is the brother of appellant, were involved in putting the drugs in the clothing. Both testified at the first trial and the prosecutor wanted to impeach them with the facts of the smuggling incident if they testify at the re-trial. The Court asked for further briefing on the issue. (R.T. 2808-2809) Mr. Tyre

then insisted that the Court resolve the conflict of interest issue at the present hearing and make a final ruling:

> MR. TYRE: What I need is – it's judicial economy at this point, meaning the sooner I know whether this is going to be allowed at trial, the sooner I can either declare a conflict, get a waiver of conflict, deal with the conflict issue. If a conflict is going to be declared again, another attorney is going to have to read through the transcripts; it's going to take six months.
>
> I am looking at getting this resolved so that I can proceed as the attorney of record for Mr. Gonzales, to proceed within a quick time, get this thing tried and let the jury make a decision.
>
> THE COURT: Well, as I sit here now I don't see a conflict as you see it. I don't perceive it is one that should prevent you from going forward with the case. I don't see any involvement on your part that would require you to be – that would require you to be a witness in this case.
>
> MR. TYRE: Your Honor, I'm just concerned. I don't want to, all of a sudden, be called up there to testify in a case where my client is a defendant.
>
> THE COURT: I would not permit you to be called. (R.T. 2809-2810)

Before this final ruling on the conflict of interest issue, the Court never addressed appellant personally on the conflict. The Court never explained to appellant the nature of any conflict of interest or advised him of his right to conflict free counsel.

John Tyre continued to represent appellant at the penalty phase re-trial. During the trial, Mr. Tyre told the Court that he had advised

appellant that he did not "believe it would be appropriate for him to take the stand [and testify] in the penalty phase." Mr. Tyre stated that if appellant chooses to testify, "it would be over defense counsel's objection." (R.T. 4192) The Court admonished appellant that he should follow his attorney's advice, but if he chose to testify, he had a right to testify. (R.T. 4193) Thereafter, appellant did testify at the penalty trial. (R.T. 4204-4307) Kimberly Gonzales and David Gonzales, the two person's identified by the prosecutor as being responsible for sewing heroin into the clothes delivered to Mr. Tyre for use by appellant, were not called as defense witnesses by Mr. Tyre at the penalty phase re-trial.

B. John Tyre Could Not Continue To Represent Appellant Because He Had An Actual Conflict Of Interest

The heroin smuggling incident created an actual conflict of interest between John Tyre and appellant. Mr. Tyre received clothes from Kimberly Gonzales, appellant's sister-in-law. Heroin was sewn into the lining of the clothes. When Mr. Tyre personally delivered the clothes to the Sheriff's lockup, the heroin was discovered.

John Tyre could have been arrested for the crime of importing heroin into the jail or for possession of heroin. He was not arrested because a deputy Sheriff had seen Kimberly Gonzales deliver the clothes to him in the courtroom. The prosecutor told the Court that the appellant's brother

and sister-in-law, David Gonzales and Kimberly Gonzales, were the persons responsible for hiding the heroin in the clothes.

The prosecutor also told the Court that he believed appellant was a party to the heroin smuggling because the clothes were to be given to appellant. The prosecutor stated that appellant had to have known that the heroin was being smuggled into the jail because no other interpretation of the facts made sense.

Smuggling heroin into the jail is a serious crime. It is a felony offense "punishable by imprisonment in the state prison for two, three, or four years." (Pen. Code § 4573.) However, at the time the incident was raised in the trial court, no criminal charges had been filed. But the prosecutor did advise the trial court that if criminal charges were filed in the future against appellant, his brother, and his sister-in-law, John Tyre would be a prosecution witness in the case.

The actual conflict of interest that existed in this case between John Tyre and appellant was twofold. First, by physically delivering clothes containing heroin to the Sheriff's lockup, Mr. Tyre had been exposed to the possibility of being criminally prosecuted for smuggling heroin into the jail. He had been exposed to this potential threat of prosecution, by appellant's family members, and according to the prosecutor, by appellant himself. If charges were filed against Mr. Tyre, then Mr. Tyre would be prosecuted by

the same government agency prosecuting appellant on the murder charges. Second, if criminal charges based on the heroin smuggling were filed against appellant, his brother, and his sister-in-law, the prosecutor intended to use Mr. Tyre as a prosecution witness against them. This turned defense counsel into a witness against his own client.

All of these facts concerning the conflict of interest were before the trial court when the Court stated it did not see a conflict of interest that would prevent Mr. Tyre from continuing to represent appellant at the penalty phase re-trial. The trial court reasoned that if it excluded evidence of Mr. Tyre's involvement in the heroin smuggling and barred the prosecution from using Mr. Tyre as a witness at the penalty trial, then the conflict was resolved. The trial court was wrong.

The continuing nature of the heroin smuggling investigation and the prosecutor's stated intention to use defense counsel as a witness against his client if charges were filed, created an intolerable conflict of interest between John Tyre and appellant. The trial court should have relieved Mr. Tyre as counsel and appointed a different attorney to represent appellant. Mr. Tyre's continued representation of appellant at the penalty phase re-trial violated appellant's constitutional right to conflict free counsel under the Sixth Amendment to the United States Constitution (Holloway v. Arkansas (1978) 435 U.S. 475, 483-484) and Article I, section

15 of the California Constitution. (People v. Easley (1988) 46 Cal.3d 712, 724-729.)

"The right to effective assistance of counsel secured by the Sixth Amendment to the federal Constitution and Article I, section 15 of the California Constitution includes the right to representation free from conflicts of interest." (People v. Frey (1998) 18 Cal.4th 894, 898, see also Mickens v. Taylor (2002) 535 U.S. 162; Holloway v. Arkansas, supra, 435 U.S. 475; Glasser v. United States (1942) 315 U.S. 60; People v. Bonin (1989) 47 Cal.3d 808, 833; People v. Easley, supra, 46 Cal.3d 712, 724-729; People v. Mroczko (1983) 35 Cal.3d 86, 103-105.) "A conflict of interest deprives the defendant of the undivided loyalty and advocacy guaranteed by both provisions." (People v. Frey, supra, 18 Cal.4th at 998; see also People v. Jones (2004) 33 Cal.4th 234.)

1. Conflict Of Interest: Counsel Is Subject To Criminal Prosecution

The fact that John Tyre could have been arrested and prosecuted for bringing heroin into the jail was an actual conflict of interest. "Many courts have found an actual conflict of interest when a defendant's lawyer faces possible criminal charges or significant disciplinary consequences as a result of questionable behavior related to his representation of the defendant." (United States v. Levy (2d Cir. 1994) 25 F.3d 142, 156; see also United States v. McLain (11th Cir. 1987) 823 F.2d

1457, 1463-1464; Government of Virgin Islands v. Zepp (3d Cir. 1984) 748 F.2d 125, 136; United States v. Cancilla (2d Cir. 1984) 725, F.2d 867, 870; United States v. White (5th Cir. 1983) 706 F.2d 506, 507-508.)

In Levy, the attorney representing Levy was under investigation for criminally aiding a co-defendant in fleeing the country to avoid prosecution. This created a conflict of interest between Levy and his attorney, because "fearing answers that might incriminate himself, the defendant's attorney would have a strong personal desire to refrain from inquiring into certain matters that were directly relevant to, and potentially exculpatory of, his client." (United States v. Levy, supra, 25 F.3d at 157.)

In Mannhalt v. Reed (9th Cir. 1988) 847 F.2d 576 the defense attorney Kempton was accused by a governmental witness Morris of buying stolen property from him, a crime related to the crimes charged against the defendant. This created an actual conflict of interest between Mannhalt and his attorney because "a vigorous defense might uncover evidence of the attorney's own crimes, and the attorney could not give unbiased advice to his client about whether to testify or whether to accept a guilty plea." (Mannhalt v. Reed, supra, 847 F.2d at 581.)

Even if the attorney is innocent and the allegations against him are plainly false, the defendant's case is impaired because the attorney is unavailable as a defense witness if he is counsel for the defendant.

(United States v. Fulton (2d Cir. 1993) 5 F.3d 605, 610.) "An attorney cannot act both as advocate for his client and a witness on his client's behalf." (Ibid.)

By taking possession of the clothing containing the heroin and delivering it to the courthouse lockup, John Tyre was subject to arrest and prosecution for possession of heroin and for bringing drugs into a jail. He had an actual conflict of interest based upon those facts. He admitted in his motion to the trial court that these facts created a conflict of interest when he asked the trial court to decide whether he should be relieved because of the conflict.[14]

John Tyre had an actual conflict of interest in this case based upon the fact that he could have been arrested and prosecuted for bringing heroin into the jail. His loyalty was divided between his own self interest in not being charged with a crime and his duty to represent appellant at the

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[14] Appellant's case is different from People v. Hardy (1992) 2 Cal.4th 86, 135-138. In Hardy, the Court stated that "A patently frivolous lawsuit brought by a defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel." (Id. at 138.) Although the prosecutor stated that he believed John Tyre was totally blameless in the heroin smuggling incident, the fact remains that John Tyre physically possessed the clothes containing the heroin and delivered the clothes to the lockup. Charging John Tyre with the crimes of possession of heroin and importing heroin into the jail would not have been "patently frivolous." He committed sufficient acts to warrant at least a finding of probable cause justifying the filing of criminal charges. (See Rideout v. Superior Court (1967) 67 Cal.2d 471, 475 [knowledge of the presence of a drug may be inferred through close proximity to the drugs].)

penalty trial. Throughout the penalty trial, this conflict of interest affected many of the decision made by counsel, such as, whether to call Kimberly and David Gonzales as witnesses, and whether to call appellant as a witness. According to the prosecutor, it was Kimberly, David, and appellant who arranged for the clothing with the heroin to be delivered to counsel. Ultimately, the decision not to call Kimberly and David as witnesses and appellant's decision to testify over counsel's objection, were made at a time when defense counsel was subject to this conflict of interest.

2. Conflict of Interest: Counsel Is A Prosecution Witness Against His Client

The fact that John Tyre was a prospective prosecution witness against appellant, if appellant was charged with importing heroin into the jail, was an actual conflict of interest. An attorney has an actual, as opposed to a potential, conflict of interest, when, during the course of the representation, the attorney's and the defendant's interests "diverge with respect to a material, factual or legal issue or to a course of action." (Cuyler v. Sullivan (1980) 446 U.S. 335, 356 n. 3; United States v. Levy (2d Cir. 1994) 25 F.3d 146, 155; see also People v. Peoples (1997) 51 Cal.App.4th 1592, 1599.) "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests."

(People v. Bonin (1989) 47 Cal.3d 808, 835; People v. Jones (1991) 53 Cal.3d 1115, 1134.)

A lawyer representing a client in a criminal case has an actual conflict of interest if the lawyer is a prosecution witness against the client in a criminal investigation. (See Wheat v. United States (1988) 486 U.S. 153, 156-157; People v. Easley (1988) 46 Cal.3d 712, 724-725; Leverson v. Superior Court (1983) 34 Cal.3d 530, 536,537.) In Wheat, the Supreme Court held that some attorney conflicts of interest may be so irreconcilable that a court may refuse to allow an attorney to represent a defendant. Before his trial, Wheat moved the Court to substitute attorney Iredale as his counsel. Iredale was already representing two co-defendants in the same case. One of the co-defendants represented by Iredale had already pleaded guilty and was expected to testify as a prosecution witness against Wheat. Because this conflict was irreconcilable and unwaiveable, the trial judge refused to allow Iredale to represent Wheat. The Supreme Court held that the removal of Iredale was proper because trial courts have a duty to protect criminal defendants from attorney conflicts of interest that may deprive the defendant of a fair trial. (Wheat v. United States, supra, 486 U.S. at 160-161.)

In People v. Easley, supra, 46 Cal.3d 712, the prosecution in a death penalty case presented evidence in the penalty phase that the

defendant committed an arson of a brothel. The Court found that the defendant's attorney had conflicting interests, simultaneously representing in a civil suit the brothel owner, who benefited from proving the defendant committed the arson, and also representing the defendant whose interest was to prove he had not committed the arson. This conflict harmed the defendant because his attorney failed to cross-examine the brothel owner on his bias and financial interest in the case and failed to present evidence that would negate or mitigate the defendant's involvement in the arson. Defense counsel's simultaneous representation of a prosecution witness and the defendant in the same case violated the defendant's federal and state constitutional right to conflict free counsel. (People v. Easley, supra, at 724-729.)

The conflict of interest an attorney has, when he represents a prosecution witness and a defendant in the same criminal case, becomes an even greater conflict when the lawyer himself is a prosecution witness against his client. An attorney who becomes a prosecution witness against his client is no longer on the same side of the case with his client. It creates an "irreconcilable" and "unwaiveable" conflict of interest. (See Wheat v. United States, supra, 486 U.S. at 156-157.)[15]

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[15] In civil cases, an attorney may be disqualified from representing one client in a lawsuit against a former client. (Comden v. Superior Court (1978) 20 Cal.3d 906, 919 n. 4; People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 263-264.)

Before the start of the second penalty trial the prosecutor announced that if criminal charges were filed against appellant, his brother, and his sister-in-law, based on the heroin smuggling incident, John Tyre would be a prosecution witness. This created an intolerable conflict of interest between John Tyre and appellant. It is difficult to imagine how a lawyer and a client could work together under such circumstances. Appellant was being represented by a lawyer who had gone over to the prosecutor's side of the case. Appellant could not be expected to trust his lawyer after the prosecutor announced that his lawyer was now a prosecution witness.

John Tyre had two conflicts of interest with appellant. The conflicts were not removed by simply excluding evidence at the penalty trial concerning Tyre's involvement in delivering the clothes containing the heroin. The criminal investigation of the heroin smuggling incident was ongoing (R.T. 2808), leaving it up to the prosecutor to determine at some future date whether Mr. Tyre would be charged with smuggling heroin or whether he would become a prosecution witness against appellant in a case charging appellant with smuggling heroin into the jail. Thus, the trial court erred in finding no conflict of interest and failing to remove Mr. Tyre as counsel for appellant.

C. The Conflict Of Interest Adversely Affected Counsel's Performance And Appellant Suffered Prejudice

Some conflicts of interest are per se reversible. "Whenever a trial court improperly requires joint representation over timely objection, reversal is automatic." (Holloway v. Arkansas (1978) 435 U.S. 475, 488.) In these cases, "it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client" because in the case of joint representation of conflicting interests, the evil "is in what the advocate finds himself compelled to refrain from doing." (Id. at 490.)

In other cases, when a trial court violates its duty to inquire into the possibility of a conflict of interest or fails to adequately act in response to what its inquiry discovers, the trial court commits error. (People v. Bonin (1989) 47 Cal.3d 808, 837 citing Wood v. Georgia (1981) 450 U.S. 261, 272.) The standard of review for reversible error is these cases is different under the federal and the state constitutions.

"To establish a federal constitutional violation, a defendant who fails to object at trial must show that an actual conflict of interest 'adversely affected his lawyer's performance.'" (People v. Frey (1998) 18 Cal.4th 894, 998 citing Cuyler v. Sullivan (1980) 446 U.S. 335, 348, 350; People v. Kirkpatrick (1994) 7 Cal.4th 988, 1009.) "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely

affects counsel's performance." (Mickens v. Taylor (2002) 535 U.S. 162, 172 n. 5.)

Once the record establishes that an actual conflict of interest adversely affected counsel's performance, prejudice to the outcome of the case is presumed and the conviction must be reversed. (Mickens v. Taylor, supra, 535 U.S. 162, 172-173; Cuyler v. Sullivan, supra, 446 U.S. 335, 349-350; Lewis v. Mayle (9th Cir. 2004) 391 F.3d 989, 997.) However, "prejudice will be presumed only if the conflict has significantly affected counsel's performance–thereby rendering the verdict unreliable even though Strickland prejudice cannot be shown." (Mickens v. Taylor, supra, at 172-173; compare, Strickland v. Washington (1984) 446 U.S. 668, 694 [Strickland prejudice requires a showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different."].)

To establish a violation under the California Constitution, "even a potential conflict may require reversal if the record supports 'an informal speculation' that appellant's right to effective representation was prejudicially affected." (People v. Mroczko (1983) 35 Cal.3d 86, 105; accord People v. Frey, supra, 18 Cal.4th at 998; People v. Easley (1988) 46 Cal.3d 712, 729 n. 17.) "Proof of 'actual conflict' is not required." (People v. Mroczko, supra, 35 Cal.3d at 105; see also People v. Castillo (1991) 233

Cal. App.3d 23, 62; People v. Singer (1990) 226 Cal.App.3d 23, 39; People v. Jackson (1985) 167 Cal. App.3d 829, 831-832.)

In Glasser v. United States (1942) 315 U.S. 60, 72-75, a case where a single attorney represented two defendants, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and failed to resist the presentation of arguably inadmissible evidence. The Court found that both omissions resulted from counsel's desire to diminish the jury's perception of a co-defendant's guilt. This was found to be indicative of the lawyer's "struggle to serve two masters." (Glasser v. United States, supra, 315 U.S. at 75; accord People v. Easley, supra, 46 Cal.3d at 724-726 [failure to cross-examine witness or to introduce evidence negating defendant's role in arson]; People v. Mroczko, supra, 35 Cal.3d at 105-109 [failure to shift the blame to co-defendant or argue mitigating circumstances].) The critical inquiry in cases where an attorney has a conflict of interest is "whether the record shows that counsel 'pulled his punches' i.e., failed to represent defendant as vigorously as he might have had there been no conflict." (People v. Easley, supra, 46 Cal.3d at 725 citing Burger v. Kemp (1987) 483 U.S. 776, 787-788.)

1. The Dispute Over Appellant's Decision To Testify

In appellant's case, the conflict of interest culminated in a dispute during the penalty trial between John Tyre and appellant over whether appellant should testify. Mr. Tyre advised him not to testify. Appellant nevertheless testified over the objection of his counsel. (R.T. 4192-4194) The testimony was more harmful than helpful to appellant's case. Appellant testified that he shot all three of the murder victims, Lester Eaton, Elijah Skyles, and Gary Price. (R.T. 4207-4210)

During deliberations, the jury asked for appellant's testimony to be reread. (R.T. 4510-4516) The testimony was reread to the jury. (R.T. 4516) On the following day, the jury returned a verdict of death in appellant's case for the murder of Lester Eaton. (R.T. 4517-4523) Appellant's testimony must have had a significant impact on the jury. At the first penalty trial, when appellant did not testify, the jury was unable to reach a verdict. The final vote was 8 to 4 in favor of a sentence of life without parole. (R.T. 2765-2769)

Appellant had a constitutional right to testify, even if contrary to counsel's advice, and even if the testimony indicates a preference for the death penalty. (People v. Nakahara (2003) 30 Cal.4th 705, 715, 719; People v. Guzman (1988) 45 Cal.3d 915, 962; accord Rock v. Arkansas (1987) 483 U.S. 44, 49-53. ["it cannot be doubted that a defendant in a criminal case

has the right to take the witness stand and to testify in his or her own defense"].) However, at the time that appellant made the decision to testify, it was made without the assistance of a conflict free counsel. The Sixth Amendment right to counsel "requires the guiding hand of counsel at every step of the proceedings against him." (Powell v. Alabama (1932) 287 U.S. 45, 68-69; Gideon v.Wainwright (1963) 372 U.S. 335, 344-345.) Appellant did not have the guiding hand of conflict free counsel when he decided to testify, and his case suffered prejudice because of that decision.

The purpose of the trial was to determine appellant's penalty for the murder of Lester Eaton. The most serious aggravating evidence in the case was the fact that appellant had also been convicted of the two additional murders of Skyles and Price. However, the two additional murder convictions were mitigated somewhat by evidence establishing that appellant did not personally shoot Skyles and Price. Carol Mateo (R.T. 1463-1467), Judith Mejorado (R.T. 1727-1732), Jeremy Robinson (R.T. 1574-1577), and Alejandro Garcia (R.T. 1621-1629) all identified Michael Soliz as the person who shot Skyles and Price. Although appellant told Salvador Berber that he shot Skyles and Price, the prosecutor argued to the jury that appellant's confession was false because the evidence showed that Michael Soliz shot Skyles and Price, not appellant. (R.T. 2231-2234)

Now with appellant testifying, over counsel's objection, that he personally shot Skyles and Price, appellant was providing the jury with additional reasons for imposing the death penalty. This part of appellant's testimony clearly harmed his case. Any reasonable attorney representing appellant would have advised him not to testify, because little could be gained by appellant's testimony that he personally shot Skyles and Price.[16]

The dispute between appellant and John Tyre over whether appellant should testify was a clear indication that the conflict of interest resulted in a breakdown of the attorney-client relationship during the penalty trial. Appellant was forced to trial with a lawyer that the prosecutor intended to use as a prosecution witness to convict him of smuggling heroin into the jail. The conflict of interest destroyed any sense of loyalty and trust that are essential to the attorney-client relationship, especially in a capital case. If the trial court had relieved John Tyre and appointed a conflict free attorney, appellant may have accepted reasonable legal advice from a

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[16] The prosecutor on cross-examination asked appellant if he was trying to "take the heat off" Michael Soliz by "taking the rap for this murder and getting him off the hook." Appellant responded "No. I did it. Why should he suffer for what I did?" (R.T. 4274-4275) Despite appellant's denial, the trial judge, at the hearing on the motion for new trial suggested that the reason appellant testified that he shot Skyles and Price was because he had already been sentenced to life without parole and could not be given the death penalty for those two murders. Appellant could take credit for the murders to help Michael Soliz avoid a death sentence. (R.T. 4533) The Court also suggested that appellant may have been trying to make amends for confessing the crimes to Salvador Berber who later became an informer. (R.T. 4534)

different attorney and decided not to testify at the penalty trial. (See, Douglas v United States (D.C.App.1985) 488 A.2d. 121, 137 [An attorney conflict of interest "might impede communications" between the client and counsel.].) In short, without the attorney conflict of interest, appellant may have avoided a death verdict.

2. The Failure To Call Kimberly Gonzales And David Gonzales As Witnesses

There is also a second area in the record where John Tyre's conflict of interest adversely affected appellant's case. At the second penalty trial, Mr. Tyre failed to call as defense witnesses Kimberly Gonzales and David Gonzales. Both of these witnesses testified at the first penalty trial. At the first penalty trial, when these witnesses testified, the jury was unable to reach a verdict and the majority of the jurors voted in favor of a life sentence.

David Gonzales testified that he is the older brother of appellant and that he tried talking appellant out of joining a gang when appellant was twelve years old. He was very close to his brother and he urged the jury to give appellant a life sentence. (R.T. 2536-2542) Kimberly Gonzales is the wife of David Gonzales. She testified that before he went to prison, appellant would frequently help her with her children. She testified that appellant's decision to join a gang at age thirteen was influenced by the brother of a woman who was living at his mother's home.

She testified that appellant was not a cold-hearted person and urged the jury to return a life verdict. (R.T. 2565-2568)

At the second penalty trial, when neither of these witnesses testified, the jury returned a verdict of death. Kimberly Gonzales and David Gonzales were the two people that were identified by the prosecutor as the persons who likely placed the heroin in the clothing that was delivered to Mr. Tyre. One reason for not calling these witnesses could be that defense counsel did not want them impeached by the heroin smuggling incident.[17] However, another reason why the witnesses were not called could have been that Mr. Tyre did not want to be exposed to testimony from witnesses who might blame him for placing the heroin in the clothing. (See United States v. Fulton (2d Cir. 1993) 5 F.3d 605, 610 [conflict of interest may cause attorney to fear a spirited defense could uncover evidence of attorney's guilt].)

The record in this case establishes that an actual conflict of interest existed between appellant and his trial counsel and that the conflict adversely affected trial counsel's performance. Appellant has identified two areas where his defense was harmed as a result of the conflict of interest and the breakdown in the attorney-client relationship. The Court

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[17] This was not a strong reason for not calling the witnesses because the prosecution had already presented evidence that appellant had a prior felony drug conviction for possession of methamphetamine. (R.T. 4137)

should find that appellant's constitutional right to conflict free counsel has been violated and reverse his death sentence. (Holloway v. Arkansas (1978) 435 U.S. 475, 483-484[United States Constitution]; People v. Easley (1988) 46 Cal.3d 712, 724-729 [California Constitution].)

D. There Is No Evidence That Appellant Caused The Conflict Of Interest In Order To Remove His Counsel Or To Delay The Trial.

There is no evidence in this case that the appellant was involved in the clothing drug smuggling incident. Appellant's sister-in-law, Kimberly Gonzales, delivered the clothes containing the drugs to John Tyre in the courtroom. Appellant was in custody at the time of the delivery and there was no evidence of any communication between appellant and Kimberly Gonzales about smuggling heroin into the jail.

The prosecutor argued in court that appellant had to have been involved in the drug smuggling because the clothes were intended for his use during the trial. He stated that the drug smuggling would make no sense unless appellant knew that the drugs were coming. (R.T. 2780-2781) However, appellant could not be held responsible for the actions of his sister-in-law unless there was evidence that his sister-in-law was acting on his behalf or appellant authorized her actions. (See, People v. Perez (1959) 169 Cal.App.2d 473, 477.) Evidence of a "mere relationship" between the defendant and a family member is not sufficient to establish that the

defendant authorized the family member's misconduct. (People v. Perez, supra, at 478.)

In People v. Roldan (2005) __ Cal.4th __(2005), defense counsel in a capital case moved to be relieved as counsel during the trial on the grounds that he had a conflict of interest based on the defendant's threats against counsel's life. The motion was denied. On appeal, Roland argued that he was denied his constitutional right to the effective assistance of a conflict free attorney. This Court found that the "defendant's own behavior created the alleged conflict" and that the defendant "was attempting to disrupt and delay the trial by threatening his court-appointed lawyer." The Court affirmed the conviction, stating that it would not permit "defendants to interject reversible error into their trials by simply threatening their lawyers." (Peorple v. Roldan, supra.)

Under the invited error doctrine, a defendant may not claim prejudice on appeal from error caused by his own misconduct. (People v. Lang (1989) 49 Cal.3d 991, 1032; People v. Linden (1959) 52 Cal.2d 1, 28-29; People v. Gomez (1953) 41 Cal.2d 150, 162.) Without some evidence that appellant authorized or requested his sister-in-law to attempt to smuggle drugs into the jail, there is no basis for holding appellant responsible for the drug smuggling incident. Thus, the conflict of interest issue was not caused by appellant and is there is no invited error.

In People v. Hardy (1992) 2 Cal.4th 86, 132-139, the defendant in a capital case filed a pro se civil complaint in federal court against his public defender alleging negligent legal representation and seeking $5 million in compensation. The complaint was filed during jury selection in the case. The trial court refused to relieve the public defender based on this conflict of interest after the public defender stated that he did not believe the lawsuit would interfere with his diligent representation of the defendant. On appeal, the defendant argued that he was denied his constitutional right to conflict free counsel because the public defender had an actual conflict of interest when he was named as a defendant in Hardy's civil lawsuit. This Court rejected Hardy's argument and affirmed the judgment and sentence.

Three factors were important to the Court's decision in Hardy. First, the public defender indicated a desire to continue representing the defendant and stated that the lawsuit would not inhibit his representation of the defendant. Second, the Court found that the defendant's civil lawsuit was frivolous. Third, the Court determined that "Hardy was merely attempting to manufacture a possible conflict of interest to try and delay his trial." (People v. Hardy, supra, 2 Cal.4th at 138.)

In appellant's case, only the first factor in Hardy exists. In his written motion, John Tyre stated that he wished to continue representing appellant if the Court ruled that evidence of the heroin smuggling was

inadmissable at the second penalty trial and if the court would order that Mr. Tyre could not be called as a witness. (Supp. II, C.T. 234-235.) However, Mr. Tyre misunderstood and misidentified the conflict of interest issue raised by the smuggling incident. Tyre advised the court that his concern was that he might be called as a witness at the second penalty trial to testify concerning his receipt of the clothes containing the heroin. (R.T. 2809-2810)

Tyre thought that he might be forced to withdraw as counsel for appellant because an attorney may not act as both a witness and as counsel in the same case. (See, Comden v. Superior Court (1978) 20 Cal.3d 906, 910-913; California Rules of Professional Conduct, Rule 2-111(A)(4) [If an attorney representing a client knows he will be called as a witness in the case, he must withdraw as counsel in the case.].) That was only part of the problem. There remained two other conflict of interest problems that Mr. Tyre failed to recognize. Those conflicts were based upon the possibility that Mr. Tyre could be prosecuted as a participant in the heroin smuggling and the fact that Mr. Tyre would be a prosecution witness against appellant if appellant was charged with heroin smuggling.. Thus, the fact that John Tyre wanted to continue representing appellant could not be a significant factor in appellant's case if that expressed desire to remain as counsel was based upon a misunderstanding of the nature of the conflict of interest.

The second factor in Hardy, that the civil lawsuit causing the conflict was a frivolous lawsuit, does not exist in appellant's case. The discovery of heroin sewn in the lining of the clothing delivered to John Tyre for appellant's use as court clothes, resulted in an ongoing criminal investigation by the Los Angeles County Sheriff's Department. (R.T. 2807-2808) Although the prosecutor stated that he did not believe John Tyre knew of the presence of the heroin in the clothes (R.T. 2782), he did identify appellant, Kimberly Gonzales and David Gonzales as the persons he believed were responsible for the heroin smuggling. (R.T. 2780-2781; 2808-2809) Furthermore, if charges were filed against appellant, and Kimberly and David Gonzales, the prosecutor indicated that John Tyre would be a witness in the case. (R.T. 2782)

These were not frivolous allegations. Although the likelihood of John Tyre being criminally charged was remote, it still existed as a possibility. However, the greater likelihood was the prospect of John Tyre becoming a prosecution witness against appellant, and Kimberly and David Gonzales in a separate case charging them with the crime of importing heroin into the jail. With an ongoing Sheriff's investigation into the smuggling incident, these concerns were not frivolous.

The third factor in Hardy likewise has no application to appellant's case. There is no evidence in the record that appellant was attempting to

manufacture a conflict of interest in order to delay his trial. There is no evidence that appellant participated in or authorized the smuggling of heroin. It was counsel who raised the conflict of interest issue after he delivered the clothes and learned that heroin had been sewn into the lining. The conflict of interest issue was raised after appellant's first trial was over. The clothes were delivered while the first penalty trial jurors were deliberating. This occurred on March 4, 1998. (C.T. 798-800)

The first penalty trial resulted in a mistrial after the jurors could not reach a verdict on the penalty for appellant for the Lester Eaton murder. This occurred on March 9, 1998. (C.T. 827-829) The hearing on the conflict of interest issue was held on April 2, 1998. (R.T. 2802-2810) This was over six months before the start of the second penalty trial which commenced on October 13, 1998. (C.T. 871-872) Thus, the record does not support a conclusion that the conflict of interest issue was raised by appellant to delay his trial. In short, there is no evidence in this case that appellant had manufactured a conflict of interest to delay his trial or that appellant was manufacturing a conflict in order to create cause for the appointment of new counsel. The conflict of interest requires reversal of appellant's death sentence.

E. Appellant Has At Least Met The California Constitutional Standard For Reversible Error Based Upon An Informed Speculation That His Right To Effective Representation Was Prejudicially Affected By The Conflict Of Interest.

The California Constitutional right to conflict free counsel affords a defendant greater protection than the United States Constitution. In cases involving claims under the California Constitution, the Court will apply a "somewhat more rigorous standard of review." (People v. Mroczko (1983) 35 Cal.3d 86, 104.)

Federal constitutional law requires a defendant who has not objected to a conflict at trial to show an actual conflict which adversely affected his lawyer's performance. (People v. Mroczko, supra, 35 Cal. 3d at 104, citing Cuyler v. Sullivan (1980) 446 U.S. 335, 348; Berger v. Kemp (1987) 483 U.S. 776, 783. Cases under the California Constitution, by contrast, hold "that even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected. Proof of an 'actual conflict' is not required. The same principles apply when counsel represents clients whose interests may be adverse even when they are not co-defendants in the same trial." (People v. Mroczko, supra, 35 Cal. 3d at 105; see also, People v. Castillo (1991) 233 Cal. App. 3d 36, 62; People v. Singer (1990) 226 Cal. App. 3d 23, 38; People v. Jackson (1990) 167 Cal. App. 3d 829, 831-832.)

In People v. Jackson, supra, 167 Cal. App. 3d 829, the Court

reversed a defendant's assault with intent to commit rape conviction on the grounds of ineffective assistance of counsel based upon defense counsel's conflict of interest. The defendant's trial counsel and the prosecutor had an ongoing dating relationship during the trial which was not disclosed to the defendant. The Court stated the "Such an apparently close relationship between counsel directly opposing each other in a criminal prosecution naturally and reasonably gives rise to speculation that the professional judgement of counsel as well as the zealous representation to which an accused is entitled has been compromised." (People v. Jackson, supra, at 832-833.) The Court noted that because of the relationship, defense counsel may be reluctant to engage in abrasive confrontation with opposing counsel. This constituted "informed speculation" as to the existence of a disabling conflict, for which "actual prejudice need not be shown by the defendant as a condition to relief." (People v. Jackson, supra, at 833.)

In People v. Singer, supra, 226 Cal. App. 3d 23, the Court reversed a murder conviction on the grounds that trial counsel had a conflict of interest. Defendant's trial counsel had maintained a convert sexual and romantic relationship with the defendant's wife during the trial. The Court held that trial counsel's affair with the defendant's wife "deprived the defendant of his constitutional right to the undivided loyalty and effort of his attorney." People v. Singer, supra, 226 Cal. App. 3d at 39-40.) Because

of such a conflict, a defense counsel might be influence to see his client convicted in order to continue the affair or insure it remained undiscovered. He might be reluctant to call the wife as a witness in order to protect her, while jeopardizing the husband's case. He might be reluctant to call other witnesses who might implicate the wife. He might forego trial strategies for the husband in order to avoid imposing a costly burden on the wife. The Court stated that "At the very minimum these informed speculations, based upon the record, indicate the existence of a potential, prejudicial conflict." People v. Singer, supra, at 40.) The conviction was reversed under the California Constitution because the record supported "an informed speculation that [trial counsel's] conduct of the second trial was adversely affected." (Id. at 42.)

The conflict of interest in appellant's case has at least met the standard for reversible error under the California Constitution. Under that standard it is not required that the record demonstrate actual prejudice. Appellant is entitled to reversal of his death sentence if there is informed speculation that appellant's right to effective representation was affected by even a potential conflict of interest.

Here, trial counsel had two conflicts of interest based upon the smuggling incident. First, he was exposed to the possibility of being charged with a felony for his part in the delivery of the clothes containing

the heroin. Second, the prosecutor had announced that if heroin smuggling charges were filed against appellant and his family members, defense counsel would be a prosecution witness against them.

Given these facts, trial counsel might have been influence to keep appellant from testifying at trial and to keep David and Kimberly Gonzales from testifying so that they would not be questioned about trial counsel's involvement in the heroin smuggling incident. If appellant, David, or Kimberly Gonzales were accused on the witness stand of smuggling the heroin into the jail, there was always the possibility that they would attempt to avoid criminal liability in the heroin smuggling case by accusing defense counsel John Tyre.

In the case of David and Kimberly Gonzales, they were not called at the second penalty trial, and appellant had two fewer penalty phase witnesses to offer in support of his case for a life sentence. As for appellant, he did testify, but it was over trial counsel's objection. If trial counsel was objecting to appellant's testimony, there is informed speculation that trial counsel did not adequately prepare his client for testifying and did not present appellant's testimony in the most favorable manner during appellant's defense case.

Indeed, one area where trial counsel did not properly present

appellant's testimony was in the area of raising objections to the prosecutor's improper questions. When the prosecutor cross examined appellant and asked the "was this witness lying" question 19 times, trial counsel failed to raise a single objection to the prosecutor's misconduct. (See, Argument XIV) Because of the conflict, trial counsel might have preferred to have appellant's testimony discredited by the prosecutor in order to avoid the possibility that anyone might believe a future claim by appellant that Mr. Tyre was responsible for smuggling the heroin, and not appellant or appellant's brother and sister in law.

Thus, there is informed speculation that appellant's right to the effective assistance of counsel was prejudicially affected by trial counsel's conflict of interest in this case. As in the Jackson case, a "potential if not an actual conflict has been demonstrated and thus the appearance, at least, of impropriety. In these circumstances, we are foreclosed from indulging[ing] in nice calculations as to the amount of [resulting] prejudice.'" (People v. Jackson, supra, 167 Cal. App. 3d at 833, citing Maxwell v. Superior Court (1982) 30 Cal. 3d 606, 612; see also, People v. Rhodes (1974) 12 Cal. 3d 180, 186-187 [city attorney with prosecutorial responsibilities may not accept an appointment to defend persons accused of crime].) Therefore, appellant's death sentence must be

reversed under the California Constitution; as well as the United States Constitution.

XIV. APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY THE PROSECUTOR'S REPEATEDLY ASKING APPELLANT ON CROSS EXAMINATION WHETHER EACH OF THE PROSECUTION WITNESSES HAD LIED DURING THEIR TESTIMONY

A. Factual Background

Appellant testified at the second penalty trial. He admitted participating in the Hillgrove Market Robbery. He also admitted that he fired the gun that killed Lester Eaton. He explained that Lester Eaton had reached for a gun and that he and Lester struggled over the gun. During the struggle, appellant's gun went off and the bullet struck Mr. Eaton. Appellant testified that he "went blank" and "just kept shooting." (R.T. 4207-4208). He testified that he felt remorse and he apologized to Betty Eaton and her family. (R.T. 4209-4211).

Appellant also admitted that he was involved in the Shell gas station shooting of Elijah Skyles and Gary Price. According to appellant, Michael Soliz never got out of the car. Appellant approached Skyles and Price alone. He began arguing with them. He thought he saw one of them reach for a weapon, and in response, he shot them both. (R.T. 4209-4210).

Deputy District Attorney Douglas Sortino cross-examined appellant by repeatedly asking whether the prosecution witnesses had lied during their testimony. Defense counsel did not object to the cross-examination. However, Joseph Borges, counsel for Michael Soliz, did

object to one of the questions, but the trial court overruled the objection and stated that the prosecutor was entitled to cross-examine appellant in that manner. (R.T. 4275). The following are excerpts from the prosecutor's cross-examination of appellant.

1. Was Doreen Ramos Lying?

Q. When you and Mr. Soliz went into the market that night, you had bandannas on, right?
A. Nope.
Q. You didn't have any bandannas 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 around 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. (R.T. 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. (R.T. 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. (R.T. 4236)
Q. So Dorine Ramos was lying when she talked about what she saw the night of the robbery murder?
A. Yes. (R.T. 4260)

2. Was Betty Eaton Lying?

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. (R.T. 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. (R.T. 4260).

3. Was Deputy Esquivel Lying?

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 the stand?
A. Pretty much – yes. Yes. (R.T. 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. (R.T. 4260-4261).

4. Was Judith Mejorado Lying?

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 the car when Clumsy stopped the car that night?
A. I did.
Q. Jasper get out 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 that counsel table, and she said the same thing, didn't she?
A. Yes.
Q. So was she 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. (R.T. 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. (R.T. 4276).

5. Was Carol Mateo Lying?

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 testified at the earlier trial in this case and said the same thing.
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 out of the six-packs and told the police officers that was the guy who did the shooting?
A. Yes. (R.T. 4275-4276).

6. Was Jemery Robinson Lying?

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. (R.T. 4276).

7. Was Alejandro Mora Lying?

Q. And Alejandro Mora Garcia, when he picked Jasper's picture out of the six-pack and said that looks 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. (R.T. 4276)

8. Did Everyone Conspire to Lie?

Q. All those other people, they all conspired together to lie against you and Jasper?
Mr. Tyre: Objection, argumentative, your Honor.
The Court: Sustained.
Mr. Sortino: Thank you, your Honor. I have nothing further of this witness. (R.T. 4276-4277).

B. It Is Prosecutorial Misconduct For A Prosecutor To Ask A Defendant On Cross-examination Whether The Prosecution Witnesses Lied During their Testimony

Prosecutorial misconduct involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (People v. Samayoa (1997) 15 Cal.4th 795, 841; People v. Espinoza (1992) 3 Cal.4th 806, 820.) Such conduct on the part of a prosecutor may violate a defendant's federal constitutional right to due process of law. (People v. Hill (1998) 17 Cal.4th 800, 819; People v. Gionis (1995) 9 Cal.4th 1196, 1214.) A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness

as to make the conviction a denial of due process." (People v. Cole (2004) 33 Cal.4th 1158,1202; People v. Morales (2001) 25 Cal.4th 34, 44; accord, Darden v. Wainwright (1986) 477 U.S. 168, 181; Donnelly v. DeChristofore (1974) 416 U.S. 637, 642-643.

There are two issues raised by the prosecutor's method of cross examining appellant. The first is whether the prosecutor's asking appellant repeatedly whether the prosecution witnesses lied during their testimony was prosecutorial misconduct. The second is whether this prosecutorial misconduct violated appellant's federal constitutional right to due process. Appellant urges the Court to find that the prosecutor's cross-examination was misconduct that violated appellant's right to due process.

A prosecutor's use of "were they lying" questions during cross examination of a defendant was held to be prosecutorial misconduct in People v. Zambrano (2004) 124 Cal. App.4th 288, 241-243. The Court held that a witness's opinion about the veracity of another person's statements is inadmissible and irrelevant on the issue of the statements' credibility. (People v. Zambrano, supra at 239, citing People v. Melton (1988) 44 Cal.3d 713, 744.) Such testimony invades the province of the jury and is generally not helpful to a clear understanding of the witness's testimony. (People v. Zambrano, supra, at 240.)

In Zambrano, a defendant was charged with selling cocaine to an undercover police officer. The defendant testified that he knew nothing about the drugs and that the police arrested him for no reason. On cross examination, the prosecutor asked the defendant repeatedly whether the officers were lying about every aspect of their testimony that differed from the defendant's testimony. The Court held that the prosecutor "used the questions to berate defendant before the jury and to force him to call the officers liars in an attempt to inflame the passions of the jury. This was misconduct." (People v. Zambrano, supra, at 242; see also, People v. Foster (2003) 111 Cal. App.4th 379 [Misconduct issue raised but not decided.]

All federal courts that have considered the issue have found that it is not proper for a prosecutor to cross-examine a defendant by asking him if the prosecution witnesses had lied. (United States v. Combs (9th Cir. 2004) 379 F.3d 564, 572-574; United States v. Geston (9th Cir. 2002) 299 F.3d 1130, 1136; United States v. Sanchez (9th Cir. 1999) 176 F.3d 1214, 1219-1220; United States v. Gaines (1st Cir. 1999) 170 F.3d 72, 81; United States v. Sullivan (1st Cir. 1996) 85 F.3d 743, 750; United States v. Lin (D.C. Cir. 1996) 101 F.3d 760, 769; United States v. Boyd (D.C. Cir. 1995) 54 F.3d 868, 871; United States v. Scanio (2d Cir. 1990) 900 F.2d 485, 493; United States v. Richter (2d Cir. 1987) 826 F.2d 206, 208; Scott v. United

States (D.C. App. 1993) 619 A.2d 917; *see also*, United States v. Sanchez-Lima (9th Cir. 1998) 161 F.3d 545, 548 (holding it was reversible error for a government agent to testify that a prosecution witness was telling the truth).)

In United States v. Richter, supra, 826 F.2d 206, 208, the prosecutor forced the defendant to testify that an FBI agent was either mistaken or lying. The Court held that the prosecutor was guilty of misconduct and reversed the defendant's conviction. The Court noted that: "Determinations of credibility are for the jury ... not for witnesses ... Prosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper." (Id. at 208.)

Similarly, in United States v. Sullivan, supra, 85 F.3d 743, 749, the prosecutor asked the defendant a series of questions regarding whether another witness had lied. The Court held that "this type of questioning is improper." (Id.) The Court declared "we state the rule now emphatically: counsel should not ask one witness to comment on the veracity of the testimony of another witness." (Id. at 750.) The Court reasoned that "It is not the place of one witness to draw conclusions about, or cast aspersions upon another witness' veracity." (Id.)

Likewise in United States v. Boyd, supra, 54 F.3d 868, 871, the prosecutor asked the defendant over objection why the police officer would make up a story about him. On appeal, the Court held the question "infringed on the jury's right to make credibility determinations." (Id. at 871.) The Court concluded that "It is therefore error for a prosecutor to induce a witness to testify that another witness, and in particular, a government agent, has lied on the stand." (Id.)

Most state courts that have addressed the issue have found that it is not proper for a prosecutor to cross-examine a defendant by asking him if prosecution witnesses have lied in their testimony. (State v. Singh (2002) 259 Conn. 693, 712, 793 A.2d 226, 239; State v. Manning (Kan. 2001) 19 P.3d 84, 100; Commonwealth v. Martinez (2000) 431 Mass. 168, 177, 726 N.E.2d 913, 923; Burgess v. States (1998) 329 S.C. 88, 91, 495 S.E. 2d 445, 447; State v. Emmett (Utah 1992) 839 P.2d 781, 787; Knowles v. State (Fla. 1993) 632 So.2d 62, 65-66; State v. Flanagan (1990) 111 N.M. 93, 97; 801 P.2d 675, 679; State v. Casteneda-Perez (1991) 61 Wash. App. 354, 362, 810 P.2d 74, 78; People v. Adams (1989) 539 N.Y.S.2d 200, 148 A.D. 2d 964; People v. Riley (1978) 63 Ill. App. 3d 176, 184-185, 379 N.E. 2d 746, 753.)[18]

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[18] Only two courts have held that the question, "Is the witness lying?" is proper. (Whatlery v. State (1998) 270 Ga. 296, 301, 590 S.E. 2d

Recently, the Supreme Court of Connecticut addressed this legal issue in State v. Singh (2002) 259 Conn. 693, 793 A.2d 226. In Singh, the defendant was charged with arson after his restaurant was burned. The prosecution's theory was that the defendant committed the arson because of his financial difficulties. The only physical evidence connecting the defendant to the crime was the presence of gasoline on a pair of shoes found in his apartment. During cross-examination of the defendant, the prosecutor repeatedly asked the defendant if the prosecution witnesses had lied when the witnesses' testimony conflicted with the defendant's testimony. The prosecutor also argued to the jury that for the jury to believe the defendant, it would have to conclude that everyone else was lying. (Id. at 234-236)

The Court reversed the conviction, stating that "a witness may not be asked to characterize another witness' testimony as a lie, mistaken or

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45, 51; Fisher v. State (1999) 128 Md. App. 79, 149-152, 736 A.2d 1125, 1162-1163.) Four courts have held that "were they lying" questions may be permitted in certain limited circumstances. (State v. Morales (2000) 198 Ariz. 372 10 P.3d 630; State v. Pilot (Minn. 1999) 595 N.W. 2d 511; State v. Hart (2000) 303 Mont. 71, 15 P.3d 917; People v. Overlee (1997) 236 A.D. 2d 133, 666 N.Y.S. 2d 572) In two of the cases, the holdings were based on the fact that the defendant's theory of the case was that the prosecution witnesses "were lying and that the evidence against him was fabricated as part of a vast conspiracy to convict him of a crime he did not commit." (State v. Pilot, supra, 595 N.E. 2d at 5181 accord, People v. Overlee, supra, 666 N.Y.S. 2d at 575-576.)

wrong." (State v. Singh, supra, 793 A.2d at 239.) Several reasons were offered in support of this rule. First, "determinations of credibility are for the jury, and not for witnesses." (Id. at 236.) Second, "questions of this sort also create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied." (Id. at 237.) Third, by linking the defendant's acquittal with the conclusion that the witnesses lied, the prosecutor is distorting the burden of proof, because an acquittal based on reasonable doubt does not require the jury to find that the prosecution witnesses lied. (Id. at 238.) Fourth, the questions "preclude the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit." (Id.)

Asking the defendant if the prosecution witnesses have lied is particularly prejudicial in cases where the witnesses are police officers. In State v. Casteneda-Perez (1991) 61 Wash. App. 354, 360, 810 P.2d 74, 77, the Court stated:

> 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 ... [I]t is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honestly and good faith of the police witnesses. (Id. at 77)

In Knowles v. State (Fla 1993) 632 So.2d 62, 66 the court noted a fifth reason why such questions are improper. When a prosecutor repeatedly asks a defendant on cross-examination whether the prosecution witnesses have lied during their testimony, where their testimony was different from the defendant's testimony, "such questioning may lead the jury to conclude that the witness being questioned is actually lying." (Id. at 66). Thus, the questions become simply an opportunity for the prosecutor to repeatedly call the defendant a liar by means of the insinuating nature of the questions. (See, People v Zambrano, supra, 124 Cal.App.4th 228, 242 [Questions used to berate the defendant].)

The issue arose in appellant's case in the penalty phase re-trial. Appellant testified at the second penalty trial. During the prosecutor's cross-examination of appellant, the prosecutor asked the "is this witness lying" question 19 times. His questions were about the testimony of 7 prosecution witnesses, including the wife of the murder victim, a law enforcement officer, three eyewitnesses to the gas station shooting, the woman in the car with appellant at the gas station, and the woman who saw appellant before the market robbery. The questions were not designed to elicit relevant factual information. Their purpose was to improperly attack appellant's credibility by insinuating that appellant was a liar and was

therefore more deserving of the death penalty. This was an abuse of the prosecutor's right to cross-examine appellant. The Court should find that the cross-examination was prosecutorial misconduct which violated appellant's federal constitutional right to due process of law and to a fair trial. (People vs. Singh, supra, 793 A.2d at 232-239 and 246-247.)

C. Appellant Was Severely Prejudiced By The Prosecutor's Improper Cross-Examination, Requiring Reversal Of His Death Sentence

Since appellant has argued that the prosecutorial misconduct during the cross-examination violated his federal constitutional right to due process of law, the Court must apply the standard of review for federal constitutional error. Under that standard, the Court must reverse the death sentence in appellant's case unless the constitutional error was "harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 U.S. 18, 24; People v. Flood (1998) 18 Cal.4th 470, 494.) This means that reversal is required if there is a reasonable possibility that the error complained of might have contributed to the jury's verdict of death. (Fahy v. Connecticut (1963) 375 U.S. 85, 86-87; People v. Harris (1991) 9 Cal.4th 407, 425-427.) The to be harmless beyond a reasonable doubt, the constitutional error must not have contributed at all to the jury's final verdict. (Yates v. Evatt (1991) 500 U.S. 391, 403-405; People v. Flood, supra, 18 Cal.4th at 493-495.)

In State v. Singh (2002) 259 Conn. 693; 793 A.2d 226, the prosecutor not only engaged in improper cross-examination, he also argued to the jury that in order to find the defendant not guilty, the jury must find that the prosecution witnesses had lied. This argument was also improper. (State v. Singh, supra at 239.) In deciding whether to reverse the conviction, the Court stated that the ultimate question was whether "the trial as a whole was fundamentally unfair and that the misconduct so infected the trial with unfairness as to make the conviction a denial of due process." (Id. at 246.)

In deciding that question, the Court found that the error was prejudicial for two reasons. First, the evidence against the defendant "was not particularly strong." (State v. Singh, supra, at 246.) Second, the prejudicial effect of the prosecutorial misconduct was "connected directly to the critical issue" in the case, "the identity of the arsonist." (Ibid.) Thus, the Court concluded that "the defendant was deprived of a fair trial" and reversed the conviction. (Id. at 247.)

At appellant's penalty trial, the jury was charged with the responsibility "to render an individualized, normative determination about the penalty appropriate for the particular defendant — i.e. whether he should live or die." (People v. Brown (1998) 46 Cal.3d 432, 448.)

Appellant chose to testify at the penalty trial, admitting his guilt and expressing remorse for the crimes. By doing so, he hoped to persuade the jury to spare his life. The effectiveness of this approach depended in large part on his credibility as a witness, i.e. was he being truthful when he expressed remorse for his crimes.

The prosecutor's cross-examination, asking appellant on 19 occasions whether the prosecution witnesses had lied, was designed to destroy appellant's credibility in the eyes of the jury. As one Court aptly noted, such cross-examination is intended "to lead the jury to conclude that the witness being questioned is actually lying." (Knowles, v. State (Fla. 1993) 632 So.2d 62, 66.) Later, in final argument, the prosecutor drove home his point by arguing: "you saw how Mr. Gonzales testified yesterday. That demeanor is something you can take into consideration. Cold blooded. Calculating. No remorse whatsoever about what he'd done. That's probably the best indication of how he feels about what he did." (R.T. 4441)

The prosecutor's misconduct in cross-examining appellant must have had a prejudiced effect on appellant's case in the eyes of the jury. During deliberation, the jury requested that appellant's testimony be re-read. (R.T. 4509-4511). His was the only testimony the jury requested. It indicates that the jury was considering appellant's testimony as the critical

evidence upon which they were basing their verdict. (See People v. Williams (1971) 22 Cal. App.3d 34, 40 [A jury request for a re-reading of critical testimony was, in combination with other matters, in a close case, a factor demonstrating the prejudicial nature of the errors].) By having appellant's testimony re-read, the jury must have been closely examining appellant's testimony concerning how Lester Eaton was shot and whether appellant was credible in his claim that the shooting was unintended and that he felt remorse afterwards. However, in listening to the re-reading of appellant's testimony, the jury was exposed to the prosecutorial misconduct a second time.

At appellant's first penalty trial, appellant did not testify and there was no prosecutorial misconduct related to his cross-examination. In that trial, the jury was unable to reach a verdict. The vote was 8 to 4 in favor of a verdict of life without possibility of parole. Thus, in the first trial, without the prosecutorial misconduct, appellant was able to avoid a death verdict. However, in the second penalty trial, with the prosecutorial misconduct, the verdict was death.

In People v. Brooks (1979) 88 Cal. App.3d 180, 188 the court noted that in the defendant's first trial, without the prejudicial error which occurred at the second trial, the case "had ended in a hung jury." Because

the prosecution's case, without the erroneously admitted evidence, "did not convince the jury the first time," the court found that the error was "prejudicial and hence, reversible error." (Id. at 188.) At appellant's first penalty trial there were no improper cross examination and the jury could not reach a verdict. The prosecutor's improper cross-examination of appellant at the second penalty trial was probably the deciding factor in the jury's death verdict. Thus, it was prejudicial and reversible error.

At appellant's first penalty trial, the jury returned a verdict of life without possibility of parole for the murders of Elijah Skyle and Gary Price. This was in large part because the weight of the evidence showed that Skyles and Price were shot and killed by the co-defendant, Michael Soliz. All of the eyewitnesses identified Soliz as the shooter. Appellant's involvement, as argued by the prosecutor, was that appellant was backup for Soliz. (R.T. 4406) Defense Counsel for appellant on the other hand argued that appellant was merely present at the scene and did nothing to aid and abet Soliz. (R.T. 4455-4456)

The jury's only decision at the second penalty trial was whether appellant should receive the death penalty for the murder of Lester Eaton. Although Lester Eaton's murder was tragic, it was not the type of murder that typically warrants the death penalty. Appellant was convicted

under the felony murder rule, which makes an unintentional or accidental killing during the course of a robbery a crime of first degree murder. (People v. Dillon (1983) 34 Cal.3d 441, 462.)

Betty Eaton, the prosecution's only eyewitness to the murder, testified that her husband was shot during a struggle with and one of the robbers. (R.T. 3350) Shortly before the struggle, she heard her husband telling the robber to "put that gun down." Betty Eaton also testified that her husband was armed with a handgun which he carried in a holster around his waist. (R.T. 3345-3346) Sheriff's deputies, who reported to the scene after the shooting, saw that Lester Eaton was wearing a holster. (R.T. 3377)

Appellant testified that during the robbery Lester Eaton started reaching for the gun he carried in his holster. Appellant then grabbed Eaton and wrestled him to the floor. Appellant testified that Mr. Eaton was bigger than he was and that during the struggle, the gun just went off. According to appellant, his mind went blank and he just kept shooting. (R.T. 4207-4208) During his testimony, he apologized to Betty Eaton and her family for his crime and expressed remorse for his crimes. (R.T. 4209-4212)

The jury deliberated over a three day period before returning a verdict of death for appellant for the murder of Lester Eaton. (R.T. 4503-

4523) The length of the jury deliberations is another indication of the "closeness of [the] case." (People v. Cardenas (1982) 31 Cal.3d 897, 907.) In Cardenas, for example, the court noted that the prosecution's case against the defendant "was not overwhelming" and the jury deliberated for 12 hours before returning its verdicts. (Id. at 907.) The 12 hour deliberation was considered to be long enough to indicate that the case was not an "open and shut" case and that the error in the admission of the evidence was prejudicial. (Id. at 907, citing People v. Woodward (1979) 23 Cal.3d 329, 346 [Six hours was a long deliberation].) The three days of deliberations in appellant's case would likewise indicate that the case was a close one and that the error was prejudicial.

During their deliberations, the jury asked for a clarification of the jury instruction on the mitigating factor of "whether or not the victim was a participant in the defendant's homicidal conduct." Counsel for appellant suggested that this question may have been in response to his argument to the jury that Lester Eaton was armed with a gun and attempted to draw his weapon at the time of the shooting. (R.T. 4506-4508) This was a critical issue at the trial because appellant testified that he intended only to rob the market, not to commit murder. (R.T 4206). He also testified that he struggled with Lester Eaton when Eaton tried to reach for a gun and that

appellant's gun just went off unintentionally during the struggle. (R.T. 4207-4208)

Appellant's testimony, if credible, may have been a basis for the jury to return a life sentence. If the shooting of Lester Eaton was not the cold blooded execution as described by the prosecutor, then the jury may have concluded that the death penalty was not warranted. Because of these differing views of the evidence, the question of whether appellant should live or die was a close case. In a close case, a prosecutor's misconduct is more likely to be prejudicial and reversible. (People v. Vargas (1973) 9 Cal.3d 470, 480, citing Chapman v. California, supra, 386, U.S. 18, 24; In re Banks (1971) 4 Cal.3d 337; People v. Harston (1968) 69 Cal.2d 233; *see also* In re Wilson (1992) 3 Cal.4th 945, 956-958; *see also* State v. Singh, supra, 793 A.2d at 246-247.)

Therefore, based upon all of the foregoing, the court should find that the prosecutorial misconduct in cross-examining appellant was prejudicial and reversible error. The error was not harmless beyond a reasonable doubt. (Sochor v. Florida (1992) 504 U.S. 527, 540; Stringer v. Black (1992) 503 U.S. 222, 230.) There is a reasonable possibility that the jury would have reached a different verdict had the error not occurred.

(People v. Brown (1988) 46 Cal.3d 432, 447-448; People v. Robertson (1983) 33 Cal.3d 21, 63.)

D. The Issue Is Preserved For Appellate Review

Appellant made no objection to the prosecutor's improper cross-examination during the trial. Several cases have held that the lack of an objection will result in the Court finding that the claim has been waived. (People v. Gates (1987) 43 Cal.3d 1168, 1185; People v. Green (1980) 27 Cal.3d 1, 27.) However, this is only the general rule to which there are exceptions. (People v. Hill (1998) 17 Cal.4th 800, 820). "The rule that failure to object bars appellate review applies only if a timely objection or request for admonition would have cured the harm." (People v. Hamilton (1989) 48 Cal.3d 1142, 1184 n. 21 citing People v. Green, supra, 27 Cal.3d at 34.)

During the trial, counsel for co-defendant, Michael Soliz, objected to the prosecutor's cross-examination of appellant. The Court overruled the objection, stating that the prosecutor was entitled to ask appellant whether he thought the witnesses against him were lying. The record reads as follows:

> 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. (R.T. 4275)

This Court has stated that a "defendant will be excused from the necessity of either a timely objection and/or a request for an admonition if either would be futile." (People v. Hill, supra, 17 Cal.4th at 820 citing People v. Arias (1996) 13 Cal.4th 92, 159; People v. Noguera (1992) 4 Cal.4th 599, 638.) In People v. Hamilton (1989) 48 Cal.3d 1142, 1184 n. 27, a prosecutor argued to the jury that the absence of a mitigating factor rendered that factor aggravating. The argument was improper, but the defendant failed to object during the trial. At a post-trial hearing on a motion to modify the verdict, the trial judge made clear in his ruling that he believed the prosecutor's argument was correct. This Court stated that "Thus an objection by defense counsel would almost certainly have been overruled, and consequently would have failed to cure the effect of the prosecutor's argument," (People v. Hamilton, supra, at 1184 n.27.) Because an objection would have been futile, the defendant's failure to object did not waive the error and the defendant was allowed to raise the argument on appeal. (Ibid.)

In People v. Zambrano, supra 124 Cal. App.4th 228, 237, the Court applied the futility exception to allow the defendant to argue on appeal that the prosecutor's "were they lying" questions were misconduct. At trial, Zambrano's counsel failed to object specifically to the prosecutor's "were they lying" questions. However, he did object about two-thirds of the way through the line of questions, on the grounds of speculation and relevance, when the prosecutor asked the defendant whether the officers would risk losing their jobs by lying to the jury. The Court noted that the objection was overruled, but it should have been sustained.

The Court in Zambrano stated that based upon this erroneous ruling, it appeared that objections to the prosecutor's "were they lying" questions would have been futile. "If the trial court believed it was proper to ask defendant whether the officers would risk losing their jobs by lying to the jury, then it must have believed that the prosecutor's entire line of "were they lying"questions . . . were also proper." (People v. Zambrano, supra at 237.) Under these circumstances, the defendant was excused from objecting to the prosecutor's misconduct. (Ibid.)

Appellant's case falls within the exception to the general rule in the Zambrano and Hamilton cases. In light of the trial court's ruling on the co-defendant's objection to the prosecutor's cross-examination of

appellant, any objection by appellant would have resulted in the same ruling and hence an objection by appellant would have been futile. Thus, the issue of whether the prosecutor's cross-examination of appellant concerning whether the prosecution witnesses had lied, is an issue that is preserved for appeal. (See People v. Hill, supra, 17 Cal.4th at 821 [Because of the continual nature of the prosecutorial misconduct and the trial court's refusal to reign in the prosecutor, continual objection would be futile and the misconduct issues were preserved for appeal].)

It might be argued that co-counsel's objection did not state the exact grounds appellant now urges on appeal, namely, that it violates federal due process for the prosecutor to ask appellant on cross-examination whether the prosecution witnesses lied during their testimony. Counsel's objection was that appellant earlier said the witness was wrong, not that the witness was lying. However, the court's ruling made it clear the prosecutor was entitled to ask the appellant whether the witnesses were lying. (R.T. 4275-4276). Thus, any further objection by either defendant would have been futile and the issue is preserved for appeal.

Furthermore, since this is an appeal from a judgment imposing the penalty of death, "a technical insufficiency in the form of an objection will be disregarded and the entire record will be examined to

determine if a miscarriage of justice resulted." (People v. Frank (1985) 38 Cal.3d 711, 729 n. 3; *see also* People v. Bob (1946) 29 Cal.2d 321, 328.) The objection raised by the co-defendant's attorney made it sufficiently clear to the trial judge that counsel was objecting to appellant being asked whether Carol Mateo was lying when she identified Michael Soliz as the person she saw shooting the gun. Because this is a death penalty case, the objection should be deemed sufficient to preserve the issue for appellate review.[19]

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[19] The issue raised in this case is an important issue related to the fundamental fairness of criminal trials. Many of the cases relied upon by appellant in this brief found reversible error and a federal due process violation in cases where there was no objection by the defendant at the time of trial. (See, State v. Singh (2002) 259 Conn. 693, 699, 793, A.2d 226, 232; United States v. Geston (9th Cir. 2002) 299 F.3d 1130, 1136; United States v. Sanchez (9th Cir. 1999) 176, F.3d 1214, 1219; United States v. Richter (2d Cir. 1987) 826 F.2d 206, 208.) These cases reversed the convictions under a plain error standard of review or on the basis that the error was a constitutional violation that deprived the defendant of a fair trial.

XV. APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO AN IMPARTIAL JUDGE AND TO CONFRONT AND CROSS EXAMINE HIS ACCUSERS, WERE ALL VIOLATED WHEN THE TRIAL JUDGE INTERRUPTED APPELLANT'S TESTIMONY AND ACTED AS AN EXPERT WITNESS BY CHALLENGING APPELLANT'S CREDIBILITY AND TELLING THE JURY THAT APPELLANT'S TESTIMONY ABOUT ALTERING THE FIREARM USED IN THE SKYLES AND PRICES MURDERS, WAS FALSE TESTIMONY

A. Factual Background

Appellant did not testify at the first penalty trial. The first jury returned verdicts of life without possibility of parole on the Skyles and Price murders, but was hung 8 to 4 in favor of life on the penalty for appellant for the Eaton murder. At the second penalty trial, appellant did testify. On cross-examination, appellant was asked why he shot Elijah Skyles and Gary Price eleven times. Appellant responded that the gun just kept shooting because he had altered the semi-automatic 9mm handgun to fire as a fully automatic weapon. By pulling the trigger once, the gun continued to fire. When asked to explain how he had altered the weapon, appellant testified that there was a spring behind the trigger that was removed from the weapon, causing it to fire fully-automatic rather than as a semi-automatic weapon. (R.T. 4304-4305) After appellant had so testified, the Court interrupted and stated the following:

THE COURT: 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. (R.T. 4305).

When cross-examination resumed, appellant then changed his testimony and testified that he just kept pulling the trigger, but he did not know if it was eleven times. Cross-examination then ended. (R.T. 4305) Both defense counsel requested permission to approach the bench. Outside the presence of the jury, both defense counsel objected by stating:

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, "an 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 gum 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. (R.T. 4308).

Appellant contends that the trial judge's comments denied him his right to a fair trial during the penalty phase and that the death sentence should be reversed. Appellant's testimony and his credibility were a key part of appellant's defense case. Appellant testified on direct examination that he shot Lester Eaton during a struggle when Mr. Eaton reached for a gun. He stated that during the struggle, the gun just went off. Afterwards, he felt bad about the shooting because he had a conscience. He testified that he shot Skyles and Price because he thought one of them was reaching for something, possibly a weapon. After that shooting, he also felt remorse. He apologized in his testimony to Mrs. Eaton and her whole family. (R.T. 4207-4211) In closing arguments, the prosecutor argued that appellant was a liar (R.T. 4421) and that his demeanor on the witness stand showed that he was a cold-blooded and calculating person with no remorse. (R.T. 4441) The trial judge's comment that appellant's testimony was false was the type of comment that indicated that the judge was in agreement with the prosecutor's arguments.

B. The Judge's Comments Violated The California Constitution And The California Evidence Code

Article VI Section 10, of the California Constitution, provides that "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper

determination of the cause." The purpose of this provision is to allow the Court "To utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict." (People v. Proctor (1992) 4 Cal.4th 499, 542.)

However, the trial court's power to comment on the evidence is not without strict limitations, because of the danger 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 (1983) 33 Cal.3d 400, 407.) Thus, in the Cook case, the Court held that "The Constitutional provision allowing judicial comment does not authorize the judge to usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses." (People v. Cook, supra, 33 Cal.3d at 408.) "The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact finding power." (People v. Rodriguez (1986) 42 Cal.3d 730, 766.)

In People v. Cook, supra, the trial judge told the jury that the prosecution witnesses were credible, that in its opinion the elements of the crime had been established beyond a reasonable doubt, and that the defendant was in fact guilty. The Court reversed the conviction stating that

"The trial court's remarks exceeded the scope of proper judicial comment permitted by Section 10 of Article VI and interfered with appellant's constitutional right to a jury trial." (People v. Cook, supra, 33 Cal.3d at 412.) The Court also stated that "A trial judge may not express his or her views concerning the ultimate question of an accused's guilt or innocence at any stage of the proceedings." (Id. at 412, accord People v. Brock (1967) 66 Cal 2d 645, 649.)

In two cases it was found to be reversible error for the trial court to refer to the defendant as a liar. (People v. Patubo (1937) 9 Cal.2d 543, 541; People v. Oliver (1975) 46 Cal.App.3d 747, 750.) In People v. Patubo, supra, the trial judge commented on the defendant's testimony in a murder case by stating that he "has shown himself to be a willful, deliberate and outright perjurer." The judge also told the jury that he was of the opinion that the defendant was guilty of first degree murder and the extent of the punishment he is to receive is a question for the jury. This Court found the comments to be reversible error, stating that "The quoted portion of the charge went far beyond the province of the Court in such matters and passed the limitation that such comments shall not invade the province of the jury." (People v. Patubo, supra, 9 Cal.2d at 542.)

In People v. Oliver (1975) 46 Cal.App.3d 747, 750, the trial judge told the jury: "With reference to the defense witnesses, including the defendant himself, I have never in my experience as a lawyer and a judge seen an array of witnesses whose credibility is so doubtful." After the jury convicted the defendant of robbery, the trial court granted a new trial based on the judge's comments. The Court of Appeal affirmed the order granting a new trial stating that if the new trial motion had been denied, "the Judge's improper and unjustified comment on the credibility of Oliver and the defense witnesses would have required reversal of the judgment." (People v. Oliver, supra, 46 Cal.App.3d at 752.)

The trial judge's comments in appellant's case directly accused appellant of lying. The comments invaded the province of the jury and interfered with appellant's "constitutional right to a jury trial." (People v. Cook, supra, 33 Cal.3d at 412. By telling the jury that appellant's testimony was false, the trial court was revealing that it was biased against appellant and was no longer an impartial decision maker.

Article I, Section 15 of the California Constitution provides that "Persons may not ... be deprived of life, liberty or property without due process of law." (People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 806.) The phrase "due process of law" has been interrupted to guarantee

"the opportunity to be fully and fairly heard before an impartial decisionmaker." (Hall v. Harker (1999) 69 Cal.App.4th 836, 841; Catchpole v. Brannon (1995) 36 Cal.App.4th 237, 245.) The test of whether a judge is an impartial decisionmaker is whether "a reasonable man [or woman] would entertain doubts concerning the judge's impartiality." (Catchpole v. Brannon, supra, 36 Cal.App.4th at 246, see also In re Marriage of Iverson (1992) 11 Cal.App.4th 1495.) When the trial judge told the jury that appellant's testimony was not true, the judge was no longer an impartial decisionmaker. The judge's comments violated appellant's right to due process of law.

The trial judge's comments also violated Evidence Code Section 703 , subdivision (b). That section provides that: "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 also People v. Connors (1926) 77 Cal.App. 438, 450-457.) The trial judge in appellant's case was in effect testifying as an expert witness in front of the jury. The trial court's comments were based upon his own experience. He knew from personal experience that it was impossible to change a semi-automatic handgun into a fully-automatic handgun by

removing a spring behind the firing pin. By offering that unsworn testimony, the trial judge was violating Evidence Code section 703, subdivision (b). The statute also states that when this occurs over an objection, the judge "shall declare a mistrial." (Id.)

In Merritt v. Reserve Ins. Co. (1973) 34 Cal.App.3d 858, 883, a plaintiff insured sued the defendant insurance carrier for bad faith in refusing to settle an earlier personal injury case which resulted in an excess damage verdict against the insured plaintiff. To show the insurance carrier's bad faith, the plaintiff called, as an expert witness, the judge who presided over the original action. The judge testified that the expert witness used by the defense in the earlier trial was not a persuasive witness, inferring that the defense prepared by the insurance carrier had not been skillfully handled. The Court reversed the judgment against the insurance company stating:

> 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. (34 Cal.App.3d at 883.)

Cases from other jurisdictions have also held that it is error for a judge to be called as a witness. (Joachim v. Chambers (Tex. 1991) 815

S.W.2d 234 [retired judge may not testify as an expert witness]; Commonwealth v. Connelly (1970) 217 Pa. Super. 201; 269 A.2d 390 [error for prosecutor to use trial judge who accepted guilty plea as witness proving defendant's prior conviction].) The policy against judicial testimony is implicated any time a judge testifies. (See Abramson, Leslie W., Canon 2 of the Code of Judicial Conduct, 79 Marq. L. Rev. 949, 977-978 (1996).) Specifically, a judge may unfairly influence the factfinder, because by "conferring the prestige and credibility of the judicial office on a litigant's position ... the judge ... appears to be taking sides." (Id.) Furthermore, a "judge's testimony may be understood as an official testimonial ... and receive undue weight from the jury." (Id.) "Moreover, an attorney should not have to balance the need for overzealous cross-examination against the desire not to antagonize a judge who may preside over the attorney's future cases." (Id.)

Finally, in appellant's case, there was no opportunity to cross-examine the trial judge despite the fact that the judge provided unsworn testimony based on his own personal experience with firearms. Article I Section 15, of the California Constitution guarantees an accused the right "To be confronted with the witnesses against the defendant." (People v. Louis (1986) 42 Cal.3d 969, 982; People v. Chavez (1980) 26 Cal.3d 334,

357; People v. Contreras (1976) 57 Cal.App.3d 816, 819; Pen. Code, §686, subd. 3.) To the extent that no right of cross-examination was afforded to appellant at the time that the trial judge made his comments, appellant was denied his right of confrontation under the California constitution.

C. The Judge's Comments Violated the Federal Constitution

The judge's comments in appellant's case also violated the United States Constitution. The Due Process Clause of the Fourteenth Amendment guarantees the defendant in a criminal case the right to an impartial judge and a fair trial. (Tumey v. Ohio (1927) 273 U.S. 510; In re Murchison (1955) 349 U.S. 133; Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal.App.3d 983, 988.) In the case of In re Murchison, supra, the Court reversed a contempt citation where the judge acted as both prosecutor and judge. In Murchison, the Court stated:

> 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. (349 U.S. at 136.)

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "To be confronted with the witnesses against him." The right of confrontation, which protects defendants in state as well as federal criminal proceedings

(Pointer v. Texas (1965) 380 U.S. 400), "means more than being allowed to confront the witness physically." (Davis v. Alaska (1974) 415 U.S. 308, 315.) "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." (Id. at 315-316; Delaware v. Van Arsdall (1986) 475 U.S. 673, 672.)

In appellant's case, the trial judge's comments to the jury indicated that the judge believed appellant was lying during his testimony. The comments showed that the judge was biased against appellant. Appellant's federal constitutional rights to due process and to an impartial judge were violated. Since appellant was not permitted to cross-examine the judge concerning his comments and unsworn testimony, appellant's federal constitutional rights to confront and cross-examine his accusers were also violated.

D. The Judge's Comments Were Prejudicial And Appellant's Death Sentence Should Be Reversed

The trial judge's comments attacked the credibility of appellant. The judge's comments implied that appellant had committed perjury during his testimony. Appellant's credibility was one of the most important issues in the second penalty trial. The only testimony the jury requested to be re-read was appellant's testimony. (R.T. 4509-4516). The

jury must have been focusing on the issue of appellant's credibility. The trial judge's comments unfairly attacked appellant's credibility by labeling appellant's testimony false.

At the first penalty trial, when appellant did not testify, the jury was unable to return a unanimous penalty verdict on the Eaton murder. The jury returned verdicts of life without parole on the Skyles and Price murders. The vote on the Eaton murder was 8 votes for life and 4 votes for death. The most important difference between the first penalty trial and the second penalty trial was the fact that appellant testified at the second penalty trial. Although appellant in his testimony tried to express remorse, those efforts were severely undercut by the trial judge's comment that appellant's testimony about the firearm was false.

Appellant's case on the penalty was a close case. The jury was to determine only the penalty on the Eaton murder case. In the Eaton case, appellant was convicted under the felony murder rule. It was undisputed that Lester Eaton had a gun in his possession while working at the market. Appellant testified that Mr. Eaton had pulled the gun and the fatal shot was fired during a struggle with Mr. Eaton over that gun. Appellant expressed remorse for the murder and even apologized to Mrs. Eaton and her family during his testimony.

The United States Supreme Court has noted that a capital jury has wide discretion in considering factors that will guide them to either a death sentence or a sentence of life without parole. (Caldwell v. Mississippi (1985) 472 U.S. 320, 329-330.) In light of that fact, this Court has stated that non-constitutional errors in the penalty phase are reversible if there is a reasonable "possibility that the jury would have rendered a different verdict had the error or errors not occurred." (People v. Brown (1988) 46 Cal.3d 432, 448.) Without the trial judge's comment, there is a reasonable possibility that the jury would have returned a life verdict on the Eaton murder. The trial judge's comments are therefore reversible error.

The denial of appellant's federal constitutional right to an impartial judge is structural error requiring automatic reversal. (Arizona v. Fulminante (1991) 499 U.S. 279, 309-310.) Other federal Constitutional errors in the penalty phase are reversible unless the Court finds that the error is harmless beyond a reasonable doubt. (Sochor v. Florida, (1992) 504 U.S. 527, 540; Chapman v. California (1967) 386 U.S. 18, 23.) The judge's comments in this case violated the federal Constitution and were harmful to appellant. The comments went to a central issue in the case, namely, appellant's credibility in the eyes of the jury. Therefore, appellant's death sentence must be reversed.

XVI. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AT THE SECOND PENALTY TRIAL ON THE ISSUE OF LINGERING DOUBT.

A. Factual Background

There were two penalty trials in appellant's case. At the first penalty trial, the Court instructed on lingering doubt as a factor in mitigation of the death penalty. (C.T. 817) The jury returned verdicts of life without possibility of parole for appellant for the murders of Skyles and Price. However, the jury was unable to reach a verdict on the penalty for the murder of Lester Eaton. The jury indicated that the vote was 8 for life in prison and 4 for death. The Court then declared a mis-trial on the penalty in the Eaton murder case. (R.T. 2765-2774)

A second jury was selected and a second penalty trial was held on the Lester Eaton murder for appellant and for all three murders for the co-defendant Michael Soliz. As the testimony was nearing a conclusion, the Court advised counsel outside the presence of the jury that the Court did not intend to give a lingering doubt jury instruction. The Court stated that a lingering doubt jury instruction is only appropriate when the jury decided guilt. Since the jury in the penalty phase retrial did not decide guilt, the instruction was not appropriate and the Court would not give it. Counsel for appellant argued that lingering doubt was still part of the case because the prosecution had presented guilt phase evidence during

the course of the penalty trial. Mr. Borges, counsel for Soliz, indicated that the Court's ruling was a complete surprise. His whole defense at the penalty retrial had been based on the lingering doubt concept. (R.T. 4190-4192)

At the hearing on the settlement of the jury instructions, the Court made a final ruling. It would not give a lingering doubt jury instruction. The Court noted that it had given the instruction at the prior trial because the prior jury had decided guilt. Since the jury at the second penalty trial had not decided guilt, the Court found it would be inappropriate to instruct the second penalty jury on lingering doubt. The Court stated it was impossible for the jury in the second penalty trial to consider the state of mind of the jury in the guilt trial. Finally, the judge stated that the California Supreme Court had decided in two cases that a lingering doubt jury instruction is only given when the jury decides the issue of guilt. The judge cited People v. Nicolaus (1991) 54 Cal.3d 551, 586 and People v. Ghent (1987) 43 Cal.3d 739. (R.T. 4350-4354)

Two lingering doubt jury instructions were submitted by appellant. Both were rejected. The first one stated: "The adjudication of guilt is not infallible and any lingering doubts 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." (C.T. 938) This was the same jury

instruction given at the first penalty trial. (C.T. 817) The second lingering doubt jury instruction stated: "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 that state of mind between beyond a reasonable doubt and beyond all possible doubt." (C.T. 937)

During his closing arguments, the prosecutor argued that appellant deserved the death penalty because he had pistol whipped Lester Eaton, a sixty-six year old man, and deliberately shot him five times. He argued there was no provocation for the shooting and, contrary to appellant's testimony, the gun did not go off by accident. (R.T. 4433-4434) The prosecutor also argued that appellant was guilty of the Skyles and Price murders because he acted as a backup for Michael Soliz when Soliz shot and killed Skyles and Price. (R.T. 4421-4422)

Counsel for appellant argued a different version of the facts. He argued that appellant and Lester Eaton had struggled on the floor because Lester Eaton had resisted the robbery. He argued that appellant and Soliz went into the market to commit robbery, not to kill people. During the struggle between appellant and Mr. Eaton, the gun went off accidentally and Mr. Eaton was shot. Defense counsel argued that the prosecutor's claim that appellant was standing over Mr. Eaton when he shot him was wrong. The evidence showed that the gunshots were fired while appellant

and Eaton were both struggling on the floor. (R.T. 4451-4452) Concerning the Skyles and Price murder case, defense counsel argued that originally all of the eyewitnesses told the police that only Michael Soliz exited the car just before the shooting. If appellant did not get out of the car, he did not back up Soliz. He argued that even if appellant got out of the car, he was just standing there without a gun. He argued that appellant did not do anything to aid and abet the shooting and there was no evidence appellant made any statement indicating he wanted to kill Skyles and Price. (R.T. 4453-4455)

Lingering doubt about appellant's guilt or the degree of his guilt was an important issue for the jury. During the jury deliberations, the jury sent a note to the judge which requested: "Clarification of Penal Code 8.85 letter(E)." (C.T. 913; R.T. 4506-4508; 4514-4518). The trial court understood this to be a reference to Factor E in the standard jury instruction on aggravating and mitigating circumstances in CALJIC 8.85. Factor E in the instruction was the mitigating circumstance of "whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act." (C.T. 921) This instruction is taken from the language in Penal Code section 190.3, subdivision (e).

Outside the presence of the jury, the prosecutor and the trial

judge both stated that they did not see how Factor E applied to the facts of the case. Appellant's counsel, Mr. Tyre, reminded the court that he had argued to the jury that Lester Eaton was armed and attempted to draw a weapon during the robbery. Mr. Tyre suggested that Eaton's actions could have made him a "participant" in the appellant's homicidal conduct, which in turn might be a mitigating factor. Mr. Borges, the attorney for Michael Soliz, suggested that the jury could have been thinking that Mr. Skyles or Mr. Price had reached for a weapon just before the shooting, making them a "participant" in the homicidal conduct. (R.T. 4506-4508)

The trial judge asked the jury to clarify its request and be more specific concerning its inquiry about Factor E. A juror responded that the jury needed to know what was meant by the term "homicidal conduct." The court stated that homicide is the taking of the life of one person by another. It means killing and the jury was instructed to substitute the word killing for homicidal conduct in the instructions. (R.T. 4514-4516) From this exchange between the court and the jury it appears that the jury was looking closely at the underlying facts of all three murders to determine whether there was something in the facts that was mitigating and would warrant a sentence of life without possibility of parole rather than death. The jury also requested that appellant's testimony be reread. (R.T. 4509-4511)

Lingering doubt about appellant's innocence was a major part of defense counsel's arguments to the jury against the death penalty. Counsel for appellant tried to avoid a death verdict by arguing that the evidence did not prove that appellant shot Lester Eaton deliberately and in cold blood. He also argued that despite appellant's conviction of the first degree murders of Skyles and Price, the evidence showed that appellant was innocent of those crimes because he did not aid and abet Michael Soliz in the shootings. Counsel argued that appellant was merely present at the scene of the shootings. Because the concept of lingering doubt was so important to appellant's defense, it was reversible error for the trial court to refuse to instruct the jury on lingering doubt.

B. Lingering Doubt Concerning A Defendant's Guilt Is An Important Mitigating Factor That A Penalty Phase Jury Should Consider Through Appropriate Jury Instructions Even If The Penalty Jury Did Not Decide Guilt

The reasons given by the trial court for refusing to instruct on lingering doubt were incorrect. The trial court stated that two California Supreme Court cases have held that a lingering doubt jury instruction is only appropriate when the jury has decided guilt or innocence. (People v. Nicolaus (1991) 54 Cal.3d 551, 586; People v. Ghent (1987) 43 Cal.3d 739, 776.) Neither case discusses the lingering doubt jury instruction or its

applicability to a penalty phase retrial. The Nicolaus and Ghent cases merely discuss jury instructions on various other mitigating factors.

The leading case on lingering doubt involved a penalty phase retrial where the penalty jury did not decide guilt. (People v. Terry (1964) 61 Cal.2d 137, 145-147.) In Terry, during jury selection the trial court refused to permit the defendant to examine the jurors on their reaction to his claim of innocence and advised the jury they could not even consider that claim. This Court noted that the trial court "properly pointed out that the jury was not to relitigate the issue of the defendant's guilt of first degree murder." (People v. Terry, supra, 61 Cal.2d at 147.)

However, the Court in Terry stated that the jury which determines the penalty "may properly conclude that the prosecution has discharged its burden of proving defendant's guilt beyond a reasonable doubt but that it may still demand a greater degree of certainty of guilt for the imposition of the death penalty." (People v. Terry, supra, at 145-146.) Thus, the trial court in Terry erred in preventing the defendant from arguing "lingering doubts" concerning his "possible innocence of the crimes" as "a mitigating factor" to avoid a death verdict. (People v. Terry, supra, at 145-147.)

More recently this Court has held that when the first penalty trial results in a hung jury and the case proceeds to a second penalty trial

before a different jury, "it is proper for the jury to consider lingering doubt." (People v. Slaughter (2002) 27 Cal.3d 1187, 1219.) In appellant's case, the trial court erred in ruling that lingering doubt jury instructions are only appropriate when the jury is the jury that actually decided guilt. Under the Terry and Slaughter cases, a defendant has a right to have the penalty jury consider lingering doubt regardless of whether the penalty jury decided guilt.

It is true that this Court has frequently stated that a trial court is not required as a matter of state or federal law to give a lingering doubt jury instruction in a capital case. (People v. Brown (2003) 31 Cal.4th 518, 567-568; People v. Musselwhite (1998) 17 Cal.4th 1216, 1272; People v. Price (1991) 1 Cal.4th 324, 488.) However, the Court has recognized that in some capital cases the trial court's have been instructing the jury on lingering doubt. (People v. Valdez (2004) 32 Cal.4th 73, 129 n. 28; People v. Snow (2003) 30 Cal.3d 43, 125.)

The Court has stated on three occasions that there may be some cases where "a lingering doubt instruction of some type might be proper." (People v. DeSantis (1993) 2 Cal.4th 1198, 1239; See also People v. Cox (1991) 53 Cal.3d 618, 678 n. 20; People v. Thompson (1988) 45 Cal.3d 86, 34.) In the Thompson case, the defendant did not request a jury instruction in the penalty phase relating the concept of lingering doubt to

the defendant's intent to kill as a reason for not imposing the death penalty. However, since intent to kill was a contested issue at the trial and was the most serious aggravating factor in the case, the Court stated that if a jury instruction on lingering doubt about the defendant's intent to kill had been requested and refused by the trial court, the Court "might seriously consider whether refusal to give such instruction was error." (People v. Thompson, supra, 45 Cal.3d at 134-135.)

Appellant's case raises the issue that was left open in Thompson. The trial court erred when it refused to instruct on lingering doubt. Lingering doubt may be considered by a penalty jury regardless of whether it decided guilt. In appellant's case, the prosecution presented all of the guilt phase evidence during the second penalty trial. This was done so the jury could evaluate the circumstances of the crime.

During the trial, lingering doubt was the central mitigating argument made by defense counsel on behalf of appellant. In the first trial, when the jury was instructed on lingering doubt, no death verdict was returned. The jury was unable to reach a verdict on the Eaton murder. Eight jurors voted for life and four voted for death. At the second penalty trial, when the jury was not instructed on lingering doubt, the jury returned a death verdict on the Eaton murder. The trial court's decision to give a lingering doubt jury instruction in the first penalty phase trial and then

refuse to give the instruction in the second penalty trial was reversible error under the Thompson case.

C. The Failure To Instruct The Jury On Lingering Doubt Violated Appellant's Federal and State Constitutional Rights

The failure to instruct on lingering doubt in appellant's case was also constitutional error. Under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 1, 7 and 15 of the California Constitution the defendant in a capital case is entitled to due process of law, a fair jury trial, and procedural safeguards at trial which guide the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (Gregg v. Georgia (1976) 428 U.S. 153, 189.) The failure to instruct on lingering doubt violated all of these constitutional provisions.

The Eighth Amendment establishes two prerequisites to a valid death sentence. (California v. Brown (1987) 479 U.S. 538, 541.) First, the sentencing jury may not be given unbridled discretion in determining the fates of those charged with capital offenses. Death penalty statutes must be structured to prevent the penalty from being administered in an arbitrary and unpredictable fashion. (Gregg v. Georgia (1976) 428 U.S. 153; Furman v. Georgia (1972) 408 U.S. 238.) Second, even though the jury's discretion must be restricted, a capital defendant must be allowed to introduce any relevant mitigating evidence regarding his "character or

record and any of the circumstances of the offence." (Eddings v. Oklahoma (1982) 455 U.S. 104, 110; Lockett v. Ohio (1978) 438 U.S. 586, 604.)

On the issue of whether a lingering doubt jury instruction must be given, this Court has frequently cited Franklin v. Lynaugh (1988) 487 U.S. 164 as authority for finding that there is no federal or state law that requires a trial court to instruct a penalty jury that it must consider lingering doubt as to guilt in arriving at an appropriate penalty. (People v. Valdez, supra, 32 Cal.4th at 129 n. 28; People v. Musselwhite, supra, 17 Cal.4th at 1272; People v. Cox, supra, 53 Cal.3rd at 676.) However, ironically, the United States Supreme Court's Franklin decision did not involve a case in which a defendant had requested a lingering doubt jury instruction. (Franklin v. Lynaugh, supra, 487 U.S. at 169-170.)

In Franklin, the defendant was charged with a capital murder in Texas state court. After his conviction and at the penalty trial, the only mitigating evidence presented was the defendant's good conduct while incarcerated. The jury was then instructed to decide "two special" issues: (1) whether the murder was committed deliberately, and (2) whether the defendant would pose a continuing threat to society. A yes answer to both questions would result in the defendant being sentenced to death.

The defendant requested five special jury instructions that told the jury that "any evidence considered by them to mitigate against the death

penalty should be taken into account in answering the Special Issues, and could alone be enough to return a negative answer to either one or both of the questions submitted to them – even if the jury otherwise believed that 'yes' answers to the Special Issues were warranted." (Franklin v. Lynaugh, supra, 487 U.S. at 169-170.)[20]

For the first time on appeal, Franklin argued that the jury instructions "did not provide sufficient opportunity for the jury, in the process of answering the two Special Issues, to consider whatever 'residual doubt' it may have had about petitioner's guilt." (Franklin v. Lynaugh, supra, at 172.) The Court noted that, that during the trial the defendant "did not draw the jury's attention to the 'residual guilt' question" and "nothing in the defendant's mitigating presentation sought the jury's reconsideration of petitioner's guilt in committing the crime." (Id. at 175 n. 7.)

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[20] In Franklin, the defendant submitted a jury instruction that advised the jury that it could answer "no" to the Special Issue of future dangerousness if the jury found "any aspect of the defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty." (Franklin v. Lynaugh, supra, at 169 n. 4.) This was not technically a lingering doubt jury instruction, in which the jury is told it may consider whether there is some remote possibility that the defendant is innocent. The instruction in Franklin directed the jury to engage in proportionality review by considering whether "the circumstances of the offense" were less aggravating than other murder cases.

The Court nevertheless, in a plurality option, decided the residual doubt jury instruction issue, even though it was not clearly raised by the facts of the case. The Court stated:

> Our edict that, in a capital case, "the sentencer ... [may] 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," Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett, 438 U.S., at 604), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor. (487 U.S. at 174.)

Appellant takes issue with the Franklin Court's premise that lingering doubts about a defendant's guilt are not related to the circumstances of the offense. This Court reached the opposite conclusion in People v. Terry (1964) 61 Cal.2d 137, 146. In Terry, the Court noted that former Penal Code section 190.1 authorized the presentation of evidence concerning "the circumstances surrounding the crime ... and of any facts in ... mitigation of the penalty." Based on the statute, the Court reasoned that "This language can hardly exclude defendant's version of such circumstances surrounding the crime or of his contentions as to the

principal events of the instant case in mitigation of the penalty." (People v. Terry, supra, at 146.)

The Court in Terry recognized that lingering doubts about a defendant's guilt are based upon a jury's evaluation of the circumstances of the crime and the evidence connecting the defendant to that crime. The Court stated that: "Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (People v. Terry, supra, at 146.)

One federal Court has stated that: "Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty." (Tarver v. Hopper (11th Cir. 1999) 169 F.3d 710, 715.) In Lockhart v. McCree (1986) 476 U.S. 162, 181, the United States Supreme Court stated: "As several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts ... about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for

defendants in capital cases." In one study of the opinions of jurors in capital cases, the author concluded:

> "Residual doubt" over the defendant's guilt is the most powerful "mitigating" fact. [The study] suggests that the 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?, 98 Colum. L. Rev. 1538, 1563 (1998).

In another study of jurors in capital cases, the authors concluded that "The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied." (William S. Geimer and Jonathan Amsterdam, Why Jurors Vote Life Or Death: Operative Factors In Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 28 (1988).) In one law review article, the author suggested that juries in capital cases be instructed that "residual doubt" is having "some small amount of doubt as to the defendant's guilt that did not rise to the level of reasonable doubt" and that the jury is permitted "to weigh any residual doubt ... against the aggravating circumstances of the offense, just like ... with any other mitigating factor." (Jennifer Treadway, Note, "Residual Doubt" In Capital Sentencing: No Doubt It Is An Appropriate Mitigating Factor, 43 Case W. Res. L. Rev. 215, 250 (1992).)

"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.3rd at 716.) Model Penal Code §210.6 (1)(f) provides that a death sentence is excluded 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, §210.6 (1)(f) (1980).)[21]

The concept of lingering doubt arises out of the concern that innocent people might be sentenced to death. A recent report released from the Death Penalty Information Center has stated that in the past four years, juries have imposed far fewer death sentences than they did on average over the previous decade. In the 1990's, an average of 290 people were sentenced to death each year. In the last four years, that number has dropped to 174. The report attributes the decline largely to growing public awareness of death row exonerations and concerns that innocent people might be sentence to die. The report states that since 1973, 116 innocent

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[21] This Court has in the past considered the Model Penal Code provisions relating to capital cases. (People v. Robertson (1982) 33 Cal.3d 21, 59.) The United States Supreme Court has cited the Model Penal Code with approval. (Gregg v. Georgia (1976) 428 U.S. 153, 194 n. 44.)

people have been released from death row after being exonerated. Richard C. Dieter, Innocence And The Crisis In The American Death Penalty, (Sept. 2004), www.deathpenaltyinfo.org.

Thus, contrary to the Supreme Court's conclusions in Franklin, lingering doubt is well recognized as a mitigating factor, perhaps the most important mitigating factor available to a defendant in a capital case. Since lingering doubt is a doubt relating to the defendant's guilt in the case, this mitigating factor is related to "the circumstances of the offense" within the meaning of Eddings v. Oklahoma (1982) 455 U.S. 104, 110 and Lockett v. Ohio (1978) 438 U.S. 586, 604. Both cases hold that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any mitigating factor related to any aspect of a defendant's character or record and "any of the circumstances of the offense" that the defendant offers as a basis for a sentence less than death. (Eddings v. Oklahoma, supra, 455 U.S. at 110 [holding unconstitutional a barrier to considerations of youth and family background]; Lockett v. Ohio, supra, 438 U.S. at 604 [striking down an Ohio statute limiting mitigating factors to only three specific factors].)

The Eighth and Fourteenth Amendments not only guarantee the right of a capital defendant to offer any mitigating evidence, they also

require appropriate jury instructions that allow the jury to "give effect to the mitigating evidence." (Penry v. Lynaugh (1989) 492 U.S. 302, 314-319; accord, Penry v. Johnson (2001) 532 U.S. 782, 797: Smith v. Texas (2004) 125 S. Ct. 400, 406; Hitchcock v. Dugger (1987) 481 U.S. 393, 395-399; Belmontes v. Woodford (9th Cir. 2003) 350 F.3d 861, 898.) The Supreme Court has stated that: "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." (Penry v. Lynaugh, supra, 491 U.S. at 318.)

In Penry, the defendant in a capital murder case in Texas state court introduced evidence at trial showing his mental retardation and abused childhood. At the penalty phase of the trial the jury was instructed to decide three special issues: (1) whether the murder was deliberate, (2) whether the defendant would be a continuing threat, and (3) whether the killing was an unreasonable response to any provocation by the deceased. A yes answer to all three special issues required the imposition of a death sentence. A no answer to any of the special issues required a sentence of life imprisonment.

The trial court in Penry rejected the defendant's request for jury instructions authorizing the jury to answer no to the special issues

based upon the defendant's mitigation evidence. On appeal, Penry argued that "without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision." (Penry v. Lynaugh, supra, 491 U.S. at 318.) The Supreme Court agreed and reversed Penry's death sentence, stating:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605; Eddings, 455 U.S., at 119 (O'Connor, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, supra, at 605. (492 U.S. at 328.)

In appellant's case, the failure to instruct on lingering doubt likewise failed to permit the jury to give effect to the lingering doubt mitigation in this case. Pursuant to Penal Code section 190.3, subdivision (k), the trial court in appellant's case instructed the jury that in reaching an appropriate sentence it could consider any 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." (C.T. 922) This instruction was insufficient because it failed to tell the jury what lingering doubt is and that lingering doubt is a reason for the jury not to vote for the death penalty.

Lingering doubt is not a circumstance that extenuates the gravity of the crime. The instruction in appellant's case which focused on any circumstance that extenuates the gravity of the crime, encourages the jury to engage in proportionality review. Under this instruction, a juror might vote for a life sentence if the circumstances of the crime were less aggravating than other murders. Lingering doubt, on the other hand, is a mitigating factor that focuses on the weight of the evidence proving the defendant guilty. It encourages a juror to vote for a life sentence in cases where the defendant has been proven guilty beyond a reasonable doubt, but there nevertheless remains some possible doubt concerning his guilt. By rejecting appellant's jury instructions on lingering doubt, the jury was left with no guidance on this important factor in mitigation.

It was lack of guidance to the jury that resulted in the United States Supreme Court declaring the death penalty unconstitutional in

Furman v. Georgia (1972) 408 U.S. 238. The Court later stated that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (Gregg v. Georgia (1976) 428 U.S. 153, 189.) A constitutional death penalty statute is one that has the effect of "narrowing the categories of murderers for which a death sentence may ever be imposed." Jurek v. Texas (1976) 428 U.S. 262, 270.) By narrowing the categories of murders for which the death penalty is imposed, a constitutional death penalty statute prevents a jury from imposing the death penalty in a wonton and freakish manner. (Gregg v. Georgia, supra, 428 U.S. at 206-207.)

These goals can only be accomplished when the sentencing jury is expressly told what lingering doubt is and that lingering doubt is a factor in mitigation and is a valid reason for the jury not to vote for the death penalty. Lingering doubt was an important mitigating factor in appellant's case. It was a mitigating factor based upon the circumstances of the offenses. The failure of the trial court to instruct on lingering doubt as a mitigating factor violated appellant's federal and state constitutional rights. Appellant's death sentence should be reversed, because "in 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." (Penry v. Lynaugh, supra, 491 U.S. at 326.)

D. The Refusal To Instruct The Jury On Lingering Doubt At The Penalty Re-Trial Was Prejudicial And Appellant's Death Sentence Should Be Reversed.

Appellant was prejudiced by the trial court's refusal to instruct on lingering doubt. At the first penalty trial, where the jury was instructed on lingering doubt, no death penalty verdict was returned. The jury returned verdicts of life without possibility of parole for the Skyles and Price murders. The jury was unable to reach a penalty verdict on the Eaton murder charge. Their vote on the Eaton murder charge was 8 votes in favor of a life sentence and 4 votes in favor of the death penalty. At the second penalty trial, the Court rejected the jury instructions on lingering doubt and the jury returned a verdict of death. It appears that the decision to withhold the lingering doubt jury instructions did contribute to the death verdict in the second penalty trial.

The error was prejudicial because this was a close case. The issue for the jury to decide was whether to impose the death penalty on appellant for the first degree murder of Lester Eaton. The prosecutor

argued that the jury should consider the facts and circumstances of all three murders as the most important aggravating factors in the case. (R.T. 4411) He argued that appellant shot Mr. Eaton, a 66 year old man, without any provocation. He shot him five times, twice in the head and three times in the torso. He argued that the gun did not go off by accident. (R.T. 4434) The prosecutor told the jury that appellant shot Lester Eaton through the top of the head and through the brain. (R.T. 4435) He described the killing as a "cold blooded execution of a 66-year-old man who was completely incapacitated and helpless on the floor." (R.T. 4436)

Appellant's counsel, John Tyre, argued that, contrary to the prosecutor's argument, no witness saw appellant executing Lester Eaton. (R.T. 4459) The police investigation showed evidence of a struggle between appellant and Eaton. A lens from Mr. Eaton's glasses was found by the meat counter. Mr. Tyre referred to Betty Eaton's testimony that appellant and Mr. Eaton were struggling on the floor when Mr. Eaton was shot. Tyre argued there was no evidence that appellant stood over Lester Eaton and fired shots into him. (R.T. 4452)

The prosecutor was seeking the death penalty based upon the argument that the circumstances of the offense showed appellant to be a cold-blooded killer. Defense counsel was arguing that a life sentence was

the appropriate punishment because the circumstances of the offense showed that Lester Eaton was killed when the gun went off accidentally while appellant and Eaton were struggling on the floor. The facts of appellant's case were the perfect case for a jury instruction on lingering doubt.

Lingering doubt was also an important factor in evaluating appellant's involvement in the Skyles and Price murders. The most significant aggravating factor at appellant's penalty trial on the Eaton murder was appellant's convictions in the Skyles and Price murder case. Once again, the jury heard contrasting views from counsel on the circumstances of the Skyles and Price murders.

The prosecutor argued that unlike 66-year-old Lester Eaton, Skyles and Price were young men who never got an opportunity to do anything with their lives. He argued that their lives "were taken away from them by John Gonzales and Michael Soliz when they ambushed them and executed them at that service station in Covina." (R.T. 4438) The prosecutor said that the evidence showed that appellant "backed up" Michael Soliz during the shooting. He described the shooting as "incredibly vicious," involving the unprovoked shooting of two "completely defenseless" young men. According to the prosecutor, Skyles and Price

were "ambushed and executed just like Lester Eaton had been done a few months earlier." (R.T. 4437)

Defense counsel argued that the evidence in the Skyles and Price case was conflicting. Under one view of the evidence, appellant never got out of the car at the gas station when then shootings occurred. Defense counsel stated that the eyewitnesses to the gas station shootings all told the sheriff's deputies on the night of the shooting that only one person got out of the car to talk to Skyles and Price. (R.T. 4454) He argued that if appellant never got out of the car, he did not aid and abet in the murders in any way. Defense counsel also argued that even if the jury adopted the prosecutor's view of the evidence and found that appellant got out of the car, "he didn't do anything" that constituted aiding and abetting in the murders of Skyles and Price. (R.T. 4455) He just "stood next to the car." (Id.)

The lingering doubts concerning appellant's guilt on the Skyles and Price case were even greater than the lingering doubts on the Eaton murder case. Although appellant might have had a motive to seek revenge for the Billy Gallagos murder, there was still no evidence appellant did anything to aid and abet in the murders of Skyles and Price. The prosecutor's argument that appellant "backed up" Soliz is based on

evidence that appellant was merely present at the scene of the shooting. Mere presence at the scene of a crime, however, has never been enough to convict. (In re Michael T., (1978) 84 Cal.App.3d 907, 911.)

Lingering doubt went to the heart of appellant's defense against the death penalty. During deliberations the jury asked for a clarification of the jury instruction on Factor E, the mitigating circumstance of "whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct." (R.T. 4506-4508; 4514-4518) From this jury question it appears that the jury was looking closely at the underlying facts of the Eaton murder and the Skyles and Price murders to see if there was some aspect of the crimes that was mitigating and would warrant a sentence of life without possibility of parole rather than death. The jury also requested that appellant's testimony be reread. (R.T. 4509-4511) This was another indication that the jury was closely examining the underlying facts involved in the three murder. Thus, lingering doubts about appellant's guilt or the degree of his guilt were a key issue for the jury when deciding whether appellant should live or die.

A trial court's error in failing to give a required jury instruction will require reversal of a penalty verdict if "there is a reasonable (i.e. realistic) possibility that the jury would have rendered a different

verdict had the error or errors not occurred." (People v. Brown (1988) 46 Cal.3d 432, 448; People v. Robinson (1982) 33 Cal.3d 21, 63.) That standard has been met in appellant's case. Lingering doubt about appellant's guilt was the most important mitigating factor in his case. The jury instructions never told the jury about lingering doubt and its potential for mitigating a death verdict in a murder case. If appellant's jury had been instructed on lingering doubt, as were the jurors at the first penalty trial, it is reasonably possible that at least one juror would have refused to vote for the death penalty.

Appellant has also argued that the failure to instruct on lingering doubt violated appellant's federal and state constitutional rights. If the Court agrees, the standard of review is that appellant's death sentence must be reversed unless the Court finds the error to be harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 23; Sochor v. Florida (1992) 504 U.S. 527, 540.) Because of the importance of the lingering doubt issue in appellant's case, the refusal to instruct on lingering doubt was not harmless beyond a reasonable doubt. Appellant's death sentence must be reversed.

XVII. THE FEDERAL AND STATE CONSTITUTIONS BAR THE RE-TRIAL OF THE PENALTY PHASE OF A CAPITAL CASE AFTER THE JURY IN THE FIRST PENALTY TRIAL WAS UNABLE TO REACH A UNANIMOUS VERDICT

A. Factual Background

Appellant was convicted of three first degree murders involving Lester Eaton, Elijah Skyles, and Gary Price. The jury found two special circumstances to be true: murder during the commission of a robbery, and multiple murder. At the first penalty trial, the jury returned verdicts of life without possibility of parole for the murders of Elijah Skyles and Gary Price. The jury was unable to reach a unanimous verdict on the penalty for the murder of Lester Eaton. The vote was 8 in favor of a life sentence and 4 in favor of the death penalty. A mistrial was declared in the Lester Eaton penalty phase and the jury was discharged. (R.T. 2765-2774)

In addition to the hung jury on the penalty for the Eaton murder in appellant's case, the jury was unable to reach a unanimous verdict on the penalty for all three murders in the case of Michael Soliz. As to Soliz, the jury was hung 11 votes for life and 1 vote for death on the Eaton murder. The jury vote was 7 votes for life and 5 votes for death on the Skyles and Price murders. The Court also declared a mistrial in the case of Michael Soliz on the penalty for all three murders. (R.T. 2765-2774)

Before the case was set for a retrial of the penalty on the Lester Eaton murder, appellant filed a motion to bar the retrial and dismiss the death penalty from the case. (Supp. II, C.T. 236-240). The motion was brought pursuant to Penal Code Section 1385 which provides that: "The judge or magistrate may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action dismissed."

The motion was entitled "Notice of Motion to Dismiss After Hung Jury" and asked the Court for "a dismissal of all charges against the defendant (Count 1 special circumstances)." (Supp. II, C.T. 236). However, it was evident from the arguments of counsel and the ruling by the Court that appellant was seeking to bar a retrial of the penalty phase in order to remove the death penalty as a possible sentence on Count 1 for the first degree murder of Lester Eaton. (R.T. 2778-2783)

In the written motion filed with the court, appellant argued that he had been in custody for 18 months awaiting trial; he and his family had suffered severe emotional and financial hardships because of the trial; the prosecution had presented all of its evidence at the first trial, where the jury deadlocked, and it was likely that result would not change at a second trial; a retrial would be expensive; it would be unfair to put the families through a second trial, when the first jury voted predominantly against the

death penalty; and a penalty only retrial before a new jury would be unfair, because they would not be considering all of the evidence in the case. (Supp. II, C.T. 239-240)[22]

The prosecutor objected and argued that he was entitled to retry the penalty phase on all of the counts on which the jury was hung. The prosecutor stated that he had additional evidence he intended to introduce at the penalty phase retrial. He told the Court that in April of 1997, a member of the Puente gang had attempted to murder the brother of prosecution witness Salvador Berber. The prosecutor claimed he had evidence to link appellant to the attempted murder which showed that the crime was ordered or requested by appellant. (R.T. 2779-2780)[23]

After hearing the arguments of counsel, the Court denied the motion to bar retrial of the penalty phase and dismiss the death penalty from

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[22] Although a defendant has no right to make a motion to dismiss under Penal Code §1385, he may invite the Court to exercise its power and consider whether a dismissal would be in furtherance of justice. (People v. Carmony (2004) 33 Cal.4th 367, 375.) "If a trial judge is convinced that the only purpose to be served by a trial or a retrial is harassment of the defendant, he should be permitted to dismiss notwithstanding the fact that there is sufficient evidence of guilt, however weak, to sustain a conviction on appeal." (People v. Superior Court (Howard) (1968) 69 Cal.2d 491, 504.)

[23] No such evidence was ever presented at the penalty phase retrial. However, the prosecutor did offer additional evidence at the second penalty trial that was not presented at the first penalty trial. The prosecutor offered evidence that appellant committed a gas station robbery when he was 13 years old (R.T. 4085-4099), and that a four inch metal shank was found in appellant's cell at the Los Angeles County Jail. (R.T. 4105-4107)

the case. The Court simply stated that the prosecutor was entitled to have another chance to try the penalty phase. (R.T. 2783) Appellant contends that the motion to bar retrial of the penalty should have been granted and the death sentence arising from the penalty phase retrial should be reversed.

B. Penalty Phase Retrials After A Hung Jury Are In Conflict With Evolving Standards Of Decency, Which Are Reflected In The Death Penalty Statutes Of 28 State And Federal Jurisdictions, And Such Retrials Are Barred By The Federal And State Constitutions.

Appellant urges the Court to reverse his death sentence on the grounds that the penalty phase retrial after the original jury was unable to reach a unanimous verdict violated appellant's federal and state constitutional rights to a fair jury trial, to a reliable penalty determination, to be free of cruel and unusual punishments, and to due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as the State Constitutional protections in Article I, sections 7, 15, 16 and 17 of the California Constitution.[24] If the first penalty

[24]In the trial court appellant argued that retrial of the penalty phase should be barred pursuant to the Penal Code section1385 which permits dismissal of an action "in furtherance of justice." Because this is a death penalty case, a technical insufficiency in the form of the objection will be disregarded and the Court must examine the record to determine if a miscarriage of justice resulted. (People v. Frank (1985) 38 Cal.3rd 711, 729 n. 3; People v. Bob (1946) 29 Cal.2d 321, 325; Pen. Code § 1239, subd. (b).) Furthermore, this Court has allowed defendants to raise constitutional challenges to California's Death Penalty Statute without requiring that the constitutional challenge be raised first in the trial court. (See, People v. Holloway (2004) 33 Cal.4th 96, 157; People v. Snow (2003) 30 Cal.4th 43,

jury results in a hung jury, the Eighth Amendment requires that the defendant be sentenced to life without possibility of parole. A retrial of the penalty phase after the first jury is hung violates the Eighth Amendment's "evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles (1958) 356 U.S. 86, 100-101.)

1. The Federal Constitution

The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In the case of Trop v. Dulles, supra, 356 U.S. 86, 100-101, the United States Supreme Court stated that "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man ... the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Following Trop, the United States Supreme Court has prohibited the use of the death penalty in several cases under the evolving standards of decency theory of the Eighth Amendment. (Roper v. Simmons (2005) 125 S. Ct. 1183 [individuals under the age of 18]; Atkins v. Virginia (2002) 536 U.S. 304 [mentally retarded]; Thompson v. Oklahoma (1988) 487 U.S. 815 [15 year old minor]; Ford v.

125-127; *see also* People v. Mattson (1990) 50 Cal.3d 826, 854; Reed v. Ross (1984) 468 U.S. 1, 16 [Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures].)

Wainwright (1986) 477 U.S. 399 [insane person]; Enmund v. Florida (1982) 458 U.S. 782 [accomplice in a robbery]; Coker v. Georgia (1977) 433 U.S. 584 [person convicted of rape].)

In the Atkins case, the Court stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (Atkins v. Virginia, supra, 536 U.S. at 312, citing Penry v. Lynaugh (1989) 492 U.S. 302, 331.) In addition to reviewing the laws of the various states, the Court must also apply its "own judgment ... on the question of the acceptability of the death penalty under the Eighth Amendment." (Atkins v. Virginia, supra at 312-313.)

In Roper v. Simmons, supra, 125 S. Ct. 1183, 1192, the Court applied the Atkins case to the issue of executing juvenile offenders under the age of 18. The Court found a national consensus against the death penalty for juveniles and then applied the Court's own independent judgement to determine whether the death penalty is a disproportionate punishment for juveniles. The Court stated that "A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment." (Roper v. Simmons, supra, at 1194.)

In Coker v. Georgia, supra, 433 U.S. 584, 592, the Supreme Court held that the imposition of the death penalty for the rape of an adult

woman is grossly disproportionate and excessive punishment and is forbidden by the Eighth Amendment as cruel and unusual punishment. The Court found that only three states provided the death penalty for rape. (Id. at 594.) The Court stated that "the current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." (Id. at 596.)

In Enmund v. Florida, supra, 458 U.S. 782, the Supreme Court held that it violated the Eighth and Fourteenth Amendments to impose the death penalty upon a defendant who participated in a robbery during which a murder was committed, where the defendant did not himself kill or intend the victim to be killed. The Court noted that out of thirty-six states, only eight states authorized the death penalty solely for participation in a robbery in which another robber takes a life. Twenty eight states rejected the death penalty in robbery murder cases where the defendant neither killed nor intended to kill the victim. (Id. at 789-793.) The Court concluded that although not unanimous, the great weight of the state legislative judgments against imposing the death penalty "weighs on the side of rejecting capital punishment for the crime at issue." (Id. at 793.)

In Atkins v. Virginia, supra, 536 U.S. 304, the issue was whether sentencing the mentally retarded to death violated the prohibition

against cruel and unusual punishments under the Eighth Amendment. The Court found that eighteen states and the federal government prohibited imposition of the death penalty on the mentally retarded. (Id. at 314-315.) The Court stated that the number of states barring the death penalty for mentally retarded offenders had grown impressively and had consistently changed in the direction of prohibiting its use. This was seen as "powerful evidence that today our society views mentally retarded offenders as categorically less culpable." (Id. at 315-316.) Applying its own independent evaluation, the Court concluded that "death is not suitable punishment for a mentally retarded criminal." (Id. at 321.)

In California, the first death penalty statute enacted in order to comply with Furman v. Georgia (1972) 408 U.S. 238, barred any retrial of the penalty phase after the first jury could not reach a unanimous verdict. (People v. Kimble (1988) 44 Cal.3d 480, 511.) Former Penal Code section 190.4, subdivision (b) provided that "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the Court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." (Stat. 1977 ch. 316 §12.)

Section 190.4, subdivision (b) was amended by ballot initiative in 1978 to permit retrials of the penalty phase after a hung jury. Section 190.4, subdivision (b) now provides: "If the trier of fact is a jury and has been

unable to reach a unanimous verdict as to what the penalty shall be, the Court shall dismiss the jury and shall order a new jury empaneled to try the issue as to what the penalty shall be." After two hung juries, the Court has the discretion to either order a new jury or sentence the defendant to life without possibility of parole. (Id.)

California is part of a small minority of states that permit retrial of the penalty phase in a capital case after the first jury is unable to reach a unanimous verdict. In additional to California, nine other states permit retrials of the penalty phase after a hung jury.[25]

A majority of the states and two federal death penalty statutes do not permit a retrial of the penalty phase of a capital case if the jury is unable to reach a unanimous verdict.[26] This constitutes twenty seven states out of the

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[25] Alabama, Ala. Code §13A-5-46(g) (1981); Arizona, Ariz. Crim. Code §13-703.01(J), (K) and (L) (2002). Connecticut, Conn.Gen.Stat.Ann. §53a-46a (2001); Delaware, 11 Del. Code § 4209 (d)(1) and (2) (2003); Florida, Fla.Stat.Ann. §921.141(2) and (3) (1996); Indiana, Ind.Code § 35-50-2-9(f) (2002); Kentucky, Ky.Rev.Stat.Ann. §532.025(1)(b) (2001); Nevada, Nev.Rev.Stat. §175.556 (2003); Oregon, Or.Rev.Stat.Ann. §163.150(5)(b) (2001). In Montana, the judge decides the penalty after the jury finds at least one aggravating factor. Mont.Code.Ann. §46-18-305 (2003).

[26] Federal Death Penalty Act of 1994, 18 U.S.C. §3594; Federal Anti-Drug Abuse and Death Penalty Act of 1988, 21 U.S.C. §848(l); Arkansas, Ark.Stat.Ann. §5-4-603(c) (1993); Colorado, Col.Rev.Stat. §18-1.3-1201(2)(b)(II)(d) (2003); Georgia, Ga.Code.Ann. §17-10-31.1(c) (Supp. 1994); Idaho, Id.Code §19-2515(7)(c) (2003); Illinois, Ill.Ann.Stat.Ch. 720, §5/9-1(g) (2003); Kansas, Kan.Stat.Ann. §21-4624(e) (1994); Louisiana, La.Code Crim.Proc.Ann.Art. 905.8 (1997); Maryland, Md.Ann.Code.Art. 27, §413(k)(2) (1996); Mississippi, Miss.Code.Ann. §99-19-103 (2000);

thirty six states that have death penalty statutes. (See, Statutory Appendix; Jones v. United States (1999) 527 U.S. 373, 419.) This is very close to the number of states that the United States Supreme Court found to be persuasive in Enmund v. Florida, supra, 458 U.S. 782, 789 [Twenty eight states rejected the death penalty as punishment for participation in a robbery in which another robber takes a life]. In these twenty seven states and in federal death penalty cases, "the jury's inability to produce a unanimous penalty-phase verdict results in the defendant's being sentenced to life imprisonment or life imprisonment without parole." (Acker and Lanier, Law, Discretion And The Capital Jury: Death Penalty Statutes And Proposals For Reform, 32 Crim. L. Bull. 134, 169 (1996).)

The Model Penal Code also prohibits retrial of the penalty phase if the jury is unable to reach a unanimous verdict on the penalty. It

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Missouri, Mo.Rev.Stat. §565.030(4) (2000); New Hampshire, N.H.Rev.Stat.Ann. §630:5 (IX) (1995); New Jersey, N.J.Stat.Ann. §2C:11-3(c)(3)(c) (Supp. 2004); New Mexico, N.M.Stat.Ann. §31-20A-3 (2004); New York, N.Y.Crim.Proc.Law §400.27(10) (2001); Nebraska, Neb.Rev.Stat. §29-2520 (4)(f) and (h) (2002); North Carolina, N.C.Gen.Stat. §15A-2000 (b) (2001); Ohio, Ohio.Rev.Code.Ann. §2929.03 (D)(2) (1996); Oklahoma, Okla.Stat.Ann.Tit. 21 §701.11 (1987); Pennsylvania, Pa.Stat.Ann.Tit. 42 § 9711(c)(1)(v) (1998); South Carolina, S.C. Code.Ann. §16-3-20 (c) (2002); South Dakota, S.D. Codified Laws Ann. §23A-27A-4 (1979); Tennessee, Tenn.Code Ann. §39-13-204 (h) (2002); Texas, Tex.Crim.Proc.Code Ann.Art. 37.071 (2)(g) (2001); Utah, Utah Code Ann. §76-3-207 (5)(c) (2003); Virginia, Va. Code Ann. §19.2-264.4 (E) (2003); Washington, Wash.Rev.Code Ann. §10.95.080 (2) (1981); Wyoming, Wyo.Stat.Ann. §6-2-102 (d)(ii) (2001).

states that "If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose a sentence for a felony of the first degree [life]" (A.L.I., Model Penal Code §210.6(2).)

By permitting a retrial of a penalty phase after the jury is deadlocked on the penalty, California is in conflict with a clear majority of the states on this issue. Under the Eighth Amendment's "evolving standards of decency" approach, this Court should find that the Eighth Amendment bars the retrial of a penalty phase after the jury is deadlocked. The clearest objective evidence of contemporary values and evolving standards of decency is the legislation enacted by the various state legislatures. The overwhelming majority of the states with death penalty laws prohibit such retrials and this Court should adopt that view as an appropriate interpretation of the Eighth Amendment's applicability to the retrial issue.

A retrial of a penalty phase in a capital case is different from the retrial of an ordinary criminal case because the death penalty is "unique in both its severity and its finality." (Monge v. California (1998) 524 U.S. 721, 732; Gregg v. Georgia (1976) 428 U.S. 153, 188.) To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which

it is not." (Furman v. Georgia (1972) 408 U.S. 238, 313; Godfrey v. Georgia (1980) 446 U.S. 420, 427.) This requires a death penalty statute to narrow the class of murderers eligible for the death penalty. (Zant v. Stephens (1983) 462 U.S. 862, 878; Lowenfield v. Phelps (1988) 484 U.S. 231, 256.)

When a jury at a penalty phase is unable to reach a unanimous verdict, it means that some of the jurors believe that the defendant's life is worth sparing. It also means that some of the jurors were not convinced that the evidence presented during the penalty trial was sufficiently aggravating to warrant a death sentence. In appellant's case, for example, 8 jurors at the first penalty trial voted for a life sentencing after hearing the evidence. To allow a retrial of the penalty phase after the first jury is hung, especially when it is hung in favor of a life sentence, creates a risk that the death penalty may later be imposed in a wanton and freakish manner. The United States Supreme Court has stated that "the infliction of a sentence of death under legal systems that permit this unique penalty to be ... wantonly and ... freakishly imposed" violates the Eighth and Fourteenth Amendments to the federal constitution. (Lewis v. Jeffers (1990) 497 U.S. 764, 771; People v. Bacigalupo (1993) 6 Cal.4th 457, 465.)

A retrial of a penalty phase in a capital case also places a heavy burden on the defendant who must be subjected to a second trial for

his life. In the context of the Double Jeopardy Clause, the Supreme Court has stated that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual of an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty." (Green v. United States (1957) 355 U.S. 184, 187-188.) As one Court noted, "repeated trials subject a defendant to serious hardship." (Carsey v. United States (D.C.App. 1967) 392 F.2d 810, 811-812.)

Recently the United States Supreme Court rejected the argument that the Double Jeopardy Clause barred the State from retrying a penalty phase after the first jury is unable to reach a unanimous verdict. (Sattazahn v. Pennsylvania (2003) 123 S.Ct. 732; *see also* Richardson v. United States (1984) 486 U.S. 317, 324-326 [neither the failure of the jury to reach a verdict nor a mistrial following a hung jury is an event that terminates the original jeopardy].) However, the Sattazahn case did not address the Eighth Amendment issue appellant now raises. The Eighth Amendment's evolving standards of decency require that the state be limited to one opportunity to present its case for death to a jury. If the original jury cannot reach a unanimous verdict of death, twenty seven states and the federal government have stated that the death penalty should not be

imposed upon the defendant. The jury should be discharged and the defendant should be given a sentence of life imprisonment without parole.

To paraphrase the language in the Supreme Court's Green decision, repeated attempts to convince a jury to return a death verdict, enhances the possibility that even though the defendant's crime warrants a life sentence, he may be sentenced to death. (*See*, Green v. United States, supra, 355 U.S. at 188.) Therefore, appellant urges the Court to reverse his death sentence by finding that retrial of the penalty phase after a hung jury violates the Eighth and Fourteenth Amendments.

2. The California Constitution

Appellant also argues that penalty phase retrials after a hung jury at the first penalty trial violate the California Constitution under its provisions ensuring the right to a fair jury trial, to a reliable penalty determination, to be free from cruel and unusual punishment, and to due process of law. (Cal. Const. Art. I, §§ 5, 7, 16 and 17.) The California Constitution may provide greater protections to a defendant in a capital case than those afforded by the Federal Constitution. (People v. Ramos (1984) 37 Cal.3d 136, 152; *see also*, California v. Ramos (1982) 463 U.S. 992, 997; People v. Ramos (1982) 30 Cal.3d 553.)

In People v. Ramos, supra, 37 Cal.3d 136, 153-155 the Court held that the Briggs instruction, informing the jury that a sentence of life

without the possibility of parole may be commuted, violated Article I, Section 15 of the California Constitution which guarantees the right to due process of law. This occurred after the United States Supreme Court found no federal constitutional violation in giving the instruction. (California v. Ramos, supra, 463 U.S. 992.) This Court stated that the term "due process" in the California Constitution "encompasses a broad range of safeguards," and includes the right to "a fundamentally fair decision-making process." (People v. Ramos, supra, 37 Cal.3d at 153.)[27]

Therefore, appellant asks the Court to find that penalty phase retrials after the original jury has failed to reach a unanimous verdict are unconstitutional under both the Federal Constitution and the California Constitution. When the original penalty phase jury becomes deadlocked on the penalty, a mistrial must be declared, the jury must be discharged, and the defendant must be sentenced to life imprisonment without possibility of

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[27] Article I, section 27 of the California Constitution provides in part that "the death penalty ... statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments ... nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." In the Ramos case, this provision of the California Constitution was considered and was found to be no bar to the Court's authority to insure the fundamental fairness of the trial court proceedings at which the death penalty is being considered. (*See*, People v. Ramos, supra, 37 Cal.3d 136, 161-162 [Dissenting Opinion by Justice Lucas indicating that Article I, Section 27 was considered, but rejected by the majority opinion].) Article I, Section 27 only "validates the death penalty as a permissible type of punishment under the California Constitution." (People v. Frierson (1979) 25 Cal.3d 142, 186.)

parole. Penal Code section 190.4, subdivision (b) should be declared unconstitutional to the extent that it permits the retrial of a penalty phase after a hung jury. Since appellant received a death sentence as a result of a penalty phase retrial after a hung jury, appellant's death sentence should be reversed and the case should be remanded for re-sentencing to impose a sentence of life imprisonment without possibility of parole on Count 1 for the murder of Lester Eaton.

XVIII. IT WAS ERROR FOR THE COURT TO REFUSE TO TELL THE JURY AT THE PENALTY RE-TRIAL ON THE EATON MURDER THAT APPELLANT HAD ALREADY BEEN SENTENCED ON THE SKYLES AND PRICE MURDERS TO LIFE WITHOUT POSSIBILITY OF PAROLE.

A. Factual Background

At the beginning of the penalty phase re-trial of appellant on the Lester Eaton murder, a question arose concerning what the Court should tell the jury about the results of the first trial. The Court agreed that "there has to be some explanation as to what the other jury did." (R.T. 2827) By mutual agreement of the Court and counsel it was decided that the explanation would be placed in the jury questionnaire. (R.T. 2826; C.T. 3305-3306)

All parties agreed that the jury would be instructed that at the guilt phase another jury had already convicted appellant and Michael Soliz of the first degree murders of Lester Eaton, Elijah Skyles and Gary Price, and also found to be true the two special circumstances of felony-murder and multiple murder. It was agreed that the jury would be advised that a prior jury was able to reach penalty verdicts for appellant for the murders of Elijah Skyles and Gary Price. The new jury was told it would only determine what punishment should be imposed on appellant for the murder of Lester Eaton and what punishment should be imposed on Michael Soliz

for the murder of Lester Eaton and the murders of Elijah Skyles and Gary Price. (C.T. 3305-3306)

Appellant argued that pursuant to Penal Code section 190.3, the Court should also advise the jury in the questionnaire that appellant had already been sentenced to two consecutive sentences of life without possibility of parole for the murders of Elijah Skyles and Gary Price. (R.T. 2829-2830; 2841; 2843) Counsel for appellant argued that if the prosecutor was going to present evidence that appellant had been convicted of and was guilty of the murders of Elijah Skyles and Gary Price, the jury should be advised that appellant had already been punished for those two murders to the extent that he had been sentenced to life in prison without possibility of parole. (R.T. 2830) Counsel stated that the jury should be advised that appellant is already "going to spend the rest of his life in prison." (R.T. 2829)

The prosecutor objected to instructing the jury that appellant had already been sentenced to life without parole on the Skyles and Price murders. He argued it would be inappropriate because it would allow defense counsel to use the life verdicts on the Skyles and Price murders to influence the current jury concerning their verdict on the Lester Eaton case. (R.T. 2827-2829) The prosecutor stated that telling the jury that appellant

received a life sentence on the Skyles and Price murders would suggest to the current jury that appellant should also receive a life sentence on the Lester Eaton murder. (R.T. 2831-2832) He noted that if the prior verdicts had been death, it would be improper to advise the jury of those verdicts and appellant would be objecting. (R.T. 2832; 2835-2836)

The Court ruled that there was a danger that if the jury learned of the life sentences on the Skyles and Price murders, they might disagree with the prior jury's verdict and react by giving appellant the death penalty on the Eaton murder. (R.T. 2840) Therefore, the Court decided that the jury would only be told that the prior jury had reached a penalty verdict for appellant on the Skyles and Price murders and therefore the penalty for those murders was not before them. They would be instructed to only consider the punishment to be imposed upon appellant for the Lester Eaton murder and the punishment to be imposed upon Michael Soliz for all three murders. (R.T. 2839)

Counsel for appellant objected that the Court's ruling was unfair to appellant. Counsel argued that Penal Code section 190.3 allowed the prosecutor to present all the evidence concerning the Skyles and Price murders to the jury in order to persuade them to impose the death penalty upon appellant for the Eaton murder. However, in fairness the jury should

be told that appellant had already been sentenced to life without possibility of parole on the Skyles and Price murders and any death verdict in the Lester Eaton murder case could not be based upon the belief that appellant should be sentenced to death for the Skyles and Price murders. (R.T. 2841-2842)

The Court denied appellant's request to have the jury told that appellant had already been sentenced to two consecutive terms of life without possibility of parole for the Skyles and Price murders. The Court directed the jury questionnaire to be modified to eliminate any reference to those sentences. (R.T. 2843-2844) On the following court day, after the jury questionnaire had been modified, appellant again objected to the questionnaire on the same grounds. The Court overruled the objection, stating that the revised questionnaire was consistent with the Court's ruling. (R.T. 2863)

The modified jury questionnaire advised the jury: "In the previous trial, the jury also reached verdicts as to the appropriate penalty for defendant John Gonzales for the murders of Elijah Skyles and Gary Price. Therefore, the penalty phase as to defendant Gonzales for those murders is not before you. The decision you must make in this penalty phase is what punishment should be imposed on defendant Gonzales for the murder of

Lester Eaton, and what punishment should be imposed on defendant Michael Soliz for the murder of Lester Eaton and the murders of Elijah Skyles and Gary Price." (C.T. 3306) The refusal of the trial court to advise the jury that appellant had already been sentenced to life without possibility of parole for the Skyles and Price murders requires the Court to reverse appellant's death sentence.

B. Evidence Of Appellant's Life Sentences On The Skyles And Price Murders Was Admissible Under Penal Code Section 190.3 And The Griffin Rule.

Once the jury was advised that appellant had been convicted of the first degree murders of Elijah Skyles and Gary Price, appellant was entitled to have the jury advised that appellant had been sentenced on the Skyles and Price murders to life without possibility of parole. The fact that appellant received a life sentence on the Skyles and Price murders, rather than a death sentence, was a mitigating factor which weakened the effect of the prior murder convictions and would have assisted the jury in assessing the significance of the evidence of appellant's two prior murder convictions. The fact that appellant had been sentenced to life without possibility of parole on the Skyles and Price murders was relevant information for the jury to receive in assessing whether appellant should receive the death penalty for the Lester Eaton murder.

"Under California law, the prosecutor and the defendant may present evidence at the penalty phase relevant to aggravation and mitigation, including evidence of the defendant's character, background, history, and mental condition." (People v. Harris (1984) 36 Cal.3d 36, 68.) Penal Code section 190.3 provides in part that "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involve a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

Appellant's life without possibility of parole sentence on the Skyles and Price murders was expressly admissible under the statute as evidence of a "prior felony conviction". The sentence is part of the record of the prior felony conviction. (People v. Williams (1945) 27 Cal.2d 220, 227-228.) In Williams, after a defendant denied that he had a prior conviction, the prosecution introduced into evidence a court record

indicating the defendant pleaded guilty to burglary and was committed to the Preston School of Industry for a period of two years. On appeal, the defendant argued that the court record was inadmissible. This Court rejected the argument and held that "There was no error in allowing this record to be presented to the jury." (People v. Williams, supra, 27 Cal.2d at 228.)

In Romano v. Oklahoma (1994) 512 US 1, 6-14, during the penalty phase of a defendant's murder trial in Oklahoma, the prosecution introduced a copy of a judgment and death sentence establishing that the defendant had been convicted of murder at an earlier trial and had been sentenced to death. After the jury returned a verdict of death in the second murder case, the defendant appealed arguing that evidence of his prior death sentence was inadmissible and violated his constitutional rights. The Supreme Court found no error in the admission of evidence concerning the defendant's prior death sentence. Evidence of the defendant's prior murder conviction and death sentence did not violate the Constitution because under the facts of the case the jury was not affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility. (Romano v. Oklahoma, supra, 512 US at 10, see also In re Carpenter (1995) 9 Cal.4th 634, 649-653 [No prejudicial error where a juror

in a penalty phase obtained information concerning the defendant's convictions and death sentences in a related case.].)

The fact that appellant had received a sentence of life without possibility of parole for the murders of Skyles and Price was relevant and admissible under Penal Code section 190.3 as "evidence . . . relevant to...mitigation, and sentence, including . . . the nature and circumstance of . . . any prior felony conviction or convictions." The prior convictions themselves were factors in aggravation because they proved the existence of appellant's prior murder convictions. However, it was a mitigating factor that appellant had not been sentenced to death as a punishment for the Skyles and Price murders. A prior murder conviction where the sentence is life is a less serious crime than a prior murder conviction where the sentence is death. The United States Supreme Court has stated that "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (Woodson v. North Carolina (1976) 428 US 280, 305.) Thus, if the jury had been advised that appellant's sentence for the murders of Skyles and Price was life, it could have been considered by the jury to be a factor in mitigation, showing that the murder convictions were not death penalty cases.

Appellant's life sentences on the Skyles and Price murders were also relevant and admissible by analogy to the Griffin rule. In People v. Griffin (1967) 66 Cal.2d 459, the defendant was charged with murdering a woman after he attempted to rape her. During the trial, the Court admitted evidence that the defendant had committed a subsequent rape attempt involving another woman, but the Court excluded evidence that the defendant had been acquitted of the subsequent rape charge. This Court reversed Griffin's murder conviction, holding that the trial court erred in excluding evidence that the defendant had been acquitted of the alleged subsequent sex crime. (People v. Griffin, supra, 66 Cal.2d at 465.)

In the Griffin case, the Court explained that although there was authority to the contrary, "the better rule allows proof of an acquittal to weaken and rebut the prosecution's evidence of the other crime." (People v. Griffin, supra, at 465.) The Court reasoned that "[r]egardless of its probative value, evidence of other crimes always involves the risk of serious prejudice, and it is therefore always to be received with extreme caution." (People v. Griffin, supra, at 466.) Rather than excluding evidence of another crime in cases where the defendant has been acquitted, the Court adopted a rule which allows proof of the jury's acquittal. The Court stated that the rule allowing evidence of the acquittal "is fair to both the

prosecution and the defense by assisting the jury in its assessment of the significance of the evidence of another crime with the knowledge that at another time and place a duly constituted tribunal charged with the very issue of determining defendant's guilt or innocence of the other crime concluded that he was not guilty." (People v. Griffin, supra, at 466.)

The Griffin rule has been reaffirmed in several subsequent cases. (People v. Ogunmola (1985) 39 Cal.3d 120, 122 n. 1; People v. Beamon (1973) 8 Cal.3d 635, 663; People v. Mullens (2004) 119 Cal.App.4th 648, 670.) This same rule applies in federal courts. (Dowling v. United States (1990) 493 US 342.) In Dowling, the Court held that other crimes evidence is admissible in criminal prosecutions even if the defendant had been previously acquitted of the other crimes evidence. In Dowling, the Supreme Court noted that during the trial, after evidence of the other crime had been admitted, the jury was instructed that the defendant had been acquitted of the other crime. (Dowling v. United States, supra, 493 US at 345-346; see also People v. Catlin (2001) 26 Cal.4th 81, 124.)

At appellant's penalty trial, the issue for the jury to decide was whether appellant should receive a sentence of death or life without possibility of parole for the murder of Lester Eaton. The prosecution presented evidence of appellant's prior murder convictions of Elijah Skyles

and Gary Price as aggravating factors in support of its case for the death penalty. The jury should have been advised that at a prior trial, appellant was "acquitted" of the death penalty and received a sentence of life without possibility of parole on the Skyles and Price murder convictions.

Knowledge of appellant's life sentences on the Skyles and Price murders could have assisted the jury in its assessment of the significance of the evidence of the two murder convictions. It may have influenced the sentencing jury to find the murder convictions in the Skyles and Price case were less aggravating. It may have led the jury to return a verdict of life without possibility of parole on the Lester Eaton murder. Thus, it was error under California law for the trial court to refuse to instruct the jury in appellant's case that appellant had already been sentenced on the Skyles and Price murders to life without possibility of parole.

C. Exclusion Of Evidence Of Appellant's Life Sentences Violated Appellant's Eighth Amendment Right To Present Relevant Mitigating Evidence

The refusal of the trial court to advise the jury that appellant had been sentenced to life without possibility of parole for the Skyles and Price murders also violated appellant's federal constitutional rights. Under the Federal Constitution, a defendant in a capital case is permitted to introduce any evidence relevant to his character or record as a mitigating

factor. (Lockett v. Ohio (1978) 438 US 586, 604; Eddings v. Oklahoma (1982) 455 US 104, 113-114; Skipper v. South Carolina (1986) 476 US 1, 4-8; People v. Whitt (1990) 51 Cal.3d 620, 647; People v. Harris (1984) 36 Cal.3d 36, 68.) "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." (Romano v. Oklahoma (1994) 512 US 1, 7; McCleskey v. Kemp (1987) 481 US 279, 306.)

In Lockett v. Ohio, supra, 438 US 586, the Supreme Court declared an Ohio statute unconstitutional because it restricted mitigating evidence in a capital case to three narrow issues. The Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Lockett v. Ohio, supra, at 604.) The Court also stated that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in

mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (Id at 605.)

In Eddings v. Oklahoma, supra, 455 US 104, the Supreme Court reversed a death judgment because the trial judge refused to consider evidence of the defendant's violent family history as a mitigating circumstance at the penalty phase of his capital case. The Court stated that "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." (Eddings v. Oklahoma, supra, at 113.)

In Skipper v. South Carolina, supra, 476 US 1, the Supreme Court reversed a defendant's death sentence on the grounds that the trial judge erroneously excluded testimony of two jailers and a regular jail visitor that the defendant had made a good prison adjustment. The purpose of the evidence was to permit the jury to draw favorable inferences from the defendant's probable future behavior if sentenced to life in prison. Once again, the Court held that the Eighth Amendment requires that the jury in a capital case "may not . . . be precluded from considering any relevant mitigating evidence." (Skipper v. South Carolina, supra, at 4.)

In People v. Harris, supra, 36 Cal.3d 36, 67-71, this Court applied Lockett and Eddings and found that it was error under the Federal Constitution to exclude evidence of the defendant's poetry written in the jail when offered as mitigation at the penalty phase of his capital trial. The defendant had offered his poetry to demonstrate another dimension of his character, so that the jury could see him as a unique individual, worthy of receiving a life sentence rather than the death penalty. This Court stated: "We therefore conclude that substantial reasons exist to assume the reliability of the proffered poetry, and that the trial court erred in excluding it as mitigating evidence in the penalty phase of defendant's trial." (People v. Harris, supra, at 71; see also People v. Whitt, supra, 51 Cal.3d 620, 647 [It is "Skipper error" to exclude defendant's testimony when asked "Do you want to live?"and "Why do you deserve to live?"].)

In appellant's case, the fact that appellant had been sentenced to life without possibility of parole for the murders of Skyles and Price was a factor in mitigation. Evidence of appellant's participation in the Skyles and Price murders and his conviction of those murders was presented by the prosecutor as an aggravating circumstance. The jury was well aware of the fact that the penalty for first degree murder with special circumstances was either death or life without possibility of parole. A prior murder conviction

where the defendant has received the death penalty is a more aggravated prior felony conviction than a prior murder conviction where the defendant has received a sentence of life without possibility of parole. Appellant simply wished to have the jury advised that his prior first degree murder convictions involving Skyles and Price were the less serious type of prior murder convictions. Under the Eighth and Fourteenth Amendments of the Federal Constitution, appellant was entitled to have that information provided to the jury that was deciding whether he should live or die.

D. Exclusion Of Evidence Of Appellant's Life Sentences Violated Appellant's Due Process Clause Right To A Fair Trial On The Issue Of Punishment

The trial court's refusal to instruct the jury that appellant had already been sentenced on the Skyles and Price murders to life without possibility of parole also violated appellant's due process right to a fair trial. On several occasions, the United Supreme Court has stated that the Due Process Clause of the Fourteenth Amendment applies to the sentencing phase of capital trials. (Romano v. Oklahoma (1994) 512 US 1, 12; Clemons v. Mississippi (1990) 494 US 738, 746; Green v. Georgia (1979) 442 US 95, 97; People v. Harris, supra, 36 Cal.3d 36, 70.)

The right to a fair trial under the Due Process Clause requires a "fair opportunity to defend against the State's accusations" and the right

of a defendant "to be heard in his defense." (Chambers v. Mississippi (1973) 410 US 284, 294.) "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (Crane v. Kentucky (1986) 476 US 683, 690; California v. Trombetta (1984) 467 US 479, 485.) "Inherent within the Constitution's promise of due process lies the cardinal principle that no criminal defendant will be deprived of his liberty absent a full and fair opportunity to present evidence in his defense." (Chia v. Cambra (9th Cir. 2004) 360 F.3d 997, 1005.)

In Green v. Georgia, supra, 442 US 95, the defendant was charged along with a co-defendant named Moore with the crime of murder. At the penalty phase of his trial, he attempted to introduce the testimony of a third person who would testify that Moore had told the witness that Moore had killed the victim by shooting her after he had told the defendant to run an errand. The testimony was excluded as inadmissible hearsay under Georgia law and the defendant was sentenced to death. The United States Supreme Court held that the exclusion of this evidence violated the Due Process Clause of the Fourteenth Amendment, because it denied the defendant his right to a fair trial on the issue of punishment. The Court reversed the defendant's death sentence because the evidence had been improperly exluded.

Appellant urges the Court to reverse his death sentence under the Green case. Due process requires that both sides are entitled to present their evidence to the jury. In petitioner's case, the prosecutor was allowed to present its evidence of aggravation by showing that appellant had been convicted of the first degree murders of Skyles and Price. Appellant was not allowed to show that the convictions were not capital murders and he was not sentenced to death in those cases. The exclusion of this mitigating evidence violated appellant's right to due process of law at his penalty trial.

E. The Exclusion Of The Evidence Was Prejudicial

Appellant's death sentence should be reversed. The refusal of the trial court to advise the jury that appellant had already been sentenced on the Skyles and Price murders to life without possibility of parole was prejudicial to appellant's case. Because appellant has argued that the exclusion of this evidence violated his federal constitutional rights under the Eighth and Fourteenth Amendments, the standard of review is for constitutional error. (Chapman v. California (1967) 386 US 18, 24; People v. Whitt (1990) 51 Cal.3d 620, 647-648.)

Before a federal constitutional error can be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." (Chapman v. California, supra, 386 US at 24.) Federal

constitutional error can be harmless beyond a reasonable doubt, if the prosecution proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Chapman v. California, supra, at 24.)

The error was prejudicial in appellant's case because this was a close case on the issue of whether appellant should receive the death penalty. The jury was to decide whether appellant should receive the death penalty for only one count of first degree murder involving Lester Eaton. (R.T. 2863-2869.) Appellant's conviction of first degree murder for the murder of Lester Eaton was based upon the felony murder rule which includes even an accidental killing during the course of a felony. (C.T. 700; see People v. Dillon (1983) 34 Cal.3d 441, 466.))

The prosecutor argued that Lester Eaton had been killed execution style by appellant. (R.T. 4435-4437) He argued that the shooting of Lester Eaton was no accident. (R.T. 4432-4434) He emphasized that appellant's murder convictions on the Skyles and Price case were an aggravating factor that warranted the death penalty. (R.T. 4387-4389; 4435-4437) Appellant's counsel was unable to argue that the convictions were mitigated by the fact that appellant had not received the death penalty for those murders.

Counsel for appellant argued that appellant had unintentionally shot Lester Eaton while they were struggling on the floor after Mr. Eaton had attempted to reach for a gun. (R.T. 4450-4452; 4459) Lester Eaton's wife, Betty Eaton, testified at trial that she heard gunfire when Lester was struggling with one of the robbers on the floor. She also testified that Lester Eaton had a gun in a holster that he wore around his waist. (R.T. 3341-3342) Appellant testified that he struggled with Lester Eaton when Mr. Eaton reached for his own gun. He also testified that his gun went off accidentally while he was struggling with Lester Eaton on the floor of the market. (R.T. 4207-4208).

The jury deliberated over a three day period. (R.T. 4350; 4503; 4506-4516; 4517-4519) During jury deliberations, the jury asked for a re-reading of appellant's testimony. (R.T. 4509-4511) The jury also asked for a clarification of the jury instructions on the mitigating factor of "whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct." Counsel for appellant noted that this question may have been in response to his argument to the jury that Lester Eaton was armed with a gun and attempted to draw his weapon at the time of the shooting. (R.T. 4506-4508)

The jury's question shows that the jury's death verdict for appellant for the Lester Eaton murder was not an easy decision. The prosecutor argued that it was an execution style murder requiring the death penalty. Defense counsel argued that the shooting was accidental and occurred because Lester Eaton had reached for his own gun. If the jury had been advised that appellant had received a sentence of life without possibility of parole for the Skyles and Price murders, that fact may have weighed in favor of giving a similar sentence to appellant for the Lester Eaton murder. The Skyles and Price murders were more aggravating than the Eaton murder because it was an execution style murder of two young teenagers, yet a prior jury had returned a life verdict. The prosecutor conceded that the current jury might be influenced by the life sentences imposed on appellant in the Skyles and Price case and the jury might be swayed to give appellant a life sentence in the Eaton case. (R.T. 2827-2838) However, rather than being a reason to exclude the evidence, this was a reason to allow the jury to consider the evidence. It is the jury's role in a capital case to weigh the various aggravating and mitigating factors and determine "whether or not the death penalty would be appropriate in a particular case." (People v. Heard (2003) 31 Cal.4th 946, 965.)

The Court's refusal to advise the jury concerning appellant's life sentences cannot be viewed as harmless beyond a reasonable doubt. The jury at the first penalty trial was unable to reach a verdict on the penalty for the Lester Eaton murder. There vote was 8 votes for life and 4 votes for death. (R.T. 2765-2769) The first jury was aware that appellant would receive a sentence of life without possibility of parole on the Skyles and Price murders because they had returned that verdict. Thus, appellant's inability to have the second penalty jury advised of his life sentences must have been a contributing factor in the resulting death verdict.

In People v. Mullens (2004) 119 Cal.App.4th 648, 667-670, the Court found that it was reversible error to admit evidence of an uncharged criminal offense at the defendant's trial and exclude evidence that the defendant had been acquitted of the uncharged offense. In the Mullens case, the Court noted that the case had been tried twice. The first jury was unable to reach a verdict of guilty and had deadlocked on a vote of 8 to 4 in favor of finding the defendant not guilty of the charged crime. The defendant was convicted at the re-trial after the prosecution introduced for the first time evidence of the uncharged criminal act. The Court concluded that it was reasonably probable that the jury on re-trial would have reached a result more favorable to the defendant had the trial court not erroneously

excluded evidence of his acquittal regarding the alleged uncharged offense. The Court found reversible error even under the lower standard of review in People v. Watson (1956) 46 Cal.2d 818, 836. (People v. Mullens, supra, at 670.)

Reversal of appellant's death sentence would even be required under the more difficult Watson standard, which requires a showing that it would be reasonably probable that a result more favorable to the defendant would have been reached had the error not occurred. (People v. Watson, supra, 146 Cal.2d at 836.) However, in a capital case, non-constitutional penalty phase errors require reversal of the death sentence if "there is a reasonable (i.e. realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (People v. Brown (1988) 46 Cal.3d 432, 448.) In appellant's case it is reasonably possible that the jury would not have returned a death verdict if they had been instructed that appellant had already been sentenced to life without possibility of parole for the Skyles and Price murders. Furthermore, the error in excluding the evidence was not harmless beyond a reasonable doubt under Chapman. Therefore, appellant's death verdict should be reversed.

XIX. THE COURT ERRED IN ALLOWING SALVADOR BERBER TO TESTIFY THAT IF HE EVER RETURNED TO HIS HOME IN LA PUENTE, APPELLANT AND CO-DEFENDANT MICHAEL SOLIZ WOULD KILL HIM.

A. Factual Background

Salvador Berber testified at the penalty phase re-trial. He was the prosecution's jailhouse informant witness. (C.T. 694) Berber was formerly a member of the East Side Puente Street gang in the City of La Puente. He went by the nicknames of "Psycho" and "Cyclone." His former gang was a click of Puente 13. (R.T. 3986-3989) Berber knew both appellant and Michael Soliz as members of the Perth Street gang which is also a clique of Puente 13. According to Berber, appellant used the name "Speedy" and Michael Soliz went by the names "Jasper" and "Rebel." (R.T. 3989-3991)

Salvador Berber testified that at some point appellant had told him that he and Michael Soliz had robbed a market, and during the robbery appellant had shot and killed the owner. (R.T. 3993-3999) In September of 1996, Salvador Berber was arrested for robbery. While in the Los Angeles County jail, he again met appellant. Appellant continued to make statements concerning the market robbery and murder. (R.T. 3996-3999) Berber contacted law enforcement officers investigating the market robbery

murder and attempted to trade information concerning appellant's statements for leniency in Berber's robbery case. (R.T. 3998-4001)

The murder investigators arranged to have Salvador Berber and appellant placed in a jail van together and transported from the jail to court. Berber's conversation with appellant was secretly tape recorded in the van. Appellant again made admissions concerning his involvement in the market robbery and murder. Appellant also admitted shooting two black kids at a gas station when he confronted them along with Michael Soliz. The tape recording was played for the jury. (R.T. 3999-4004)

At the penalty trial, Salvador Berber testified that he eventually was able to make a deal in his own robbery case. He had been charged with robbery with an allegation of a prior robbery conviction. He was facing 14 years in prison under California's Three Strikes law. Douglas Sortino, the prosecutor in appellant's case, was also the prosecutor in Berber's case. Berber pleaded guilty to robbery. His strike prior was stricken. He was sentenced to a five year suspended prison sentence and was placed on probation for five years. The only condition placed upon him in connection with the deal was to tell the truth. (R.T. 4717-4719).

Berber testified that he no longer lived in La Puente. When asked what would happen to him if he went back to La Puente, Berber testified

over appellant's objection that "They'd kill me." (R.T. 4019) Appellant's death sentence should be reversed because of the erroneous admission of testimony from Salvador Berber during the penalty phase that if he ever returned to his home in La Puente, appellant and co-defendant Michael Soliz would kill him.

B. There Was No Evidence That Appellant And Soliz Had Any Plan To Kill Berber And Therefore The Testimony Was Inadmissible.

The prosecution had no evidence of any plan by appellant and Soliz to kill Salvador Berber. Berber's testimony that if he ever returned to La Puente, "they'd kill me," was not admissible evidence at appellant's penalty trial. "[E]vidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated." (People v. Warren (1988) 45 Cal.3d 471, 481; People v. Hannon (1977) 19 Cal.3d 588, 600; People v. Weiss (1958) 50 Cal.2d 535, 545.) In appellant's case, the evidence was not substantiated and was highly prejudicial on the issue of whether appellant should receive either the death penalty or a sentence of life without possibility of parole.

In People v. Weiss, supra, 50 Cal.2d 535, a witness who had an abortion performed on her by one of the co-defendants was granted immunity from prosecution and led law enforcement officers to the location

where the abortion took place. The next day she received a telephone call from an individual stating he was the attorney for one of the defendants. The caller questioned the witness and asked if she had been contacted by an investigator from the State Medical Board or if she had identified the house where the abortion had been performed. At trial, the witness was permitted to testify concerning the telephone call incident.

The Court held that it was error to receive the testimony based on the theory that it was an attempted suppression of evidence because there was no evidence that the call had been authorized by the defendant. The Court stated:

> Efforts to suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. (Citation.) Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. (Citation.) However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant. (50 Cal.2d at 554)

In Weiss, the Court held that it was error to admit evidence of the intimidating telephone call, but it was not prejudicial in light of the overwhelming evidence of the defendant's guilt. (People v. Weiss, supra, 50 Cal.2d at 554.) However, in two later cases the Courts found reversible error in the erroneous admission of such evidence where the evidence of the

defendant's guilt was not strong and the case was described as a "close case." (People v. Hannon, supra, 19 Cal.3d 588, 603; People v. Perez (1959) 169 Cal.App.2d 473, 475.)

In People v. Perez, supra, 169 Cal.App.2d 473, the Court of Appeal reversed a judgment of conviction finding it was prejudicial error to admit evidence the defendant's brother offered money to the complaining witness in a robbery prosecution if he would fabricate testimony at trial. The Court noted that evidence a defendant attempted to suppress testimony was relevant to show a consciousness of guilt. "However, if the attempt is made by a third person outside of the presence of the defendant, it must appear that the third person is acting on behalf of the defendant in doing so, or is authorized by him to do so." (People v. Perez, supra, at 477.)

In Perez, the person who attempted to bribe the witness was the defendant's brother. However, evidence of the defendant's "mere relationship" with his brother was not sufficient to establish that the defendant authorized the bribery attempt. Because evidence proving the defendant's guilt of grand theft charge did not present "a strong case for the prosecution," the Court found reversible error. (People v. Perez, supra, 475, 478.)

In People v. Hannon, supra, 19 Cal.3d 588, the defendant was charged with attempted robbery and assault with a deadly weapon. The manager of the restaurant who was the attempted robbery victim could not positively identify the defendant as the robber, but his assistant did identify the defendant. The defendant did not testify at trial, but called a friend who provided an alibi for him for the time of the crime. The prosecution presented evidence that the alibi witness had refused to talk to a prosecution investigator pursuant to orders from the defendant's counsel, and the trial court instructed the jury that evidence that the defendant attempted to suppress evidence could be considered as showing a consciousness of guilt.

In Hannon, this Court reversed the defendant's conviction stating that "the admission of evidence purporting to show suppression or attempted suppression of evidence is erroneous absent the prerequisite of proof that the defendant was present at such an incident or proof of authorization of such illegal conduct." (People v. Hannon, supra, 19 Cal.3d at 600.) The Court noted that the defendant had waived any error in admitting the evidence by failing to object, but the Court reversed the conviction on the grounds that it was error to instruct the jury on the issue of suppression of evidence and consciousness of guilt based upon the evidence. (Ibid.) In finding reversible error, the Court stated:

> When in the present case the jury was instructed and the prosecutor permitted to argue that the refusal of [the alibi witness] to speak to [the prosecution investigator], if believed, could be considered as a circumstance from which a consciousness of guilt on the part of the defendant could be inferred, an impermissible impact may have resulted in the minds of the jurors. This was a close case and it appears reasonably probable that a verdict more favorable to the defendant might have resulted if the error had not occurred. (Citation.) Accordingly, the judgment must be reversed. (19 Cal.3d at 603.)

In appellant's case, there was no evidence that appellant and Michael Soliz had threatened to kill Salvador Berber if he returned to La Puente. Although Salvador Berber testified that "They'd kill me," and never identified who "They" were, any reasonable juror would infer that Berber was referring to appellant and Michael Soliz, the defendants on trial. Appellant and Soliz were the only persons on trial and Berber was the chief prosecution witness against them. The jury must have concluded that Berber was telling them that if he ever returned home, he would be murdered by appellant and Soliz. However, there was no evidence of any murder plot.

Before the start of the trial, the prosecutor stated that he had additional evidence he would be presenting at the second penalty trial of an attempted murder of Salvador Berber's brother occurring in April of 1997. The attempted murder was committed by another member of the Puente

gang. According to the prosecutor, there was evidence to link appellant to the attempted murder, showing that appellant had either ordered or requested the commission of the crime. (R.T. 2779-2780) However, no such evidence was forthcoming at the second penalty trial. The prosecution had no evidence connecting appellant to the attempted murder upon Salvador Berber's brother. There was likewise no evidence that appellant or Soliz planned to kill Salvador Berber if he ever returned to La Puente.

Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. (People v. Burgener (2003) 29 Cal.4th 833, 869; People v. Warren (1988) 45 Cal.3d 471, 481; People v. Avalos (1984) 37 Cal.3d 216, 232.) However, Salvador Berber's testimony in appellant's case went beyond merely testifying concerning his fear of retaliation for testifying. His statement "They'd kill me" if he returned home to La Puente conveyed the message that there was an existing threat made by appellant and Soliz to murder Berber if he returned to La Puente. However, without evidence that appellant or Soliz made or authorized any death threat, testimony concerning the threat was inadmissible. (People v. Hannon, supra, 19 Cal.3d at 600; People v. Weiss, supra, 50 Cal.2d at 554.)

C. The Death Threat Evidence Was Prejudicial

The issue at appellant's penalty trial was whether appellant should receive a sentence of death or a sentence of life without possibility of parole. Inadmissible evidence that Salvador Berber would be killed by appellant and Soliz if he returned to La Puente was highly prejudicial to appellant's chance to receive a life sentence. If the jury had credited Berber's testimony, the only conclusion would be that the jury should impose a death sentence on appellant and Soliz as a way of saving Salvador Berber's life.

Prejudicial error is found for the erroneous admission of evidence of threats against witnesses in cases where the evidence presents a "close case." (People v. Hannon, supra, 19 Cal.3d at 603; People v. Perez, supra, 169 Cal.App.2d at 475, 478.) Appellant's case was such a close case. The issue was whether appellant should receive the death penalty for the first degree murder of Lester Eaton. At the first penalty trial, when the jury did not receive the improper threat evidence, the jury was unable to reach a verdict. There vote was 8 to 4 in favor of a life sentence. (R.T. 2765-2769)

The jury deliberated over a three day period. During deliberations they requested a re-reading of appellant's testimony. (R.T. 4509-4511) During his testimony, appellant tried to explain to the jury that

he felt remorse for his crimes and that he had a conscience. (R.T. 4209-4210) He apologized to Betty Eaton and her family for his involvement in the death of Lester Eaton. (R.T. 4211-4214) The jury also sent a note to the judge during deliberations asking for further explanation of the mitigating factor of whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct. Counsel for appellant suggested the jury was considering whether Lester Eaton's act of attempting to draw a weapon while resisting the robbery would constitute a mitigating circumstance justifying a life sentence. (R.T. 4506-4508)

Appellant's case at the penalty phase was a close case. The error in allowing Salvador Berber to testify that appellant and Soliz would kill him if he ever returned home to La Puente may well have tipped the scale in favor of the jury voting for appellant's death. There is at least a reasonable possibility that the jury would have rendered a verdict of life had the error not occurred. (People v. Brown (1988) 46 Cal.3d 432, 448.) A prior jury that did not hear the threat evidence did not return a death verdict. Therefore, the Court should reverse appellant's death sentence.

D. The Erroneous Admission Of The Death Threat Evidence Also Violated Appellant's Federal Constitutional Rights.

The erroneous admission of the death threat evidence violated appellant's federal constitutional right to due process of law under the

Fourteenth Amendment to the United States Constitution. (Duncan v. Henry (1995) 513 US 364, 366; Estelle v. McGuire (1991) 502 US 62, 68.) A denial of due process in a state criminal trial "is the failure to observe that fundamental fairness essential to the very core concept of justice." (Lisenba v. California (1941) 314 US 219, 236.) The admission of inadmissible evidence violates due process "if there is no permissible inference the jury may draw from the evidence" and the evidence is "of such quality as necessarily prevents a fair trial." (Jammal v. Van de Kamp (9th Cir. 1991) 926 F.2d 918, 920.) Appellant contends that the admission of the death threat evidence violated his right to a fundamentally fair trial under the Due Process Clause.

The erroneous admission of the death threat evidence also violated appellant's constitutional rights under the Eighth Amendment. (Johnson v. Mississippi (1988) 486 US 578, 584-585.) The Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. (Gardner v. Florida (1977) 430 US 349, 363-364; Woodson v. North Carolina (1976) 428 US 280, 305.) Any decision by a jury to impose a death sentence "cannot be predicated upon mere 'caprice' or on 'factors that are constitutionally impermissible or

totally irrelevant to the sentencing process.'" (Johnson v. Mississippi, supra, 486 US 578, 585; Zant v. Stephens (1983) 462 US 862, 884-885, 887 n. 24.) The erroenous admission of the unsubstantiated death threat testimony rendered appellant's death sentence unreliable under the Eighth Amendment.

In Johnson v. Mississippi, supra, 486 US 578, the defendant was convicted of murder in Mississippi and was sentenced to death. One of the aggravating circumstances supporting the death sentence was evidence that the defendant had been convicted in New York of the crime of second degree assault with intent to commit rape. While the defendant's death sentence was on appeal, the New York Court of Appeals reversed the defendant's assault conviction. The United States Supreme Court vacated the death sentence, holding that it violated the Eighth Amendment's prohibition against cruel and unusual punishment to allow the defendant's death sentence to stand where it was based in part on the vacated New York conviction. (Johnson v. Mississippi, supra, 486 US at 584-590.)

In appellant's case it was error for the jury to consider the death threat evidence. The evidence was inadmissible. It was prejudicial because it implied that the death penalty should be imposed upon appellant as a way of saving Salvador Berber's life. This evidence should not have

been admitted because there was no plot to murder Berber. Consideration of the death threat evidence violated the Eighth Amendment in the same manner that the jury's consideration of the invalid New York assault conviction violated the Eighth Amendment in Johnson v. Mississippi, supra. It allowed the jury to consider evidence that was "totally irrelevant to the sentencing process." (Id. at 585.)

In appellant's case, the issue of whether appellant should receive a death sentence or a sentence of life without possibility of parole was a close case. The jury was considering the sentence for only one count of first degree murder. Appellant testified at trial that the gun went off accidentally when he was struggling with Lester Eaton during the robbery. (R.T. 4207-4208) Counsel for appellant argued to the jury that appellant and Soliz went into the market to rob it, not to commit murder. Counsel also argued that the gun went off by accident while appellant and Mr. Eaton were struggling on the floor. (R.T. 4450-4452)

During deliberations the jury asked for clarification of the mitigating factor of whether the victim was a participant in the defendant's homicidal conduct. (R.T. 4506-4508.) The jury also asked for a re-reading of appellant's testimony. (R.T. 4509-4511) An earlier jury was unable to reach a unanimous verdict and the majority of the jurors at the first penalty

trial voted in favor of life. All of these factors show that the erroneous admission of Salvador Berber's testimony that appellant and Soliz would kill him if he returned to La Puente was not harmless beyond reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 23.) Therefore, the Court should reverse appellant's death sentence.

XX. THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE INSTRUCT THE JURY ON THE ELEMENTS OF THE CRIME OF POSSESSION OF A DEADLY WEAPON IN THE JAIL

A. Factual Background

During appellant's penalty trial, the prosecution introduced evidence that appellant possessed a shank in the Los Angeles County Jail. Deputy Sheriff Arnolufo Esquivel testified that he conducted a search of appellant's jail cell in the Los Angeles County Jail on January 4, 1998. During the search he recovered a metal shank that was four-inches in length. A shank is a jail-made knife. (R.T. 4105-4107) Deputy Esquivel testified that it was illegal for inmates to possess shanks inside the jail. The shank was introduced into evidence. (R.T. 4108-4111; Peo. Ex. 161.)

On cross examination, Deputy Esquievel admitted that he did not find the shank on the person of appellant and he never saw appellant in possession of the shank. He had no evidence that the shank had ever been used. Although criminal charges had been filed against appellant for the unlawful possession of the shank in the jail, the charges had been dismissed. (R.T. 411-4113)

Appellant in his testimony admitted that he had committed a the robbery of a gas station with a knife when he was thirteen years old. He also admitted that he had been convicted of felony possession of drugs.

(R.T. 4257-4258) These were two other aggravating factors that the prosecution had presented during the course of the penalty trial. (4085-4099; 4136-4137). However, appellant vigorously denied that he possessed a shank in the County Jail. (R.T. 4259-4261) Appellant testified that the shank was not his and it was never found in his cell. He testified that Deputy Esquivel was lying about finding the shank in his cell. (R.T. 4259-4260)

In the prosecutor's closing arguments to the jury, he referred to evidence that a shank was found in appellant's cell. He argued that this was a crime involving a threat of violence and it showed that appellant was not interested in rehabilitation because he was manufacturing weapons in the jail. (R.T. 4395-4397) Later in his argument, he again referred to the fact that appellant made a shank in the jail. This was in connection with the prosecutor's argument that appellant had shown no remorse. (R.T. 4439-4440) Counsel for appellant argued that finding a shank in appellant's jail cell was not significant because there was no evidence he had used the shank. The punishment for such conduct, he argued, was to place the inmate in the hole [solitary confinement]. (R.T. 4459-4460)

The jury was instructed that in determining appellant's penalty for the first degree murder of Lester Eaton, they should be guided by

several factors, including: "The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried and convicted in the present case, which involves the use or attempted use of force or violence or the express or implied threat to use force or violence." (C.T. 921) The jury was also instructed that "evidence has been introduced for the purpose of showing that the defendant John Gonzales has committed the following criminal activity which involved the express or implied use of force or violence or the threat of force or violence: . . . The January 4, 1998 possession of a jail-made shank inside the Men's Central Jail." (C.T. 924) Lastly, the jury was instructed that "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 threat of force or violence." (C.T. 924) Reasonable doubt was also defined for the jury. (C.T. 923)

B. The Failure Of The Trial Court To Instruct The Jury On The Elements Of The Crime Of Possession Of A Deadly Weapon Violated Appellant's Federal And State Constitutional Rights To Due Process, A Jury Trial, And To A Reliable Penalty Determination.

In light of appellant's testimony that he did not have a shank in his cell, it was error for the trial court to fail to instruct the jury on all of

the elements of the crime of possessing a shank in the jail. The jury could not lawfully consider the shank evidence unless the evidence demonstrated "the commission of an actual crime, specifically, the violation of a penal statute." (People v. Phillips (1985) 41 Cal.3d 29, 72.) Without jury instructions on the specific crime of violating Penal Code section 4547, there was no way for the jury to decide whether appellant was guilty of that crime. If he was not guilty of the crime, it would be error for the jury to even consider the evidence. (People v. Phillips, supra, 73-75.)

Penal Code section 190.3, subdivision (b) permits the jury at a penalty trial 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." Evidence of an inmate's unlawful possession of a shank in the jail is admissible as evidence of an aggravating circumstance under section 190.3, subdivision (b). (People v. Gutierrez (2002) 28 Cal. 4th 1083, 1152; People v. Hughes (2002) 27 Cal. 4th 287, 382-383.) The jury must be instructed that before they may consider evidence of other criminal activity they must find "beyond a reasonable doubt" that the defendant engaged in such other criminal activity. (People v. Phillips (1985) 41 Cal. 3d 29, 65; People v. Robertson (1983) 33 Cal. 3d 21, 53-55.)

This Court has frequently held that a trial court has no sua sponte duty to instruct the jury on the elements of the other crimes that are introduced at the penalty phase. (People v. Carter (2003) 30 Cal. 4th 1166,1220; People v. Memro (1995) 11 Cal. 4th 786, 881.) This rule recognizes that a defendant for tactical considerations may not want the penalty phase instructions overloaded with a series of lengthy instructions on the elements of alleged other crimes. The defendant may fear that such instructions could result in the jury placing undue significance on the other crimes rather than on the central question of whether he should live or die. (People v. Phillips (1985) 41 Cal 3d 29, 73 n.25.)

Appellant's case does not fit within the general rule because he vigorously contested his guilt of the crime of possessing a deadly weapon in the jail. Appellant testified that he did not have a shank in his cell. He testified that the deputy who claimed to have found a shank in his cell was lying. By this testimony, appellant was contesting both dominion and control over the shank and knowledge of its presence in his cell. Because appellant was claiming his innocence of the crime of possessing the shank, he was constitutionally entitled to have the jury instructed on the elements of that crime.

Under the Due Process Clause of the Fourteenth Amendment a defendant may not be convicted of a crime unless the prosecution proves every element of the crime beyond a reasonable doubt. (In re Winship (1970) 397 US 358, 364.) Furthermore, the Sixth Amendment of the United States Constitution "gives 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 US 506, 522-523; Sullivan v. Louisiana (1993) 508 US 275, 277.) Under Article I, Section 15 of the California Constitution a defendant in a criminal case is entitled to due process of law which includes the right to a fundamentally fair decision-making process. (People v. Ramos (1984) 37 Cal 3d 163, 152-153.)

Appellant's constitutional rights to due process and to a jury trial were violated by the jury's consideration of the disputed shank possession evidence without the most basic jury instructions on the elements of that crime. Penal code section 4574 provides in part that "any person who, while lawfully confined in a jail . . . possesses therein any . . . deadly weapon . . . is guilty of a felony." Before a defendant can be found guilty of a violation of Section 4574, the prosecution must prove beyond a reasonable doubt that the defendant "knowingly possessed a deadly weapon

while in the jail." (People v. James (1969) 1 Cal.App.3d 645, 649-650.) In People v. Savedra (1993) 15 Cal.App.4th 736, 742 the Court noted that in all such cases, the jury should be instructed that the prosecution must prove four elements: "(1) A person possessed a weapon (2) The weapon was a deadly weapon (3) Without authorization [and] (4) While lawfully committed to county jail." The Court also held that the jury must be advised that "Possession requires that a person knowingly exercise direct control over a thing." (Ibid.).

In People v. Reynolds (1988) 205 Cal.App.3d 776, the Court reversed a defendant's conviction of possession of a sharp instrument while confined in state prison under a similar section, Penal Code, section 4502. The Court reversed the conviction because the trial court failed to instruct the jury that in order to convict it was necessary for the prosecution to "prove that the defendant knew the prohibited object was in his possession." (People v. Reynolds, supra, 205 Cal.App.3d at 779.) The Court noted that "A defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and a denial of that right constitutes a miscarriage of justice regardless of the strength of the prosecution's case." (People v. Reynolds, supra at 779, citing, People v. Mayberry (1975) 15 Cal 3d 143, 157.)

In Reynolds, the Court also stated that "Where possession is an element of the offense, the trial court has a duty to submit to the jury, with proper instructions, the question of whether the defendant had knowledge of the object's presence." (People v. Reynolds supra at 780.) The failure of the trial court to submit this element to the jury "constituted error, because it removed from the jury's consideration an element of the offense charged." (Ibid.) The Court found that the error was prejudicial regardless of the strength of the prosecution's case because the defendant's testimony, if believed, would have supported a finding of the absence of knowledge. (People v. Reynolds, supra, at 781; see also People v. Cummings (1993) 4 Cal. 4th 1233, 1213-1215 [reversible error based on a failure to instruct on all the elements of the crime of robbery]; People v. Jaso (1970) 4 Cal.App.3d 767 [reversible error in failure to instruct on the intent element of the crime of theft].)

The failure to instruct the jury on all of the elements of the crime of possession of a shank in jail also violated appellant's constitutional rights under the Eighth Amendment of the United States Constitution. For the death penalty to be constitutional under the Eighth Amendment, there must be a reliable determination that death is the appropriate punishment in any capital case. (Gardner v. Florida (1977) 430 US 349, 363-364.) A

death sentence must not be based upon an arbitrary determination or upon the consideration of factors that are constitutionally impermissible. (Johnson v. Mississippi (1988) 46 US 578, 585.)

The lack of proper jury instructions on the elements of the crime of possessing a deadly weapon in a jail means that there is no assurance that the jury properly found that appellant had committed this crime beyond a reasonable doubt before considering it as a factor in aggravation. The jury instructions simply stated that evidence had been presented to show that appellant had committed the other criminal activity of "possession of a jail-made shank inside the Men's County Central Jail." (C.T. 924) Without an instruction on the necessary element of knowledge, the jury may have concluded that the mere discovery of a shank inside appellant's cell made him guilty of the crime of possessing a shank in the jail.

Appellant's unknowing possession of a shank was not a violation of the Penal Code, and it was improper for the jury to consider the shank evidence unless the prosecution proved appellant's knowledge and the jury found that appellant had knowledge after considering jury instructions on the elements of the crime. The failure of the trial court to sua sponte instruct the jury on the elements of the crime of possession of a

shank in the jail violated appellant's state and federal constitutional rights to due process, to a jury trial, and to a reliable death penalty determination.

C. The Failure To Instruct On The Elements Of The Crime Of Possessing A Shank In The Jail Was Prejudicial And Requires Reversal Of Appellant's Death Sentence.

The failure of the trial court to instruct the jury concerning the elements of the crime of possession of a dangerous weapon by an inmate in a county jail was prejudicial error. In People v. Cummings (1993) 4 Cal. 4th 1233, 1311-1315, this Court reversed a defendant's robbery convictions on the grounds that the trial court had failed to instruct the jury on all of the elements of the crime of robbery. The Court found the error to be reversible per se. After reviewing a series of United States Supreme Court decisions, including Rose v. Clark (1986) 478 US 570 and Carella v. California (1989) 491 US 263, this Court stated that none of those cases "suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially of all the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (People v. Cummings, supra, 4 Cal. 4th at 1315.) Thus, under the Cummings case, the failure to instruct on all the elements of the

crime of possession of a deadly weapon in a jail should be viewed as reversible per se in appellant's case.

If the Court applies the harmless error standard for federal constitutional review, the instructional error in this case would not be harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 US 18, 24.) Appellant's case is almost identical with People v. Reynolds (1988) 205 Cal.App.3d 776. In Reynolds, the defendant was charged with possession of a sharp instrument in state prison. The defendant testified that he did not know of the presence of the sharpened object that was found in a shoe. The Court instructed the jury on only general criminal intent and failed to submit to the jury the question of whether the defendant had knowledge of the object's presence. The Court held that the failure to instruct the jury on the critical element of knowledge was prejudicial "because it removed from the jury's consideration an element of the offense charged." (People v. Reynolds, supra at 780.) The error was reversible because the defendant's testimony, if believed, "would have clearly supported a finding of absence of knowledge." (People v. Reynolds, supra at 781.)

In appellant's case, appellant testified that there was no shank in his cell and that the deputy was lying when he said he found a shank in

the cell. (R.T. 4259-4261). The deputy testified that he found the shank in the jail cell, but not on the person of appellant. He also testified that he never saw appellant physically in possession of the shank and there was no indication that the shank was ever used. (R.T. 4105-4113) It is reasonably possible that the jury could have concluded that the deputy actually found the shank in appellant's cell, but appellant was unaware of the shank in his cell, because it had been placed there by another inmate. Under this view of the evidence, appellant would have been not guilty of the crime of violating Penal Code section 4574, based upon his lack of knowledge. (People v. Savedra, supra, 15 Cal.App.4th at 742; People v. James, supra, 1 Cal 3d at 649-650.) The failure of the trial court to instruct the jury on the elements of the crime would have thus been reversible error in appellant's case based on People v. Reynolds, supra.

The error in failing to instruct on all the elements of the crime of possessing the shank also violated appellant's Eighth Amendment right to a reliable determination of the death penalty in his case. (Gardner v. Florida (1977) 430 US 349, 363-364.) It resulted in a decision by the jury to impose a death sentence that may have been predicated upon mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." (Johnson v. Mississippi (1988) 486

US 578, 585; see also People v. Phillips (1985) 41 Cal 3d 29, 82-84.)

The question of whether appellant should receive the death penalty for the first degree murder of Lester Eaton was a close one. At the first penalty trial, the jury was hung with 8 jurors voting for life and 4 for death. At the first penalty phase jury trial, the prosecution did not introduce evidence of appellant's possession of a shank in jail. Thus, the jury's erroneous consideration of the shank evidence without jury instructions on the elements of the crime may have tipped the scales in favor of the death penalty at the second penalty trial. The shank evidence was extremely prejudicial. It suggested to the jury that the death penalty was the only way to stop appellant's violent criminal conduct in prison. The jury may have concluded that if they voted for a life sentence, appellant would kill again in prison with weapons similar to the shank found in his cell in the county jail.

Furthermore, the jury deliberated for three days before returning a death verdict. During their deliberations, they requested that appellant's testimony be reread. They were also focusing on appellant's conduct during the murder of Lester Eaton, asking for clarification of the factor in mitigation of whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct. (R.T. 4506-4508) Thus, the jury instruction error concerning the other criminal

activity of possession of a deadly weapon in a jail was prejudicial. It may have been the deciding factor in a close case for the jury to return a death verdict in appellant's case for the Eaton murder. Appellant may have receive a death verdict based upon evidence of shank that did not belong to him and that he did not even know was in his cell. Therefore, the court should vacate appellant's death sentence.

XXI. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THEIR CONSIDERATION OF MERCY AND SYMPATHY AS A BASIS FOR RETURNING A VERDICT OF LIFE WITHOUT POSSIBILITY OF PAROLE

A. Factual Background

In deciding the death penalty the jury was instructed that: "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." (C.T. 926-927; CALJIC 8.88.) The jury was also given a list of factors in aggravation and mitigation to be considered in deciding the death penalty. (C.T. 921-922; CALJIC 8.85.) The list of factors included "Factor (k)" which provided that the jury could consider "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." (C.T.922; Pen.Code § 190.3, subd. (k).)

In the instructions given by the Court, there was no sentence which stated: "To return a verdict of life without parole, each of you must..." Recognizing this fact, counsel for appellant submitted two

proposed jury instructions on mercy and sympathy which directed the jury on how these factors may be a basis for returning a verdict of life without parole. The first instruction on mercy stated: "After considering all the aggravating and mitigating factors that are applicable in this case, you may decide to impose the penalty of life in prison without possibility of parole in exercising mercy on behalf of the defendant." (C.T. 939)

The second instruction on sympathy provided in part: "You may consider sympathy or pity for a defendant, if you feel it appropriate to do so, in determining to impose the penalty of life in prison without possibility of parole. If any of the evidence arouses sympathy or compassion in you to such an extent as to persuade you that death is not the appropriate punishment, you may act in response to these feelings of sympathy and compassion and impose life in prison without possibility of parole." (C.T. 948) The trial court refused both of appellant's proposed jury instructions. The refusal of the trial court to give these instructions requires the reversal of appellant's death sentence for the Lester Eaton murder.

B. The Failure To Instruct The Jury On The Mitigating Factors Of Mercy And Sympathy Violated Appellant's Federal And State Constitutional Rights

The failure to instruct on mercy and sympathy in appellant's case was constitutional error. Under the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution and under Article I, Sections 1, 7 and 15 of the California Constitution, the defendant in a capital case is entitled to due process of law, a fair jury trial, and procedural safeguards at trial which guide the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (Gregg v. Georgia (1976) 428 US 153, 189.) The failure to instruct on mercy and sympathy violated all of these constitutional provisions.

A denial of due process under the federal constitution "is the failure to observe that fundamental fairness essential to the very concept of justice. [The Court] must find that the absence of that fairness fatally infects the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." (Lisenba v. California (1941) 341 US 219, 236.) A violation of the Due Process Clause under the California Constitution means that the defendant was denied his right to "a fundamentally fair decision-making process." (People v. Ramos (1984) 37 Cal.3d 136, 152-153.)

The Eighth and Fourteenth Amendments of the United States Constitution require that in a death penalty case the 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 (1978) 438 US 586, 604; Eddings v. Oklahoma (1982) 455 US 104, 110.) The Lockett and Eddings cases not only guarantee the right of a capital defendant to offer any mitigating evidence, they also require appropriate jury instructions that allow the jury to "give effect to the mitigating evidence." (Penry v. Lynaugh (1989) 492 US 302, 314-319; Hitchcock v. Dugger (1987) 481 US 393, 395-399.) The Supreme Court has stated that: "A State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." (Penry v. Lynaugh, supra, 491 US at 318.)

Under these constitutional provisions, appellant was entitled to have the jury instructed on the concepts of mercy and sympathy. The jury should have been expressly told that it could return a verdict of life without possibility of parole based upon the concepts of mercy and sympathy. The jury in appellant's case was told directly how they could "return a judgment of death," but there was no similar language directing the jury how they could "return a judgment of life without parole." Although the instructions did refer to sympathy under the Factor (k) part of

the instruction, there was no mention of the word "mercy." Finally, the instruction permitting the jury to consider any sympathetic or other aspect of the defendant's character or record did not directly state that such evidence may warrant a sentence of life without possibility of parole. Rather, the instruction refers to a sentence of life without possibility of parole as a default sentence by stating that sympathetic or other aspects of the defendant's character or record may be considered "as a basis for a sentence less than death." (C.T. 922)

In California v. Brown (1987) 479 US 538, the Supreme Court held that a jury instruction in the penalty phase of a capital case which stated that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling, " did not violate the Eighth and Fourteenth Amendments. The Court determined that a reasonable juror would not be likely to single out the word "sympathy" from the other nouns accompanying it. The most likely interpretation of the instruction would be to avoid basing the jury's decision on "mere sympathy" which would be sympathy that was not rooted in the aggravated and mitigating evidence introduced during the penalty phase. (California v. Brown, supra, 479 US at 541-543.)

Appellant's case is different from the Brown case. In Brown, the issue was whether the instruct on not considering sympathy violated the Eighth Amendment. In appellant's case, the issue is whether the refusal to give appellant's proposed jury instructions on sympathy and mercy violated the Eighth Amendment and appellant's constitutional rights to due process and a fair trial at the penalty phase. Although the Brown case did not decide the issue raised in appellant's case, the Court did reaffirm the Lockett and Eddings decisions by stating that "the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his 'character or record and any circumstances of the offense.'" (California v. Brown, supra, 479 US at 541.) The rejection of appellant's proposed instructions on mercy and sympathy violated that principle.

C. The Refusal To Instruct The Jury On Mercy And Sympathy Was Prejudicial

Appellant did suffer prejudice by the refusal of the trial court to instruct on mercy and sympathy. This Court has stated that the failure to give a required jury instruction is reversible on the penalty verdict if there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (People v. Brown (1988) 46 Cal.3d 432, 448.) Since appellant has argued that the failure to give these instructions violated his constitutional rights, his death sentence should be reversed unless the

Court finds that the error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 US 18, 23.)

Appellant had little by way of a defense to the first degree murder charge involving Lester Eaton. During the penalty phase of the trial, appellant admitted that he shot and killed Lester Eaton during a robbery of the Hillgrove Market. However, he told the jury that on the night of the shooting, he only intended to rob the market, not to commit murder. (R.T. 4204-4206) During the robbery, Lester Eaton started reaching for his own gun. Appellant grabbed Mr. Eaton and started wrestling with him. While they were wrestling, the gun just went off. Appellant testified that his mind went blank and he just kept shooting. He told the jury that after the shooting he felt remorse. (R.T. 4207-4208) During his testimony, he also apologized to Lester Eaton's wife, Betty Eaton. (R.T. 4211-4212) He told the jury that if he received a life sentence, he would try to rehabilitate and educate himself. (R.T. 4216)

Appellant's mother, Edna Gonzales, testified that appellant was a good son, who, as a young boy, went to school and obtained good grades. It was only after she took a job at a school cafeteria, that her son joined a gang. (R.T. 4378-4380) She testified that she loved her son. She

also apologized to Mrs. Eaton for the death of her husband. (R.T. 4381-4383)

Appellant presented evidence that when he was fourteen years old he was hospitalized after being shot by a gang member. (R.T. 4355-4357) His sister, Frances Ontiveros, testified that her six-year old daughter had Downs Syndrome. Before appellant was arrested, he would sometimes take care of her daughter while Mrs. Ontiveros was at work. (R.T. 4364-4368) David Gonzales, Jr., the nine year old nephew of appellant, testified at the penalty phase concerning his love for his uncle. (R.T. 4200-4203) William Marmolejo, a neighbor, testified that appellant helped out with his disabled daughter at the Special Olympics. (R.T. 4372-4377)

Appellant needed the two proposed jury instructions on mercy and sympathy to enable the jury to give effect to his mitigation evidence. The prosecutor argued that the mitigation did not outweigh the aggravation in this case. (R.T. 4443) Counsel for appellant argued that the family of appellant had presented evidence that appellant had a positive effect on his nephew. (R.T. 4459) But in the final argument made by counsel for appellant, he could not refer to specific jury instructions on mercy or sympathy as factors that the jury could consider as a basis for returning a verdict of life without possibility of parole. (R.T. 4447-4465)

The error in refusing to instruct on mercy and sympathy in appellant's case should be reversible. The issue of whether appellant should receive the death penalty was a close case. The first penalty jury had hung 8 to 4 in favor of a life verdict. (R.T. 2765-2769) During deliberations at the second penalty trial, the jury asked for a re-reading of appellant's testimony. (R.T. 4510-4511) The jury also asked for clarification of the mitigating circumstance of whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct. (R.T. 4506-4508) This shows that the jury was seriously considering whether Lester Eaton's act of reaching for his own gun during the robbery was a mitigating factor supporting a life sentence. The fact that the jury deliberated over three days appears to indicate that the jury had a difficult time reaching a death verdict. If the Court had given appellant's jury instructions on mercy and sympathy, there is a reasonable possibility the jury would have returned a verdict of life rather than death. Therefore, the Court should reverse appellant's death sentence.

XXII. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING WHY THE AGE OF THE DEFENDANT IS A MITIGATING FACTOR AND HOW IT COULD BE CONSIDERED AS A BASIS FOR RETURNING A VERDICT OF LIFE WITHOUT POSSIBILITY OF PAROLE

A. Factual Background

Appellant was only 19-years old at the time of the murders of Lester Eaton, Elijah Skyles, and Gary Price. (R.T. 4356) The jury was instructed pursuant to CALJIC 8.85 and Penal Code section 190.3 concerning the factors in aggravation and mitigation they should consider and be guided by in determining whether appellant should receive a sentence of death or life without possibility of parole. (C.T. 921-922) One of the factors the jury was told to consider was "Factor (i)," which is "The age of the defendant at the time of the crime." (C.T. 922) The instruction did not state whether age was an aggravating factor or a mitigating factor. Furthermore, the instruction did not tell the jury how they should consider age in determining appellant's penalty.

Recognizing these shortcomings in the standard jury instructions, appellant submitted a clarifying jury instruction on age as a mitigating factor. Appellant's instruction stated the following:

> One of the factors for you to consider in determining the penalty is the age of the defendant at the time of the

offenses. Chronological age, by itself, is a matter over which the defendant has no control, and which is not relevant to the choice of penalty. However, the factor relating to the defendant's age, as set forth in these instructions, refers to any matter concerning defendant's age, maturity, and judgment that common experience or morality might indicate to be relevant to the issue of penalty. You shall therefore give any such age-related factors consideration in arriving at a judgment as to penalty." (C.T. 944)

The trial court refused to give appellant's proposed jury instruction on age as a mitigating factor. The failure of the trial court to give this instruction was error and requires reversal of appellant's death sentence.

B. The Failure To Instruct The Jury On Age As A Mitigating Factor Violated Appellant's Federal And State Constitutional Rights

The failure to instruct on age as a mitigating factor in appellant's case was constitutional error. Under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 1, 7 and 15 of the California Constitution, the defendant in a capital case is entitled to due process of law, to a fair jury trial, and to the procedural safeguards at trial which guide the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (Gregg v. Georgia (1976) 428 US 153, 189.) The failure to instruct on age as a mitigating factor violated all these constitutional provisions.

The Due Process Clauses of the federal and state Constitutions require "fundamental fairness" in the decision-making process of the trial. (Lisenba v. California (1941) 314 US 219, 236; People v. Ramos (1984) 37 Cal.3d 136, 152-153.) Under the Eighth and Fourteenth Amendments of the United States Constitution, a capital defendant must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." (Eddings v. Oklahoma (1982) 455 US 104, 110; Lockett v. Ohio (1978) 438 US 586, 604.) Furthermore, "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." (Penry v. Lynaugh (1989) 492 US 302, 318; see also Penry v. Johnson (2001) 532 US 782.)

The United States Supreme Court has stated that age is an ambiguous factor that may at times be both aggravating and mitigating in a capital case. (Tuilaepa v. California (1994) 512 US 967, 977.) "Both the prosecution and the defense may present valid arguments as to the significance of the defendant's age in a particular case." (Ibid.) However, a defendant's youth, on the other hand, has always been considered a

mitigating circumstance. (Johnson v. Texas (1993) 509 US 350, 367; Thompson v. Oklahoma (1988) 487 US 815, 834; Eddings v. Oklahoma, supra, 455 US at 115.) The Supreme Court has stated that "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of Lockett and Eddings." (Johnson v. Texas, supra, 509 US at 367.)[28]

In Eddings, the Court stated that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." (Eddings v. Oklahoma, supra, 455 US at 115.) "[M]inors often lack the experience, perspective, and judgment expected of adults." (Eddings v. Oklahoma, supra, at 116, citing Bellotti v. Baird (1979) 443 US 622, 635.) "Crimes committed by youths . . . deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." (Eddings v. Oklahoma, supra at 115 n.11.)

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[28] The United States Supreme Court has held that the Eighth Amendment prohibits the imposition of the death penalty upon anyone under the age of 16 at the time of the commission of the crime. (Thompson v. Oklahoma (1988) 487 US 815.) In 2005, the Supreme Court held that the Eighth Amendment bars the infliction of the death penalty on offenders who are under the age of 18 at the time of the offense. (Roper v. Simmons, (2005) 125 S. Ct. 1183.)

"A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence." (Johnson v. Texas, supra, 509 US 350, 367.) The critical issue is whether the refusal to give appellant's proposed jury instruction on age as a mitigating circumstance prevented the jury from giving effect to the mitigating evidence of appellant's young age at the time of the commission of the crimes. (See Penry v. Lynaugh (1989) 492 US 302, 314-319; Johnson v. Texas, supra, 509 US 350, 369; Boyde v. California (1990) 494 US 370, 380.)

The refusal of the trial court to give appellant's proposed jury instruction on age as a mitigating factor did prevent the jury in appellant's case from giving effect to the mitigating evidence of appellant's youthful age. (Roper v. Simmons (2005) 125 S. Ct. 1183, 1197) The Court's instruction merely told the jury they could consider "the age of the defendant at the time of the crime." (C.T. 922) The instruction did not tell the jury that a young age was a mitigating factor. The instruction also did not tell the jury how a person's youth could be considered as a basis for returning a verdict of life without possibility of parole. The trial court's refusal to give appellant's proposed instruction on age as a mitigating factor was error under the Supreme Court's recent Roper decision.

In Roper v. Simmons (2005) 125 S. Ct. 1183, 1188-1189, the prosecution argued to a jury in a death penalty trial that the defendant's young age at the time of the murder was an aggravating factor. The defendant was 17 years old when he committed a capital murder. He was sentenced to death. The Supreme Court vacated the death sentence by holding that the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders under the age of 18.

In Roper, the Court noted that in some cases, "a defendant's youth may even be counted against him." (Roper v. Simmons, supra, at 1197.) The Court cited to the record in the Roper case where "the prosecutor argued Simmons' youth was aggravating rather than mitigating." (Ibid.) This was condemned as prosecutorial "overreaching" that "could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked." (Ibid.) This means that the jury in a death penalty case must be instructed in cases involving young defendants that the defendant's youth is a mitigating factor that weighs in favor of a life sentence rather than the death penalty. The Roper case appears to say that such an instruction is required by the Eight Amendment in all capital trials involving young defendants.

Appellant's proposed instruction informed the jury that a person's age may be relevant to his "maturity and judgment." (C.T. 944) It gave the jury a vehicle by which they could take evidence of appellant's youthful age of 19 and use it as a mitigating factor. A person who is immature and who has poor judgment because of his youthful age "deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." (Eddings v. Oklahoma, supra at 115 n.11.) By refusing to give appellant's proposed jury instruction on age, the trial court was depriving the jury of the means of giving effect to appellant's mitigating evidence concerning his youthful age. This violated appellant's federal and state constitutional rights.

C. The Refusal To Instruct The Jury On Age As A Mitigating Factor Was Prejudicial.

Appellant was only 19-years old at the time of the commission of the murders. (R.T. 4356) Despite the fact that appellant's young age was clearly a mitigating circumstance, the prosecutor argued to the jury that appellant's age was an aggravating circumstance. The prosecutor argued that at the time of the crime, appellant was 19-years old and Michael Soliz was 21 or 22 years old. He argued that both were old enough to know better. (R.T. 4405) Thus, because the trial court's instructions did not explain to the jury that a young age was a mitigating

factor and did not explain how age should be viewed by the jury, the prosecutor was able to argue that age in this case was an aggravating factor. The jury should have been instructed that age was a mitigating factor and appellant's youth could be considered as a reason for arriving at a verdict of life without possibility of parole. The failure of the trial court to give appellant's proposed instruction on age as a mitigating factor was therefore prejudicial. The jury instruction given by the Court failed to instruct the jury how it might give effect to the mitigating factor of the appellant's youthful age.

Reversal of appellant's death sentence is required because there is a reasonable possibility that the jury would have rendered a different verdict if appellant's proposed jury instruction had been given. (People v. Brown (1988) 46 Cal.3d 432, 444.) Because the failure of the trial court to instruct the jury on age as a mitigating factor was constitutional error, appellant's death sentence must be reversed, unless the Court finds that the error is harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 US 18, 23.) Appellant's case meet both standards of reversible error.

The jury's determination on the death penalty for the Lester Eaton murder was a close case. At the first penalty trial, the jury was hung

with a vote of 8 to 4 in favor of a life sentence. (R.T. 2765-2769) At the second penalty trial, the jury deliberated over a three-day period. (C.T. 911-914; 954-955) During their deliberations, the jury requested that appellant's testimony be re-read to them. (R.T. 4510-4511) The jury also asked for a clarification of the mitigating circumstance of whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct. (R.T. 4506-4508)

At the penalty phase, appellant presented testimony concerning his youthful enticement into a gang. Appellant's mother testified that appellant joined a gang when he was 11 or 12-years of age. (R.T. 4378-4381) William Marmolejo testified that appellant had been influenced to join a gang by William's younger brother Fernando Marmolejo. Fernando was 30-years old at the time and was a member of the Puente 13 gang. (R.T. 4372-4384) William Marmolejo testified that he believed that Fernando was responsible for appellant becoming a Perth Street gang member and appellant was "pretty young" at the time. (R.T. 4375)

Thus, of all the factors in mitigation, appellant's young age was a factor that weighed the most in favor of avoiding a death sentence. Appellant was 19 years old at the time of the crimes. He had been

encouraged to join a gang at the age of 12 at the urgings of a 30 year old adult gang member. At the time that appellant took this fateful step, his mother was force to take a job and was not at home to counsel watch over him. Appellant's youth was an extremely important mitigating factor in this case.

However, the trial court's refusal to give his proposed jury instruction identifying age as a mitigating circumstance and explaining to the jury how age may affect a person's "maturity and judgment," led to a denial of appellant's right to have the jury fairly consider this factor in mitigation. The close nature of the case, the prior hung jury, and the prosecutor's improper use of age as an aggravating factor, all lead to the conclusion that the refusal to give appellant's proposed instruction was prejudicial and reversible error. The court should reverse appellant's death sentence.

XXIII. APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BASED UPON THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS.

Appellant urges the Court to reverse his death sentence based upon the cumulative effect of the penalty phase errors. "When an error or a combination of errors occurs at the penalty phase of a capital case, [the Court] will reverse the judgment if there is a reasonable possibility that the jury would have reached a different result if the error or errors had not occurred." (People v. Hernandez (2003) 30 Cal.4th 835, 877 citing People v. Brown (1988) 46 Cal.3d 432, 448; *see also* People v. Davenport (1985) 41 Cal.3d 247, 286-287; People v. Lucky (1988) 45 Cal.3d 259, 304.) Furthermore, the cumulative effect of a combination of federal constitutional errors would require reversal of a death sentence if the combined effect of the errors was not harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 23.)

The one critical difference between the first penalty trial which ended in hung jury and the second penalty trial which resulted in a death verdict, was appellant's decision to testify at the second trial. Appellant's trial counsel told the Court that appellant was testifying over counsel's objection. (R.T. 4192). This critical decision to testify was made by appellant without the assistance of a conflict free counsel in violation of

his Sixth Amendment right to counsel. If appellant's testimony had helped his case and had not been subject to improper attacks by the prosecutor and the trial judge, appellant's mere decision to testify might not be viewed by the Court to be prejudicial. However, that was not the case.

On balance, appellant's testimony hurt his case. The conflict of interest arising out of the heroin smuggling incident had caused appellant to stop listening to his counsel. Appellant testified that he shot all three murder victims, despite overwhelming evidence that Michael Soliz had killed Skyles and Price. Even the prosecutor argued to the jury that appellant was not telling the truth when he said that he shot Skyles and Price. (R.T. 2232-2234). Thus, by claiming that he personally shot Skyles and Price, appellant was harming his chance for a life verdict. On this record, it is reasonably possible that if appellant had a conflict free counsel, he would have listened to the advice of his lawyer and stayed off the witness stand. By not testifying, appellant may have avoided a death verdict, as he did at the first penalty trial.

The right to counsel error and the harmful nature of appellant's testimony must also be combined with what happened during appellant's testimony. His credibility was attacked through the misconduct of the prosecutor and the improper statements of the trial judge. The

prosecutor asked appellant repeatedly on cross-examination whether each of the prosecution witnesses had lied during their testimony, a tactic that has now been recognized as prosecutorial misconduct. The trial judge interrupted appellant's testimony and told the jury that appellant's testimony about altering the firearm used in the Skyles and Price murders was false testimony. These were extremely harmful and improper attacks upon appellant's credibility as a witness.

Credibility was a critical issue for the jury at the second penalty phase trial. During deliberations, the jury asked for the testimony of appellant to be re-read. Appellant was the only witness for which the jury made such a request. The decision concerning whether appellant should live or die was clearly being affected by the jury's evaluation of appellant's testimony and hence his credibility. Appellant may have lied in his testimony about shooting Skyles and Price, but the jury was only focusing on whether appellant should receive the death penalty for the Lester Eaton murder. From a later jury question, it appears that the jury was concerned with appellant testimony about the market robbery and the shooting of Lester Eaton.

During deliberations, the jury requested a clarification of "Factor E" in the jury instructions on mitigating circumstances. Factor E

was the mitigating circumstance of "whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct." Appellant's trial counsel told the court that he believed that the jury's question meant that the jury was considering whether the fact that Lester Eaton was armed with a gun and attempted to draw his weapon at the time of the shooting was a mitigating factor. (R.T. 4506-4508).

Appellant testified that during the robbery, Lester Eaton reached for a gun that he carried in a holster. Appellant grabbed Lester Eaton and wrestled him to the floor. Appellant testified that it was during the struggle on the floor that the gun went off and Mr. Eaton was shot. According to appellant, his mind went blank and he just kept shooting. (R.T. 4207-4208). During his testimony, appellant expressed remorse for his crimes and apologized to Betty Eaton and her family. (R.T. 4209-4212). By asking for a re-reading of appellant's testimony during deliberations, the jury must have been closely considering whether appellant's version of the events was credible. If so, his version was mitigating and may have been a basis for imposing a life sentence rather than the death penalty.

The prosecutor argued to the jury that appellant deserved the death penalty because he killed Lester Eaton without provocation by

shooting him five times, twice in the head and three times in the torso. He argued that the gun did not go off by accident. Rather, the killing of Mr. Eaton was a "cold blooded execution of a 66-year old man who was completely incapacitated and helpless on the floor." (R.T. 4443-4446). In persuading the jury to accept his version of the facts and impose the death penalty, the prosecutor's case was aided by the prosecutor's improper cross-examination technique and the trial judge's comment that appellant had given false testimony. These two errors combined to weaken appellant's credibility in the eyes of the jury and may have unfairly influenced the jury in their decision on the death penalty.

The decision on whether appellant should live or die must have been a close question for the jury. The jury deliberated for three days and a prior jury had hung 8 to 4 in favor of a life sentence. Several additional errors in appellant's case may have improperly swayed the jury toward a death verdict. Salvador Berber's unsubstantiated testimony that he would be killed by appellant and Michael Soliz if he ever returned home was highly prejudicial. It implied appellant needed to be killed in order to save Berber's life. Evidence that a shank had been found in appellant's jail cell was equally harmful to appellant's case. It created the image that if appellant was sentenced to life in prison, he might kill again. However, the

shank evidence was admitted without proper jury instructions explaining the elements of the crime in order that the jury might give effect to appellant's claim of innocence of the shank allegation. These errors combined to improperly push the jury in the direction of a death verdict.

In two instances, errors combined to prevent appellant from raising credible defenses during the penalty phase. The refusal to instruct on lingering doubt deprived appellant of an instruction that focused the jury's attention upon the strongest reason why appellant should not be put to death. There was lingering doubt in the Lester Eaton murder on the issue of whether the shooting was an intentional cold blooded shooting or whether the gun went off accidentally during appellant's struggle with Mr. Eaton. There was also lingering doubt concerning whether appellant aided and abetted Michael Soliz in the murders of Skyles and Price. The court's refusal to instruct on lingering doubt made appellant's case for a life sentence more difficult to achieve.

The second area where appellant's defense case was harmed was in the trial court's exclusion of evidence that appellant had been sentenced to life without possibility of parole for the murders of Skyles and Price. The prosecutor was able to show the jury that in addition to the Eaton murder, appellant had been convicted of the two additional first

degree murders of Skyles and Price. Appellant should have been allowed to mitigate this evidence by telling the jury that these were not capital murders and no death penalty had been imposed upon appellant for these murders. The exclusion of this evidence combined with the other errors to make it harder for appellant to receive a life sentence.

The final combination of errors in the penalty phase occurred during the jury instructions and final arguments. The trial court refused to give appellant's proposed jury instructions on mercy, sympathy, and age as mitigating factors. The prosecutor engaged in misconduct in final argument by improperly arguing that age was an aggravating factor in the case.

The numerous and cumulative nature of these errors was prejudicial. The prosecution did not have an overwhelming case for the death penalty for the murder of Lester Eaton. There is a reasonable possibility that absent these cumulative errors the verdict may have been life without possibility of parole. Therefore, appellant's death sentence should be reversed.

XXIV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime –

even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing

courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (Furman v. Georgia (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, Godfrey v. Georgia (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(People v. Edelbacher (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(Zant v. Stephens (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (People v Bacigalupo (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[29] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty

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[29] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in People v. Superior Court (Engert) (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-two.

law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (People v. Dillon (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See People v. Hillhouse (2002) 27 Cal.4th 469, 500-501, 512-515; People v. Morales (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[30] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It

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[30] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In People v. Stanley (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in Pulley v. Harris (1984) 465 U.S. 37, 53. Not so. In Harris, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, supra, 465 U.S. at 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that

challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[31] (See section E. of this Argument, *post*).

B. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

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[31] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in Furman v. Georgia (1972) 408 U.S. 238, 33 L.Ed.2d 346, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[32] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[33] or having had a "hatred of religion,"[34] or threatened witnesses after his arrest,[35] or disposed of the victim's body in a manner that precluded its recovery[36].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in

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[32] People v. Dyer (1988) 45 Cal.3d 26, 78; People v. Adcox (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[33] People v. Walker (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[34] People v. Nicolaus (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S.Ct. 3040 (1992).

[35] People v. Hardy (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S.Ct. 498.

[36] People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.*, 496 U.S. 931 (1990).

assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (Tuilaepa v. California (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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 been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[37] or that the defendant killed with a single execution-style wound.[38]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest,

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[37] See, e.g., People v. Morales, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); People v. Zapien, No. S004762, RT 36-38 (same); People v. Lucas, No. S004788, RT 2997-98 (same); People v. Carrera, No. S004569, RT 160-61 (same).

[38] See, e.g., People v. Freeman, No. S004787, RT 3674, 3709 (defendant killed with single wound); People v. Frierson, No. S004761, RT 3026-27 (same).

sexual gratification)[39] or that the defendant killed the victim without any motive at all.[40]

c. That the defendant killed the victim in cold blood[41] or that the defendant killed the victim during a savage frenzy.[42]

d. That the defendant engaged in a cover-up to conceal his crime[43] or that the defendant did not engage in a cover-up and so must have been proud of it.[44]

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[39] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 968-69 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-60 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3543-44 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge).

[40] 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).

[41] See, e.g., People v. Visciotti, No. S004597, RT 3296-97 (defendant killed in cold blood).

[42] See, e.g., People v. Jennings, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[43] See, e.g., People v. Stewart, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); People v. Benson, No. S004763, RT 1141 (defendant lied to police); People v. Miranda, No. S004464, RT 4192 (defendant did not seek aid for victim).

[44] See, e.g., People v. Adcox, No. S004558, RT 4607 (defendant freely informed others about crime); People v. Williams, No. S004365, RT 3030-31 (same); People v. Morales, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

e. That the defendant made the victim endure the terror of anticipating a violent death[45] or that the defendant killed instantly without any warning.[46]

f. That the victim had children[47] or that the victim had not yet had a chance to have children.[48]

g. That the victim struggled prior to death[49] or that the victim did not struggle.[50]

h. That the defendant had a prior relationship with the victim[51] or that the victim was a complete stranger to the defendant.[52]

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[45] See, e.g., People v. Webb, No. S006938, RT 5302; People v. Davis, No. S014636, RT 11,125; People v. Hamilton, No. S004363, RT 4623.

[46] See, e.g., People v. Freeman, No. S004787, RT 3674 (defendant killed victim instantly); People v. Livaditis, No. S004767, RT 2959 (same).

[47] See, e.g., People v. Zapien, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[48] See, e.g., People v. Carpenter, No. S004654, RT 16,752 (victim had not yet had children).

[49] 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).

[50] See, e.g., People v. Fauber, No. S005868, RT 5546-47 (no evidence of a struggle); People v. Carrera, No. S004569, RT 160 (same).

[51] See, e.g., People v. Padilla, No. S014496, RT 4604 (prior relationship); People v. Waidla, No. S020161, RT 3066-67 (same); People v. Kaurish (1990) 52 Cal.3d 648, 717 (same).

[52] See, e.g., People v. Anderson, No. S004385, RT 3168-69 (no prior relationship); People v. McPeters, No. S004712, RT 4264 (same).

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them 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 penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[53]

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[53] See, e.g., People v. Deere, No. S004722, RT 155-56 (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, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); People v. Samayoa, No. S006284, XL RT 49 (victim was an adult "in her prime"); People v. Kimble, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No. S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-16 (victim was "elderly").

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[54]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[55]

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[56]

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[54] See, e.g., People v. Clair, No. S004789, RT 2474-75 (strangulation); People v. Kipp, No. S004784, RT 2246 (same); People v. Fauber, No. S005868, RT 5546 (use of an ax); People v. Benson, No. S004763, RT 1149 (use of a hammer); People v. Cain, No. S006544, RT 6786-87 (use of a club); People v. Jackson, No. S010723, RT 8075-76 (use of a gun); People v. Reilly, No. S004607, RT 14,040 (stabbing); People v. Scott, No. S010334, RT 847 (fire).

[55] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-61 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (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).

[56] 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 2603-04 (late at night); People v. Lucero, No. S012568, RT 4125-26 (middle of the day).

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[57]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[58]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no

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[57] See, e.g., People v. Anderson, No. S004385, RT 3167-68 (victim's home); People v. Cain, No. S006544, RT 6787 (same); People v. Freeman, No. S004787, RT 3674, 3710-11 (public bar); People v. Ashmus, No. S004723, RT 7340-41 (city park); People v. Carpenter, No. S004654, RT 16,749-50 (forested area); People v. Comtois, No. S017116, RT 2970 (remote, isolated location).

[58] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright (1988) 486 U.S. 356, 363 [discussing the holding in Godfrey v. Georgia (1980) 446 U.S. 420].)

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none 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. 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 inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In People v. Fairbank (1997) 16 Cal.4th 1223, 1255, this Court said 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 . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466 [hereinafter Apprendi]; Ring v. Arizona (2002) 536 U.S. 584 [hereinafter *Ring*]; and Blakely v. Washington (2004) 124 S.Ct. 2531 [hereinafter Blakely].

In Apprendi, 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. (Apprendi, *supra,* 530 U.S. at 478.)

In Ring, the high court struck down Arizona's death penalty 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 593.) The court acknowledged that in a prior case reviewing Arizona's capital

sentencing law (Walton v. Arizona (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Ring, *supra,* 536 U.S. at 598.) The court found that in light of Apprendi, Walton no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In 2004, in Blakely, the high 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 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 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." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in Apprendi, Ring, and Blakely, and violates the federal Constitution.

a. In the Wake of Apprendi, Ring, and Blakely, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

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.[59] Only

[59] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); State v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; State v. Simants (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. 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.

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*; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty,

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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 circumtances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (State v. Ring (Az., 2003) 65 P.3d 915.)

section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[60] 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 (C.T. 926), "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.*" (CALJIC No. 8.88; emphasis added.)

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.[61] These factual determinations

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[60] 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 (1988) 46 Cal.3d 432, 448.)

[61] 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)

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.[62]

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 section 190.2(a)), Apprendi does not apply. After Ring, this Court repeated the same analysis in People v. Snow (2003) 30 Cal.4th 43 [hereinafter Snow], and People v. Prieto (2003) 30 Cal.4th 226 [hereinafter Prieto]: "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." (People v. Prieto, *supra*, 30 Cal.4th at 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[63]

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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.*, 59 P.3d at 460)

[62] 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 prison. (People v. Allen (1986) 42 Cal.3d 1222, 1276-1277; People v. Brown *(Brown I)* (1985) 40 Cal.3d 512, 541.)

[63] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or

indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in Ring. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorised by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(Ring, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (Ring, *supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied

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imprisonment in the state prison for a term of 25 years to life."

"shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See People v. Hernandez (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[64] while California's

[64] Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the

statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[65] There is no meaningful difference between the processes followed under each scheme.

"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, 536 U.S. at 604.) In Blakely, the high court made it clear that, as Justice Breyer pointed out, " 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." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional

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trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[65] Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

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. 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." (Snow, *supra*, 30 Cal.4th at 126, fn. 32; citing Anderson, *supra*, 25 Cal.4th at 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." (Prieto, 30 Cal.4th at 275; Snow, 30 Cal.4th at 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. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And Blakely makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In Prieto, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (Tuilaepa v. California (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (Prieto, 30 Cal.4th at 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, as noted above, 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 915, 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; State v. Ring (Az. 2003) 65 P.3d 915; Woldt v. People (Colo.2003) 64 P.3d 256; Johnson v. State (Nev. 2002) 59 P.3d 450.[66])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and

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[66] 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).

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, *supra*, 124 S.Ct. at 2538.) Thus, under Apprendi, Ring, and Blakely, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[67]

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[67] In People v. Griffin (2004) 33 Cal.4th 536, this Court's first post-Blakely discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in Prieto and Snow. The Court cited Cooper Industries, Inc. v. Leatherman

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to Apprendi, Ring and Blakely are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of

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Tool Group, Inc. (2001) 532 U.S. 424, 432, 437 [hereinafter Leatherman], for the principles 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"].) (Griffin, *supra*, 33 Cal.4th at 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 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.*, 532 U.S. at 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.

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 would still be life without possiblity of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (Prieto, 30 Cal. 4th at 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, *supra*, 536 U.S. at 606, quoting with approval Justice O'Connor's Apprendi dissent, 530 U.S. at 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (Monge v. California (1998) 524 U.S. 721, 732 ["the death penalty is unique in both its severity and its finality"].)[68] As the high court stated in Ring, *supra*, 536 U.S. at 608, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

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,

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[68] The Monge court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed Ring, and expressly stated that the Santosky v. Kramer ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied 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.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, *supra*, 524 U.S. at 732 (emphasis added).)

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 U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (People v. Taylor (1990) 52 Cal.3d 719, 749; *accord*, People v. Bolin (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[69] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*; Blakely, *supra*.)

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[69] See, e.g., Griffin v. United States (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem.* Murray v. Hoboken *Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (Brown v. Louisiana (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].[70]) Particularly given the "acute need for reliability in capital sentencing proceedings" (Monge v. California, *supra*, 524 U.S. at 732;[71] *accord*, Johnson v. Mississippi (1988) 486 U.S. 578,

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[70] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (Johnson v. Louisiana (1972) 406 U.S. 356; Apodaca v. Oregon (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[71] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' Gardner v. Florida 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (Monge v. California, *supra*, 524 U.S. at 731-732.)

584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see Monge v. California, *supra*, 524 U.S. at 732; Harmelin v. Michigan (1991) 501 U.S. 957, 994), and certainly no less (Ring, 536 U.S. at 609).[72] See section D, *post*.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[73] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (People v. Medina (1995) 11 Cal.4th 694, 763-764) – would by its inequity

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[72] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[73] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See People v. Wheeler (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

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 U.S. 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.*

(*Richardson, supra*, 526 U.S. at 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (People v. Hawthorne, *supra*; People v. Hayes (1990) 52 Cal.3d 577, 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.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case 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.

a. 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 (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself,

must satisfy the requirements of the Due Process Clause." (Gardner v. Florida (1977) 430 U.S. 349, 358; see also Presnell v. Georgia (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. 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. (Winship, *supra*, 397 U.S. at 363-364; see also Addington v. Texas (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship, supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the

private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (Santosky v. Kramer (1982) 455 U.S. 743, 755; see also Matthews v. Eldridge (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," Speiser, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See Winship, *supra* (adjudication of juvenile delinquency); People v. Feagley (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); People v. Burnick (1975) 14 Cal.3d 306 (same); People v. Thomas (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by

imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 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 omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], 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."

(455 U.S. at 755.)

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, *supra*, 455 U.S. at 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." (Winship, *supra*, 397 U.S. at 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, *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (Beck v. Alabama (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see Monge v. California (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In Monge, the U.S. 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.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, *supra*, 524 U.S. at 732 (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 are the factual bases for its decision are true, but that death is the appropriate sentence.

Appellant is aware that 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 People v. Griffin (2004) 33 Cal.4th 536, 595; People v. Rodriguez (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently

explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(State v. Rizzo (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

In sum, the need for reliability is especially compelling in capital cases. (Beck v. Alabama (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See Monge v. California, *supra*, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) 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.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the

evidence burden of proof. (See, e.g., Griffin v. United States (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; Den ex dem. Murray v. Hoboken Land and Improvement Co., *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "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 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 (1980) 447 U.S. 343, 346.)

Accordingly, appellant respectfully suggests that People v. Hayes – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons,

appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (Hicks v. Oklahoma, *supra*, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (Sullivan v. Louisiana (1993) 508 U.S. 275.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (People v. Hayes, *supra*, 52 Cal.3d at 643.) However, even with a normative determination to make, 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. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (Eddings v. Oklahoma (1982) 455 U.S. at 112.) It is unacceptable – "wanton" and "freakish" (Proffitt v. Florida, *supra*, 428 U.S. at 260) – the "height of arbitrariness" (Mills v. Maryland (1988) 486 U.S. 367, 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.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

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*.) 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.[74] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the 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 is not, is reversible per se. (Sullivan v. Louisiana, *supra.*)

6. California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (California v. Brown, *supra*, 479 U.S. at 543; Gregg v. Georgia, *supra*, 428 U.S. at

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[74] See, e.g., *People v. Dunkle*, No. S014200, RT 1005.

195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (People v. Fairbank, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See Townsend v. Sain (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (People v. Fauber (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (In re Sturm (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that

his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 269.)[75] The same analysis applies to the far graver decision to put someone to death. (See also People v. Martin (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (Harmelin v. Michigan, *supra,* 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

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[75] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

Written findings are essential for a meaningful review of the sentence imposed. In Mills v. Maryland, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is "normative" (People v. Hayes, *supra*, 52 Cal.3d at 643) and "moral" (People v. Hawthorne, *supra*, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[76]

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[76] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); State v. White (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art.

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As Ring v. Arizona has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated

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905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 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. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (Barclay v. Florida (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting Proffitt v. Florida (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In Pulley v. Harris (1984) 465 U.S. 37, 51, the high court, while declining to hold that

comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in Harris, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, 465 U.S. at 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in Furman v. Georgia, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has

deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See Gregg v. Georgia, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See Atkins v. Virginia (2002) 536 U.S. 304, 316 fn. 21; Thompson v. Oklahoma (1988) 487 U.S. 815, 821, 830-831; Enmund v. Florida (1982) 458 U.S. 782, 796, fn. 22; Coker v. Georgia (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision

was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in Furman v. Georgia (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (Gregg v. Georgia (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (Proffitt v. Florida (1976) 428 U.S. 242, 259, 96 S.Ct. 2960, 49 L.Ed.2d 913.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[77]

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[75] 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, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see State v. Dixon (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433,444; People v. Brownell (Ill. 1980) 404 N.E.2d 181,197; Brewer v. State (Ind. 1981) 417 N.E.2d 889, 899; State v. Pierre (Utah 1977) 572 P.2d 1338, 1345; State v. Simants (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; State v. Richmond (Ariz. 1976) 560 P.2d 41,51; Collins v. State (Ark. 1977) 548 S.W.2d 106,121.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See People v. Fierro, *supra*, 1 Cal.4th at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., People v. Marshall (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in Pulley v. Harris – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned

in *Furman* in violation of the Eighth and Fourteenth Amendments. (Gregg v. Georgia, *supra*, 428 U.S. at 192, citing Furman v. Georgia, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., Johnson v. Mississippi (1988) 486 U.S. 578; State v. Bobo (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses.

At the penalty trial, the prosecutor presented evidence that appellant robbed a gas station when he was 13 years old. He carried a knife during the robbery. (R.T. 4085-4087; 4091-4097) Evidence was also presented that a shank, a jail made knife, was found in appellant's jail cell at the Los Angeles County Jail. (R.T. 4105-4113)

The prosecutor relied upon the gas station robbery and the possession of the shank in the jail as aggravating factors under "Factor B," other crimes involving a threat of violence. (R.T. 4394-4397; 4438-4440) He argued that the appellant's possession of the shank in the jail was evidence that appellant was not interested in rehabilitation and should be put to death. (R.T. 4397)

The United States Supreme Court's recent decisions in Blakely v. Washington, *supra*, Ring v. Arizona, *supra*, and Apprendi v. New Jersey, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it

were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Mills v. Maryland (1988) 486 U.S. 367; Lockett v. Ohio (1978) 438 U.S. 586.) In appellant's case, the jury was instructed pursuant to CALJIC 8.85 which used the restrictive adjectives in the list of potential mitigating factors. (C.T. 921-922)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Edelbacher (1989) 47 Cal.3d 983, 1034; People v. Lucero (1988) 44 Cal.3d 1006, 1031, fn.15; People v. Melton (1988) 44 Cal.3d 713, 769-770; People v. Davenport (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Zant v. Stephens (1983) 462 U.S. 862, 879; Johnson v. Mississippi (1988) 486 U.S. 578, 584-585.)

In appellant's case, the jury during deliberations asked for a clarification of the meaning of Factor (e), whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct. (R.T. 4506-4511) The jury wanted to know the meaning of the term "homicidal conduct." The Court responded, it means killing. (R.T. 4514-4516) This shows that the jury was having difficulty interpreting the list of factors in CALJIC 8.85. (C.T. 921-922)

The prosecutor also argued to the jury that appellant's age was an aggravating factor. Appellant was 19 years old at the time of the crimes. The prosecutor argued appellant was old enough to know better. (R.T. 4405) However, the Supreme Court has held that "a defendant's youth is a relevant mitigating circumstance." (Johnson v. Texas (1993) 509 U.S. 350, 367.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than

he might otherwise be by relying upon . . . illusory circumstance[s]." (Stringer v. Black (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital

sentencing procedures must protect against "'arbitrary and capricious action'" (Tuilaepa v. California (1994) 512 U.S. 967, 973 quoting Gregg v. Georgia (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (Eddings v. Oklahoma, *supra*, 455 U.S. at 112.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., Monge v. California, *supra*, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an

interest protected under both the California and the United States Constitutions." (People v. Olivas (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' Trop v. Dulles, 356 U.S. 86, 102 (1958)." (Commonwealth v. O'Neal (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (Westbrook v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (People v. Olivas, *supra*; Skinner v. Oklahoma (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In Prieto,[78] as in Snow,[79] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate

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78 "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (Prieto, 30 Cal.4th at 275; emphasis added.)

79 "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (Snow, 30 Cal.4th at 126, fn. 3; emphasis added.)

facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See People v. Allen (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to Prieto and Snow, there is no hint in Allen that capital and

non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (People v. Allen, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (McCleskey v. Kemp (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (Coker v. Georgia, *supra*, 433 U.S. 584) or offenders (Enmund v. Florida (1982) 458 U.S. 782; Ford v. Wainwright (1986) 477 U.S. 399; *Atkins v. Virginia, supra*.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial

judge is not only allowed but required in particular circumstances. (See section 190.4; People v. Rodriguez (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by Allen for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (People v. Allen, *supra*, 42 Cal.3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (Ford v. Wainwright, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (Woodson v. North Carolina (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also Reid v. Covert (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.];

Kinsella v. United States (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; Gregg v. Georgia, *supra*, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; Gardner v. Florida (1977) 430 U.S. 349, 357-358; Lockett v. Ohio, *supra*, 438 U.S. at 605 [plur. opn.]; Beck v. Alabama (1980) 447 U.S. 625, 637; Zant v. Stephens, *supra*, 462 U.S. at 884-885; Turner v. Murray (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting California v. Ramos (1983) 463 U.S. 992, 998-999; Harmelin v. Michigan, *supra*, 501 U.S. at 994; Monge v. California, *supra*, 524 U.S. at 732.)[80] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against,

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[80] The Monge court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (Monge v. California, *supra*, 524 U.S. at 731-732.)

requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (Allen, *supra*, at 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in Prieto and Snow. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (Bush v. Gore (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents

violations of rights guaranteed to the people by state governments. (Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., Atkins v. Virginia, *supra.*)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [People v. Allen, *supra*, 42 Cal.3d at 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (Blakely v. Washington, *supra*; Ring v. Arizona, *supra.*)[81]

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[81] Although Ring hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., Mills v. Maryland, *supra*, 486 U.S. at 374; Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (Monge v. California, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (Ring, *supra*, 536 U.S. at 609.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also People v. Bull (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., Stanford v. Kentucky (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306]

[dis. opn. of Brennan, J.]; Thompson v. Oklahoma, *supra*, 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.)[82]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in Miller v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot (1895) 159 U.S. 113, 227; Sabariego v. Maverick (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

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[82] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (Furman v. Georgia, *supra*, 408 U.S. at 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles (1958) 356 U.S. 86, 100; Atkins v. Virginia, *supra*, 536 U.S. at 325.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (Atkins v. Virginia, *supra*, 536 U.S. at 316, fn. 21, citing the Brief for The European Union as

Amicus Curiae in McCarver v. North Carolina, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See Atkins v. Virginia, *supra.*) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (Hilton v. Guyot (1895) 159 U.S. 113, 227; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311])

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[83] Categories of criminals that warrant such a

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[83] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the

comparison include persons suffering from mental illness or developmental disabilities. (Cf. Ford v. Wainwright, *supra*; Atkins v. Virginia, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

XXV. APPELLANT JOINS IN THE ARGUMENTS MADE BY THE CO-APPELLANT MICHAEL SOLIZ

Pursuant to California Rules of Court, Rule 13(a)(5), the appellant joins in the arguments made by the co-appellant Michael Soliz in his briefs.

CONCLUSION

Based upon the foregoing, appellant urges the Court to reverse his convictions and death sentence, and remand the case for a new trial.

Dated: June 6, 2005

Respectfully submitted,

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CERTIFICATION

The undersigned hereby certifies that the type-size used in this brief is 13 point type-size and the brief contains 132,681 words.

Joseph F. Walsh

Joseph F. Walsh

STATUTORY APPENDIX

Jurisdictions That Bar Retrial Of The Penalty Phase When The Jury Is Unable To Reach A Unanimous Verdict On The Penalty And That Require The Imposition Of A Sentence Of Life Imprisonment Or Life Imprisonment Without Parole

Federal Death Penalty Act of 1994

18 U.S.C. §3594

["Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the Court shall sentence the defendant accordingly. Otherwise, the Court shall impose any lesser sentence that is authorized by law ... life imprisonment [or] ... life imprisonment without possibility of release."] (Jones v. United States (1999) 527 U.S. 373, 380-381 [Section 3594 interpreted to require sentence of life or life without parole if the jury is deadlocked at the penalty phase]

Federal Anti-Drug Abuse and Death Penalty Act of 1988

21 U.S.C. 848(l)

["Upon the recommendation that the sentence of death be imposed, the Court shall sentence the defendant to death. Otherwise, the Court shall impose a sentence, other than death, authorized by law."] (Jones v. United States, supra, 527 U.S. 373, 419 [Section 848(l) interpreted to require a sentence of life or life without parole if the jury is deadlocked at the penalty phase.]

Arkansas

Ark.Stat.Ann. §5-4-603(c) (1993)

["If the jury does not make all findings required by subsection (a) [aggravating circumstances] of this section, the Court shall impose a sentence of life imprisonment without parole.]

Colorado

Col.Rev.Stat. §18-1.3-1201(2)(b)(II)(d) (2003)

["If the jury's verdict is not unanimous, the jury shall be discharged, and the Court shall sentence the defendant to life imprisonment."]

Georgia

Ga. Code Ann. §17-10-31.1(c) (Supp. 1994)

["Where a jury has been impaneled to determine sentence and the jury has unanimously found the existence of at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence or either life imprisonment or imprisonment for life without parole."]

Idaho

Idaho Code §19-2515(7)(c)(2003)

["If the jury does not find the existence of a statutory aggravating circumstance or if the jury cannot unanimously agree on the existence of a statutory aggravating circumstance, the defendant will be sentenced by the Court to a term of life imprisonment with a fixed term of not less than ten (10) years."]

Illinois

Ill.Ann.Stat.Ch. 720 §5/9-1(g) (2003)

["If after weighing the factors in aggravation and mitigation, one or more of the jurors determines that death is not the appropriate sentence, the Court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections."]

Kansas

Kan.Stat.Ann. §21-4624(e) (1994)

["If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of imprisonment as provided by law and shall commit the defendant to the custody of the secretary of corrections."]

Louisiana

La. Code Crim. Proc. Ann. Art. 905.8 (1997)

["If the jury is unable to unanimously agree on a determination, the Court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."]

Maryland

Md. Ann. Code Art. 27, §413(k)(2) (1996)

["If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the Court may not impose a sentence of death."]

Mississippi

Miss. Code Ann. §99-19-103 (2003)

["If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."]

Missouri

Mo. Rev. Stat. §565.030(4) (2000)

["If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment, the Court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death."

New Hampshire

N.H.Rev.Stat.Ann. §630:5(IX) (1995)

["If the jury cannot agree on the punishment within a reasonable time, the judge shall impose the sentence of life imprisonment without possibility of parole."]

New Jersey

N.J.Stat.Ann. §2C:11-3(c)(3)(c) (Supp. 2004)

["If the jury is unable to reach a unanimous verdict, the Court shall sentence the defendant pursuant to subsection b ["30 years, during which the person shall not be eligible for parole"].]

New Mexico

N.M.Stat.Ann. §31-20A-3 (2004)

["Where a sentence of death is not unanimously specified, or the jury does not make the required finding, or the jury is unable to reach a unanimous verdict, the Court shall sentence the defendant to life imprisonment."]

New York

N.Y.Crim.Proc.Law §400.27(10) (2001)

["The Court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the Court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and thirty-five years and a maximum term of life."}

Nebraska

Neb.Rev.Stat. §29-2520 (4)(f) and (h) (2002)

["(f) The jury at the aggravation hearing shall deliberate and return a verdict as to the existence or non-existence of each alleged aggravating circumstance. ...If the jury is unable to reach a unanimous verdict with respect to an aggravating circumstance, such aggravating circumstance shall not be weighed in the sentencing determination proceeding as provided in section 29-2521.

...

(h) If no aggravating circumstance is found to exist, the Court shall enter a sentence of life imprisonment without parole."]

North Carolina

N.C.Gen.Stat. §15A-2000(b) (2001)

["If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation."]

Ohio

Ohio Rev. Code Ann. §2929.03(D)(2) (1996)

["If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the Court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following: ... life imprisonment without parole, life imprisonment with parole eligibility ..."] (State v. Springer (1992) 63 Ohio St.3d 167, 172, 586 N.E.2d 96, 100. [when the jury is deadlocked on sentencing, "the trial judge is required to sentence the offender to life imprisonment."].)

Oklahoma

Okla.Stat.Ann.Tit. 21 §701.11 (1987)

["If the jury cannot, within a reasonable period of time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life."]

Pennsylvania

Pa.Stat.Ann.Tit. 42 §9711(c)(1)(v) (1998)

["the Court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to sentence, in which case the Court shall sentence the defendant to life imprisonment."]

South Carolina

S.C. Code Ann. §16-3-20 (c) (2002)

["If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A)."]

South Dakota

S.D. Codified Laws Ann. §23A-27A-4 (1979)

["If an aggravating circumstance is found and a recommendation of death is made, the Court shall sentence the defendant to death. If a sentence of death is not recommended by the jury, the Court shall sentence the defendant to life imprisonment."]

Tennessee

Tenn. Code Ann. §39-13-204(h) (2002)

["If the jury cannot ultimately agree on punishment, the trial judge shall inquire of the foreperson of the jury whether the jury is divided over imposing a sentence of death. If the jury is divided over imposing a sentence of death, the judge shall instruct the jury that in further deliberations, the jury shall only consider the sentences of imprisonment for life without the possibility of parole and imprisonment for life. If, after further deliberations, the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and such judge shall impose a sentence of imprisonment for life."]

Texas

Tex.Crim.Proc. Code Art. 37.071(2)(g) (2001)

["If the jury returns a negative finding on any issue submitted under subsection (b) of this article [aggravating circumstances] or an affirmative finding on an issue submitted under subsection (e) of this article [mitigating circumstances] or is unable to answer any issue submitted under subsection (b) or (e) of this article, the Court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life."]

Utah

Utah Code Ann. §76-3-207(5)(c) (2003)

["If the jury is unable to reach a unanimous decision imposing a sentence of death or the state is not seeking the death penalty, the jury shall then determine whether the penalty of life in prison without parole shall be imposed ... If ten jurors or more do not agree upon a sentence of life in prison without parole, the Court shall discharge the jury and impose an indeterminate prison term of not less than 20 years and which may be for life."]

Virginia

Va. Code Ann. §19.2-264.4(E) (2003)

["In the event the jury cannot agree as to the penalty, the Court shall dismiss the jury, and impose a sentence of imprisonment for life."]

Washington

Wash.Rev.Code Ann. §10.95.030(2) (1981)

["If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4) [unanimously find "beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency."], the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1)."]

Wyoming

Wyo.Stat.Ann. §6-2-102(d)(ii) (2001)

["If the jury is unable to reach a unanimous verdict imposing the sentence of death within a reasonable time, the Court shall instruct the jury to determine by a unanimous vote whether the penalty of life imprisonment without parole shall be imposed. If the jury is unable to reach a unanimous verdict imposing the penalty of life imprisonment without parole within a reasonable time, the Court shall discharge the jury and impose a sentence of life imprisonment."]

CERTIFICATE OF SERVICE

I, the undersigned, certify:

That I am a citizen of the United States, over the age of eighteen years, and not a party to the within cause; I am employed in the City and County of Los Angeles, State of California; my business address is 316 W. Second Street, Suite 1200.

On this date I caused to be served on the interested parties hereto, a copy of **APPELLANT'S OPENING BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below:

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, and that this Certificate has been executed on June 6, 2005, at Los Angeles, California.

CANDACE PARK