SUPREME COURT COPY

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	No. S075616
	)	
	)	(Los Angeles Superior Court No. KA033736-01)
Plaintiff and Respondent	)	
v.	)	
JOHN ANTHONY GONZALES, MICHAEL SOLIZ,	)	
Defendant and Appellant,	)	

SUPREME COURT
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Frederick K. Ohlrich Clerk
Deputy

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

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

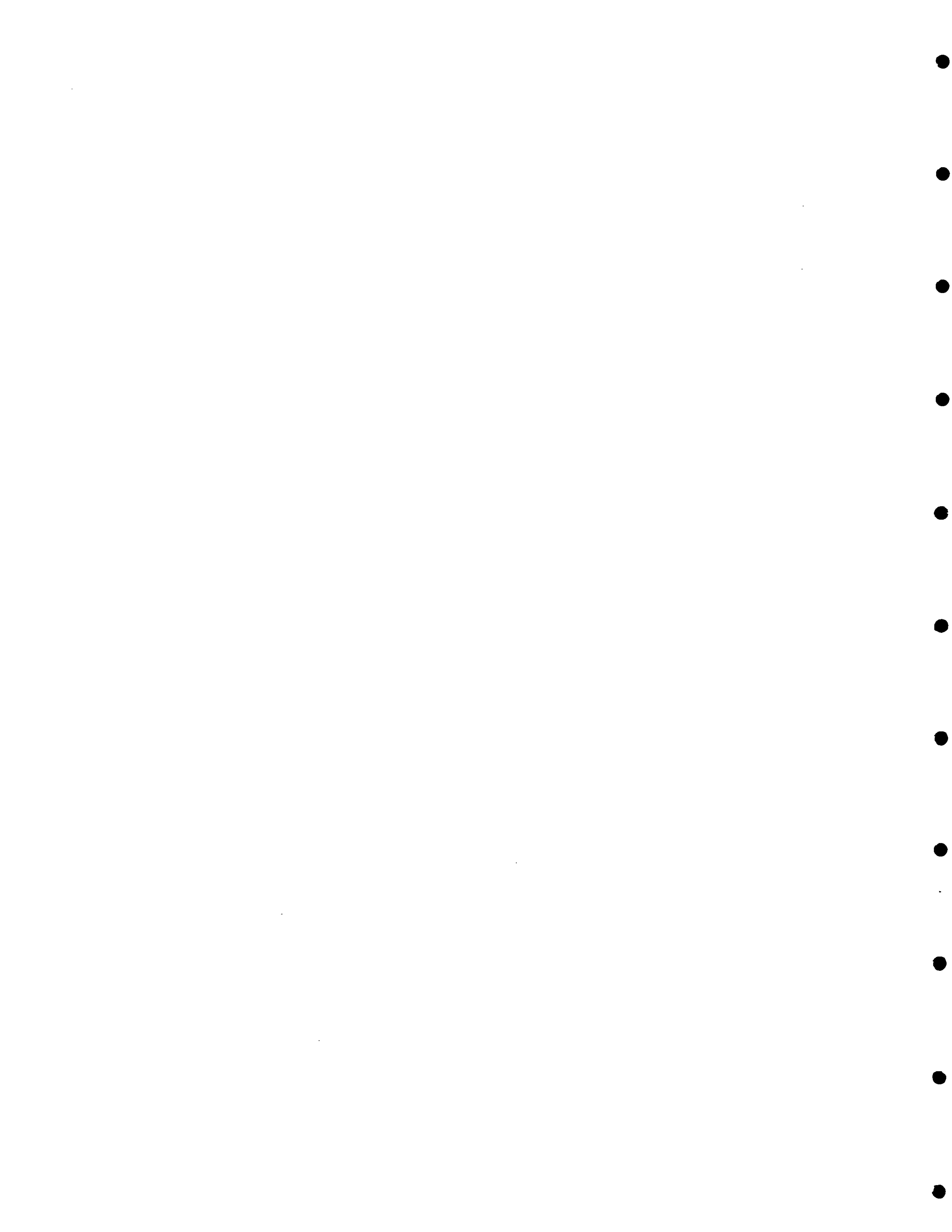

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENTS:

I. THE COURT ERRED IN DENYING A SEVERANCE OF THE EATON MURDER FROM THE SKYLES AND PRICE MURDERS 2

A. The Prosecutor's Argument To The Jury 2

B. The Severance Issue Was Not Waived 5

C. There Was No Overwhelming Evidence Of Appellant Gonzales' Guilt On The Skyles And Price Murders 6

D. The Prosecutor Did Join A Weaker Case (Skyles And Price) With A Stronger Case (Eaton) 8

E. The Ballistics Evidence Was Only Partially Cross-Admissible And Was Only Relevant In The Case Of Co-Appellant Soliz 10

F. The Absence Of A Limiting Jury Instruction 14

G. Appellant's Involvement As The Shooter In The Eaton Murder Was Far More Inflammatory Than His Mere Presence At The Skyles And Price Murders 15

H. There Is A Higher Degree Of Scrutiny Of Severance Issues In Capital Cases 17

I. The Gang Allegation And The Gang Evidence 18

J. Conclusion 20

II. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE TAPE RECORDED CONVERSATION BETWEEN APPELLANT AND SALVADOR BERBER IN THE SHERIFF'S VAN 21

A. Miranda 22

B. Massiah 23

III. THE COURT ERRED IN DENYING A MOTION FOR THE APPOINTMENT OF A SECOND COUNSEL 25

IV. THE COURT ERRED IN DENYING A MOTION FOR THE APPOINTMENT OF A SECOND INVESTIGATOR 27

V. THE EVIDENCE IS INSUFFICIENT TO CONVICT APPELLANT OF THE FIRST DEGREE MURDERS OF SKYLES AND PRICE 30

VI. THE COURT ERRED IN INSTRUCTING ON THE LAW OF AIDING AND ABETTING THAT THE CRIME OF MURDER IS A NATURAL AND PROBABLE CONSEQUENCE OF THE COMMISSION OF THE CRIME OF SIMPLE ASSAULT 37

VII. THE COURT FAILED TO SUA SPONTE INSTRUCT ON VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE ON THE SKYLES AND PRICE MURDER CHARGES 43

VIII. THE COURT FAILED TO SUA SPONTE INSTRUCT THE JURY PURSUANT TO PENAL CODE SECTION 1111 ON ACCOMPLICE TESTIMONY 46

IX. THE PROSECUTOR ENGAGED IN MISCONDUCT IN HIS FINAL ARGUMENT TO THE JURY IN THE GUILT PHASE OF THE TRIAL 50

X. APPELLANT'S CONVICTIONS SHOULD BE REVERSED BASED UPON THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS 51

XI. APPELLANT DID NOT WAIVE HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY QUESTIONED ON RACIAL BIAS AND THE COURT'S REFUSAL TO QUESTION THE JURY AFTER APPELLANT'S LATE OBJECTION REQUIRES AUTOMATIC REVERSAL OF THE DEATH SENTENCE 51

XII. THE COURT VIOLATED THE WITHERSPOON AND WITT CASES WHEN IT EXCUSED JURY 8763 FOR CAUSE 63

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 . . 70

A. Introduction 70

B. The Conflict Of Interest 71

C. The Federal Constitution 72

D. The California Constitution 75

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 80

A. The "Were They Lying" Questions Were Misconduct Under The Facts Of This Case 81

1. Deputy Esquivel 84

2. Doreen Ramos 85

3. Carol Mateo, Jeremy Robinson, And Alejandro Garcia 85
4. Betty Eaton 87
5. Judith Mejorado 87

B. The Improper Cross-Examination Was Prejudicial 88

C. The Issue Was Preserved For Appeal 91

XV. APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS, TO AN IMPARTIAL JUDGE AND TO CONFRONT AND CROSS-EXAMINATION 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 PRICE MURDERS, WAS FALSE TESTIMONY 95

A. The Error Was Not Waived 95

B. The Respondent Has Almost Conceded That The Judge's Comments were Error 98

C. The Error Was Prejudicial Because The Judge's Comments May Have Had A Negative Effect On The Jury's Evaluation Of Appellant's Credibility–A Key Issue In The Case 102

XVI. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AT THE SECOND PENALTY TRIAL ON THE ISSUE OF LINGERING DOUBT 104

A. The Facts Of The Case Are Unique 105

B. The Oregon v. Guzek Case 107

C. The Smith, Brewer, And Abdul-Kabir Cases 110

D. The Error Was Prejudicial 119

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 121

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 125

XIX. THE COURT ERRED IN ALLOWING SALVADOR BERBER TO TESTIFY IF HE EVER RETURNED TO HIS HOME IN LA PUENTE, APPELLANT AND CO-DEFENDANT MICHAEL SOLIZ WOULD KILL HIM . 130

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 133

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 136

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 137

XXIII. APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BASED UPON THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS 137

XXIV. APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHT TO A JURY TRIAL 138

A. The Relevant Statutory Maximum Is LWOP 139

B. Normative Findings Are Subject To The Sixth Amendment 142

XXV. APPELLANT JOINS IN THE ARGUMENTS MADE BY THE CO-APPELLANT MICHAEL SOLIZ 146

CONCLUSION 146

PROOF OF SERVICE 147

TABLE OF CONTENTS

Page(s)

UNITED STATES SUPREME COURT CASES:

Abdul-Kabir v. Quarterman (2007) 127 S. Ct. 1654 111,113,115,120

Ake v. Oklahoma (1985) 470 U.S. 68 27,29

Apprendi v. New Jersey (2000) 530 U.S. 466 48,138

Atkins v. Virginia (2002) 536 U.S. 304 124

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Beck v. Alabama (1980) 447 U.S. 625 43

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Cuyler v. Sullivan (1980) 446 U.S. 335 72

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TABLE OF CONTENTS

Page(s)

Glasser v. United States (1942) 315 U.S. 60 73

Gray v. Mississippi (1978) 481 U.S. 648 69

Gregg v. Georgia (1976) 428 U.S. 153 143

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Illinois v. Perkins (1990) 496 U.S. 292 22

In re Winship (1970) 397 U.S. 358 37

Jackson v. Virginia (1980) 443 U.S. 307 30

Johnson v. Mississippi (1988) 486 U.S. 578 21,37,43

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Kansas v. Marsh (2006) 126 S. Ct. 2516 142,143

Kuhlmann v. Wilson (1986) 477 U.S. 436 23

Lewis v. Jeffers (1990) 497 U.S. 763 124

Lockett v. Ohio (1978) 438 U.S. 586 108,125,126

Massiah v. United States (1964) 377 U.S. 201 21,23

McNeil v. Wisconsin (1991) 501 U.S. 171 23

Mickens v. Taylor (2002) 535 U.S. 162 72,73,75,79

Miranda v. Arizona (1966) 384 U.S. 436 21,23

Oregon v. Guzek (2006) 546 U.S. 517 107,108

Penry v. Johnson (2001) 532 U.S. 782 105,111,112

Penry v. Lynaugh (1989) 492 U.S. 302 . 105,108,111,113,114,115,119,120

Powell v. Alabama (1932) 287 U.S. 45 74,79

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TABLE OF CONTENTS

Page(s)

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Socher v. Florida (1992) 504 U.S. 527 88

Texas v. Cobb (2001) 532 U.S. 162 23

Trope v. Dulles (1958) 356 U.S. 86 121,124

Tuilaepa v. California (1994) 512 U.S. 967 142

Turner v. Murray (1986) 476 U.S. 28 51,52,53,62

United States v. Gaudin (1995) 515 U.S. 506 46,48

United States v. Lane (1985) 474 U.S. 438 2,9

Uttecht v. Brown (2007) 127 S. Ct. 2218 68

Wainwright v. Witt (1985) 469 U.S. 412 62,63

Wheat v. United States (1988) 486 U.S. 153 71,72

Williams v. Taylor (2000) 529 U.S. 362 68

Witherspoon v. Illinois (1968) 391 U.S. 510 63,68

Zant v. Stephens (1983) 463 U.S. 862 143

FEDERAL COURT CASES:

Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073 2,4,5,9,15

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Hovey v. Ayers (9th Cir. 2006) 458 F.3d 892 73

Juan H. v. Allen (9th Cir. 2005) 408 F.3d 1262 7,8,32,34

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United States v. Levy (2d Cir. 1994) 25 F.3d 142 71

TABLE OF CONTENTS

Page(s)

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Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450 40

Coleman v. Superior Court (1981) 116 Cal.App.3d 129 16

Corenevsky v. Superior Court (1984) 36 Cal.3d 307 27

In re Deborah C. (1981) 30 Cal.3d 125 22

In re Eric J. (1979) 25 Cal.3d 522 129 22

In re Lynette G. (1976) 54 Cal. App.3d 1087 34

In re Michael T. (1978) 84 Cal.App.3d 907 3,7,30,35

In re Sakarias (2005) 35 Cal.4th 140 36

In re Seaton (2004) 34 Cal.4th 193 58

Merritt v. Reserve Ins. Co. (1973) 34 Cal.App.3d 858 100

Milton v. State Bar (1969) 71 Cal.2d 525 25

People v. Anderson (2001) 25 Cal.4th 543 138,140

People v. Arias (1996) 13 Cal.4th 92 14,96

People v. Armendariz (1984) 37 Cal.3d 573 60

People v. Avena (1996) 13 Cal.4th 394 54

People v. Avila (2006) 38 Cal.4th 491 105

People v. Balcom (1994) 7 Cal.4th 414 13

People v. Barnett (1998) 17 Cal.4th 1044 100

People v. Balderas (1985) 41 Cal.3d 144 16

People v. Benevides (2005) 35 Cal.4th 69 55

People v. Barton (1995) 12 Cal.4th 186 45

People v. Beaman (1973) 8 Cal.3d 635 31,34

People v. Black (2005) 35 Cal.4th 1238 139

People v. Bob (1946) 29 Cal.2d 321 60

TABLE OF CONTENTS

Page(s)

People v. Bonilla (2007) ___ Cal.4th ___ 138

People v. Bonin (1998) 47 Cal.3d 808 72,80

People v. Boldin (2002) 29 Cal.4th 515 52

People v. Boyette (2002) 29 Cal.4th 381 102

People v. Bradford (1997) 15 Cal.4th 1229 9,11

People v. Brooks (1986) 185 Cal.App.3d 687 43,44

People v. Breverman (1998) 19 Cal.4th 142 43,45

People v. Brown (2003) 31 Cal.4th 518 47

People v. Brown (1988) 46 Cal.3d 432 88,129,133

People v. Burgener (2003) 29 Cal.4th 833 131

People v. Butts (1965) 236 Cal.App.2d 817 38,39

People v. Campbell (1994) 25 Cal. App.4th 402 34

People v. Cardenas (1982) 31 Cal.3d 897 90

People v. Carey (2007) __ Cal.4th __ 138

People v. Carpenter (1997) 15 Cal.4th 312 10

People v. Carter (2003) 36 Cal.4th 100 133

People v. Chatman (2006) 38 Cal.4th 344 81,82,83,85,94

People v. Chagolla (1983) 144 Cal. App.3d 422 34

People v. Cole (2004) 33 Cal.4th 1158 81,131

People v. Cook (2006) 39 Cal.4th 566 12

People v. Cook (1983) 33 Cal.3d 400 97,101

People v. Cornwell (2005) 37 Cal.4th 50 73

People v. Cottle (2006) 39 Cal.4th 246 60

People v. Cox (1991) 53 Cal.3d 618 105,107,108,110

People v. Cunningham (2001) 25 Cal.4th 926 63

TABLE OF CONTENTS

Page(s)

People v. Crowe (1973) 8 Cal.3d 815 59

People v.Cudjo (1993) 6 Cal.4th 585 55

People v. Cummings (1993) 4 Cal.3d 1233 135

People v. Daniels (1991) 52 Cal.3d 815 44

People v. Davis (2005) 36 Cal.4th 510 22

People v. Demetrulias (2006) 39 Cal.4th 1 56,96,105,130

People v. DeSantis (1993) 2 Cal.4th 1198 107

People v. Dillon (1983) 34 Cal.3d 441 47

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People v. Ewoldt (1994) 7 Cal.4th 380 13

People v. Flannel (1979) 25 Cal.3d 668 45

People v. Flood (1998) 18 Cal.4th 470 48

People v. Frank (1985) 38 Cal.3d 711 60

People v. Frey (1998) 18 Cal.4th 894 72,126,127

People v. Godinez (1992) 2 Cal. App.4th 492 40

People v. Grant (2003) 113 Cal.App.4th 579 2,4,5,9,15

People v. Gray (2005) 37 Cal.4th 168 10,13

People v. Guerra (2006) 37 Cal.4th 1067 82,131,133

People v. Gurule (2002) 28 Cal.4th 557 123

People v. Gutierrez (2002) 28 Cal.4th 1043 44

People v. Gutierrez (1994) 23 Cal. App.4th 1576 131

People v. Hamilton (1989) 48 Cal.3d 1142 6

TABLE OF CONTENTS

Page(s)

People v. Hannon (1977) 19 Cal.3d 588 130,132

People v. Harris (2005) 37 Cal.4th 310 105,116

People v. Hawkins (1995) 10 Cal.4th 920 5,123

People v. Heard (2003) 31 Cal.4th 946 67

People v. Hempstead (1983) 148 Cal.App.3d 949 38

People v. Hernandez (2003) 30 Cal.4th 835 122

People v. Hernandez (2004) 33 Cal.4th 1040 14

People v. Hickles (1997) 56 Cal.App.4th 1183 40,41,42

People v. Hill (1998) 17 Cal.4th 800 94

People v. Hines (1997) 15 Cal.4th 997 105,116

People v. Horn (1960) 187 Cal. App.2d 68 56

People v. James (1969) 1 Cal.App.3d 645 134

People v. Jackson (1985) 167 Cal.App.3d 829 76,77

People v. Jenkins (2000) 22 Cal.4th 900 63

People v. Johnson (1988) 47 Cal.3d 576 14

People v. Johnson (1993) 6 Cal.4th 1 56

People v. Kaurish (1990) 52 Cal.3d 648 63

People v. Kelly (1992) 1 Cal.4th 495 52,53

People v. Lewis (2001) 26 Cal.4th 334 47,48

People v. Lewis and Oliver (2006) 39 Cal.4th 970 105

People v. Mahoney (1927) 201 Cal. 618 102

People v. Magiefico (1972) 25 Cal.App.3d 1041 22

People v. Manriguez (2005) 37 Cal.4th 547 15,17,45

TABLE OF CONTENTS

Page(s)

People v. Maury (2003) 30 Cal.3d 342 5,24,133

People v. Medina (1995) 11 Cal.4th 694 10

People v. Melton (1988) 44 Cal.3d 713 85

People v. Merriam (1967) 66 Cal.2d 390 36

People v. Micky (1991) 54 Cal.3d 612 55

People v. Mitchell (1986) 183 Cal. App.3d 325 34

People v. Montez (1999) 74 Cal. 4th 1050 40

People v. Moore (1953) 120 Cal. App.2d 303 34

People v. Mroczko (1983) 35 Cal.3d 86 73,75,79

People v. Mullens (2004) 119 Cal.App.4th 648 128

People v. Musselwhite (1998) 17 Cal.4th 1216 107

People v. Najera (2006) 138 Cal. App.4th 212 46

People v. Nakahara (2003) 30 Cal.4th 705 78

People v. Ochoa (2001) 26 Cal.4th 398 16

People v. Oliver (1975) 46 Cal.App.3d 747 100

People v. Ogg (1968) 258 Cal. App.2d 841 56

People v. Partida (2006) 37 Cal.4th 428 14,28,57,97,130,131

People v. Patubo (1937) 9 Cal.2d 543 97,100

People v. Pearson (1969) 70 Cal.2d 218 36

People v. Phillips 1985) 41 Cal.3d 29 134,135

People v. Prettyman (1996) 14 Cal.4th 248 37,38

People v. Prieto (2003) 30 Cal.4th 226 138,141

People v. Prince (2007) __ Cal.4th __ 138

People v. Ramirez (2006) 39 Cal.4th 398 5,10

TABLE OF CONTENTS

Page(s)

People v. Reynolds (1988) 205 Cal. App.3d 776 134,135

People v. Reyes (1974) 12 Cal.3d 486 35

People v. Robinson (2005) 37 Cal.4th 592 53,54,105

People v. Rogers (2006) 39 Cal.4th 826 10,11

People v. Rogers (1978) 21 Cal.3d 542 57

People v. Saldana (1965) 233 Cal. App.2d 24 18

People v. Satchell (1971) 6 Cal.3d 28 38

People v. Savedra (1993) 15 Cal. App.4th 736 134

People v. Saunders (1993) 5 Cal.4th 580 58

People v. Seijas (2005) 36 Cal.4th 291 57

People v. Sharp (1983) 150 Cal. App.3d 13 23,24

People v. Singer (1990) 226 Cal. App.3d 23 76,77,80

People v. Slaughter (2002) 27 Cal.4th 1187 105

People v. Slayton (2001) 26 Cal.4th 1076 23

People v. Stanley (2006) 39 Cal.4th 913 12

People v. Stanworth (1969) 71 Cal.2d 820 60

People v. Stevens (2007) __ Cal.4th __ 138

People v. Stewart (2004) 33 Cal.4th 425 64,65,67,69

People v. Stiteley (2005) 35 Cal.4th 514 14

People v. Sturm (2006) 37 Cal.4th 1218 . 90,96,97,99,101,102,103,128,136

People v. Terry (1964) 61 Cal.2d 137 109,118

People v. Thompson (1988) 45 Cal.3d 86 106

People v. Valdez (2004) 32 Cal.4th 73 107

People v. Visciotti (1992) 2 Cal.4th 1 55

TABLE OF CONTENTS

Page(s)

People v. Warren (1988) 45 Cal.3d 471 130,132

People v. Weiss (1958) 50 Cal.2d 535 132

People v. Wheeler (1978) 22 Cal.3d 258 61,122

People v. Williams (1945) 27 Cal.2d 220 126

People v. Williams (1971) 22 Cal. App.3d 34 90

People v. Williams (2006) 40 Cal.4th 287 26,28

People v. Wilson (1924) 76 Cal. App. 688 56

People v. Wrest (1992) 3 Cal.4th 1088 5

People v. Yeoman (2003) 31 Cal.4th 93 122,123

People v. Zambrano (2004) 124 Cal. App.4th 228 6,80,82,83,84,87,93

People v. Zapien (1993) 4 Cal.4th 929 47

People v. Zimmerman (1984) 36 Cal.3d 154 140

Puett v. Superior Court (1979) 96 Cal. App.3d 936 27

Summer v. Martin (1921) 55 Cal. App.603 58

Walker v. Superior Court (1974) 37 Cal. App.3d 938 18

Williams v. Superior Court (1984) 36 Cal.3d 441 2,4,16,17,20

OTHER STATE COURT CASES:

Boehm v. State (Nev. 1997) 944 P.2d 269 23

State v. Singh (2002) 259 Conn. 693, 793 A.2d 226 86

State v. Casteneda-Perez, (1991) 61 Wash. App.354, 360 P.2d 74 83

CONSTITUTIONS:

U.S. Constitution 5th Amendment 22

TABLE OF CONTENTS

Page(s)

U.S. Constitution 6th Amendment 48,72,142,143

U.S. Constitution 8th Amendment 123,125,142

U.S. Constitution 14th Amendment 62,125

Cal. Constitution, Art. XI 97

CALIFORNIA STATUTES:

Pen. Code 186.22 19

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TABLE OF CONTENTS

Page(s)

Evid. Code 1103 57

MISCELLANEOUS:

CALJIC NO. 2.02 48

CALJIC NO. 2.21.2 48

CALJIC NO. 3.11 46

CALJIC NO. 3.18 46

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A.B.A. Guidelines For The Appointment And Performance Of Counsel In Dealth Penalty Cases, Guideline 2.1 (1989) 26

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SUPREME COURT OF THE STATE OF CALIFORNIA

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

INTRODUCTION

This appeal is from a final judgment imposing a sentence of death and is therefore automatic pursuant to Penal Code section 1239, subdivision (b). In this reply brief, appellant has replied to those arguments made by respondent that require further comment without undue repetition of arguments made in appellant's opening brief. Appellant does not intend to concede any argument or factual discrepancy by omission in this reply brief.

ARGUMENTS

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

A. The Prosecutor's Argument To The Jury

Appellant argued that the trial court erred in denying his motion to sever the Eaton murder case from the Skyles and Price murder case. A joint trial of the two murder cases resulted in an unfair trial which violated his constitutional right to due process. A critical issue for the jury in the Skyles and Price murder case was whether appellant aided and abetted Michael Soliz in the commission of the murders. In his final argument, the prosecutor improperly argued that the jury should use evidence of appellant's participation 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). If the jury used evidence concerning the Eaton murder to convict appellant of 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).

Respondent argues that the prosecuting attorney's argument to the jury was proper. Respondent states: "Indeed, the prosecuting attorney's rebuttal argument (and the chart used) was, in proper context, merely an argument that the jurors could and should draw proper and reasonable inferences from the evidence that appellants were members of the same

clique of the same gang; that they committed crimes together; that they had already killed Mr. Eaton by the time of the murders of Messrs. Skyles and Price . . ." (R.B. 151) Respondent's summary of the prosecuting attorney's argument is incomplete and thereby misleading.

The prosecutor was faced with a problem of how to convict appellant of the murders of Skyles and Price when the evidence at most established his mere presence at the scene of the crime. Appellant's attorney argued that the crimes had been committed solely by Michael Soliz. He argued that appellant did not get out of the car at the gas station. Appellant's counsel alternatively argued that even if appellant had gotten out of the car, he just stood there and did not do anything. (R.T. 2281-2283; 2287-2289.) Under California law mere presence at the scene of the crime does not constitute aiding and abetting. (In re Michael T., (1978) 84 Cal. App.3d 907, 911.)

To overcome this problem the prosecutor improperly used evidence of the Eaton murder as character evidence to convict appellant of the Skyles and Price murders. He referred to his chart which stated that "Soliz and Gonzalez are crimies." (Supp. II, C.T. 327). The prosecutor argued that appellant and Soliz were not only members of the same gang, "These are people who commit crimes together." (R.T. 2308) The prosecutor then expressly told the jury not to view the two separate murder cases in isolation. Rather, they should use the Eaton murder in order to convict appellant of the Skyles and Price murders. The prosecutor stated:

> "If you look at this crime in isolation just as 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 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 the 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 Markert robbery murder. They knew what each was about. They knew what each was going to do. (R.T. 2308-2309)

The prosecutor's argument encouraged the jury to convict appellant of the Skyles and Price murders based upon evidence that appellant had a general disposition to commit murder. The argument was that appellant was guilty of the Skyles and Price murders because he had committed the murder of Lester Eaton with Michael Soliz three months earlier. This Court has said that 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.) This 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.) In the Grant and Bean cases, the Courts found due process violations when the prosecutors made similar arguments to the jury in cases where the trial court had denied a severance. (People v. Grant, supra, 113 Cal. App.4th at 589-591; Bean v. Calderon, supra,163 F.3d at 1084.)

B. The Severance Issue Was Not Waived

Respondent argues that appellant has waved any error concerning the prosecutor's final argument by failing to object to the argument during trial, citing People v. Wrest (1992) 3 Cal.4th 1088, 1105. (R.B. 151) However, Wrest involved an argument that a defendant's conviction should be reversed for misconduct of the prosecutor during final argument. The Court held that the issue of prosecutorial misconduct in final argument had been waived by failure to object to the argument. Appellant's argument is that the trial court erred in denying his motion for a severance.

The severance argument is not waived on appeal because appellant filed a written pretrial motion for severance (C.T. 398-402) and thus objected to the joinder of the two murder cases. (See, People v. Ramirez (2006) 39 Cal.4th 398, 438-439; People v. Maury (2003) 30 Cal.4th 342, 392; People v. Hawkins (1995) 10 Cal.4th 920, 939-940.) Because of the denial of the severance motion, the prosecutor was able to use evidence of one crime to convict appellant of another crime. Reviewing a prosecutor's final argument is an appropriate method for evaluating prejudice from the denial of a severance and for determining whether the severance ruling resulted in denial of due process. (See People v. Grant, supra, 113 Cal. App.4th at 589-591; Bean v. Calderon, supra, 163 F.3d at 1084.) There was no waiver of appellant's severance argument.

Respondent also argues that appellant should have renewed the motion for severance upon learning that there was an evidentiary gap in the case on the Skyles and Price murders, citing People v. Ervin (2000) 22 Cal.4th 48, 68. (R.B. 150) In Ervin the Court held that if new grounds for a severance occur after the Court has initially denied the severance motion,

a defendant must renew his motion to sever in order to include those new grounds before he may raise the new grounds on appeal. (People v. Ervin, supra, 22 Cal.4th at 68.) In appellant's case, the evidentiary gap simply meant that the evidence against appellant on the Skyles and Price murder was weak. This was not a new ground for the severance. It was the same ground appellant argued in his initial severance motion. (C.T. 398-399) Thus, respondent's waiver argument under Ervin must fail.

Respondent concurs that appellant's severance motion was poorly drafted and only implied that the motion was seeking a severance of the Eaton murder from the Skyles and Price murder case. (R.B. 133 n. 51.) However, respondent does not claim that the severance issue was waived because of a poorly drafted motion. The co-defendant Michael Soliz filed a motion for severance of the two murder cases. (C.T. 465-484). The trial court denied all severance motions filed by both appellant and Soliz. (R.T. 29-30). Since the Soliz severance of counts motion was denied by the trial court, any further severance of counts argument by appellant would have been futile. Because any further objection by appellant would have been futile, appellant's severance of counts argument was not waived for purposes of this appeal. (People v. Hamilton (1989) 48 Cal.3d 1142, 1184 n.27; People v. Zambrano (2004) 124 Cal. App.4th 288, 237.)

C. There Was No Overwhelming Evidence Of Appellant Gonzales' Guilt On The Skyles And Price Murders

Respondent argues that there was overwhelming evidence of appellant's guilt of the double murder of Skyles and Price and any error in failing to sever the counts was harmless. (R.B. 146-152). Respondent argues as though there is only one appellant before the Court. There are two appellants, Michael Soliz and John Gonzales. Their cases must be

separately analyzed. In the case of Michael Soliz, four eyewitnesses identified Soliz as firing the gun that killed Skyles and Price. However, in the case of appellant John Gonzales, all of the eyewitnesses testified that appellant merely stood by the car at the time of the shooting. It cannot be said there was overwhelming evidence of guilt in appellant's case.

Mere presence at the scene of the crime does not establish that a person has aided and abetted the crime. (In re Michael T., (1970) 84 Cal. App.3d 907, 911.) In a recent Ninth Circuit case the Court found insufficient evidence based on facts similar to those of appellant's case. (Juan H. v. Allen, (9th Cir. 2005) 408 F.3d 1262, 1274-1279.) In Juan H., the defendant, a juvenile, was home with his family when someone fired two shots into their trailer. An hour and half later, the defendant and his brother confronted two men. The defendant's brother asked them if they had fired the shots. When the men responded that they did not know what the brother was talking about, the brother pulled out a shotgun, killed one of the men, and shot at the other. Prior to the shooting, the defendant had been seen making gang gestures toward the men. The defendant and the two victims were associated with rival gangs. Shortly after the shooting, the defendant made a gun-like gesture to a neighbor and he and his family tried to leave the scene of the shooting. On this evidence, the defendant was convicted of aiding and abetting the murder of one of the men and the attempted murder of the other man.

The Ninth Circuit held that there was insufficient evidence to convict the defendant, Juan H., of murder and attempted murder. The Court held that "The record contains manifestly insufficient evidence to support the necessary conclusions that Juan H. knew that Merendon planned to commit the first degree murders of Ramirez and Magdelano, and that Juan

H. acted in a way intended to encourage or facilitate these killings." (Juan H. v. Allen, supra, 408 F.3d at 1277.) The Court also rejected the argument that Juan H. provided backup for his brother during the shooting. The Court stated "Nor could any factfinder reasonably conclude that, by standing, unarmed, behind his brother, Juan H. provided 'backup' in the sense of adding deadly force or protecting his brother in a deadly exchange." (Juan H. v. Allen, supra, 1279.)

Thus, respondent's argument that there was overwhelming evidence of guilt in the Skyles and Price murder case, although possibly true in the case of Michael Soliz, is untrue in the case of appellant. The prosecutor in his final argument recognized this fact when he discussed the Skyles and Price murder case with the jury. The prosecutor noted that "If you look at this crime in isolation just as one situation, you might be able to say how would they know what the other was going to do." (R.T. 2308) This was a concession by the prosecutor that the case against appellant was weak. The prosecutor was saying in his argument that if the jury looked at the Skyles and Price case independent of the Eaton murder case, they might be inclined to find appellant not guilty.

D. The Prosecutor Did Join A Weaker Case (Skyles And Price) With A Stronger Case (Eaton)

Respondent argues that the evidence supporting both groups of offenses was strong and overwhelming and this was not a situation where a weak case was joined with a strong case in order to produce a spillover effect that unfairly strengthened or bootstrapped the weak case. (R.B. 139) However, the record disproves respondent's argument in the case of appellant.

The weak case versus strong case comparison must be made

separately as to each appellant. In the case of appellant, the Skyles and Price case was a weak case because appellant was merely present at the scene of the murders. The Lester Eaton robbery murder case was a stronger case for the prosecution in the sense that it was based on more than appellant's mere presence. Dorene Ramos testified concerning appellant's preparations before the robbery. Richard Alvarez testified concerning driving appellant to and from the robbery and appellant's use of a van during the robbery. The police discovered the van after the robbery. Appellant's jacket and his fingerprints were found in the van. A cash register tray stolen during the robbery was also found in the van. Thus, appellant's case is the classic joinder of a weaker case with a stronger case.

This Court has stated that reversal is required when "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.) Appellant was convicted of the weaker Skyles and Price murder charges after the prosecutor urged the jury to consider the stronger Lester Eaton murder evidence to convict appellant of the Skyles and Price murders. The improper joinder altered the outcome of the Skyles and Price murder case because, if tried alone appellant may have been acquitted of the Skyles and Price murder charges. Thus, because the severance motion was denied, appellant was denied his constitutional right to a fair trial under the Fifth Amendment. (United States v. Lane (1986) 474 U.S. 438, 446 n.8; Bean v. Calderon (9th Cir. 1998) 163 F.3rd 1073, 1084; People v. Grant (2003) 113 Cal. App.4th 579, 587-594.)

E. The Ballistics Evidence Was Only Partially Cross Admissible And Was Only Relevant In The Case Of Appellant Soliz

Respondent argues that the severance motion was properly denied because evidence in the Skyles and Price murder case and evidence in the Lester Eaton murder case were cross-admissible. (R.B. 136-138) Respondent argues that the ballistics evidence connects the two murder cases. A live round found in the getaway van used in the Hillgrove Market robbery murder was compared with the expended shells found at the scene of the Skyles and Price murders. It was determined that they had all been fired or had come from the same gun. In other words, the same gun was used in the two groups of offenses. Respondent argues that the question is not cross admissibility of the charged offenses, but rather "the interplay of evidence between the two occurrences." (R.B. 137)

In People v. Carpenter (1997) 15 Cal.4th 312, 361-362, the Court stated that "Evidence of both incidents would have been admissible at separate trials of each. The ballistics evidence showed that the same gun was used each time, strongly indicating that the same person committed each crime. Thus, evidence that defendant was the gunman in one incident was evidence that he was the gunman in the other." (See also, People v. Medina (1995) 11 Cal.4th 694, 748-749.) In People v. Ramirez (2006) 39 Cal.4th 398,439-440, the Court found that joinder of several murder cases occurring over a 14 month period was proper because the crimes were linked by the evidence. The defendant's shoe prints were found at several of the crime scenes and the defendant sold property stolen from several of the victims to a single purchaser.

Respondent's argument however fails to recognize that cross-

admissibility must go in both directions. (People v. Rogers (2006) 39 Cal.4th 826, 851-852.) To establish cross-admissibility, the "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.) In People v. Gray (2005) 37 Cal.4th 168, the defendant argued on appeal that it was error not to sever a capital murder charge where the murder occurred during the course of a burglary, robbery, and sexual assault, from six other burglary charges in cases where the victims were not personally injured. The Court found many points of similarity between the crimes, including the fact that four of the break-ins occurred on the same night and at the same trailer park. In upholding the joinder, the Court stated that "the crimes bore sufficient characteristics such that the evidence of the non capital burglaries would have been cross-admissible in a separate capital trial, and vice versa." (People v. Gray, supra, 37 Cal.4th at 222, emphasis added.)

In People v. Rogers, supra, the defendant argued that two murder counts should have been severed for trial. The Court noted that the inquiry on the question of cross-admissibility was "would the evidence pertinent to one case have been admissible in the other under rules of evidence which limit the use of character evidence or prior similar acts to prove conduct." (People v. Rogers, supra, 39 Cal.4th at 851-852.) The Court noted that both murders shared common and distinctive marks: "both woman were prostitutes who last were seen alive on Union Avenue in Bakersfield; both suffered multiple gunshot wounds to the torso; both bodies were dumped in the Arvin-Edison Canal, in rural areas about seven miles from each other; and both were killed by the same gun, which belonged to the defendant." (People v. Rogers, supra, at 852.)

The Court held that the evidence in the two murder cases was cross-admissible. Evidence pertaining to the Clark homicide would have been admissible at a separate trial on the Benintende homicide on the issue of identity. Likewise, evidence of the Benintende homicide would have been admissible at a separate trial of the Clark homicide on this issue of intent. (People v. Rogers, supra, 39 Cal.4th at 854-853.) Thus, there was no error in joining the two murder counts in a single trial. (See also, People v. Cook (2006) 39 Cal.4th 566, 581-583 [Joinder of three murders upheld where the same gun was used in two murders and where a single eyewitness saw one of the shooting murders, as well as the murder where the victim was beaten to death.]; People v. Stanley (2006) 39 Cal.4th 913, 933-935. [Joinder of capital and non-capital crimes upheld where all the crimes occurred at approximately the same time and location, with the same weapon.].)

In appellant's case, the ballistics evidence was only halfway cross-admissible and the theory of relevancy only related to the co-appellant Michael Soliz. If the Lester Eaton robbery murder charges were separately tried, the ballistics evidence concerning the shell casings left at the scene of the Skyles and Price murders may have been relevant to prove the identity of the second robber in the Lester Eaton case. The prosecution's theory was that appellant struggled with Lester Eaton and fired a revolver which killed Eaton. A second robber pointed a gun at Betty Eaton, but did not fire his weapon during the crime. A live round from a nine millimeter handgun was found on the floor of the van used in the robbery. Ballistics evidence established that the live round was ejected from the same firearm used by Michael Soliz during the Skyles and Price murders. The ballistics evidence may have been relevant to prove the identity of Michael Soliz as the second,

non-shooting robber in the Lester Eaton robbery murder case.

The reverse is not true if appellant and Soliz were separately tried on the Skyles and Price murder charges. The ballistics from the Lester Eaton case would not be relevant to prove any issue in the Skyles and Price case. Eyewitnesses at the gas station established that Michael Soliz fired a nine millimeter semi-automatic handgun which killed Skyles and Price. The same witness placed appellant at the scene of the shooting standing next to the car. Ballistics evidence that a live nine millimeter round was found in the van used in the Lester Eaton murder would not be relevant to prove any disputed issue in the Skyles and Price case. Michael Soliz was not directly connected to the bullet found in the van and thus discovery of the bullet in the van in the Lester Eaton case would not prove his identity as the shooter in the Skyles and Price case.

The Lester Eaton robbery murder case was not similar to the gang shooting in the Skyles and Price murder case. It follows that at a separate trial of the Skyles and Price murders, evidence concerning the Lester Eaton murder would not be admissible on any theory such as identity, intent, or common plan or scheme. (Compare, People v. Ewoldt (1994) 7 Cal.4th 380, 393; People v. Balcom (1994) 7 Cal.4th 414, 423.) The two murder cases were not similar and the ballistics evidence in the Lester Eaton murder case had no independent relevancy in the trial of the Skyles and Price murder case. The only purpose for using the Lester Eaton murder evidence in the Skyles and Price murder case was to prove that appellant was a person of bad character who had a disposition to commit murders. On that issue, the evidence was inadmissible.

In People v. Gray (2005) 37 Cal.4th 168, 222, this Court stated: "Where two crimes or, as here, two sets of crimes, are tried jointly

and the evidence of one set would not have been admissible in the trial of the other had it been tried separately, the potential for prejudice has increased. This is because the jury in a joint trial will be exposed to additional evidence of the defendant's criminal behavior, raising the possibility the jury will be swayed by the evidence of the defendant's bad character." The prosecutor in appellant's case used evidence concerning the Eaton murder to sway the jury to convict the appellant of the Skyles and Price murders. Thus, joinder of the two murder cases made the trial "so grossly unfair as to deny due process." (People v. Stiteley (2005) 35 Cal.4th 514,533; People v. Arias (1996) 13 Cal. 4th 92, 127; People v. Johnson (1988) 47 Cal.3d 576, 590.)

F. The Absence Of A Limiting Jury Instruction

Respondent argues that the Court should not consider the fact that no cautionary or limiting jury instruction was given telling the jury not to use evidence of the Eaton murder to convict appellant of the Skyles and Price murders. (R.B. 152-153) Respondent argues that the trial court has no sua sponte duty to give a limiting jury instruction, citing People v. Hernandez (2004) 33 Cal.4th 1040, 1051. Respondent has mis-characterized appellant's argument. Appellant is not arguing that the trial court erred in failing to sua sponte instruct on the limited use of certain evidence. Appellant argues that the Court erred in denying his severance motion and that the error was so prejudicial under the facts of this case that appellant was denied his federal constitutional right to due process of law. (Cf. People v. Partida (2006) 37 Cal.4th 428, 431 ["A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process."].)

Two cases have held that when evaluating prejudice from the

improper joinder of two crimes, the Court may look to the jury instructions to see if the prosecutor's improper argument to the jury that evidence of one crime should be used to convict the defendant of another crime was lessened by a cautionary instruction. (People v. Grant (2003) 113 Cal. App.3d 579, 591-592; Bean v. Calderon (9th Cir. (1998) 163 F.3d 1073, 1084.) The absence of a cautionary or limiting jury instruction simply means that there is nothing in the record by way of instructions that would lessen or ameliorate the prejudicial effects of the improper joinder. Where no cautionary or limiting jury instruction is given, there is a greater likelihood that the jury followed the prosecutor's improper argument and used evidence of one crime in order to convict the defendant of another crime thereby violating the defendant's due process rights.

G. Appellant's Involvement As The Shooter In The Eaton Murder Was Far More Inflammatory Than His Mere Presence At The Skyles And Price Murders

Respondent argues that neither crime was significantly more inflammatory than the other. (R.B. 140) Respondent describes the Lester Eaton case as the unprovoked pistol-whipping and murder of a defenseless, elderly shopkeeper, shot repeatedly in the head while kneeling on the ground. Respondent describes the Skyles and Price murder as the cold-blooded execution of two teenagers. (R.B. 140) Once again, respondent fails to analyze appellant's severance argument separate from the co-appellant Soliz's severance argument. The cases are different. The arguments are different. The prejudicial impact of the improper joinder is different.

In evaluating prejudice in a severance denial, one of the factors is whether "certain of the charges are unusually likely to inflame the

jury against the defendant." (People v. Manriquez (2005) 37 Cal.4th 547, 573; People v. Ochoa (2001) 26 Cal.4th 398,423.) In People v. Balderas (1985) 41 Cal.3d 144, 174, the Court stated that a charge or evidence particularly calculated to inflame or prejudice a jury would include "child molestation charges" or evidence of "gang warfare." (See, Coleman v. Superior Court (1981) 116 Cal. App.3d 129 [child molestation charges]; Williams v. Superior Court (1984) 36 Cal.3d 441 [evidence of gang warfare].) Thus, using the Balderas standard and viewing the nature of the crimes themselves, the Eaton murder and the Skyles and Price murders "were not particularly brutal, repulsive, or sensational." (People v. Balderas, supra at 174.) However, such an approach fails to consider the specific prejudice suffered by appellant alone.

The Court should look to appellant's degree of involvement in the crime. Appellant was merely present at the scene of the murder when Michael Soliz shot and killed Skyles and Price. The prosecutor argued to the jury that appellant was guilty of the murders of Skyles and Price because appellant had shot and killed Lester Eaton three months earlier during a robbery at the Hillgrove market. Appellant's alleged participation in the murders of Skyles and Price was not inflammatory at all. He merely waited by the car while Michael Soliz shot and killed Skyles and Price. By comparison, appellant's involvement in the murder of Lester Eaton was significantly more inflammatory. The prosecution's theory in the Eaton case was that appellant fired the fatal shots that killed Lester Eaton. The prosecutor argued to the jury that this was a brutal, unprovoked pistol-whipping and murder of a defenseless elderly shop keeper.

It was the highly inflammatory nature of appellant's conduct, as the actual shooter in the Lester Eaton case, that was used by the

prosecutor in order to convict appellant of the murders of Skyles and Price. Viewed in this light, appellant's significantly more inflammatory conduct in shooting Lester Eaton was likely to inflame the jury against appellant when deciding whether appellant's mere presence at the scene of the Skyles and Price murders was enough to convict him of those crimes.

H. There Is A Higher Degree Of Scrutiny Of Severance Issues In Capital Cases

Respondent argues that appellant should be given no consideration for the fact that "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 (1984) 36 Cal.3d 441, 454.) (R.B. 140-141) Respondent argues that even in capital cases, joinder is proper as long as the evidence on each charge is so strong that consolidation is unlikely to effect the verdict and separate trials would have given the prosecution multiple opportunities in which to convince the jury to impose the death penalty, citing, People v. Manriquez, supra, 37 Cal.4th at 574, 576.

Respondent's argument is not persuasive. The evidence against appellant on the Skyles and Price murders was far weaker than the evidence on the Lester Eaton murder. Consolidation of the two murder cases made it more likely that the jury would convict appellant of the Skyles and Price murders. At a separate trial, the jury may have acquitted appellant of the Skyles and Price murders based upon his mere presence at the scene of the crime. There was no evidence that appellant performed any act which aided Michael Soliz in the commission of those murders.

This is not a case where separate trials would have given the prosecution multiple opportunities to convince the jury to impose the death

penalty. Rather, if the two murder cases were separated, appellant would have had a greater chance of being acquitted of the Skyles and Price murders. Thereafter, if appellant had been tried alone on the Lester Eaton murder, he would have had a greater chance of avoiding the death penalty. An acquittal of the Skyles and Price murders would have removed the principle aggravating factor offered at a penalty trial on the Lester Eaton murder. Appellant faced a far greater danger of receiving the death penalty for the Eaton murder at a joint trial with the Skyles and Price murder charges. The fact that this is a capital case supports appellant's severance argument.

I. The Gang Allegation And The Gang Evidence

Respondent argues that the gang evidence was cross-admissible in both groups of offenses. The gang allegation filed pursuant to Penal Code Section 186.22, subdivision (b) alleged that all of the offenses were committed for the benefit of a street gang. Respondent notes that the jury found the gang allegation true on both the Eaton murder and robberies and the Skyles and Price murders. (R.B. 139) Appellant disagrees with respondent's analysis. The mere fact that a prosecutor may allege a gang allegation on every count in a multi-count information does not mean that all of the charges are properly joined.

Penal Code Section 954, which governs joinder of counts in a single trial, provides in relevant part: "An accusatory pleading may charge . . . two or more different offenses in the same class of crimes or offenses, under separate counts . . ." Under this statute, joinder of offenses of different classes is improper. (See, Walker v. Superior Court (1974) 37 Cal. App.3d 938, 941 [joinder of charges of possession of a gun by an ex-felon with a charge of robbery was improper where the gun was not used in the

robbery]; People v. Saldana (1965) 233 Cal. App.2d 24, 29 [joinder of marijuana possession with a rape charge was improper where there was no evidence that defendant possessed the marijuana at the time of the rape].). If respondent's approach is correct, offenses of different classes could all be joined in one accusatory pleading by simply alleging a gang allegation pursuant to Penal Codes Section 186.22, subdivision (b). The severance rules would vanish in all gang cases.

A better approach would be to make a distinction between cases where membership in the gang is central to the criminal act, such as, a gang retaliation murder, and offenses where gang members commit an ordinary street crime, such as a robbery, and it becomes a gang crime merely because gang members are the perpetrators. Such a distinction appears in appellant's case. The Skyles and Price murders were a gang motivated revenge killing. It was the prosecution's theory that Skyles and Price were murdered in retaliation for the gang murder of Billy Gallegos by the Neighborhood Crips. On the other hand, the Hillgrove market robbery and the murder of Lester Eaton were ordinary street crimes. They were motivated by a simple desire to steal. They became gang crimes because gang members were the perpetrators of the crimes.

In the case of the Skyles and Price murders, but for the gang motivation, the crimes would not have been committed. In the case of the Hillgrove market robbery and murder, the crimes would have occurred regardless of whether the perpetrators were gang members or not. The gang related evidence was important to explain the motive for the Skyles and Price murders. However, the gang evidence was largely irrelevant to the Hillgrove market robbery and the murder of Lester Eaton. Viewed in this light, the gang allegation and the gang evidence common to both murder

cases was not grounds for joining the two murder cases in a single trial.

In Williams v. Superior Court (1984) 36 Cal.3d 441, 450, the Court found that the gang related nature of separate charges was a factor that weighed in favor of severing two murder cases. The Court stated that "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." While the gang evidence was central to the Skyles and Price murder case, it had limited probative value in the Lester Eaton murder case. The fact that the gang evidence was cross-admissible in both cases was not a valid reason for denying appellant's motion for severance. The gang evidence certainly does not overcome the prejudice suffered by appellant from the prosecutor's argument to the jury to use evidence of one crime to convict appellant of another crime. Thus, the gang allegation and the gang evidence do not make joinder in this case proper.

J. Conclusion

During final argument, the prosecutor argued that the jury should convict appellant of the murders of Skyles and Price based upon evidence that appellant shot and killed Lester Eaton during the Hillgrove market robbery. The prosecutor attempted to convict appellant of one crime based upon evidence that he committed another crime. This is the prejudice that exists in improperly joining a strong case with a weak case. The jury will misuse the evidence in the strong case to convict the defendant in the weak case.

Appellant's severance argument is different from that of the co-appellant Soliz. Appellant suffered greater prejudice from the joinder of the Eaton case with the Skyles and Price case. The ballistics evidence

common to both murder cases was evidence related to the gun used by Michael Soliz during the commission of the two crimes. The ballistics evidence had no special relevance to appellant's case and was not fully cross-admissible in the Soliz case. Only by separately analyzing the prejudicial aspects of the denial of severance on appellant's case alone can important differences be seen between the arguments of the two appellants.

If the Court separately analyzes the prejudice arising from the joint trial, the conclusion is inescapable that joinder of the two murder cases resulted in an unfair trial and a denial of appellant's federal constitutional right of due process. Appellant urges the Court to reverse his murder convictions in the Skyles and Price case. A reversal of those convictions would also require a reversal of appellant's death sentence on the Eaton murder because the penalty trial jury considered the Skyles and Price murder convictions as aggravating factors. (See, Johnson v. Mississippi (1988) 486 U.S. 578, 584-585.)

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

Appellant argued that the trial court erred in denying his motion to suppress his tape recorded statements made to Salvador Berber. He argued that the statements were obtained in violation of his state and federal constitutional privilege against self incrimination under Miranda v. Arizona (1966) 384 U.S. 436. He also argued that the statements were obtained in violation of his state and federal constitutional right to counsel under Massiah v. United States (1964) 377 U.S. 201.

A. Miranda.

Respondent argues that Miranda warnings are not required when the police place the defendant in a cell with an undercover agent who then elicits incriminating statements. (R.B.. 157-161) (Illinois v. Perkins (1990) 496 U.S. 292, 296-300; People v. Davis (2005) 36 Cal.4th 510, 554.) The Perkins case did hold that Miranda warnings were not required. However, Perkins did not reach the "agency" issue that exists when the police use informants or third parties to interrogate suspects. The police cannot avoid the requirements of Miranda by asking a private citizen to conduct an interrogation of an in-custody suspect at their direction. (See, In re Deborah C. (1981) 30 Cal.3d 125, 130-131; In re Eric J. (1979) 25 Cal.3d 522, 527; People v. Mangiefico (1972) 25 Cal.App.3d 1041, 1049.)

Appellant urges the Court to consider the agency issue and find that Miranda was violated in this case. "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, 377 U.S. at 467 emphasis added.) Since Salvador Berber was clearly an agent of law enforcement at the time he was questioning appellant in the Sheriff's van, Miranda warnings were required under the above cited agency cases. Appellant was in custody at the time of the interrogation. He should have been advised his rights under Fifth Amendment before he made the decision to waive those rights and answer Berber's questions.

The Nevada Supreme Court has held that conversations between a 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. If the defendant is not advised of his rights under the Miranda decision, the statements are inadmissible in evidence under the Nevada Constitution's privilege against self incrimination. (Boehm v. State (Nev. 1997) 944 P.2d 267, 271.) This Court should similarly find that appellant's state and federal constitutional privileges against self incrimination were violated by the admission of appellant's statements made to Salvador Berber.

B. Massiah.

Respondent argues that appellant's right to counsel claim under Massiah v. United States (1964) 377 U.S. 201 was waived because it was not raised in the trial court. (R.B. 162) This is not correct. Appellant's motion to suppress evidence argued that appellant's statements were obtained in violation of his constitutional right to counsel. (C.T. 405) In the motion, appellant cited Kuhlman v. Wilson (1986) 477 U.S. 436, which is a right to counsel case based upon Massiah. (C.T. 406) There was no waiver of this issue.

Respondent argues that a Massiah claim is offense specific. Respondent states that although appellant had counsel representing him on a drug case, he had no counsel on the murder cases because no murder charges had been filed against him. (R.B. 162-166) (Texas v. Cobb (2001) 532 U.S. 162, 168-173; McNeil v. Wisconsin (1991) 501 U.S. 171, 175; People v. Slayton (2001) 26 Cal.4th 1076, 1079.) Appellant argues that the offense specific rule should be reconsidered in light of the California Rules of Professional Conduct and People v. Sharp (1983) 150 Cal.App.3d 13. 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."

In People v. Sharp, supra, the Court held that a defendant's California constitutional right to counsel was violated when the prosecutor directed the Sheriff's Department to conduct a line-up with a defendant in the absence of his counsel with witnesses on robbery charges that had not yet been filed against the defendant. In Sharp, the Court quoted a State Bar ethics opinion which stated "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.)

Respondent argues that this Court has recently rejected a right to counsel argument based upon the California Rules of Professional Conduct in People v. Maury (2003) 30 Cal.4th 342, 408. In Maury, the defendant was represented by counsel on a case involving possession of stolen property when he was questioned by a police detective and a deputy district attorney concerning a murder investigation. The defendant argued that his statements concerning the murder were erroneously admitted into evidence in violation of his right to counsel because the prosecutor knew he was represented by counsel in the stolen property case at the time of the interview.

The Court in Maury rejected the argument that the admission of the defendant's statements seriously undermined his defense because his own defense counsel used those statements to form the evidentiary basis for his defense that another person committed the murder. People v. Maury, supra, 30 Cal.4th at 408.) The Court had no reason to reconsider the right to counsel issue in Maury because any violation in Maury's case was

harmless. By contrast, in the appellant's case the admission into evidence of appellant's confession to Salvador Berber concerning all three murders was highly prejudicial. Appellant's tape recorded statement was central to the prosecution's case at both the guilt and penalty phases.

The reason for the rule prohibiting a lawyer from communicating with another party represented by counsel without the consent of the party's counsel is to preserve "the attorney-client relationship and the proper functioning of the administration of justice." (Mitton v. State Bar (1969) 71 Cal.2d 525, 534.) "The rule was designed to permit an attorney to function adequately in his proper role and prevent the opposing attorney from impeding his performance in such role." (Ibid.)

Appellant urges the Court to reconsider the offense specific rule concerning Massiah claims and determine whether State Bar ethical considerations warrant a change in the existing rules. Based upon the facts of this case, the Court should find that appellant's state and federal constitutional right to counsel were violated by admitting evidence of appellant's statements made in custody to "police agent" Salvador Berber.

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

Appellant argued that the trial court erred in denying his motion for the appointment of a second attorney and that a defendant in a capital case has an absolute state and federal constitutional right to the appointment of a second attorney. Respondent argues that the right to receive a second attorney is discretionary with the trial court and appellant failed to make a sufficient factual showing for the appointment of a second counsel. Respondent also argues that the trial court's decision is reviewed

under an abuse of discretion standard and there was no abuse here. (R.B. 167-170)

Respondent has failed to address appellant's argument that 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 American Bar Association has adopted Guidelines for Capital Cases which require the appointment of two counsel in cases where the death penalty is sought. (A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 2.1 (1989 Ed.) ["In cases where the death penalty is sought, two qualified attorneys should be assigned to represent the defendant."])

Appellant urges the Court to adopt the approach in Gideon v. Wainwright (1963) 372 U.S. 335. In Gideon, the Court abandoned the "fundamental unfairness" test of Betts v. Brady (1942) 316 U.S. 445 and held that in all felony criminal prosecutions in state courts an indigent defendant was entitled to the appointment of counsel. (Gideon v. Wainwright, supra, 372 US at 342-344.) In capital cases, the Court should abandon the case by case evaluation and hold than in every case where the death penalty is sought, the defendant has a constitutional right to two qualified attorneys. Since appellant's request for a second counsel was denied, he urges the Court to reverse his convictions and death sentence.

Appellant is aware that this Court recently discussed the issue of second counsel in a capital case in People v. Williams (2006) 40 Cal.4th 287, 300-301. In Williams, the Court held there was no absolute constitutional right to second counsel in a capital case and that denial of a motion for second counsel is reviewed for an abuse of discretion. (People v. Williams, supra, 40 Cal.4th at 300-301.) In Williams, the Court found no

error in denying a motion for second counsel and no prejudice. However, the defendant in Williams was charged with only one murder. He pleaded guilty and at the penalty phase his attorney presented an extensive mitigation case.

Appellant's case involved three murders and two separate homicide investigations. At the second penalty trial, a serious issue concerning a conflict of interest arose after defense counsel received court clothes from appellant's family containing heroin. (See, AOB, Arg. XIII) During the penalty trial, a dispute arose between appellant and his counsel concerning whether appellant should testify. The harm resulting to appellant's case from the conflict of interest and the dispute over the decision to testify could have been lessened if the trial court had appointed a second attorney at the outset. If the Court retains the case by case approach for determining whether it is error to deny the appointment of second counsel in a capital case, then appellant has met that standard in this case. The trial court's failure to appoint a second counsel was sufficiently prejudicial during the second penalty trial to warrant a reversal of appellant's death sentence.

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

Appellant argued that the denial of his motion for a penalty phase investigator resulted in a violation of his state and federal constitutional rights to the effective assistance of counsel and to due process of law. (Ake v. Oklahoma (1985) 470 U.S. 68, 76-77; Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319-320; Puett v. Superior Court (1979) 96 Cal.App.3d 936, 938-939.) Respondent argues that appellant's

constitutional arguments were waived because appellant failed to raise them in the trial court. (R.B. 171-172)

Appellant's constitutional arguments were not waived. In People v. Partida (2005) 37 Cal.4th 428, 431, the Court ruled that a defendant could argue on appeal that the erroneous admission of evidence had the effect of violating the defendant's constitutional rights. In Partida, the defendant objected to gang evidence on the grounds that the evidence was more prejudicial than probative. On appeal, the defendant argued that the admission of the evidence violated the defendant's federal due process rights because the gang evidence made the trial fundamentally unfair. The Court held that the defendant was entitled to raise that argument on appeal and the issue had not been waived. Under Partida, appellant's constitutional arguments are not waived.

Respondent also argues that there was no abuse of discretion in the trial court's ruling denying appellant's motions for a second investigator and any error was harmless under the facts of this case. Respondent states that appellant made an insufficient factual showing in order to warrant the granting of a motion for a second investigator. (R.B. 173-174) Appellant disagrees.

In People v. Williams (2006) 40 Cal.4th 287, 302-304, the defendant made a claim that the trial court's failure to authorize funds for a second investigator specializing in penalty phase preparation violated the defendant's constitutional rights. The Court found no reversible error in the case because the trial court authorized a total of $7,000.00 for a single investigator at a lower hourly rate. The Court stated that the record failed to show that the investigation was inadequate or that counsel's representation of the defendant fell below an objective standard of reasonableness because

of any lack of investigative resources. The Court noted that defense counsel "mounted a substantial penalty phase defense." (People v. Williams, supra, 40 Cal.4th 304.)

The Williams case, however, is distinguishable from appellant's case. In Williams, the defendant was charged with only a single murder. The defendant in Williams pleaded guilty and only litigated the penalty phase. In appellant's case, appellant was charged with three murders arising out of two separate homicide investigations. Each homicide investigation had two experienced police homicide investigators assigned to the case. Thus, the prosecutor had four investigators and appellant had only one. Unlike Williams, appellant litigated both the guilt and penalty phases and did not plead guilty.

Appellant's case is similar to the constitutional imbalance that led to a violation of the defendant's rights in Ake v. Oklahoma (1984) 470 US 68. In Ake, the United States Supreme Court reversed the defendant's conviction and death sentence on the grounds that he had been denied his constitutional right to due process by the state court's refusal to fund defense psychiatric assistance. In Ake, in the guilt phase the defendant raised the issue of insanity and in the penalty phase the prosecution raised the issue of future dangerousness. In each proceeding, the prosecution offered expert psychiatric testimony. Since the trial court refused to appoint a defense psychiatrist, the defendant offered no expert testimony in either the guilt or penalty phase.

Appellant's case more closely resembles the facts in the Ake case than the facts in the Williams case. The denial of appellant's motion for a second investigator to prepare for the penalty trial resulted in an imbalance between the prosecution and the defense. It violated appellant's

constitutional right to effective assistance counsel and to due process of law under both the state and federal constitutions. Because of this denial, the Court must reverse appellant's death sentence.

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

Appellant has argued that the evidence is insufficient to convict him of the first degree murders of Skyles and Price. The evidence fails to establish that appellant aided and abetted Michael Soliz in the commission of the murders. Appellant argued that his mere presence at the scene of the crime "does not amount to aiding and abetting." (In re Michael T. (1978) 84 Cal. App.3d. 907, 911.) The standard of review is "whether the record evidence could reasonably support a finding of guilt beyond reasonable doubt." (Jackson v. Virginia (1980) 443 U.S. 307, 318.) The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case from a conviction "except on proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged." (In re Winship (1970) 397 U.S. 358, 364.)

Respondent argues that there was "overwhelming evidence" of appellant's guilt of the murders of Skyles and Price. (R.B. 234) Respondent argues that at the time that Michael Soliz shot Skyles and Price, appellant also had a gun. (R.B. 148; R.T. 1810.) However, prosecution witness, Judith Mejorado, never testified at trial or at the preliminary hearing that appellant had a gun. (R.T. 1660-1788) Deputy David Castillo testified that in November of 1996 he interviewed Judith Mejorado at the Industry Sheriff's Station. (R.T. 1789-1792) During the interview,

Mejorado told Deputy Castillo that appellant had the gun but that he did not fire his gun. (R.T. 1810)

Even with this additional evidence in the record that appellant had a gun, the evidence is still insufficient to convict appellant of the murders of Skyles and Price. There is no evidence in the record that appellant did anything with a gun on the night of the shooting. There is no evidence in the record that Judith Mejorado ever saw appellant's gun on the night of the shooting. Judith Mejorado's statement that appellant had a gun was ambiguous. Her statement to Detective Castillo that appellant had a gun could have meant that appellant owned the gun, but did not have it with him on the night of the shooting.

Significantly, during his final argument the prosecutor never argued to the jury that appellant possessed a gun as he stood by and watched Michael Soliz shoot Skyles and Price. The prosecutor argued "These guys are out driving around in a car on a Saturday night . . . They got out of the car with a gun . . . Why get out of the car with a gun?" (R.T. 2234-2235) The argument referred to a single gun, the gun used by Michael Soliz during the shooting. Apparently, the prosecutor did not believe he had proven that appellant was armed with a gun at the time of the shooting.

Aiding and abetting requires proof of some criminal "act" beyond mere presence at the scene of the crime. To be an aider and abettor, a 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.) Even if the record supports the conclusion that appellant possessed a gun on the night of the shooting, there is no evidence that appellant did anything with the gun. There was no act beyond his mere

presence at the scene at the time that Michael Soliz shot and killed Skyles and Price.

Appellant's case is factually similar to a recent Ninth Circuit case finding insufficient evidence to convict a juvenile of the crime of murder based upon his standing next to his brother while his brother shot and killed a rival gang member. (Juan H. v. Allen, (9th Cir. 2005) 408 F.3d 1262, 1274-1279.) In Juan H. the defendant, a juvenile, was home with his family in their trailer when someone fired two shots into the trailer. An hour and half later, the defendant and his brother confronted two men. The defendant's brother asked them if they had fired the shots. When the men responded that they did not know what the brother was talking about, the brother pulled out a shotgun and fired at both men, killing one of them. Prior to the shooting, the defendant had been seen making gang gestures toward the men, and he and the two victims were associated with rival gangs. Shortly after the shooting, the defendant made a gun-like gesture to a neighbor, and he and his family tried to leave the scene of the shooting.

The defendant, Juan H., was convicted of aiding and abetting the murder of one of the men and the attempted murder of the other. The Ninth Circuit reversed the convictions for insufficient evidence. The Court held that no reasonable factfinder could have found that the defendant knew that his brother would commit the murder or that he acted in a way to encourage or facilitate the killing. The Court stated:

> The record contains manifestly insufficient evidence to support the necessary conclusions that Juan H. knew that Merendon [his brother] planned to commit the first-degree murders of Ramirez and Magdeleno and that Juan H. acted in a way intended to encourage or facilitate these killings. Viewed in the light most favorable to the prosecution, the

> circumstantial evidence in this case does not permit any reasonable factfinder to sustain the delinquency petition of Juan H. on the charges of aiding and abetting first-degree murder and attempted first-degree murder, as those crimes are defined by California Law. (408 F.3d at 1277.)

In Juan H., the Court noted that the evidence was that Juan H. stood behind his older brother at the time of the shooting. This proved neither knowledge that his brother would commit murder, nor an intent to assist his brother in committing the murder. (Juan H. v. Allen, supra at 1278.) The Court also rejected the argument that Juan H. aided and abetted his brother in the murder by providing "back up." The Court stated: "Nor could any factfinder reasonably conclude that, by standing, unarmed behind his brother, Juan H. provided 'back up,' in the sense of adding deadly force or protecting his brother in a deadly exchange." (Juan H. v. Allen, supra at 1279; see also Piaskowski v. Bett (7th Cir. 2001) 256 F.3d 687, 691-693 [Evidence of a factory worker's presence at the scene of an assault and murder was insufficient to prove that he aided and abetted or conspired to commit the murder.].)

Appellant's case is the same as the Juan H. case. Appellant stood behind Michael Soliz while Soliz shot Skyles and Price, just as Juan H. stood behind his brother when his brother shot at two rival gang members, killing one of them. Both appellant and Juan H. had a gang revenge motive based upon an earlier suspected shooting by the victims. Both appellant and Juan H. left the scene after the shooting. The prosecutors in both cases argued that appellant and Juan H. were providing "back up" for the shooter. In the Juan H. case, the Court held that the evidence was insufficient and the convictions violated federal due process.

Appellant is likewise entitled to have his first degree murder convictions in the Skyles and Price case reversed for insufficient evidence of aiding and abetting. Appellant did nothing to encourage or facilitate the murders of Skyles and Price.

There are several Court of Appeal cases that have stated that "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (In re Lynette G. (1976) 54 Cal.3d 1087, 1094; see also People v. Campbell (1994) 25 Cal. App.4th 402, 409; People v. Mitchell, (1986) 183 Cal. App.3d 325, 330; People v. Chagolla (1983) 144 Cal. App.3d 422, 429.) The approach in these cases was expressly rejected by the Ninth Circuit in Juan H. v. Allen, supra, at 1276 and 1278 n.14. Although presence at the scene of the crime, companionship, and conduct before and after the offense may be relevant to prove criminal intent, such evidence does not prove the criminal act. The earliest case suggesting these factors limited their applicability to their issue of criminal intent. In People v. Moore (1953) 120 Cal. App.2d 303, 306, the Court stated that "presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred." (Emphasis added.)

To be convicted under an aiding and abetting theory, a 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.) Aiding and abetting requires proof that the defendant committed a criminal act which facilitates the commission of a crime by another person. "Mere presence at the scene of a crime which does not itself assist its

commission or mere knowledge that a crime is also 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.) Mere association with another person who has committed a crime is also insufficient to establish aiding and abetting. (People v. Reyes (1974) 12 Cal.3d 486, 500.)

The Lynette G. line of cases should not be used to affirm appellant's convictions in this case. Appellant's conduct before and after the crime did not turn appellant's mere association with Soliz into aiding and abetting. Whether appellant aided and abetted Michael Soliz in the commission of the murders of Skyles and Price requires evidence of some criminal act beyond appellant's mere presence at the scene of the crime. If appellant's conduct was mere presence, no amount of companionship evidence or evidence of conduct before or after the offense can turn appellant's mere presence into a criminal act. Because appellant did nothing to assist Michael Soliz in the commission of the crimes, appellant's first degree murder convictions in the Skyles and Price case should be reversed.

Finally, respondent argues that it is ironic that appellant would claim on appeal that the evidence is insufficient because appellant told Salvadore Berber that he personally shot Skyles and Price and appellant testified during the penalty trial that he personally shot Skyles and Price. (R.B. 232-233 and n.59) At trial, the prosecutor argued that appellant's confession to Salvadore Berber was true when he said he shot Lestor Eaton, but was false when he said he shot Skyles and Price. (R.T. 2223-2226; 2316-2318; 2324-2327) Respondent cannot change their theory on appeal and ask the Court to use evidence they believe to be false in order to affirm appellant's conviction.

In the case of In re Sakarias (2005) 35 Cal.4th 140, 155-156, this Court stated that "fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for the truth." In the Sakarias case, Sakarias and Waidla were both charged with the murder of a single victim. At Sakarias' trial the prosecutor argued that Sakarias struck the fatal blow. At Waidla's trial, the prosecutor argued that Waidla struck the fatal blow. Both defendants were sentenced to death at their separate trials. The Court held that the prosecutor's bad faith use of inconsistent theories was a violation of due process of law. It also violates due process for respondent to claim for the first time on appeal that appellant's statement that he shot and killed Skyles and Price was a true statement that may be considered as evidence supporting appellant's conviction of those two murders.

Respondent also may not rely upon appellant's testimony given during the penalty phase of the trial in which he stated that he shot Skyles and Price. Appellant's testimony at the penalty trial was not before the jury during the guilt phase of the trial. To consider appellant's testimony during the penalty phase as evidence supporting his conviction during the guilt phase would be improperly considering evidence outside of the record of the guilt phase. (See, People v. Pearson (1969) 70 Cal.2d 218, 222 n.1 [Defendant's written statement to the trial judge prior to sentencing was not before the trier of fact at the time the verdict was returned and may not be considered by the appellate court in reviewing the judgement to determine the sufficiency of the evidence to convict.]; People v. Merriam

(1967) 66 Cal.2d 390, 396 [An appellate court will not review or consider matters outside of the record.].) Thus, it is neither ironic nor improper for appellant to argue insufficiency of the evidence. His insufficiency argument must be reviewed without consideration of his statement to Salvador Berber or his own penalty trial testimony.

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

Appellant argued that it was error for the trial court to instruct that the crime of murder is the natural and probable consequence of the commission of the crime of simple assault. He argued that the instruction was in conflict with this Court's holding in People v. Prettyman (1996) 14 Cal.4th 248, 267. Appellant also argued that the instruction violated his federal constitutional rights to due process and to a jury trial. (In re Winship (1970) 397 U.S. 358, 364.) Finally, appellant argued that the erroneous instruction was prejudicial, requiring reversal of the Skyles and Price murder convictions and reversal of appellant's death sentence on the Eaton murder. (See, Johnson v. Mississippi (1988) 486 U.S. 578, 584-585.)

Respondent argues that any federal constitutional objections to the jury instructions were waived by failure to raise them below. (R.B. 245) Appellant has not waived any objection to the jury instructions. Penal Code section 1259 provides that "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Based upon this section, a defendant in a criminal case

may challenge a jury instruction on appeal even though he failed to object to the instruction at trial. (People v. Satchell (1971) 6 Cal.3d 28, 33 n.10; People v. Hempstead (1983) 148 Cal.App.3d 949, 956.) There was no waiver.

Respondent argues that People v. Prettyman, supra, 14 Cal.4th 248, 267, narrowly held that a trial court has a duty to instruct on the elements of the target crime when the jury is instructed on the natural and probable consequence doctrine. Respondent notes that Prettyman found that the error in failing to identify the target offense was harmless in that case because the only target offense shown by the evidence was assault with a deadly weapon; the natural and probable consequence doctrine was not argued by the parties; and the prosecutor's theory that the defendant had assisted or encouraged the perpetrator to commit murder was amply supported by the evidence. (People v. Prettyman, supra at 274.) (R.B. 245-249)

Respondent implies that the Court should simply ignore the following language in the Court's Prettyman decision: "If, for example, the jury had concluded that the 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].)." (People v. Prettyman, supra, 14 Cal.4th at 267.) Respondent finally argues that no reversible error has occurred in this case because the jury could reasonably and rationally conclude that appellant was aware that Soliz was armed with

a deadly weapon and intended to assault Sklyes and Price with that deadly weapon. (R.B. 247-251)

Respondent's argument misses the point. The jury instructions allowed the jury to convict appellant of murder based upon evidence that he aided and abetted Soliz in a simple assault upon Skyles and Price. The jury instructions made no distinction between simple assault and felony assault with a firearm. The instructions allowed the jury to convict appellant of murder "even if he did not intend to commit murder," if the "crime of murder was a natural and probable consequence of the commission of the crime of assault." (C.T. 690).

The instruction is in conflict with Prettyman because in Prettyman the Court stated: "Murder, for instance, is not the 'natural and probable consequence' of 'trivial' activities." (People v. Prettyman. supra, 14 Cal.4th at 269.) The language in Prettyman and the Court's examples based on the facts in that case support the conclusion that the Court's holding was: murder is not the natural and probable consequence of the crime of simple assault. Further indication that this was the holding of the case is seen from the Court's citation to People v. Butts (1965) 236 Cal.App.2d 817.

In Butts, the Court of Appeal reversed Butts' conviction of involuntary manslaughter based on the theory that he aided and abetted the co-defendant Otwell. Butts and Otwell were involved in a fight with a group of strangers. During the fight, Otwell pulled a knife and fatally stabbed one of the persons he was fighting. In reversing Butts' conviction the Court stated that there was "no evidence that Butts advised and encouraged the use of a knife, that he had advance 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 fist fight, 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.)

Respondent argues that subsequent Court of Appeal cases have rejected the Butts rationale. (See, People v. Montes (1999) 74 Cal.App.4th 1050, 1055-1056; People v. Godinez (1992) 2 Cal.App.4th 492, 501.) However, this Court cited Butts approvingly in its decision in Prettyman. Although lower Court of Appeal decisions may criticize the Butts case, they have no authority to overrule Butts, which was approved by this Court in Prettyman. (See, Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [Decisions of the California Supreme Court are binding on the Courts of Appeal.].)

Respondent argues that appellant's reliance upon People v. Hickles (1997) 56 Cal.App.4th 1183 is misplaced. (R.B. 250-251) Respondent argues that in Hickles the Court reversed the conviction because of the failure to identify the target offense in a case where the prosecution relied upon the natural and probable consequence theory to convict the defendant of murder. However, the facts in Hickles are similar to appellant's case because the defendant in Hickles was the non-shooter involved in the fatal confrontation. In Hickles, the failure to instruct on the target crime was reversible error because the jury might have "viewed murder as a natural and probable consequence of simple assault or even an argument, perhaps 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.)

Like the defendant in Hickles, appellant was the non-shooter in the confrontation with Skyles and Price. If the crime of murder is not the natural and probable consequence of the commission of the crime of simple assault, then the jury instructions in appellant's case were erroneous. If there is any likelihood that appellant was convicted of murder based upon the jury's conclusion that murder was the natural and probable consequence of simple assault, then appellant's convictions of the crimes of murdering Skyles and Price should be reversed under Prettyman, Hickles, and Butts.

Respondent argues that the only reasonable interpretation of the evidence was that the natural and probable consequence of appellants leaving their car armed was the fatal shooting of Skyles and Price. (R.B. 251) Respondent's argument might be correct if the jury had been properly instructed that they could find that murder was the natural and probable consequence of felony assault with a firearm. However, in appellant's case the jury was erroneously instructed that appellant could be found guilty of murder if the jury concluded that murder was the natural and probable consequence of the commission of simple assault.

There was evidence in the record that appellant and Soliz approached Skyles and Price for the purpose of committing a simple assault. Los Angeles County Deputy Sheriff Scott Lusk, a gang expert, testified that appellant and Soliz were both gang members and that gang members often band together in order to commit various crimes, including

"simple assaults." (R.T. 2060; 2081.) It was not clear from the evidence that when appellant and Soliz initially approached Skyles and Price, Michael Soliz intended to commit murder. Judith Mejorado testified that both appellant and Soliz asked her to drive into a gas station after they said they knew those people. She heard loud talking, like an argument, and thereafter she heard gunshots. (R.T 1711-1717; 1727-1732). What started out as an argument somehow escalated into Soliz shooting Skyles and Price.

Appellant's presence at the gas station is similar to the defendant in People v. Hickles, supra, 56 Cal.App.4th 1138. In Hickles the defendant and another man went to a motel room to confront a former roommate who had been evicted and who had caused the telephone service to be interrupted. The other man shot and killed the victim. The defendant Hickles, the non-shooter, was convicted of murder under a natural and probable consequence theory of aiding and abetting. In reversing the conviction, the Court noted that by failing to identify the target crime, there was a danger that the jury might have erroneously "viewed murder as the natural and probable consequence of simple assault." (People v. Hickles, supra, at 1197-1198.)

In appellant's case, there was not only the danger that the jury may have concluded that murder was the natural and probable consequence of simple assault, the jury instructions expressly stated that murder could be a natural and probable consequence of simple assault. The jury did not have the option of using felony assault with a firearm as the target offense. The only target offense in the natural and probable consequence jury instruction was the crime of simple assault. (C.T. 690) Thus, a straightforward application of Hickles to appellant's case requires the Court to reverse appellant's convictions for the murders of Skyles and Price. A

reversal of the Skyles and Price murder convictions should automatically reverse any death penalty in the Eaton case because those convictions were used by the prosecutor as aggravating factors. (Johnson v. Mississippi (1988) 486 US 578, 584-585.)

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

Appellant argued that the trial court erred in failing to sua sponte instruct the jury on the lesser included offense of voluntary manslaughter based on a sudden quarrel or heat of passion in the case involving Skyles and Price. (People v. Breverman (1998) 19 Cal.4th 142, 154-162.) Appellant argued that there was adequate provocation for the sudden quarrel based upon the prosecution's evidence concerning the earlier murder of Billy Gallegos. (People v. Brooks (1986) 185 Cal.App3d 687, 693.)

Appellant also argued that failure to instruct on a lesser included offense of voluntary manslaughter resulted in an incomplete definition of the malice element of the crime of murder. This violated appellant's federal constitutional rights to a jury trial and to due process of law. (See, People v. Breaverman, supra, 19 Cal.3d at 187-191 (Kennard, J., Dissenting).) Finally, appellant argued that the failure to instruct on voluntary manslaughter violated both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment by depriving appellant of his constitutional right to a reliable determination of guilt in a capital case. (Beck v. Alabama (1980) 447 U.S. 625, 638.)

Respondent argues that there was insufficient evidence of provocation and that the evidence showed that appellant acted out of revenge which is an insufficient basis upon which to instruct on voluntary manslaughter. (People v. Gutierrez (2002) 28 Cal.4th 1083, 1144.) Respondent also argues that sufficient time had passed so that an ordinary person's passions would have cooled. (People v. Daniels (1991) 52 Cal.3d 815, 868.) (R.B. 252-254) Neither argument is correct.

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 murders. In People v. Brooks, supra 185 Cal.App.3d 687, 693, the Court stated that the "murder of a family member is legally adequate provocation for voluntary manslaughter." Although not a family member, Billy Gallegos was a fellow gang member and thus a friend of appellant and Michael Soliz. Any reasonable person would have a strong emotional response to the murder of a friend. The recent murder of a friend is adequate provocation.

The passage of time between the Gallegos murder and the shooting of Skyles and Price was not so long as to defeat voluntary manslaughter jury instructions as a matter of law. Billy Gallegos had been shot and killed two weeks earlier by two black gang members. Skyles and Price wore clothing that identified them as rival gang members. There was no evidence that appellant and Soliz were looking for Skyles and Price on the night of the shooting. While driving home late one night, appellant and Soliz unexpectedly saw Skyles and Price at a Shell gas station.

In People v. Daniels, supra, 52 Cal.3d at 868, the defendant was convicted of murdering two police officers who came to take him to prison after his conviction for bank robbery had been affirmed on appeal.

Evidence that the defendant was bent on revenge for having been crippled by police gun fire after the bank robbery was found to be insufficient to justify manslaughter jury instructions. Two years and three months had passed between the defendant's injury and the killing of the police officers. This was found, as a matter of law, to be sufficient to allow the defendant's passions to cool.

In appellant's case, the two weeks between the murder of Billy Gallegos and the Shell gas station shooting does not compel a finding that the passions of an ordinary reasonable person had cooled. Since appellant was not present when Gallegos was murdered, he must have learned of the murder some time later. The passage of time may have been shorter than two weeks. When appellant and Soliz unexpectedly saw Skyles and Price at the Shell gas station, this may have been the first occasion in which they experienced a heat of passion concerning the Gallegos murder. Thus the issue in this case concerning whether passions had cooled was an issue that should have been submitted to the jury for their determination based upon appropriate voluntary manslaughter jury instructions.

A trial court has a sua sponte duty to instruct on lesser included offenses where there is substantial evidence of the lesser offenses. (People v. Breverman (1998) 19 Cal.4th 142, 162; People v. Barton (1995) 12 Cal.4th 186, 201; People v. Flannel (1979) 25 Cal.3d 668, 684-685.) In appellant's case, he has argued that the evidence was insufficient to convict him of the murders of Skyles and Price. If the Court finds substantial evidence to convict, the Court must also find that it was error not to instruct on the lesser included offense of voluntary manslaughter. There was substantial evidence of adequate provocation resulting in a sudden quarrel and a killing during the heat of passion.

Appellant's case is distinguishable from recent cases that have found trivial insults to be inadequate provocation to support instructions on voluntary manslaughter. (See, People v. Manriquez (2005) 37 Cal.4th 547, 586 [Insufficient provocation where victim called defendant a "mother fucker" and taunted him repeatedly to take out his weapon and use it.]; People v. Najera (2006) 138 Cal.App.4th 212, 226 [Insufficient provocation where victim called the defendant a "faggot."].) The failure to instruct the jury on the lesser included offense of voluntary manslaughter requires the Court to reverse appellant's convictions for the murders of Skyles and Price.

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

Appellant argued that the trial court failed to sua sponte instruct the jury that the testimony of an accomplice must be corroborated and must be viewed with distrust pursuant to Penal Code section 1111. Richard Alvarez was an accomplice on the Lester Eaton robbery and murder case because he drove with appellant and Michael Soliz both to and from the location of the market robbery. Appellant also argued that the failure to instruct the jury concerning accomplice testimony violated appellant's federal constitutional right to have the jury determine whether appellant was guilty of every element of the crime beyond a reasonable doubt. (See, United States v. Gaudin (1995) 515 US 506, 522-523.)

Respondent argues there was insufficient evidence that Richard Alvarez was an accomplice and thus the trial court had no sua sponte duty to instruct pursuant in CALJIC 3.11 and 3.18. Respondent states there was insufficient evidence to suggest that Mr. Alvarez aided or

abetted, or otherwise facilitated the appellant's criminal actions with the requisite criminal intent. (R.B. 255-259) Appellant disagrees.

"If sufficient evidence is presented at trial to justify the conclusion that a witness is an accomplice, the trial court must so instruct the jury, even in the absence of a request." (People v. Brown (2003) 31 Cal.4th 518, 555; People v. Zapien (1993) 4 Cal.4th 929, 982.) In appellant's case there was more than enough evidence to submit the accomplice issue to the jury with proper jury instructions. Richard Alvarez drove his car both to and from the vicinity of the Hillgrove Market on the night of the robbery. He waited several blocks away while appellant, Soliz, and Michael Gonzalez left in the van and robbed the market. When appellant and the other two returned to the location where Richard Alvarez was waiting, the van was abandoned and the three robbers entered Richard Alvarez's car. Alvarez then drove the robbers away to a place of safety. (R.T. 1252-1257)

When questioned by the police, Richard Alvarez was uncooperative and at first denied any involvement. He later claimed that he only participated in picking up the robbers after the robbery. In court, he asserted his Fifth Amendment privilege against self incrimination during his testimony. The court granted Richard Alvarez immunity in order to continue his testimony. (R.T. 1225-1231) There was clear evidence in the record from which the jury would have concluded that Richard Alvarez was an accomplice in the robbery who was subject to prosecution for the murder of Lester Eaton under the felony murder rule. (People v Dillon (1983) 34 Cal.3d 441, 462.) Thus, the accomplice jury instructions should have been given in this case.

Respondent argues that even if it was error to fail to give the accomplice jury instructions, any error was harmless because there was sufficient corroborating evidence in the record. (People v. Lewis (2001) 26 Cal.4th 334, 370.) (R.B. 258) There was other corroborating evidence in the record consisting of the testimony of Doreen Ramos, appellant's fingerprints found in the van, and appellant's tape recorded statements to Salvador Berber. However, the trial court's failure to instruct the jury concerning the need to corroborate an accomplice's testimony, resulted in the jury never making a determination whether Richard Alvarez's testimony was corroborated.

The accomplice corroboration issue is an issue for the jury, not for the trial judge or the appellate court to decide. The failure to present the accomplice corroboration issue to the jury denied appellant his constitutional right to have the jury find every aspect of his guilt beyond a reasonable doubt as guaranteed by the Sixth Amendment constitutional right to a jury trial. (See, Apprendi v. New Jeersey (2000) 530 U.S. 466, 490; United States v Gaudin (1998) 515 U.S. 506, 522-523; People v. Flood (1998) 30 Cal.4th 100, 101.) Respondent has failed to respond to appellant's constitutional argument.

Respondent finally argues that failure to instruct the jury that the testimony of an accomplice must be viewed with distrust was likewise harmless under the facts of this case. (R.B. 259) Respondent states that the jury already viewed Mr. Alvarez's testimony with distrust because he denied making many of his statements to the detectives. Most of Mr. Alvarez's statements incriminating appellant came through the testimony of the detective who had interviewed Alvarez prior to trial. Respondent also notes that the jury was instructed pursuant to CALJIC 2.02 [consider bias, motive,

and inconsistent statements], and 2.21.2 [a witness who is willfully false in one part may be distrusted in others.]. Appellant disagrees that the error was harmless.

The error was prejudicial because Richard Alvarez was a key witness for the prosecution against appellant on the Hillgrove Market robbery and the murder of Lester Eaton. Betty Eaton, the only eyewitness to the robbery and murder, could not identify appellant or Michael Soliz as the robbers. Doreen Ramos only saw appellant and Soliz prior to the robbery in possession of guns and bandannas. Appellant's fingerprints on papers found in the robbery van connected appellant to the van, but not necessarily to the market robbery and murder. Finally, even though appellant confessed to the robbery and murder to Salvador Berber, the issue of appellant making false confessions was raised by the prosecution when it argued that appellant's confession to shooting Skyles and Price was a false confession. The prosecution needed Richard Alvarez to connect appellant to the market robbery and the murder of Lester Eaton.

Respondent also ignores two other factors that appellant argued in the opening brief. First, after Richard Alvarez was granted immunity outside the presence of the jury, appellant requested that the trial court advise the jury that Alvarez had been given immunity. The court denied that request. (R.T. 1225-1231) Secondly, the jury was instructed at the end of the case that "Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact." (C.T. 676) Thus, rather than instructing the jury that the testimony of an accomplice must be corroborated and viewed with distrust, the jury was told just the opposite, that Richard Alvarez's testimony did not require corroboration, and the court refused to tell the jury that Alvarez had been given immunity.

The standard of review for jury instruction error 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 instruction. (People v. Lewis (2001) 26 Cal.4th 334, 371.) The standard of review for federal constitutional error is whether the error is harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.) Under the facts of this case, 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 under either standard of review. The Court should reverse the Lester Eaton murder conviction and the death sentence.

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

Respondent argues that appellant has waived the issue of prosecutorial misconduct during final argument on two of the three assigned errors because appellant failed to raise an objection in the trial court. Respondent also argues that the prosecutor did not commit misconduct and any error in the prosecutor's argument was harmless. (R.B. 260-270) Appellant relies upon the arguments previously made in Appellant's Opening Brief in Argument IX at pages 251-267.

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

Respondent argues that appellant's convictions should not be reversed for any errors considered separately or cumulatively. (R.B. 271) Appellant relies upon the arguments raised in Appellant's Opening Brief in Argument X at pages 268-270.

XI. <u>APPELLANT DID NOT WAIVE HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY QUESTIONED ON RACIAL BIAS AND THE COURT'S REFUSAL TO QUESTION THE JURY AFTER APPELLANT'S LATE OBJECTION REQUIRES AUTOMATIC REVERSAL OF THE DEATH SENTENCE.</u>

Appellant argued that his death sentence should be set aside because the trial court refused to question the jury on the issue of racial bias. (<u>Turner v. Murray</u> (1986) 476 U.S. 28, 36-37.) Respondent argues that appellant has waived any objection to the manner in which voir dire was conducted at the second penalty trial. Respondent states that "appellants failed to preserve this claim for appeal by failing to timely object to the questionnaire or to the manner or completeness of the court's questioning on this issue." (R.B. 286) Respondent is wrong. The record is clear that appellant did object (R.T. 3180-3182) and although his objection was late, it was sufficient to preserve the issue for appeal.

Respondent does not dispute appellant's constitutional right to have the jury questioned on racial bias. In <u>Turner v. Murray</u>, supra, 476 U.S. 28, 36-37, the United States Supreme 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." The Court stated that "We find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized." (Turner v. Murray, supra, at 36.) The requirement of asking jurors whether they harbored racial prejudice was found to be "minimally intrusive" (Id., at 37) and that "the risk that racial prejudice may have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." (Id., at 36.).

In Turner, a black defendant was charged with capital murder for the fatal shooting of a white proprietor of a jewelry store in the course of a robbery. During voir dire the trial judge refused the defendant's request to question the prospective jurors on racial prejudice. The Supreme Court held that "[b]y refusing to question prospective 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) On the issue of waiver, the Court stated that "a defendant cannot 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; accord, People v. Bolden (2002) 29 Cal.4th 515, 539: People v. Kelley (1992) 1 Cal.4th 495, 515.)

The issue of questioning the jury on racial bias was not waived in appellant's case because he objected in the trial court. (R.T. 3180-3182) The objection was late because counsel waited until after the jury and the alternates had been sworn. The trial court stated that it was too late to bring the issue to the court's attention because the jury had already been selected. The court stated that if defense counsel had raised the race issue earlier, it would have addressed the issue because there were African American jurors sitting on the panel. The court concluded that counsel's

failure to say anything during voir dire on this issue had effectively waived the issued. (R.T. 3181) The trial court erred in finding that this important constitutional issue was waived.

The fact that the objection was late did not waive the issue of questioning the jurors on racial bias because the trial had not yet started. The opening statements had not been given and no witnesses had testified. The trial judge still had the opportunity and time to question the sworn jurors and alternates on the issue of racial bias. If none of the sworn jurors or alternates revealed any racial bias, the trial could thereafter proceed and appellant's constitutional rights would have been protected. If a biased juror was revealed during the questioning, he could have been excused and replaced by an alternate juror. If a sworn alternate had revealed racial bias, he could have been excused. The court could have re-summoned some of the recently dismissed prospective jurors and replaced the excused alternate with a new alternate. Thereafter, the trial could have commenced without violating appellant's constitutional rights.

A similar remedy was employed by the trial court in People v. Kelly (1992) 1 Cal.4th 495, 516-518. In the Kelly case, the trial court conducted individual sequestered questioning of jurors on their attitudes regarding the death penalty. After a number of jurors had been so questioned, defense counsel asked permission to ask the sequestered jurors about their attitudes regarding race as required by Turner v. Murray (1986) 476 U.S. 28. The court allowed defense counsel to ask race questions during the remainder of the individual sequestered voir dire. It denied defense counsel's request to recall each juror who had already been individually questioned. Instead, the court allowed defense counsel to ask race questions during the general non-sequestered voir dire, and to question

any prospective juror in private who so requested. This Court found that the trial court properly exercised its discretion by fashioning a remedy that allowed the race bias questions to be asked.

At the time that appellant made his objection in the trial court, all that was required was for the trial judge to ask one question concerning racial bias to the entire jury panel. (See People v. Robinson (2005) 37 Cal.4th 592, 620.) In Robinson, a black defendant was charged with murdering two young white men. After his conviction and death sentence, he argued on appeal that the jurors were not adequately questioned concerning racial bias as required by Turner v. Murray (1986) 476 U.S. 28. However, the questionnaire used during jury selection specifically informed the prospective jurors that a party or witness "may come from a different nationality, racial or religious group," and asked: "Would that fact affect your judgment or the weight and credibility you would give to his or her testimony?" One juror indicated some prejudice on the questionnaire and was questioned in court by the trial judge. Defense counsel thereafter used a peremptory challenge to excuse the juror.

This Court in Robinson held that a single question on racial bias in the jury questionnaire was sufficient to comply with the constitutional requirement in Turner that the jury be questioned on racial bias. (People v. Robinson, supra, at 620.) Concerning Robinson's argument that the trial court failed to ask further questions on racial bias, the Court stated that "If counsel had believed that further inquiry was necessary in this instance or with regard to other prospective jurors, he could have submitted additional questionnaire inquiries or suggested additional oral questions. As noted above, defense counsel's failure to do so forfeits the claim on

appeal." (People v. Robinson, supra, 37 Cal.4th at 619, citing People v. Avena (1969) 13 Cal.4th 394, 413.)

In appellant's case, the trial court's failure to question the jurors on racial prejudice could have been easily remedied by the court even though the objection was late. It was not necessary for each juror to be individually questioned concerning racial bias. It did not require numerous follow-up questions. In Turner, the Court noted that "the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively." (Turner v Murray, supra., at 37.).

The trial court in appellant's case could have asked a single question to the jury panel: Does the fact that two of the murder victims were African American and one of the murder victims was Caucasian cause any of the jurors to be prejudiced against the two Hispanic defendants? Asking that single question may have revealed one or more racially biased jurors who could have been excused for cause and replaced with alternates. Asking that one question would have adequately protected appellant's constitutional right to an impartial jury. What the trial court could not do under the Turner decision was to refuse to make any inquiry at all. The failure to make any inquiry of the jury at all, once the issue was brought to the Court's attention, is reversible error under Turner.

Many of the cases relied upon by respondent in support of the waiver argument are cases where the defendant made no objection during the trial. In People v. Benavides (2005) 35 Cal.4th 69, 88 this Court stated that criminal convictions may "not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced." (Accord, People v. Ervin (2000) 22 Cal.4th 48,

73; People v. Cudjo (1993) 6 Cal.4th 585, 627-628; People v. Visciotti (1992) 2 Cal.4th 1, 37-38, 41-42; People v. Mickey (1991) 54 Cal.3d 612, 664-665.) Appellant did not acquiesce to the jury selection procedure in his case. He objected in the trial court that questions concerning racial bias had not been asked. Respondent's reliance upon these cases is therefore misplaced.

The lateness of appellant's objection is the key issue in this case. The trial court felt that appellant's objection came too late because the jury and the alternates had already been selected and sworn. Indeed, in one case this Court stated that "Objections to the jury selection process must be made when the selection occurs." (People v. Johnson (1993) 6 Cal.4th 1, 23.) However, in Johnson the objection to the jury selection process was made during the middle of the trial when the court was replacing one of the original jurors with an alternate juror. The defendant objected that the trial court had improperly limited both sides to one challenge "per seat" for the four alternate jurors and defendant had previously used his challenge for the seat ultimately given to the alternate juror. The defendant had not previously objected during jury selection, but once the alternate juror was substituted during the middle of the trial, defense counsel moved for a mistrial. Under these circumstances the Court held that an objection during the middle of the trial to the jury selection process was too late and was waived.

Unlike Johnson, most cases holding that a defendant has forfeited his appellate claim by failing to make a "timely" objection have involved objections to the admissibility of evidence. (People v Demetrulias (2006) 39 Cal.4th 1, 19-22; People v Ogg (1968) 258 Cal.App.2d 841, 846; People v Horn (1960) 187 Cal.App.2d 68, 77; People v Wilson (1924) 76

Cal.App. 688, 706-707.) These cases are based upon an application of Evidence Code section 353, subdivision (a). That section provides that a judgment may not be reversed by reason of the erroneous admission of evidence unless: "There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . ." (Emphasis added; see also, People v Partida (2005) 37 Cal.4th 428, 433; People v Seijas (2005) 36 Cal.4th 291, 302; People v Rogers (1978) 21 Cal.3d 542, 548.)

In Demetrulias, the defendant raised objections to the admissibility of the testimony of several witnesses who testified to the nonaggressive or nonviolent character of the victims. The defendant objected on the erroneous grounds that the testimony was irrelevant, called for speculation, and lacked foundation. All of these objections were overruled. Later, after the witnesses were no longer on the witness stand, defense counsel moved to strike their testimony on the correct legal grounds that evidence of a victim's peaceful character violates Evidence Code section 1103, subdivision (a). The trial court agreed to bar the prosecutor from introducing further evidence of the peaceful character of the victims. However, the trial court refused to strike the testimony of the victims' character already in the record. (People v Demetrulias, supra, 39 Cal.4th 1, 19.)

When the defendant in Demetrulias raised the issue of the admissibility of the evidence on appeal, the Court held that the issue had been waived under Evidence Code section 353, subdivision (a). The Court stated that under section 353, "defendant's claim that the admission of evidence of the victims' peaceful characters violated Evidence Code section

1103 is not cognizable; defendant forfeited his claim by failing to make timely objections or a timely motion to strike on that specific ground." (People v Demetrulias, supra, at 21.) The Court noted that the defendant's motion to strike the testimony under Evidence Code section 1103 "was made some days afterwards" and that the motion was "specific enough, but not timely." (Ibid.)

In appellant's case, appellant's objection to the trial court's failure to question the jury on racial bias was not too late. Appellant's objection was raised on the same day that the jurors and alternates had been sworn. Although jury selection had been completed, it had been completed just moments before appellant raised his objection. Jury selection commenced on October 20, 1998. It continued on October 21, 1998 and concluded on Thursday October 22, 1998 when the jurors and the alternates were sworn. (C.T. 876-877; 878-879; 889-890.) It was on the last day of jury selection after the jury had been sworn and excused for the day that appellant raised his objection concerning the failure to question the jurors on race. (C.T. 889-890; R.T. 3180-3182) The jury trial was not scheduled to start until four days later on Monday October 26, 1998. (C.T. 891-894) Thus, there was adequate time for the trial court to remedy the failure to ask racial bias questions before the start of the trial.

The rationale for the waiver rule is that the failure to object prevents the trial court from correcting the error. "In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his obligations until it would be

too late to obviate them, and the result would be that few judgments would stand the test of an appeal." (In re Seaton (2004) 34 Cal.4th 193, 198; People v. Saunders (1993) 5 Cal.4th 580, 590; Sommer v. Martin (1921) 55 Cal.App.603, 610.) The defendant's failure to object during trial, deprives the court and the prosecution of "the opportunity to cure the defect at trial." (In re Seaton, supra, 34 Cal.3d at 198; People v. Rogers (1978) 21 Cal.3d 542, 548.)

Appellant's objection was not waived because at the time that the objection was made the trial court had the opportunity to correct the error. The trial judge could have simply asked a single question concerning racial bias to the entire jury panel. If none of the jurors expressed any racial bias against the appellants based upon the race of Skyles and Price, or the race of Lester Eaton, or the race of the appellants, the trial could continue. If any juror admitted racial bias, the juror could have been excused and replaced with an alternate. If further alternates were needed, the court could have summoned additional jurors to replace any excused alternate. The jurors could have been summoned back to court the following day, Friday October 23, 1998, for further questioning. (See, People v. Crowe (1973) 8 Cal.3d 815, 832 [If the trial court mistakenly swears the jury before the defendant has used all of his peremptory challenges, the court may fashion a remedy such as reopening jury selection.].)

It is true that appellant's objection in the trial court was in the form of a motion for a mistrial which did not expressly request that voir dire be reopened for an additional racial prejudice question. However, appellant did object on the grounds that none of the jurors or alternates were questioned on racial bias. That objection was sufficient to preserve for

appeal the argument that the trial court should have reopened jury selection to ask at least one question on racial bias.

Furthermore, because this is a death penalty case, appellant's objection was sufficient to preserve the issue of reopening the voir dire as the appropriate remedy. 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; People v. Bob (1946) 29 Cal.2d 321, 325.).

Finally, appellant's case is distinguishable from this Court's recent decision in People v. Cottle (2006) 39 Cal.4th 246. In Cottle, after twelve jurors had been sworn, one of the jurors expressed the feeling that he could not be fair in a criminal case. After further questioning by the court, the juror agreed to put aside any sympathy he had for the victims and try the case fairly. The defendant moved to reopen jury selection to use an unused peremptory challenge to dismiss the juror. The court denied the motion. The defendant was convicted and argued on appeal that the trial court erred in refusing his request to reopen jury selection to exercise an unused peremptory challenge.

The Court affirmed the conviction on the basis of Code of Civil Procedure section 226, subdivision (a) which provides: "A challenge to an individual juror may only be made before the jury is sworn." (Emphasis added.). (People v Cottle, supra, 39 Cal.4th 246, 255.) The

Court noted in Cottle that both sides had consecutively passed their peremptory challenges and the jury was sworn. "At this point, by its terms, section 226, subdivision (a) barred the court from reopening jury selection and permitting further peremptory challenges." (People v Cottle, supra, at 255.). The Court overruled People v. Armendariz (1984) 37 Cal.3d 573, which allowed a trial court to reopen jury selection after the jury had been sworn in order for the defendant to exercise further unused peremptory challenges.

The Cottle case has no direct application to appellant's case. Appellant was not asking to reopen jury selection in order to exercise a peremptory challenge. Appellant objected that no questions were asked of any of the jurors concerning whether racial bias would prevent them from being fair and impartial jurors. These questions were designed to disclose a challenge for cause based on actual prejudice. In Cottle, the Court noted that a trial court may discharge a juror if there is good cause for his removal. (People v Cottle, supra, at 255; Code Civ. Proc. §§233 and 234; Pen. Code §1089.) Code of Civil Procedure section 234 provides in part that "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or on other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefore, the court may order the juror to be discharged and draw a name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she has been selected as one of the original jurors." Penal Code §1089 contains similar language for the removal of a juror for good cause.

In Cottle, the Court also noted that the defendant was not raising a constitutional claim based on either double jeopardy or a challenge to the improper use of peremptory challenges under Batson v. Kentucky (1986) 476 U.S. 79 and People v. Wheeler (1978) 22 Cal.3d 258. (People v Cottle, supra, at 257-258.). Appellant's case does raise a constitutional issue. Appellant argues that he was denied his constitutional right to a fair and impartial jury based on the trial court's failure to question perspective jurors concerning racial bias as required by Turner v. Murray (1986) 476 U.S. 28. Jury selection in appellant's case should have been reopened in order to protect appellant's constitutional right to a fair and impartial jury.

In short, the record shows that the jury that imposed the death penalty on appellant was not questioned concerning racial bias. Appellant raised an objection in the trial court at the end of the jury selection process after the jury had been sworn, but four days before the start of the trial. The waiver doctrine is only appropriate where the lateness of the objection prevents the trial court from remedying the error. Here, there was an adequate opportunity at the time of appellant's objection for the trial court to fashion a remedy. The trial court could have asked one question to the entire panel concerning whether any juror harbored racial prejudice that would prevent him from being a fair and impartial juror in the case. The appellants, John Gonzalez and Michael Soliz, were Hispanic. The murder victims, Elijah Skyles and Gary Price, were African Americans. Murder victim Lester Eaton was Caucasian. The refusal of the trial judge to question the jurors on racial prejudice denied appellant of his federal constitution right to an impartial jury and requires automatic reversal of his death sentence. (Turner v. Murray (1986) 476 U.S. 28, 36-37.)

XII. THE COURT VIOLATED THE WITHERSPOON AND WITT CASES WHEN IT EXCUSED JUROR 8763 FOR CAUSE

Appellant argued that Prospective Juror 8763 was erroneously excluded from the jury based upon her views on capital punishment and the improper exclusion of the juror violated appellant's federal constitutional right to due process of law under the Fourteenth Amendment of the United States Constitution. (Wainwright v. Witt (1985) 469 U.S. 412; Witherspoon v. Illinois (1968) 391 U.S. 510.) A trial judge may exclude a prospective juror based on the juror's views on capital punishment only when those 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.) Respondent argues that Perspective Juror 8763 gave conflicting answers on whether she could vote for the death penalty and the trial court's determination as to the juror's true state of mind, if supported by substantial evidence is binding on the appellate court. (R.B. 294-295)

This Court has upheld a trial court's ruling excusing a trial juror if the ruling is fairly supported by the record and has accepted as binding the trial court's determination as to the prospective juror's true state of mind when a 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.) However, 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 the predilection would actually preclude him from

engaging in the weighing process and returning a capital verdict." (People v. Kaurish (1990) 52 Cal.3d 648, 699.)

Respondent notes that in the juror questionnaire, Juror 8763 stated her approval that: A person who kills another during the commission of a robbery should automatically receive life imprisonment without possibility of parole (Question 100); A person who intentionally kills more than one person should automatically receive life imprisonment without possibility of parole (Question 102); and that she had conscientious objections to the death penalty which might impair her ability to be fair to the prosecution in a case where the death penalty is sought (Question 106). (C.T. 3309)

However, on the same page of the jury questionnaire there are indications that the juror was confused by the questionnaire. Juror 8763 stated that she both agreed and disagreed with the statement that anyone who kills another person during the commission of a robbery should automatically receive the death penalty (Question 99). In conflict with her answer in Question 102, the juror stated that she agreed with the statement that anyone who intentionally kills more than one person without legal justification should automatically receive the death penalty (Question 101). When asked if during the penalty phase she would vote to impose life imprisonment without the possibility of parole regardless of the evidence, the juror first answered "not sure." The words "not sure" were crossed out and a "yes" answer was circled. Concerning the juror's answer on Question 99 where she circled both "agrees" and "disagrees," the Court stated that "We don't really know what your answer was." (R.T. 3096) Thus, the trial court did not excuse the juror based upon any answers given in the juror questionnaire alone.

Indeed in this Court's opinion in People v. Stewart (2004) 33 Cal.4th 425, 446-452, the Court reversed a death sentence on the grounds that a trial court erroneously excused five prospective jurors for cause based upon their answers in a jury questionnaire. Although the Court did not say that a trial court may never grant a motion to excuse a juror for cause based solely upon the juror's checked answers in a jury questionnaire, the Court did note that it was unaware of any authority upholding such a practice. (People v. Stewart, supra at 450-451.)

By asking the potential jurors appropriate clarifying questions, a trial court can make its own assessment of the demeanor and credibility of the prospective jurors when evaluating whether the juror's views would substantially impair their performance as a juror in the case. When a trial court rules on this issue based upon the jury questionnaire alone, the trial court's determination is not entitled to deference on appeal. Thus, in Stewart this Court concluded that "The trial court erred in dismissing the five prospective jurors for cause without first conducting any follow-up questioning." (People v. Stewart, supra at 451.)

Although a poor phrasing of the jury questionnaire in Stewart contributed to the Court's conclusion, the Court noted that "Even if the questionnaire had tracked the 'prevent or substantially impair' language of Witt, we still would find that the prospective jurors could not properly be excused for cause without any follow-up oral voir dire by the court." (People v. Stewart, supra at 451-452.) Thus, respondent's focus on the juror's answers in the jury questionnaire as establishing a record for excusing the juror is misplaced. This Court must focus on the juror's answers in court while being questioned by the trial judge.

Resolution of the issue of whether the juror in this case was properly excused essentially rests upon an evaluation of two of the juror's answers. The first question concerned the juror's response in the questionnaire to Question 97. In that response, Juror 8763 stated that only God should be a judge of whether or not a person should receive the death penalty. The Court then 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 might 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)

This response does not meet the Witt standard for excusing a juror. It merely indicates that the juror has strong religious beliefs that only God should decide when a person should be put to death. The juror did not say that these views were immutable. In fact, the next question asked by the Court clearly revealed that Juror 8763 could follow the Court's instructions and vote for the death penalty.

In this second question, the Court asked: "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 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 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) Based on this answer, Juror 8763 was qualified to sit on appellant's jury. There was no basis under the law for excluding the juror.

It is not grounds for excluding a juror from a capital case simply because the juror would hold the prosecution to a greater showing than average before that juror would vote for death. "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; see also People v. Heard (2003) 31 Cal.4th 946, 965; People v. Stewart, supra, 33 Cal.4th at 446-447.)

In Heard, a juror was excused because he indicated that past psychological factors related to the defendant might weigh heavily on the juror so that he probably would not impose the death penalty. In Stewart, five jurors were excused because their opinions concerning the death penalty would have made it very difficult for them to impose the death penalty. In Heard and Stewart, this Court found that the juror's answers were not sufficient to warrant their being excused from the jury. In each case, the death sentence was reversed based on Witherspoon/Witt error. (People v. Heard, supra, 965-966 at Stewart, supra, at 454-455.)

In People v. Stewart, supra, 33 Cal.3d at 446-447, the Court stated that "A prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold for concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California 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 circumstances 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 will 'substantially impair the performance of his or her duties as a juror under Witt.'" (People v. Stewart, supra, at 446-447.)

A similar view was expressed by the Ninth Circuit in Brown v. Lambert, (9th Cir. 2005) 431 F.3d 661, where the Court reversed the defendant's death sentence based on the erroneous exclusion of a juror. During voir dire examination the juror expressed caution that the death penalty should be reserved for severe situations. He stated that he would feel most comfortable imposing the death penalty where the defendant is incorrigible and would re-violate if released, and less comfortable imposing the death penalty when the defendant is found to have been temporarily insane. However, he did state unequivocally that he would consider the death penalty as an option if told to do so. The Court noted that the juror's views involving the death penalty mirrored Washington's death penalty statute itself, which required the jurors to take into account mitigating factors and aggravating factors and the particular circumstances of the case before deciding whether or not to impose the death penalty. Thus, the Court held that the removal of this juror violated the defendant's federal constitutional right to due process under Witherspoon v. Illinois (1968) 391 U.S. 510.

The Brown v. Lambert case was subsequently overruled by the Supreme Court in Uttecht v. Brown (2007) 127 S.Ct. 2218. The Court

noted that Brown's case was in federal habeas corpus proceedings when the Ninth Circuit ruled that the juror was improperly excused under Witherspoon v. Illinois (1968) 391 U.S. 510. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a federal court may not grant habeas relief unless the decision of the state court is contrary to, or an unreasonable application of, clearly established federal law. See 28 U.S.C. §§2254(d)(1)-2; Williams v. Taylor (2000) 529 U.S. 362, 413. The Supreme Court denied relief because that high standard was not met. The Court determined that the Supreme Court of Washington recognized the deference owed to the trial court, identified the correct standard required by federal law, and found it was satisfied. If Brown's case had been on direct appeal rather than on habeas proceedings, the result in the case may have been different. (See, Schriro v Landrigan (2007) 127 S.Ct. 1933, 1939 ["The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold."].)

In appellant's case the removal of Prospective Juror 8763 violated appellant's federal constitutional right to due process of law under Witherspoon. Juror 8763 stated that she would vote for the death penalty depending upon the circumstances as a last resort if all the evidence is against him. (R.T. 3097) This meant that she would hold the prosecutor to a higher threshold before she would return the death penalty. She indicated that she could put her own religious and personal beliefs aside in a proper case and vote for the death penalty provided there were compelling reasons for death. Removal of a juror under these circumstances is constitutional error and is reversible per se with regard to any ensuing death penalty judgment. (Gray v. Mississippi (1987) 481 U.S. 648, 659-667; Davis v.

Georgia (1976) 429 U.S. 122, 123; People v. Stewart (2004) 33 Cal.4th 425, 454.)

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. Introduction

Appellant has argued that his federal and state constitutional right to counsel was violated during the penalty trial because his counsel had a conflict of interest. Trial counsel John Tyre received clothing from Kimberly Gonzales and David Gonzales for delivery to appellant at the courthouse. After Mr. Tyre delivered the clothing to a deputy at courthouse, a search of the clothing revealed heroin sewn into the lining. Because of his delivery of the clothing, John Tyre had two conflicts of interest. First, he was subject to criminal prosecution for assisting in the heroin smuggling. Second, he was a prosecution witness against appellant if heroin smuggling charges were filed against appellant.

Appellant also argued that the conflict of interest adversely affected his counsel's performance. Because of the conflict there was a breakdown in the attorney client relationship over appellant's decision to testify. Appellant testified at the penalty trial over the objection of counsel. Also because of the conflict, Mr. Tyre failed to call Kimberly Gonzales and David Gonzales as penalty phase witnesses and failed to object to the prosecutor's improper cross examination of appellant.

Respondent argues that there was no conflict of interest (R.B. 304) and even if there was a conflict, counsel's performance was not

adversely affected in any way. (R.B. 308) According to respondent, "Appellant Gonzales' theory – that his counsel's performance was 'adversely affected' merely because he might have been a potential defendant, or might be a potential witness against appellant Gonzales, in an as yet uncharged future criminal case – appears to be nothing more than ipse dixit: It adversely affected counsel's performance because I say so. The simple 'possibility of conflict is insufficient to impugn a criminal conviction.'" (R.B. 308) Respondent is wrong on both arguments.

B. The Conflict Of Interest

Appellant's counsel John Tyre had two conflicts of interest. By delivering the clothes containing the concealed heroin, Mr. Tyre could have been arrested and prosecuted. A lawyer has a conflict of interest when he "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 (2nd Cir. 1994) 25 F.3d. 142, 156.) A conflict of interest exists in these circumstances 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 (9th Cir. 1988) 847 F.2d 576, 581.)

John Tyre also had a conflict of interest based upon the prosecutor's statement that if criminal charges were filed against appellant and his family for smuggling heroin into the jail, Mr. Tyre would be a prosecution witness. (R.T. 2782) A lawyer has a conflict of interest if he represents a prosecution witness and the defendant in a criminal case. (Wheat v. United States (1988) 486 U.S. 153, 156-157; People v. Easley (1988) 46 Cal.3d 712, 724-725.) An even greater conflict of interest exists

if an attorney becomes a prosecution witness against his own client. When an attorney becomes a prosecution witness against his own client, it creates an "irreconcilable" and "unwaverable" conflict of interest. (See, Wheat v. United States, supra, 486 U.S. at 156-157.)

Respondent claims these are mere potential conflicts of interest because John Tyre was never charged with heroin smuggling and he never became a prosecution witness against appellant. Heroin smuggling charges were never filed. However, the record indicates that during trial, the Sheriff's Department was conducting an ongoing investigation. (R.T. 2807-2808) It is the pendency of this criminal investigation that creates the actual conflict of interest between counsel and his client. Defense counsel had a motive to protect himself as well as representing his client. "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; see also, Cuyler v. Sullivan (1980) 446 U.S. 335, 356 n.3; People v. Fry (1998) 18 Cal.4th 894, 898.)

C. The Federal Constitution

Under the federal constitution a potential conflict of interest without more is not grounds for reversing a criminal conviction. (Cuyler v. Sullivan (1980) 446 U.S. 335, 350.) In Sullivan, the Supreme Court stated: "We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." (Id. at 350)

To reverse a conviction under the federal constitution for an attorney conflict of interest, a defendant must show that an actual conflict of

interest adversely affected his lawyer's performance. (Mickens v. Taylor (2002) 535 U.S. 162, 171-173; People v. Cornwell (2005) 37 Cal. 4th 50, 74-75.) "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." (Mickens v. Taylor, supra, at 172 n.5.)

Whether a conflict of interest had an adverse effect on counsel's performance requires a review of the trial record to determine whether "counsel 'pulled his punches' i.e., failed to represent defendant as vigorously as he might have had there been no conflict." (People v. Easley (1988) 46 Cal.3d 712, 725; see also, Glasser v. United States (1942) 315 U.S. 60, 72-75; People v. Mroczko (1983) 35 Cal.3d 86, 105-109.) The issue is whether counsel abandoned a defense strategy or tactic in order to protect his other client or himself. In Hovey v. Ayers (9th Cir. 2006) 458 F.3d 892, 908, the Court stated that to show an actual conflict of interest, the defendant must demonstrate "that some plausible alternative defense strategy or tactic might have been pursued but was not, due to the attorney's other loyalties or interests."

Appellant has identified three adverse effects on counsel's performance. The first adverse effect is the dispute over appellant's decision to testify. Mr. Tyre advised appellant not to testify, but appellant refused to accept his advice and testified over Mr. Tyre's objection. (R.T. 4192-4194) Appellant's testimony was harmful because he testified that he shot all three murder victims, Lester Eaton, Elijah Skyles, and Gary Price. (R.T. 4207-4210) Testimony that he shot Skyles and Price was in conflict with the evidence in the case. All of the eyewitnesses stated that Skyles and Price were shot by Michael Soliz. (R.T. 1463-1467; 1574-1577; 1621-1624). Even the prosecutor argued to the jury that appellant's confession to

shooting Skyles and Price was not true. (R.T. 2232-2234)

During deliberations, the jury asked for a rereading of appellant's testimony. (R.T. 4510-4516) After rereading appellant's testimony, the jury returned a verdict of death. (R.T. 4517-4523) At the first penalty trial, when the appellant did not testify, the jury was unable to reach a verdict and the vote was 8 to 4 in favor of a sentence of life without possibility of parole. (R.T. 2765-2769) Appellant was prejudiced by the conflict of interest because, at the time that he made his decision to testify, appellant was denied his constitutional right to the assistance of conflict-free counsel. The Sixth Amendment right to counsel "requires the guiding hand of [conflict-free] counsel at every stage of the proceeding against him." (Powell v. Alabama (1932) 286 U.S. 45, 68-69; Gideon v. Wainwright (1963) 372 U.S. 335, 344-345.)

The second adverse effect on counsel's performance was the failure to call Kimberly Gonzales and David Gonzales as defense witnesses at the second penalty trial. Both witnesses testified at the first penalty trial where the jurors were unable to reach a death verdict. Kimberly Gonzales and David Gonzales were the two family members who gave the clothing which contained the heroin to John Tyre. Because the criminal investigation into the heroin smuggling incident was ongoing, Mr. Tyre had a self interest motive in not calling these witnesses. He would not want them to testify because they might blame him for placing the heroin in the clothing.

The third adverse effect was John Tyre's failure to object to the prosecutor's improper "Were They Lying" questions during cross-examination of appellant. (See, AOB Arg. XIV) Tyre had initially objected to appellant testifying at all during the trial. When appellant did

testify, counsel made no effort to prevent the prosecutor from asking objectionable questions. Because of the ongoing criminal investigation into the heroin smuggling, Tyre may have preferred to have appellant's testimony discredited by the prosecutor in order to prevent the possibility that anyone would believe a future claim by the appellant that Mr. Tyre was responsible for smuggling the heroin.

These adverse effects in the record meet the federal constitutional standard for demonstrating an actual conflict of interest that has adversely affected counsel's performance. (Glasser v. United States, supra, 315 U.S. at 72-75.) An attorney without a conflict of interest would have called Kimberly and David Gonzales as defense witnesses and would have objected to the improper cross-examination of appellant. An attorney without a conflict of interest would have prepared his client to testify rather than objecting to his testimony. A conflict-free attorney would not have been hindered by concerns that appellant or his witnesses would accuse him of wrongdoing. Thus, appellant's death sentence should be reversed for violation of appellant's Sixth Amendment federal constitution right to conflict-free counsel. (Mickens v. Taylor, supra, 535 U.S. 162, 171-173.)

D. The California Constitution

In the opening brief, appellant argued that the death penalty should be reversed under the California Constitutional right to conflict-free counsel because the California Constitution provides a "somewhat more rigorous standard of review." (People v. Mroczko (1983) 35 Cal.3d 86, 104.) Under the California Constitution, "even a potential conflict may require reversal if the record support 'an informed speculation' that appellant's right to effective representation was prejudicially affected. Proof of an 'actual conflict' is not required. The same principal applies

when counsel represents clients whose interest may be adverse even when they are not co-defendants in the same trial." (People v. Mroczko, supra, 35 Cal.3d at 105.)

Respondent has made no argument concerning the California Constitution and has failed to respond to appellant's reliance upon People v. Singer (1990) 226 Cal. App.3d 23, 38 and People v. Jackson (1990) 167 Cal. App.3d 829, 831-832. Appellant's argument is similar to the approach used in the Singer case. In Singer, the Court reversed a murder conviction on the grounds that trial counsel had a conflict of interest based upon his covert sexual and romantic relationship with the defendant's wife during the trial. The Court held that counsel's affair with the defendant's wife created a conflict of interest that "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.)

The Court stated that the conflict may have influenced defense counsel to see his client convicted and imprisoned so that the affair with the defendant's wife could continue and remain undiscovered. Although the wife testified at the first trial which resulted in a hung jury, defense counsel did not call the wife as a witness at the second trial. The Court noted that the conflict of interest may have caused the attorney to be reluctant to call the wife as a witness in order to protect her, while jeopardizing her husband's case. The attorney might also have been reluctant to call other defense witnesses to avoid implicating the wife in the murder. The conflict may also have caused defense counsel to forego expensive trial strategies to protect the wife's finances at the expense of her husband's defense at trial. The Court reversed the conviction under the California Constitution because the record supported "an informed

speculation that [trial counsel's] conduct in the second trial was adversely affected." (People v. Singer, supra, at 42; accord, People v. Jackson, supra, 167 Cal. App.3d at 832-833.)

Respondent has argued that appellant's suggested adverse effects on counsel's performance are nothing more than ipsi dixit. However, appellant's arguments are similar to those made in cases interpreting the California constitutional right to the assistance of conflict-free counsel. (See, People v. Singer, supra, at 39-42; People v. Jackson, supra, 832-833.) There is at least informed speculation in appellant's case that John Tyre objected to appellant testifying out of fear that appellant might implicate Tyre in the heroin smuggling. There is also informed speculation that since Tyre objected to appellant testifying, he did not properly prepare appellant for his testimony.

John Tyre failed to object to the prosecutor's improper questioning of appellant on cross-examination when the prosecutor asked appellant if other witnesses were lying. There is informed speculation that Mr. Tyre may have wanted appellant's testimony discredited by this cross-examination so that appellant would not be seen as credible if he accused Tyre of involvement in the heroin smuggling incident. Finally, there is informed speculation that John Tyre failed to call Kimberly Gonzales and David Gonzales as witnesses at the second penalty for the same reason. He did not want to risk the possibility that they might while testifying blame him for the heroin smuggling incident.

It may appear that these informed speculations take an extreme view of the record. However, this was the same approach taken in People v. Singer, supra, 226 Cal. App.3d at 40. In Singer, the Court stated:

> Just as in the sexual-romantic relationship in Jackson between defense counsel and the prosecutor, the relationship here between defense counsel and defendant's wife deprived defendant of his constitutional right to the 'undivided loyalty and effort' of his attorney. (Maxwell v. Superior Court, supra, 30 Cal.3d 606, 612 . . .) The validity of the adversarial system depends upon the guarantee of this "undivided loyalty" for every criminal defendant. Given the instant facts, a defense attorney, in the extreme, might be influenced to see his client convicted and imprisoned so that the affair can continue or remain undiscovered. (226 Cal. App.3d at 39-40, emphasis added)

Applying the informed speculation standard of the California Constitution, appellant has identified several areas in the record where the conflict may have adversely affected counsel's performance. Kimberly and David Gonzales were not called as defense witnesses. Counsel failed to object to the prosecutor's improper cross-examination of appellant. Counsel objected to appellant testifying. All of counsel's actions may have been motivated by counsel's interest in not having appellant or appellant's witnesses publicly accuse counsel of criminal involvement in the heroin smuggling.

The most compelling reason for reversing appellant's death sentence in this case is the dispute between counsel and appellant over appellant's decision to testify. Appellant's decision to testify clearly harmed his case during the penalty trial. In most cases a defendant in a capital case has the right to testify even over the objection of his counsel. (People v. Nakahara (2003) 30 Cal.4th 705, 715, 719.) In appellant's case, the essence of the constitutional error was that the counsel advising

appellant had a conflict of interest. Appellant was therefore denied his constitutional right to the assistance of conflict-free counsel at the time that he made this important decision. He was deprived of his right to "the guiding hand of [conflict-free] 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.)

Respondent's brief suggests that appellant has not proven that the conflict of interest caused the dispute between appellant and counsel over the decision to testify. Indeed, a dispute over the decision to testify may occur in a case where counsel does not have a conflict of interest. Under the federal Constitution, a conviction may not be reversed based upon a "mere theoretical division of loyalties." (Mickens v. Taylor (2002) 535 U.S. 162, 171.) However, even assuming appellant has failed to meet the federal standard of reversal for an attorney conflict of interest, he has met the standard for reversal under the California Constitution.

Under the California Constitution "even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." (People v. Mroczko (1983) 35 Cal.3d 86, 105.) The record in this case supports informed speculation that the conflict of interest resulted in a breakdown of the attorney-client relationship which culminated in the dispute over whether appellant should testify. Appellant was denied his constitutional right to conflict-free counsel at the time he made the decision to testify. (See, Mannhalt v. Reed (9th Cir. 1988) 847 F.2d 576, 581 [An attorney with a similar conflict of interest "could not give unbiased advice to his client about whether to testify."].) This was a fundamental flaw in

the proceedings of the second penalty trial that resulted in appellant's death sentence.

If the Court finds that appellant was denied his constitutional right to conflict-free counsel, he is entitled to automatic reversal of his death sentence. The California Constitutional right to conflict-free counsel is one of those fundamental constitutional rights which are "so basic to a fair trial that their infraction can never be treated as harmless error." (People v. Singer, supra 226 Cal. App.3d at 37; People v. Bonin (1989) 47 Cal.3d 808, 833-835.) Therefore, appellant's death sentence should be reversed.

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

During the prosecutor's cross-examination of appellant at the second penalty trial, the prosecutor asked the "Were They Lying" question 19 times. The prosecutor asked appellant if seven prosecution witnesses had lied during the trial, including the wife of the murder victim, a law enforcement officer, three eyewitnesses to a gas station shooting, the woman in the car with appellant at the gas station, and the woman who saw appellant before the market robbery. Appellant argued that this was prosecutorial misconduct which violated the Fourteenth Amendment to the United States Constitution because it infected the penalty trial with such unfairness as to make the resulting death sentence a denial of due process. (See, Darden v Wainwright (1986) 477 U.S. 168, 181; People v Cole (2004)

33 Cal. 4th 1158, 1202; People v Zambrano (2004) 124 Cal.App. 4th 288, 241, 243.)

Respondent argues that the cross-examination of appellant was neither improper nor misconduct; that the issue was waived by appellant's failure to timely object and request an admonition during trial; and that even if error occurred it was harmless. (R.B. 317) Respondent relies upon the recent case of People v Chatman (2006) 38 Cal. 4th 344, 377-384 in support of the argument that the cross-examination was proper. Respondent's arguments should be rejected.

A. The "Were They Lying" Questions Were Misconduct Under The Facts Of This Case

In People v Chatman, supra, 38 Cal. 4th at 377-384, the California Supreme Court considered for the first time whether "Were They Lying" questions were prosecutorial misconduct. In Chatman, the defendant testified that he had not driven a certain car. On cross-examination he was asked why two witnesses would testify that he had driven the car. The defendant responded that he did not know. The prosecutor asked if he thought the women were lying. The defendant responded "yes." The prosecutor then asked if the defendant, who knew the witnesses, could explain why they would lie. The defendant suggested that they may dislike him. On appeal the defendant argued that the prosecutor committed misconduct by repeatedly asking him on cross-examination to comment on the veracity of other witnesses.

The Court held that "A party who testifies to a set of facts contrary to the testimony of others may be asked to clarify what his position is and give, if he is able, a reason for the jury to accept his testimony as more reliable." (People v Chatman, supra, at 382.) The Court went on to

say that "A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken. When, as here, the defendant knows the other witnesses well, he might know of reasons those witnesses might lie. Any of this testimony could be relevant to the credibility of both the defendant and the other witnesses. There is no reason to categorically exclude all such questions. Were a defendant to testify on direct examination that a witness against him lied, and go on to give reasons for this deception, surely that testimony would not be excluded merely because credibility determinations fall squarely within the jury's province. Similarly, cross-examination along this line should not be categorically prohibited." (People v Chatman, supra, at 382.)

In Chatman, the Court noted that the prosecutor's questions were designed to clarify the defendant's position and determine whether the defendant had any information about whether the other witnesses had a bias, interest, or motive to be untruthful. Because the defendant knew the witnesses and had personal knowledge of the conversations he had with them, he could provide relevant, non-speculative testimony as to the accuracy of their information and any motive for dishonesty. (People v Chatman, supra, at 383.) "Moreover, the 'Were They Lying' questions were brief and generally precursors to follow-up questions as to whether defendant knew of any reason the witnesses had to lie." (People v Chatman, supra, at 383; see also People v Guerra (2006) 37 Cal. 4th 1067, 1125-1126 [It is not improper for the prosecutor to ask the defendant if he knew of any reason why two witnesses lied].)

In Chatman, the Court left intact an earlier decision which held that the "Were They Lying" questions were improper in a case where the defendant was questioned about witnesses he did not know and who were police officers. (People v Zambrano (2004) 124 Cal.App. 4th 228, 241.) Zambrano was arrested for selling cocaine to two undercover officers. At trial, both officers testified to the circumstances of the transaction. Zambrano testified that he had been working at his business and denied any involvement in the drug transaction. On cross-examination, the prosecutor repeatedly asked the defendant if the officers were lying. (Id. at 235.)

The Court in Zambrano held that the prosecutor's questions called for irrelevant and speculative testimony. It was clear from the record that the defendant was testifying to a diametrically different set of circumstances from those recounted by the officers. However, the defendant, as a stranger to the officers, had no basis for insight into their bias, interest, or motive to be untruthful. If the prosecutor had asked the defendant why the officers might lie, which she did not, it would have been apparent that any answer would have been speculative. Under these circumstances, the questions did not develop facts regarding the defendant's own testimony. They "merely forced defendant to opine without foundation, that the officers were liars." (People v Zambrano, supra, 124 Cal.App. 4th at 241; People v Chatman, supra, at 381.)

Furthermore, asking a defendant if a prosecution witness has lied is particularly prejudicial in cases where the witness is a police officer. 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."

1. Deputy Esquivel

Appellant was asked three times on cross-examination whether Los Angeles County Deputy Sheriff Arnolufo Esquivel was lying when he testified that he found a shank in appellant's jail cell at the Los Angeles County Jail. (R.T. 4260-4261.) Deputy Esquivel had earlier testified that he found the shank in appellant's cell. (R.T. 4105-4107.) Appellant testified that the shank was not his and it was not found in his cell. (R.T. 4260-4261.) Asking appellant on cross-examination if Deputy Esquivel was lying was improper under the Zambrano case.

Appellant was a stranger to Deputy Esquivel. Appellant had no basis for insight into the Deputy's bias, interest, or motive to be untruthful. He was not asked if he knew any reason why Deputy Esquivel was lying and thus the questions were not the same as those asked in Chatman and Guerra. Had the prosecutor asked appellant why Esquivel might lie, the answer would have been speculative because appellant did not know him.

As in the Zambrano case, the prosecutor's repeated questions about whether Esquivel had lied "merely forced defendant to opine without foundation, that the officers were liars." (People v Zambrano, supra, 124 Cal.App. 4th at 241.) As noted in Zambrano, 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.)

Thus, asking appellant on cross-examination whether Deputy Esquivel was lying was prosecutorial misconduct.

2. Doreen Ramos

Appellant was asked four times on cross-examination whether Doreen Ramos was lying. (R.T. 4233-4236; 4260.) Ramos testified that appellant had a bandana and a beanie while talking with Michael Soliz on Perth Street prior to the Hillgrove Market robbery. Appellant testified that he had no bandana or beanie and was never on Perth Street. (R.T. 4236.) Cross-examining appellant concerning whether Doreen Ramos lied in her testimony was not proper under the Chatman case. Appellant testified that he was not on Perth Street and thus did not claim to have personal knowledge of the events.

Furthermore, appellant did not know Doreen Ramos. He could not be expected to know why Ramos might lie. In Chatman, the Court stated that "If a defendant has no relevant personal knowledge of the events, or of a reason that a witness might be lying or mistaken, he might have no relevant testimony to provide." (People v Chatman, supra, at 382.) Questioning appellant concerning Doreen Ramos in this manner was thus prosecutorial misconduct. "Lay opinion about the veracity of particular statements by another is inadmissible on that issue." (People v Melton (1988) 44 Cal. 3d 713, 744.) Doreen Ramos is a second witness that falls outside of the rules of the Chatman case.

3. Carol Mateo, Jeremy Robinson, And Alejandro Garcia

Appellant in his direct examination testified that he shot Skyles and Price. (R.T. 4209-4210.) On cross-examination, appellant was asked four times whether Carol Mateo was lying when she identified

Michael Soliz as the person who shot Skyles and Price. (R.T. 4275-4276.) Appellant was asked if Jeremy Robinson wasn't telling the truth when he identified Michael Soliz's photograph as the person who shot Skyles and Price. (R.T. 4276.) Appellant was also asked if Alejandro Mora Garcia wasn't telling the truth when he selected Michael Soliz's photograph as the person who did the shooting. (R.T. 4276.)

Asking Appellant if these witnesses were lying was not proper under the Chatman case because appellant did not know these witnesses. They were strangers and he had no basis for knowing why they might lie. They were all eyewitnesses to the shooting of Skyles and Price The crime occurred at nighttime. Carol Mateo and Jeremy Robinson witnessed the event from a passing car. If they were wrong in their identification of Michael Soliz as the shooter it was more likely the result of mistaken identification rather than a lie.

A prosecutor's use of the "Were They Lying" questions during cross-examination of appellant in this situation was misconduct because the question "precludes the possibility that the witnesses' testimony conflicts with that of the defendant for a reason other than deceit." (State v Singh (2002) 259 Conn. 693, 793 A.2d 266, 238.) Repeatedly asking a defendant if the prosecution witnesses were lying creates the risk that the jury may conclude that in order to acquit the defendant, it must find that the prosecution witnesses lied. It also distorts the burden of proof, because an acquittal based on reasonable doubt does not require the jury to find that the prosecution witness lied. (State v Singh, supra, 793 A.2d at 237-238.)

4. **Betty Eaton**

Appellant was asked on cross-examination whether Betty Eaton was not telling the truth or was lying to the police when she said the robbers were wearing bandanas. (R.T. 4234-4235; 4260.) At first appellant stated that Betty Eaton was not telling the truth. When asked again, he testified that he did not believe she was lying. Rather she was testifying about what she thought she saw. Appellant did not know Betty Eaton. Without knowing her, it was calling for speculation for appellant to be asked whether she was lying. The prosecutor's cross-examination was prosecutorial misconduct. The prosecutor wanted appellant to call the sympathetic widow of the deceased Lester Eaton a liar so that the jury would think that appellant was a person of bad character. Questioning appellant concerning whether Betty Eaton had lied was not proper under Chatman.

5. **Judith Mejorado**

Appellant was asked five times on cross-examination whether Judith Mejorado had lied to the police or lied during her testimony. Appellant was asked if Mejorado had lied when she said both appellant and Soliz had told her to drive back to the gas station so they could talk to Skyles and Price. Appellant was asked if she lied when she told the police that both appellant and Soliz had gotten out of the car at the gas station on the night of the shooting. Finally, appellant was asked if Judith Mejorado had lied when she told the police and testified that Michael Soliz got back into the car on the left side after the shooting. (R.T. 4272-4276)

Appellant had personal knowledge of the events at the gas station and also knew Ms. Mejorado. However, appellant was not asked questions similar to those in Chatman and Guerra concerning whether he

knew of a reason why Judith Mejorado might lie. Appellant was asked whether Judith Mejorado had lied to the police and lied in her testimony. He was asked five times whether Judith Mejorado lied. The questioning was prosecutorial misconduct because the prosecutor "used the questions to berate the defendant before the jury and to force him to call the [witnesses] liars in an attempt to inflame the passions of the jury." (People v Zambrano, supra, 124 Cal.App. 4th at 242.)

B. The Improper Cross-Examination Was Prejudicial

Respondent argues that if the cross-examination was improper, the error was harmless because appellant's credibility had already been impeached by the testimony of the eyewitnesses about whom he was questioned, by the facts and circumstances of the murders, by his taped statements to Mr. Berber, by his pretrial attempts to have witnesses change their testimony, and by his observably evasive, false and contradictory testimony. Respondent argues that there is no reasonable possibility that appellant would received a more favorable result if the questioning had not occurred. (R.B. 330.) Respondent's arguments are not true.

Appellant did suffer prejudice. The standard for reversible error at the penalty phase of a capital trial is whether 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.) If the Court agrees that the prosecutorial misconduct violated appellant's federal constitutional right to due process, the error is reversible unless it was harmless beyond a reasonable doubt. (Sochor v Florida (1992) 504 U.S. 527, 540.)

The jury at the second penalty trial had the responsibility of determining whether appellant should live or die for the murder of Lester

Eaton. Appellant testified that he shot Lester Eaton during a struggle over Mr. Eaton's gun. Appellant testified that he had no intention to kill Lester Eaton. The prosecutor, on the other hand, argued to the jury that appellant intentionally executed Mr. Eaton during the course of the robbery. If the jury had believed appellant's version of the struggle, they may have returned a life verdict. Thus, the jury's decision on the penalty probably turned on the issue of whether appellant was credible in describing the events that led to the death of Lester Eaton.

The prosecutor's improper cross-examination of appellant attacked his credibility before the jury. Appellant was asked on 19 occasions whether seven prosecution witnesses had lied when their testimony conflicted with his testimony. The prosecution witnesses were the wife of Lester Eaton, the law enforcement officer who found the knife in appellant's jail cell, three eyewitnesses to the gas station shootings of Skyles and Price, Judith Mejorado, who was in the car with appellant at the gas station, and Doreen Ramos who saw appellant and Soliz on Perth Street before the market robbery.

The repetitive nature of the questioning shows they were not designed to elicit relevant factual information. The questions were argumentative. In Chatman, the Court stated that "An argumentative question is a speech to the jury masquerading as a question . . . An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (People v Chatman (2006) 38 Cal. 4th 344, 304.)

The prosecutor in appellant's case was not seeking answers. He was talking past the witness and making an argument to the jury. The

argument to the jury was that appellant was the liar, not the prosecution witnesses. This type of cross-examination highlights the fact that the prosecutor disbelieves the defendant's testimony. It is a subtle way for a prosecutor to imply to the jury that he believes the defendant is lying. This was misconduct under Chatman.

Respondent failed to address several of appellant's prejudice arguments in the opening brief. First, if an error occurs during the testimony of a critical witness and the jury requests a re-reading of the witness' testimony during deliberations, this supports the conclusion that the error was prejudicial. (See People v Williams (1971) 22 Cal.App.3d 34, 40.) Appellant was an important witness in the case and during deliberations the jury requested that appellant's testimony be re-read. (R.T. 4509-4511.) Second, if at a prior penalty trial a majority of jurors voted for a life sentence, error during the second penalty trial resulting in a death verdict is more likely to be viewed as reversible. (People v Sturm (2006) 37 Cal. 4th 1218, 1244 [Judicial misconduct held to be reversible error at second penalty trial where the vote at the first penalty trial was a 10 to 2 in favor of life.].) At a prior penalty trial when appellant did not testify and there was no prosecutorial misconduct, the vote was 8 to 4 in favor of a verdict of life. (R.T. 2765-2769.)

Third, the length of the jury deliberations indicates that the case is a close case which further supports the conclusion that the error was prejudicial. (People v. Cardenas (1982) 31 Cal. 3d 897, 907.) The jury deliberated for three days before returning a death verdict. (R.T. 4503-4523) Fourth, during deliberations the jury asked for clarification of the jury instruction on the mitigating factor of "whether or not the victim was a participant in the defendant's homicidal conduct." (R.T. 4506-4508.)

Appellant testified that the gun went off by accident during a struggle with Eaton over possession of Lester Eaton's gun. (R.T. 4207-4208.) The jury's question shows that the jury was closely examining the circumstances of the Lester Eaton shooting.

Appellant's credibility was a key issue for the jury in deciding whether Eaton was accidentally shot during a struggle or was intentionally killed by appellant. How the jury decided the credibility issue may have affected their decision on whether to impose the death penalty. Thus, there is a direct connection between the improper attack on appellant's credibility by the prosecutor's "Were They Lying" questions and the jury's ultimate verdict of death. All of these factors demonstrate that the prosecutor's improper cross-examination was prejudicial.

C. The Issue Was Preserved For Appeal

Respondent argues that appellant failed to timely object or seek an admonition and thus waived any right to complain on appeal concerning the prosecutor's misconduct in asking the "Were They Lying" questions. Respondent admits that Mr. Borges, counsel for the co-defendant Michael Soliz, did raise an objection. However, respondent argues that appellants did not timely, specifically or repeatedly object, and the trial court said nothing to suggest an objection would have been futile. (R.B. 324-325.) Appellant disagrees. The record shows that when Mr. Borges made his objection, the trial court's ruling indicated that the court had approved the prosecutor's cross-examination method, including his use of the "Where They Lying" question.

In analyzing this issue, it is necessary to view an expanded portion of the record, beyond the limited objection made by Mr. Borges. The objection 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.)

The objection was made to the prosecutor's first question to appellant concerning whether Carol Mateo was lying. Just prior to that question, the prosecutor had asked if all of the identifications of Michael Soliz as the shooter were wrong. Appellant answered that all of the witnesses were wrong. The prosecutor then asked if Carol Mateo was lying. Mr. Borges objected because earlier appellant had stated that all of the eyewitnesses were wrong. Up to that point, appellant had not testified that Carol Mateo was lying. In overruling the objection, the Court stated that "Before he said two or three times that she was lying. So in cross-examination I think counsel's entitled to pick up on that portion of it." (R.T. 4275.)

From a review of the earlier cross-examination of appellant, it appears that the "she" who appellant had earlier said was lying was not Carol Mateo, but Judith Mejorado. Just prior to the objection, the

prosecutor had been cross-examining appellant concerning Judith Mejorado. The prosecutor asked appellant if Ms. Mejorado was lying when she told the police and testified that both defendants talked about going back and talking to the guys at the gas station. Appellant answered yes to both questions. (R.T. 4272) The prosecutor asked appellant if Judith Mejorado was lying when she told the police and testified that both defendants got out of the car that night. Appellant responded yes to both questions that she was lying. (R.T. 4272-4274.) The prosecutor then turned to questioning appellant concerning whether Carol Mateo had been lying and that was when Mr. Borges made his objection. (R.T. 4275)

Thus, when the Court stated that appellant had said two or three times that "she" was lying and the prosecutor could pick up on that, the Court must have been referring to the prosecutor's cross-examination of appellant concerning Judith Mejorado. The Court was ruling that the cross-examination of appellant concerning whether Judith Mejorado was lying was proper cross-examination and the prosecutor could continue that line of cross-examination by asking appellant if Carol Mateo was lying. In light of that ruling, any further objection by appellant to "Were They Lying" questions would have been futile.

In People v Zambrano (2004) 124 Cal.App. 4th 288, the Court held that after one objection made by trial counsel, any further objection to the prosecutor's "Were They Lying" questions would have been futile. The Court stated that "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 proper." (People v Zambrano, supra, at 237.) In Zambrano, the Court held that the defendant was excused from further

objecting to the prosecutor's "Were They Lying" questions and the issue was not waived on appeal. (Ibid.)

Appellant's case is similar to Zambrano. In appellant's case, the Court ruled that the prosecutor's "Were They Lying" questions were proper when appellant was cross-examined concerning whether Judith Mejorado was lying. It would have been futile for appellant to raise the same objection when appellant was cross-examined concerning whether Carol Mateo or any of the other prosecution witness was lying. The Court's comments indicated that any further objection to the questions would have been futile. Thus, appellant has not waived this argument for purposes of appeal.

In People v Chatman (2006) 38 Cal. 4th 344, 380, the Court noted that defense counsel did object to a number of the "Were They Lying" questions as argumentative, speculative and irrelevant. The trial judge overruled these objections, indicating generally that it would permit this line of questioning. On appeal, the Court held that "a request for a jury admonition or the lodging of further objections would have been futile. Additional objections were not necessary to preserve the claim." (People v Chatman, supra, at 380, citing People v Hill (1998) 17 Cal. 4th 800, 820.) Thus, under Chatman, further objection by appellant to the prosecutor's questions would have been futile and the objection is not waived for purposes of appeal.

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 PRICE MURDERS WAS FALSE TESTIMONY

Appellant argued it was prejudicial error for the trial judge to comment during appellant's testimony that appellant had lied. Respondent argues that the grounds asserted on appeal were waived by failing to assert them in the trial court and that any error was harmless. Respondent does not argue that no error occurred as a result of the trial court's improper comments. Respondent says that the comments by the trial judge were not "necessarily improper." (R.B. 336-337.) However, at the motion for new trial, the trial judge conceded error by stating that "I have to concede that it was probably error for the Court to have made the comment that it did based on the Court's personal knowledge, having carried a semi-automatic weapon as an officer in the Marine Corps as a sidearm. And, in a sense, I was an uncross-examined expert witness." (R.T. 4539-4540.) Appellant maintains that the error was not waived and it was not harmless.

A. The Error Was Not Waived

Appellant did object to the Court's comments. The objection was not made at the same time that the Court's comments were made, but was made shortly thereafter, possibly a few minutes later. Trial counsel waited until appellant concluded his testimony. After appellant had ended his testimony, counsel requested to approach the bench to raised an

objection. The Court's comments appear at R.T. 4305. The objection by appellant's counsel appears three pages later at R.T. 4308. The objection is sufficiently close in time with the Court's comments to be deemed a contemporaneous objection. (Compare, People v Demetrulias (2006) 39 Cal. 4th 1, 19-22 [Objection and motion to strike made several days after the testimony was not timely.].)

To preserve a judicial misconduct issue for appeal, a defendant must both object and request an admonition to the jury. (People v Sturm (2006) 37 Cal. 4th 1218, 1237.) However, where a Court overrules the objection, the defendant is excused from the requirement of requesting a jury admonition under the futility doctrine. A court will not grant a request to admonish the jury to disregard the comments if the court has ruled that the comments are proper. (People v Arias (1996) 13 Cal. 4th 92, 159.)

Appellant's objection was overruled. When the objection was made, the Court stated that it was justified in making its comments because appellant's testimony was "just nonsense, and its so obviously palpably untrue." (R.T. 4308.) Thus, if appellant had requested that the jury be admonished to disregard the Court's comments, such a request would have been futile in light of the Court's ruling that its comments were proper. Appellant was excused under the futility doctrine from the requirement of requesting a jury admonition. .

There was likewise no waiver of any of the legal grounds argued by appellant on this appeal. Appellant's trial counsel stated "I'm objecting to the Court editorializing about the gun . . . 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." (R.T. 4308.) The objection was specific enough to preserve the argument that the judge may not act as a witness in

the case. Evidence Code Section 703 subdivision (b) states that "the judge presiding at the trial of an action may not testify in that trial as a witness." (See also Merritt v Reserve Ins. Co. (1973) 34 Cal.App. 3d 858, 883 ["We think it prejudicial to one party for a judge to testify as an expert witness on behalf of the party with respect to matters that took place before him in his judicial capacity."].)

Appellant's objection was also specific enough to allow an argument on appeal that the judge's comments constituted judicial misconduct. Appellant's objection that the Court was "editorializing" and offering "its own interjection as an expert," was an objection to the judge's misconduct during the course of the trial. This was sufficient to preserve for appeal appellant's claim that the Court engaged in judicial misconduct by editorializing in front of the jury that appellant's testimony was false. (See People v Sturm, supra, 37 Cal. 4th 1218, 1233-1245; People v Cook (1983) 33 Cal. 3d 400, 407; People v Patumbo (1937) 9 Cal. 2d 543, 541.)

Appellant did not object in the trial court that the judge's comments violated the California Constitution or the Federal Constitution. On this appeal, appellant has argued that the judge's comments violated various provisions of the California Constitution and the Federal Constitution including the due process right to a fair trial before an impartial judge, the Confrontation Clause, and the judicial comment provision in Article XI Section 10 of the California Constitution. However, appellant may argue on appeal that the effect of overruling appellant's objections was that appellant's constitutional rights were violated. (People v Partida (2005) 37 Cal. 4th 428. 431.)

In Partida, the defendant in a murder case objected to the admissibility of gang evidence on the grounds that the evidence was more

prejudicial than probative under Evidence Code, Section 352. On appeal, the defendant argued that the evidence was inadmissible under Evidence Code Section 352 and that the evidence also violated the defendant's federal due process rights because the gang evidence made the trial fundamentally unfair. The issue on appeal was whether the federal due process argument had been waived because of the lack of a specific objection in the trial court.

The Court in Partida concluded that a trial objection must fairly state the specific reason the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for the reason asserted at trial. A defendant may not argue on appeal that the court should have excluded the evidence for a reason not asserted at trial. Because the defendant in Partida had not made a due process objection in the trial court, the defendant had forfeited the claim on appeal that due process required the Court to exclude the evidence. Nevertheless, the Court in Partida held that the defendant could argue on appeal that the erroneous admission of the evidence had the effect of violating the defendant's constitutional right to due process. (People v Partida, supra, 37 Cal. 4th 428, 431.)

B. The Respondent Has Almost Conceded That The Judge's Comments Were Error

Respondent has almost conceded that the trial judge's comments were error by stating that the judge's comments were not "necessarily improper." (R.B. 336-337.) However, respondent offers no legal theory how the trial judge's comments were proper. At the motion for new trial, the trial judge conceded that the comments were "probably error" but refused to grant a new trial, finding that the error was harmless. (R.T.

4539-4540.) Since respondent does not actually concede the issue, appellant will briefly address the merits of the misconduct issue and this Court's recent decision in People v Sturm, supra, 37 Cal. 3d 1218.

Appellant was asked on cross-examination why he shot Elijah Skiles and Gary Price eleven times. Appellant testified that the gun just kept shooting because he had altered the semi-automatic nine millimeter handgun to fire as a fully automatic weapon. When asked by the prosecutor 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.)

The Court interrupted appellant's testimony and stated: "The Court will take judicial notice of the fact that you cannot render a semi-automatic fully-automatic by any manipulation of the spring behind the trigger. That is a physical impossibility with that weapon. The Court knows from its own experience." (R.T. 4305.) The judge's comments had the effect of telling the jury that appellant's testimony was false. Appellant's counsel objected to the Court editorializing about the gun and objected that the Court should not have interjected as an expert witness in the case. (R.T. 4308.) The judge responded by stating that the information concerning rendering a weapon fully automatic was so basic that appellant's testimony was "just nonsense" and "so obviously palpably untrue." However, neither defense counsel had any awareness or knowledge of how a weapon could be made fully automatic. (R.T. 4308.)

There was no legal basis for the Court to take judicial notice concerning how a firearm is changed from semi-automatic to fully automatic. The subject matter of altering firearms is not a matter of

generalized knowledge so universally known that it cannot reasonably be subject to dispute and is capable of accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, §§ 451 subd.(f) and 452, subd. (h); People v Barnett (1998) 17 Cal. 4th 1044, 1122.) How a gun is changed from semi-automatic to fully-automatic was not a proper subject for judicial notice. It was an area that required expert testimony. The trial court's comments cannot be justified on the basis that the judge was properly taking judicial notice.

The trial judge was offering his own expert opinion testimony. As the judge noted, he had learned of the operation of firearms from his years in the Marine Corps. (R.T. 4539-4540.) By offering expert opinion testimony in the case, the judge violated Evidence Code section 703 subdivision (b) which provides that "the judge presiding at the trial of an action may not testify in that trial as a witness." Once an objection is made, the statute requires the Court to declare a mistrial. Section 703 subdivision (b) states that "Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge." The failure to declare a mistrial in response to an objection under this section was reversible error. The statute contains no harmless error exception.

The reason that a judge should never testify as a witness in a case over which he is presiding is because it appears that he is "throwing the weight of his position and authority behind one of two opposing litigants." (Merritt v Reserve Ins. Co. (1973) 34 Cal.App. 3d 858, 853.) In appellant's case, the judge's comments implied that appellant had committed perjury. In past cases where this has occurred, the Courts have reversed the defendant's conviction. (People v Patubo (1937) 9 Cal. 2d 543, 541; People v Oliver (1975) 46 Cal.App. 3d 747, 750.) "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 (1983) 33 Cal. 3d 400, 408.)

The trial court's comments during appellant's testimony were also judicial misconduct under People v Sturm (2006) 37 Cal. 4th 1218, 1233-1244.) In Sturm, the Court noted numerous instances of judicial misconduct. The defendant had been convicted of three counts of first degree murder based on a felony murder theory. During jury selection at the penalty retrial, the judge stated that premeditation in the case was a "gimme" and that premeditation was "all over and done with." The Court held that the comments were prejudicial because the defendant's lack of premeditation was a central theory supporting the defense case in mitigation. (People v Sturm, supra, 37 Cal. 4th 1218, 1230-1232.)

The Court also found three other instances of judicial misconduct. The trial judge poked fun at the defendant's theory of the case by making jokes during the testimony of Dr. Stein, an expert pharmacologist who testified concerning the effects of drugs on the defendant. The trial judge made comments during the testimony of Dr. Fossum, a clinical psychologist, rebuking the expert witness in front of the jury by suggesting that she was manufacturing her testimony. The judge made comments during her testimony indicating that the Court believed her testimony was of little consequence. Finally, the trial judge repeatedly reprimanded defense counsel in front of the jury.

The trial judge's conduct in Sturm during the second penalty trial was misconduct. The Court stated that "A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to

a defendant's counsel and witnesses and utters frequent comments from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge.'" (People v Sturm, supra, 37 Cal.4th at 1238.) "A trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness." (People v Sturm, supra, at 1238, citing People v Boyette (2002) 29 Cal. 4th 381, 460; People v Mahoney (1927) 201 Cal. 618, 627.)

In appellant's case, the trial court also committed misconduct. The judge told the jury that appellant's testimony regarding changing a firearm from semi-automatic to fully-automatic was false testimony and the judge did not believe him. It implied that appellant had committed perjury. This was judicial misconduct. The comments had the effect of violating appellant's state and federal constitutional rights to due process, to an impartial judge, and to cross-examine the witnesses against him. Based upon all of the foregoing, it is clear that the judge's comments were error. The main issue in this case is whether the error was prejudicial.

C. The Error Was Prejudicial Because the Judge's Comments May Have Had A Negative Effect On The Jury's Evaluation Of Appellant's Credibility – A Key Issue In The Case

The judge's comments may have been brief, but unfortunately they were made on the most important issue in the case. The issue was appellant's credibility. The jury's determination of whether appellant would live or die may have turned on the issue of appellant's credibility during his testimony at the second penalty trial. The attack on his credibility by the trial judge may have caused the jury to reject appellant's version of the Lester Eaton shooting thereby causing the jury to impose a death sentence.

Appellant testified that Lester Eaton was shot unintentionally during a struggle over Eaton's gun, which Eaton withdrew from his holster to resist the robbery. Appellant and Eaton were on the floor when appellant's gun went off. Appellant testified that he had no intention to murder Lester Eaton. (R.T. 4207-4208.) Betty Eaton confirmed that her husband had struggled on the floor with one of the robbers when the shots were fired. (R.T. 957-962.) She testified that her husband carried a handgun which he wore in a holster. (R.T. 974.) Law enforcement officers discovered the holster on the deceased Lester Eaton when they arrived after the shooting. (R.T. 870-872.)

The prosecutor argued in his closing arguments that appellant deserved the death penalty because he deliberately shot Lester Eaton 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 stated that the evidence was consistent with appellant standing over Lester Eaton and shooting him while he was kneeling on the floor. (R.T. 4435-4436.) The Court's comments were prejudicial because the Court was telling the jury that appellant had lied in his testimony. The comments made it appear as though the judge was siding with the prosecutor.

In People v Sturm, supra, 37Cal.4th at 1243-1244, the Court stated that the "cumulative effect of the trial judge's comments requires a reversal of the death sentence." The Court noted that the error occurred in the defendant's second penalty trial. The first penalty trial did not result in a verdict. The jury had voted 10 to 2 in favor of life imprisonment. The Court note that "It was reasonably probable that the second penalty phase jury's verdict would have been different had the trial judge exhibited

patience, dignity and courtesy that is expected of all judges." (People v Sturm, supra, at 1244.) Appellant's case was also a penalty retrial. At the first penalty trial, where the judicial misconduct did not occur, the jury's vote was 8 to 4 in favor of a life sentence. Thus, it was reasonably probable that the second penalty jury's verdict would have been different if no judicial misconduct had occurred.

During deliberations, the jury requested a re-reading of appellant's testimony. (R.T. 4509-4511.) This demonstrates the importance of appellant's testimony in the case. The jury also 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." (R.T. 4506-4508.) The jury was likely trying to decide whether Eaton was accidentally shot during a struggle as testified by appellant or intentionally shot execution-style as argued by the prosecutor. The judge's comments touched upon the most critical aspect of appellant's case for mitigation---the credibility of appellant. Appellant's testimony presented his strongest case for mitigation of the death penalty on the Lester Eaton murder. When the judge called appellant a liar in front of the jury, it was exceedingly prejudicial and threatened to undermine appellant's entire mitigation case. Therefore, the Court should reverse appellant's death sentence.

XVI. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AT THE SECOND PENALTY TRIAL ON THE ISSUE OF LINGERING DOUBT.

Appellant argued that the trial court erred in refusing to instruct on lingering doubt at the second penalty trial. The court would not instruct on lingering doubt at the second penalty trial because the jury had

not decided the issue of guilt. (R.T. 4190-4192) The trial court's ruling was directly contrary to this Court's holding that at penalty retrials before a different jury, "it is proper for the jury to consider lingering doubt." (People v. Slaughter (2002) 27 Cal.3d 1187, 1219.) Appellant also argued that the Eighth and Fourteenth Amendments 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; Penry v. Johnson (2001) 532 U.S. 782, 797; Smith v. Texas (2004) 543 U.S. 37, 46-49.)

Respondent argues that this Court has repeatedly rejected claims under state or federal law that a trial court must instruct concerning lingering doubt, and that the jury is allowed under the "factor (k)" instruction to consider in mitigation any lingering doubt it may have. (See, People v. Lewis and Oliver (2006) 39 Cal.4th 970, 1067; People v. Demetrulias (2006) 39 Cal.4th 1, 42; People v. Avila (2006) 38 Cal.4th 491, 615; People v. Harris (2005) 37 Cal.4th 310, 359; People v. Robinson (2005) 37 Cal.4th 592, 653-654; People v. Hines (1997) 15 Cal.4th 997, 1068; People v. Cox (1991) 53 Cal.3d 618, 675-678.) Respondent argues there is no basis for reconsidering this issue in light of the Court's case authority which has consistently rejected the claim. (R.B. 370.). Appellant believes there are three reasons for reconsidering the issue in his case.

A. The Facts Of The Case Are Unique

The first reason is that the facts of this case show the unfairness and prejudice in the trial court's refusal to instruct on lingering doubt. Two lingering doubt jury instructions were requested and rejected by the trial court. The first stated: "The adjudication of guilt is not fallible 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) The second 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)

The first instruction was given during appellant's first penalty trial. (C.T. 817) At the first penalty trial, the jury returned verdicts of life without possibility of parole for appellant for the murders of Skyles and Price. The jury was unable to reach a verdict on the penalty for the murder of Lester Eaton. When the Court declared a mistrial on the penalty in the Eaton murder case, the jury's vote was 8 to 4 in favor of a life sentence.. (R.T. 2765-2774) At the second penalty trial, the trial court refused to give any instruction on lingering doubt and the jury returned a death verdict.

None of the cases cited by respondent involve facts where a lingering doubt jury instruction was given at the first penalty trial, leading to a hung jury, and where a lingering doubt jury instruction was rejected at the second penalty trial, leading to a death verdict. This Court has noted 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, 134-135.) The unique facts of appellant's case require the Court to find that the refusal to give a lingering doubt jury instruction was reversible error. (People v. Thompson, supra, 45 Cal.3d at 134-135.)

B. The Oregon v. Guzek Case

The second reason is that the Court should reconsider the lingering doubt jury instruction issue base upon the recent United States Supreme Court decision in Oregon v. Guzek (2006) 546 U.S. 517. In Guzek, the Supreme Court clarified its earlier plurality opinion in Franklin v. Lynaugh (1988) 487 U.S. 164. The Franklin case has been frequently cited as authority for finding that there is no federal or state law that requires a trial court to instruct on lingering doubt. (See People v. Valdez (2004) 32 Cal.4th 73, 129 n.28; People v. Musselwhite (1998) 17 Cal.4th 1216, 1272; People v. Cox (1991) 53 Cal.3d 618, 676.)

The United States Supreme Court in Oregon v. Guzek, supra, clearly stated that its earlier decision in Franklin v. Lynaugh, supra, did not resolve whether the Eighth Amendment affords capital defendants the right to introduce evidence at sentencing designed to cast "residual doubt" on his guilt. The Court noted that the Franklin plurality said it was "quite doubtful" that any such right existed. However, the Court stated that "Franklin did not resolve whether the Eighth Amendment affords defendants such a right." (Oregon v. Guzek, supra 546 U.S.at 525.) Furthermore, the Court in Guzek stated that "In this case, we once again face a situation where we need not resolve whether such a right exists." (Oregon v. Guzek , supra at 525.)

In Guzek, the defendant was charged with capital murder. At the guilt phase of the trial, his mother testified that he had been with her on the night oft the crime. The jury rejected the alibi evidence; convicted the defendant; and sentenced him to death. In a series of trials and reversals, the Oregon Supreme Court vacated the defendant's death sentence on three occasions, ordering new sentencing proceedings. Seeking to avoid error at

the fourth sentencing proceeding, the Oregon Supreme Court addressed the issue of the admissibility of the live alibi testimony of his mother which the defendant sought to admit at his fourth penalty trial. The Oregon Supreme Court held that the Eighth and Fourteenth Amendments gave the defendant a federal constitutional right to introduce his mother's live alibi testimony at the upcoming fourth penalty trial.

Since the defendant in Guzek had already been convicted of the murder, the mother's alibi evidence was evidence of a lingering doubt concerning the defendant's guilt. The Oregon Supreme Court held that such evidence was admissible under prior United States Supreme Court decisions requiring the Courts to admit evidence of mitigating factors that would warrant a sentence of less than death. (See Lockett v. Ohio (1978) 438 U.S. 586; Green v. Georgia (1979) 442 U.S. 95.)

Although rejecting the reasoning of the Oregon Supreme Court, the United States Supreme Court reaffirmed that "The Eighth Amendment also insists that a sentencing jury be able 'to consider and give effect to mitigating evidence' about the defendant's 'character or record or the circumstances of the offense.'" (Oregon v. Guzek, supra, 546 U.S. at 526, citing Penry v. Lynaugh (1989) 492 U.S. 302, 327-328.) However, "[t]he Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted. Rather, 'States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and more equitable administration of the death penalty.'" (Oregon v. Guzek, supra, at 526, citing Boyde v. California (1990) 494 U.S. 370, 377.)

In Guzek, the Court found three circumstances that supported the conclusion that the State possessed the authority to exclude live testimony of the defendant's alibi witness at a penalty trial. First, the Court noted that sentencing traditionally concerns how, not whether, a defendant committed the crime. The alibi evidence at issue in the case was only whether, not how, he did so. Second, the parties had previously litigated the basic crime. Since the defendant had been convicted of the murder, his alibi evidence was related to a matter not at issue at the sentencing retrial and was in the nature of an improper collateral attack upon the conviction.

Third, the negative impact of a rule restricting defendant's ability to introduce new alibi evidence was minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury the transcripts of all of the witnesses who testified during the guilt trial. Since the defendant's mother had testified at the guilt trial, a transcript of her testimony would be admissible at the defendant's penalty retrial and thus the alibi evidence would be presented at the upcoming penalty retrial. Given these three factors, the Court held that "The Eighth Amendment does not protect defendant's right to present the evidence at issue here." (Oregon v. Guzek, supra, at 527.)

The Court should reconsider the lingering doubt jury instruction issue in light of the Guzek case. The three factors considered in the Guzek case for upholding Oregon's evidentiary exclusion law do not apply in appellant's case. Factors one and two, that sentencing concerns how and not whether the defendant committed the crime and that the defendant may not re-litigate guilt or innocence, have already been rejected by this Court in People v. Terry (1964) 61 Cal.2d 137, 145-147.) In Terry, the Court noted that although jurors at a penalty trial may not reconsider the

issue of the defendant's guilt or innocence, they may properly consider the issue of lingering doubt. 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.)

Where the issue of lingering doubt is raised, the defendant at a penalty trial is not seeking to re-litigate guilt or innocence. Rather, he is raising lingering doubt as a mitigating circumstance in support of a sentence of less than death. Under California law, a defendant may present lingering doubt evidence and he is not technically re-litigating guilt or innocense. Thus, the first two factors in Guzek have no application to a capital defendant in California.

The third circumstance in Guzek is whether the negative impact of disallowing jury instructions on lingering doubt is minimized by the fact that under California law the defendant has the right to introduce evidence establishing lingering doubt and may argue lingering doubt to the jury. (See People v. Cox (1991) 53 Cal.3d 618, 677.) Under this third factor in Guzek, the Court must balance the negative impact of a rule barring a lingering doubt jury instruction with the fact that the defendant may present evidence showing a lingering doubt concerning his guilt and may argue lingering doubt during his final argument. This balancing process now leads to the third reason why this Court should reconsider the lingering doubt jury instruction issue.

C. The Smith, Brewer, And Abdul-Kabir Cases

The third reason that the Court should reconsider the lingering doubt jury instruction issue is to consider the effect of three new United

States Supreme Court decisions relating to the constitutional adequacy of jury instructions on mitigation in capital cases. (Smith v. Texas (2007) 127 S.Ct. 1686; Brewer v. Quarterman (2007) 127 S.Ct. 1706; Abdul-Kabir v. Quarterman (2007) 127 S.Ct. 1654.) All three cases arise out of Texas State Court capital trials. In each case the defendant argued that the jury instructions given in the penalty phase trials violated the Eighth and Fourteenth Amendments because the instructions failed to allow the jury to "give effect to the mitigating evidence" as required by Penry v. Lynaugh (1989) 492 U.S. 302, 314-319. (See also, Penry v. Johnson (2001) 532 U.S. 782, 797; Smith v. Texas (2004) 543 U.S. 37.) In the opening brief, appellant expressly relied upon the Penry case in arguing that the federal constitution require the giving of lingering doubt jury instructions. (A.O.B. 390-392)

In Smith v. Texas, supra, 127 S.Ct. 1686, the Supreme Court was reviewing for a second time a defendant's death sentence. Smith was sentenced to death under a Texas law which required the imposition of the death penalty if the jury answered "yes" to two special issues, namely, whether the murder was deliberate and whether the defendant created a risk of future dangerousness. Smith presented mitigating evidence of his low I.Q., his learning disability, his exemplary school behavior, his father's drug abuse and criminal activity, and his age of 19. The trial judge gave a supplemental nullification instruction. The instruction directed the jury to give effect to the mitigating evidence, but only by negating what would otherwise be affirmative responses to the two special issues.

When the case was first before the Supreme Court, the Court summarily reversed the death sentence on the grounds that the jury instructions were constitutionally defective because they only allowed the

jury to give effect to mitigation evidence by giving negative answers to what would otherwise be affirmative responses to the two special issues relating to deliberateness and future dangerousness. The jury instructions were constitutionally inadequate because they did not allow the jury to give full consideration and full effect to the mitigating circumstances in choosing the defendant's appropriate sentence. (Smith v. Texas (2004) 543 U.S. 37, citing Penry v. Johnson (2001) 532 U.S. 782.)

After the case was remanded, the Texas Appellant Court refused to vacate the death sentence. The State Court held that Smith had failed to preserve a challenge to the nullification charge and was required to show egregious harm before the sentence could be reversed. The United States Supreme Court again granted certiorari and again reversed the death sentence. The Court stated that its earlier decision had confirmed that the special issues did not meet constitutional standards under the Penry case, and the nullification charge did not cure that error. In essence, the jury was instructed to misrepresent its answer to one of the two special issues when necessary to take into account the mitigating evidence. Thus, the nullification charge created an ethical and logical dilemma that prevented jurors from giving effect to the mitigating evidence when the evidence was outside the scope of the special issues. (Smith v. Texas, supra, 127 S.Ct. At 1690-1691.) Since the basis for relief was error caused by the special issues, it was not necessary for Smith to have objected to the nullification charge during his trial. Therefore, Smith had properly preserved his constitutional challenge to the jury instructions and was entitled to relief because there was a reasonable likelihood the jury was not permitted to consider relevant mitigating evidence.

In Brewer v. Quarterman, supra, 127 S.Ct. 1706, the defendant was convicted of capital murder in Texas and sentenced to death. At his trial he presented several pieces of mitigating evidence including a bout with depression, abuse by his father, drug abuse, and being manipulated and dominated by his female co-defendant. The trial judge rejected Brewer's proposed instructions giving effect to the mitigating evidence. Instead, the judge instructed the jury on the two special issues of whether he committed the murder deliberately and whether he would be a continuing threat to society, the issue of future dangerousness. Brewer's death sentence was affirmed on direct appeal, but reversed by the District Court. However, the Fifth Circuit reversed and reinstated the death sentence.

The United States Supreme Court reversed the lower federal Court and set aside the death sentence. The Court held that the Texas special issues did not provide the sentencing jury with an adequate opportunity to decide whether his mitigating evidence might provide a legitimate basis for imposing a sentence other than death. (Brewer v. Quarterman, supra, 127 S.Ct. at 1712, citing Penry v. Lynaugh (1989) 492 U.S. 302, 323.) Brewer's history of depression and abuse served as a "double-edged sword" in that it diminished his blameworthiness but also indicated the probability that he would be a future threat to society. Thus, the Texas special issues did not allow the jury to sufficiently consider Brewer's mitigating evidence. Nor did they allow the jury to respond in a moral, reasoned manner in weighing such evidence and deciding whether the defendant was truly deserving of death. (Brewer v. Quarterman, supra, 127 S.Ct. at 1713-1714.)

In Abdul-Kabir v. Quarterman, supra, 127 S.Ct. 1654, the defendant was convicted of capital murder in Texas State Court and sentenced to death. At the penalty trial, the jury was asked to answer two special issues regarding the deliberate nature of the crime and Kabir's future dangerousness. Kabir presented mitigating evidence which sought to reduce his moral culpability by attributing his violent propensities to neurological damage and his unhappy childhood. During his closing arguments, the prosecutor advised the jury that it was to answer the special issues based only on the facts. The trial judge had earlier refused to give any special jury instruction authorizing a negative answer to either of the special issues based on any mitigation evidence presented by the defendant. The jury answered the special issues in the affirmative and Kabir was sentenced to death.

The United States Supreme Court reversed the death sentence, finding that the Texas State Court in denying post conviction relief had misapplied clearly established federal law within the meaning of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 USC §2254. (Abdul-Kabir v Quarterman, supra, 127 S.Ct. at 1659.) The Court had previously held that sentencing juries must give meaningful consideration and effect to all mitigating evidence that may provide a basis for not imposing the death penalty on a particular defendant, regardless of the severity of the crime or future dangerousness. (Penry v. Lynaugh (1989) 492 U.S. 302, 323-324.)

In Kabir's case, the Texas State Court judgment affirming the death sentence was objectively unreasonable in light of the Court's Penry decision. Any evidence must be permitted its mitigating force beyond the scope of the special issues. Kabir's mitigating evidence did not rebut the

special issues of deliberateness or future dangerousness, but was intended to provide the jury with an alternate justification for not imposing the death penalty.

The Court held that Kabir's evidence of childhood neglect and abandonment and possible neurological damage could have compelled the jury to provide a "yes" answer to the question of future dangerousness, while at the same time the jury instructions failed to give the jury "a means for giving meaningful effect to the mitigating qualities of such evidence." (Abdul-Kabir v. Quarterman, supra, 127 S.Ct. at 1673.) Kabir was entitled to habeas relief because there was a reasonable likelihood that the special issues jury instructions had precluded the jury from giving meaningful consideration to his mitigating evidence, as required by the Penry case. (Abdul-Kabir v. Quarterman, supra, at 1673-1674.)

These three new cases from the United States Supreme Court support the appellant's argument that the failure to instruct the jury on lingering doubt renders appellant's death sentence unconstitutional under Penry v. Lynaugh (1989) 492 U.S. 302. By rejecting the appellant's lingering doubt jury instructions, the trial court left the jury with no meaningful basis to consider lingering doubt in appellant's guilt as a mitigating factor upon which the jury could base a sentence less than death. The failure to instruct the jury on lingering doubt prevented the jury from giving effect to appellant's lingering doubt mitigation. Thus, appellant's death sentence was obtained in violation of his Eighth and Fourteenth Amendment constitutional rights.

Recent studies have indicated that lingering doubt about the defendant's guilt is the most powerful mitigating fact that a defendant can raise at the penalty phase in order to receive a sentence less than death.

(Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998).) "Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty." (Tarver v. Hooper (11th Cir. 1998) 169 F.3d 710, 715.) A recent report released from the Death Penalty Information Center indicates a decline in death sentences due to growing public awareness of death row exonerations and concerns that innocent people might be sentenced to death. (Richard C. Dieter, Innocence and the Crisis in the American Death Penalty, (Sept. 2004), www.deathpenaltyinfo.org)

In the past, this Court has held that the concept of lingering doubt is sufficiently encompassed within the standard jury instructions on "factor (k)." (People v. Harris (2005) 37 Cal.4th 310, 359; People v. Hines (1997) 15 Cal.4th 997, 1068.) In appellant's case the jury was instructed concerning "factor (k)" pursuant to CALJIC 8.85 and was told that in determining the penalty the jury should consider, among other factors, "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)

In three United States Supreme Court cases the Court has held that the "factor (k)" jury instruction given in California death penalty cases did direct the jury to consider the defendant's pre-crime background and character, post-crime rehabilitation, and forward-looking mitigation evidence that the defendant would lead a constructive life if incarcerated, when deciding whether to impose a life or death sentence. (Ayers v. Belmontes (2006) 127 S.Ct. 469; Brown v. Payton (2005) 544 U.S. 133;

Boyde v. California (1990) 594 U.S. 370.) In Ayers, the Court rejected a claim that "factor (k)," with its focus on circumstances extenuating the gravity of the crime, precluded consideration of mitigating evidence unrelated to the crime, such as the defendant's forward-looking mitigation evidence that he likely would lead a constructive life if incarcerated instead of executed. The Court stated that the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (Ayers v. Belmontes, supra, 127 S.Ct. at 475-476; Boyde v. California, supra, 594 U.S. at 380.)

In Ayers, the Court held that the "factor (k)" jury instruction was constitutional and provided no basis for vacating the death sentence. The Court stated that there was no reasonable probability that the jury had disregarded the defendant's mitigating evidence. The jury heard the mitigating evidence and was instructed to consider all evidence presented. Both parties addressed the mitigating evidence in their closing arguments. Under these circumstances, the Court held it was not reasonably likely that the jury understood the "factor (k)" instruction to mean that it could not consider the defendant's mitigating evidence. The Court noted that it had recently reached a similar conclusion based on similar facts in Brown v. Payton, supra. (Ayers v. Belmontes, supra, 127 S.Ct. at 475-476.)

Appellant's case is not governed by the Ayers and Payton decisions. Rather, appellant's case is controlled by the Smith, Brewer, and Abdul-Kabir cases. The lingering doubt concept is not encompassed in "factor (k)" in the trial court's jury instructions. Lingering doubt is not a circumstance that extenuates the gravity of the crime. Focusing on circumstances that extenuate the gravity of the crime encourages the jury to

engage in proportionality review. Under such an instruction, a juror might vote for a life sentence if the circumstances of the crime were less aggravating than those of other murders. Those considerations have nothing to do with lingering doubt.

Lingering doubt is a mitigating factor that focuses on the weight of the evidence proving the defendant guilty. It is based on the concept that even though the prosecution has proven the defendant guilty beyond a reasonable doubt, a jury may still demand a greater degree of certainty of guilt before imposing the death penalty. (People v. Terry, (1964) 61 Cal.2d 173, 145-146.) Lingering doubt concerns the defendant's "possible innocence of the crimes" as "a mitigating factor" to avoid a death verdict. (People v. Terry, supra, at 145-147.) Lingering doubt 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. Lingering doubt can exist in cases where the murder is extremely grave or where the murder is not so grave. Lingering doubt is different from the concept of the gravity of the crime.

Furthermore, lingering doubt has nothing to do with any sympathetic or other aspect of the defendant's character or record. Evidence of the defendant's character or record refers to evidence of the defendant's pre-crime background and character, his post-crime rehabilitation, such as his conversion to Christianity, and to forward-looking mitigation evidence that the defendant likely would lead a constructive life if incarcerated. This is why the cases of Ayers, Payton, and Boyde are distinguishable. Lingering doubt has nothing to do with the

defendant's character, his post-crime rehabilitation, or any forward-looking mitigation evidence.

Lingering doubt is a separate and distinct mitigating factor that is simply absent from the "factor (k)" instruction. Thus, by refusing to instruct on lingering doubt as a mitigating circumstance, the trial court did not provide the sentencing jury with an adequate opportunity to decide whether lingering doubt might provide a legitimate basis for imposing a sentence less than death. The failure to provide such guidance to the jury violated appellant's Eighth and Fourteenth Amendment constitutional right to have the sentencing jury consider and weigh relevant mitigating evidence and give effect to its consideration in imposing a sentence. (Penry v. Lynaugh, supra, 492 U.S. at 321.) Thus, appellant is entitled to have his death sentence vacated under Penry, Smith, Brewer, and Abdul-Kabir.

D. The Error Was Prejudicial

Appellant suffered prejudice from the trial court's refusal to instruct on lingering doubt. An earlier jury that received a lingering doubt instruction failed to reach a unanimous verdict and did not return a death verdict. At the first penalty trial the instruction allowed the jury to give effect to evidence raising a lingering doubt concerning the circumstances under which appellant shot and killed Lester Eaton. The prosecutor argued that appellant coldly executed Lester Eaton, who was incapacitated and helpless on the floor. (R.T. 4436) Appellant's counsel argued to the jury that Eaton was shot during a struggle on the floor and there was no evidence that appellant coldly executed Lester Eaton. (R.T. 4452) Appellant testified during the penalty trial that the gun went off by accident during a struggle with Mr. Eaton after Eaton had reached for his own gun. (R.T. 4207-4208)

Without a jury instruction on lingering doubt, the jury was left with no vehicle to give effect to appellant's lingering doubt mitigation. It is not enough to simply allow defense counsel to argue lingering doubt as a mitigating circumstance. In Abdul-Kabir, the Court stated that "the jury must be permitted to 'consider fully' such mitigating evidence and that such consideration 'would be meaningless' unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful mitigating effect in imposing the ultimate sentence." (Abdul-Kabir v. Quarterman, supra, at 1672, citing Penry v. Lynaugh, supra, 492 U.S. at 323.

Lingering doubt was also an important factor in evaluating the evidence concerning appellant's involvement in the Skyles and Price murders. Appellant's convictions for murdering Skyles and Price were the most significant aggravating factor in support of the death penalty. The prosecutor argued that appellant committed the murders along with Michael Soliz. (R.T. 4438) Appellant's counsel argued that appellant did not do anything that constituted aiding and abetting in the murders because he just stood there next to the car. (R.T. 4455) If the jury had a lingering doubt concerning whether appellant was actually guilty of aiding and abetting in the murders of Skyles and Price, it would have weakened the persuasive force of this aggravating factor and may have caused the jury to return a life sentence in the case involving the murder of Lester Eaton. However, without a lingering doubt jury instruction, the jury was once again left without a means to give effect to the lingering doubt mitigation.

It is not enough for the jury to be instructed on "factor (a)" pursuant to CALJIC 8.85 that the jury should consider: "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 "factor (a)" instruction states that the appellant is guilty and makes no mention of lingering doubt or the possibility of his innocence. Under the "factor (a)" instruction there was no means by which the jury could accept or give effect to the defense evidence or argument that there was a lingering doubt concerning whether appellant's actions constituted aiding and abetting Soliz in the murders of the Skyles and Prize. Factor (a) does not encompass lingering doubt.

Other indications that a refusal to instruct on lingering doubt was prejudicial are seen from the jury's question during deliberations. The jury requested clarification of 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; 4515-4518) The jury also requested that appellant's testimony be reread. (R.T. 4509-4511) The jury was closely examining the underlying facts of all three murders. Thus, the failure of the trial court to instruct on lingering doubt requires reversal of appellant's death penalty because 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.)

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

Appellant argued that penalty phase retrials after a hung jury are in conflict with the evolving standards of decency which are reflected in the death penalty statutes of 28 state and federal jurisdictions. (Roper v.

Simmons (2005) 543 U.S. 551; Trop v. Dulles (1958) 356 U.S. 86, 100-101.) In 27 states and in federal death penalty cases, the jury's inability to reach a unanimous penalty phase verdict results in the defendant being sentenced to life imprisonment or life imprisonment without parole. (Jones v. United States (1999) 527 U.S. 373, 419; Acker and Laniere, Law, Discretion And The Capital Jury: Death Penalty Statutes And Proposals For Reform, 32 Crim. L. Bull. 134, 169 (1996).)

Respondent argues that appellant has waived the argument by failing to raise an objection on this ground in the trial court. (R.B. 380) Appellant disagrees. This Court has consistently considered "as applied" challenges to California 's death penalty scheme on the merits without requiring an objection in the trial court. (People v. Hernandez (2003) 30 Cal.4th 835, 863.) A reviewing court also may consider on appeal a claim raising a pure question of law on undisputed facts even where the legal issue is raised for the first time on appeal. (People v. Yeoman (2003) 31 Cal.4th 93, 118.)

Appellant's case is similar to People v. Yeoman, supra, 31 Cal.4th at 115-118. In Yeoman, the defendant objected to the prosecutor's exclusion of prospective jurors on account of their race on the grounds that it violated People v. Wheeler (1978) 22 Cal.3d 258 [Race based peremptory challenges violate the California Constitution.]. The defendant renewed that argument on appeal and added an additional claim that the prosecutor's use of peremptory challenges violated Batson v. Kentucky (1986) 476 U.S. 79 [Race based peremptory challenges violate the United States Constitution.]. The prosecution argued that the federal claim under Batson was waived by failing to raise it in the trial court.

This Court rejected the waiver argument because a claim under Batson was based upon the same factual inquiry required under Wheeler. The Court stated that "As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (People v. Yeoman, supra, 31 Cal.4th at 117.)

In appellant's case, appellant made a motion pursuant to Penal Code section 1385 to bar retrial of the penalty phase after the jury had hung with 8 votes in favor of a life sentence and 4 votes in favor of the death penalty in the Lester Eaton murder case. Section 1385 allows a trial court to dismiss a case in the furtherance of justice. Appellant's argument on appeal that retrial of the penalty phase violates the Eighth Amendment's "evolving standards of decency" is similar to a motion to bar retrial "in the furtherance of justice." The factual argument for each motion is the same. The first jury was hung in favor of a life sentence and a retrial should not be allowed. Thus, under Yeoman, appellant's Eighth Amendment argument has not been waived.

Respondent argues that this Court has consistently upheld penalty phase retrials as constitutional. (See, People v. Gurule (2002) 28 Cal.4th 557, 645; People v. Hawkins (1995) 10 Cal.4th 920, 966.) (R.B. 381) However, in Hawkins and Gurule the defendants raised a different constitutional argument. In those cases, the defendants argued that having a second jury impaneled to retry the penalty prevented that jury from considering the issue of lingering doubt because the second jury had not

decided the defendant's guilt or innocence. The Court rejected that argument finding that defendants at penalty phase retrials were entitled to raise lingering doubt at penalty only retrials.

Appellant's argument raises a different constitutional claim. Appellant argues that 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.) In twenty-seven states out of thirty-six states that have a 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 imprisonment or life imprisonment without parole. (Jones v. United States (1999) 527 U.S. 373, 419.) This is similar to the number of states that was found persuasive in Enmund v. Florida (1982) 458 U.S. 782, when the Court found that evolving standards of decency prevented the imposition of the death penalty upon an accomplice in a robbery murder who does not take a life.

To allow retrial of a 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 be imposed in a wanton and freakish manner. (See, Lewis v. Jeffers (1990) 497 U.S. 764, 771.) 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 (1957) 355 U.S. 184, 188.)

Although the United States Supreme Court has held that retrying a penalty phase after the first jury is unable to reach a unanimous verdict does not violate the Double Jeopardy Clause (Sattazahn v. Pennsylvania (2003) 537 U.S. 101, 107-110), that Court has never

considered a challenge under the Eighth Amendment's evolving standards of decency. Furthermore, this Court has never considered such a claim. In deciding this issue for the first time, the Court must be guided by the fact that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (Atkins v. Virginia (2002) 536 U.S. 304, 312.) After reviewing the laws of the various states, the Court must then apply its "own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment." (Atkins v. Virginia, supra, 356 U.S. at 312-313.)

Appellant urges the Court to find that penalty phase retrials after a hung jury, especially if hung in favor of a life sentence, violates contemporary values and the evolving standards of decency. The Court should declare Penal Code section 190.4, subdivision (b) unconstitutional to the extent that it permits the retrial of a penalty phase after a hung jury. Appellant urges the Court to declare this statute unconstitutional under the United States Constitution and the California Constitution.

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

Appellant argued that it was error to exclude evidence that appellant had already been sentenced to life without possibility of parole for the murders of Elijah Skyles and Gary Price. The evidence was admissible under Penal Code section 190.3 as evidence of a "prior felony conviction." Appellant argued that the lesser sentence of life without possibility of

parole imposed for the Skyles and Price murders was also relevant mitigation evidence admissible under the Eighth Amendment (Lockett v. Ohio (1978) 438 U.S. 586, 604) and under the Fourteenth Amendment Due Process Clause. (Green v. Georgia (1979) 442 U.S. 95, 97.)

Respondent argues that the sentence appellant received for the murders of Skyles and Price is not recognized by statute or in case law as a relevant aggravating or mitigating factor. According to respondent, the sentence appellant received for the murders of Skyles and Prices is not evidence bearing on the issue of appellant's "character or the characteristics of the offense." (R.B. 316) Respondent's arguments are wrong.

Evidence of appellant's sentences on the Skyles and Price murder convictions of life imprisonment without possibility of parole were admissible under Penal Code section 190.3, as "evidence . . . relevant to . . . mitigation, and sentence, including . . . the nature and circumstance of... any prior conviction or convictions." The record of a prior felony conviction includes the sentence. (People v. Williams (1945) 27 Cal.2d 220, 227-228.) Appellant's life without possibility of parole sentences for the Skyles and Price murders were clearly admissible under section 190.3 and the Williams case.

Under the Eighth Amendment, 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 U.S. 586, 604; Eddings v. Oklahoma (1982) 455 U.S. 104, 113-114.) Evidence that appellant had already been sentenced to life without possibility of parole for the Skyles and Price murders was mitigating evidence. The fact that appellant was convicted of two first degree murders involving Skyles and Price was certainly aggravating evidence. However, the fact that appellant did not

receive the death penalty for those two murders is some indication from which the jury could conclude that appellant's prior convictions were less serious than if appellant had received the death penalty. Since the evidence had some tendency to prove mitigation, the evidence was relevant and admissible under People v. Frye (1998) 18 Cal.4th 894, 1013-1017.

Respondent relies on this Court's opinion in People v. Frye, supra, in arguing that trial courts retain authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record or the circumstances of the offense. (R.B. 314-315) In Frye, the prosecution presented evidence that the defendant had a prior felony conviction for sexual assault in the state of Florida. The defendant attempted to call several witnesses who could testify concerning the events in a bar that preceded the sexual assault. The trial court excluded the defense evidence finding it irrelevant.

This Court found that the exclusion was error, stating that "Although the proffer of testimony regarding defendant's familiarity with the victim and their heavy consumption of alcohol preceding the sexual assault does not appear strongly relevant to defendant's character or record, the evidence nonetheless has some tendency to show defendant was not as morally culpable as the conviction for sexual assault in the abstract might suggest." (People v. Frye, supra, 18 Cal.4th at 1016. Thus, the Frye case cited by respondent, actually supports appellant's argument that evidence of his life without possibility of parole sentences for the Skyles and Price murders was relevant to show that appellant was not as morally culpable as the convictions in their abstract might suggest.

Finally, respondent argues that excluding the evidence is not reversible because the error was harmless beyond a reasonable doubt. (R.B.

316) Appellant disagrees. The exclusion of this evidence was highly prejudicial. Clearly the most serious aggravating factor in support of the death penalty for the crime of murdering Lester Eaton was the fact that appellant had two first degree murder convictions for the murders of Skyles and Price. The erroneously excluded mitigating evidence of the life sentences was directly related to the prosecutor's key aggravating evidence. In other words, the excluded evidence was not directed at some collateral fact.

The exclusion of the evidence was also prejudicial because the question of whether appellant should receive the death penalty for the Lester Eaton murder was a close question. At the first penalty trial the jury hung with 8 votes in favor of life and 4 votes in favor of death. At the first penalty trial, all of the jurors knew that appellant would receive a sentence of life imprisonment without possibility of parole for the Skyles and Price murders because the first jury returned the penalty verdicts on those murders. Thus, keeping evidence of appellant's sentences away from the second jury was reversible error. In People v. Sturm (2006) 37 Cal.4th 1218, 1243-1244, the Court found that error occurring at the defendant's second penalty trial was prejudicial and reversible in light of the fact that at the first penalty trial, where the error did not occur, the jury had voted 10 to 2 in favor of life imprisonment. (See also, People v. Mullens (2004) 119 Cal.App.4th 648, 667-670.)

There are also other indications of the close nature of the case. The jury deliberated over a three day period. During the deliberations, the jury asked for a re-reading of appellant's testimony. The jury also asked for clarification 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. This shows that the jury was giving close consideration of the question of whether appellant's conduct in shooting Lester Eaton required a death sentence or a sentence of life without possibility of parole.

In his closing argument to the jury, the prosecutor stated that the jury must determine whether they should impose the death penalty on appellant because of his commission of three murders. The jury was to decide only the punishment for appellant for the murder of Lester Eaton. However in reaching that decision, the prosecutor noted that the jury should also consider appellant's conviction of the double murder of Elijah Skyles and Gary Price. (R.T. 4387-4389) Excluding evidence that appellant was sentenced to life without possibility of parole on the Skyle and Price murders deprived appellant of important mitigating facts that would have lessened the severity of the prosecutor's aggravating evidence. In short, allowing the evidence to be considered by the jury may have resulted in a different verdict—a life verdict.

In a capital case, reversal of a death sentence is required 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.) For federal constitutional error, the Court must reverse unless the error is harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.) Because the Skyles and Price murder convictions were the most aggravating evidence offered by the prosecution, the error in excluding evidence concerning appellant's lesser sentence of life without possibility of parole was not harmless beyond a reasonable doubt. There is a reasonable possibility that the jury would have rendered a

different verdict had the error not occurred. Therefore, the Court must reverse appellant's death sentence.

XIX. THE COURT ERRED IN ALLOWING SALVADOR BERBER TO TESTIFY IF HE EVER RETURNED TO HIS HOME IN LA PUENTE, APPELLANT AND CO-DEFENDANT MICHAEL SOLIZ WOULD KILL HIM

Salvador Berber testified at the penalty retrial that if he ever returned to La Puente "they'd kill me." (R.T. 4019) Appellant argued that the evidence was inadmissible because there was no evidence that appellant and Soliz had any plan to kill Salvador Berber. (People v. Hannon (1977) 19 Cal.3d 588, 600.) Respondent argues that appellant has waived the issue by failing to state any grounds for his objection in the trial court. (R.B. 191) Evidence Code section 353 provides that a judgment shall not be reversed by reason of the erroneous admission of evidence unless there was an objection in the trial court to the evidence that was timely made, stating the specific grounds for the objection. (People v. Demetrulias (2006) 39 Cal.4th 1, 19-22.)

In appellant's case, the issue has not been waived. Counsel for appellant clearly objected to the admissibility of this evidence. (R.T. 4019) It is true that no grounds were expressly stated by counsel in making the objection. However, the grounds for the objection were obvious. Evidence that a defendant has threatened a witness is highly prejudicial and admissible only if adequately substantiated. (People v. Warren (1988) 45 Cal.3d 471, 481.)

In People v. Partida (2005) 37 Cal.4th 428, 437 this Court stated: "If the trial objection fairly informs the court of the analysis it is asked to undertake, no purpose is served by formalisticly requiring the party

also to state every possible legal consequence of error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence." In appellant's case, Salvador Berber's claim that appellant and Soliz would kill him if he returned home to La Puente was obviously prejudicial and totally unsubstantiated. As such, appellant's trial objection was sufficient to preserve the issue for appeal.

Respondent also argues that appellant's federal due process argument has been waived for appeal because it was not raised in the trial court. (R.B. 191) In People v. Partida, supra, 37 Cal.4th 428, 431 this Court stated that a defendant "may not argue on appeal that the court should have excluded evidence for a reason not asserted at trial" but that a defendant "may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process." (See also, People v. Cole (2004) 33 Cal.4th 1158, 1159 n.6.) Under Partida, appellant may argue on appeal that the erroneous admission of this evidence had the effect of violating his federal constitutional right to due process. Thus, there was no waiver of his federal due process argument.

On the merits of the argument, respondent argues that 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. Guerra (2006) 37 Cal.4th 1067, 1141; People v. Burgener (2003) 29 Cal.4th 833, 869.) (R.B. 192-194) For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or that the witness's fear of retaliation is directly linked to the defendant. (People v. Guerra, supra, 37 Cal.4th at 1141; People v. Gutierrez (1994) 23 Cal. App.4th 1576, 1588.)

In People v. Guerra, supra, 37 Cal.4th at 1141-1142, the Court upheld the admissibility of the testimony of two witnesses who testified that they feared the defendant's family might retaliate against them if they returned to Guatemala after testifying against the defendant. The Court held that this evidence was relevant to the jury's assessment of the witness's credibility. The Court noted that the evidence was admitted on the issue of the witness's fear and the jury was instructed accordingly. "Importantly, the trial court admonished the jurors that if they believed the statements were made, they must not attribute them to defendant." (People v. Guerra, supra, at 1142.)

In appellant's case, the evidence was not offered for the limited purpose of showing that the witness was in fear. The evidence was admitted without any limitations and the trial court did not admonish the jury to limit the evidence to the issue of the witness's fear. Furthermore, the jury was not instructed, as in Guerra, that the jury should not attribute any threats against the witness to the defendants. Rather, in appellant's case, Salvador Berber was permitted to testify that if he returned to his home in La Puente, "They'd kill me." The only reasonable inference from that testimony was that Salvador Berber was referring to appellant and Michael Soliz, the two defendants on trial. However, there was no evidence that either appellant or Soliz had threatened to kill Salvador Berber.

Since the evidence in appellant's case was not offered on the limited issue of fear and the jury was not instructed to limit consideration of the evidence to that issue, the admission of the evidence was error. "[E]vidence that a defendant is threatening witnesses implies a consciousness of guilt and is thus highly prejudicial and admissible only if adequately substantiated." (People v. Warren (1988) 145 Cal.3d 471, 481;

People v. Hannon (1977) 19 Cal.3d 588, 600; People v. Weiss (1958) 50 Cal.2d 535, 545.) Since the evidence was not substantiated or connected to either defendant in the case, it was erroneously admitted.

Finally, respondent argues that any error in admitting the evidence was harmless. (R.B. 194) Appellant disagrees. Appellant had already been convicted of three murders. The erroneous admission of evidence that appellant had planned to kill a fourth victim, Salvador Berber, was highly prejudicial. It may have tipped the scales in favor of the jury deciding that it must sentence appellant to death in order to save the life of Salvador Berber. At the first penalty trial, when the jury did not hear such evidence, the jury did not return a verdict of death. Thus 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.) Therefore, appellant urges the Court to reverse his 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

Appellant argued that 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. Respondent argues that this Court has repeatedly denied such claims, finding the instructions are not required in the absence of a request by defense counsel. (R.B. 374) Respondent relies upon recent case law. (People v. Guerra (2006) 37

Cal.4th 1067, 1147; People v. Carter (2003) 30 Cal.4th 1166, 1227; People v. Maury (2003) 30 Cal.4th 342, 443.)

The general rule is that instructions on other crimes are not required in the absence of a defense request. The rule is based on the tactical consideration that a defendant may fear that instructions on other crimes evidence 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.)

However, appellant's case is different because it is based on a unique set of facts. At the penalty trial, the prosecution presented evidence that a shank was found in appellant's cell at the Los Angeles county jail. Appellant testified at the penalty trial that the shank was not his and that it was not found in his cell. Under the law, a person is not guilty of possessing a deadly weapon in the jail unless he "knowingly" possesses the weapon. (People v. Reynolds (1988) 205 Cal.App.3d 776, 779; People v. Savedra (1993) 15 Cal.App.4th 736, 742; People v. James (1969) 1 Cal.App.3d 645, 649-650.) By denying that the shank was in his cell, appellant was asserting his innocence of the crime of possessing a deadly weapon in the jail.

Appellant's denial of knowingly possessing a deadly weapon in the jail was no frivolous denial. During his testimony, appellant admitted all of the other criminal conduct offered as aggravating factors in his case. He admitted shooting Lester Eaton. He admitted committing the Hillgrove Market robbery. He admitted committing a gas station robbery when he was 13 years old and that he committed the robbery with a knife. (R.T. 4257-4258) He admitted he was present during the Skyles and Price shooting at the Shell gas station. Why would appellant deny possessing a

shank in his cell when he so freely admitted every other aggravating circumstance? The reason must be that he did not commit that crime.

The jury could not lawfully consider the shank evidence unless the evidence demonstrates "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, 41 Cal.3d at 73-75.)

If appellant had been charged in criminal court with the crime of possession of a deadly weapon in the jail, it would have been reversible error for the court to fail to instruct the jury on all of the elements of the charged crime. (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 trial judge 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 in Reynolds 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 the absence of knowledge." (People v. Reynolds, supra, at 781; see also, People v. Cummings (1993) 4 Cal.4th 1233, 1311-1315 [Robbery

convictions reversed where trial court failed to instruct the jury on all of the elements of the crime of robbery.].

It was improper for the jury to consider the shank evidence in determining appellant's death penalty unless the jury was convinced beyond a reasonable doubt that appellant actually committed the crime. Without jury instructions on the elements of the crime, including the element of knowledge, the jury had no means of making that determination. However, the fact that a shank was found in appellant's cell may have been used by the jury to consider appellant a dangerous inmate who should receive the death penalty. The prosecutor in his final argument to the jury emphasized the fact that appellant had a knife in his cell and was therefore dangerous. (R.T. 4396-4398)

The failure to instruct the jury on the elements of the crime of possessing a deadly weapon in a jail was reversible error. At the first penalty trial, the prosecution did not introduce evidence of appellant's possession of a shank in the jail and the jury did not return a verdict of death. This is an indication that the jury instruction error occurring at the second penalty trial was reversible. (See, People v. Sturm (2006) 37 Cal.4th 1218, 1243-1244.) Therefore, appellant urges the Court to reverse his 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

Respondent argues that this Court has held that a trial court does not err when it refuses to give supplemental jury instructions

concerning the jury's consideration of mercy and sympathy as a mitigating factor. (R.B. 370-371) Appellant relies upon the arguments raised in Appellant's Opening Brief in Argument XXI at pages 467-475.

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

Respondent argues that this Court has repeatedly rejected claims that a trial court erred in refusing to specifically instruct the jury at the penalty trial concerning the age of the defendant as a mitigating factor (R.B. 371) Appellant relies upon the arguments raised in Appellant's Opening Brief in Argument XXII at pages 476 through 485.

XXIII. APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BASED UPON THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS

Respondent argues that the Court should not reverse appellant's death penalty on the basis of any cumulative error or on the basis of any error occurring during the penalty trial. (R.B. 382) Appellant relies upon the arguments raised in Appellant's Opening Brief in Argument XXIII pages 486 through 492.

XXIV. APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHT TO A JURY TRIAL

Appellant argued that his death sentence is unconstitutional because in returning a death verdict the jury was not required to unanimously agree beyond a reasonable doubt (1) that one or more aggravating circumstances existed and (2) that the aggravating circumstances outweighed the mitigating circumstances. (A.O.B. 509-532) Appellant relied upon the Sixth and Fourteenth Amendment cases of Apprendi v. New Jersey (2000) 530 U.S. 466; Ring v. Arizona (2002) 536 U.S. 584; and Blakely v. Washington (2004) 542 U.S. 296.

Respondent argues that this Court has repeatedly rejected arguments that Apprendi and Ring affect California's death penalty law. Respondent states that "Unlike the determination of guilt, the sentencing function is inherently moral and normative, not [factual], and thus not susceptible to any burden of proof qualification." (R.B. 335-356) Respondent relies upon, among others, this Court's decisions in People v. Anderson (2001) 25 Cal.4th 543, 601 and People v. Prieto (2003) 30 Cal.4th 226, 263.

The recent case of Cunnigham v. California (2007) 127 S. Ct. 856 supports the argument that California's death penalty law violates the Sixth and Fourteenth Amendment constitutional right to a jury trial under the United States Constitution. Although the Court has recently rejected a similar Cunningham argument in three cases, (People v. Stevens (2007) __Cal.4th__; People v. Carey (2007) __Cal.4th__; People v. Prince (2007)

__Cal.4th__; see also, People v Bonilla (2007)__Cal.4th__), appellant asks the Court to reconsider the issue in his case.

A. The Relevant Statutory Maximum Is LWOP

The Supreme Court in Cunningham has stated that "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." (Cunningham v. California (2007) 127 S. Ct. 856, 860, citing Blakely v. Washington (2004) 542 U.S. 296, 303-304.) In Cunningham, the Court noted that under California's determinate sentencing law (DSL), the jury's guilty verdicts alone limited the defendant's sentence to the middle term, and thus the middle term became the statutory maximum for the Court's Apprendi analysis. The Court held that increasing a defendant's sentence to the upper term based upon the finding of an aggravating fact at a sentencing hearing violated the Constitution unless that aggravating fact was submitted to a jury and proven beyond a reasonable doubt. (Cunningham v. California, supra, 127 S. Ct. at 868-871.)

In Cunningham, the Supreme Court rejected this Court's decision in People v. Black (2005) 35 Cal.4th 1238. Black held that the relevant statutory maximum after a guilty verdict was the upper term and that the judge's selection of the upper term at sentencing did not violate the defendant's Sixth Amendment constitutional right to a jury trial. After reading the relevant rules of court, the Supreme Court in Cunningham held that the middle term was the relevant statutory maximum and the upper term could only be imposed if the aggravating factors were proven to a jury beyond a reasonable doubt as required by Apprendi.

The error in the Black case was repeated when the Court examined California's death penalty law and made its determination of the relevant "statutory maximum" for the crime of murder. In the Anderson case the Court stated that "under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum; the only alternative is life imprisonment without the possibility of parole." (People v. Anderson (2001) 25 Cal.4th 543, 589-590 n.14.)

Applying Cunningham to California's death penalty law requires a re-evaluation of the relevant statutory maximum in a case where a defendant has been convicted of murder with one or more special circumstances. Penal Code section 190.2 subdivision (a) provides that the sentence for first degree murder with a special circumstance is "death or confinement in state prison for a term of life without possibility of parole." However, before a death sentence may by imposed, the jury at a penalty trial must "take into account and be guided by the aggravating and mitigating circumstances . . . and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code §190.3.)

Death cannot be imposed upon a defendant based solely upon the jury's verdict of guilty of murder with one or more special circumstances. Without the jury's finding at a penalty trial that aggravating circumstances exist and that the aggravating circumstances outweigh the mitigating circumstances, the maximum sentence that may be imposed on a defendant is life without possibility of parole. (People v. Zimmerman (1984) 36 Cal.3d 154, 157). For example, in Zimmerman when the jury

was unable to reach a unanimous verdict for death at the penalty trial, the trial court was required to impose a sentence of life without possibility of parole. (People v. Zimmerman, supra, at 157.)

Zimmerman was tried under an earlier version of Penal Code section 190.4 which required the trial court to impose a sentence of life without possibility of parole if the penalty jury was deadlocked and unable to reach a unanimous verdict. (See, AOB Arg. XVII) The current version of Section 190.4 provides that after a second hung jury, the trial court has the discretion to order a third penalty trial or sentence the defendant to life without possibility of parole. Under either version of the statute, a trial judge has no power to sentence a defendant to death when the penalty jury fails to reach a verdict of death.

Based on Cunningham, the relevant statutory maximum after a defendant has been convicted of murder with special circumstances is life without possibility of parole. Before the maximum sentence may be increased to death, the penalty phase jury must find that aggravating circumstances exist and that the aggravating circumstances outweigh the mitigating circumstances. Furthermore, Cunningham makes it clear that the Sixth Amendment requires these two findings be made by the jury using a beyond a reasonable doubt standard.

The central holding in Cunningham is that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (Cunningham v. California, supra, 127 S. Ct. at 863-864.) Since appellant's death sentence was imposed by a jury that did not use the beyond a reasonable doubt standard, the death sentence was imposed in violation of

appellant's Sixth and Fourteenth Amendment constitutional right to a jury trial.

B. Normative Findings Are Subject To The Sixth Amendment

In People v. Prieto (2003) 30 Cal.4th 226, 263, the Court stated that under California's death penalty law, the jury in the penalty phase "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 (1954) 512 U.S. 967, 972.) No single factor therefore determines which penalty – death or life without possibility of parole – is appropriate. While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true even though the jury must make certain factual findings in order to consider certain circumstances as aggravating factors. As such, the penalty phase determination 'is inherently moral and normative, not factual.'" The Court concluded by stating that these normative findings need not be found by the jury beyond a reasonable doubt. (People v. Prieto, supra, 30 Cal.4th at 263.)

By this language in the Prieto case, the Court has improperly exempted normative findings in California's death penalty law from the Sixth Amendment. Although the term "normative process" has been used to describe the jury's deliberation over whether to vote for a death sentence, the term arises in cases evaluating state death penalty laws under the Eighth Amendment. (Kansas v. Marsh (2006) 126 S.Ct. 2516, 2528.)

The Court in Marsh referred to the jury's decision on the death penalty as a "normative process in which a jury is constitutionally

tasked to engage when deciding the appropriate sentence for a capital defendant." (Kansas v. Marsh, supra, 126 S. Ct. at 2528.) The Court concluded that the Eighth Amendment is not violated by Kansas' death penalty statute which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise. (Id. at 2529.)

The Marsh Court noted that the Eighth Amendment places only two constitutional limitation on a state capital sentencing system. A state capital sentencing system must: "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." (Kansas v. Marsh, supra, 126 S. Ct. at 2524-2525, citing Furman v. Georgia, (1972) 408 U.S. 238 and Gregg v. Georgia (1976) 428 U.S. 153.) "So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed." (Kansas v. Marsh, supra, at 2525, citing Franklin v. Lynaugh (1988) 487 U.S. 164, 179 and Zant v. Stephens (1983) 462 U.S. 862, 875-876 n.13.)

However, nothing in the Marsh case and its discussion of normative findings and the Eighth Amendment authorizes state death penalty laws to ignore the Sixth Amendment jury trial rights discussed in Apprendi, Ring, and Cunningham. Appellant's claim under Apprendi is a claim under the Sixth Amendment constitutional right to a jury trial, not an Eighth Amendment cruel and unusual claim. The Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." (Apprendi v. New Jersey (2000) 530 U.S. 466, 490.)

Merely labeling the jury's finding as "normative findings" does not remove the requirements of the Sixth Amendment. In Ring v. Arizona (2002) 536 U.S. 584, 602, the Supreme Court held that "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact no matter how the State labels it must be found by a jury beyond a reasonable doubt." The Court stated that "the relevant inquiry is not one of form, but of effect." (Ring v. Arizona, supra 536 U.S. at 604.)

In Ring v. Arizona, supra, the Supreme Court vacated a death sentence because under Arizona law, it was the judge, not the jury, who found the aggravating circumstances which authorized the death penalty. In Arizona, the punishment for murder is death or life imprisonment. At the time of Ring's trial, once the jury found a defendant guilty of murder, it was left to the judge to decide whether to impose the death penalty. A defendant could not receive the death penalty based solely on the jury's verdict finding him guilty of first degree murder.

Thus in Ring the death penalty was the maximum sentence for murder in Arizona only in a formal sense. Arizona law explicitly cross-referenced the statutory provision requiring a finding of an aggravating circumstance before the death penalty could be imposed. The Supreme Court held that Ring's death sentence was unconstitutional because of the way it was imposed. The Sixth Amendment required that the finding of an aggravating circumstance, increasing the penalty from life imprisonment to

death, must be made by a jury beyond a reasonable doubt. (Ring v. Arizona, supra, at 604-610.)

Under California's death penalty law, the jury's determination that aggravating circumstances exist and that the aggravating circumstances outweigh the mitigating circumstances are necessary findings that must be made before a death sentence can be imposed. Whether these findings are called factual findings or normative findings, the effect is the same. The findings authorize a death sentence. Without the findings, the maximum punishment for murder with special circumstances is life without possibility of parole.

In Justice Scalia's concurring opinion in Ring, he states that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives whether the statute calls them elements of the offense, sentencing factors, or Mary Jane must be found by the jury beyond a reasonable doubt." (Ring v. Arizona, supra, at 610.) To paraphrase Justice Scalia, whether the statute calls them elements of the offense, sentencing factors, or normative findings, the Sixth Amendment requires that they must be found by the jury beyond a reasonable doubt. Since the jury findings in appellant's case were not made beyond a reasonable doubt, appellant's death sentence has been imposed in violation of his Sixth and Fourteenth Amendment constitutional right to a jury trial. Therefore, appellant's death sentence should be reversed under Apprendi, Ring, Blakely, and Cunningham.

XXV. APPELLANT JOINS IN THE ARGUMENTS MADE BY THE CO-APPELLANT MICHAEL SOLIZ

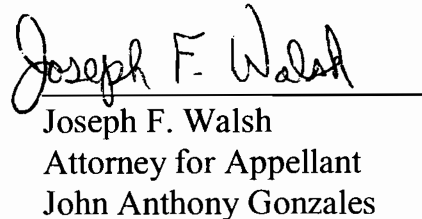
Pursuant to California Rules of Court, Rule 13(a)(5), the appellant joins in the arguments made by the co-appellant Michael Soliz in his briefs.

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: August 2, 2007

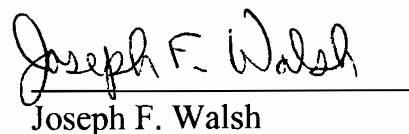
Respectfully submitted,



Joseph F. Walsh
Attorney for Appellant
John Anthony Gonzales

CERTIFICATION

The undersigned hereby certifies that the type-size used in this brief is 13 point type-size and the brief contains 44,482 words.



Joseph F. Walsh

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, Los Angeles, CA. 90012.

On this date I caused to be served on the interested parties hereto, a copy of **APPELLANT'S REPLY 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 August 2, 2007, at Los Angeles, California.

CANDACE PARK