IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CHARLES EDWARD MOORE, Defendant and Appellant.	Appeal No. S075726

Appeal from the Superior Court of the State of California
Los Angeles County No. A0185568
Hon. James Pierce, Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to the California Constitution, Art. VI, § 11 and Penal Code, § 1239, subd. (b). Further, this appeal is from a final judgment following a jury trial and is authorized by Penal Code, § 1237, subd. (a).

STATEMENT OF THE CASE

In 1978, appellant, Charles Edward Moore was charged by information with two counts of the first degree murders of Hettie and Robert Crumb under the 1977 death penalty law.[1/] (former Pen. Code, §

1. Appellant was also charged with Lee Edward Harris. (1CT 8.)

187 et seq.)[2/] Each of the two murder counts alleged three special circumstance allegations, robbery-murder, burglary-murder, and multiple murder. (former Pen. Code, § 190.2, subds. (c)(3)(i), (c)(3)(v), and(c)(5).) Appellant was also separately charged with one count of burglary in violation of section 459, with special allegations that he personally used a deadly and dangerous weapon, (Pen. Code § 12022, subd. (b)), personally used a firearm, (Pen. Code, § 12022.5), and that he inflicted great bodily injury upon Hettie and Robert Crumb (Pen. Code, § 12022.7). Finally he was charged with two counts of robbery (Pen. Code § 211), with the same weapon and great bodily injury allegations. (1 CT 177.)[3/]

The guilt phase portion jury trial began on March 26, 1984 and concluded on April 5, 1984 when the jury found appellant guilty of all charges and found all special allegations true. (1CT 226-232.) The penalty phase portion of the trial began on April 9, 1984. On April 11, 1984, the jury fixed the penalty at death. (1CT 251, 268.)

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2. All statutory references are to the California Penal Code unless otherwise stated.

3. "CT" refers to the Clerk's Transcript on Appeal; "RT" refers to the Reporter's Transcript on Appeal. Each transcript is also designated with the volume number.

Appellant appealed the judgment to this Court which affirmed the judgment in its entirety on November 3, 1988, and denied his related habeas petitions. (*People v. Moore* (1988) 47 Cal.3d 63). (2 CT 337-416.)

In 1991, appellant filed an habeas petition in the United States District Court for the Central District of California, (Case No. 91-5976-KN). In 1995, the district court granted summary judgment in favor of appellant on two of his claims (involving his pre-trial and mid-trial requests to proceed pro se), and summarily adjudicated a number of other claims in favor of the state. On that basis, the district court granted appellant's petition for the writ, ordering that the state either decide to try him within sixty days or release appellant. (See, *Moore v. Calderon* (1997) 108 F.3d 261.)

The state appealed from that decision, and appellant cross-appealed from the district court's denial of his other claims. The state moved the district court for a stay pending appeal, which it denied. The Ninth Circuit Court of Appeals in *Moore v. Calderon* (9th Cir. 1995) 56 F.3d 39, and Justice O'Connor in her capacity as Circuit Justice for the Ninth Circuit, *Calderon v. Moore*, No. A-910 (June 9, 1995) (unpublished order), denied subsequent requests for a stay pending appeal. (3 CT 783.) Thereafter, the state granted appellant a new trial, and simultaneously pursued the appeal

of the District Court's order on the merits in the Ninth Circuit. However, the state's appeal in the Ninth Circuit was dismissed as moot since a new trial had been granted. (3 CT 784; see *Moore v. Calderon, supra,* 108 F.3d at p. 263.)

On June 27, 1995, the prosecution moved to remove the case from the superior court for lack of jurisdiction and determination of defense counsel. (3 CT 787; RT Vol. I, A22, 15.)[4/] On June 30, 1995, appellant moved the court for *pro per* status, which was granted on June 30, 1995. Appellant also asked for the appointment of advisory counsel. (3 CT 798-799.) On July 7, 1995, the prosecution filed its notice of its intention to present all penalty phase evidence that was presented in appellant's 1984, plus six additional incidents involving appellant's conduct at San Quentin. The court also denied appellant's request for advisory counsel. (3 CT 803-804;1 RT 5-7.) On July 12, 1995, the prosecution argued that trial setting proceeding were premature since the trial court lacked jurisdiction. The motion was denied. At that time, appellant was granted *pro per* status for the guilt phase portion of the trial only. Appellant did not waive counsel for the penalty phase. Appointment of advisory counsel was also granted. (3

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4. The reason for this motion was because at that time the case was apparently pending in the United States Supreme Court.

CT 811.) Appellant also moved to dismiss the case for lack of a speedy trial. (4 CT 821-829.)

The case proceeded with preparation for trial until February 19, 1997, when an order from the United State Supreme Court issued, staying the proceeding pending resolution of the state's appeal of the district court order granting appellant's habeas petition. Trial proceedings were then suspended. (5 CT 1215, 1219; 2 RT 338)[5/]

On March 7, 1997, the Ninth Circuit affirmed the district court's issuance of the writ based on appellant's pretrial request to proceed *pro se*. (*Calderon v. Moore* (9th Cir. 1997) 108 F.3d 261, cert denied June 23, 1997, 521 U.S. 1111.)

The matter was returned to the superior court for trial on July 25, 1997. (5 CT 1246; 2 RT 345-348) On July 28, 1997, appellant again requested and was granted the right to represent himself at trial, and he also requested the appointment of co-counsel to assist with his defense. (5 CT 1250.) At the next hearing on August 6, 1997, arraignment was continued until August 19, 1997. Attorney John Schmocker was present and informed the court that he did not want to be appointed as co-counsel for appellant,

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5. *Calderon v. Moore*, No. A-577 (February 20, 1997) (unpublished order). (5 CT 1216.)

but would accept appointment as advisory counsel. Appellant waived time for trial except that he specifically did not waive any claim of the violation of his speedy trial rights which may have already occurred. (5 CT 1252-1256;2 RT 356.) The district attorney explained that neither the public defender nor the alternate public defender counsel would accept appointment as second counsel status. (2 RT 349.) At the next hearing on August 20, 1997, appellant was arraigned on the charges, at which time he pleaded not guilty and denied all special allegations. Appellant's motion for appointment of co-counsel was argued and denied. John Schmocker was appointed as advisory counsel for appellant. (5 CT 1260.)

On September 3, 1997, attorney Mari Morsell appeared before the court and stated that she was willing to accept appointment as co-counsel for appellant. (5 CT 1272; 2RT 379.) The matter was continued until September 17, 1997 at which time appellant's motion for co-counsel and standby counsel was denied. Mr. Schmocker was appointed as "advisory" counsel. (5 CT 1290-1291; 2 RT 423-430.)

On October 14, 1997, moved to dismiss for lack of jurisdiction under California Code of Civil Procedure section 660, which was argued and denied. (5 CT 1302-1303.)

On March 2, 1998, appellant moved pursuant to section 1538.5, to suppress evidence seized during a warrantless search of his residence room on December 21, 1977. (6 CT 1457.) A hearing on the motion began on April 6, 1998 and concluded on April 15, 1998 when the trial court denied the motion. (6 CT 1521-1525; 2 RT 558-673.) On May 18, 1998, a trial date of June 17, 1998 was set. (6 CT 1540.) On May 27, 1998, appellant filed a petition for writ of mandate to the Court of Appeal, Second Appellate District, from the denial of the suppression motion. His petition was denied June 18, 1998. (Court of Appeal No., B122339) (CT Vols. 6-7, 1567-1922.)

On May 21, 1998, the trial court was notified by the Sheriff Department that following an administrative hearing, appellant's *pro per* privileges had been suspended by the county jail. The reason given for the purported suspension of his privileges was that, during a search when appellant was on his way to meet with his attorney in an attorney room, appellant was found to be in possession of a rod from part of his typewriter that was in his legal folder. (6 CT 1543-65.)[6/] At the pretrial hearing on May 28, 1998, appellant asked the court to reinstate his *pro per* privileges,

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6. The memo from the Sheriff's Department stated that his privileges had already been terminated. (6 CT 1565.)

but the court denied the request. (7 CT 1923.) On June 10, 1998, appellant asked for limited reinstatement of his privileges, but was denied. (7 CT 1946-1947.)

On June 17, 1998, the day set for trial, appellant relinquished his *pro per* status and advisory counsel was appointed to represent him at trial. (8 CT 1963.)

On September 18, 1998, the day set for the trial to begin, appellant expressed his concerns about a possible conflict over defense strategy with defense counsel. A *Marsden*[7] hearing was held, as well as a request for reinstatement of appellant's *pro per* status. Subsequently his motion to represent himself was withdrawn. (8 CT 1968-1971.)

On September 21, 1998, the prosecution filed its notice of additional penalty phase evidence, specifically an incident at the jail where it was reported that a shank was found inside appellant jail cell. (8 CT 1972-1981.)

Jury trial began on September 21, 1998 with jury selection, and the evidentiary portion of the guilt phase portion of the trial began on October 6, 1998. (8 CT 1988-1993.) On October 7, 1998, appellant moved to be returned to *pro per* status but was denied. (8 CT 1994.) Two days later,

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7. *People v. Marsden* (1970) 2 Cal.3d 118.

October 9, 1998, the prosecution rested its case. Appellant through his counsel filed a motion to dismiss pursuant to section 1118.1 which was argued and denied. (8 CT 1999.) At the conclusion of that hearing, appellant renewed his request for *pro per* status. Following any inquiry of appellant, this request was granted, specifically within the limitations cited at the hearing of May 28, 1998, the date upon which the trial court refused to reinstate his *pro per* privileges terminated by the jail authorities. The jury was then informed of the change in appellant's status. (8 CT 1999.)

Both sides rested their respective cases on October 9, 1998. (8 CT 2002.) On October 15, 1998, the jury found appellant guilty of two counts of first degree murder, and the special circumstance allegations true. The jury determined that during the commission of the murder of Mr. Crumb, appellant personally used a deadly and dangerous weapon, but found that the same allegation with respect to Mrs. Crumb not true. The jury also found appellant guilty of first degree burglary, robbery and found all of the enhancement allegations true. (8 CT 2011-2019.)

The penalty phase portion of the trial began on October 16, 1998. On October 26, 1998, the jury fixed the penalty for both murders at death. (8 CT 2109-2112.)

On December 7, 1998, appellant's motion for new trial and to strike the special circumstances was heard and denied. (8 RT 1994-2004.) The automatic motion for modification of the verdict was also denied. (8 RT 2005-2012.) As to counts one and two, the court imposed the judgment of death. As for the remaining counts, the court selected count five, the robbery of Mr. Crumb as the principle term and imposed the upper term of four years, with a consecutive three year enhancement for great bodily injury finding; the court imposed a consecutive term of one year for the robbery of Mrs. Crumb and a consecutive term for the burglary which was stayed pursuant to section 654. However, the court stayed this additional term of imprisonment due to the fact that it had relied on the facts underlying those offenses to deny the modification of the death sentence. (8RT 2012-2013.)

Appellant's notice of automatic appeal was filed with the Supreme Court pursuant to Penal Code section 190.6 on December 31, 1997.

* * * * *

STATEMENT OF THE FACTS

Guilt Phase Evidence

On December 2, 1977, the bodies of Robert and Hettie Crumb were found inside their Long Beach apartment. Both had been bound, gagged, and sustained multiple stab wounds. Walter Watson testified that in 1977 he owned the apartment building where the Crumbs lived and managed the other apartments for him. (5 RT 1206-1208.) Watson had last seen the Crumbs alive om December 1, 1977 at around 4:00 p.m., when he went by their apartment to collect the rent receipts. (5 RT 1210-1211.) Watson said the following day he had tried calling them but no one answered, so he and his wife went to the Crumbs apartment to check on them. Watson knocked on the door but no one answered his knock. When he checked the front door Watson found the door was unlocked, which he thought was unusual. Watson entered the apartment and immediately saw two hooded bodies. Watson left the apartment and telephoned for the police. (5 RT 1211-1213.)

Aside from managing the apartments, the Crumbs made and sold costume jewelry, which they kept in display cases inside their apartment. (5 RT 1214-1215.) Watson identified several pieces of jewelry recognized as

having seen in the possession of the Crumbs. (5 RT 1216-1217, 1219-1220.)

Retired Long Beach police officer was the lead detective who investigated the murders. Collette testified that when he entered the apartment he noticed the livingroom in disarray. Papers, mostly rental contracts, were strewn about the livingroom and the apartment appeared to have been ransacked. (5 RT 1119-1120, 1122, 1126.) Collette observed a large butcher knife on the floor that had a reddish substance on the blade. (5 RT 1120-1121.) Collette said Mr. Crumb was positioned on the livingroom floor against the sofa with his legs underneath the coffee table. He had a pillowcase over his head and his hands were bound behind his back with white adhesive tape. When the pillow case was removed, the officer found a sock in his mouth that had been taped and another pillowcase had been wrapped around his neck and twisted. (5 RT 1126, 1129, 1156.) Mr. Crumb's wallet was on a sofa cushion nearby and contained his driver's license but no money. (5 RT 1122, 1150, 1159.) Ms. Crumb's body was found approximately five feet from her husband and she laid face down on the floor, partially covered with yellow curtain that had been twisted tightly going through mouth and twisted at back of her head. Near her body was a small folding pocket knife that had what appeared to have blood on it. (5 RT 1121-1122, 1155-1156.)

When Collette went inside their kitchen, he observed an open drawer with a butcher knife sticking over the edge of the drawer. The knife was fingerprinted but appellant's prints were not on the knife. (5 RT 1123, 1128, 1154-1155, 1157-1158-1159.) Inside the bedroom Collette found several jewelry display cases that had been pried open, and several boxes thrown on the bed. (5 RT 1123-1124.)

The coroner, Dr. Lakshmanan,[8/] testified that Mr. Crumb died as a result of multiple stab wounds to chest which penetrated liver, heart, and lung. Mr. Crumb sustained ten stab wounds. The wounds were measured and it was determined that the deepest stab wound measured eight inches in depth. (5 RT 1267-1270.) Mr. Crumb also had lacerations to the back of the head from blunt force trauma, which according to the pathologist, could have been caused by a pistol. (5 RT 1272-1273.) Dr. Lakshmann opined that the wounds were consistent with having been made by the butcher knife found on the floor next to the body. The doctor said a couple of the wounds could have been caused by the pocket knife based on the depth of

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8. Dr. Peter Dystra actually performed the autopsies on the bodies in 1977, but he no longer worked for the medical examiner's office. Dr. Lakshmanan's conclusions were based on his review of the Dr. Dytra's report. (5 RT 1265-1267.)

some of the wounds, but he believed the injuries were more consistent with having been inflicted by the larger knife. (5 RT 1275-1277.)

Mrs. Crumb died as a result of two stab wounds to the chest which penetrated her right lung. She sustained a total of six stab wounds, three of them in the back of the chest and the two fatal wounds. The doctor stated that her wound were between six and a half to seven inches deep, and were inconsistent with having been inflicted by the pocket knife found near her body. (5 RT 1277-1278, 1280-1282, 1285-1286.)

As in appellant's first trial, the prosecution's case was based almost entirely on the testimony of Terry Avery who had been granted immunity from prosecution in exchange for her testimony. In November 1977, Avery was living with her mother in Denver, Colorado. In November she ran away from home and hooked up with appellant and Lee Harris. Avery had known appellant for a couple of years, but said she had just met Harris. (6 RT 1326-1327.)[9/] Appellant, Avery and Harris left Colorado and drove to Lawrence, Kansas where appellant purchased some shoes and clothing for Avery.[10/] The three then drove to Kansas. (6 RT 1328-1329.) In Kansas

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9. The sister of Avery's boyfriend at the time was married to Harris, but Avery claimed she did not know Harris before she ran away from home in November 1977. (RT 1401-1402.)

10. In Lawrence the three participated in the killing of a store (continued...)

City they boarded a bus for Los Angeles. According to Avery, appellant mentioned to them that he had previously lived in an apartment where a woman and her husband had money and jewelry. Avery said appellant told Harris that he wanted to rob the people in California. Avery admitted that she was not forced to leave Colorado with Harris and appellant, but she6 claimed that she did not feel that she could leave them since she was too far from home, and she did know they were headed to California to commit a robbery. (6 RT 1330-1331, 1382-1385, 1401, 1426.) Avery said both appellant and Harris planned the robbery, but she described Harris as the "brains" behind everything. (6 RT 1422-1423, 1425.)

In early December, the three arrived at the bus station in downtown Los Angeles, then took a city bus to Long Beach. They then checked into the Kona Motel in Long Beach where she and appellant signed in as Mr. and Mrs. Brown. (6 RT 1333-1335, 1337, 1390.) After checking into the motel, appellant and Harris left Avery alone for a while and returned with a bag from a drugstore.[11/] Inside the bag was what she described a surgical

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10.(...continued)
clerk but that evidence was not presented until the penalty phase of the trial.

11. During her prior testimony Avery testified she accompanied them to the store to get the tape. (6 RT 1392-1393.)

tape. Avery also said she saw three firearms, a black revolver, a black smaller gun, and a silver pistol. (6 RT 1337-1339, 1392-1393) .

The two made stocking masks, and Harris and appellant armed themselves with the two black guns. They then walked to the Crumbs' apartment building. Avery said she knew they were going there to rob the people and she claimed she went along because she had no choice since she had no money of her own. Avery claimed she only stayed with them so she could get back home. When they got to the apartment building , the front door was locked, James Jones, who knew appellant and lived at the complex, opened the front door for them. (6 RT 1340-1343, 1393, 1395, 1399-1400.)

Avery testified they walked up to the manager's apartment and she was the one who knocked on the door. When Mrs. Crumb answered the door, appellant grabbed her and pushed her inside and into a chair. Avery said she did not see either Harris or appellant put on their masks or take out their guns, but once they were inside, both had guns drawn and masks on. According to Avery, Mrs. Crumb looked at appellant as though she recognized him. (6 RT 1344, 1363, 1394-1395, 1403.) When they got inside the Crumb's apartment both Harris and appellant demanded money from Mr. Crumb. Avery claimed appellant hit Mr. Crumb with the gun

butt. Mrs. Crumb screamed and told them they had no money since they had gone to the bank earlier that day. Harris then grabbed Ms. Crumb, threw her to the floor and held her down. Harris told Avery to go and look for jewelry. (6 RT 1345-1347, 1403-1406.) Harris told her to first grab pillow case or towel, which he used to bind Ms. Crumb. (6 RT 1347-1351, 1405-1406.)

Avery said she went inside the bedroom and searched for jewelry or anything else they could take. She found large jewelry boxes and display cabinets underneath the bed. Appellant came into the bedroom and pried open the display cases. Appellant and Avery filled up a pillowcase with the jewelry from the display cases. (6 RT 1348-1350, 1406-1408.) When Avery returned to the livingroom she saw that the victims had been taped up, and Harris was choking Ms. Crumb with a white rag. (6RT 1351-1352, 1424.)

Avery testified that when she came out of the bedroom, Harris told her to go into the kitchen and find a butcher knife. She said she went into the kitchen and saw some knives but she hesitated. Harris then came into the kitchen got a knife out of one of the drawers and returned to the

livingroom.[12/] She then went into the bedroom. From the bedroom she saw appellant stab Mr. Crumb in the back and Harris stabbed Ms. Crumb. (6 RT 1353-1354, 1355-1360, 1409, 1412-1413, 1418-1419, 1421.) Harris had Avery get a pocketknife that was laying nearby and stab Mrs. Crumb. Avery said she stabbed Mrs. Crumb twice and Harris became angry with her and said she did not do it hard enough. (6 RT 1359-1362, 1410-1412, 1419.)Avery said she returned to the bedroom and continued to fill up bags with Crumb's jewelry.

The three left the apartment and returned to their motel room where they inspected the proceeds of the robbery. Avery took a ring and bracelet for herself. (6 RT 1365-1366.) She said appellant took two rings and a buckle. Later that night Harris broke up the two black guns and put them in a cloth bag. Avery said she and appellant walked to the beach and appellant threw the bag into the ocean. (6 RT 1368-1369.) Later the next day Avery told appellant and Harris that she wanted to return to Denver. Appellant bought her a bus ticket and Avery left for Denver. (6 RT 1369-1370.)

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12. In prior testimony Avery said Harris went to the kitchen and retrieved two butcher knives. (6 RT 1420-1421.)

Several days later she met up with appellant and Harris in Colorado. Avery said Harris and appellant questioned her about whether she told anyone about what had happened in Long Beach. Avery assured them that she had not. Claiming that she feared for her life, Avery told her parents about what had happened and her parents called the police. (6 RT 1371-1372.) Avery spoke with the Denver police but she did not report the Long Beach crimes. She also informed the police where they could find both Harris and appellant. (6 RT 1373.) On January 10, 1978, Avery spoke with Detective Collette whom she told about what had happened in Long Beach. However she did not tell him that she was present in the apartment when the Crumbs were killed. Avery was granted immunity from prosecution for her testimony. (6 RT 1373-1374, 1385-1390.) At trial Avery identified several articles of jewelry that she said came from the Crumbs' apartment. (6 RT 1375-1378.)

The former testimony of James Jones at appellant's first trial was read to the jurors because he was unavailable for trial. Jones was a resident of the apartment building managed by the Crumbs, and did odd jobs for them. He also recognized appellant whom he had know when appellant lived in the other apartment building managed by the Crumbs. (5 RT 1242-1244, 1250.)

Jones testified that the day before their deaths, he had been over at the Crumb's apartment and when he left, everything inside the apartment was in order. (5 RT 1232-1239.) Jones said later that day, he got dressed in women's clothes and went to a neighborhood bar. Jones said he drank until he was intoxicated.[13/] Jones said he did not recall meeting or speaking with anyone when he returned home later that night. He said there were all kinds of people hanging out in front of the apartment that night but he did not recall speaking to anyone. He specifically did not recall seeing appellant that night. He said he would have had no problem recognizing appellant had he seen him on the street that night. (5 RT 1239-1241, 1250-1254, 1256.)

Jones also identified four rings, a belt buckle, two watches, a ladies ornament, and a necklace, that he had previously seen in the Crumbs' possession. (5 RT 1246-1249.)[14/]

Donald Danhour, former investigator with the Denver Police department testified that on December 20, 1997 he and other officers arrested appellant at a Denver apartment. Danhour said he was stationed at

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13. In prior testimony Jones said he was not intoxicated. (5 RT 1254.)

14. It was stipulated that the exhibits shown to Jones were numbered the same as this trial. (5 RT 1256.)

the back of the apartment when he saw appellant coming out of a back window. The officer stopped appellant and arrested him. In the area where the officer arrested appellant was a gun on the ground. (5 RT 1224-1227.) The officer said that following his arrest, he personally removed two rings, one turquoise and the containing diamonds and a ruby. (5 RT 1228-1229.)

Penalty Phase Evidence

Over appellant's objection, evidence of the murder in Lawrence, Kansas was admitted during the penalty phase. (7 RT 1738.) Once again Avery was the state's primary witness.

Avery said that when she, appellant and Harris left Denver, they traveled in a rental car to Lawrence, Kansas where they stayed overnight, went shopping and ate at a local Woolworth's store. (7 RT 1836, 1838.) When they returned to their motel room, appellant said he had previously worked at the Woolworth store and that they could rob the store. (7 RT 1837.) Sometime between nine and ten o'clock at night, they returned to the store which was still open. Avery went inside to find out how busy the store was, and she returned to the car, but Harris was not in the car. Appellant was in the back seat. Avery told appellant that there were only a few people in the store. A few minutes later, Harris came back with the store manager, Sam Norwood, who he had forced to come with him at gun

point. (7 RT 1834-1838.) Avery testified that Harris and appellant pushed Norwood inside the car and questioned him about money in the store safe. Norwood told them there was no money in the safe because they had taken the money to the bank. Appellant struck Norwood in the head with the pistol and demanded money. Avery said Norwood begged for his life and said all he wanted to do was to go home to his boy who was having a birthday party. Avery said appellant threatened Norwood's son. Appellant took the man's wallet and other items including a camera. (7 RT 1840-1842.) They then drove to a secluded area, drug Norwood out of the car and both Harris and appellant shot and killed him. Once they were back inside the car Harris asked appellant why he shot the man so many times and appellant answered "make sure he was dead" and appellant laughed. (7 RT 1843-1845.) From there they drove to the bus terminal headed for California. (7 RT 1846.)

During cross-examination Avery said there were no prior specific discussions about killing anyone. Harris repeatedly said that he did not want to go back to prison and it was Harris who talked about killing witnesses, but Avery said appellant was in agreement. (7 RT 1849, 1854-1855.)

Michael Malone of Lawrence, Kansas prosecuted appellant for the Norwood murder. Malone said appellant was charged with kidnaping, aggravated robbery and first degree murder. The murder occurred right after Thanksgiving, 1977. Norwood's hands were taped behind his back with white adhesive tape and he had been shot four times in the back of his head. (7 RT 1824-1829.)

In 1979, Joseph Reliham was a court transport deputy in Arapahoe County Colorado. He testified that one in 1979 while he was escorting appellant, appellant overpowered him, took his weapon and escaped from the courthouse. Reliham testified that as he was removing appellant's handcuffs, he was either struck or shoved in the chest by appellant. (7 RT 1761-1766.)

James Peters, who at the time of appellant's trial was the district attorney for four counties surrounding Denver, testified that in 1980 he prosecuted appellant for escape, aggravated robbery and for being a habitual criminal. The case was resolved by way of a guilty. Peters said that after appellant had escaped from deputy Reliham, he ran outside, and took a passing motorist's car at gunpoint. Appellant was captured a few hours later. (7 RT 1767-1770.) Peters said that when he escaped, appellant had previously been convicted of two counts of aggravated robbery and two

counts of theft of a jewelry store in a shopping mall. On the day of his escape, appellant was in court because he had requested reconsideration of his sentence. Peters had with him certified copies of the records of the aggravated robbery convictions. (5&7 RT 1170-1772.) During cross-examination, Peters stated that Terry Avery had testified against appellant at trial. (7&5 RT 1772-1113.)

Several San Quentin correctional officers also testified about appellant's conduct while on death row. James Williams testified that on October 29, 1991 he was working as a gun rail security officer for East Block. That day appellant apparently got into an altercation with another inmate. Peters said the two men initially were playfully slapping each other and it did not seem as much was going on at the time. Eventually the two ended up wrestling on the ground, and both were throwing punches at each other. At one point appellant got the other inmate in a head lock. When the officers sounded the alarm and drew their weapons, the incident stopped. This was the only incident Peters had witnessed appellant involved in. (7 RT 1776-1780.)

Adam Javaras testified that on February 1, 1993, appellant approached an inmate on the yard and struck him in the face. The two

started swinging at each other and when they kept fighting after the guards tried to break up the fight. (7 RT 1781-1785.)

Janet Lawson described one incident where appellant threw a food tray at her through his cell bars after she passed his tray to him through the food port. (7 RT 1787-1789.)

Rogers Larry testified about an incident where several inmates, including appellant, were playing what the officer described as a "physical game of basketball." During the game there was a "heated discussion" between appellant and another inmate for about a minute then the two started fighting. They stopped after being commanded to do so. Appellant was labeled the aggressor in this incident because the officer said he charged at the other inmate. (7 RT 1790-1794.)

Three Los Angeles County Sheriffs deputies testified. One officer testified to finding a shank in the conduit right outside the top appellant's cell bars. (7RT 1796-1803.) Another officer testified about finding the typewriter rod in appellant's legal possessions that caused him to lose his library privileges at the jail. (7 RT 1812-1819.) Finally, another officer testified that appellant was found with a baggy containing urine. The officer said that as he was handcuffing him, appellant said, "You idiot. Are

you fucking stupid." The officer claimed appellant made the statement in a "hostile" manner. (7 RT 1805-1810.)

Most of the defense witnesses were members of appellant's family who testified about appellant's life prior to his leaving Denver. The family history was perhaps told by his oldest sister Karen Vaden. Karen testified that including herself, seven children in the family. Appellant, was the third from the last child and named after his father. (7 RT 1928.) Karen said their parents married in 1952 when Karen was 3 or 4 years old, and their brother Milton was born that same year. Their mother, who was still living was Caucasian, and their father, deceased was Black. Karen testified that their parents worked a lot and therefore not at home much. Karen said she essentially raised essentially Milton when he was born, and by the age of 10, she had to raise the other children. At age 18 Karen married and left their home. The day after Karen married their mother left their father. Their mother moved in with her for a short time then the mother moved to California with the youngest child Robert. (7 RT 1927-1929.) Karen said it was her opinion that their parents "didn't have any business being parents. She described their parents as follows:

> "They had a very difficult time showing love. I don't think they knew how to show love as a parent. They thought making sure that we had a roof over our head and food and clothes or took us to church, to a movie once in a while, that

> was being a parent. They didn't participate in any school activity. There was no warmth between any of them in showing affection. There was no such things as hugs. There was no playing ball or, you know, doing things that parents normally do with their children. That did not exist between our parents. They didn't even show each other affection much less us. We kind of just were a family within our family. With the kids, we were our own family. And they were just there."

She said their father drank, gambled and chased young females and was very abusive to the family. Karen thought their father was more abusive to appellant, but she did not know why. She said that when she left home, her parent had to be parents "all of a sudden, and they didn't like it." She thought neither one of them wanted the responsibility to be a parent, and according to Karen their mother had no "backbone", plus she was afraid of their father. Karen said that when she was home she stood up to their father to try to keep things in line, but when she left it became more difficult for the family. She believed her mother left because she was afraid of their father. (7 RT 1930-1931.)

She described their father a type of person that wanted money and he did not care how he got it. After their mother left, their father would steal for money, and then force the younger children to go with him and steal rather than attend school. She said if any of the children resisted, he would

beat them. They really had no choice in the matter when it came anything he wanted. (7 RT 1931.)

Karen said that after she married she felt guilty because wanted to keep all of the other children but could not. Eventually her attempts to help her siblings contributed to the breakup of her own marriage. (7 RT 1932-1933.) She said that she thought appellant's being on death row was somehow her failure in that she did not get to save him. (7 RT 1933.)

Appellant's other siblings testified to the abuse they endured primarily from their father. Milton said their father gambled, drank, and was very abusive. Their parents also fought a lot over the father's abusive treatment of the children. (7 RT 1915-1916.) Milton said their mother had a nervous breakdown, and that is when she left home. (7 RT 1917.) He said he at one point he had a lot of anger about his parents but had since put it behind him. (7 RT 1919-1918.)

Appellant's younger brother Robert said as children they had a difficult time growing up because they were bi-racial. He said everyone was against them, Blacks, Whites, Mexicans. He too said their father drank, gambled away their rent money and "played around with other women" (7 RT 1877.) He said when the family broke up and he went with their mother to California. He said he stayed with her for about six months

then went to Denver for about a year, and then to Kansas with their father's relatives. He said as a juvenile he too started burglarizing home and he was eventually sent to a juvenile facility. Later he started using drugs. Robert said finally got his life together. He completed drug rehabilitation, entered the job corps, got married and started his own family. (7 RT 1879-1882.)

Steven said he never really got his life together and he blamed their father for his problems. He said he did not attend school so he did not learn to read or write. He said their father's girlfriends would come by, so their father would make him leave for a week or two. He said as a kid he would intentionally get in trouble so he could be sent to jail so he could eat and have a place to sleep. (7 RT 1889-1892.)

Appellant's sister Linda described their home life after their parents separated as "pitiful." She said after her mother left, their father began having sex with her when she was between 12 and 14 years old at the time. She eventually was able to leave and live with another family. (7 RT 1898-1900, 1928.)

Psychiatrist Marshall Cherkas testified that he was asked to evaluate appellant and his family to determine whether there were any mitigating circumstances that should be presented to the jury. (7 RT 1935-1937.) Cherkas testified that based upon his review of appellant's background and

history discussed by appellant's family members, the impact of appellant history was that he had a predilection toward antisocial behavior and narcissistic. However, believed appellant was a passive person who did not talk about his feelings with others and lacked trust in others. (7 RT 1938, 1942-1943.) Cherkas stated that following the commission of the crimes in 1978, appellant's subsequent history was not particularly violent. (7 RT 1941.)

Ruth Tiger testified that she met appellant through a prison fellowship organization. Ms. Tiger testified that appellant had often expressed remorse over his past behavior, had repented and had made efforts to change his life. (7RT 1947-1949.)

Appellant did not testify at either phase of the proceedings.

* * * * *

ARGUMENT

GUILT PHASE ERRORS

I.

APPELLANT WAS DENIED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO MEANINGFUL SELF-REPRESENTATION WHEN THE SUPERIOR COURT DENIED HIS REQUEST FOR THE APPOINTMENT OF CO-COUNSEL.

A. Introduction

Despite being charged with capital murder, appellant was unequivocal in his desire to represent himself. Knowing full well the possible consequences of such an endeavor, he had particular ideas about how he wanted his defense conducted and therefore did everything possible to preserve his right to represent himself at trial. Nonetheless, appellant was aware of his limitations in terms of being able to present his defense to the jury by himself. For that reason, he specifically requested the appointment of co-counsel, not just advisory or standby counsel but his repeated request for the appointment of co-counsel was denied.

As explained below, appellant contends that the trial court's denial of his request for the appointment of co-counsel deprived him of his due process right to a fair trial as guaranteed by the Fifth Amendment and Fourteenth Amendments, his right to meaningful self-representation under

the Sixth Amendment and a fair trial, and his Eighth Amendment right to a reliable capital trial.

Although this Court has held that the appointment of second counsel in a capital case is not an absolute right protected either by the state or federal constitutions, (*People v. Jackson* (1980) 28 Cal.3d 264, 286-288; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 428-430), it has also been held that the denial of a request for second counsel in a capital case may be an abuse of discretion where the factual record fails to justify the trial court's ruling. (*Keenan v. Superior Court*, 31 Cal.3d at p. 433-434.) Furthermore, when the denial of a motion for second counsel results in a situation, as was the case here, where a defendant is constructively deprived of the fundamental right of effective counsel, the federal Constitution has been violated. (See, *Maine v. Moulton* (1985) 474 U.S. 159, 168-170; *United States v. Cronic* (1984) 466 U.S. 648, 653; *Powell v. Alabama* (1932) 287 U.S. 45, 59.)

B. Factual and Procedural Background

When appellant first returned to superior court for retrial in 1995 following the reversal of conviction by the federal court, he promptly requested and was granted the right to represent himself at trial. When he asked for the appointment of co-counsel, the court explained that co-

counsel would retain complete control over the case, whereas advisory counsel would be able to advise him outside the courtroom but could not be "seen or heard even in the courtroom. Standby counsel was explained as simply someone to take over should he be unable to continue to represent himself. Appellant argued that since this was a capital case he should allowed to have co-counsel. However, he informed the court that if his request for co-counsel was denied, he would accept advisory counsel but for that reason. The court denied appellant's request for co-counsel but appointed advisory counsel for him. (1 RT 24-29.) Appellant represented himself up until the proceedings were stayed while the case was in the Ninth Circuit.

When the case returned to the superior court for trial following the Ninth Circuit Court's decision appellant was again granted *pro per* status. At that time he specifically requested the appointment of second counsel to assist him. The court[15] sought to clarify his request by asking whether he wanted the appointment of advisory counsel and appellant explained that he had previously been appointed advisory counsel but since this was a death penalty case, he wanted second counsel. The district attorney stated that she

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15. At that time the pretrial proceedings were before Judge Andrews who was not the trial judge. (2 RT 348.)

did not believe either the public defender or the alternate defender would accept appointment as co-counsel. The court continued the matter to later that day so that an inquiry could be made of each appointed counsel office as to their policies regarding appointment as second counsel. (2 RT 349-351.)

Later that day, John Schmocker appeared for possible appointment as advisory counsel to appellant. Mr. Schmocker explained that he needed time to confer with the local appointment panel to determine how he would be compensated as advisory counsel. Appellant asked the court for clarification as to the nature of Mr. Schmocker's appointment and the court advised him that Mr. Schmocker would be appointed as advisory counsel which meant that he would be available to answer questions and assist appellant with legal matters but Mr. Schmocker could not assist with the presentation of his case at trial. (2 RT 352-354.) Appellant stated that he wanted co-counsel who would be available to assist him in presenting some of the arguments, filing writs and assisting with his defense. The court explained that when a *pro per* defendant has an attorney involved in the presentation of the case, the attorney has taken over and he would no longer be representing himself. (2 RT 353-354.) The matter was continued to allow appellant to determine what he wanted to do and to allow Mr.

Schmocker time to whether he would be able to accept appointment as advisory counsel. (2RT 354-355.)

At the next hearing, appellant stated his intention to file a formal request for co-counsel. At that time Mr. Schmocker informed the court that he was not prepared to accept appointment as co-counsel but would accept appointment as advisory counsel. Mr. Schmocker explained that, pursuant to the local appointment contract, co-counsel status was "disapproved ", but that the contract does provide for either standby or advisory counsel. Schmocker stated that he had explained this to appellant, but nevertheless appellant wanted to pursue the issue of appointment of co-counsel. The matter was again continued. (2 RT 356-362.)

On August 6, 1997, appellant filed a formal motion for the appointment of co-counsel. (5 CT 1253-1256.) At the hearing on the motion, appellant explained the specific type of appointment he was seeking. He stated that advisory counsel would just give advice and sit on the side and standby counsel's role would simply be to take over the case should he be unable to continue to represent himself. Co-counsel, however, would know his defense strategy and would not only advise him but also help with presenting his case to the jury. Again Mr. Schmocker explained for the record that he was unwilling to accept appoint on the terms detailed

by appellant. Appellant provided the court with the name of another attorney, Mr. Halpern, who had indicated his willingness to accept appointment as co-counsel. The district attorney argued that appellant had no right to the appointment of co-counsel. (2 RT 365-375.)

At the next hearing on August 20, 1997, the court informed appellant that Mr. Halpern could not be appointed to the case because Halpern was not on the list of attorneys qualified to "handle a case of this type." The court denied appellant's request for co-counsel and appointed Mr. Schmocker as advisory counsel to assist appellant in the preparation of his defense. (2 RT 376.) Appellant inquired if he found counsel on the list of attorneys, would the court appoint co-counsel. The court stated:

> "If that person is on the approved list of attorneys that I can appoint, I'd be pleased to appoint someone who will work with you as co-counsel. I don't have any problem with that. I just don't know of anybody at this point who is able and willing to work as co-counsel."

Appellant asked to see a list of qualified attorneys and the court agreed to provide him with the list. The district attorney again voiced her objection to the appointment of co-counsel. (2 RT 377-378.)

At the next court proceeding, Ms. Mari Morsell appeared and explained that she was a grade 3-4 attorney on the Long Beach appointment panel, but she was not on the death penalty panel with that court. She was

however on the list of qualified attorneys to handle death penalty cases in other courts within the Los Angeles County. She further stated that her understanding was that to be second chair she did not have to be on the death penalty panel. The court questioned Ms. Morsell whether she would be available to start the trial within the next forty-five days. She responded that she did not believe she could but would make the effort to do so. (2 RT 379-381.) From there the discussion focused on co-counsel's responsibilities. Ms. Morsell explained that her understanding was that her role would be as a participant in the trial but only to the extent appellant wanted her to participate. Appellant explained that he accepted that description of her role because ultimately all decision making would be his. He said Ms. Morsell would discuss the issues and strategy with him, assist him in selecting a jury and possibly participate in jury selection, and possibly examine witnesses. The prosecutor voiced her objection to that arrangement. The district attorney argued that appellant's request for co-counsel had previously been denied by other judges handling the previous pretrial proceedings, and that appellant was not entitled to co-counsel absent unusual circumstances or that this was a particularly difficult case, and that neither circumstance applied here. (2 RT 382-385.)

Ms. Morsell explained that, if appointed, she did not see her role as merely standby counsel but as second chair, i.e., *Keenan* counsel. She said in those situations, second counsel often participates in the penalty phase only because it may be difficult for the same counsel to present both the guilt and phase, or where one counsel is better at examining such as an expert witness. Ms. Morsell also voiced her disagreement with the prosecutor's assessment of the complexity of the case by saying that anytime the prosecution seeks the death penalty, extra care should be taken. (2 RT 385-386.) Appellant argued that co-counsel would not only assist him in preparing his defense, but would also question him should he decide to testify, and if something happened where he could no longer represent himself, co-counsel would also function as standby counsel. The court put the matter over for a week to allow Ms. Morsell to determine whether she would be ready to go within the next forty-five days. (2 RT 388-394.)

A week later, a hearing was held during which Ms. Morsell stated that given the volume of materials involved in the case, she would not be prepared for trial within the next thirty-five days. The court again deferred making a decision on appellant's motion, particularly since the prosecution had stated its intention to seek a writ on the denial of its Penal Code section 170.6 motion. (2 RT 398-403.)

At the next hearing,[16] the court explained that it had spoken with the coordinator of the capital case panel and had been informed that co-counsel could only be appointed from the South Bay Capital Case list. The court also explained that it had been advised by the administrators of that contract that, if the court appointed "co-counsel" for appellant, such counsel would not be compensated. As it was explained to the court, under the local contract compensation for second counsel is set at 15% of the compensation received by first counsel. Under the facts of this case, since there had been no first counsel appointed because appellant was representing himself, there would be no compensation for second counsel, unless counsel was appointed as advisory or standby counsel. After more discussion about compensation, the matter was again deferred to the next hearing. (2 RT 404-422A.)

On September 17, 1997, the court finally denied appellant's motion for co-counsel. The court stated that it had investigated the issue with other attorneys and the judges who administered the appointment contract and that the best way of assuring competent counsel was to deny the motion. The court gave appellant the option of accepting either advisory counsel or

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16. Also present at this hearing were Ms. Morsell and a representative from another law firm appellant had asked about being appointed as second chair.

standby counsel and appellant accepted the appointment of advisory counsel. Mr. Schmocker was again appointed as his advisory counsel. (2 RT 423-430.)

Appellant later moved for reconsideration of the denial of his motion for co-counsel. In his moving papers appellant referred to several authorities including *Keenan v. Superior Court*, *supra*, and Penal Code section 987 et seq. as a basis for the appointment of co-counsel. His request was again denied. (5 CT 1308-1315; 2 RT 450-453.)[17]

C. Appointment Co-Counsel For Appellant Was Not Inconsistent with His Right of Self-Representation And Was a Reasonable Request Given the Complexities of the Case.

In *Faretta v. California* (1975) 422 U.S. 806, the United States Supreme Court held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol. The Court is *Faretta* determined that

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17. At that hearing, appellant noted that one of the problems expressed by Ms. Morsell was that she would be unavailable to begin the trial by October. Since the 45 days had passed with the appointment of advisory counsel, appellant asked the court if it would reconsider his request for co-counsel if he found an attorney willing to be co-counsel by the next scheduled trial date of February 2, 1998. The court made no assurances other than it would entertain the motion if he found such counsel. (2 RT 453.)

"[unless] the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." (*Id.*, at p. 821.) *Faretta's* holding was based on the longstanding recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment. Under that Amendment, it is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who has the right to confront witnesses, and who must be accorded "compulsory process for obtaining witnesses in his favor." The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defence," implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 174 [104 S.Ct. 944, 79 L.Ed.2d 122].)

Faretta also held that a trial court may, appoint "standby counsel" to "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. [citation omitted.]." (*Faretta v. California*, 422 U.S., at p. 835, fn. 46.)

Although *Faretta* referred to the legal assistance provided to those representing themselves at trial as "standby counsel", many courts including this Court have recognized that there are several forms of appointed assistance to defendants seeking to represent themselves. In *People v. Hamilton* (1989) 48 Cal.3d 1142, this Court has stated that there have been several terms used to refer to the legal assistance provided for under *Faretta*. This Court said the terms "co-counsel", "advisory counsel", "standby counsel", and "hybrid representation" all have been loosely used to describe a multitude of situations, when in fact there are only two forms, representation by counsel with defendant playing a limited role and self-representation with an attorney playing a limited role. (*Id.*, at p. 1164, fn. 14.) This Court has also stated that a self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over presentation of the defense case, may do so only with the court's permission and upon a proper showing. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219; *People v. Crandell* (1988) 46 Cal.3d 833, 861.) Thus, a trial court "is not foreclosed from permitting a greater role for counsel assisting a *Faretta* defendant, so long as defendant's right to present his case in his own way is not compromised. For example, if the defendant so desires and assisting

counsel agrees, the court may allow counsel's limited participation as a trial advocate, where this will serve the interests of justice and efficiency." (*See, People v. Hamilton*, *supra*, 48 Cal.3d at p. 1164, fn. 14.)

In this instance appellant specifically wanted to represent himself with the assistance of counsel who would play a limited role as directed by him. Based on the foregoing decisions it is clear that the trial court had discretion to appoint co-counsel for appellant to serve the functions that he wanted. However the lower court mistakenly believed that appointed counsel's assistance to a *pro per* capital defendant was dictated by the label attached to such counsel and as a result the court imposed impermissible restrictions on the duties of counsel depending upon the label applied. The court said appellant was entitled to either advisory counsel or standby counsel, both of which would be compensated, but that co-counsel would not. (2 RT 424-425-428.) However, advisory counsel functions were limited to providing advice and standby counsel would do nothing unless appellant was unable to continue to represent himself.

Contrary to the trial court's ruling, there is no legal requirement that "advisory counsel" only assist a self-represented defendant outside the courtroom or merely give advice to the *pro per* defendant without any participation at trial. In *McKaskle v. Wiggins*, *supra*, when discussing the

reference in *Faretta* to appointment of standby counsel for a defendant representing himself at trial, the Supreme Court noted that participation in the presence of the jury by standby counsel can be problematic because excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*, and "lead to the erosion of the dignitary values that the right to self-representation is intended to promote and may undercut the defendant's presentation to the jury of his own most effective defense." Despite this, the Court stated that it believed that a "categorical bar on participation by standby counsel in the presence of the jury" was unnecessary. (*Id.*, at p. 465 U.S. at p. 182.) The Court went on to state:

> "In measuring standby counsel's involvement against the standards we have described, it is important not to lose sight of the defendant's own conduct: A defendant can waive his *Faretta* rights. Participation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable. A defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel unreasonably interfered with the defendant's right to appear in the status of one defending himself." (*Ibid.*)

The Supreme Court's discussion in *McKaskle* indicates that the function of counsel appointed to a self-represented defendant cannot be based on the label attached to the appointment. Rather, the function of counsel is dependent on the rights and desires of the defendant. If a self-

represented defendant expressly approves of appointed counsel's participation at trial, there is nothing impermissible with appointing counsel for that purpose. All that is required is that the defendant expressly agree with the arrangement. This principle is consistent with the advice given to defendants seeking to represent themselves at trial which is that by doing so, they are precluded from claiming ineffective assistance of counsel on appeal. (*Faretta v. California, supra,* 422 U.S. at 834, fn. 46; *People v. Hamilton, supra,* 48 Cal.3d at p. 1164; *People v. Mendoza* (2000) 24 Cal.4th 130, 157.)

In this case appellant understood the court's discretion in appointing counsel to assist him. As long as his acquiesced to participation by co-counsel during his trial who did not deprive him of control over his own defense and did not interfere with his right to appear in the status of one defending himself, he was willing to waive some of *Faretta* protections for the orderly administration of justice. Because of the unnecessary restrictions placed upon the duties of both advisory and standby counsel, he specifically did not agree to accept such appointments.

Appellant specifically requested the appointment of an attorney who would not only know his defense strategy and advise him, but also help with the presentation of his case to the jury. Appellant discussed the fact that

there were the Colorado and Kansas convictions which he needed assistance from counsel in preparing for the penalty phase trial. Appellant was also concerned with how to present himself as a witness. He said that should he testify, he wanted co-counsel to question him to avoid having to simply give narrative testimony. Finally, as he noted, if something happened where he could no longer represent himself, co-counsel who was intimately involved in his defense would also serve as standby counsel. (5 CT 1253, 1256; 2 RT 366-367, 389.) Given appellant's understanding of the stated limitations of the various forms of hybrid counsel assisting him, he believed that appointment of second counsel was appropriate.

The prosecutor opposed the request for co-counsel.[18/] The prosecutor argued that the court should deny the motion for the appointment of second counsel because, other than the fact that this was a capital trial there was nothing particularly unusual or difficult about the case that required co-counsel. The prosecutor claimed that this was nothing more than a straightforward robbery-murder cases that did not require the

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18. Had the request been made by appointed counsel rather than a *pro per* defendant, the prosecutor would not have been able to oppose the request because all discussions and rulings about second counsel would have been made *in camera*. (*Pen. Code* § 987.9, subd. (a); see Argument II, *infra*.)

appointment of second counsel. (2 RT 384-385.)[19/] While this might have been a simple felony-murder case for the prosecution, it certainly was a difficult and complex case for the defense.

This was a capital case which itself is more difficult and complex that most trials, and for a person representing himself the task is even greater. Death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. (*Gardner v. Florida* (1977) 430 U.S. 349, 357 [51 L.Ed.2d 393, 401-402, 97 S.Ct. 1197]; *Gregg v. Georgia* (1976) 428 U.S. 153, 187 [49 L.Ed.2d 859, 882-883, 96 S.Ct. 2909].) Thus, in striking a balance between the interests of the state and those of the

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19. The prosecutor also claimed that in its previous opinion, this Court ruled against appellant on this issue. (2 RT 369-370.) That was not true, since in its previous decision the issue was whether the trial court erred in denying appellant's request for co-counsel status when he was represented by counsel. This Court held that appellant had no absolute right to participate in the presentation of his case when he was represented by counsel, and that after reviewing the record, the Court found that appellant had failed to make the requisite "substantial showing" for co-counsel status. (*People v. Moore, supra,* 47 Cal.3d at pp. 77-78.) At the second trial appellant was representing himself and was effectively seeking the appointment of *Keenan* counsel, which was never discussed in the previous appeal.

defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (*Keenan v. Superior Court*, *supra*, 31 Cal.3d at pp. 430-431, internal citations omitted.) The United States Supreme Court has repeatedly expressed the same opinion. (See *Ford v. Wainwright* (1986) 477 U. S. 399 411 (plurality opinion) (This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Gardner Florida* (1977) 430 U.S. 349 357 (plurality opinion); *Woodson v. North Carolina* (1976) 428 U. S. 280, 305 (plurality opinion); *Furman Georgia* (1972) 408 U.S. 238, 289 (Brennan, J. , concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.").)

No doubt in part because of this heightened concern for reliability, as well as because death penalty cases are typically more complex than non-capital cases, and always involve two trials in one, guilt and penalty phase, the American Bar Association task force assigned to study the death penalty recommends that "two qualified trial attorneys should be assigned to represent the defendant." (ABA Guidelines Appointment and Performance of Counsel in Death Penalty Cases Guideline 2.1 (1990).)

Indeed, the right to have co-counsel in a capital case has existed since the earliest codification of California statutes and appears to be based upon pre-existing federal law. The federal provisions for appointment of second counsel in capital cases have existed since 1970 and exist not just because capital cases are necessarily more complex but because of the irreversible nature of the penalty (*United States v. Shepherd* (6th Cir. 1978) 576 F.2d 719, 729; *United States v. Watson* (4th Cir. 1973) 496 2d 1125, 1130 (Murray, J. dissenting).)

Furthermore, the legislative intent evinced in section 987.9 - that a court be guided by the defendant's need for a complete and full defense requires that the trial court apply a higher standard than bare adequacy to a defendant' s request for additional counsel. If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, . . . a presumption arises that a second attorney is required. (*Keenan v. Superior Court, supra,* 31 Cal.3d at p.434.) The fact that appellant was representing himself made preparation and presentation of the case for the defense even more difficult and the appointment of second counsel even more vital to ensuring his ability to have a fair trial.

As appellant explained to the court, he was not defending himself against one charge of robbery-murder but three: two California murders with special circumstance allegations, and the Kansas murder case which was used against him at the penalty trial. Furthermore, this was the second trial of these same charges and all of the crimes were twenty years old, which necessarily created the additional problems of faded memories, lost witnesses, and prior recorded testimony. Furthermore, all of the crimes which involved consideration of vicarious liability issues which itself is complex. Added to these issues were the numerous new uncharged acts purported to have been committed by appellant while in prison and in county jail that was used as aggravating evidence at the penalty phase portion of the trial. This was a difficult case for any attorney and even more so for a *pro per* defendant.

The trial court denied appellant's request for co-counsel stating that because of the restrictions in the local appointed counsel contract regarding payment of counsel, and because it believed that the only way to ensure competent representation was to not appoint co-counsel for appellant. (2 RT 424.) Instead it appointed Mr. Smocker as advisory counsel and limited him providing advice only but not participating in the trial. (2 RT 423-430.) Appellant fails to see how appointing counsel with limited responsibilities

was better at ensuring competent representation than appointing counsel that would fully assist him with his right of self-representation.

Appellant provided specific reasons justifying the appointment of co-counsel and he was willing to relinquish some of his *Faretta* rights as long as he maintained control over the defense to be presented in order to obtain the legal assistance he needed. The trial court should have ruled upon his request based on his needs and not because of unnecessary labels attached to the second counsel appointment.

If this Court determines that the reasons offered by appellant were insufficient to establish a need for co-counsel, then appellant contends that the case should be remanded for him to make a record of sufficient showing of need because he was never given a full and fair opportunity to express his reasons to the court. Due process guarantees the accused the right to access to the courts and the right to a meaningful opportunity to be heard. (See e.g., *In re William F.* (1974) 11 Cal.3d 249, 255 [due process requires fundamental fairness in the fact finding process]; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914; see also *People v. Braxton* (2002) 103 Cal.App.4th 471 ["justice" requires remand where defendant was improperly denied an opportunity to make motion for new trial].)

Had his motion been properly treated as a request for ancillary funds under Penal Code section 987.9, rather than as ordinary pretrial motion, appellant would have been able to fully explain his need for second counsel without having to fully disclose his reasons and defense to the prosecutor.

D. The Trial Court Erred In Denying Appellant's Motion Because of the Payment Restrictions in the Local Sole Appointed Counsel by Contract.

The real impediment to the appointment of second counsel for appellant was the local appointed counsel contract. The court told appellant if he found someone from the approved list of attorneys who was willing to accept the case as co-counsel, it would do so. (2 RT 377.) Advisory counsel, Mr. Schomoker, repeatedly told the court that he was not willing to accept appointment as co-counsel. Appellant was able to discuss the matter with several attorneys, one of which was Ms. Morcell who appeared qualified to act as second chair for appellant. Nevertheless, one of the reasons given by the court for denying appellant's motion was the local contract regarding appointing second counsel for a *pro per* defendant. (2 RT 423-424.) Appellant contends that reliance upon the local appointment contract to deny his request was improper and deprived him of due process, effective assistance of counsel, as well as a violation of the equal protection.

Although co-counsel appointments for *pro per* defendants were not specifically prohibited under that contract, such appointments were discouraged not only by the terms of the contract itself but by the administrators of the contract as well. (2 RT 357.) There were two restrictions in the contract that were mentioned here. The first was the requirement that any appointment had to be made from their capital case list. (2 RT 376, 404.) Second, there were no provisions in the local contract for compensation for second counsel where a defendant was representing himself. Thus, as explained by the court, even if there was an attorney from the capital list who would accept appointment as co-counsel for a self-represented defendant, he or she would not be compensated. The reasoning given for not compensating co-counsel for a *pro per* defendant was based on the how the contract was structured. Under the contract, once counsel has been appointed for a capital defendant, co-counsel could be appointed and would receive 15% of the amount paid for first counsel. Since no counsel is appointed to a pro per defendant, there was no provision for compensation for a second counsel if that person was designated as co-counsel. However, if that attorney was designated as "advisory" or "standby" counsel, provided for compensation and apparently payment was for reasonable services rendered. This was apparently the case regardless of

any showing of need by a *pro per* defendant. Since it was highly unlikely that any attorney, even one on the local capital case list would accept appointment to a capital trial as co-counsel without some assurance about compensation, the trial court was precluded from appointing co-counsel.

At one point appellant found an attorney who was both competent to assist him and willing to be appointed as co-counsel, Ms. Morsell, but the question was raised as to whether the court could appoint her since she was not on the local capital list. She was however qualified to accept capital appointments in other areas of the county, and was on the local appointed counsel list as a level 3/4. However, since appellant would remain the attorney of record, Ms. Morcell was certainly qualified to accept appointment to this case as second chair. (2 RT 379-380, 385-386.)

However Ms. Morcell' qualifications were the impediment to her being appointed as appellant's co-counsel. The reason was the fact that she could not be compensated if she was appointed as appellant's co-counsel. She would be compensated as "advisory" or standby" counsel, but those appointments required her to provided very limited assistance to appellant. Once again the unnecessary labels attached to assisting counsel for a *pro per* defendant and restrictions placed on the duties of counsel based on

those labels interfered with appellant's right to receive the necessary services to defend himself.

As appellant has discussed above, a trial court has the discretion to appoint counsel for a *pro per* defendant based upon the needs of the defendant and not the label attached to the appointment. The exercise of judicial discretion means the exercise of discriminatory judgment within the bounds of reason; it implies the absence of arbitrary determination or capricious disposition. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) Judicial discretion is defined as "the sound judgment of the court, to be exercised according to the rules of law." (*Lent v. Tilson* (1887) 2 Cal. 404, 422.) To exercise discretion, the trial court must know and consider all material facts and all legal principles essential to an informed, intelligent and just decision. (*In re Cortez* (1971) 6 Cal.3d 78, 85; see also *Bailey v. Taaffe* (1866) 29 Cal. 422, 424 [judicial discretion must be guided and controlled in its exercise by fixed legal principles; it is not a mental discretion, but a legal discretion].)

Here the decision to deny appellant's request for the appointment of co-counsel was not based on sound judicial discretion. Rather the denial of the motion was based on the arbitrary provisions of the local appointment contract that limited payment to counsel for a self-represented defendant

based on the labels attached. This was not an informed decision based upon the needs of appellant. Appellant found an attorney willing to accept appointment as co-counsel and assist him with presenting his defense as he wanted. The court should have considered appointing co-counsel for appellant regardless of the restrictions in the local appointment contract. Denying appellant's motion because of the restrictions in the local contract or by the required labels that had to attach to that appointment was arbitrary. The court erred by denying appellant's motion based on the restrictions in the local appointment contract rather than appellant's genuine showing of need and the factors relating to the case.

E. The Denial of Appellant's Request for Co-Counsel Was Prejudicial and Deprived Appellant of His Constitutional Right to Self-Representation, And Due Process Right To A Fair Trial.

When appellant decided to represent himself he knew that he would not be entitled to any special treatment but he did not expect to being treated any less than any other defendant simply because he chose to exercise his constitutional right to present his own defense. Appellant's request was simple but consistent. He wanted to control his defense by representing himself with the assistance of counsel who would work with him in presenting his defense. The court told appellant that he would have to find an attorney willing to work as co-counsel. Appellant found several

attorneys willing to accept the role as co-counsel but then was denied such assistance. He was not denied because of a lack of showing of need, but because of the mistaken belief that the duties of an attorney assisting a pro per defendant were to be limited by the court and not appellant and because of the restrictions in the local appointment contract. As a result, appellant never received the assistance he needed to prepare his defense. Had the court's decision been guided by appellant's needs rather than arbitrary factors, there is no doubt the situation that eventually occurred at trial with the constant disagreements with advisory counsel leading to the rotating attorneys would have been avoided.

From the beginning Mr. Schmoker was unwilling to work with appellant as co-counsel. (2 RT 357, 366, 371.) After being appointed as advisory counsel, he and appellant continued to disagree about the defense that would be presented. (3 RT 783.) Their disagreement continued even after appellant relinquished his *pro per* status as evidence by the several *Marsden* hearings held during which appellant objected to Mr. Schmoker's representation. (3 RT 829-835, 5 RT 1321-1322, 6 RT 1473-1495.) Eventually appellant again chose to represent himself, but he did so only as a last resort because he believed he was not being properly represented by counsel. As the trial court noted the switch in attorneys near the end if trial

would have a devastating impact on the jury. (6 RT 1456.) All of this contentiousness between appellant and his counsel most certainly could have been avoided had the court appointed counsel willing to work with appellant as co-counsel without the arbitrary restrictions on his or her duties.

Appellant wanted to represent himself and present the defense he wanted. He was however willing relinquish some of his *Faretta* rights in order to do so with the assistance of co-counsel, which was within the court's discretion, and not simply someone who provided only "advisory" or "standby" assistance as limited by the trial court. As appellant has previously discussed, had he accepted the assistance of counsel he would have had the right to the assistance of second counsel based on a showing of need. However, just because he chose to represent himself, he was denied the right to second counsel based on his particular showing of need. Instead the decision was based on factors having nothing to do with the circumstances of the case. The trial court therefore abused its discretion in denying appellant's request and as a result, impermissibly interfered with appellant's Sixth Amendment right to self-representation, which is *per se* reversible error. Furthermore, the error also deprived appellant of his Fifth and Fourteenth Amendments rights to due process, a fair trial, and his

Eighth Amendment right to a reliable capital trial. Both the guilt and penalty phase judgments must be reversed.

* * * * *

II.

THE TRIAL COURT'S DECISION TO NOT APPOINT KEENAN COUNSEL FOR APPELLANT BECAUSE OF THE RESTRICTIONS IN THE LOCAL APPOINTMENT CONTRACT RESULTED IN A FUNDAMENTAL VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS AS WELL AS HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample

opportunity to meet the case of the prosecution. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [104 S.Ct. 2052; 80 L.Ed.2d 674]; *Powell v. Alabama* (1932) 287 U.S. 45 [53 S.Ct. 55, 77 L.Ed. 158]; *Johnson v. Zerbst* (1938) 304 U.S. 458 [58 S.Ct. 1019, 82 L.Ed. 1461]; *Gideon v. Wainwright* (1963) 372 U.S. 335[83 S.Ct. 792, 9 L.Ed. 2d 799].)

The Sixth Amendment further recognizes that the right to counsel is more than simply the presence of counsel that is important. The Supreme Court has stated that the Sixth Amendment right to counsel includes the right to the effective assistance of counsel. (*McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14; *Strickland*, 466 U.S. at p. 686; *United States v. Gouveia* (1984) 467 U. S. 180, 187 [104 S. Ct. 2292, 81 L. Ed. 2d 146]; *Coleman v. Alabama* (1970) 399 U. S. 1, 9-10; *Reece v. Georgia* (1955) 350 U.S. 85.)

There are two distinct ways in which a defendant can be deprived of the effective assistance of counsel. First, counsel can perform in an ineffective manner by failing to render adequate legal assistance. (*Strickland v. Washington*, 466 U.S. at p. 686;) Alternatively, state interference can itself violate a defendant' s right to the effective assistance of counsel by rulings which interfere with the ability of counsel to respond to the state's case or conduct a defense. (*Ibid*; see also, *Geders v. United*

States (1976) 425 U. S. 80 [defendant denied right to effective counsel where trial court precluded him from consulting with counsel during an overnight recess in trial]; *Herring New York* (1975) 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed. 2d 593 [defendant denied right to effective counsel where trial court refused to allow his counsel to make closing argument in bench trial]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-613, 92 S.Ct. 1891, 32 L.Ed.2d 358, [ruling requiring that defendant be the first defense witness ["The accused is thereby deprived of the "guiding hand of counsel" in the timing of this critical element of his defense."]; *Ferguson v. Georgia* (1961) 365 U.S. 570, 593-596 [81 S.Ct. 756, 5 L.Ed.2d 783] [state rule barring questioning of a defendant on direct examination by his attorney during an unsworn statement].)

While generally a defendant who represents himself at trial forfeits a claim that their own actions represented ineffective assistance of counsel, (*Faretta,* 422 U.S. 806, 834-835, fn. 46; *People v. Bloom* (1989) 48 Cal.3d 1194, 1226), a *pro se* defendant cannot forfeit a claim of ineffective assistance of counsel that was the result of state interference with his effective representation. In that instance a defendant, even a self-represented one, is denied his or her constitutional right to effective assistance of counsel.

In this case, the provisions of the local appointment contract foreclosing any payment to second counsel appointed to a *pro se* capital defendant impermissibly interfered with appellant's ability to effectively represent himself. Although the contract did not specifically state that second counsel could not be appointed to a *pro per* defendant, the provisions absolutely denying compensation to second counsel under these circumstances resulted in a bar to the appointment of *Keenan* counsel for appellant. Appellant explained that although he wanted control over his strategy and presentation of his defense, he needed second counsel who would work with him in presenting his case as he wanted, and who would not only advise him but also help with presenting his case to the jury. He wanted someone to question witnesses, including himself should he desire to exercise his right to testify. Keeping in mind that he had already been advised that neither advisory nor standby counsel would perform any of these functions, (1 RT 24-29, 2 RT 352-354), appellant specifically wanted the appointment of second counsel to provide the assistance he need to effectively represent himself.

Despite the provisions of the local contract, the trial court clearly had the authority to appoint second counsel. Under Penal Code section 987, subdivision (b), a defendant in who is unable to employ defense counsel is

entitled in a capital case to have the county assign counsel to represent him at public expense. Subdivision (d) of section 987 specifically requires the court to appoint an additional attorney as co-counsel upon the request of appointed counsel if the court is convinced by the reasons stated in an affidavit presented by appointed counsel that the appointment is necessary to provide the defendant with effective representation. (*Pen. Code* §987, subd. (d).) Additionally, Penal Code section 1095 guarantees a capital defendant the right to have his or her case argued by two attorneys. (*Pen. Code* §1095.) It is apparent that requests for second counsel are therefore usually granted due to the complexity of capital cases, the Eighth Amendment guarantee of heightened reliability and due process in such cases, and such practical considerations as the impact of conviction upon the credibility of guilt phase counsel and the need for skilled penalty phase investigation and representation. (*Keenan v. Superior Court, supra*; California Criminal Law and Practice (*Continuing Education of the Bar*, 5th ed. 2000) §55.9, pp. 1541-1542.)

In this instance, the trial court did not deny appellant's request based on an inadequate showing of need as required under Penal Code section 987.9, subdivision (d). Rather the only reason for denying the request for co-counsel was the provisions of the local contract that obviously

"disapproved" of the appointment of co-counsel for *pro per* defendants, regardless of the consequences at stake.

The trial court denied appellant's request because the local appointment contract provided no mechanism to pay co-counsel on a capital case where a defendant had exercised his constitutional right of self-representation. This was the rule irrespective of whether the case at issue was a capital trial. The trial court had been advised by the administrators of the local contract that under their appointment contract with private counsel, compensation for second counsel on a capital case was set at 15% of the compensation received by first counsel. Since in this case there was no appointed "first counsel" there could be no compensation for second counsel since 15% of zero is zero. (2 RT 404-422A.) This is an absurd, mechanical application of the rules regarding appointment and payment of second counsel.

Interestingly, there was no monetary limitation if second counsel was appointed as advisory or standby counsel, and there was no mention of the application of the 15% limitation. Advisory or standby counsel could be fully compensated for their time. (2 RT 404-422A.)

This reason for denying appellant's right to at least apply for second counsel in a capital case is indefensible. Certainly money was not the issue.

Obviously appellant was not compensated for his work as a *pro per* defendant at the rate of appointed "first counsel." Thus, the county saved money by appellant's decision to represent himself. Furthermore, as it turned out, Mr. Schmocker was paid for his services both as lead counsel and as advisory counsel during various stages of this trial. Certainly compensation for co-counsel for appellant as a *pro per* defendant would not have been any more than what was paid to Mr. Schmocker, and the same fee arrangement that was in place for advisory counsel could have been applied for the appointment of co-counsel.

What is apparent from these provisions of this particular contract was that it was designed to preclude a capital defendant from exercising his right of self-representation. If a capital defendant wished to obtain the full complement of ancillary services granted to other defendants charged with capital murder, he or she must accept appointed counsel. As counsel for himself, the contract put an inherent conflict of interest on appellant. He either had to represent himself without the necessary ancillary services to render that representation effective and best assure him a fair trial, or forego his right of self-representation in order to receive the services afforded to any other capital defendant. On this point the county's appointment contract violated this Court's judicially declared rule of criminal procedure,

announced in Justice Richardson's opinion in *People v. Barboza* (1981) 29 Cal.3d 375, prohibiting public contracts with counsel for indigent defendants which "contain inherent and irreconcilable conflicts of interest." (*Id.*, at p. 381.)

By denying appellant's request for co-counsel based on the payment structure of the local contract, the superior court effectively denied defendant the assistance of counsel that he needed to represent himself. As was explained by appellant, given the complexity of the case there was simply no way that he could effectively represent himself without the assistance of co-counsel. His ability to effectively represent himself was not cured by the appointment of Mr. Schmocker as advisory counsel, particularly given the limitations on the amount of assistance that Schmocker could provide as advisory counsel. As advisory counsel, Mr. Schmocker could only provide advice and could not participate in the trial as appellant requested and needed. (2 RT 423-430.) Appellant needed an attorney to work with him in presenting his case to the jury, and not simply someone who advised him on trial court procedures.

Thus, the contract here deprived appellant of his constitutional right to effective assistance of counsel, as well as violated this Court's rule against contracts that create inherent conflicts of interests.

The question now becomes whether in order to prevail on appeal appellant must show outcome-determinative prejudice in order to gain a fair trial. The Supreme Court of the United States has articulated two different standards of prejudice for assessing ineffective assistance of counsel claims. In cases of "actual ineffectiveness–where defense counsel has performed in a negligent manner– the defendant generally must show "that the deficient performance prejudiced the defense." (*Strickland v. Washington, supra*, 466 U.S. at p. 687; accord *Perry v. Leeke* (1989) 488 U.S. 272, 279 [109 S.Ct. 594, 102 L.Ed.2d 624].) This requires the defendant to show that but for counsel's errors, there is a "reasonable probability" that the result of the proceeding would have been different. (*Strickland v. Washington, supra*, 466 U.S. at pp.688, 693.) The "reasonable probability" standard merely requires defendants to show "a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

However, the standard applied in cases directly involving "state interference" with counsel's performance,is "a different matter." (*Perry v. Leeke, supra*, 488 U.S. at p. 279.) State interference with counsel's ability to represent a criminal defendant "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Perry v. Leeke*

(1989) 488 U.S. 272, 280.) In a case involving state interference, the Supreme Court generally has not applied a harmless error test. (See, e.g., *Geders v. United States*, *supra*, 425 U.S. 80; *Herring v. New York, supra*, 422 U.S. 853.) "[V]arious kinds of state interference with counsel's assistance" can warrant a presumption of prejudice. (*Strickland*, 466 U.S. at 692; *Smith v. Robbins* (2000) 528 U.S. 259, 286 [120 S.Ct. 746, 145 L.Ed.2d 756.) As the Eleventh Circuit Court of Appeals has concluded, the *Strickland* harmless error standard does not "apply to situations where the state, the court, or the criminal justice system denies a defendant the effective assistance of counsel." (*Crutchfield v. Wainwright* (11th Cir. 1986) 803 F.2d 1103, 1108.)

The critical factor rendering violations of the right to effective assistance of counsel under these circumstances inappropriate for harmless error analysis is the reviewing court's inability to determine whether such violations were in fact harmless beyond a reasonable doubt. (See, e.g., *Gideon v. Wainwright*, *supra*, [complete denial of right to counsel]; *Payne v. Arkansas* (1958) 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 [introduction of coerced confession]; *Tumey v. Ohio* 2 (1927) 73 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 [adjudication by biased judge]; *Waller v. Georgia* (1984) 467 U.S. 39, 49 & n. 9, 104 S.Ct. 2210, 81 L.Ed.2d 31 [public trial]; *Holloway*

v. Arkansas (1978) 435 U.S. 475, 98 S.Ct. 1173, 55 L. Ed. 2d 426 [conflict of interest in representation throughout entire proceeding]; *Faretta v. California*, *supra*, [self-representation].) Errors that either "abort[] the basic trial process . . . or den[y] it altogether," (*Rose v. Clark* (1986) 478 U.S. 570 at p. 578 fn. 6), have an effect on the composition of the record so pervasive that it cannot be determined by the reviewing court. (See also *Satterwhite v. Texas* (1988) 486 U.S. 249, 256, [108 S.Ct. 1792, 100 L.Ed.2d 284, [errors that "pervade the entire proceeding" and whose scope "cannot be discerned from the record" require *per se* reversal); *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431; 89 L.Ed.2d 674 [suggesting that errors having a pervasive effect on the factfinding process are not susceptible to harmless error analysis]). To apply harmless error analysis under such circumstances would require the reviewing court to engage in an inquiry that was "purely speculative." (*Satterwhite*, 486 U.S. at p. 256.)

Although these cases adopt a standard of reversal *per se* for state-induced ineffective assistance of counsel claims, the record here provides ample grounds to show that the failure to appoint co-counsel for appellant actually denied him the adversarial testing of the charges contemplated required by the Sixth Amendment. In most capital cases there is expert

testimony where questioning of an expert witness could be best done by an attorney. This case was no exception. For example, appellant's examination of the defense psychiatrist was minimalist at best. The doctor's testimony consisted primarily of a narrative about his findings regarding appellant's family dynamics, and many of appellant's questions were sustained as objectionable. (7 RT 1935-1941.) This was certainly a situation where second counsel who was more adept at questioning an expert witness would have been better.

Appellant explained that he needed the assistance of counsel not merely to advise him outside the courtroom but to assist in preparing and presenting his case. As if often the case in a capital trial, second counsel effectively prepares for the penalty phase of the trial. That would have allowed appellant to focus on the guilt phase issues where most of his efforts were placed since he had a particular strategy of defending himself.

Also, appellant desired to have an attorney question him when he testified rather than simply present narrative testimony. This was critical to appellant's request and therefore we can only speculate on whether the trial court's decision not to appoint co-counsel impacted appellant's decision not to testify at either phase of the trial.

Additionally, as appellant has discussed above, the local appointment contract created an inherent conflict of interest with respect to his ability to obtain the ancillary services he needed to effectively represent himself. In *People v. Barboza*, *supra*, the Court reversed the conviction of two indigent defendants who had been represented by the Madera County Public Defender because the contract under which the public defender was paid created an inherent conflict of interests. Under this contract, the public defender's office was to receive payments totaling $104,000 per year. However, each year $15,000 of this amount was placed in a special fund to be used to pay counsel who were appointed when the public defender could not represent an indigent defendant due to conflicts of interest. The public defender was entitled to any money left in the fund at the end of the year and was also required to make up any deficiency. As described by Justice Richardson, "The direct consequence of this arrangement was a financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel." (*Id.*, 29 Cal.3d at p. 310.) Significantly, Justice Richardson did not analyze the case to determine whether the dual representation had prejudiced the defendants in any specific way, but

instead concluded that the public defender's contract itself compelled reversal. (*Id.*, at p. 381, internal citations omitted.)

Under California conflict jurisprudence, one must make at least some limited showing of adverse impact on counsel's representation as a prerequisite to reversal. 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. Proof of an 'actual conflict' is not required." (*People v. Mroezko* (1983) 35 Cal.3d 86, 105.) Like the federal "actual conflict" rule, this rule is applied even in the absence of any objection at trial. (*Ibid.*) Thus, a potential conflict exists if an informed speculation suggests that the defendant's right to effective representation was prejudicially affected.

In this case, as a *pro per* defendant appellant was provided with advisory counsel, but counsel's services was severely restricted. Advisory counsel could only provide advice but not participate in any manner at trial. Counsel's participation at trial was critical to appellant's request for co-counsel. He wanted to exercise his right to testify at trial, but he wanted his presentation to be effective. By that appellant means that he wanted to avoid narrative testimony and ensure that his cross-examination by the

prosecution was proper. In order to do that he needed counsel who would be allowed to participate at trial which automatically excluded advisory counsel. Thus, there is more than "informed speculation" here that the conflict created by the appointment contracts prohibition on the appointment of co-counsel for *pro per* capital defendants prejudicially affected appellant's right of effective representation.

Under these circumstances, defendant was denied due process under the Fourteenth Amendment, the right to effective assistance of counsel under the Sixth Amendment, and a reliable guilt and penalty phase determination under the Eighth Amendment. Reversal of the both the conviction and sentence is required.

* * * * *

III.

THE DENIAL OF APPELLANT'S REQUEST FOR CO-COUNSEL DENIED HIM OF HIS EQUAL PROTECTION BASED ON THE LOCAL APPOINTMENT CONTRACT THAT DENIED COMPENSATION TO SECOND COUNSEL DENIED APPELLANT THE SAME ACCESS TO NECESSARY ANCILLARY SERVICES AS ANY OTHER CAPITAL DEFENDANT

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution commands that no state shall "'deny to any person within its jurisdiction the equal protection of laws', which is essentially a directive that all persons similarly situated should be treated alike." (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 471; *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249, 87 L.Ed.2d 313].) Thus, states are precluded from legislating "that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the object of that statute". (*Reed v. Reed* (1971) 404 U.S. 71, 75-76 [92 S.Ct. 251, 30 L.Ed.2d 225; *Eisenstadt v. Baird* (1972) 405 U.S. 438, 446-447[92 S.Ct. 1029; 31 L.Ed.2d 349].)

The California Constitution, Article I, section 7, while substantially similar to its federal counterpart, maintains independent meaning and may

in certain instances provide broader protection than that which is guaranteed by the U.S. Constitution. (*People v. Leung* (1992) 5 Cal.App.4th 482, 494.) In either instance there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (See, *Bush v. Gore* (2000) 531 U.S. 98, [121 S.Ct. 525, 530-532, 148 L.Ed.2d 388].)

In this instance, appellant's equal protection challenge is simple: the appointment contract that "disapproved of" second counsel appointments for *pro per* capital defendants unconstitutionally denied him the same access to the authorized ancillary services as any other capital defendant.

In order to prevail on an equal protection challenge, the proponent of an equal protection claim must demonstrate that the challenged state action results in disparate treatment of persons who are similarly situated with regard to a given law's legitimate purpose. (See, *People v. Raszler* (1985) 169 Cal.App.3d 1160, 1167; *People v. Leung, supra,* 5 Cal.App.4th at p. 494; *Mclean v. Crabtree* (9th Cir. 1999) 173 F.3d 1176, 1185; *United States v. Lopez-Flores* (9th Cir. 1995) 63 F.3d. 1468, 1472). To determine whether two or more groups are similarly situated is to determine whether "the distinction between them can be justified under the appropriate test of

equal protection". (*In Re Eric J.* (1979) 25 Cal.3d 522, 530; *United States v. Lopez-Flores, supra* 63 F.3d at 1472.)

For purposes of this case, the similarly situated groups are capital defendants with appointed counsel, and those capital defendants such as appellant who represent themselves at trial.

Appellant has found one court of appeal case that has held that a *pro per* capital defendant did not have an equal protection right to *Keenan* counsel. (*Scott v. Superior Court* (1989) 212 Cal.App.3d 505 [hereafter referred to as *Scott*.) In, *Scott* the court held that although an attorney in a capital case may seek appointment of a second attorney, defendant was not entitled to appointment of co-counsel, since he was not an attorney and had abandoned his constitutional right to counsel in favor of his right to self-representation. (*Id.*, at p. 512.) The court reasoned that since the defendant had chosen to manage his own matter, the therefore relinquished many of the benefits associated with the right to counsel, including the right to co-counsel as provided for under Penal Code section 987. (*Id.*, at p. 512.)

Appellant believes that the decision in *Scott* is simply wrong, one because its analysis of the case law was wrong, and two, the holding does not make logical sense.

First, *Scott* asserts that this court has consistently held that a defendant is not entitled to have his case presented in court both by himself and by counsel acting at the same time or alternating at defendant's pleasure. (*Id.*, at p. 510.) In making this assertion, the court in *Scott* cites several cases, none of which directly discuss the issue at hand. For example, the court refers to *People v. Darling* (1962) 58 Cal.2d 15, which was a case that predated *Faretta*, and the issue there involved appointed counsel's request to permit the defendant to "propound a question or two to a witness, if he so sees fit now and then." Although the court there said a defendant who has been appointed counsel does not have a right to participate along with counsel, it did note that the granting or denial of such a request was within the discretion of the court. (*Id.*, 58 Cal.2d at pp. 19-20.) Other cases cited by the court in *Scott* was equally inapposite. In those cases, the defendant was represented by counsel and requested to be designated as co-counsel. (See, *People v. Mattson* (1959) 51 Cal.2d 777; *People v. Miranda* (1987) 44 Cal.3d 57, 75; *People v. Moore* (1988) 47 Cal.3d 63, 77-78.) Notably, the court in *Scott* refers to this Court's decision in *People v. Hamilton, supra*, 48 Cal.3d at pp. 1162-1163, but does not discuss this Court's statement in that a *pro per* defendant may have the assistance of appointed counsel as a trial advocate, where this would serve

the interests of justice and efficiency. (*See, People v. Hamilton*, *supra*, 48 Cal.3d at p. 1164, fn. 14.) Thus, none of the cases cited by the court in *Scott* stand as authority that co-counsel for a defendant representing himself in a capital trial is prohibited.

Finally, *Scott* is distinguishable on one very important point. The court in *Scott* noted that virtually all of the tasks urged in support of the defendant's request for *Keenan* counsel, such as interviewing witnesses, including experts, aiding in obtaining his own expert witnesses, preparation of mitigating evidence at the penalty phase of the trial, assistance in challenging the special circumstance allegation, would be accomplished with the assistance of his investigators and advisory counsel, and said that there was nothing preventing the superior court from granting a specific and limited request, upon a proper showing, to allow advisory counsel, to question specific witnesses. (*Scott v. Superior Court,* 212 Cal.App.3d at p. 512.) In this case, however, the trial court specifically restricted advisory counsel from questioning witnesses as appellant wanted. Thus, appellant's ability to utilize the services of his advisory counsel as co-counsel was not the same situation as in *Scott*.

As for the equal protection argument, *Scott* concludes that *pro per* defendants are not similarly situated with other defendants just because

appellant is not an attorney. (*Scott*, 212 Cal.App.3d at p. 512.) This is where that decision does not make logical sense. Once a defendant decides to represent himself, he or she becomes "attorney of record", and as attorney of record it does not matter that the defendant does not have a state bar card. All discovery is turned over to the defendant, he or she determines the course of action for the defense, the defendant then directs all pretrial proceedings, *voir dires* the jury, gathers defense witness and questions all witnesses, and presents closing arguments, and performs every other function as counsel as a certified attorney. The defendant is even advised that he or she would be treated no differently than any other attorney. It therefore does not make sense to treat a pro per defendant any differently with respect to the appointment of second counsel based on his or her lack of a bar card.

The stated purpose behind Penal Code section 987, subdivision (d) which specifically discusses the appointment of co-counsel, is "to provide the defendant with effective representation." Furthermore, Penal Code section 987.9, is the common avenue for capital defendants to obtain ancillary services, including *Keenan* counsel, and that statute simply requires that a request be made by the defendant's counsel. In the case of a defendant representing himself, he is deemed his own counsel and therefore

had a right like other defendants with appointed counsel to seek those services as well. Penal Code section 987.9 does not say that the "attorney" means only a state bar certified attorney. The state cannot treat the *pro per* defendant as attorney of record for all purposes except for the authorized ancillary services.

After determining the groups to be compared, the equal protection analysis proceeds to a determination of what level of scrutiny is appropriate. (*People v. Leung*, *supra,* 5 Cal.App.4th at 494.) The level of scrutiny is determined by examining the interests affected. As stated by one court, this assessment depends upon the "classification involved in, and the interests affected by, the challenged law." (*People v. Leng* (1999) 71 Cal.App4th 1, 11.)

The interest at stake here is clear. As with all defendants charged with capital crimes, the fundamental interest of life and effective assistance of counsel is affected. It was appellant's right to counsel, and specifically his fundamental right to self-representation, which is a fundamental personal right under the constitution. (*Faretta v. California*, *supra.*) Included in that fundamental right is the ability to have access to all of the necessary defense services afforded any other capital defendant in order to protect that litigant's right to effective assistance of counsel. A real,

appreciable impact on or significant interference with this fundamental constitutional right is subject to the strict scrutiny standard. Although the federal constitution may not require this state to provide second counsel for indigent capital defendants, "having provided such an avenue, however, a State may not 'bolt the door to equal justice' to indigent defendants." (*Halbert v. Michigan* (2005) ___U.S.__ [125 S.Ct. 2582, 2586, 162 L.Ed.2d 552].)

Under a strict scrutiny standard, the state must show that the challenged classification: (1) bears a close relationship to the promotion of a compelling state interest; (2) is required to achieve the government's goal; and (3) is narrowly drawn to achieve the goal by the least restrictive means necessary. (*Craig v. Boren* (1976) 429 U.S. 190 [97 S.Ct. 451, 50 L.Ed.2d 397]; *People v. Leng*, *supra*, 71 Cal.App.4th at p. 11.) The state bears the burden of proving that the classification meets all three prongs of the aforementioned test. (*Craig v. Boren, supra*, 429 U.S. 190.)

Since the court absolutely refused to appoint *Keenan* counsel for appellant, there was not justification offered for the disparity in treatment. In any event, the state cannot show a compelling, or for that matter, a rational justification for the provisions of the local appointment contract

that prohibit funding for second counsel for a *pro per* capital defendant simply because he chose to represent himself.

One could argue that financial considerations might be the compelling reason for denying the appointment of co-counsel for a self-represented capital defendant, but the way this contract was structured, no such claim can be justified on a compelling basis.

The appointment contract provided full compensation for the first appointed counsel, and provides compensation for second counsel at 15% of what is paid to first counsel. According to the trial court's explanation, since there was no first counsel appointed to appellant, there was no mechanism to apportion payment for second counsel. This justification for this disparity in treatment is specious. Under the contract nothing was paid for appointed counsel since appellant decided to represent himself, therefore the economical considerations with having to pay two appointed counsel was nonexistent.

Furthermore, the contract provided a mechanism for payment of advisory counsel presumably without the 15% limitation since there was no first counsel. Even though advisory counsel was prohibited from participating at trial, depending upon the amount of pretrial preparation involved and advice needed by a specific defendant, advisory counsel could

cost the same if not more than the appointment of second counsel. Under the contract advisory counsel could be paid more than second chair to appointed counsel, and most definitely anything negotiated with counsel appointed as second chair to appellant.[20/]

Furthermore, the absolute bar to the appointment of second counsel for a *pro per* defendant does not necessarily save any money. As the contract was written, it could cost the same or more to compensate advisory counsel for less work. On the other hand, appointing an attorney to act as second chair would be even more cost effective since one attorney could serve the dual purpose of advisory counsel as well as serving in the limited capacity that appellant wanted.

Also, the contract's absolute bar to the appointment of second counsel for *pro per* capital defendants was not the least restrictive means of achieving the goal of saving money. Inherent in the appointment of second counsel for a *pro per* defendant is the agreement by counsel to accept the appointment under the terms stated by the defendant. As noted by Mr. Schmocker, very few attorneys, including himself, would accept

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20. In this instance more money likely was paid to Mr. Schmocker because of his various roles as advisory counsel, then appointed counsel and later advisory counsel when appellant was returned to *pro per* status.

appointment as second chair to a self-represented defendant. (2 RT 356-362, 365-375.) Thus, the inability to find counsel willing to take on such an appointment results in a more narrowly drawn alternative rather than the absolute bar presented in this contract.

The efficient administration of the criminal justice system might also be considered a legitimate state interest, but compensating an attorney willing to accept an appointment as second counsel to a *pro per* defendant does no disservice to this interest. Any attorney willing to take on such an appointment would know their role is to do only what the defendant wanted. Compensating attorneys to fully participate as the defendant wanted would only enhance the orderly administration of justice.

The trial court stated that it was denying appellant's request believing that was the best way of assuring competent counsel. (2 RT 424-427.) However the court's ruling had the opposite effect. By denying the appointment of second counsel for appellant with the ability to fully assist him with the preparation and presentation of his case and not limited by the constraints of advisory counsel, the court ensure that appellant was denied effective assistance of counsel.

It is apparent from the discussion the trial court had with the administrators of the contract that co-counsel appointments for *pro per*

capital defendants were disfavored. Rather than serving any compelling purpose, the contract was designed to discourage such appointments. Any attorney willing to accept the case as co-counsel to a *pro per* defendant were effectively discouraged since they would not be compensated.

Finally, even if a rational relationship analysis is applied to the classification used here, the appointment cannot withstand an equal protection challenge. Applying this level of scrutiny, the classification need only bear a rational relationship to a legitimate state interest. (*Lucas v. Superior Court* (1988) 203 Cal.App. 3d 733, 738.) As discussed above, the terms of the contract hardly serves any significant monetary goal, particularly since it provides for full compensation to advisory counsel.

In summary there simply was no compelling or even a rational interest involved here that would outweigh appellant's fundamental right to a fair trial and effective representation. The trial court's strict adherence to the terms of the local appointment contract which deny compensation to counsel appointed to a *pro per* defendant as co-counsel and thereby effectively deny *Keenan* counsel to pro per defendants, denied appellant the equal protection of the law guaranteed by the federal constitution, (*Cleburne v. Cleburne Living Center, Inc., supra*, 473 US. 432,439; *Eisenstadt v. Baird, supra*, 495 U.S. 438,446-447; *Reed v. Reed, supra*, 404

U.S. 71,75-76), and the California Constitution. (*People v. Boulerice, supra,* 5 Cal.App.4th 463,471; *People v. Leung, supra*, 5 Cal.App.4th 482,494.)

The contract operated to deny appellant equal protection under the law as guaranteed by the Fourteenth Amendment. Accordingly, neither the convictions nor the sentence of death satisfies the Eighth and Fourteenth Amendments' guarantees of reliability in capital sentencing.

For these reasons, the verdicts and the sentence of death must be reversed.

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IV.

THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUEST FOR AN ORDER REINSTATING HIS LIBRARY PRIVILEGES DEPRIVED HIM OF THE ADEQUATE RESOURCES TO DEFEND HIMSELF

Shortly before the trial was due to start, appellant's *pro per* privileges at the jail was revoked. (3 RT 712-724.) A hearing was held in Deputy Wolhope testified that as he was escorting appellant to a meeting with Mr. Schmocker, the officer searched appellant's file folder and found a rod that had been removed from a typewriter and appeared to have been sharpened. (3 RT 726–732.) Deputy Jeanson also testified that an administrative hearing was held and during that hearing appellant admitted possessing the rod for protection. Following the administrative hearing, the jail revoked all of appellant's *pro per* privileges which included library and telephone privileges. (3 RT 734-739, 743.) Officer Jeanson told the court that appellant's only access to legal materials was through a legal runner, advisory counsel or investigator. (3 RT 740-742.)

Appellant asked the court for an order to restore limited *pro per* privileges. He specifically requested asked for an order that he be allowed to review any necessary legal materials in his cell. Officer Jeanson stated that the jail prohibits law books to be taken to the cells because it the books are temporarily unavailable to other *pro per* defendants or the books might

be destroyed. Appellant argued that he was being denied his constitutional right to the law library and materials necessary to defend himself but the trial court refused to reinstate any of his *pro per* privileges. (3 RT 738-740, 747-748.)

Two weeks later appellant again asked the court for an order restoring some of his *pro per* privileges at the jail. Appellant complained that he had not been given access to then law books and telephones. He asked that some arrangement be made so he could obtain the necessary materials to prepare for trial, or at least more access to the phones, but the court refused. The court told appellant that his investigator and advisory counsel were sufficient to provide him with the legal materials. (3 RT 755-757.)

Appellant contends that the court's refusal to reinstate some of appellant's *pro per* privileges denied him assess to the necessary tools for him to have a meaningful opportunity to represent himself.

Appellant's right to self-representation under *Faretta* necessarily includes the right to prepare a defense, including access to research materials. (See, e.g.,*Taylor v. List* (9th Cir. 1989) 880 F.2d 1040, 1047; *Milton v. Morris*, *supra*, 767 F.2d at p. 1447; *Bribiesca v. Galaza* (9th Cir. 2000) 215 F.3d 1015, 1020.) Access to legal materials, however, may be

limited for security considerations and avoidance of abuse by opportunistic or vacillating defendants. In those circumstances, however, special adjustments are required. (*Milton v. Marks*, 767 F.2d at p. 1446.)

In this case, the jail determined that appellant was a security risk because of a prior incident in the library where appellant got into a fight with another inmate and because of the rod found in his legal folder. As a result the jail revoked all of appellant's. Appellant was willing to accept the restriction on his direct access to the law library, but asked that he be allowed to have some books brought to him in his cell by a runner. The officer testified that the jail policy was not to do this because the books "might" be destroyed, appellant submits that fact that the books might be destroyed was insufficient justification to deny appellant access to the law books his cell. There was no evidence that appellant had previously abused the books while he had access to the library, and therefore there was no reason to assume that he would do so if he reviewed the books in his cell.

The court believed that providing a legal runner and advisory counsel was sufficient access to legal materials for appellant to prepare for trial. However, as appellant explained the restrictions on his telephone use made it difficult to even contact his advisory counsel or his investigator to obtain the necessary materials from them. (RT 755-756.) Having access to

an investigator or advisory counsel for assistance is meaningless if he was denied access to the means to speak with them. As a result of his being denied access to legal materials and the telephone appellant believed he was not prepared for trial and therefore had to relinquish his right of self-representation. (3 RT 776-777, 806-810.) In this instance, the state unreasonably hindered appellant's efforts to prepare his own defense and denied his Fifth and Fourteenth Amendments right to due process of law and Sixth Amendment right to self-representation. As a result, both the guilt and penalty judgments must be reversed.

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V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE JEWELRY SEIZED DURING THE WARRANTLESS SEARCH OF HIS APARTMENT IN COLORADO.

A. Introduction.

Prior to trial appellant moved to suppress evidence, specifically the jewelry, found in his brother's apartment in Colorado in 1977. Appellant contended that when the police came to his brother's apartment, they lacked a valid arrest or search warrant and therefore lacked legal authority to search and seize anything from the apartment.[21]

At the evidentiary hearing on the suppression motion, two police from the Colorado police department who were involved in the arrest and search of the apartment testified. They testified that on December 20, 1977 Terry Avery was interviewed. During that interview she told the police about the events of the Kansas homicide and told the police nothing about

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21. The prosecution argued that appellant had no right to litigate the suppression issue because it had previously raised and ruled upon in his prior habeas proceedings. (8 CT 1406-1410, 1420-1430; 2 RT 464, 504-506.) The trial court correctly ruled that appellant could litigate the suppression issue because the case was been remanded because appellant had erroneously been denied the right to represent himself, and therefore all prior rulings were not binding. (2 RT 508.)

the Long Beach crimes. She also told police where they could find appellant and Harris. (2 RT 520, 562-564, 568-569.)

At the hearing suppression hearing, officer Deasy testified that after receiving the information from Avery, the officers found out there was an outstanding warrant for appellant's arrest for a jewelry store robbery in Littleton, Colorado. Apparently their information about the warrant was from a wanted bulletin. (2 RT 571-575.) Initially Deasy claimed they also had a search warrant for the apartment but later explained that the search warrant was obtained and executed two days after appellant's arrest, so the police did not have a search warrant when they went to appellant's apartment that night. (3 RT 584-585.)

The police decided to go and arrest appellant based the warrant for the jewelry store robbery out of Arapahoe county. However at the hearing it was shown that this particular warrant was also obtained two days after appellant's arrest. (3 RT 594.) There was a second arrest warrant which had been issued December 6, 1977 that was produced for the hearing, but it was for Lee Harris only . (3 RT 595-598.) They did not obtain either an arrest or search warrant for appellant or his property when the Denver police went to his brother's home on December 20, 1977, and they waited

several hours before going to the apartment to arrest appellant. (3 RT 583-589, 596-597, 599, 600, 622-623.)

When they got to the apartment several police officers surrounded the apartment then forced their way inside. Harris was arrested inside the apartment and appellant was arrested outside after he ran out through a back window. (3 RT 601, 604-605, 611, 623-626.) Inside the bedroom of the apartment one officer saw a yellow bag containing jewelry on top of a bureau which he seized. (3 RT 630-631.)

At the conclusion of the hearing appellant argued that his arrest was unlawful because the prosecution had failed to produce competent evidence that the police had either a valid arrest or search warrant prior to his arrest. He also argued that there was no exigent circumstances that necessitated the police forcibly entering the house to arrest him. He further argued that the police had no probable cause to seize the jewelry from the apartment that the Colorado police had no authority to release the property to the California police. (3 RT 657-659)

The prosecution argued that because appellant was arrested outside the residence and they had probable cause to arrest him for the Kansas homicide, the police did not need a warrant. The prosecutor also argued that appellant lacked standing to contest the seizure of the jewelry bag

because the property was stolen. Finally the prosecutor argued that the Colorado authorities did not need a court order to release the property to Detective Collette. (3 RT 659-662.)

The trial court denied the motion to suppress finding that the officers had knowledge of the jewelry store robbery and the Kansas murder, and the officers were aware that appellant was wanted for those crimes. The court said that when the police went to the apartment they knocked and gave sufficient warning of their presence. They arrested Harris inside the apartment pursuant to the warrant for his arrest and that the jewelry was in plain view. (3 RT 666-672.)

On appeal appellant contends that the trial court erroneously denied his motion to suppress the evidence because the seizure of the jewelry was the result of an unlawful arrest and seizure in violation of the Fourth Amendment of the United States Constitution.

B. Both The Arrest and Subsequent Search of Appellant's Residence Was Unlawful Because It Was Not Pursuant To Either A Valid Arrest Or Search Warrant.

The Fourth Amendment provides that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. A persons capacity to claim the protection of the Fourth Amendment depends . . . on whether the person

who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. (*Minnesota v. Carter* (1988) 525 U.S. 83, 88 [119 S.Ct. 469; 142 L.Ed.2d 373], quoting *Rakas v. Illinois* (1978) 439 U.S. 128, 143 [99 S.Ct. 421; 58 L.Ed.2d 387].) The Fourth Amendment protects the individuals privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individuals home a zone that finds its roots in clear and specific constitutional terms: The right of the people to be secure in their. . . houses . . . shall not be violated. That language unequivocally establishes the proposition that [a]t the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his [or her] own home and there be free from unreasonable governmental intrusion. (*Payton v. New York* (1980) 445 U.S. 573, 589-590 [100 S.Ct. 1371; 63 L.Ed.2d 639], quoting *Silverman v. United States* (1961) 365 U.S. 505, 511 [81 S.Ct. 679; 5 L.Ed.2d 734].)

Nowhere is the protective force of the Fourth Amendment more powerful than it is when the sanctity of the home is involved . . . The sanctity of a persons home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the amendment. (*Los Angeles Police Protective League v. Gates* (9th Cir. 1990) 907 F.2d 879,

884.) A search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show . . . the presence of exigent circumstances. (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 474-475; *Welsh v. Wisconsin* (1984) 466 U.S. 740, 742.)

Appellant had a legitimate expectation of privacy behind the locked door of his living quarters and therefore the police needed a warrant before entering his home either to arrest or to search.

In reviewing the denial of a motion to suppress evidence, this Court views the record in the light most favorable to the trial court's ruling and defer to its findings of historical fact, whether express or implied, if they are supported by substantial evidence. This Court must then decide for itself what legal principles are relevant, independently apply them to the historical facts, and determine as a matter of law whether there has been an unreasonable search and/or seizure. (*People v. Miranda* (1993) 17 Cal.App.4th 917, 922; see also *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

At the suppression hearing below, one of the contested issues was whether the police had obtained an arrest warrant for appellant's arrest prior to forcing entry into the apartment. The trial court found that there had been an arrest warrant issued for appellant's arrest prior to the police going

to the apartment. (3 RT 669.) Appellant contends that the record shows otherwise. The testimony presented by the officers at the suppression hearing established that the police had neither before going to appellant's apartment.

Over appellant's objection the court admitted two exhibits which purported to be the warrants relied upon by the police when they arrested appellant in their home. (RT 656-657, 666.) However the court should have excluded that evidence as unreliable.

Although officer Deasy claimed the police possessed a warrant for the jewelry store robbery in Littleton, Colorado, the record indicates otherwise. When that warrant was produced in court, it was proved that it had not been issued until two after appellant's arrest. (RT 594.) Thus, the police could not have relied on the purported jewelry store warrant as a basis to arrest him. Officer Deasy claimed he confirmed the existence of the jewelry store robbery before going to appellant's apartment but that was uncorroborated hearsay. (RT 585-587.) Ironically Deasy testified that there was a Littleton officer with them that night, (RT 574), Littleton being the location of the jewelry store robbery, but apparently that officer failed to produce the arrest warrant that formed the basis for their being there. The fact remains that no warrant for appellant's arrest that had been issued prior

to appellant's arrest was ever produced. The second document admitted over appellant's objection was an arrest warrant for Lee Harris only. (RT 595-596.) Based on the totality of the evidence presented, the police failed to prove that there was a valid arrest warrant for appellant. Therefore, the trial court erred in finding that the police had obtained a warrant.

Furthermore, even though there may have been a prior warrant issued for Harris' arrest, the could not simply execute that warrant without first obtaining a search warrant for the premises, (*Steagald v. United States* (1981) 451 U.S. 204 [101 S.Ct. 1642, 68 L.Ed.2d 38]), which the record shows they never obtained. The sum total of the information available to the officers at the time of entry did not provide the significant standard of probable cause required for the substantial step of intruding into a residence without a warrant. (See *People v. Ramey* (1976) 16 Cal.3d 263; *Payton v. New York, supra.*)

Nor did exigent circumstances permit the warrantless entry into the apartment. A warrantless entry of a residence is unconstitutional absent exigent circumstances. (*Welsh v. Wisconsin, supra*; *Payton v. New York, supra*; *People v. Ramey, supra.*) In the context of warrantless arrests within a residence the term exigent circumstances means an emergency situation requiring swift action for various purposes, including "to forestall

the imminent escape of a suspect." (*People v. Ramey, supra*, l6 Cal.3d at p. 276.) "There is no ready litmus test for determining whether [exigent] circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers." (*Ibid.*)

In this case, the trial court did not make a factual finding that the officers were acting under exigent circumstances, and no such finding could have been made here since, as a matter of law, the facts adduced below were not such as to support this exigency. If there was ever a warrant for appellant's arrest for the jewelry store robbery as the police claimed, there was certainly no reason not obtain a copy of that warrant prior to going to the apartment. The police had determined appellant's location from Avery and then waited several hours before making the arrest. They certainly did not act with any urgency.

In *United States v. George* (9th Cir. l989) 883 F.2d l407, the court pointed out that the exigency of escape or flight typically arises where the police reasonably believe the suspect knows or will learn at any moment that he is in immediate danger of apprehension. (*Id.*, at p. l4l2.) George points out that the situation is different "where the arresting officers have no reason to believe that the suspects are aware of their imminent capture. Suspects who are inside their homes and unaware of their impending arrests

generally have no reason immediately to flee." (*Id.*, at p. 1413.) The court held that the officers could not reasonably believe the suspect knew or was in substantial danger of learning of his imminent capture. (*Id.*, at p. 1414.) The court therefore held that the entry was not justified by exigent circumstances and hence unlawful. (*Id.*, at p. 1415.) Here the officers had no reason to believe there was a danger that either appellant or Harris would flee before they could obtain a valid warrant, particularly since there was no evidence presented that they knew that Avery had spoken to the police. There simply was no exigent circumstances present here for the police to enter appellant's residence without either an arrest or search warrant.

C. The Error In Denying Appellant's Motion To Suppress Requires A Reversal of His Conviction.

When an arrest is illegal, all evidence the police secure which is tainted by that illegality must be suppressed. (*Brown v. Illinois* (1975) 422 U.S. 590, 598-599 [45 L.Ed.2d 416, 95 S.Ct. 2254]; *People v. Williams* (1988) 45 Cal.3d 1268, 1299.) In the superior court appellant sought to suppress all evidence which was the fruit of the illegal arrest, specifically the jewelry found inside the apartment that was eventually identified as belonging to the Crumbs, as well as the testimony pertaining to that jewelry.

The seizure of evidence in violation of the Fourth Amendment is governed by the test for reversal found in *Chapman v. California* (1967) 386

U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]. (*People v. Minjares* (1979) 24 Cal.3d 410, 424.) Under the *Chapman* test, reversal is required unless the People prove the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Under this test, reversal is required when the evidence improperly obtained constitutes "a substantial part of the prosecution's case." (*People v. Minjares, supra*, 24 Cal.3d at p. 424.)

Here the jewelry found in the apartment was a substantial part of the prosecution's case since it directly linked appellant to the murders and was a substantial part of the evidence used to corroborate the accomplice testimony. The failure to suppress this evidence standing alone requires reversal.

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VI.

THE FIRST DEGREE MURDER CONVICTIONS MUST BE REVERSED BECAUSE APPELLANT WAS GIVEN CONSTITUTIONALLY INSUFFICIENT NOTICE THAT HE COULD BE CONVICTED OF A VIOLATION OF PENAL CODE SECTION 189, AND A CONVICTION UNDER THAT SECTION WAS BEYOND THE JURISDICTION OF THE COURT

A. Introduction

As in 1978, appellant was charged in the information upon which he was tried with two counts of murder in violation of section 187, which were alleged to have been committed "willfully and unlawfully and with malice aforethought . . ." No allegation was made that he had committed felony-murder under Penal Code section 189. Appellant was however charged with both a burglary and robbery special circumstance allegation pursuant to section 190.2, subdivisions (c)(3)(i) and (v), and was further charged with the underlying felonies of burglary and robbery. (1CT 1-7; 5 CT 1350-1356.)

Nonetheless, concerning each homicide, the guilt phase jury was instructed solely on the theory of felony murder and not on the theory of murder with malice aforethought in violation of Penal Code section 187. (6 RT 1628-1629.) During the jury instruction conference appellant specifically objected to the court instructing the jury pursuant to CALJIC

Nos. 8.10, 8.21, and 8.27, all of which concerned first degree murder based on the felony murder theory. (6 RT 1593-1594, 1604-1605.) Appellant argued that the failure to specifically charge felony murder violated his constitutional right to notice and due process. The prosecutor was asked whether she was proceeding under both theories of first degree murder and she stated that she was not. She said the jury did not have to find that appellant committed a wilful, deliberate and premeditated murder in order to convict him of first degree murder. The prosecutor argued that instructing the jury on willful, deliberate and premeditated murder with respect to the special circumstance allegation was sufficient. (6 RT 1593-1596.)

Appellant submits that since felony-murder was not charged in the information as to the homicides of Mr. and Mrs. Crumb, appellant had no constitutionally sufficient notice that the state sought a conviction of felony-murder, and that, therefore, the trial court's instruction, and the prosecutor's argument, on felony-murder constituted prejudicial error, violating due process and necessitating reversal of both first degree murder convictions. Appellant was potentially convicted on two counts of offenses other than those with which he was charged. This was in excess of the jurisdiction of the trial court. (*People v. Lohbauer* (1981) 29 Cal.3d 364,

368-369; *People v. West* (1970) 3 Cal.3d 595, 612; *In re Hess* (1955) 45 Cal.2d 171, 175.)

B. Appellant Received Constitutionally Inadequate Notice That He Faced a Conviction of Felony-Murder on Counts I and II

Due process requires notice of the charges against which the defendant must defend. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." (*U.S. Const.*, Sixth Amendment.) This guarantee is applicable to the state through the Due Process Clause of the Fourteenth Amendment. (*In re Oliver* (1948) 333 U.S. 257, 273-274 [68 S.Ct. 499, 92 L.Ed. 682].)

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal [Citations omitted]. . . . It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. [Citation omitted.]" (*Cole v. Arkansas* (1948) 333 U.S. 196, 201.)

"The Sixth Amendment requires, in part, that an information state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against. (*Russell v. United States* (1962) 369 U.S. 749, 763-64 [68 S.Ct. 499, 92 L.Ed. 682]; *Miller v.*

Stagner (9th Cir. 1985) 757 F.2d 988, 994, amended, 768 F.2d 1090 (9th Cir. 1985)." (*Givens v. Housewright* (9th Cir. 1986) 786 F.2d 1378, 1380.) To determine whether a defendant has received constitutionally adequate notice of the charges against him, the court looks first to the information. (*James v. Borg* (9th Cir. 1994) 24 F.3d 20, 24.) Where the information is inadequate, however, adequate notice may be found from other sources, such as argument at the preliminary hearing (evidence of other crime at preliminary insufficient to give notice) or actual and timely notice of the prosecution's intent to seek conviction on a theory of proof not mentioned in the information. (See *Morrison v. Estelle* (9th Cir. 1992) 981 F.2d 425, 428; but see *Gray v. Raines* (9th Cir. 1981) 662 F.2d 569, 570-571; *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234.)[22/]

1. Dillon Established That Felony-Murder is Distinct from All Other Murder and is Exclusively Codified in Penal Code Section 189

In *People v. Dillon* (1983) 34 Cal.3d 441, this Court went to great lengths to preserve what it found to be a legislative preference for the

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22. Appellant acknowledges that this Court has rejected this jurisdictional argument in *People v. Hughes* (2002) 27 Cal.4th 287, 369, but also notes that in doing so, this court this not discuss the decision in *Sheppard v. Rees, supra.*)

continued existence of a felony-murder theory of liability for first degree murder. In fact, *Dillon* was a radical re-evaluation of California precedent in the area of felony-murder and it admitted as much. (34 Cal.3d at p. 472, fn. 19, and 473, fn. 20.)

In *Dillon*, the Court was confronted with the two challenges that: (1) the felony-murder rule was an uncodified common law crime which the Court should "abolish" in light of the elimination of common law crimes effected by the Penal Code of 1872 (see *Pen. Code*, § 6; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631-632); and (2) that if codified by statute, then the California felony-murder rule created an unconstitutional presumption of the statutory element of malice, in violation of the holdings of *Mullaney v. Wilbur* (1975) 421 U.S. 684 and *Sandstrom v. Montana, supra.* (34 Cal.3d at p. 462.)

The Court first concluded that the legislative history of the adoption of the Penal Code of 1872 compelled the conclusion that ". . . section 189 [is] not only a degree fixing device but also a codification of the felony-murder rule; no independent proof of malice is required in such cases, and by operation of the statute the killing is deemed to be first degree murder as a matter of law." (34 Cal.3d at p. 465.)

The Court then addressed the contention that, because "malice" is a statutory prerequisite of murder under section 187, the felony-murder rule operates to create an unconstitutional presumption of malice. (34 Cal.3d at pp. 472-473.) The Court's opinion rejecting this contention makes perfectly clear that there are two distinct crimes of "murder," each with different elements:

> "We do not question defendant's major premise, i.e., that due process requires proof beyond a reasonable doubt of each element of the crime charged. (See Pen. Code, § 1096; *People v. Vann* (1974) 12 Cal.3d 220, 225-228.) Defendant's minor premise, however, is flawed by an incorrect view of the law of felony-murder in California. To be sure, numerous opinions of this Court recite that malice is 'presumed' (or a cognate phrase) by operation of the felony-murder rule. But none of those opinions speaks to the constitutional issues now raised, and their language is therefore not controlling. (*In re Tartar* (1959) 52 Cal.3d 250, 258, and cases.)" (34 Cal.3d at pp. 473-474, fn. omitted.)

The Court continued with the observation that any "presumption of malice" was necessarily a conclusive one and hence a rule of substantive law. Cutting through the language of presumption contained in prior precedent, the Court held that the "'conclusive presumption' is no more than a procedural fiction that masks a substantive reality, to wit, that as a matter of law malice is not an element of felony-murder." (34 Cal.3d at p. 475; emphasis added.)

If there is any doubt that this Court was distinguishing between two crimes, both denominated murder and both potentially of the first degree, but with different elements, it is forever laid to rest by the Court's succinct response to the equal protection claim raised in *Dillon*:

> "There is likewise no merit in a narrow equal protection argument made by defendant. He reasons that the 'presumption' of malice discriminates against him because persons charged with 'the same crime,' i.e., murder other than felony-murder are allowed to reduce their degree of guilt by evidence negating the element of malice. As shown above, in this state the two kinds of murder are not the 'same' crimes and malice is not an element of felony-murder." (34 Cal.3d at p. 476, n. 23; see also 34 Cal.3d at pp. 476-477, fn. 24.)

Even assuming this Court has retreated from the broad language of *Dillon* describing felony-murder and malice murder as "separate crimes" (see e.g., *People v. Pride* (1992) 3 Cal.4th 195, 249), it has continued to reaffirm that "the elements of the two types of murder are not the same." (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, emphasis in original.)

2. The Information Was Inadequate to Support a Charge of Felony-Murder

In *Gray v. Raines, supra*, 662 F.2d 569, the Ninth Circuit Court of Appeals found that an information charging rape under one section of a multi-sectioned statute gave inadequate notice that the defendant could be convicted of rape under a separate section of the same statute, where the

separate sections involved proof of different elements. "What makes statutory and forcible rape separate offenses for charging purposes is the fact that proof of different elements is required." (*Id.*, at p. 572; see also *Givens v. Housewright, supra*, 786 F.2d 1378 [charge of wilful, deliberate, and premeditated murder constitutionally inadequate notice of murder by torture].) The fact that the two crimes in Gray were both defined in the same statute, and both denominated by the same generic name, "rape", was not sufficient to satisfy constitutional requirements of notice. "Obviously, the State . . . may organize its criminal laws in whatever manner it chooses. The state cannot, however, use a classification scheme to circumvent the constitutional notice requirement imposed on the state when charging a defendant with an offense." (662 F.2d at p. 571; see also *Givens v. Housewright, supra*, 786 F.2d at p. 1382.)

As *Dillon* points out, in California the crimes of premeditated and deliberate murder and non-malice felony-murder require different elements of proof, and are not even defined in the same statute, as was the case in *Gray*. In *Sheppard v. Rees, supra*, 909 F.2d 1234, the State effectively conceded that a charge of murder under section 187 is not *per se* sufficient

notice of a felony-murder charge. (909 F.2d at pp. 1236-1237.)[23] The information, then, was constitutionally inadequate to put appellant on notice that he might be convicted of a violation of section 189, felony-murder.

California law regarding the adequacy of the information is generally similar:

> "It is fundamental that '[w]hen a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." [Citation.]' (*People v. West* (1970) 3 Cal.3d 595, 612, 91 Cal.Rptr. 385, 477 P.2d 409.)" (*People v. Lohbauer*, *supra*, 29 Cal.3d 364, 368; *In re Hess, supra*, 45 Cal.2d 171, 174-175.)[24]

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23. While the state attempted to avoid such a complete concession on this point by arguing that it was not because California's murder pleading practice that furnished inadequate notice, but because a pattern of government conduct that affirmatively misled the defendant, resulted in denying the defendant an effective opportunity to prepare a defense. (id., at p. 1236), it cannot be avoided from the facts of *Sheppard*.

24. In *Gray v. Raines, supra*, 662 F.2d at pages 571-572, the Ninth Circuit found support for its conclusion that the information in that case was constitutionally inadequate in this Court's opinion in *In re Hess*, *supra*, 45 Cal.2d 171, which stated *inter alia* that:

> "A person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense. . . ." (*Id.*, at p. 174; emphasis added.)

(continued...)

The alternative tests for a lesser included offense in this context are (1) whether the offense is lesser included under the language of the indictment or information, (*People v. Lohbauer, supra; People v. West*, supra) or (2) whether the offense is lesser-included under the statutory definition of the offense charged. (*People v. Lohbauer, supra*, at p. 369.) If either test is satisfied, the conviction is within the jurisdiction of the trial court. If neither is satisfied, it is not. This rule specifically precludes the conviction of an uncharged lesser related (but not included) crime. (*People v. Lohbauer, supra*, 29 Cal.3d at pp. 369-370.) Moreover, "reasonable doubts in determining the identity of the offense charged are to be resolved in the defendant's favor." (*People v. Schueren* (1973) 10 Cal.3d 553, 558.)

This Court in *Lohbauer* resisted the state's invitation to create a third test under which a reviewing court could "hold immaterial any variance between an offense charged and a lesser offense of which a defendant is convicted unless 'the defendant was misled to his prejudice and prevented from preparing an effective defense.'" (29 Cal.3d at p. 370.) In *People v. Thomas* (1987) 43 Cal.3d 818, 830, this Court reaffirmed the holding of *Lohbauer* on this issue.

24.(...continued)

The information upon which appellant was tried specifically charged murder with malice under section 187. Felony-murder is not the same as malice murder, as this Court explained in *Dillon*. Nor is felony-murder an included offense either under the language of the statute or under the language of the charge in the information. It is true that both sections 187 and 189 require a killing. However, while a violation of section 187 requires malice, a violation of the felony-murder rule codified in section 189 does not. Conversely, a violation of the felony-murder rule in section 189 requires the intent and attempt to commit one of the felonies enumerated in that section, whereas a violation of section 187 does not. Consequently, a charge of "murder" without more does not state which of these two crimes is alleged. A charge of murder with reference to one statute or the other does not state that both are alleged. Though each statute defines a crime with the same generic name, each statue has a different complex of essential elements. In short, under the rule stated in *Lohbauer*, the first degree murder convictions in this case which were predicated on the incorrect felony-murder instruction were beyond the trial court's jurisdiction to impose under California law.

Appellant recognizes that a line of cases deriving from *People v. Witt* (1915) 170 Cal. 104, has long held that a charge in the language of or by

reference to Penal Code section 187- i.e., murder with malice- is adequate to sustain a felony-murder conviction. However, it is necessary to consider exactly what *Witt* decided, and on what basis:

> "The information charged the defendants with the crime of murder, committed as follows: 'That the said [defendants] . . . did wilfully, unlawfully, feloniously and with malice aforethought, kill and murder . . . a human being, contrary to the form, force and effect of the statute, etc. Concededly, this describes the offense of murder in the language of our statute, and is in accord with a form approved over and over again by this court. It is claimed, however, that it does not sufficiently allege the kind of murder proved in this case, viz: one committed in the perpetration or attempt to perpetration or attempt to perpetrate one of the felonies specified in section 189 of the Penal Code. Whatever may be the rule declared by some cases from other jurisdictions it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto* (1883) 63 Cal.165, 'The information is in the language of the statute defining murder, which is: 'Murder is the unlawful killing of a human being with Malice aforethought' (*Pen. Code*, § 187). Murder, thus defined, includes murder in the first degree and murder in the second degree. It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this cases includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence.' Under our decisions, there is no ground for distinction in this regard between the class of murder in the first degree here involved and any other class." (*People v. Witt, supra*, 170 Cal. at pp. 107-108; emphasis added.)

Appellant has no quarrel with the proposition that an information "may be in the words of the enactment describing the offense," as Penal

Code section 952 provides. *Witt* and its progeny followed this rule, but based their holdings on the assumption that first degree felony-murder was described and included in the provisions of Penal Code section 187. *Dillon* however, established that a charge of murder with malice (a violation of *Pen.Code* § 187) plainly does not charge the offense of felony-murder in the language of the statute defining it. The statute describing first degree felony-murder is Penal Code section 189 and no other. Therefore, *Dillon* destroyed the fundamental premise of *Witt*, i.e., that first degree felony-murder is a violation of Penal Code section 187. It is an established rule of law that a later decision overrules prior decisions which conflict with it, whether or not such prior decisions are mentioned and commented upon. (*In re Lane* (1962) 58 Cal.2d 99, 105.) Thus, it would appear that, in logic and law, *Dillon* has *sub silentio* undermined the rule of pleading set forth in *Witt*.

3. While Sufficient Notice May be Provided from Sources Other Than the Information, No Such Notice Was Provided in This Case

While the language of the information presents a jurisdictional issue (*People v. Lohbauer, supra*, 29 Cal.3d at p. 368), as a matter of notice, it has been recognized that constitutionally adequate notice may be found from the circumstances of the case outside of the language of the

information. Thus, if an information provides jurisdiction for conviction of a rape, for example, sources other than the information may be adequate to provide notice of alternate theories of rape. (See *People v. Collins* (1960) 54 Cal.2d 57.)

However, the mere fact that evidence of the elements of another similarly named crime is presented at a preliminary hearing has been found insufficient to give notice under the Sixth Amendment. (*Gray v. Raines*, *supra*, 662 F.2d at pp. 571, 573-574.) Similarly, notice of the alternate theory given at a jury-instruction conference near the close of the evidence has been found constitutionally inadequate. (*Id.* at p. 569; but see *Morrison v. Estelle, supra*, 981 F.2d at p. 428.) In this instance the prosecutor only elected its theory of felony murder during the jury selection conference. (6 RT 1593-1600.)

On the issue of notice, California generally relies upon the evidence at the preliminary hearing, in conjunction with the information, to provide notice of the charges against which the accused must defend. (*People v. Thomas, supra*, 43 Cal.3d 818, 829; *People v. Watkins* (1987) 195 Cal.App.3d 258, 264-268; *People v. Scott* (1991) 229 Cal.App.3d 707, 712-718; *People v. Johnson* (1991) 233 Cal.App.3d 4.) In *Watkins, Scott,* and *Johnson*, the courts referred to such non-pleading notice, although in the

context of the lack of prejudice. For instance, in *Watkins*, the court found a lack of prejudice from the fact that "[t]he information alleged that the murder was committed in the commission of a robbery as a special allegation. At both the preliminary hearing and trial, the only theory advanced by the prosecution was felony-murder, and the defense was not misled or deceived by the charging allegation." (195 Cal.App.3d at p. 267.) *Johnson* and *Scott* both relied upon evidence presented at the preliminary hearing. (233 Cal.App.3d at pp. 456-457; 229 Cal.App.3d at p. 717.)

Both *Scott, supra*, 229 Cal.App.3d at pp. 715-716, and *Johnson, supra*, 233 Cal.App.3d at pp. 455, also relied upon *People v. Thomas*, supra, 43 Cal.3d 818, which reiterated the rule that notice comes from the evidence adduced at the preliminary hearing as well as the information. However, *Thomas* does not resolve the issue posed by *Dillon*.

The issue in *Thomas* was whether or not an information which alleged a general charge of manslaughter, but included a specific reference to subsection (1) of section 192 (voluntary manslaughter), gave notice that a conviction was sought under subsection (2) of that same section. This Court held that the reference to one subsection of a statute was not determinative on the issue of jurisdiction or notice: "[I]t is the language of

the accusatory pleading which is controlling and not the specification of the statute by number . . ." (43 Cal.3d at p. 831.)

The lack of notice in this case is even more striking here particularly since this was appellant's second trial on the same charges. The language of the accusatory pleadings, both the original complaint and the information, was not a general charge of murder. Instead, both documents specifically alleged not only section 187, but it also alleged that the murder was committed "with malice aforethought." (1 CT 1-3, 18-21, 49-51.) That language, as the court in *Thomas* pointed out, "is controlling." The specification of section 187 in this case serves to confirm the language of the information as charging only malice-murder.

Additionally, during appellant's first trial, although the prosecution relied on both theories of first degree murder to convict appellant, (1 CT 174-180), the jury found appellant guilty as charged in the information, i.e, murder with malice aforethought pursuant to Penal Code section 187. (1 CT 226-227.) These facts further support appellant's lack of notice argument.

Both the allegation of malice and the specification of section 187 point to another crucial difference from the situation in *Thomas*. There, this Court dealt with a general allegation of a violation of one statute, which

could be violated in different ways. The information therefore conferred jurisdiction to convict the defendant of a violation of that one statute. Malice-murder and felony-murder are defined in two different statutes, and an allegation of the violation of one statute cannot confer jurisdiction or provide adequate notice that a conviction will be sought under the other. There is no logical basis for treating murder, which is defined in two different statutes, with different elements of proof, differently for purpose of jurisdiction or notice.

C. The Inadequate Notice of a Charge of Felony-Murder as to Count I and II Require Reversal of Appellant's First Degree Murder Convictions.

The record indicates that the prosecution gave no notice prior to the discussion on instructions that she intended to rely upon a felony-murder theory at trial. Appellant submits that on the facts of this case, the notice that such a conviction was sought was constitutionally inadequate, and the conviction on a felony-murder theory was beyond the jurisdiction of the court.

In light of the inadequacy of the information and the evidence, the presentation of the evidence in appellant's first trial, and the absence of any other notice of a felony-murder charge prior to the day argument to the jury commenced, the notice of such a charge was constitutionally inadequate and

appellant's convictions for two counts of first degree murder based upon the theory of felony murder must be reversed.

It has been held, in the Ninth Circuit, that constitutionally inadequate notice of the crimes of which a defendant might be convicted is a structural error, requiring reversal without an examination of prejudice. (*Sheppard v. Rees, supra*, 909 F.2d at pp. 1237-1238; *Gray v. Raines, supra*, 662 F.2d at p. 572.) The error is structural because it involves a fundamental right of notice and adequate opportunity to defend oneself at trial. The defense did not have adequate notice of the charge and therefore no opportunity to rebut the charge of felony murder. The error here goes to the heart of the fact-finding process.

Moreover, if the elements of malice murder and felony-murder are the same in California, then malice is an element of felony-murder, and the California felony-murder rule violates *Sandstrom*m, *supra*, and *Mullaney*, *supra*, in that the required element of malice is unconstitutionally presumed. If that is true, the court failed to instruct the jurors that they must find malice in order to convict of felony-murder. Failure to do so amounts to an unconstitutional conclusive presumption. (*Carella v. California* (1989) 491 U.S. 263; *People v. Figueroa, supra*, 41 Cal.3d at pp. 723-741.)

Therefore, appellant's the convictions of first degree murder as to Counts I and II must be reversed.

* * * * *

PENALTY PHASE ERRORS

VII.

THE TRIAL ERRED IN ADMITTING AND INSTRUCTING UPON EVIDENCE IN AGGRAVATION THAT VIOLATED APPELLANT'S RIGHT TO A RELIABLE PENALTY DETERMINATION AND OTHER FUNDAMENTAL CONSTITUTIONAL RIGHTS, REQUIRING REVERSAL OF THE DEATH JUDGMENT.

A. Introduction.

During the penalty phase of this case, the prosecution introduced in aggravation what it claimed was evidence of thirteen previously unadjudicated acts of force or violence under the authority of section 190.3(b). (See 8 RT 1974.)[25/]

It is argued as a general matter below that reliance on such unadjudicated criminal activity during the sentencing phase deprived appellant of his constitutional rights. Even assuming a jury may properly rely upon this type of evidence in determining penalty, the jury's reliance on the unadjudicated criminal activity in this case was inappropriate given the misleading, unreliable, and inflammatory nature of the evidence. Appellant contends that this evidence, however, was insufficient to establish an act of

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25. The prosecutor stated that all of the aggravating evidence, including appellant's prior convictions was being admitted under factor (b), prior violent conduct and not as prior convictions. (7 RT 1733.)

violence under factor (b). Furthermore, incomplete and misleading jury instructions allowed the jury to rely on the incident as an aggravating factor without finding that it constituted criminal activity involving violence under factor (b). These errors violated appellant's state statutory rights and his rights under both state and federal constitutions to due process, a fair trial and a reliable penalty verdict. (*Cal. Const.*, art. I, §§ 15, 16, 17; *U.S. Const.*, 5th, 6th, 8th, and 14th Amends.)

B. The San Quentin Incidents

1. Fight With Inmate-Choke-hold

Officer Williams testified that while working in the gun rail for East Block he observed appellant and another inmate where playfully slapping each other and eventually the two began wrestling and punching each other on the ground. (7 RT 1776-1780.)

2. Battery on Inmate

This was the incident testified to by officer Javaras that in 1993, he observed appellant walk up to another inmate on the yard and strike the inmate in the face. The two then began fighting until the guards broke it up. (7 RT 1781-1785.)

3. Battery on Correctional Officer-Throwing Food

This was described by officer Lawson where appellant threw his food tray at his cell bars and some of the food hit her. (7 RT 1787-1789.)

4. Fight With Inmate-Basketball Game

This incident by officer Larry as a physical basketball game that got out of hand. The officer testified that during the basketball game appellant and another inmate got into a heated argument and after a minute or two they began fighting. The officer labeled appellant the aggressor in the incident because appellant supposedly charged the other inmate first. (7 RT 1790-1794.)

Appellant contends that none of these incidents were sufficient to be admissible as aggravating evidence under Penal Code section 190.3(b) and therefore should not have been admitted for the jury's consideration.

C. County Jail Incidents

There were three incidents testified to that allegedly qualified as other acts committed by force or violence. All three were alleged as possession of weapons in custody. Two involved the alleged possession of shanks (pen shank and typewriter rod shank) while appellant was housed at county jail, and the other was described as possession of urine, where an

officer said appellant was found in possession of a baggy containing urine. (7 RT 1805-1810.)

D. All Of These Acts Were Insufficient Proof of the Commission of An Actual Crime And Therefore Should Have Been Excluded As Criminal Activity Under Section 190.3(b).

Evidence of criminal activity under section 190.3, factor (b) must be limited to conduct that demonstrates the commission of a violation of a penal statute. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [construing 1977 death penalty statute]; *People v. Boyd* (1985) 38 Cal.3d 762, 776-778; *People v. Belmontes* (1988) 45 Cal.3d 744, 808.) The prosecution must establish each element of the offense beyond a reasonable doubt. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) Factor (b) evidence must constitute a crime, and that crime must include a requisite degree of force or violence. (*People v. Boyd*, 38 Cal.3d at 776-777.) Such evidence may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt. (*People v. Clair* (1992) 2 Cal.4th 629, 672-73.) It is the responsibility of the trial court to determine that the evidence meets this high standard of proof. (*People v. Boyd*, 38 Cal.3d at 778 (citing *People v. Johnson*, 26 Cal.3d 557, 576 (1980) (quoting *Jackson v. Virginia,* 443 U.S. at 318-319). A trial

court's decision to admit evidence pursuant to factor (b) is reviewable for abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

None of the San Quentin incidents described an act consisting of a "willful and unlawful use of force or violence upon the person of another", which is required for battery under Penal Code section 242. The "choke-hold" incident was best characterized as horse-play between two individuals. The other two incidents on the yard apparently involve mutual combat between the two inmates. In another incident appellant got into an argument with the other inmate that culminated in a fight. In the other incident the guard described appellant walking up to an inmate and punching him. However, the guard had no idea who or what started the altercations and therefore no evidence that the fight was unprovoked. In *People v. Young* (2005) 34 Cal.4th 1149, this Court found sufficient evidence of a battery where the evidence was that the defendant unprovoked, approached an inmate in the holding cell and punched him in the face, causing him to bleed from his nose and mouth. (*Id.*, at p. 1211.) In this instance the evidence presented failed to support the claim of battery.

Finally, the incident with the food tray also failed to support a claim of battery. According to the officer appellant threw his food tray at his cell

bars and some food hit her. That act hardly qualified as an unlawful use of force against another person.

Similarly, the incidents that occurred while appellant was in county jail were claimed to have been the criminal act of possession of a weapon presumably in violation of section 4574[26], but those incidents also failed to

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26. Penal Code Section 4574 states:

"Bringing or sending into, or possessing tear gas or specified weapons in place where prisoners are in custody; Punishment

(a) Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give such authorization, any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison or prison road camp or prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the state prison are located under the custody of prison officials, officers or employees, or any jail or any county road camp in this state, or within the grounds belonging or adjacent to any such institution, any firearms, deadly weapons, or explosives, and any person who, while lawfully confined in a jail or county road camp possesses therein any firearm, deadly weapon, explosive, tear gas or tear gas weapon, is guilty of a felony and punishable by imprisonment in the state prison for two, three, or four years.

(b) Except as provided in subdivision (a), any person who knowingly brings or sends into such places any tear gas or tear gas weapons which results in the release of such tear gas or use of such weapon is guilty of a felony and punishable by

(continued...)

constitute a crime for purposes of section 190.3(b). While the possession of a baggy of urine might have been disgusting, urine is not a weapon and certainly possession of it is not a criminal offense. Moreover, there was proof of only one incident where appellant possibly possessed a shank and that was the typewriter rod in his legal papers. The other alleged weapon was found in the conduit outside of appellant's cell where anyone could have placed the weapon. (7 RT 1800-1801.) In the absence of any evidence—as opposed to bald speculation and conjecture– regarding who placed the weapon in the conduit, the evidence that appellant purportedly possessed the shank, it was improper to admit this evidence as "criminal activity"committed by appellant, and is inadmissible as aggravating evidence for that reason alone. Moreover, such mere possession does not by itself rise to the level of an actual or implied threat of force or violence.

26.(...continued)
imprisonment in the state prison for two, three, or four years.

(c) Except as provided in subdivision (a), any person who knowingly brings or sends into such places any tear gas or tear gas weapons is guilty of a misdemeanor and punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($ 1,000), or by both such fine and imprisonment."

(See, e.g., *People v. Cox* (2003) 30 Cal.4th 916, 973.) Thus, its use as an aggravating factor was an overbroad application of factor (b) which impermissibly "inject[ed] into the individualized sentencing determination the possibility of 'randomness'. . . ." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 477, citation omitted.) It also "invited 'the jury to be influenced by a speculative or improper consideration'. . . ." (*Ibid.*, citations omitted.) Indeed, a rule permitting an aggravating factor to be found in any instance involving mere possession of a weapon would invite the jury to speculate improperly about situations where it may or may not be used.

In summary, none of the acts discussed constituted criminal activity for purposes of section 190.3(b) and should have been excluded. Certainly there was insufficient proof of criminal activity beyond a reasonable doubt.

Assuming, arguendo, that all of this evidence was admissible under factor (b), the trial court removed from the jurors' consideration the issue of whether that evidence proved the commission of a crime by instructing them that appellant's conduct constituted "criminal acts" or "criminal activity."

The jury was instructed with CALJIC No. 8.87 (1989 revision), as follows:

> "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts

or activity: 1977, robbery with a weapon, two counts, Colorado; 1977, murder, kidnapping, robbery, Kansas; 1979, escape with gun, robbery with gun, Colorado; 1991, fight with inmate, choke hold; 1993, battery with inmate; 1993 battery on correctional officer, throwing food; 1993, fight with inmate, basketball game; 1996, possession of weapon in custody, urine; 1998 possession of weapon in custody, typewriter shank; 1998 possession of weapon in custody, pen shank, which involved the express or implied use of force or violence or the threat of force or violence. Before a jury may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance."

"It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." (7 RT 1974-1975 [oral rendition].)

This instruction improperly decided against appellant the issue of whether or not his purported criminal acts violated any penal statute under factor (b), and thereby deprived him of a jury determination of whether the threat evidence was properly to be considered as aggravation. As noted above, before prosecution evidence may be considered in aggravation under factor (b), the jurors must find beyond a reasonable doubt that the defendant's conduct constituted commission of an actual crime. (*People v. Phillips, supra*, 41 Cal.3d at pp. 65-72; *People v. Robertson* (1982) 33

Cal.3d 21, 53-55.) Thus, the jury must find not only that the defendant committed a particular act and that it involved the express or implied threat to use force or violence (§ 190.3, factor (b)), but also that the conduct "violate[d] a penal statute." (*People v. Wright* (1990) 52 Cal.3d 367, 425, original emphasis.)

Appellant had a due process right to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. (*U.S. Const.*, 14th Amend.; see *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) The instruction here violated that constitutional mandate, as well as appellant's Sixth and Fourteenth Amendment due process and jury trial rights (see *In re Winship* (1970) 317 U.S. 358, 364 [due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"]), and his Eighth and Fourteenth Amendment right to a reliable penalty determination, by effectively creating a mandatory presumption that the threat evidence was in fact criminal activity. By thrice using the term "such criminal acts" (or "activity"), the instruction plainly implied that the threats against a school officer were in fact crimes and that the jurors did not have to decide that question.

The only question the jurors were told to decide, beyond a reasonable doubt, was whether "the defendant, did in fact commit such criminal acts." Thus, the second sentence of the instruction focused the jurors on deciding whether appellant had "committed" the acts in question without also requiring that they find beyond a reasonable doubt that those acts were in fact criminal ones. Rather, once the jury found that appellant had committed those acts, they were to presume that they were "criminal acts" or "criminal activity" and apply the aggravating factor against appellant. (See *Francis v. Franklin* (1985) 471 U.S. 307, 314 ["A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts."]; *People v. Figueroa* (1986) 41 Cal.3d 714, 734 [instruction that promissory notes were "securities" under the relevant law was tantamount to a directed verdict on that offense]; *People v. Vanegas* (2004) 115 Cal.App.4th 592, 598-602 [instruction requiring the jury to find "dangerousness to human life" upon proof of violation of basic speed law is unconstitutional].).) This "foreclosed independent jury consideration" of all of the required elements of the aggravating factor. (*Carella v. California* (1989) 491 U.S. 263, 266.)

"The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty

verdict but which nevertheless have the effect of doing so by eliminating other relevant considerations if the jury finds one fact to be true.'" (*People v. Figueroa, supra,* 41 Cal.3d at p. 724, quoting *United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144.) That was the precise situation here.

As shown above, this Court has repeatedly found evidence of non-criminal acts inadmissible under factor (b). However, the faulty jury instruction precluded any defense to the allegation that appellant's alleged offenses were in fact "criminal acts" or "criminal activity," and directed the jury to infer that those allegations were true once it was inevitably proved that appellant had committed them. The instruction therefore improperly removed the factual issue of "criminal activity" from the jury's consideration in violation of appellant's statutory and constitutional due process and jury-trial rights. (See *Figueroa, supra*, 41 Cal.3d at pp. 725-726.) The resultant improper finding and consideration of a statutory aggravating factor denied appellant his constitutional right to a reliable penalty determination and requires reversal of the death judgment. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 590; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Moreover, the mere possibility that an instruction created a mandatory presumption is federal constitutional error. (*Sandstrom v.*

Montana, supra, 442 U.S. 510, 519.) Because the instructional error violated due process and the Eighth Amendment, at a minimum it requires reversal unless it can be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Brown* (1988) 46 Cal.3d 432, 448.) The People cannot meet this burden with respect to either the constitutionally-erroneous instruction or the constitutionally-improper consideration by the jury of appellant's petty offenses. The death judgment must therefore be reversed.

Reversal of the death judgment is required when, as here, the jury is permitted to consider aggravating circumstances that are materially inaccurate because such errors undermine the strong Eighth Amendment requirement of heightened reliability in capital sentencing. (*Johnson v. Mississippi, supra*, 486 U.S. at p. 590.) Appellant's penalty jury indisputably was presented with erroneous aggravating evidence of alleged criminal conduct. Evidence of unadjudicated acts of violence are admissible at a penalty trial because they tend "to show defendant's propensity for violence." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) The purpose of the statutory exclusion of non-violent unadjudicated conduct is to prevent the jury from hearing evidence of conduct which,

although criminal, is not of a type which should influence a life or death decision. (*People v. Boyd, supra*, 38 Cal.3d at p. 776.)

The instructional error also permitted the jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens, supra,* 462 U.S. at p. 885), likewise rendering the death verdict unreliable in violation of Eighth Amendment standards and requiring reversal (*Johnson v. Mississippi, supra*, 486 U.S. at p. 585).

* * * * *

VIII.

THE TRIAL COURT ERRED IN FAILING TO ENSURE IMPARTIALITY AND PARITY OF INSTRUCTIONS BETWEEN CALJIC NOS. 8.85 AND 8.87 REGARDING JURY NON-UNANIMITY THUS SKEWING THE INSTRUCTIONS TOWARD A DEATH VERDICT AND VIOLATING APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION.

"There should be absolute impartiality as between the People and the defendant in the matter of instructions . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) Lack of parity skews the proceeding toward death thus promoting the random and arbitrary imposition of death in violation of appellant's constitutional right to be free from cruel and unusual punishment, to due process, and to equal protection. (*U.S. Const. Amends.* VIII, XIV; *Sochor v. Florida* (1992) 504 U.S. 527; *Gregg v. Georgia* (1976) 428 U.S. 153.)

CALJIC No. 8.85 which was given in this case instructed the jury on the factors it could consider in weighing aggravating and mitigating evidence when determining the life or death of appellant.[27] (CT 2115-2116.) CALJIC No. 8.87 given in modified form, instructed the jury on the

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27. This instruction mirrors the relevant portion of Penal Code section 190.3.

burden of proof required for "other criminal activity" evidence. Paragraph two of this instruction specifically told the jury that "it is not necessary for all jurors to agree" as to other unadjudicated criminal activity. (CT 2118.) This states the law as interpreted by this Court, as does the comparable rule regarding mitigation. (*People v. Caro* (1988) 46 Cal.3d 1035, 1057, overruled on another ground *People v. Whitt* (1990) 51 Cal.3d 620, 657 fn. 29.); *People v. Breaux* (1991) 1 Cal.4th 281, 314. However, because *Breaux* precludes the defendant from obtaining a specific non-unanimity instruction as to mitigation, the prosecution should not be permitted to obtain such an instruction in the specific context of other crimes aggravation. Particularly where, the United States Supreme Court has not resolved the issue of whether juror unanimity is required for unadjudicated crimes.

It is the trial court's duty to see that jurors are adequately informed on the law. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490-491.) The trial court also has a duty to refrain from instructing on principles of law that have the effect of confusing the jury. (*People v. Satchell* (1971) 6 Cal.3d 28, 33 fn. 10.) Thus, the language that "it is not necessary for all jurors to agree" should be deleted from CALJIC No. 8.87 *sua sponte*, or alternatively, the same non-unanimity language should be added to the

instructions defining the burden of proof regarding mitigation evidence (CALJIC Nos. 8.85 and 8.88) so that the instructions are symmetrical.

Although appellant did not object, the error is still preserved for appeal since the error consists of a breach of the trial court's fundamental instructional duty. (See *People v. Hernandez* (1988) 47 Cal.3d 315, 353; *People v. Harris* (1981) 28 Cal.3d 935, 956; *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249 [if a defendant's substantial rights will be affected by the asserted instructional error, the court may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court.].)

* * * * *

IX.

CALJIC NO. 8.88, AS GIVEN, VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Introduction and Procedural Summary

The jury was instructed with the 1989 revision of CALJIC No. 8.88 which stated:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on [the] [each] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing

> the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom." (CALJIC 8.88 1989 rev.) (8 RT 1975-1977.)

The foregoing instruction violated appellant's substantial rights under the Fifth, Sixth, Eight and Fourteenth Amendments to the United Stated Constitution and the corresponding sections of the California Constitution. The instruction was vague and imprecise in that it failed to accurately describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. Further, the instruction contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were "substantial" in comparison to mitigating circumstances. The instruction was therefore, improperly

weighted toward death. In addition, the instruction effectively informed the jury that a single mitigating factor was not sufficient to prevent imposition of the death penalty. Moreover, the instruction's definition of mitigating circumstances was defective and failed to inform the jury of the full scope of evidence which may be considered in mitigation. The instruction also mislead the jury by referring to "life without parole" rather than "life without the possibility of parole" and then failed to provide the jury with a definition of this technical, legal term. Because the infirmities of the instruction affected appellant's substantial constitutional rights, reversal of the death judgment is required.[28/]

1. CALJIC No. 8.88, As Given, Improperly Reduced the Prosecution's Burden of Proof Below the Level Required By Penal Code section 190.3.

California Penal Code section 190.3 states that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of

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28. Appellant acknowledges that similar arguments have been rejected by the Court in the past. (See e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 124, *People v. Ochoa* (1998) 19 Cal.4th 353, 457-458; *People v. Duncan* (1991) 53 Cal.3d 955, 978; *People v. Berryman* (1993) 6 Cal.4th 1048, 1099-1100, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 820.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and that the questions raised herein should therefore be reconsidered. In addition, appellant must presents these issues in order to preserve it for federal review.

confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (*Pen. Code* § 190.3.)[29] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*Boyde v. California* (1990) 494 U.S. 370, 377.)

However, this mandatory language is not included in CALJIC No. 8.88. Instead, the instruction informs the jury merely that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. In *People v. Duncan*, this Court held that this formulation was permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating (sic)." (*People v. Duncan, supra*, 53 Cal.3d at p. 978.) However, this is simply not so. The word "substantial" means only "of or having substance." (Webster's New World Dict. (3d College ed. 1989) p. 1336.) Although the word carries with it connotations

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29. The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (*People v. Brown* (1985) 40 Cal.3d 512, 544, n.17.)

"considerable," "ample," and "large" (*Ibid.*), it neither means nor suggests "outweigh." The instruction therefore fails to conform to the requirements of Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed bu mitigating circumstances. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violates the Fourteenth Amendment. (*Hicks v. Oklahoma, supra*, 447 U.S. at pp. 346-347.)

In addition, appellant submits that the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which misdescribes the burden of proof, and thus, "vitiates all the jury's findings," can never be shown to be harmless. (*Sullivan v. Louisiana, supra*, 508 U.S. 275, 281, emphasis in original.) Appellant respectfully requests that this court reconsider this issue.

2. CALJIC 8.88, As Given, Incorrectly Described the Weighing Process Applicable to Aggravating and Mitigating Evidence Under California Law.

A trial court has a *sua sponte* duty to correctly instruct the jury on the general principles of law governing the case before it. (*People v. Hernandez, supra*, 47 Cal.3d at p. 353; *People v. Avalos* (1984) 37 Cal.3d

216, 229.) A trial court's instructions should be correctly phrased and not misleading. (*People v. Forte* (1988) 204 Cal.App.3d 1317, 1323.)

Here, CALJIC No. 8.88 mislead the jury not only regarding the weighing process required by California law, but also in a number of other respects. For example, the instruction was defective because it improperly suggested that a quantitative comparison of the "totality" of mitigating factors was required. This Court has repeatedly indicated that one mitigating factor, standing alone, may be sufficient to outweigh all other factors. (*People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5; *People v. Hayes* (1990) 52 Cal.3d 577, 642; *People v. Cooper* (1991) 53 Cal.3d 771, 845.) The language of CALJIC No. 8.88 not only failed to communicate this important concept to the jury but also suggested that the jury was required to consider the "totality" of the mitigating circumstances and balance them against the "totality" of the aggravating circumstances. This was prejudicial because, in the absence of qualitative considerations, this quantitative formula could weigh the scales in favor of a judgment of death, thereby depriving appellant of the individualized consideration guaranteed him by the Eighth Amendment to the United States Constitution. (*Stringer v. Black* (1992) 503 U.S. 222, 231-232 [112 S.Ct. 1130, 117 L.Ed.2d 367].)

Further, although CALJIC No. 8.88 instructed the jury not to engage in "a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them," it is difficult to believe that the jury would have interpreted an instruction to consider "the totality of the aggravating circumstances with the totality of the mitigating circumstances" as anything other than a specific direction to mechanically sum of these factors and weigh them against each other in the aggregate. The term "totality" plainly implies a quantitative weighing process rather than a qualitative analysis.

In addition, as previously noted, the last sentence of CALJIC No. 8.88 quoted above states "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." This language further implies a mechanical, quantitative weighing process and undermines the concept that one mitigating factor can outweigh all of the aggravating factors and warrant a sentence of life without the possibility of parole.

Moreover, CALJIC No. 8.88 is death oriented because it tells the jury what warrants death but fails to inform them what warrants life without the possibility of parole. The jury was never told that one mitigating factor

can be deemed sufficient to outweigh all the aggravating factors no matter how "substantial" those factors are. The instruction reinforces a notion of quantity and not quality of the factors involved. As previously stated, this Court has repeatedly indicated that one mitigating factor may be found sufficient to outweigh a number of aggravating factors and permit the jury to return a judgment of life without parole, rather than death. (*People v. Grant, supra*, 45 Cal.3d at p. 857, fn. 5; *People v. Hayes, supra*, 52 Cal.3d at p. 642; *People v. Cooper, supra*, 53 Cal.3d at p. 845.) However, the misleading language if CALJIC 8.88 failed to effectively communicate this rule to the jury in appellant's case.

The instruction was also defective in its description of mitigation. As noted above, the instruction stated that "[a] mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." This definition of mitigation was insufficient to inform the jury of the full scope of evidence that must be considered in determining the appropriate sentence and was reasonably likely to be understood as a limitation on mitigating evidence.

This Court's assumption that "mitigating" is a commonly understood term necessitating no further definition is refuted by empirical evidence. The same empirical evidence indicates that one of the primary misconceptions harbored by jurors concerning mitigation is that it relates only to the circumstances of the crime. (See *Haney & Lynch, Comprehending Life and Death Matters; A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 422-424; *Haney et al, Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) J. Soc. Iss., vol. 50, No.2.) The definition of mitigation given in this case, with its focus limited to "the crime in question," was thus substantially likely to have been understood as limiting the jury's consideration solely to the circumstances of the crime, in violation of the state and federal Constitutions. Numerous authorities have noted the importance of mitigation evidence which is wholly unrelated to the crime, (See e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 398 [defendant's childhood "filled with abuse and deprivation, or reality that he was 'borderline mentally retarded'" may influence jury's determination of moral culpability]; *Lambright V. Stewart* (9th Cir. 2001) 241 F.3d 1201, 1208 [evidence of mental disabilities or a tragic childhood can affect a sentencing

determination even in the most savage case."]; on impact of mental retardation and other factors, see generally Garvey, Aggravation and Mitigation in Capital Cases; What do Jurors Think? 98 Columbia L.Rev. 1538.) The trial court's failure to provide the jury with an adequate understanding of this critical concept undermined the reliability of the ensuing death judgment, failed to properly channel the jury's decision-making process, and effectively eliminated from consideration relevant mitigating evidence. (U.S. Const. Amends. V, VI, VIII, XIV; *Hitchcock* v. *Dugger*, *supra*, 481 U.S. at pp. 398-399; but see *People* v. *Welch* (1999) 20 Cal.4th 701, 722.)

B. <u>The Error Requires Reversal</u>

Reversal *per se* is mandated if the error necessarily rendered the trial fundamentally unfair, if it aborted the basic trial process, or denied it altogether (*Rose v. Clark, supra,* 478 U.S. at pp. 577-578), thereby permitting a presumption of prejudice (*Bank of Nova Scotia v. United States* (1988) 487 U.S. 250 [108 S.Ct. 2369; 101 L.Ed.2d 228]). Otherwise, the *Chapman* standard of review applies. (*People v. Odle* (1988) 45 Cal.3d 386, 414-415, 247.) Instructional error must be analyzed in terms of its potential impact on the actual trial. (*Id.*, at p. 413.) An appellant court may ascertain whether the defendant's substantial rights were affected by instructional

error and, if so, may consider the merits and reverse the conviction if the error occurred, even though the defendant failed to object in the trial court. (*People v. Anderson*, *supra*, 26 Cal.App.4th at p. 1249.) Here, trial counsel did not object to the giving of CALJIC No. 8.88, however, this Court still has a duty to determine whether CALJIC No. 8.88, as given in this case affected appellant's substantial rights.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605 [98 S.Ct. 2954, 57 L.Ed.2d 973].) The numerous errors in this instruction improperly impaired, to appellant's disadvantage, the jury's assessment as to whether life without possibility of parole or death was the proper verdict to reach in this case. It cannot be established beyond a reasonable doubt that these errors did not contribute to the judgment of death. (*Chapman v. California, supra*, 386 U.S. at p. 24.) It certainly cannot be established that these errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Accordingly the death judgment must be reversed.

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X.

THE FAILURE TO GIVE APPELLANT'S SPECIAL PENALTY PHASE INSTRUCTION THAT THE JURY COULD CONSIDER THE FACT THAT HIS ACCOMPLICE A MORE LENIENT SENTENCE AS A MITIGATING FACTOR VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant submitted a special instruction during the penalty phase which would have told the jury that it could consider the fact that his accomplice received a more lenient sentence as a mitigating factor. The trial court said it would consider giving the instruction but thought this subject was covered in CALJIC No. 8.85 which refers to whether or not appellant was an accomplice and whether his participation in the commission of the crimes was minor as a mitigating factor. (7 RT 1737-1738.) However, when the instructions were read to the jury, the court did not give the requested instruction and therefore rejected it. (7 RT 1972-1974.)

Appellant's proposed instruction regarding leniency for the accomplice was a proper pinpoint instruction, i.e., an instruction that pinpoints a legal theory of the defense." For example, a court at the guilt phase upon request must give an instruction that "'pinpoint[s]' the crux of a defendant's case, such as mistaken identification or alibi." (*People v.*

Adrian (1982) 135 Cal.App.3d 335, 337.) This is so even though the general instructions "sufficiently encompass" those theories of defense to relieve the court of any duty to instruct *sua sponte* on them. (See, e.g., *People v. Freeman* (1978) 22 Cal.3d 434, 438 [no *sua sponte* duty for the court to instruct on alibi, which would have been "redundant" since "the jury was instructed to acquit defendant if the prosecution failed to establish his guilt beyond a reasonable doubt"].)

A defendant's pinpoint instruction at the penalty phase is proper where "the instruction ... assist[s] the jury in comprehending the legal 'crux' of defendant's case [by] illuminating the legal standards at issue." (*People v. Howard* (1988) 44 Cal.3d 375, 442.) Here, the proffered instruction would have illuminated the legal standard for the penalty decision by providing straightforward advice that the jury could properly factor the punishment given to an equally guilty accomplice – the crux of appellant's mitigation case—into its penalty determination.

During his penalty phase closing argument appellant continued his defense theme that Terry Avery had lied, that there was no corroboration of her testimony, and that she did so in order to obtain leniency from prosecution as she ultimately did. (8 RT 1969-1970.) Despite her participation in the crimes, Avery was an accomplice and received complete

immunity for the crimes in California and Kansas. Appellant's proposed instruction would have assisted the jury precisely because consideration of Avery's punishment was not part of the general instructions that were given here.

The trial court believed the fact of the accomplice leniency was encompassed in the language that referred to whether or not appellant was an accomplice and whether his participation in the commission of the crimes was minor was a mitigating factor. However the jury's consideration of his participation was not the focus of his proposed instruction. The instruction given only informed the jury that it could consider appellant's culpability as a mitigating factor, nor was his point made by the catch-all instruction of factor (j)[30] which told the jury to consider any other extenuating factors. Appellant's instruction specifically told the jury that it could consider the accomplice culpability and the punishment she received.

In capital cases, the actual death verdict is a highly "moral and . . . not factual" determination. (*People v. Brown* (2004) 33 Cal.4th 382, 400; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) At the penalty phase of a

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30. Factor (c), prior convictions, was excluded from the instructions given to appellant's jury because it was not a factor for consideration when the offenses were committed. The remaining factors were re-lettered.

capital trial, one circumstance the jury may consider in mitigation of the offense is the relative culpability and participation levels of the principals. (*Pen. Code*, sec. 190.3, subd. (k); *People v. Malone* (1989) 47 Cal.3d 1, 58 ["Because this was a two-person crime and much of the defense was directed to placing primary responsibility on Crenshaw, defendant's relative culpability was relevant."]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738] [relative culpability is a "critical issue" in the penalty phase of a capital trial].)

The Due Process Clause of the Fourteenth Amendment entitles a defendant to present evidence relevant to rebut the prosecution's case for death. For instance, even if a defendant's parole ineligibility would not be constitutionally relevant mitigating evidence under the minimum Eighth Amendment standards, a defendant would have an independent due process right to present, and have the jury consider, such evidence if the prosecution relies on the defendant's future dangerousness as a reason for imposing death. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163; accord *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, n.1 [same – adjustment to jail].) Pursuant to this principle, if the prosecution relies on the defendant's role in the charged crime to urge the jury to vote for death, the defendant has a due process right to present and have the jury consider anything that

might rebut or undermine the prosecution's theory. (See, e.g., *Green v. Georgia*, supra, 442 U.S. at p. 97 [evidence that co-participant was the only actual killer "was highly relevant to a critical issue in the punishment phase" in part because prosecutor argued defendant was an actual killer; exclusion from penalty phase violated federal due process]; *Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, 1440-1441 [polygraph test to state's chief witness was relevant to raise doubt as to prosecution's theory regarding defendant's role in crimes, exclusion at penalty phase violated federal due process right to present relevant mitigating evidence]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-623 [where defendant's role in offense, or relative culpability, is relevant mitigating factor under state law, and where prosecutor makes it relevant through argument that defendant was ringleader, defendant entitled to present, and have jury consider, evidence relevant to that issue under the Eighth Amendment and the Due Process Clause].)

Appellant's proposed instruction was proper for the jury's consideration . The trial court's refusal to give the instruction not only was error under state law, it also violated appellant's federal constitutional rights to due process, equal protection, a fair trial by jury and a reliable and non-arbitrary penalty determination. (*U.S. Const.*, Amends. VI, VIII and

XIV.) By refusing to specifically instruct that the jury could consider the leniency given to the accomplice, the trial court failed to give guidance to the jury with respect to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869; 71 L.Ed. 2d 1; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.)

* * * * *

XI.

THE FAILURE TO INSTRUCT THE JURY ON THE PRESUMPTION OF LIFE VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In non-capital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is basic component of a fair trial. (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. (Note, *The Presumption of Life; A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale. L.J. 352; cf. *Delo v. Lashley* (1993) 507 U.S. 272.) Appellant submits that the court's failure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishment, and his right to equal protection under the Fourteenth Amendment.

In *People v. Arias* (1996) 13 Cal.4th 92, this Court rejected a similar argument. Appellant respectfully requests reconsideration of this contention, as he submits that *Arias* was wrongly decided on this point.

Appellant must also raise this issue in order to preserve it for federal review. In *Arias*, this Court rejected the contention that a "presumption of life" instruction must be given on the grounds that the United States Supreme Court decisions have held that as long as a state's law properly limits death eligibility, "the state may otherwise structure the penalty determination as it sees fit." (*Id.* at p. 190.)

However, as appellant argues, *infra*, California's death penalty scheme does not properly limit death eligibility. Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to narrow the class of death-eligible murderers, fails to require written findings regarding aggravating factors, and fails to require proportionality review. Accordingly, appellant submits that a presumption of life instruction is constitutionally required at the penalty phase, and in its absence, reversal of the penalty judgment is required.

* * * * *

XII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime –

even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing

courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo, supra*, 6 Cal.4th at p. 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained thirteen special circumstances[31/] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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31. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-four.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other

categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[32/] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required

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32. The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs

Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a)

other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[33/] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[34/] or having had a "hatred of religion,"[35/] or threatened witnesses after his arrest,[36/] or disposed of the victim's body in a manner that precluded its recovery[37/].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967,

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33. *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

34. *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

35. *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S.Ct. 3040 (1992).

36. *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S.Ct. 498.

37. *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.*, 496 U.S. 931 (1990).

987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[38] or that the defendant killed with a single execution-style wound.[39]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest,

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38. See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

39. See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

sexual gratification)[40] or that the defendant killed the victim without any motive at all.[41]

c. That the defendant killed the victim in cold blood[42] or that the defendant killed the victim during a savage frenzy.[43]

d. That the defendant engaged in a cover-up to conceal his crime[44] or that the defendant did not engage in a cover-up and so must have been proud of it.[45]

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40. See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

41. See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

42.See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

43.See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

44. See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

45. See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant

(continued...)

e. That the defendant made the victim endure the terror of anticipating a violent death[46] or that the defendant killed instantly without any warning.[47]

f. That the victim had children[48] or that the victim had not yet had a chance to have children.[49]

g. That the victim struggled prior to death[50] or that the victim did not struggle.[51]

45.(...continued)
failed to engage in a cover-up).

46. See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

42. See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

48. See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

49. See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

50. See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

51. See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

h. That the defendant had a prior relationship with the victim[52/] or that the victim was a complete stranger to the defendant.[53/]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[54/]

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52. See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

53. See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

54. See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, (continued...)

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[55]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[56]

54.(...continued)
No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

55. See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

56. See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[57]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[58]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable

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57. See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

58. See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[59/]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

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59. The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not

permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh

mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 124 S.Ct. 2531 [hereinafter *Blakely*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* 536 U.S. at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the

functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant `statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

a. *In the Wake of Apprendi, Ring, and Blakely, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[60/] Only

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60. See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev.

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating

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60.(...continued)
Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a©) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[61/] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (RT 1976),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[62/] These factual determinations

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61. This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

62. In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted)

(continued...)

are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[63]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at 263.) This holding is

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62.(...continued)
we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460)

63. This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

based on a truncated view of California law. As section 190, subd. (a),[64] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorised by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Append*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only

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64. Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

in a formal sense." (*Ring, supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[65] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[66] There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which

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65. Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

66. Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.) The Court has repeatedly sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30

Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan*, *supra*, 53 Cal.3d at pp. 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord, *State v. Whitfield* (Mo. 2003) 107

S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[67])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Append*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Append* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Append* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124

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67. See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

S.Ct. at 2538.) Thus, under *Append*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[68/]

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68. In *People v. Griffin* (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [hereinafter *Leatherman*], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (*Griffin*, *supra*, 33 Cal.4th at 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" (*Leatherman*, *supra*, 532 U.S. at 429.)

This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the

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The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural

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68.(...continued)
amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *Id.*, 532 U.S. at 437, 440. *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

protections. (*Prieto*, 30 Cal.4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring*, *supra*, 536 U.S. at 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death

penalty is unique in both its severity and its finality"].)[69/] As the high court stated in *Ring*, *supra*, 536 U.S. at 608, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to

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69. The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at 732 (emphasis added).)

their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. *The Requirements of Jury Agreement and Unanimity*

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[70/] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra*; *Blakely, supra.*)

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70. See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].[71]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 732;[72] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578,

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71. In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

72. The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the

(continued...)

584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 536 U.S. at 609).[73] See section D, *post*.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[74] To apply the requirement to findings carrying a maximum punishment of one year in the

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72.(...continued)
accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at 731-732.)

73. Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

74. The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding*

from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Richardson*, *supra*, 526 U.S. at 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are

prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of

the Fifth and Fourteenth Amendment. (*In re Winship*, *supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*,

supra, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity

of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.)

Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing

proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and

normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth

and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less

than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions

affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator.

A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra.*) The reason is obvious. Without an instruction on the burden of proof, jurors may not use

the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[75] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana, supra.*)

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75. See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

6. California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at 543; *Gregg v. Georgia*, *supra*, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental

that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 269.)[76/] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth

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76. A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the

aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[77]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under

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77. See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that

reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris supra*, 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from

outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316 fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537©).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia, supra,* 428 U.S. at p. 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259, 96 S.Ct. 2960, 49 L.Ed.2d 913.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[78/]

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78. See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La.

(continued...)

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher

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78.(...continued)
Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant, specifically fights with other inmates, possession of purported weapons in county jail, a fight during a basketball game, possession of a piss bomb, throwing food at an officer and devoted a portion of its closing argument to arguing these alleged offenses. (RT 1776-1818, 1961-1964.)

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a

reasonable doubt by a jury acting as a collective entity. (See C.1, *ante*.) The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio, supra*, 438 U.S. 586.)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" were relevant solely as possible mitigators (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1184; *People v. Edelbacher*, *supra,* 47 Cal.3d at p. 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant*

v. Stephens (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black*, *supra*, 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating

relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California, supra,* 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra,* 455 U.S. at 112.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California,*

supra, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olives* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the

classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olives*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[79] as in *Snow*,[80] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of

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79. "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at 275; emphasis added.)

80. "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; emphasis added.)

giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C. *ante*.) These

discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp*

(1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal.3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that

fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at 994; *Monge v. California*, *supra*, 524 U.S. at 732.)[81] The qualitative difference between a

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81. The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or

(continued...)

prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating

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81.(...continued)
innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at 731-732.)

and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore, supra,* 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer

permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*People v. Allen*, *supra*, 42 Cal.3d at 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[82/]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual

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82. Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at 609.)

punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United

States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.)[83/]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied

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83. These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100; *Atkins v. Virginia*, *supra*, 536 U.S. at 325.) It prohibits the use of forms of

punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra.*) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113,

227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[84/] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright, supra*; *Atkins v. Virginia*, *supra*.)

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84. Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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XI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[85/] Reversal is required unless it can be said that

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85. Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Appellant's guilt phase trial was rendered ineffective by appellant's inability to obtain the necessary ancillary services needed to adequately represent himself. The trial court's singular error in denying his motion for the appointment of co-counsel based on the restrictions in the local appointment contract, and by refusing to restore his *pro per* privileges at the jail so that he could properly represent himself, resulted in effectively denying him is right of self-representation, impermissibly interfered with his right to effective assistance of counsel, created a unjustifiable conflict of interest and deprived appellant of his constitutional right to due process of law, and equal protection under the law. (Arguments I through IV). Added to these errors was the trial court's denial of his motion to suppress evidence which resulted in his being convicted based upon evidence that violated his Fourth Amendment right to unreasonable searches and seizures. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (*U.S.*

Const., Amend. XIV; Cal. Const., art. I, §§ 7, 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

During the penalty phase, the jury was improperly allowed to consider non-criminal acts as aggravating evidence and the instructions thereon were erroneous (Argument VI), the delivery of CALJIC Nos. 8.85, 8.87, and 8.88, (Arguments VII & VIII), the court's rejection of appellant's special requested pinpoint instruction that the jury could consider the

leniency granted to the accomplice (Argument IX), the failure to instruction on the presumption of life (Argument X) and California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violated the United States Constitution in numerous respects (Arguments XI).

Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

* * * * *

CONCLUSION

Appellant's guilty verdicts, determinate sentence and his death sentence should be reversed for the reasons set forth above.

Dated: March 22, 2006

Respectfully submitted

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Cynthia A. Thomas, am the appointed counsel for Charles Edward Moore, in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 55,061 words in length excluding the tables and this certificate.

Dated: March 22, 2006

_____

Cynthia A. Thomas
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party within the action; my business address is 5050 Laguna Blvd., #112-329, Elk Grove, California, 95758.

On March 23, 2006, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 23, 2006, at Elk Grove, California.

_____
CYNTHIA A. THOMAS
DECLARANT