SUPREME COURT COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. CHARLES EDWARD MOORE Appellant.	S075726 Superior Court (Los Angeles) A0185568

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal From The Judgment Of The Superior Court

Of The State Of California, Los Angeles County

Honorable James Pierce, Judge

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DEATH PENALTY

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INTRODUCTION

Mr. Moore was charged with capital murder in 1978, convicted, and sentenced to death in 1984. In 1988, this Court affirmed his conviction and sentence. (*People v. Moore* (1988) 47 Cal.3d 63.)

Defendant sought relief in federal court. In 1995, federal district judge David Kenyon granted relief in an unpublished ruling, ordering a new trial. (*See Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 263.) The case was returned to state court in May of 1995 for a second trial. (1 RT A-1.) Ultimately, opening statements in the second trial began in October of 1998. (5 RT 1110.)

Mr. Moore was again convicted and sentenced to death, and his appeal to this Court was automatic. He was given appointed counsel. His case was fully briefed in November of 2007 and argued to the Court and submitted for decision in December of 2008. In January of 2009, however, the court vacated submission of the case and vacated appointment of counsel. Seven months later, the Court appointed replacement counsel.

Currently, the Court has before it an Appellant's Opening Brief, a Respondent's Brief and an Appellant's Reply Brief. Taken together, these briefs accurately convey the factual and procedural background of this case. This supplemental brief follows.

STATEMENT OF FACTS

When this case was returned to state court for the second trial, Mr. Moore elected to represent himself. Among the claims raised in the current briefing are several regarding the trial court's refusal to appoint co-counsel for Mr. Moore despite his repeated requests for such assistance. (Appellant's Opening Brief, Arguments I-IV.) As such, and because a number of the errors identified in this supplemental brief may have resulted from the absence of input from any counsel representing Mr. Moore, it may be useful to focus on the unusual and rather significant role the state had in ensuring that Mr. Moore went to trial representing himself, without aid from any lawyer in the actual courtroom, and in guiding the choice of advisory counsel for consultation outside the courtroom.

In this regard, Mr. Moore's first appearance in connection with the re-trial was on June 13, 1995. (1 RT A-3.) He was represented by counsel at the time, lawyers from the large law firm of Irell and Manella, who had represented him in federal court proceedings for many years. (1 RT A-3.) At that first hearing, Mr. Moore stated he wished to represent himself; when advised of the limitations he would face as a pro per defendant, he asked if he could "represent myself with advisory counsel." (1 RT A-6-8.) The court said that it would not appoint advisory counsel. (1 RT A-8.) After some discussion, Mr. Moore's counsel explained that Mr. Moore would consider the matter and decide on June 22 (the next court date) whether to represent himself. (1 RT A-8.) In simple and clear terms the court then formally denied Mr. Moore's motion to represent himself, finding it too equivocal:

"THE COURT: I find Mr. Moore's request to go pro per too equivocal. It is for that reason denied at this point." (1 RT A-18.)

At the next hearing, the matter was assigned to a new judge. (1 RT A-22.) The prosecutor immediately got involved in the question of Mr. Moore's representation. Although Mr. Moore's prior motion for self-representation had been denied, and there was no pending motion for self-representation at all, at the very beginning of the hearing the *prosecutor* advised the court that the "first issue" to deal with was whether defendant wanted to represent himself. (1 RT A-22.) The matter was postponed to June 30, 1995.

On June 30, and again although there was no pending motion for self-representation, the *prosecutor* stated that "the very first issue [is] whether or not he wants to represent himself." (1 RT A-32.) When defendant finally stated in response to discussion about representation that he wished to represent himself, the prosecutor offered his "suggest[ion] now [that] the court review his form and go through the formal process for any person requesting to go pro per." (1 RT A-42.)

The court embraced the prosecutor's proposal and took a waiver of Mr. Moore's right to counsel. (1 RT A-43-50.) When Mr. Moore's lawyer expressed concern about Mr. Moore's understanding, the prosecutor stepped into the process again, suggesting that the defense lawyer was "interfering with the court's communication with a person who has indicated he wants to go pro per." (1 RT A-45.) Ultimately, Mr. Moore waived his right to counsel and was permitted to represent himself. (1 RT A-50.)

Shortly thereafter, Mr. Moore requested co-counsel. (1 RT 6.) He later clarified that he wanted the court to appoint co-counsel -- who could assist him in court -- but if the court refused to do that, he wanted advisory counsel who could advise him. (1 RT 25.) The prosecutor indicated that he had "some thoughts on that when the court allows me to." (1 RT 24.) The prosecutor later made clear his position that Mr. Moore should not have co-counsel at all in the case. (1 RT 26.) As to advisory counsel, the prosecutor explained the court had discretion to appoint advisory counsel. (1 RT 26-27.)

The court denied appointment of co-counsel. (1 RT 27.) It then made clear it was considering appointment of advisory counsel -- specifically, lawyers from Irell and Manella, the law firm that had represented Mr. Moore for so many years in federal habeas proceedings. (1 RT 28.) The prosecutor jumped into the fray again:

> "MR. CARBAUGH: Your honor, I might state one thing if I may.
>
> "THE COURT: Yes.
>
> "MR. CARBAUGH: In one of the appearances before Judge Charvat when Judge Charvat indicated he was strongly considering advisory counsel, he said it was going to be off the panel." (1 RT 28.)

The trial court indicated it would appoint advisory counsel, but would go through a "list with the downtown court." (1 RT 29.)

Several weeks later, defendant reiterated his request for co-counsel. (1 RT 54.) Although there did not appear to be any ambiguity in the record at all, the prosecutor nevertheless stated that he wanted "the record to be very clear as to the history of the

request for counsel." (1 RT 55.) The prosecutor then explained that Mr. Moore's request for co-counsel had been denied numerous times already. (1 RT 55.) Ultimately, the court appointed *advisory* counsel from the panel. (1 RT 65-66.)

Trial did not go forward. Instead, the case was stayed pending the state's appeal of the federal court order requiring a new trial. (2 RT 338, 342.) When those appeals were rejected, the case was once again returned to state court for a new trial in July of 1997. (2 RT 345.)

Defendant once again asked to represent himself. (1 RT 348.) He again asked for co-counsel. (1 RT 349.) The newly assigned prosecutor explained her view that neither the public defender's office nor the conflict panel would accept such an appointment, although she advised the court to inquire directly with those offices. (1 RT 349.)

When the court took the matter up several weeks later, the prosecutor argued against the appointment of co-counsel. (1 RT 370.) According to the prosecutor, Mr. Moore should not have any legal assistance in court because (1) he did not have a right to such help (2) he did not show he needed such help and (3) no attorney would do it. (1 RT 370.)

It turns out, however, that the prosecutor was wrong. Mr. Moore located counsel, Mari Morsell, who was willing to serve as co-counsel. (1 RT 379-384.) The prosecutor again voiced her "oppos[ition] to this arrangement in its entirety." (1 RT 384.) Over the state's objection, the court appointed co-counsel "for the limited purpose at this point of

determining your ability to be ready on this case within a 45-day period." (1 RT 393.) The matter was rescheduled for one week. (1 RT 391.)

One week later, the parties reconvened. In response to the trial judge's ruling, the state attempted to get a new judge. (1 RT 398.) The judge refused to step down. (1 RT 398-399.) Ultimately, however, the court refused to appoint co-counsel. (1 RT 423.) The court did appoint John Smocker as advisory counsel. (1 RT 428.)

Before trial began, Mr. Moore's pro per library privileges were revoked. (3 RT 721-756.) Accordingly, several weeks later, Mr. Moore changed his mind and asked that advisory counsel (Mr. Smocker) formally represent him. (3 RT 807.) The prosecutor affirmatively objected to Mr. Moore being represented in court by trained counsel, arguing that his request for counsel came too late. (1 RT 808.) The court overruled the objection and continued the matter several weeks for Mr. Smocker to prepare. (1 RT 815.)

As the current briefing shows, the last witness called by the state in its case-in-chief was accomplice and alleged eyewitness Terry Avery. (6 RT 1325.) After Ms. Avery testified, and apparently upset with Mr. Smocker's cross-examination, Mr. Moore renewed his request to represent himself. (6 RT 1496-1497.) After an in camera hearing at which the prosecutor was excluded, the trial court denied the request because it believed Mr. Moore would need additional time to prepare. (6 RT 1496-1497.)

The prosecutor disagreed with the court's ruling, arguing that the court should relieve counsel and allow Mr. Moore to go forward without trained counsel. (6 RT 1497-1498.) In light of the prosecutor's argument, the court renewed its questioning of Mr. Moore, assured itself that he did not need additional time, and changed its ruling, allowing Mr. Moore to represent himself. (6 RT 1497.) The court ordered Mr. Smocker to remain "standby counsel which means you're not here for advisory counsel." (6 RT 1502.)

After the court ruled, the prosecutor said she would consult with the Attorney General's office on the matter. (6 RT 1503.) After that consultation, the prosecutor took the most unusual step of actually trying to "withdraw" the fact that the state had urged the court to let Mr. Moore proceed in this capital case without the aid of counsel:

> "MS. SEYMOUR: . . . I am willing at this point in time to withdraw my comments to the court's earlier ruling over the lunch hour denying the defendant's motion to go pro per." (6 RT 1505.)

The court did not change its ruling. (6 RT 1505.) Pursuant to the court's order, Mr. Moore represented himself -- without even advisory counsel -- throughout the rest of trial, including (1) the guilt phase instructional conference, (2) closing arguments, (3) the penalty phase and (4) the post-judgment motions.

As discussed in the opening and reply briefs already on file with the Court, and for the additional reasons raised in this brief below, there are a number of reasons to reverse both the guilt phase and the penalty phase in this case. It is open to question whether the

errors identified in these arguments would have occurred had the adversary system been balanced here by the presence of experienced counsel on *both* sides of this case, a lawyer if not representing Mr. Moore then at least in a co-counsel or even advisory counsel role.

As to the guilt phase, and by way of example only, at the instructional conference the prosecutor asked the court to instruct the jury it could convict of first degree murder by simply finding (1) possession of stolen property and (2) some sight corroborating evidence. (*See* 8 CT 2038; 6 RT 1580.) The court agreed. (6 RT 1580.) Similarly, although the entire defense theory was that the jury should not believe Teri Avery because she was an accomplice who had not been charged, the prosecutor asked the court to instruct the jury that it should not consider why any "other person is not being prosecuted." (8 CT 2035.) Again, the court agreed. (7 RT 1617.)

The propriety of providing a shortcut to conviction of first degree murder, or undercutting the defense theory as to Ms. Avery, is discussed below in Arguments I and II. But it is by no means clear that these errors would even have occurred had there been some type of legal assistance on *both* sides of this case.

The penalty phase too would have benefitted from some level of legal assistance to Mr. Moore. As discussed more fully below, in asking the jury to impose death, (1) the prosecutor here relied on a version of the facts which was starkly inconsistent with the version relied on to seek death in the Harris case, (2) the prosecutor introduced non-statutory aggravating evidence in violation of state law, and (3) the trial court failed to instruct the jury to view with caution Avery's critical penalty phase accomplice testimony

as to other crimes. While these issues too are discussed separately below, it is again not clear that the errors would have occurred had there been counsel on both sides of this case.

In sum, the state's extremely skilled advocates consistently sought to ensure that the uneducated and untrained defendant in this case represented himself with no in-court assistance from any lawyer. They were successful. While reasonable minds may certainly differ as to the propr role a state prosecutor should play in ensuring that a pro per capital defendant receives no legal aid at all at his trial, there should be little doubt that absent experienced counsel in some capacity on the defense side of the adversarial scale in this case, the scales were tipped in the state's favor and serious errors occurred. As discussed below, reversal is required.

ARGUMENT

GUILT PHASE ISSUES

I. THE TRIAL COURT IMPROPERLY CREATED AN UNCONSTITUTIONAL PRESUMPTION, AND LIGHTENED THE STATE'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT, BY TELLING THE JURY THAT IT COULD FIND MR. MOORE GUILTY OF MURDER IF IT FOUND (1) POSSESSION OF STOLEN PROPERTY AND (2) SLIGHT CORROBORATING EVIDENCE.

Counts one and two of the information charged Mr. Moore with first degree murder. (1 CT 1-7.) At the close of the case, the jury was given two theories on which it could rely to convict of the charged murders.

The jury was told it could convict of murder if the state proved an unlawful killing "during the commission or attempted commission of robbery and/or burglary." (7 RT 1628.) Alternatively, at the state's request, the jury was told it could convict of murder if the state proved that (1) Mr. Moore had been in possession of recently stolen property and (2) there was "corroborating evidence" which "need only be slight, and need not by itself be sufficient to warrant an inference of guilt." (8 CT 2038; 6 RT 1580, 1618.) The jury was given a written version of this instruction to take into deliberations as well. (8 CT 2038.)

This latter theory of culpability was based on standard CALJIC instruction 2.15. According to the use note which accompanies that instruction, it is supposed to be used only as to theft-related offenses. (*See* CALJIC 2.15, Use Note.) Nevertheless, in this

case it was given *not* just in connection with the burglary or robbery charges, but with the murder charge as well. Thus, at the state's request, the jury was told that if the state proved possession of stolen property with slight corroboration, that was "sufficient to permit an inference that *the defendant is guilty of the crimes charged.*" (6 RT 1618, emphasis added.)

In explaining the possession-of-stolen-property theory, the court gave several examples of what the jury could consider "corroboration." The jury was told it could consider as corroboration that Mr. Moore had "an opportunity to commit the crime." (6 RT 1619.) It was also told it could consider "any other evidence which tends to connect the defendant with the crimes charged." (6 RT 1619.)

As more fully discussed below, this possession-of-stolen-property theory of culpability was fundamentally improper and violated a number of Mr. Moore's constitutional rights. Although the trial court may have intended to limit its possession-of- stolen-property theory to the theft-related charges contained in counts three, four and five, it never informed the jury of any such limitation. To the contrary, as noted, the court affirmatively told the jury it could rely on this theory to determine Mr. Moore's guilt "of any crime charged." (6 RT 1618.) Under this theory, the jury was permitted to find Mr. Moore guilty of first degree murder solely from (1) possession of recently stolen property and (2) slight corroborating evidence, which would otherwise be insufficient to warrant an inference of guilt (such as opportunity). This was error; it gave the jury an unconstitutional shortcut to conviction, it constituted an improper evidentiary

presumption as to the elements of murder, and it improperly lightened the state's burden of proof. Reversal is required.

A. The Court Erred In Instructing The Jury It Could Convict Mr. Moore Of Murder If It Found (1) Possession Of Stolen Property And (2) Slight Corroborating Evidence.

In theft cases, CALJIC 2.15 permits a jury to infer guilt from the fact that a defendant "is in possession of recently stolen property when coupled with slight corroboration by other inculpatory circumstances." (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1173.) The premise behind CALJIC 2.15 is that there is a rational connection between guilt of a theft-related offense and the combination of (1) possession of stolen property and (2) other inculpatory circumstances. Accordingly, state cases hold it proper to permit a jury to infer guilt of theft in such circumstances. (*Id.* at pp. 1173-1174.)

The courts have repeatedly held, however, that there is no similar connection which would permit a jury to infer guilt of *murder* based merely on (1) a defendant's possession of stolen property and (2) other inculpatory circumstances. Thus, it error to tell a jury it may find a defendant guilty of murder based on these two elements. (*People v. Barker*, *supra*, 91 Cal.App.4th at p. 1176. *Accord People v. Coffman* (2004) 34 Cal.4th 1, 101-102; *People v. Prieto* (2003) 30 Cal.4th 226, 248-249.) Pursuant to *Barker*, *Coffman* and *Prieto*, the trial court erred in instructing the jury it could convict Mr. Moore of first degree murder by finding possession of stolen property along with slight corroborating evidence.

B. The Erroneous Provision Of A Possession-Of-Stolen-Property Theory Of First Degree Murder Requires Reversal.

The question then becomes whether this error requires reversal of Mr. Moore's murder conviction. As more fully discussed below, there are three distinct ways of looking at the error in this case. Under any of these three approaches, the murder conviction must be reversed.

1. Because the jury was given a fundamentally incorrect theory of culpability as to the murder charge, and because it is impossible to determine if the jury relied on that theory in convicting Mr. Moore, reversal is required.

Where a jury is given both proper and improper theories of culpability in a criminal case, and the jury verdicts do not indicate the jury relied on the proper theory in convicting a defendant, reversal is required. (*See, e.g., People v. Smith* (1984) 35 Cal.3d 798, 808 [trial court instructs jury on both proper and improper theories of murder; held, reversal is required because "the People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial."]; *accord People v. Guiton* (1993) 4 Cal.4th 1116, 1120; *see also People v. Morris* (1988) 46 Cal.3d 1, 24; *People v. Boyd* (1985) 38 Cal.3d 762, 770; *People v. Cantrell* (1973) 8 Cal.3d 672, 686; *People v. Robinson* (1964) 61 Cal.2d 373, 406.) As one appellate court has correctly concluded, "[w]here the reviewing court cannot determine upon which theory the jury convicted defendant and one of the theories is an improper basis for conviction, 'it must

find the error to have been prejudicial.'" (*People v. Macedo* (1989) 213 Cal.App.3d 554, 561-562.)

That is exactly what happened here. On the one hand, the jury was told it could convict of first degree murder if the state proved felony murder based on robbery or burglary. On the other hand, the jury was also told it could convict of first degree murder simply by finding possession of stolen property with corroborating circumstances. This latter theory had no basis in state law. As a consequence, of course, provision of this theory to the jury plainly violated Due Process. (*See Suniga v. Bunnell* (9th Cir. 1994) 998 F.2d 664 [defendant charged with murder, jury presented with two theories of culpability only one of which had a basis in state law; held, Due Process was violated]; *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587 [same].) But because the jury returned a general verdict, it is impossible to determine if the jury relied on this patently improper theory of first degree murder. Pursuant to the authorities discussed above, reversal of the murder conviction is therefore required.

2. Because the jury instructions permitted the jury to infer the elements of first degree murder solely from proof that Mr. Moore possessed stolen property along with slight corroboration, reversal is required.

There is a second way to characterize the court's error in providing CALJIC 2.15 as to the murder charge. This instruction operated as an improper permissive instruction which allowed the jury to infer all elements of murder (and therefore convict of murder) from proof that defendant possessed stolen property. Because the state cannot establish that the jury did not do exactly what it was told it could do -- that is, convict of murder by

relying solely on the predicate facts of possession of stolen property plus slight corroboration -- reversal is required.

The starting point for this analysis is the Fifth Amendment requirement that in criminal cases the state prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358; *Patterson v. New York* (1977) 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury make the determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Together, these rights require a jury determination, based upon proof by the state beyond a reasonable doubt, of every factual element of the crime charged. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 512-514; *In re Winship*, *supra*, 397 U.S. at pp. 363-364.)

Jury instructions violate these constitutional principles when they relieve the state of the burden of proof beyond a reasonable doubt of every element of the crime charged. (*See Sandstrom v. Montana*, *supra*, 442 U.S. at p. 520-524. *Accord Carella v. California* (1989) 491 U.S. 263, 265; *Francis v. Franklin* (1985) 471 U.S. 307, 313.) A state may not make certain facts elements of a criminal offense and then impose a presumption as to the existence of these facts based on proof of other, predicate facts. (*Carella v. California*, *supra*, 491 U.S. at p. 265; *Francis v. Franklin*, *supra*, 471 U.S. at p. 313; *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 515.) "Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding

task assigned solely to juries in criminal cases." (*Carella v. California, supra*, 491 U.S. at p. 265.)

There are two types of presumptions. A mandatory presumption requires the jury to infer an ultimate fact from proof of a predicate fact. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A permissive presumption permits, but does not require, the jury to infer the ultimate fact from the predicate fact. (*Francis v. Franklin, supra*, 471 U.S. at p. 314.) In both situations, the vice is identical; presumptions which permit or require a jury to presume an element of the offense from proof of certain predicate facts "render[] irrelevant the evidence on that issue" and make it impossible to determine "[i]f the jury may have failed to consider evidence" on the issue by relying on the presumption. (*Connecticut v. Johnson* (1983) 460 U.S. 73, 85-86.)

Here, Mr. Moore was charged with first degree murder. Once the prosecutor here elected a felony murder theory of liability, this required the prosecution to prove an unlawful killing during the course of a felony enumerated in Penal Code section 189.

As given in this case, CALJIC No. 2.15 directly told the jury that it could convict Mr. Moore of first degree murder if it found (1) he was in conscious possession of recently stolen property, and (2) slight corroborating evidence. Once these two predicate facts were established, then "guilt [of murder] may be inferred." (6 RT 1618.) In other words, the court's instruction allowed the jury to use a permissive inference not just to infer a single element of murder, but to infer every element of a first degree murder charge.

While permissive inferences (or presumptions) are less intrusive than mandatory presumptions, they are nevertheless disfavored because they "tend to take the focus away from the elements that must be proved." (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 900 [Rymer, J. concurring].) Permissive presumptions are constitutional only if can be said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County v. Allen*, *supra*, 442 U.S. at p. 166, n. 28.) A permissive inference violates Due Process whenever "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin*, *supra*, 471 U.S. at p. 316.)

In *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, the Ninth Circuit Court of Appeal applied these principles in a case analogous to this one. There defendant was charged with vehicular assault. Under Washington state law, one element the state had to prove to obtain a conviction was that defendant drove in a reckless manner. As to this element, however, the jury was given a permissive presumption and told that it could (but was not required to) infer the defendant had driven in a reckless manner solely from evidence that he was speeding. The court found that even though "it is certainly true that excessive speed is probative of a jury's determination of recklessness, here we cannot say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed." (*Id.* at p. 316.) Thus, the instruction was constitutionally deficient and defendant's conviction was reversed. (*Id.*)

Schwendeman is virtually identical to this case. With respect to the felony murder charge, it cannot be said with "substantial assurance that the inferred fact of [an unlawful killing during commission of an enumerated felony] more likely than not flowed from the proved fact of [possession of recently stolen property]." As one court has concluded on this very subject, "[p]roof a defendant was in conscious possession of stolen property simply does not lead naturally and logically to the conclusion that the defendant committed a murder to obtain the property." (*People v. Barker*, *supra*, 91 Cal.App.4th at p. 1176.)

In short, the permissive presumption given to the jury in this case violates the Due Process Clause precisely because the suggested conclusion (that defendant is guilty of first degree murder) "is not one that reason and common sense justify" in light of the predicate facts on which the presumption is based (possession of stolen property plus slight corroboration). (*Francis v. Franklin*, *supra*, 471 U.S. at p. 316.) Because of the federal constitutional dimension to this error, the *Chapman* standard applies, requiring the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *see Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316 [applying *Chapman* to improper permissive presumption]; *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1038 [same].)

In assessing whether the error was harmless, the question is not whether there is sufficient evidence from which the jury could have found the ultimate fact under other instructions. (*See, e.g.*, *Hanna v. Riveland*, *supra*, 87 F.3d at p. 1039; *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.) Instead, the question is whether the state can

prove beyond a reasonable doubt that the jury did not rely solely on the predicate fact -- thereby ignoring all other evidence -- in deciding the ultimate fact. *(Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316.)

Here, as to the murder charge, the jury was effectively told it could infer every element of a first degree murder charge from the predicate facts of possession of recently stolen property with slight corroboration. As in *Schwendeman*, "[b]y focusing the jury on the evidence of [possession of stolen property] alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which [Mr. Moore] was convicted without considering all the evidence presented at trial." (*Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316; *see Yates v. Evatt* (1991) 500 U.S. 391, 405-406 ["[S]ome presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed."].)

Mr. Moore recognizes that in light of the deferential standards of appellate review, there was sufficient evidence from which a jury could have found the presumed facts supporting felony murder. The fact remains, however, that the improper presumptions provided by CALJIC 2.15 "permitted the jury to find [all] element[s] of the crime of which [Mr. Moore] was convicted without considering all the evidence presented at trial." Accordingly, the state will be unable to prove there was "no reasonable probability that the instruction did not materially affect the verdict." (*Schwendeman v. Wallenstein, supra,* 971 F.2d at p. 316.) Reversal of the murder conviction is required.

3. Telling the jury that it could convict Mr. Moore of murder if it found possession of stolen property along with "slight" corroboration undercut the presumption of innocence and improperly lightened the state's burden of proof beyond a reasonable doubt.

Reversal is also required because this instruction permitted a conviction for murder based on proof less than reasonable doubt. As discussed above, jury instructions are unconstitutional if they relieve the state of the burden to prove every element of the offense beyond a reasonable doubt. (*See Sandstrom v. Montana*, *supra*, 442 U.S. at p. 521.)

Here, the jury was told that possession of recently stolen property is not alone sufficient to prove the charged crime of murder. (6 RT 1618.) This statement of the law is manifestly correct since (as discussed above) the charged offense of first degree murder contains elements that cannot logically be proven by mere possession of stolen property.

But the jury was then told that "guilt could be inferred" so long as the state provided "corroborating evidence tending to prove defendant's guilt." (6 RT 1618.) This corroborating evidence "need only be slight." (6 RT 1618.) In other words, the jury was told that it could convict of murder on proof of a fact which is alone insufficient to prove murder (possession of stolen property), so long as the state also introduced some other "slight" evidence.

Several courts have considered similar instructions permitting a conviction on the basis of proof of some fact that is insufficient to establish guilt plus other "slight" evidence. These courts have found such instructions violate due process. Thus, the Fifth

Circuit has repeatedly held that it violates due process to instruct the jury that a defendant may be convicted of conspiracy upon proof of the existence of the conspiracy plus "slight evidence" connecting the defendant to it. (*United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628-629, *cert. denied*, 434 U.S. 903; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500-501.) The Fifth Circuit explained in *Partin* that the "slight evidence" instruction "reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt." (*United States v. Partin, supra*, 552 F.2d at p. 629. *See United States v. Durrive* (7th Cir. 1990) 902 F.2d 1221, 1228, *quoting United States v. Martinez de Ortiz* (7th Cir. 1989) 883 F.2d 515, 524-525[conc. opn. of Easterbrook, J.]; *United States v. Dunn* (9th Cir. 1977) 564 F.2d 348, 356-357.) Similarly, the trial court's use of a "slight evidence" standard in this case plainly undercut the state's burden of proof beyond a reasonable doubt.

It is true, of course, that the trial court gave a general instruction which correctly described the state's burden of proof. But as the Supreme Court has held, a correct instruction does not remedy a constitutionally infirm instruction if the jury could apply either instruction to arrive at a verdict. (*Francis v. Franklin, supra*, 471 U.S. at pp. 319-320.) That is just the situation here; this court has no way of knowing whether Mr. Moore was convicted on the basis of CALJIC No. 2.15.

A similar analysis has resulted in reversals in the conspiracy context described above. Thus in *United States v. Hall*, the Fifth Circuit rejected the government's argument that the error was cured by other, proper instructions on reasonable doubt:

> "Despite the lack of provable prejudice to defendant's case because of other instructions giving the reasonable doubt standard, however, the erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing the jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt."

(*United States v. Hall*, *supra*, 525 F.2d at 1256.) Such reduction of the government's burden of proof "is impermissibly inconsistent with the 'constitutionally rooted presumption of innocence.'" (*Id.* at p. 1256, fn. 2, *quoting Cool v. United States* (1972) 409 U.S. 100. *Accord United States v. Partin*, *supra*, 552 F.2d 621.)

Put another way, an error which lessens the prosecution's burden is structural and requires automatic reversal. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) This is because, when the jury receives instructions which permit it to convict without applying the reasonable doubt burden of proof, "there has been no jury verdict within the meaning of the Sixth Amendment [and] the entire premise of [a *Chapman* harmless error] review is simply absent." (*Id.* at p. 280.) Reversal is therefore required.

C. Neither *Prieto* Nor *Coffman* Bar Relief On This Claim.

As discussed above, there are three distinct reasons the error in this case requires reversal of the murder conviction: (1) it gave the jury an unconstitutional theory of

culpability, (2) it constituted an improper permissive inference as the elements of murder and (3) it improperly lightened the state's burden of proof beyond a reasonable doubt. Mr. Moore concedes that although this Court has recognized the error in giving CALJIC 2.15 as a theory of culpability in a murder case, it has not held the error prejudicial. (*People v. Prieto, supra*, 30 Cal.4th at p. 247.)

In *Prieto*, this Court addressed the third of these harmless error theories, concluding that the instruction did not "lower[] the prosecution's burden of proof." (30 Cal.4th at p. 248.) The Court reached this conclusion for two reasons, noting that (1) nothing in CALJIC 2.15 "directly or indirectly address[ed] the burden of proof" or "absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt" and (2) proper instructions were given on the burden of proof. (*Ibid.*) Because there was no federal constitutional error, the court applied the state standard of prejudice, analyzed the evidence presented in the case and concluded there was "no reasonable likelihood the jury would have reached a different result if the court had limited the permissive inference described in CALJIC 2.15 to theft offenses." (*Id.* at p. 249, *citing People v. Watson, supra*, 46 Cal.2d at p. 836.)

Several points are noteworthy about *Prieto*. Initially, although *Prieto* addressed the burden of proof approach to prejudice, it did not address either the unconstitutional theory or permissive inference approaches to prejudice discussed above. Case are not authority for propositions which are not considered. (*See People v. Williams* (2004) 34 Cal.4th 397, 405; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 581; *General Motors*

Accept. Corp. v. Kyle (1960) 54 Cal.2d 101, 114.) Pursuant to these other approaches, reversal is required.

As to the burden of proof argument which *Prieto* did consider, and with all due respect, neither of *Prieto*'s reasons withstand scrutiny. To be sure, it is true that CALJIC 2.15 does not "directly or indirectly address the burden of proof" or "absolve[] the prosecution of its burden of establishing guilt beyond a reasonable doubt." But the Supreme Court has itself made clear that instructions do not have to "directly or indirectly address" the state's burden of proof in order to improperly lighten that burden, so long as that is their real-world impact. (*See, e.g., Cool v. United States*, *supra*, 409 U.S. at p. 104 [instruction which suggested that jury could reject defense evidence if not proven beyond a reasonable doubt lightened the state's burden of proof even though the instruction did not address the state's burden of proof].) And, as noted above, courts have uniformly held that instructions analytically identical to CALJIC 2.15 violate the constitution precisely because they undercut the state's burden of proof, even if they do not do so "directly or indirectly." (*United States v. Partin*, *supra*, 552 F.2d at pp. 628-629; *United States v. Hall*, 525 F.2d at p. 1256; *United States v. Gray*, 626 F.2d at pp. 500-501.)

It is also true that the trial court here gave a correct definition of the state's burden of proof. But that does not salvage the conviction. Where a jury is given instructions which, if followed, lighten the state's burden of proof, the fact that a correct definition of the burden has also been provided does not render harmless the improper instruction. (*Cool v. United States*, *supra*, 409 U.S. 100 [instruction which lightened the state's burden of proof required reversal even though a correct instruction on reasonable doubt

was also given]; *United States v. Hall*, *supra*, 525 F.2d at 1256. *Accord Francis v. Franklin*, *supra*, 471 U.S. at pp. 319-320 [holding that a correct instruction does not remedy a constitutionally infirm instruction if the jury could apply either instruction to arrive at a verdict].) This aspect of *Prieto* should be reconsidered.[1]

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[1] In *People v. Coffman*, *supra*, 34 Cal.4th at pp. 101-102 this Court again found provision of CALJIC 2.15 to be harmless error. *Coffman* does not explain whether any of the three prejudice arguments discussed above were considered. Instead, *Coffman* analyzed the facts of the case, applied *Watson*'s "reasonable likelihood" test applied to errors of state law only, and found the error harmless. (*Ibid.*) *Coffman*'s use of the state-law *Watson* test suggests that it was presented with none of the claims made here, each of which is premised on the federal constitution.

II. BECAUSE THE TRIAL COURT'S PROVISION OF CALJIC 2.11.5 FUNDAMENTALLY UNDERCUT THE DEFENSE PRESENTED TO THE HOMICIDES CHARGED IN COUNTS ONE AND TWO, REVERSAL IS REQUIRED.

A. Introduction.

Counts one and two charged Mr. Moore with murder. (1 CT 1-7.) It is fair to say that the main witness against Mr. Moore as to these charges was Terry Avery. Avery testified that Mr. Moore participated in the underlying felonies and personally killed Mr. Crumb. (6 RT 1325-1380.) The prosecutor herself recognized that the evidence against Mr. Moore was "primarily the testimony of Terry Avery." (7 RT 1651.)

The defense theory as to Avery as quite different; as Mr. Moore explained to the jury in closing arguments, the jury should not believe her. (7 RT 1672.) She was an accomplice to the offense. (7 RT 1674.) She had not been prosecuted by authorities for her role in the offense and she was lying to minimize her own role in the murders. (7 RT 1684-1685.) According to Mr. Moore, the evidence did not show that three people committed the crime at all, and it was Avery and Harris who committed the crime. (7 RT 1679-1680.) In order for the jury to fairly evaluate the defense theory as to Avery, it was essential the jury discuss and consider exactly why she testified against Mr. Moore and why she had not been prosecuted.

As discussed more fully below, however, at the prosecutor's request the trial court provided a jury instruction which fundamentally undercut this theory of defense. Thus,

although the trial court properly recognized (and advised the jury) there was evidence showing other persons may have been involved in the crimes, the court instructed the jury not to "discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether Lee Harris has been or will be prosecuted." (7 RT 1617.) As discussed in detail below, this instruction precluded the jury from properly assessing Avery's credibility. Because this was the core of the defense case, reversal is required.

B. The Trial Court's Instruction Undercut The Central Theory Of Defense In Violation Of The Fifth, Sixth And Eighth Amendments.

Under the state and federal constitutions, criminal defendants have a right "to have the jury determine every material issue presented by the evidence." (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) In addition, the Sixth and Fourteenth Amendments guarantee criminal defendants not only the right to confrontation, but "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Moreover, in a capital case, criminal defendants have an Eighth Amendment right to a reliable guilt phase proceeding. (*Beck v. Alabama* (1980) 447 U.S. 625.)

Instructions which affirmatively interfere with a jury's ability to consider a defense permitted under state law violate these constitutional provisions. (*See, e.g., Penry v. Lynaugh* (1989) 489 U.S. 302 [at penalty phase of capital trial, defendant presents evidence of mental retardation as a basis for sentence less than death, jury

instructions interfered with jury's ability to consider the evidence; held, Eighth Amendment violated]; *Hitchcock v. Dugger* (1987) 481 U.S. 393 [at penalty phase of capital trial, defendant presents evidence of non-statutory mitigating factors, jury instructions interfered with jury's ability to consider this evidence; held, Eighth Amendment violated]; *People v. Mize* (1889) 80 Cal. 41 44-45 [defendant charged with murder, defense presented evidence of self-defense, jury instructed it could find culpable mental state simply by finding defendant shot victim; held, instruction improper because it undercut the defense presented]; *People v. Medrano* (1978) 78 Cal.App.3d 198, 214 [instruction which withdraws a principal defense from the jury is error], *overruled on other grounds in Vista v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307.)

Here, CALJIC 2.11.5 directly undercut the entire theory of defense in connection with Avery's testimony. Avery was an accomplice as a matter of law. She initially lied to police, denying being present at all. (6 RT 1373.) Mr. Moore's theory was that Avery and Harris had committed the offense, and Avery was lying to minimize her involvement. (6 RT 1679-1680, 1684.) Yet CALJIC 2.11.5 directly told the jury it was not to "discuss or give any consideration" as to why other persons were not being prosecuted. Given that Avery was the State's most important witness at trial, CALJIC 2.11.5 should not have been given:

> "CALJIC No. 2.11.5 should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility."

(*People v. Williams* (1997) 16 Cal.4th 153, 226. *Accord People v. Hardy* (1992) 2 Cal.4th 86, 190 [CALJIC No. 2.11.5 may prevent the jury from considering the incentive a nonprosecuted participant in the crime has to lie]; *People v. Carrera* (1989) 49 Cal.3d 291, 312; Use Note to CALJIC No. 2.11.5.)

It is true, of course, that the instruction here not only told the jury not to consider "why the other person is not being prosecuted in this trial" but went on to tell the jury it should not consider "whether Lee Harris has been or will be prosecuted." (7 RT 1617.) The state may argue that the jury would have applied CALJIC 2.11.5 only to Lee Harris.

Such an argument ignores the context of the instruction. In one sentence, divided into two clauses separated by the disjunctive "or", the instruction advises the jury not to discuss or consider "[1] why the other person is not being prosecuted in this trial or [2] whether Lee Harris has been or will be prosecuted." (7 RT 1617.) If the first clause (which advises the jury not to "discuss or give any consideration as to why the other person is not being prosecuted in this trial") was interpreted as applying solely to Harris, then the second clause (which advises the jury not to discuss or consider "whether Lee Harris has been or will be prosecuted") is entirely surplusage. Though the average layperson may not be familiar with interpretive maxims counseling against rendering language surplusage, the deductive concept is commonly understood. And appellate courts themselves have long counseled against interpretations of jury instructions which render other instructions surplusage. (*See, e.g., People v. Waples* (2000) 79 Cal.App.4th 1389, 1397; *People v. Relegado* (2000) 78 Cal.App.4th 1056, 1063; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147-148.)

The fact of the matter is that in assessing Avery's credibility, the jury was entitled to -- and indeed, should have -- considered her immunity from prosecution. (*See, e.g.*, *People* v. Cox (1991) 52 Cal.3d 618, 668, fn. 14 [a jury should consider immunity or other favorable treatment in assessing a witness' credibility]; *People v. Sheldon* (1989) 48 Cal.3d 935, 946 ["entirely proper for the jury to consider whether [non-prosecuted participant] avoided prosecution in return for testifying against defendant."].) And this instruction permitted the jury to ignore this critical subject.

Mr. Moore recognizes the Court has held provision of CALJIC 2.11.5 not to be error where the record as a whole shows that "a reasonable juror" would not have understood the instruction as "prohibit[ing] a juror from considering the punishment the accomplices faced and what they actually received in assessing the credibility of their testimony." (*People v. Jones* (2003) 30 Cal.4th 1084, 1114. *Accord People v. Lawley* (2002) 27 Cal.4th 102, 162; *People v. Cain* (1995) 10 Cal.4th 1, 35.) *Jones* thus applied the standard test articulated by the United States Supreme Court for assessing whether a jury instruction is erroneous. (*See Boyde v. California* (1994) 494 U.S. 370, 380, 383-384 [to determine whether an instruction is erroneous, court looks to see whether "there is a reasonable likelihood that the jury has applied the challenged instructions" in an improper manner].)

With all due respect, *Jones* and its progeny have applied the wrong test to assess this type of instructional error. As this Court has recognized repeatedly, the *Boyde* test for error applies only where the instructions are ambiguous. (*See, e.g., People v. Mayfield* (1997) 14 Cal.4th 668, 777; *People v. Prettyman* (1996) 14 Cal.4th 248, 272; *People v.*

Avena (1996) 13 Cal.4th 394, 417.) The *Boyde* test does not apply to instructions which are on their face improper. (*Boyde v. California, supra*, 494 U.S. at p. 380.)

Here, the entire defense case was that Avery was lying to gain immunity. Nevertheless, the trial court told the jury it should not "discuss or give any consideration as to why" Avery was "not being prosecuted in this trial." (7 RT 1617.) This instruction was not ambiguous, it was flat-out wrong. As this Court has recognized, "CALJIC No. 2.11.5 should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility." (*People v. Williams, supra*, 16 Cal.4th at p. 226.) Error has occurred.

Under the circumstances of this case, though, even if the *Boyde* test is applied it would require a conclusion that error has occurred. In applying *Boyde*, and determining whether "there is a reasonable likelihood that the jury has applied the challenged instructions" in an improper manner, a reviewing court must consider the context in which the instruction was given. (*Boyde v. California, supra*, 494 U.S. at pp. 380, 383-384.) Here CALJIC 2.11.5 was not the only instruction which undercut this central aspect of the defense case.

To the contrary, separate and apart from CALJIC 2.11.5, the trial court gave another instruction which -- in light of CALJIC 2.11.5 -- the jury could reasonably have understood to preclude consideration of Avery's punishment:

> "In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict . . . ." (6 RT 1634.)

But even this was not all. Later in the guilt phase the court gave a third separate instruction which -- again in the context of a case where the jury had already been told it could not consider why Avery was not being prosecuted -- a reasonable jury could have understood to preclude consideration of Avery's punishment:

> "In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict . . . ." (6 RT 1641.)

This Court has noted, on many occasions, that "[t]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, n.17.) *Accord People v. Stitely* (2005) 35 Cal.4th 514, 559; *People v. Jones* (1997) 15 Cal.4th 119, 168.) That assumption is no less crucial here. Assuming the jurors followed their instructions here, they would (1) not have "discuss[ed] or give[n] any consideration as to why [Avery] . . . is not being prosecuted in this trial" (7 RT 1617), and (2) not have "discussed or considered" Avery's potential punishment. (7 RT 1634, 1641.) By following these jury instructions, the jury was precluded from considering the defense presented. Even if only one juror understood and followed these instructions, error has occurred.

As noted above, instructions in a capital case which interfere with the jury's ability to consider a defendant's defense violate the Fifth, Sixth and Eighth Amendments. Such an error requires the state, as the beneficiary of the error, to prove it harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 384 U.S. at p. 24.) Here, the state will be unable to met this burden for two reasons.

First, there can be no dispute that if the trial court had precluded defendant from cross-examining Avery on her motivation for testifying, this would have been "constitutional error of the first magnitude [that] no amount of showing of want of prejudice would cure[.]" (*Davis v. Alaska* (1974) 415 U.S. 308, 318 [reversing conviction where defendant was precluded from cross-examining key state witness on motivation to testify for state].) Here, the trial court permitted cross-examination, but then gave an instruction which precluded the jury from fully considering the evidence elicited. As a practical consequence, it makes little difference to a defendant where the vice lies; the harm is that the jury does not get to consider the motivation of the state's key witness. The error cannot be harmless. (*Compare Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114 [where the Constitution precludes the state from excluding certain evidence, it equally precludes admitting the evidence under instructions which prevent the factfinder from considering it]. *Accord Penry v. Lynaugh*, *supra*, 489 U.S. 302 [same]; *Hitchcock v. Dugger*, *supra*, 481 U.S. 393 [same].)

Second, Mr. Moore's attack on Avery's credibility was his only defense to the charges. If the jury believed Avery, it would have to convict on all charges. And the prosecutor urged the jury to do just that, telling the jury in closing argument that "you

know [Avery] was telling the truth." (7 RT 1653.) In this situation, giving the jury an instruction which interfered with its ability to consider the only defense presented to the charges cannot be proved harmless. Reversal is required.

III. THE TRIAL COURT VIOLATED DUE PROCESS AND THE SIXTH AMENDMENT BY EFFECTIVELY TELLING THE JURY THAT DIRECT EVIDENCE DID NOT HAVE TO BE PROVEN BEYOND A REASONABLE DOUBT.

A. The Relevant Facts.

The state charged Mr. Moore with murder. The state presented the jury with two distinct categories of evidence to support its case.

First, the state presented the jury with direct evidence, consisting of the testimony of Terry Avery. As discussed above, Avery testified that Mr. Moore was in the apartment and was directly involved in the murders. Mr. Moore's theory was that Avery was lying to cover her own involvement.

The state also presented circumstantial evidence to try and corroborate Avery's testimony. In the prosecutor's own words, "there is sufficient circumstantial evidence to convict . . . without the testimony of Terry Avery." (6 RT 1651.) This circumstantial evidence included testimony showing (1) defendant had been a tenant in the victims' building, (2) defendant rented a hotel room near the apartment only days before the killing and (3) when arrested, defendant was wearing jewelry taken in the robbery. (6 RT 1652; *see* 5 RT 1188, 1228-1229, 1242-1243.)

In short, the state relied on both direct and circumstantial evidence to support its case. When the court instructed the jury, it specifically identified the *second* of these categories (circumstantial evidence) and told the jury that as to this category of evidence,

two important limitations applied: (1) the evidence had to be proved beyond a reasonable doubt and (2) if there were two reasonable constructions of the evidence, the jury had to adopt the construction favoring Mr. Moore. (6 RT 1616-1617.) As more fully discussed below, in a case like this -- where the state relied on both direct and circumstantial evidence, and the defense contended there was an alternate explanation for the direct evidence -- it was fundamentally improper to limit these cautionary principles to the jury's evaluation of circumstantial evidence. Reversal is required.

B. Under The Circumstances Of This Case, Limiting Both Reasonable Doubt And The "Two Reasonable Constructions" Rule To Circumstantial Evidence Was Unconstitutional And Requires Reversal.

In criminal cases, the Due Process Clause of the Fifth Amendment requires the state to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358; *Patterson v. New York* (1977) 432 U.S. 197.) In turn, the Sixth Amendment requires that the jury, not the trial court, make the determination that the state has proven the elements of the charged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.)

Jury instructions violate these constitutional principles if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof" less than beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6, 22.) In assessing whether "there is a reasonable likelihood that the jury has applied the challenged instructions" in an improper manner, a reviewing court must consider the

entire context in which the instruction is given. (*Boyde v. California* (1990) 494 U.S. 370, 380, 383-384.) Where there is a "reasonable likelihood" that the jury has applied a reasonable doubt instruction incorrectly, the error is deemed structural and reversal is required without a showing of prejudice. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

In this case, recognizing the state had presented circumstantial evidence against Mr. Moore, the trial court advised the jury of two cautionary principles which implement the presumption of innocence. First, the jury was instructed that it could rely on circumstantial evidence. (6 RT 1616.) But before jurors could rely on such evidence, it had to be proved beyond a reasonable doubt:

> "Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (6 RT 1616.)

Second, the trial court explained that as to circumstantial evidence, the jury was required to give Mr. Moore the benefit of the doubt if there were two reasonable views of the evidence:

> "If the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation which points to his guilt." (6 RT 1617.)

Of course, it is true these two cautionary principles -- that evidence must be proved beyond a reasonable doubt and that the jury must acquit if there is a reasonable interpretation of the evidence that points to innocence -- apply to circumstantial evidence. And it is both obvious, and logical, that by explicitly limiting the quoted principles to *circumstantial* evidence, the instructions logically told the jurors these principles did *not* apply to *direct* evidence. (*See, e.g., People v. Vann* (1974) 12 Cal.3d 220, 226-227 ["An instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality."] (rejected on another point by *People v. Brigham* (1979) 25 Cal.3d 283); *People v. Crawford* (1997) 58 Cal.App.4th 815, 824-825. *See generally People v. Dewberry* (1959) 51 Cal.2d 548, 557; *People v. Salas* (1976) 58 Cal.App.3d 460, 474. *See also People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.].)

Significantly, however, California courts have long recognized that these two cautionary principles apply to all types of evidence, not just circumstantial evidence. Thus, while it is true that a determination of guilt resting upon circumstantial evidence requires proof beyond a reasonable doubt, so too does a determination of guilt based on direct evidence. (*People v. Vann, supra*, 12 Cal.3d at p. 226.) Similarly, the principle that where two reasonable interpretations of the evidence exist the one favorable to the defendant must be adopted by the jury is *not* limited to circumstantial evidence, but applies to *all* evidence, including *both* direct and circumstantial evidence. (*See People v.*

Naumcheff (1952) 114 Cal.App.2d 278, 281-82 [in case consisting primarily of direct evidence, jury instructed that "[i]f from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case it is your duty to adopt the one of innocence and find the defendant not guilty."]; *People v. Foster* (1926) 198 Cal. 112, 127 [defendant charged with robbery; state presents direct evidence of his guilt in the form of eyewitness testimony, jury properly instructed "that, considering the evidence as a whole, if it was susceptible of two reasonable interpretations, one looking 'toward guilt and the other towards the innocence of the defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant.'"].)

In this case, as noted above, jurors were given a specific instruction advising them of the requirement of proof beyond a reasonable doubt for circumstantial evidence. Further, the instructions specifically told the jurors that where circumstantial evidence was involved, they could *not* convict where they could draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence. (6 RT 1617.) As the cases above suggest, there is a reasonable likelihood this instruction told the jury these important cautionary principles did not apply to direct evidence. (*People v. Vann*, *supra*, 12 Cal.3d at pp. 226-227; *People v. Crawford*, *supra*, 58 Cal.App.4th at pp. 824-825.)

This was especially prejudicial here. There will be no genuine dispute that the three pieces of circumstantial evidence which were introduced in the case -- the fact that Mr. Moore had been a tenant in the building, he rented a nearby motel room and he was

found with jewelry taken in the robbery -- were not sufficient in and of themselves to prove guilt beyond a reasonable doubt. Thus, the case really came down to the direct evidence. Of course, the entire defense theory as to this evidence was that there was an alternate and reasonable explanation: Avery was lying to cover her own involvement. As such, it was especially important for the jury to know that the cautionary principles of reasonable doubt and two reasonable construction apply to this evidence. Yet there is a reasonable likelihood the jury applied the instructions so as to permit it to return a guilty verdict based on this direct evidence even if it found the evidence was reconcilable with innocence. Under these circumstances, the burden of proof beyond a reasonable doubt was undercut in violation of Mr. Moore's Fifth and Sixth Amendment right to a fair jury trial. Reversal is required. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 280.)

IV. THE TRIAL COURT'S REFUSAL TO APPOINT SECOND COUNSEL VIOLATED BOTH STATE AND FEDERAL LAW.

Defendant was charged with capital murder. The case involved two victims, a non-testifying defendant who had been tried separately and a testifying accomplice who was not being charged at all.

But that is not all. The non-testifying co-defendant had actually been tried twice. The first time he was convicted of murder and sentenced to death, but that conviction was reversed by this Court. (*See People v. Harris* (1984) 36 Cal.3d 36.) He was tried a second time and received life without parole. (*See People v. Harris* (1987) 191 Cal.App.3d 819.)

But the matter was even more complex. Mr. Moore was also tried twice. The first time he too was convicted and sentenced to death; that conviction was reversed after many years in federal court. Mr. Moore was tried a second time and convicted and sentenced to death again. At the penalty phase, the state spent considerable effort presenting other crimes evidence, including calling numerous witnesses from out of state to testify about offenses which occurred outside of California.

At the second trial, Mr. Moore represented himself and repeatedly asked for second counsel pursuant to *Keenan v. Superior Court* (1982) 31 Cal.3d 424. (*See* 1 RT 6, 54, 349; 2 RT 450-453; 5 CT 1308-1315.) The court consistently denied these requests. (1 RT 27, 65-66, 423.) Without co-counsel, Mr. Moore was certainly hampered in his efforts; by way of example, Mr. Moore at one point he asked for funds to contact

witnesses and -- over Mr. Moore's objection -- the court provided $20.00 to conduct telephone interviews. (3 RT 682-683.)

In his original opening brief, Mr. Moore contended that the trial court's denial of his many requests for co-counsel was improper and violated both state and federal law. (Appellant's Opening Brief 31-87.) There is no need to repeat those arguments here. Suffice it to say that given the complex history of this case, which included three full trials prior to the trial at issue here and penalty phase evidence covering numerous crimes in several states, *Keenan* counsel would have been proper even if Mr. Moore was represented by a trained lawyer. It follows that this conclusion is even stronger here, where Mr. Moore was *not* represented by counsel, but was representing himself. And since Mr. Moore was entitled to second counsel under state law, the trial court's arbitrary deprivation of this right violated Due Process. (*See, e.g., Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) For the reasons discussed in the briefing already on file with the Court, the refusal to appoint second counsel in this case requires reversal.

PENALTY PHASE ISSUES

V. THE TRIAL PROSECUTOR VIOLATED BOTH DUE PROCESS AND THE EIGHTH AMENDMENT IN TAKING FUNDAMENTALLY INCONSISTENT POSITIONS IN THE PENALTY PHASES OF HARRIS AND MOORE.

A. The Relevant Facts.

The state's theory of this case, of course, was that both Lee Harris and Mr. Moore were involved in the crimes. The two defendants were tried separately for the offenses. The state sought death against both defendants.

Harris was originally tried in 1980. At the guilt and penalty phases of this trial, the prosecutor's theory was straightforward: Harris planned the murders and was the mastermind, controlling both Avery and Moore, and therefore deserved to die. Thus, the prosecutor argued that it was Harris who ordered Terry Avery to get the knife and to stab Mrs. Crumb. (RTH 1980 at 1638, 1647, 1657.)[2] Ms. Avery's acts were "initiated, responsible, scored by, if you will, directed by Lee Edward Harris." (RTH 1980 at 1659.) The prosecutor left no doubt that the idea to kill was Harris's and Harris's alone:

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[2] "RTH 1980" refers to the Reporter's Transcript of Proceedings from Mr. Harris's first trial. These transcripts were before this Court in *People v. Harris*, Cr. No. 21633. "RTH 1985" refers to the Reporter's Transcript of Proceedings from Mr. Harris's second trial. These transcripts were before the Second District Court of Appeal in *People v. Harris*, B016657. Contemporaneous with the filing of this brief, Mr. Moore is filing a separate request for this Court to take judicial notice of the transcripts in these two cases. Attached as exhibits to that request are the arguments of counsel referenced in this brief.

> "[T]he evidence is clear and uncontraverted that no one in the apartment but Lee Edward Harris brought up the idea, the thought of and the course of conduct known as stabbing these innocent people, nobody other than Lee Edward Harris." (RTH 1980 at 1659.)

According to the prosecutor, it was Harris who provided the knife to Moore. (RTH 1980 at 1686.) The prosecutor recognized that Harris ordered not only Avery, but Mr. Moore as well: Harris "ordered and initiated the killing itself and the act of Mr. Moore which followed immediately." (RTH 1980 at 1697.) Harris "ordered it to be done by others, suggested it and initiated it." (RTH 1980 at 1699.)

During the penalty phase, the prosecutor returned to this same theme. He urged the jury to give Harris death because he "directed the murders of Hettie and Robert Crumb by word, deed and conduct." (RTH 1980 at 2076.) It was Harris, the prosecutor argued, who "was the moving force in ultimately deciding to exterminate these innocent people." (RTH 1980 at 2076.) Harris was "the man in control of Charles Moore also, who supplied the idea for the crime . . . ." (RTH 1980 at 2077.) This jury imposed death.

On appeal, this Court reversed the conviction and death sentence. (*People v. Harris* (1984) 36 Cal.3d 36.) Harris was tried a second time; this trial occurred in 1985. The state sought death again.

Again the prosecutor made clear that the plan to kill was "Mr. Harris's plan." (RTH 1985 at 3605.) Again the prosecutor made clear that Harris controlled Moore:

> "[W]ho is controlling the big beast [Moore]? Lee Harris, he's in control." (RTH 1985 at 3606.)

The prosecutor argued that Harris was "the calm, cool and collected one that channels the violence and aggression of the animal Charles Moore." (RTH 1985 at 3606.) While the plan to rob the Crumbs was hatched in Kansas and Missouri, the plan to kill was "a different plan." (RTH 1985 at 3609.) Harris "controlled" Moore. (RTH 1985 at 3614.) It was Harris who was "calm and cool and gave quiet and efficient, if you will, orders." (RTH 1985 at 3615.)

After obtaining a conviction, the prosecutor again sought death for Harris. Again he asked the jury to impose death because Harris was the mastermind who controlled Mr. Moore:

> "You also know without question now that the idea of the actual killing and how to do each of the . . . killings was this defendant Lee Edward Harris' contribution to this series of executions." (22 RTH 1985 at 3838.)
>
> "[T]he actual killing idea and method in all instances was chosen by Mr. Harris for the motive stated, to not leave witnesses." (22 RTH 1985 at 3843.)
>
> "We know again from the evidence that when it came to ordering Mr. Moore around in regard to his aggressive behavior, Mr. Harris did take control, was all to control him in re his actions toward Ms. Avery." (22 RTH 1985 at 3844.)

Ultimately, the second jury gave Harris a life sentence. (*See People v. Harris* (1987) 191 Cal.App.3d 819, 820.)

Trial in this case began in 1998. At the guilt phase, the prosecutor presented a very different view as to who had actually planned the killing. Now that the state was seeking to convict and execute Mr. Moore, it would no longer argue that "without question . . . the idea of the actual killing and how to do each of the . . . killings was this defendant Lee Edward Harris' . . . ." (22 RTH 1985 at 3838.) Instead, now that the state was seeking to convict and execute Mr. Moore, the plan was just as much his as it was Mr. Harris's:

> "With respect to Marie Crumb, what did the defendant do? We know he grabbed her as he went in the door. Had the decision been made to kill those people by then? Yes. The defendant and Harris were not leaving witnesses. That decision may have been confirmed when Marie recognized him, but they had already decided they were going to kill these people as well as take their property." (7 RT 1659.)

The prosecutor also presented a very different view as to whether Harris controlled Mr. Moore. Now that the state was seeking to convict and execute Mr. Moore, the state would no longer argue that Harris was the "calm cool and collected one" who was "controlling" Mr. Moore. Instead, the state now argued that Moore "encouraged, initiated, coerced these killings as much as Lee Harris." (7 RT 1660.)

This new theme continued during the penalty phase. The prosecutor argued that Mr. Moore did not act under the domination of "another person who planned these crimes." (8 RT 1958.) To the contrary, the prosecutor suggested Mr. Moore was the planner; after all, as the prosecutor argued, "where did they take place? Locations the defendant had worked at or lived at. Who knew these victims' practices regarding money, their rituals? The defendant." (8 RT 1958-1959.) According to the prosecutor,

there was 'no evidence" that Harris "pressured" or controlled Mr. Moore. (8 RT 1959.) According to the prosecutor, there was nothing about Mr. Moore's role in the offense which "provides any mitigation." (8 RT 1960.)

As more fully discussed below, the prosecutor's inconsistent positions violated both Due Process and the Eighth Amendment. A new penalty phase is required.

B. The Prosecutor Violated Due Process In Presenting Inconsistent Arguments In Connection With A Fact Directly Relevant To Punishment.

The Due Process Clause guarantees criminal defendants a fair trial. (*Turner v. Louisiana* (1965) 379 U.S. 466.) It imposes on criminal prosecutors -- as agents of the state -- a duty not simply to convict, but to seek justice. (*See* American Bar Association Standards for Criminal Justice (2d. Ed. 1982) § 3-1.1(b)(c); American Bar Association Code of Professional Responsibility, E. C. 7-3.) As the United States Supreme Court noted long ago, "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

The justification for this rule is simple. "[S]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." (*Brady v. Maryland* (1963) 373 U.S. 83,. 87.) Thus, the prosecutor may not be "the architect of a proceeding that does not comport with the standards of justice." (*Ibid.*) It is for this reason that the Due Process Clause has long

been held to limit the ability of prosecutors to use unfair methods in obtaining a conviction. (*See, e.g., Giglio v. United States* (1972) 405 U.S. 150; *Miller v. Pate* (1967) 386 U.S. 1; *Brady v. Maryland, supra,* 373 U.S. 83; *Napue v. Illinois* (1959) 360 U.S. 264; *Alcorta v. Texas* (1957) 355 U.S. 28.)

Applying these very principles, this Court has explicitly held that a prosecutor's presentation of inconsistent theories is improper where the variation is "used to convict the defendant *or increase his or her punishment.*" (*In re Sakarias* (2005) 35 Cal.4th 140, 161, emphasis added.) Such conduct "gives rise to a due process claim (under both the United States and California Constitutions) . . . ." (*Id.* at p. 160.)

That is exactly the case here. A defendant who plans a crime, and who controls others to commit the crime, is plainly more culpable than a defendant who does not initiate the plan. (*See, e.g., People v. Marshall* (1990) 50 Cal.3d 907, 944-945; *People v. Hall* (1994) 8 Cal.4th 950, 958 n.4; *People v. Turner* (1990) 50 Cal.3d 668, 715; *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1147; California Rule of Court 4.421, subdivision (a)(4) [in aggravating sentence, court may consider that "defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission."].) Thus, among the factual questions directly relevant to the jury's sentencing decision were (1) whether Mr. Moore planned the murders and (2) whether Harris was the mastermind who controlled Moore. As such, the prosecutor's inconsistent positions on these issues violated Due Process.

The standard of prejudice for such an error is, as this Court has itself noted, "a complex one." (*In re Sakarias*, *supra*, 35 Cal.3d at p. 164.) The first question the Court must resolve is whether the argument made in Mr. Moore's case -- suggesting that he planned the murder and was not controlled by Harris -- is "probably false or probably true." (*Ibid.*) If it is true, there is no prejudice; if it is false, the next question is whether the inconsistent argument "could reasonably have affected the penalty verdict." (*Ibid.*)

Here, the record shows that the prosecutor's argument in Mr. Moore's case was "probably false." After all, although Avery said that defendant was involved in the plan to rob the Crumbs, she made clear (1) Harris ordered defendant to wear a mask, (2) Harris purchased surgical tape at the drugstore, (3) Harris ordered Avery to get the knives, (3) Harris ordered Avery to stab Mrs. Crumb, (4) Harris got angry when she did not stab hard enough, (5) Harris got angry when she touched the coffee table and left fingerprints, (6) Mr. Moore told Avery the murder was Harris's idea, (7) Avery believed Harris was the "brains" behind the plan, and (8) although Moore was involved in planning the robbery, she never heard him say anything about a murder. (6 RT 1331, 1340, 1353, 1354, 1369, 1392-1393, 1422, 1423.)

The question then becomes whether the inconsistent argument "could reasonably have affected the penalty verdict." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 164.) Because this error is of federal constitutional dimension, another way of phrasing this standard is to ask whether the state can prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 384 U.S. 18, 24 [standard for assessing federal constitutional error requires the state to prove any error harmless beyond a reasonable

doubt].) Where it is reasonably probable that at least one juror would have cast a different vote, this standard is satisfied. (*Compare People v. Terry* (1964) 61 Cal.2d 137, 153 [less demanding state-law standard of prejudice satisfied where evidentiary errors "may have led a single juror" to cast a different vote]; *People v. Hamilton* (1963) 60 Cal.2d 51, 136-137 [state law standard satisfied if "only one of the twelve jurors was swayed by the inadmissible evidence . . . ."].)

The state will be unable to prove this error harmless here. As noted above, this was not a case without mitigating evidence. The jury heard from five of defendant's siblings about his difficult upbringing: his father was an alcoholic who gave his children drugs, taught them to steal, and beat them with his fists and with extension cords. (7 RT 1877, 1881, 1888, 1892, 1897, 1916, 1929, 1931.) He would bring women to the house, then force the children to leave; one of Mr. Moore's sisters left the home because the father was raping her; and a younger brother intentionally would get arrested just to get out of the home. (7 RT 1889-1890, 1898.)

Moreover, the inconsistent argument made by the prosecutor involved a fact which was critical to the calculus of death. The particulars of a defendant's role in any capital homicide are a critical factor for the jury to consider in deciding whether the defendant should live or die. Thus, as the cases cited above make clear, a defendant who plans a murder and controls accomplices to achieve that end is certainly more culpable then a defendant who neither plans the homicide nor controls others, but who is himself controlled. Indeed, the state here recognized this basic concept, not only in urging the jury to return a death verdict against Harris because he was the mastermind who

controlled Mr. Moore, but in providing that operating under the domination of another party is a statutory mitigating circumstance. (*See* Penal Code section 190.3, subdivision (g).)

Finally, while it is certainly true that the homicide here -- as in all capital cases -- was tragic and senseless, the fact of the matter is that the crime is not one which is in itself so inherently aggravating that death was pre-ordained. (*See In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for five separate counts of first degree murder]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnaping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering ten people].) Moreover, the second jury to hear this case in connection with Harris -- who Avery herself acknowledged was the "brains" of the operation -- imposed a life without parole term. On this record the state will be unable to prove beyond a reasonable doubt that not a single juror would have imposed a life verdict in the absence of the error. A new penalty phase is required.

C. The Prosecutor's Request That the Jury Sentence Moore to Die Based On A Theory Of His Culpability That The State Had Specifically Disclaimed At The Harris Trial Violates the Eighth Amendment.

Separate and apart from the Due Process grounds discussed above, a new penalty phase is compelled by the Eighth Amendment. The United States Supreme Court has recognized the death penalty is a qualitatively different punishment than any other. (*See, e.g., Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13; *Woodson v. North Carolina* (1976)

428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (*See, e.g., Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama, supra*, 447 U.S. at p. 638, n.13.)

Procedures which interfere with the presentation and consideration of reliable information undercut this heightened need for reliability and therefore violate the Eighth Amendment. (*See, e.g., Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Gardner v. Florida* (1977) 430 U.S. 349, 362; *Lockett v. Ohio* (1978) 438 U.S. 586.) This is so even when those same procedures do not violate the Due Process clause. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. at pp. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]. *See Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the due process clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."].)

Here, even if the prosecutor's presentation of inconsistent theories does not violate the Due Process clause, it certainly violates the "heightened need for reliability" in capital cases. In *People v. Harris* the state sought -- and initially obtained -- a death sentence based on a theory of the crime in which Harris was the mastermind, the planner, who controlled both Avery and Moore. But this theory was never presented to the Moore jury.

In other words, the state asked the jury to sentence Moore to die based on a theory of the case that it had specifically disclaimed in asking the jury to sentence Harris to die. This approach to capital litigation raises the substantial risk of an unreliable death

sentence. Even if the Due Process Clause tolerates this type of "give" in the criminal justice system, the Eighth Amendment will not tolerate it in the more rigorous context of capital sentencing. A new penalty phase is required.

VI. BECAUSE THE UNITED STATES SUPREME COURT HAS EXPLICITLY HELD THAT EXCLUSION OF EVIDENCE REGARDING THE LIFE SENTENCE OF A CO-DEFENDANT IS CONSTITUTIONAL ERROR, THE TRIAL COURT ERRED IN REFUSING TO ALLOW EVIDENCE, CLOSING ARGUMENT OR JURY INSTRUCTIONS ON THIS POINT.

A. The Relevant Facts.

Teri Avery was the state's star witness. She testified in some detail about the crime and the relative culpability of Lee Harris and Charles Moore.

In sum, Avery told the jury that although it was Mr. Moore who told Lee Harris about the jewelry, Mr. Moore said nothing about killing anyone. (6 RT 1423.) According to Avery, Lee Harris was the brains of the operation and Mr. Moore never suggested that a murder was to be involved in the crime:

"Q: [by defense counsel] Mr. Harris, he was the brains behind all of this?

A: [by Teri Avery]: Yes.

. . .

Q: But Harris was the brains, right?

A: Yeah.

Q: Mr. Moore, during these plans, didn't suggest he intended to kill anybody, did he?

A: No." (6 RT 1422-1423.)

But according to Avery, Harris was not just the "brains" of the operation, he was also directly involved in the actual murders. Harris threw Mrs. Crumb on the floor after they entered the apartment. (6 RT 1346.) Harris ordered Avery to turn the volume up on the television so the victims could not be heard. (6 RT 1348.) Harris strangled Mrs. Crumb, holding a rag around her neck and twisting it. (6 RT 1352-1353.) Harris ordered Avery to retrieve knives from the kitchen, and specifically demanded a butcher knife. (6 RT 1352-1353.) When Avery delayed, Harris came into the kitchen and found the butcher knife himself. (6 RT 1353.)

According to Avery, Moore stabbed Mr. Crumb once or twice. (6 RT 1356, 1413.) But it was Harris who ordered Avery to stab Mrs. Crumb, and became angry when she did not stab hard enough. (6 RT 1354, 1359.) Harris also ordered Avery to wipe down the coffee table so there were no fingerprints. (6 RT 1354, 1362.) In a separate trial, Harris was found guilty of murder and received a life without parole term. (7 RT 1907.)

In light of Harris's significant role in the offense, defendant -- who was representing himself during the penalty phase -- sought to inform the jury about Harris's sentence. (7 RT 1907.) He also asked for a specific instruction telling the jury "you may consider the fact that the defendant's accomplice received a more lenient sentence as a mitigating factor." (7 RT 1737.)

When the matter was discussed, the prosecutor objected, arguing "there was case law which says, at least as to Lee Harris, that is irrelevant the fact that he ultimately did receive life without the possibility of parole." (7 RT 1907.) Without specifying the case

names, trial court agreed that such cases existed. (7 RT 1907.) According to the court, the sentence imposed on Harris was "inappropriate to argue in the case." (7 RT 1907.) The court was quite clear that defendant could not rely on this information as mitigation:

> "THE COURT: I have read cases on that as well. I don't believe the punishment in regards to codefendants is appropriate to argue in the case.
>
> "DEFENDANT MOORE: As a mitigating factor?
>
> "THE COURT: As any type of factor, mitigating or aggravating. It's not a proper relevant subject in regards to what are the two punishments they are to -- to give you." (7 RT 1907.)

Consistent with its ruling that this information would not come before the jury, the court did not provide defendant's requested instruction on the point. (7 RT 1972-1974.)

The trial court's ruling requires a new penalty phase for five reasons. First, as discussed in Argument B below, seven years before the penalty phase in this case the United States Supreme Court held that in a capital case, evidence that an equally culpable co-defendant received a life sentence may not be excluded under the Eighth Amendment. Second, as discussed in Argument C below, even if the Eighth Amendment did not itself require admission of this evidence, admission was required under the Due Process Clause to rebut the prosecutor's specific argument that the facts of this crime alone required death. Third, as discussed in Argument D below, the trial court's separate refusal to allow defendant to argue this subject at the penalty phase violated the Sixth Amendment right to present closing argument on all relevant points in a case. Fourth, as discussed in Argument E below, even if the court's rulings did not violate the federal constitution, they violated state law, specifically the provisions of section 190.3 which permit capital

defendants to introduce "any matter relevant to . . . sentence." Finally, as discussed in Argument F below, the errors require a new penalty phase.

B. Because The Sentence Imposed On Harris Could Serve As A Basis For A Sentence Less Than Death, The Trial Court Here Was Not Free To Exclude It In Its Entirety From The Jury's Calculus Of Death.

1. United States Supreme Court precedent required that defendant be permitted to introduce evidence about Harris's sentence.

It is now well established that the Eighth and Fourteenth Amendments will not permit a death sentence to stand where the sentencer has not considered mitigating evidence. (*See, e.g., Eddings v. Oklahoma* (1982) 455 U.S. 104.) "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. . . . Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances." (*Jurek v. Texas* (1976) 428 U.S. 262, 271.)

In a number of cases the Supreme Court has defined exactly what the term mitigating evidence means. More than two decades ago the Court explained that mitigating evidence was evidence which "might serve as a basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5.) The Court has more recently reiterated this broad definition: "the question is simply whether the evidence is of such a character that it "might serve 'as a basis for a sentence less than death.'" (*Tennard v. Dretke* (2004) 542 U.S. 274, 287.)

In *McKoy v. North Carolina* (1990) 494 U.S. 433, the Court articulated a functionally similar definition. There, the Court held that "mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance *which a fact-finder could reasonably deem to have mitigating value.*" (*Id.* at p. 440, emphasis added.) Pursuant to this definition, evidence may not be excluded from consideration "if the sentencer could reasonably find that it warrants a sentence less than death." (*Id.* at p. 441.) The Court has more recently reiterated this broad definition as well, defining mitigation as "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*Smith v. Texas* (2004) 543 U.S. 37, 44.)

In light of the fundamental role played by the sentencing jury in a capital case, there is a sound rationale for these broad definitions of mitigating evidence. As the Supreme Court noted for than 40 years ago, "a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.) In the many years since *Witherspoon*, the Court has continued to stress the jury's central purpose in "expresss[ing] the conscience of the community." (*See, e.g., Jones v. United States* (1999) 527 U.S. 373, 382; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 238; *McKleskey v. Kemp* (1987) 481 U.S. 279, 310.) The broad definition of mitigating evidence furthers this goal; the jury cannot reliably express the "conscience of the community" when it is barred from hearing evidence "which might serve as a basis for a sentence less than death" or "which a fact-finder could reasonably deem to have mitigating value."

As such, the question here is simple: given Harris's major role in the crime, did evidence that he received a life sentence meet these definitions? Or, put in the exact language of the case law, is this evidence (1) "of such a character that it might serve as a basis for a sentence less than death" or (2) the type of evidence "a fact-finder could reasonably deem [it] to have mitigating value?" The answer is yes.

Indeed, as noted above, the United States Supreme Court itself answered this question in 1991 -- seven years before the penalty phase in this case, applying these inclusive definitions of mitigating evidence and holding that evidence of more lenient sentences imposed on other defendants was relevant mitigating evidence under the Eighth Amendment. (*Parker v. Dugger* (1991) 498 U.S. 308, 314-316.) Because *Parker* controls this case, and because there has been some confusion about *Parker*'s holding in some of this Court's subsequent case law, a detailed analysis of *Parker* is required.

There, the defendant was convicted of capital murder. At the time, Florida law permitted a capital defendant to present two types of mitigating evidence: (1) evidence which related to a statutory list of mitigating circumstances and (2) non-statutory mitigating evidence. (498 U.S. at p. 313.) At defendant's penalty phase his lawyer presented non-statutory mitigating evidence that a co-defendant who had actually killed one of the victims received only a second degree murder sentence. (498 U.S. at p. 314.) The trial judge -- who was the sentencer under the Florida scheme -- imposed death after finding six aggravating circumstances and no statutory mitigating circumstances, and concluding that the non-statutory mitigation did not outweigh the aggravation. (498 U.S. at p. 311.) On appeal, the Florida Supreme Court struck two of these aggravating

circumstances. (*Ibid.*) In nevertheless upholding the death sentence, the state supreme court "did not consider the evidence of nonstatutory mitigating circumstances." (498 U.S. at p. 318.)

In federal habeas proceedings, defendant attacked the state supreme court's failure to consider this non-statutory mitigating evidence. Obviously, since he was in the United States Supreme Court, defendant did not argue that the state court's ruling had solely violated state law. The Supreme Court, of course, does not consider -- nor could it second guess the Florida Supreme Court on -- pure questions of state law. (*See Mullaney v. Wilbur* (1975) 421 U.S. 684, 691.) Instead, defendant argued that the trial court's failure to consider the non-statutory mitigating evidence, including the less severe punishment of a co-defendant, violated the Eighth Amendment.

The Supreme Court agreed, holding that the state supreme court was not permitted "to ignore the evidence of mitigating circumstances in the record . . . ." (498 U.S. at p. 320.) Echoing the rationale of *Lockett* and *Eddings*, the Court noted that the death sentence imposed by the reviewing court was invalid precisely because the state court had "affirmed Parker's death sentence without considering the mitigating circumstances" in violation of defendant's Eighth Amendment right to "the individualized treatment to which he is entitled under the Constitution," citing *Clemons v. Mississippi* (1990) 494 U.S. 738, 752. (498 U.S. at p. 322.)

The citation to page 752 of *Clemons* is important. It shows that *Parker* was premised on the same Eighth Amendment principles animating *Locket* and *Eddings*.

Clemons held that where a state reviewing court in a capital case found an invalid aggravating sentence, it could step into the role of the sentencer and re-weigh the remaining aggravation and mitigation to determine the proper sentence. (494 U.S. at p. 741.) Significantly, at page 752, *Clemons* went on to note that in such a situation, a reviewing court's failure to consider mitigation would violate both *Lockett* and *Eddings*. (*Clemons v. Mississippi*, *supra*, 494 U.S. at p. 752.) Of course, as the facts of *Parker* and the citation to *Clemons* establish, it was this precise *Lockett* error which the Supreme Court found in *Parker*.

More recently, the Supreme Court has confirmed the essential mitigating value of the type of evidence involved in *Parker*. In *Kimbrough v. United States* (2007) 552 U.S. 85 the Court spoke directly to the relevance of comparative punishments in determining an appropriate sentence even in the non-capital context.

In *Kimbrough*, defendant was convicted of drug offenses involving 56 grams of crack cocaine. At sentencing, the trial court considered "the nature and circumstances of the offense and [defendant's] history and characteristics." (*Id.* at p. 93.) In addition, however, the trial court also considered the significantly lower sentences imposed on defendants who possessed 56 grams of powder cocaine. (*Ibid.*) Based on this factor the trial court imposed a lower term on defendant, ruling that a longer sentence would be "disproportionate." (*Ibid.*) The Fourth Circuit Court of Appeals held that the trial court's consideration of sentences imposed in other cases was improper. (*Ibid.*) The Supreme Court reversed, holding that the trial court "rested its sentence on . . . appropriate

considerations" and properly considered the sentences imposed in other cases. (*Id.* at p. 111.)

Parker and *Kimbrough* are entirely logical. Both establish that one factor relevant to selecting an appropriate punishment is the need to avoid disparities among defendants who have committed similar -- or as in both *Parker* and this case, identical -- crimes. Congress itself has agreed with this conclusion; the federal death penalty statute lists a number of mitigating factors which the jury "shall consider," including whether "[a]nother defendant or defendants, equally culpable, will not be punished by death." (18 U.S.C. § 3592, subdivision (a)(4).) So have other states. (*See, e.g., State v. Towery* (1996) 186 Ariz. 168, 176; *State v. Ferguson* (Del. 1992) 642 A.2d 1267; *State v. McIlvoy* (Mo. 1982) 629 S.W.2d 333, 341.)

Parker and *Kimbrough* control the outcome here. After all, according to the state's own witness, Harris was the "brains" of the operation, and he was personally responsible for killing one of the two victims. Under *Skipper* and *McCoy*, the relevant Eighth Amendment question is whether evidence that Harris received a life sentence is "of such a character that it *might* serve as a basis for a sentence less than death" or "*could* . . . [be] deem[ed] to have mitigating value." *Parker* shows that the Supreme Court has already answered this question; such evidence is plainly mitigating within the meaning of these broad definitions. Because this evidence could have served as the basis for a sentence less than death it was proper mitigation; the trial court's exclusion of this evidence violated the Eighth Amendment. Constitutional error has occurred.

2. This Court's decisions distinguishing *Parker* should be overruled.

In making this argument, defendant is aware that prior to the Supreme Court's decision in *Parker*, there was a long line of decisions from this Court suggesting that the sentence imposed on an accomplice was not admissible under *Lockett*. (*See, e.g. People v. Carrera* (1989) 49 Cal.3d 291, 343; *People v. Malone* (1988) 47 Cal.3d 1, 54; *People v. Belmontes* (1988) 45 Cal.3d 744, 811-813.) In *People v. Mincey* (1992) 2 Cal.4th 408, this Court addressed the issue anew after *Parker* and reached the same result.

In *Mincey*, defendant was convicted of capital murder. At his penalty phase, the trial court excluded evidence that a co-defendant was to receive a sentence less than death. (2 Cal.4th at p. 464.) On appeal, defendant argued that *Parker* required admission of this evidence. (2 Cal.4th at p. 479.) This Court analyzed *Parker* and disagreed. According to this Court, *Parker* did not hold that evidence of an accomplice's sentence was mitigating (and admissible) under the Eighth Amendment. (2 Cal.4th at p. 480.) Under this Court's reading, *Parker* was based on the premise that "[i]n Florida, unlike California, [the rule is that] a codefendant's sentence disposition is admissible" and "[n]othing in *Parker* supports the conclusion that California is constitutionally required to adopt the Florida rule." (2 Cal.4th at p. 480.) In other words, under this Court's reading, the failure of the Florida state courts to consider evidence of the accomplice's more lenient sentence did not violate federal law, only state law. (*Accord People v. Brown* (2003) 31 Cal.4th 518, 562 [*Parker* rests on the requirements of Florida law and "does not state or imply the Florida rule is constitutionally required . . . ."]; *People v.*

McDermott (2002) 28 Cal.4th 946, 1005 [same]; *People v. Bemore* (2000) 22 Cal.4th 809, 857-858; *People v. Cain* (1995) 10 Cal.4th 1, 63.)

Of course, there is an immediate problem. *Parker* itself found Eighth Amendment error and reversed the defendant's death sentence. As discussed in detail above, *Parker* cited *Clemons* and invalidated the death sentence because the state court's refusal to "consider[] the mitigating circumstances," including the less severe sentence of a co-defendant, violated defendant's right to "the individualized treatment to which he is entitled under the Constitution." (498 U.S. at p. 322.) Of course, the right to "individualized treatment" in capital cases to which *Parker* referred springs directly from the Court's Eighth Amendment precedents. (*See, e.g., Lockett v. Ohio, supra*, 438 U.S. at pp. 602-603.) In short, if the error in *Parker* was purely an error of state law, the Supreme Court would not have found federal constitutional error and granted federal habeas relief. (*See Estelle v. McGuire* (1991) 502 U.S. 62, 67 ["federal habeas relief does not lie for errors of state law."].)

It may be that this Court's analysis in *Mincey* and its progeny rests on a more nuanced analysis. As noted above, *Parker* could not grant relief absent a federal constitutional error. Thus, one could argue that *Mincey* means that although *Parker* necessarily found Eighth Amendment violation in the state court's failure to consider mitigating evidence, the Eighth Amendment violation in *Parker* is not the same type of Eighth Amendment violation involved in *Lockett*. In other words, *Parker* created a two-tiered class of mitigating evidence which the Eighth Amendment does not permit a state to exclude from a penalty phase. Under this view, there is (1) a first class of mitigating

evidence whose admission is guaranteed directly by the Eighth Amendment and (2) a second class of mitigating evidence whose admission is *not* guaranteed by the Eighth Amendment, but which -- if state law independently guarantees admission -- then its exclusion nevertheless violates the Eighth Amendment. Under this reading of *Mincey*, the decision in *Parker* must have involved the second type of evidence.

Under this view, the essential holding of *Parker* is that where a state elects to provide more protections than are constitutionally required -- by permitting presentation of additional mitigating evidence beyond *Lockett* -- a sentencer's failure to consider that additional mitigating evidence will still violate the Eighth Amendment. Put another way, under *Mincey* when a trial court excludes mitigating evidence, there is federal constitutional error regardless of whether (1) the Eighth Amendment itself requires admission of the evidence (as in *Lockett*) or (2) only state law requires admission of the evidence.

There are several problems with this interpretation of *Parker*. First, nothing in *Parker* itself suggests the Court was extending the reach of the Eighth Amendment to evidence excluded purely in violation of state law. In fact, such an interpretation of *Parker* is totally inconsistent with the Supreme Court's existing Eighth Amendment case law explicitly addressing factors weighed by a sentencer in deciding whether death is appropriate.

In this regard, the Court has long made clear that a capital sentencer's consideration of an aggravating factor invalid only under state law does *not* violate the

federal constitution. (*Barclay v. Florida* (1983) 463 U.S. 939, 951, n.8, 956, 967-968.) Such an error is a "mere error of state law." (*Id.* at p. 951, n.8.) Instead, there is a federal constitutional violation only where an aggravating factor considered by the sentencer is actually invalid under the *federal* constitution. (*Barclay v. Florida, supra*, 463 U.S. at 951, n.8. *Accord Maynard v. Cartwright* (1988) 486 U.S. 356 [where aggravating factor was unconstitutionally vague in violation of the Eighth Amendment, a death sentence based on that factor was infected with constitutional error].)

In *Mincey*, this Court never explained why the United States Supreme Court would employ such diametrically opposite applications of the Eighth Amendment. That is, in deciding whether a defendant should live or die, *Barclay* establishes that a sentencer's consideration of an aggravating factor invalid only under state law is "mere[ly] an error of state law" and does not violate the federal constitution. But, if *Mincey*'s interpretation of *Parker* is to be accepted, *Parker* established the exact opposite proposition: when a sentencer is precluded from considering mitigation required only by state law, this is *not* simply an error of state law, but it actually violates the federal constitution. There is no reason the Supreme Court would draw such a stark distinction.

Indeed, this Court has itself rejected the precise approach to mitigating evidence that *Mincey* concluded was the basis for the *Parker* decision. Thus, when a trial court excludes testimony which is admissible under *Lockett*, there is a federal constitutional violation and the error is reviewed under the standard of prejudice applicable to federal constitutional errors. (*See, e.g., People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.)

But the Court has reached a very different conclusion in connection with the exclusion of mitigating evidence which is *not* admissible under *Lockett*, but only under state law.

For example, this Court has long held that there is no Eighth Amendment right under *Lockett* or *Eddings* to present evidence of lingering doubt at the penalty phase of a capital trial. (*See, e.g., People v. Stitely* (2005) 35 Cal.4th 514, 566; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1240; *People v. Cox* (1991) 53 Cal.3d 618, 676.) Instead, the right to present lingering doubt evidence in California arises out of state law only. (*People v. Gay* (2008) 42 Cal.4th 1195, 438; *People v. Hamilton* (2009) 45 Cal.4th 863, 911-912.) Because the right to present lingering doubt evidence is of state origin only, when a trial court improperly excludes lingering doubt evidence there is no federal constitutional violation and the error is analyzed by applying the state law "reasonable possibility" of prejudice standard applied generally to state law errors. (*See, e.g., People v. Hamilton, supra*, 45 Cal.4th at p. 912; *People v. Gay, supra*, 42 Cal.4th at p. 1223.)[3]

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[3] The "reasonable possibility" test requires reversal of the penalty phase if there is a reasonable possibility that an error affected the penalty verdict. (*See, e.g., People v. Allen* (1986) 42 Cal.3d 1222, 1281.) This Court has explicitly noted that this test was designed to "assess[] the effect of state-law error at the penalty phase of a capital trial." (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Thus, in contrast to the test used to assess federal constitutional error (which requires the state to prove the error harmless), the reasonable possibility test requires affirmance unless prejudice is affirmatively established. (*Compare Chapman v. California* (1967) 386 U.S. 18, 24 [standard of prejudice for federal constitutional errors requires the state to prove the error harmless] *with People v. Brown, supra*, 46 Cal.3d at p. 448 [under reasonable possibility test, prejudice must by proved]. *Accord People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222 [burden is on defendant to prove prejudice under the reasonable possibility test]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1233-1234.) This Court has long distinguished between the *Chapman* and "reasonable possibility" standards and treated them as distinct tests. (*See People v. Welch* (1999) 20 Cal.4th 701, 762; *People v. Mickey* (1991) 54 Cal.3d 612, 682; *People v. Gordon* (1990) 50 Cal.3d 1223, 1267; *People v. Brown, supra*, 46 Cal.3d at pp. 447-448.)

In short, as this Court recognized in *Lucero*, when a trial court excludes evidence which is itself mitigating under the Eighth Amendment, there is Eighth Amendment error. In contrast, as this Court recognized in cases such as *Hamilton* and *Gay*, when a trial court excludes evidence which is mitigating under state law only, there is no Eighth Amendment (or indeed federal constitutional) error at all.

This approach is entirely correct. But as should also be clear, it is also entirely inconsistent with *Mincey*'s reading of *Parker*. If the evidence in *Parker* was mitigating only because of state law, then -- pursuant to *Hamilton* and *Gay* -- the refusal to consider such evidence should not have constituted an Eighth Amendment error. Under this Court's own precedents, *Parker*'s affirmative finding of an Eighth Amendment error necessarily reflects a conclusion that the mitigating evidence was itself admissible under the Eighth Amendment.

In sum, the distinction of *Parker* this Court advanced in *Mincey* and its progeny is (1) unsupported by *Parker* itself, (2) inconsistent with the current broad definition of mitigating evidence announced by the Supreme Court in *Tennard* and *McCoy* (and followed by Congress in the federal death penalty act), (3) inconsistent with the Supreme Court's treatment of state law error in connection with aggravating factors in *Barclay* and

(4) inconsistent with this Court's own clear distinction between constitutional mitigation and non-constitutional mitigation. *Parker* controls this case.[4]

C. The Trial Court's Refusal To Allow Defendant To Rebut The Prosecutor's Arguments For Death Requires A New Penalty Phase.

Even if the Eighth Amendment itself did not require admission of evidence regarding Harris's life sentence, the Due Process Clause did. This is because even if the evidence was not independently admissible under *Lockett* in its own right, it was admissible to rebut a specific argument on which the prosecutor relied in seeking death.

In this regard, when a state chooses to impose capital punishment, the Eighth Amendment requires procedures which insure that the sentence is not meted out in an unreliable, arbitrary manner but instead is based on complete and accurate information. (*See, e.g., Lockett v. Ohio, supra*, 438 U.S. at p. 604; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) The Due Process Clause prevents a death sentence from being based on information, or argument, which the defendant did not have a full opportunity to rebut. (*See, e.g., Simmons v. South Carolina* (1996) 512 U.S. 154; *Gardner v. Florida, supra*, 430 U.S. at p. 357. *See Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [Due Process does not permit the state to rely on a defendant's confession while at the same

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[4] There is yet another problem with the *Mincey* court's conclusion that *Parker* set up a two-tiered jurisprudence of mitigation, and that exclusion of mitigating evidence authorized solely by state law violates the Eighth Amendment. Such an approach would, of course, create a strong disincentive for states to go beyond the reach of *Lockett*. Significantly, the Supreme Court has specifically eschewed an interpretation of the federal constitution which would "create disincentives" for the state to provide extra protections to its citizens. (*See Monge v. California* (1998) 524 U.S. 721, 734.)

time exclude evidence from defendant explaining why the confession was unreliable].)

In *Simmons*, the Court reversed a death sentence where the trial court refused to provide an accurate instruction, or allow accurate argument, which was directly responsive to a particular argument the prosecutor made. There, defendant presented mitigating evidence regarding his background. In response, the prosecutor argued that the jury's concern should not be with how the defendant was "shaped," but "what to do with him now that he is in our midst." (512 U.S. at pp. 157, 182.) The prosecutor also told the jury that its verdict should not be controlled by emotion but should be "an act of self-defense." (512 U.S. at pp. 157, 182.) Defense counsel sought to rebut this argument by requesting an instruction advising the jury that a sentence of life without parole would indeed be carried out; that it meant life in prison.

Significantly, at no point did the prosecutor ever explicitly argue that defendant posed a potential danger to members of society outside prison walls. Indeed, as Justice Scalia noted in his dissent, "[n]ot only . . . was future dangerousness not emphasized, but future dangerousness outside of prison was not even mentioned." (512 U.S. at p. 181 [Scalia, J., dissenting].) Nevertheless, the Supreme Court held that the prosecutor's remarks had raised the issue; as such, the trial court's refusal to give the requested instruction violated Due Process and required reversal of the death sentence.

Simmons and *Crane* control this case. Here, the prosecutor advised the jury that the factors it should consider in deciding if defendant should die could be "divided into two categories, [1] circumstances surrounding the crimes defendant has been convicted of

and his participation in it and [2] factors surrounding defendant's life and how he has conducted it." (8 RT 1956.) In no uncertain terms the prosecutor told the jury the first of these factors -- the crime itself -- "points in one direction, towards death." (8 RT 1958.) Separate and apart from considering any facts having to do with defendant himself, the prosecutor told the jury that "[t]he facts surrounding the murders of Robert and Marie Crumb make this a case where the death penalty is and should be imposed." (8 RT 1964.)

The prosecutor was certainly within his rights to urge the jury to find that the crime itself merited death, even before consideration of circumstances relating to Mr. Moore himself. By the same token, Mr. Moore should have been fully entitled to argue that, contrary to the prosecutor's argument, the crime itself did not inescapably "point in one direction, towards death." In making this argument -- and especially in light of the jury's role as the "conscience of the community" -- defendant should have been entitled to at least ask the jury to consider that another jury had unanimously elected to give Harris life for his arguably more culpable role in the same offenses. In effect, the trial court here permitted the prosecutor to tell the jury the crime itself deserved death while precluding the defendant, in aid of a contrary argument, from telling the jury that -- in fact -- Harris had already received life for this offense. Due Process was violated.

D. The Trial Court's Refusal To Allow Defendant To Argue A Proper Theory Of Mitigation Violated Defendant's Fifth, Sixth, Eighth And Fourteenth Amendment Rights.

As discussed above, the trial court precluded the jury from learning that Harris had received a life sentence. In addition, the trial court preluded any argument on the point, ruling that Mr. Moore could not rely on this evidence in urging the jury to spare his life. (7 RT 1907.)

In Argument V-B, *supra*, Mr. Moore contended that the Supreme Court's decision in *Parker* compelled a finding the trial court erred in excluding evidence regarding Harris's life sentence. Obviously, if this Court does not reconsider its prior rulings that *Parker* is distinguishable, the trial court's further ruling completely barring defendant from discussing this subject in closing argument cannot be challenged. After all, if evidence of Harris's sentence was genuinely inadmissible, then the trial court's order barring argument on the subject is above reproach.

But as discussed above, the trial court's exclusion of this evidence from the jury cannot be squared with *Parker*. Accordingly, the trial court's further order barring argument on the subject violated the Sixth Amendment.

In this regard, the Sixth Amendment to the United States Constitution not only provides criminal defendants with a right to counsel, but it also permits them to represent themselves. (*Faretta v. California* (1975) 422 U.S. 806, 821.) The goal of the rights provided in the Sixth Amendment -- including confrontation, compulsory process, and

notice -- is to help ensure a fair trial. (*See Strickland v. Washington* (1984) 466 U.S. 668, 685.)

In order to "ensure that the trial is fair", the Sixth Amendment also provides a right to present closing argument. (*See, e.g., Herring v. New York* (1975) 422 U.S. 853, 856-862; *In re William F.* (1974) 11 Cal.3d 249, 255, n.5; *People v. Green* (1893) 99 Cal. 564.) Closing argument for the defense "is a basic element" of the adversary process in a criminal trial. (*Herring v. New York, supra*, 422 U.S. at p. 858.) As this Court has itself noted, albeit in the context of defense counsel making a closing argument, the right "to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom." (*People v. Beivelman* (1968) 70 Cal.2d 60, 76-77. *Accord People v. Sieber* (1927) 201 Cal. 341, 355.)

To be sure, a trial judge retains discretion to limit argument to a reasonable time, or to preclude argument which is either redundant, based on an incorrect understanding of the law or unsupported by the facts. (*Herring v. New York, supra*, 422 U.S. at p. 862; *People v. Marshall* (1996) 13 Cal.4th 799, 854-855; *People v. Modesto* (1967) 66 Cal.2d 695, 707-708.)

Thus, a trial judge who has allowed full argument about the general subject of misidentification in criminal cases may properly preclude argument about specific magazine articles on that subject. (*People v. London* (1988) 206 Cal.App.3d 896, 909-910. *Accord People v. Marshall, supra*, 13 Cal.4th at p854-855 [where trial judge

fully allowed argument in a capital case which compared facts of the case with other cases, it was not improper to preclude further detailed argument about the facts of other cases].) Similarly, a trial court may properly preclude argument on a theory of defense which is completely unsupported by the evidence. (*People v. Modesto*, *supra*, 66 Cal.2d at pp. 707-708.) Finally, a trial court may preclude incorrect statements of the law during closing argument. (*People v. Sudduth* (1966) 65 Cal.2d 543, 548.) Yet where a trial court refuses to allow argument on a theory which is permitted under the law, the court has committed "gravely prejudicial error in depriving defendant of the opportunity to present that theory to the jury." (*People v. Modesto*, *supra*, 66 Cal.2d at p. 708.)

Here, the trial court precluded defendant from urging the jury to spare his life by considering, in part, the fact that Harris received only a life sentence for his role in the crimes. (7 RT 1907.) As discussed in argument V-B, *supra*, this evidence was indeed constitutionally relevant mitigating evidence. Accordingly, the trial court violated defendant's Sixth Amendment rights when it precluded him from asking the jury to spare his life on this basis.

E. The Trial Court's Refusal To Permit Evidence And Argument About Harris's Life Sentence Violated State Law.

The crime in this case occurred in December 1977. At the time, Penal Code section 190.3 provided that once a defendant has been convicted of special circumstances murder, there would be a separate penalty phase to determine the appropriate penalty as between life without parole and death. That section described the evidence admissible at the penalty phase as follows:

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

Thus, under the plain terms of this statute, the parties are permitted to introduce "any matter relevant" to three distinct areas: (1) aggravation, (2) mitigation and (3) sentence. Equally important, under the express language of section 190.3, mitigating evidence is "*not*" limited to "the defendant's character, background, history, mental condition and physical condition."

Here, as discussed above, evidence of a life sentence imposed on an equally culpable co-defendant is mitigating evidence within the broad definition of mitigation set out in *Tennard* (evidence which "might serve as a basis for a sentence less than death") or *Smith* (evidence "which a fact-finder could reasonably deem to have mitigating value." (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 287; *Smith v. Texas*, *supra*, 543 U.S. at p. 44.) But even if this Court rejects the argument, such evidence also falls within the broad definition of permissible penalty phase evidence set forth in section 190.3.

In determining what the legislature intended by authorizing evidence "as to any matter relevant to . . . sentence," it is important to note that the legislature must have intended this to mean something different from evidence relating to "aggravation" or "mitigation." "Otherwise, the clause would be mere surplusage and serve no purpose, in direct contravention of our rules of statutory construction." (*State Farm Mut. Auto Ins.*

Co. v. Garamendi (2004) 32 Cal.4th 1029, 1046. *Accord Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided"].)

It is also important to note the breadth of the statutory language. The statute does not purport to narrowly define the type of evidence which can be presented in connection with the sentence. Instead, the statute broadly permits "any matter" relevant to the sentence. Evidence that an equally culpable co-defendant received a life sentence falls squarely within the broad language "any matter relevant to . . . sentence."

Of course, in deciding the intent behind this particular provision of section 190.3, there is a principle of construction which is relevant. When a criminal statute is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. (*See, e.g., People v. Garcia* (1999) 21Cal.4th 1, 10; *People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Here, given the use of the extremely broad phrase "any matter relevant to . . . sentence," it is certainly reasonable to assume that the legislature intended to permit defendants to rely on evidence of a co-defendant's sentence in the very same case. Exclusion of such evidence also violated state law.

F. The Trial Court Exclusion Of Evidence And Argument About Harris's Life Sentence Requires A New Penalty Phase.

The United States Supreme Court has never held that errors which prevent the jury from considering mitigating evidence can be found harmless by a reviewing court. (*See, e.g., Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296 [instructional error precludes full jury consideration of mitigating evidence at defendant's penalty phase; held, death sentence reversed without application of a harmless error test]; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 247-265 [same]; *Penry v. Johnson* (2001) 532 U.S. 782, 796-803 [same]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328 [same]; *Eddings v. Oklahoma, supra*, 455 U.S. 104 [sentencer refuses to consider evidence regarding defendant's childhood; held, death sentence reversed without application of a harmless error test]; *Lockett v. Ohio, supra*, 438 U.S. 586 [state statute precluded sentencer from considering mitigating evidence; held, death sentence reversed without application of a harmless error test].) Lower federal courts too have agreed that this type of error is not subject to harmless error review. (*See, e.g., Nelson v. Quarterman* (5th Cir. 2006) 472 F.3d 287, 314.)

Penry is particularly instructive. In that case, defendant first contended that the state's use of a psychiatrist's report violated his Fifth Amendment rights. (532 U.S. at pp. 793-796.) The Supreme Court rejected the claim and, in an alternative holding, found any error harmless. (532 U.S. at p. 796.) As to defendant's second claim involving mitigating evidence, the Court agreed there was constitutional error and reversed without any harmless error analysis at all.

In making this argument, defendant is aware this Court has charted a different course, applying harmless error analysis to such errors. (*See, e.g., People v. Lucero, supra,* 44 Cal.3d at pp. 1031-1032.) Subsequent cases have reached the same conclusion, citing *Lucero*. (*See, e.g., People v. Smith* (2005) 35 Cal.4th 334, 368; *People v. Mickle* (1991) 54 Cal.3d 140, 193.)

In this case, there is no need to resolve the tension between these two lines of authority. Even assuming this Court applies harmless error analysis to the trial court's errors here, the error cannot be found harmless for two reasons.

First, the trial court here did not just preclude evidence on the subject, it also precluded argument. As the Supreme Court has observed, the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (*United States v. Cronic* (1984) 466 U.S. 648, 655.) The essence of the Sixth Amendment is contained in the Supreme Court's observation that "[t]ruth . . . is best discovered by powerful statements on both sides of the question." (*Ibid.*)

Here, the entire adversary system ceased to function in connection with this mitigating evidence. The defendant was precluded from presenting this information to the jury by way of argument or instruction, and he was prevented from urging the jury to spare his life on the basis of this evidence. Under these circumstances, defendant did not have "partisan advocacy on both sides of [his] case . . . ." At every turn he was barred from presenting his "side of the case" to the jury on this point. Nor could a reliable judgment

emerge from the existence of "powerful statements on both sides of the question." Because of the trial court's ruling, defendant was not allowed to make any statement at all on his side of this important issue.

Second, this was not a case bereft of mitigation. Although defendant was representing himself, the jury heard from five of defendant's siblings about his upbringing. Mr. Moore's father was an alcoholic and a gambler. (7 RT 1877, 1888, 1916, 1929.) He gave his children marijuana, taught them to steal, and made them steal things for him from people's backyards. (7 RT 1881, 1892, 1931.) If they refused to steal for him, he would beat them. (7 RT 1931.) He beat the children, first with an extension cord and then with his fists. (7 RT 1881, 1897, 1899, 1916.) According to Karen, defendant's oldest sister, defendant's father was most abusive to defendant. (7 RT 1929.)

Occasionally their father would have girlfriends to the house, and force the children to leave. (7 RT 1889-1890.) The youngest in the family, Steven Moore, would sometimes violate the law just so he could get to juvenile hall for a meal and a place to sleep. (7 RT 1889-1890.) One of defendant's older sisters, Linda, left home because Mr. Moore's father was raping her. (7 RT 1898.)

Moreover, in considering harmless error, it is important to recall that although this homicide involved two victims, Harris was not only the "brains" of the operation, but he was the actual killer of one of the victims. On this record the state will be unable to prove beyond a reasonable doubt that 12 jurors charged with expressing the "conscience of the

community" would have unanimously reached the same result had they known that another jury had unanimously imposed a life sentence on Harris. A new penalty phase is required.

VII. THE TRIAL COURT COMMITTED A SERIES OF ERRORS AT THE PENALTY PHASE WHICH, WHEN TAKEN TOGETHER, REQUIRE A NEW SENTENCING HEARING.

In addition to the penalty phase errors discussed above, the court committed a series of other errors at the penalty phase. As discussed in Arguments A, B and C below, the state was improperly permitted to introduce non-statutory aggravating factors, the jury was improperly permitted to rely on other aggravating evidence without necessarily finding that the state had established the evidence was proper aggravation, and the jury was permitted to rely on testimony at the penalty phase given by an accomplice without instructions on the dangers of accomplice testimony. As discussed in Argument D below, the Court need not address the question of whether these errors in and of themselves were prejudicial; taken together on the record of this case these errors require a require a new penalty phase.

A. The State Improperly Introduced Non-Statutory Aggravation At The Penalty Phase.

The offense in this case occurred in December of 1977. After the offense, Mr. Moore suffered convictions for robbery (in 1978), escape (1980) and an unrelated murder (1979). (7 RT 1968-1770, 1824; Exhibits 23, 24 27.) Although all these convictions occurred *after* the crime in this case, at the penalty phase of trial the prosecutor introduced documentary and testimonial evidence about the convictions themselves. (7 RT 1968-1770, 1824; Exhibits 23, 24 27.)

This was improper for two reasons. With respect to prior criminal conduct, the 1978 death penalty law (enacted by the electorate) permitted the state to introduce evidence at the penalty phase of a capital case showing both "criminal activity by the defendant which involved the use or attempted use of force or violence" and "the presence . . . of any prior felony conviction." (Penal Code sections 190.3, subdivisions (b) and (c).)

But the crime in this case was *not* governed by the 1978 death penalty law. Instead, because the crime here occurred on December 1, 1977, it was governed by the 1977 death penalty law enacted by the Legislature. And although the 1977 law permitted evidence showing "criminal activity by the defendant which involved the use or attempted use of force or violence" (just as the later 1978 law), it contained no provision similar to the 1978 law which authorized consideration of prior felony convictions at all. (*See* Penal Code section 190.3, subdivisions (a)-(j) [West 1977].) Indeed, the addition of "prior criminal convictions" in the 1978 death penalty law was no accident; the ballot pamphlet which went out to voters made clear that one of the purposes of the 1978 law was to "revise existing law relating to mitigating or aggravating circumstances." (Ballot Pamphlet, General Election (November 7, 1978) Analysis of Proposition 7 by Legislative Analyst at p. 32.) In short, because this was a case governed by the 1977 law, the criminal convictions introduced in this case were not authorized by statute and constituted non-statutory aggravation. (*See, e.g.*, *People v. Wright* (1991) 52 Cal.3d 367, 425 [evidence which does not fall within aggravating evidence set forth in Penal Code section 190.3, subdivisions (a) - (k) cannot be considered in aggravation at the penalty phase of a capital trial;]; *People v. Burton* (1989) 48 Cal.3d 843, 859 [same]; *People v. Boyd* (1985) 38 Cal.3d 762, 774 [same].)

But even if the 1977 law had contained the identical provision as the subsequently enacted 1978 law, admission of this evidence here was improper. The fact of the matter is that the convictions introduced against Mr. Moore all occurred *after* the crime was committed in this case. As this Court has recognized in applying the 1978 law, the reason prior convictions are permitted at the penalty phase of a capital trial is to show that the defendant's prior contacts with the criminal justice system did not deter him from committing the current offense, and so he is worthy of more severe treatment. (*People v. Balderas* (1985) 41 Cal.3d 144, 201.) Thus, convictions which occur *after* commission of the capital crime are inadmissible. (*Id.* at p. 203. *Accord People v. Webster* (1991) 54 Cal.3d 411, 453; *People v. Morales* (1989) 48 Cal.3d 527, 567.)

It is true, of course, that defendant here failed to object to admission of this evidence. But as this Court has noted, because this is purely a question of law, the Court can (and has) exercised its discretion to reach this very issue even in the absence of an objection. (*See People v. Ashmus* (1991) 54 Cal.3d 932, 983.) The Court should take the same approach here and address the merits of this claim. Error has occurred.

B. The Trial Court Erred In Failing To Instruct The Jury That Before It Could Rely On The State's Section 190.3(b) Evidence, It Had To Specifically Find The Offenses Involved "Criminal Activity By The Defendant Which Involved The Use Or Attempted Use Of Force Or Violence Or The Expressed Or Implied Threat To Use Force Or Violence."

Penal Code section 190.3, subdivision (b) permits the state to ask a jury to impose death by relying on "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force

or violence." Fairly read, the bulk of the state's case in aggravation was directed to proving such evidence. (7 RT 1762-1764, 1768-1772, 1777-1778, 1781-1784, 1788-1789, 1797-1799, 1806-1808, 1814-1816, 182401827, 1834-1846.)

The trial court properly instructed jurors that to rely on this evidence, they had to be "satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts or activity." (8 RT 1975.) But although section 190.3, subdivision (b) explicitly requires that the criminal activity "involve[] the use of force or violence or the expressed or implied threat to use force or violence," jurors were never told that before they could rely on section 190.3, subdivision (b) evidence to impose death they had to conclude it involved force or violence. (8 RT 1975.) This was constitutional error.

To be sure, this Court has held that the Sixth Amendment itself does not require a jury finding on this element. (*See, e.g., People v. Ochoa* (2001) 26 Cal.4th 398, 452-454.) The Court has reasoned that the Sixth Amendment right to a jury trial applies to the elements of special circumstance allegations which expose a defendant to the risk of a death penalty, but it does not apply to the elements of aggravating factors which guide the jury's decision as to what sentence to impose once special circumstances have been found true. (*Id.* at pp. 453-454.) But even accepting here for the sake of argument the Court's view of the Sixth Amendment, constitutional error has nevertheless occurred here, albeit under the Due Process Clause as opposed to the Sixth Amendment.

Under the 1977 law, evidence may be considered under section 190.3, subdivision (b) only if it involves "the presence . . . of criminal activity by the defendant which

involved the use or attempted use of force or violence of the expressed or implied threat to use force or violence." Even if this Court is correct that the Sixth Amendment permits a state to repose this question in the hands of a judge, the fact of the matter is that the California legislature did not do so. Instead, absent a waiver of the right to a jury trial, the Legislature placed the decision as to whether aggravating factors have been proven in the hands of the same jury which decided the guilt and special circumstance issues. (*See* Penal Code section 190.4.) In other words, regardless of whether the Sixth Amendment permits the Legislature to allow judges to find the factors set forth in section 190.3, the California Legislature elected to have these findings made by the jury. Accordingly, although Mr. Moore may have had no Sixth Amendment right to instructions on the "force or violence" element of the section 190.3(b) factors, he did have a right to such instructions under state law. (*See People v. Freeman* (1994) 8 Cal.4th 450, 512 [question of whether evidence falls within section 190.3, subdivision (b) is a "question for the jury"].) And because state law itself created a right to such instructions, the trial court's arbitrary deprivation of this right violated Due Process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Error has occurred.

C. The Trial Court Improperly Failed To Instruct The Jury Not To Rely On Accomplice Terry Avery's Penalty Phase Testimony About The Prior Offenses Unless Those Statements Were Corroborated Or That This Testimony Should Be Viewed with Caution.

1. The relevant facts.

As noted above, after the 1977 offense charged in this case, Mr. Moore was convicted of murdering Sam Norwood, the manager of a Woolworth's store in Lawrence, Kansas. (7 RT 1825-1828; Exhibits 27.) The state introduced this conviction in the penalty phase. (7 RT 1828; Exhibit 27.)

But the state also introduced detailed testimony about the murder itself. This testimony came from Terry Avery. According to the attorney who prosecuted the murder charge, Avery was given immunity from prosecution for her role in the crime. (7 RT 1829.)

Avery testified that Mr. Moore used to work at the Woolworth's store. (7 RT 1836.) According to Avery, Moore spoke about robbing the story with Harris and both Moore and Harris brought guns. (7 RT 1837.)

Harris went into the store and walked out with the manager, Sam Norwood, at gunpoint. (7 RT 1839-1840.) Harris forced the manager into their car; Moore was in the back seat. (7 RT 1839-1840.) The manager asked them not to hurt him; they told him to shut up. (7 RT 1840.)

Avery said that Harris and Moore asked Mr. Norwood for the store's money, but he explained that he had taken it to the bank that day. (7 RT 1841.) Avery testified that Moore then hit Norwood in the head. (7 RT 1841.) They took his wallet. (7 RT 1842.) According to Avery, when Mr. Norwood said he wanted to go home to see his son's birthday party, Mr. Moore said that if he wanted to see his son, they could go and get him. (7 RT 1842.)

Harris drove the car for 10 minutes to a secluded area. (7 RT 1843.) Harris and Moore took Mr. Norwood out of the car; moments later, Avery heard gunshots. (7 RT 1845.) Harris and Moore came back to the car; when Harris asked Moore why he shot so many times, Moore laughed and said "to make sure he was dead." (7 RT 1845.)

The prosecutor knew full well the value of Avery's chilling testimony to the state's penalty phase case. She explained to the jury that the "principal conduct" of violence on

which the jury should rely to sentence Mr. Moore to die was the Kansas murder. (8 RT 1960.) She relied on the details about the crime provided by Terry Avery. (7 RT 1961.)

As more fully discussed below, the trial court erred in failing to instruct the jury (1) to view Avery's penalty phase testimony with caution and (2) it could not rely on Avery's penalty phase testimony unless this evidence was corroborated.

2. The trial court had a *sua sponte* duty to instruct the jury it should view Avery's testimony with caution and should not rely on Avery's penalty phase testimony police unless corroborated.

Penal Code section 1111 governs the treatment of accomplice testimony, providing that a conviction may not be based upon such testimony unless it is corroborated:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

"It is well-settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Martin* (1970) 1 Cal.3d 524, 531.) Consistent with this principle, this Court has repeatedly recognized the *sua sponte* obligation to instruct on the necessity of accomplice corroboration instructions in

connection with accomplice testimony at the penalty phase of capital cases. (*See, e.g.*, *People v. Mincey* (1992) 2 Cal.4th 408, 461; *People v. Miranda* (1987) 44 Cal.3d 57, 100; *People v. McClellan* (1969) 71 Cal.2d 793, 807-808; *People v. Varnum* (1967) 66 Cal.2d 808, 814-815.) According to the Court, "when the prosecution seeks to introduce evidence of the defendant's unadjudicated prior criminal conduct, the jury should be instructed at the penalty phase that accomplice testimony must be corroborated." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 461.)

Here, Avery was given immunity for her role in the Kansas murders. While it is true that years later, the Kansas prosecutor said he had not planned on charging her (7 RT 1829), as this Court has long noted "[w]hether a person is an accomplice [for purposes of section 1111] is a question of fact for the jury . . . ." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) Thus, pursuant to *Mincey*, *Varnum*, *McClellan* and *Miranda*, the trial court had a *sua sponte* duty to fully instruct the jury that if Avery was an accomplice, the jury should (1) view her testimony with caution and (2) not rely on that testimony unless it was corroborated. The trial court's failure to give such instructions was clear error.

In making this argument, Mr. Moore is aware of this Court's decisions in *People v. Easley* (1988) 46 Cal.3d 712 and *People v. Williams* (1997) 16 Cal.4th 153. In *Easley*, recognizing its prior decisions in *Varnum*, *McClellan* and *Miranda*, the Court noted it "ha[s] required corroboration of accomplice testimony at the penalty phase" where "the prosecution sought to introduce evidence of *unadjudicated* prior criminal conduct." (46 Cal.3d at p. 733, emphasis added.) But the Court then held that an accomplice's testimony that a defendant committed a crime did *not* require corroboration where defendant's guilt

of the crime *had* been previously *adjudicated* and "a jury ha[s] already found defendant guilty, beyond a reasonable doubt." (46 Cal.3d at p. 734.) The Court later reiterated these same principles in *Williams*. (16 Cal.4th at p. 276.)

Of course this makes perfect sense. If an accomplice testifies that defendant committed a prior crime, no corroboration is necessary where the crime had already been fully adjudicated and a jury found defendant committed the crime beyond a reasonable doubt. The same would presumably be true if the defendant entered a plea and freely admitted he committed the crime. Thus, if the prosecutor here had only sought to introduce Avery's testimony that Mr. Moore had previously committed murder, no corroboration would be necessary because Mr. Moore had been convicted of that offense.

But that is not what happened here. Instead, the prosecutor introduced Avery's penalty phase testimony to show the extent and nature of Mr. Moore's involvement in the prior crime; these were facts and circumstances relating to the Kansas crime which had quite plainly *not* been adjudicated in the prior proceeding. And the prosecutor specifically relied on Avery's testimony about how the Kansas crime occurred in asking the jury to impose death. But none of these facts had necessarily been previously adjudicated by the Kansas conviction itself. On this record, under this Court's decisions in *Easley*, *Williams*, *Mincey*, *Varnum*, *McClellan* and *Miranda*, the trial court was required to instruct the jury that Avery's penalty phase testimony must be corroborated.

In short, under state law Mr. Moore was entitled to instructions which told the jury Avery's penalty phase testimony should be viewed with caution and should not be relied

on unless it was corroborated. Thus the trial court's failure to give these instructions plainly violated state law and, as a consequence, the due process clause. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [arbitrary deprivation of state law right violates Due Process].) In addition, since state law permitted Mr. Moore to urge the jury to reject Avery's testimony because it was uncorroborated, the trial court's refusal to instruct on this line of defense affirmatively interfered with his ability to present a defense to the jury that was fully recognized by state law, in violation of the Fifth Amendment right to present a defense and the Sixth Amendment right to a jury trial. (*See, e.g., Simmons v. South Carolina* (1994) 512 U.S. 154 [at penalty phase of capital trial, jury was instructed not to consider parole; held, instruction violated due process where defense theory was that defendant would never be paroled]; *People v. Mize* (1889) 80 Cal. 41, 44-45 [defendant charged with murder, defense presented evidence of self-defense, jury instructed it could find culpable mental state simply by finding defendant shot victim; held, instruction improper because it undercut the defense presented]; *People v. Medrano* (1978) 78 Cal.App.3d 198, 214 [instruction which withdraws a principal defense from the jury is error], overruled on other grounds in *Vista v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307.)

The trial court's failure to give the corroboration instruction also violated the Eighth Amendment, which imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [plurality opinion of Stewart, Powell, and Stevens, JJ.]; *see also, Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428, *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) The Eighth Amendment requires provision of

"accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," (*Gregg v. Georgia* (1976) 428 U.S. 153, 190 [joint opinion of Stewart, Powell, and Stevens, JJ.]), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination." (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Pursuant to these principles, the trial court's failure to give the corroboration instructions violated the Eighth Amendment. Under state law, the jury simply could not rely on Avery's testimony unless this evidence was corroborated. The trial court's failure to explain this to the jury violated the Eighth Amendment precisely because it undercut the reliability of the evidence which resulted in the jury's subsequent death sentence.[5]

D. The Cumulative Effect Of These Penalty Phase Errors Requires A New Penalty Phase.

The jury was being asked to choose between life and death. Each of the penalty phase errors discussed above had a distinct impact on death's side of the scale.

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[5] Although prejudice is discussed more fully in Argument D, below, as a general matter "the failure to instruct on accomplice testimony pursuant to section 1111 is harmless where there is sufficient corroborating evidence in the record." (*People v. Miranda, supra*, 44 Cal.3d at p. 100.) The corroborating evidence must "tend[] to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth . . . ." (*People v. Thurman* (1972) 28 Cal.App.3d 725, 729.) Here, aside from testimony from the Kansas prosecutor that he prosecuted the case and obtained a conviction, the state introduced no first hand testimony at all about the Kansas crime. Thus, there was no evidence at all to corroborate Avery's testimony about Mr. Moore's role in the Kansas offense.

First, the jury was improperly permitted to consider non-statutory aggravating factors in violation of state law. Second, the jury was permitted to rely on other aggravating evidence without making the requisite findings of violence necessary to ensure that the evidence was proper aggravating evidence. And third, the jury was permitted to rely on a description of a prior crime given by an accomplice and in the absence of any corroboration at all.

Whether the errors are analyzed under the Fifth Amendment, the Sixth Amendment or the Eighth Amendment is of no import. Under any framework, the error is subject to the *Chapman* standard of prejudice, requiring the state to prove the error harmless beyond a reasonable doubt. (*See Chapman v. California*, *supra*, 386 U.S. at p. 24.) But even if this Court were to apply the lower standard of prejudice applicable to errors of state law, a new penalty phase would still be required for several reasons. (*See People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

First, as noted above in connection with the accomplice corroboration argument, the prosecutor explicitly asked the jury to impose death -- at least in part -- on the basis of Avery's uncorroborated testimony about Mr. Moore's specific role in the Kansas crime. (7 RT 1961.) The prosecutor's reliance on this evidence in closing argument is, of course, an important component of any harmless error calculus. (*People v. Powell* (1967) 67 Cal.2d 32, 55-57; *People v. Cruz* (1964) 61 Cal.2d 861, 868.)

In addition, as explained in Argument IV-B, *supra*, this was not a case where the aggravating evidence regarding the crime was so aggravating that death was a foregone

conclusion. Harris, the "brains" of the operation who personally strangled Mrs. Crumb, received a life without parole sentence. Moreover, as also discussed above, this was a case where defendant -- although he was representing himself -- still managed to present significant mitigating evidence about his childhood and background. On such a record as this, the state will be unable to prove harmless this series of errors which skewed the calculus of death. A new penalty phase is required.

VIII. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. MOORE'S DEATH SENTENCE MUST BE REVERSED.

In the capital case of *People v. Schmeck* (2005) 37 Cal.3d 240, the defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (37 Cal.4th at p. 303.) This Court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (37 Cal.4th at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the Court held that a defendant could preserve these claims by "(I) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (37 Cal.4th at p. 304.)

Mr. Moore has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck*, Mr. Moore identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case:

> (1) The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die. (7 RT 1756.) This aggravating factor was unconstitutionally vague in violation of the Eighth Amendment and requires a new penalty phase. This Court has already rejected this argument. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) The Court's decision in *Ray* should be reconsidered.

(2) California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has already rejected this argument. (*People v. Schmeck, supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by appellant in *People v. Schmeck, supra,* however, the Court's decision should be reconsidered.

(3) Penal Code section 190.3, subdivision (a) -- which at the time of trial in this case permitted a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The jury in this case was instructed in accord with this provision. (7 RT 1755.) This Court has already rejected this argument. (*People v. Schmeck, supra,* 37 Cal.4th at pp. 304-305.) For the same reasons set forth by appellant in *People v. Schmeck, supra,* however, the Court's decision should be reconsidered.

(4) During the penalty phase, the state introduced evidence that Mr. Moore had suffered several prior felony convictions. (7 RT 1769-1770, 1828.) The jurors were never told that before they could rely on this aggravating factor, they had to unanimously agree that defendant had committed the prior crime. In light of the Supreme Court decision in *Ring v. Arizona* (2002) 536 U.S. 584, the trial court's failure violated Mr. Moore's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Schmeck, supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck, supra,* however, the Court's decision should be reconsidered.

(5) During the penalty phase, the jury was instructed it could consider prior criminal acts which involved the express or implied use of violence. (7 RT 1755.) The jurors were instructed they could not rely on this evidence unless it had been proven beyond a reasonable doubt. (7 RT 1975.) The jurors were told, however, that they could rely on this factor (b) evidence even if they had not unanimously agreed that the conduct had occurred. (7 RT 1975.) In light of the Supreme Court decision in *Ring v. Arizona, supra,* 536 U.S. 584, the trial court's failure violated Mr. Moore's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decision in *Lewis* should be reconsidered.

(6) Under California law applicable to this case, a defendant convicted of first degree murder could not receive a death sentence unless a jury (1) found true one or more special circumstance allegations which rendered the defendant death eligible and (2) found that aggravating circumstances outweighed mitigating circumstances. The jury in this case was not told that the second of these decisions had to be made beyond a reasonable doubt. This violated Mr. Moore's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(7) At the penalty phase, the trial court instructed the jury in accord with then-standard instruction CALJIC 8.85. (8 CT 2115.) This instruction was constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or "substantial," and (5) failed to specify a burden of proof as to either mitigation or aggravation. (8 CT 2115-2116.) These errors, taken singly or in combination, violated Mr. Moore's Fifth, Sixth, Eighth and Fourteenth Amendment rights. This Court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) The Court's decisions in *Schmeck* and *Ray* should be reconsidered.

(8) Because California's death penalty law violates international law -- including the International Covenant of Civil and Political Rights -- Mr. Moore's death sentence must be reversed. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(9) At the penalty phase, the prosecution introduced evidence that he had several prior criminal convictions. (7 RT 1771-1772, 1828.) The prosecution also presented evidence about the facts underlying those prior convictions. (7 RT 1769-1770, 1825-1827.) At the penalty phase, the jury was told it could consider this evidence in deciding whether petitioner should live or die. (7 RT 1974-1975.) The trial court's introduction of the facts on which the prior convictions were premised put defendant in jeopardy a second time for these offenses in violation of the Double Jeopardy clause of the state and federal constitutions. This Court has already rejected this argument. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 134-135.) For the reasons set forth by the appellant in *Bacigalupo*, *supra*, however, the Court's decision should be reconsidered.

(10) At the penalty phase, the jury was properly instructed that before it could rely on prior criminal activity as a basis for imposing death, it had to

> find the prior activity true beyond a reasonable doubt. (7 RT 1974-1975.) Allowing a jury which has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker. This Court has already rejected this argument. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decision in *Hawthorne* should be reconsidered.

To the extent respondent argues that any of these issues is not properly preserved because Mr. Moore has not presented them in sufficient detail to this Court, Mr. Moore will seek leave to file a second supplemental brief more fully discussing these issues.

CONCLUSION

For all these reasons, and for the reasons set forth in Mr. Moore's previously filed opening and closing briefs, reversal of both the guilt and penalty phases is required.

DATED: 11/22/10

Respectfully submitted,

Cliff Gardner
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 25564 words in the brief.

Dated: 11/22/10.

Cliff Gardner

CERTIFICATE 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 to the within action. My business address is 1448 San Pablo Ave. Berkeley, CA 94702. I am not a party to this action.

On November 23, 2010 I served the within

SUPPLEMENTAL APPELLANT'S OPENING BRIEF IN PEOPLE V. MOORE, S075726

upon the parties named below by depositing a true copy in a United States mailbox in Oakland, California, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true.

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