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SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
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DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TIMOTHY RUSSELL

Defendant and Appellant.

(Riverside County
Sup. Ct. No. RIF72974)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death under Penal Code section 1239.[1]

STATEMENT OF THE CASE

On February 7, 1997, appellant Timothy Russell was indicted by the Riverside County grand jury on two counts of murder under section 187, committed on January 5, 1997: Count I, the murder of James Lehmann and Count II, the murder of Michael Haugen. (1CT 4-8.)[2] Lehman and Haugen were both Riverside County deputy sheriffs.

Each of the two murder counts also alleged that appellant personally used a firearm in the commission of the charged offense within the meaning of sections 12022.5, subdivision (a) and 1192.7, subdivision (c)(8). (1CT 5, 7.)

Each murder count also alleged three special circumstances under section 190.2: (1) that appellant intentionally killed the victim while the victim was engaged in the course of the performance of his duties as a peace officer (§ 190.2, subd. (a)(7)); (2) that appellant killed the victim while lying in wait (§ 190.2, subd. (a)(15)); and (3) that appellant was charged with committing more than one murder in this proceeding (§ 190.2, subd. (a)(3)). (1CT 6-7.)

In Count III, appellant was charged with assault with a deadly weapon under section 245, subdivision (a)(1) committed against Beverly

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] "CT" refers to the Clerk's Transcript on Appeal; "RT" refers to the Reporter's Transcript on Appeal; "Supp. CT" refers to the Supplemental Clerk's Transcript on Appeal.

Brown on January 5, 1997. (1CT 7-8.)

In Count IV, appellant was charged with misdemeanor spouse abuse under section 273.5, subdivision (a) committed against Elaine Russell on January 5, 1997. (1CT 8.)

Trial began on August 10, 1998. (4CT 931.) Prior to jury selection, the court granted the prosecutor's motion to strike the lying-in-wait special circumstance allegation as to each count. (4CT 931.) A jury was sworn on the second day of trial. (12CT 3316.)

Opening statements were heard on August 19, 1998, and the prosecution began its case-in-chief the same day. (12CT 3322.)

On August 25, the seventh day of trial, appellant withdrew his not guilty plea to Count IV, the misdemeanor spouse abuse charge, and pled no contest. (12CT 3334.)

The prosecution rested its case on August 26. (9RT 1178.) On August 31, the defense presented its case and rested. The prosecution presented one rebuttal witness. (12CT 3382.)

On September 2, prior to arguing the case to the jury, the court granted the prosecution motion to dismiss count III, the assault with a deadly weapon charge allegedly committed against Beverly Brown. (12CT 3384.) Later the same day, the parties gave closing arguments and the jury began deliberations.

Jury deliberations continued through September 3 without a verdict. On September 4, the court received a note from Juror No. 2 complaining about the manner in which Juror no. 8 was deliberating. (13CT 3584.) The court thereafter questioned the jury foreperson (Juror No. 12) and Juror No. 8. The court admonished Juror No. 8 and allowed her to continue deliberating. (13CT 3483.) Shortly thereafter, the court received another

note from the jury concerning a conflict regarding premeditation and deliberation in the court's lying-in-wait instruction (CALJIC No. 8.25) and its special instruction. (13CT 3483.) The court amended the special instruction and the jury returned to its deliberations. Soon thereafter, the jury returned verdicts finding appellant guilty of first degree murder in both counts I and II. Each of the firearm use enhancement allegations was found to be true, as were both special circumstance allegations. (13CT 3483-3492.)

On September 8, the court denied appellant's motion to exclude victim-impact evidence. (13CT 3499.) The prosecution made its opening statement, and proceeded to present six victim-impact witnesses as its entire penalty phase case. (13CT 3499.) The next day the defense presented its penalty phase defense. (13CT 3522.)

On September 10 the proceedings were continued until Monday, September 14 due to the illness of a juror. (13CT 3536.) On September 14, the prosecution presented one rebuttal witness. The jury received its instructions and retired to commence deliberations. (13CT 3537.)

The jury encountered difficulty reaching a verdict. Numerous jury notes were submitted and the court conferred with the jury foreperson in chambers regarding the jury's difficulties. (13CT 3574-3575.) A motion for mistrial by the defense was denied on September 16. (13CT 3575.) On the afternoon of September 18, the jury informed the court that they were split 8-4 and unable to reach a verdict. On appellant's motion, the court declared a mistrial. (13CT 3581.)

The prosecution elected to retry the penalty phase. Pretrial motions were heard beginning on October 30. (15CT 3953.) The court denied appellant's motion to exclude victim-impact evidence. (15CT 3962.) The

court also denied appellant's motion to introduce the videotapes of appellant's lengthy statements to the police made the day of the shootings, which had been introduced by the prosecutor at the guilt phase. (15CT 3963.) The penalty retrial began with jury selection on November 5, 1998. (15CT 3969.)

A panel was sworn November 12, 1998, and the parties presented their opening statements on November 16. The case went to the jury on December 1, 1998. (21CT 5771.) Late in the third day of deliberation, the jury returned a verdict of death. (21CT 5851, 5853.)

On January 8, 1999, appellant's motions for new trial and for modification of the verdict were denied. (21CT 5888.) The court sentenced appellant to death on both counts. (21CT 5888.) The court also imposed 4-year determinate sentences on both counts for personal use of a firearm in the charged homicides. These terms were ordered to run concurrent to the imposition of the death sentences. (21CT 5888.)

This appeal is automatic.

STATEMENT OF FACTS

Summary of the Facts

This case was the tragic culmination of a domestic dispute which ended with the shooting deaths of two responding sheriff deputies, Michael Haugen and Jim Lehmann, at the hand of appellant, Tim Russell.

Appellant's life was in a downward spiral in January, 1997. Although he was married with two children and working successfully as a sign painter in Riverside County, appellant had battled alcohol, drugs and mental illness for years. In 1996, appellant's marriage disintegrated and he began drinking again. His mood swings also became more pronounced. Finally, matters deteriorated to the point where, in the early morning hours

of Friday, January 3, 1997, appellant left the home in Whitewater he shared with his wife Elaine, and went to sleep at the sign shop where he worked. He returned home briefly later that day to pick up some of his belongings, then left again.

Appellant spent Saturday visiting a friend. Later that night he began drinking. In the early morning hours of Sunday, January 5, he went home to Whitewater, which led to a fight with Elaine. Elaine called the police. By the time the police arrived, appellant had left the house and was heading for the adjacent desert, armed with an old M-1 rifle. When appellant noticed the police coming toward him he fired in their direction about twelve times in rapid succession, hitting one officer once, the other twice, and killing them both. There was no question that it was appellant who shot the officers. The main issues in the guilt phase of the trial were whether or not appellant intended to kill them and whether appellant lay in wait to do so.

Appellant was arrested without incident a few hours after the shooting. He readily acknowledged responsibility for the shootings, and led the police to the place in the desert where he had left the gun used in the shooting. In fact, appellant voluntarily gave three separate recorded interviews in the two days following his arrest and agreed to accompany the authorities to the scene of the shooting, where he helped them understand what had happened. These videotaped interviews were introduced by the prosecutor at the guilt phase of appellant's trial.

The remorse shown by appellant on these tapes and his despair upon learning that he had killed the officers, rather than simply deterring them from pursuing him, were significant facts in his defense at both the guilt and penalty phases. Appellant's defense at the guilt phase was that he had not

intended to kill the officers. At the penalty phase his remorse was a significant factor in mitigation. The jury found appellant guilty of first degree murder as to both officers, but the jury could not agree on a penalty verdict. A mistrial was declared.

At the penalty retrial, with guilty verdicts already in hand, the prosecution was no longer interested in presenting appellant's recorded admissions, and successfully opposed appellant's attempts to have them admitted. As a result, the new jury did not receive as complete a picture of the circumstances of the shooting as the first jury.

Appellant did not have any significant criminal history. At the penalty retrial, the prosecution relied on the circumstances of the offense, including victim-impact evidence from nine witnesses, to obtain a death verdict. The defense sought to show that the shooting was an aberrant act of someone whose life was unraveling. It showed how appellant struggled to overcome a childhood marred by the early loss of his father and brutal physical abuse by his stepfather. Appellant grew up to be a decent, working man beset by addictions and mental problems.

A. The Prosecution Guilt Case

1. Events Leading up to the Shootings

Appellant's life went into crisis in the first days of 1997. He left his wife and home in the very early morning hours of Friday, January 3, 1997, and went to sleep in the sign shop where he worked. The next day, appellant sought out the advice of his old friend, Jeff Alleva. Appellant had known Alleva for about 20 years. (5RT 620.) Although they had been close friends in the past, they had not seen much of each other for three or four years. (5RT 613-614.) Alleva had been an alcoholic, but had not been drinking for 19 years. When they first met, appellant and Alleva drank and

smoked marijuana together. (5RT 621-622.) Alleva had contact with appellant through the years when appellant was "in recovery." (5RT 622.)

On the day appellant came to visit, the two passed the time reminiscing, talking about appellant's marriage and about appellant needing to get "back into recovery and being sober and having a recovering lifestyle." (5RT 616, 625.) Appellant had dinner with Alleva and his wife and left around 9 p.m. (5RT 615.) Appellant seemed sad and concerned about his deteriorating marriage (5RT 615-616), and resigned to needing to make changes (5RT 616-617). Appellant asked if Alleva could hold onto some of his belongings that he had in his truck, including clothes and his gun, but Alleva was not comfortable doing so. (5RT 619, 627.) The two friends arranged to meet the next day, Saturday, January 4. Appellant returned on Saturday and he and Alleva talked more, reminiscing and discussing what appellant needed to do to "get back on track." (5RT 618.) Appellant's mood seemed the same as it had been the day before. (5RT 618.) He left Alleva's home between 8 and 10 p.m. Saturday night. (5RT 630.)

A bartender, John Johnson, remembered appellant arriving at the Red Barn bar in Palm Desert around 10:30 to 11 p.m. Saturday night. (5RT 633-635.) Johnson remembered serving appellant three or four Corona beers. (5RT 636.) Appellant was quiet while at the bar. (5RT 637.) Johnson did not know what time appellant left the bar; he estimated that it was between 12:30 and 1 a.m., but that was simply an estimate based on how long it takes to drink three or four beers. (5RT 637, 641.)

Elaine Russell's sister, Beverly Brown, had moved in with appellant and Elaine in their two-bedroom modular home in mid-December. On Sunday, January 5, around 2:30 a.m., Brown was awakened by appellant,

who wanted to talk with her. (6RT 651.) Appellant had a bottle of Corona beer in his hand. (6RT 652.) Brown knew appellant had a problem with alcohol. (6RT 681.) He appeared to be "[a] little" intoxicated, but not excessively so. (6RT 725-726.)[3] When they started talking, appellant appeared disturbed, but was not too animated or raising his voice. Appellant told Brown that his marriage to Elaine was over. (6RT 653.) After about 10 minutes, appellant got louder, his gestures bigger and he became more agitated. (6RT 655.) He was saying things about his wife that Brown felt were inappropriate. (6RT 685.) Elaine came out of the bedroom and asked appellant to leave. (6RT 655-656.) That caused appellant to become even more agitated. (6RT 686.) Appellant was losing control of himself. (6RT 687.)

Elaine went to the bathroom while appellant continued "ranting and raving." (6RT 688.) When she returned appellant began fighting with her. He knocked her to the ground and kicked her. (6RT 657-658.) Brown begged appellant to leave. Appellant, according to Brown, told them "not to fuck with his job, his life and not to call the cops." (6RT 658.) Appellant tore the phones out of the wall and left. (6RT 659.)

After appellant left, Elaine ran across the street to her neighbors, John and Twilla Gideon, to call the police. (6RT 661.) Brown stayed in the house with the Russells' two children, Douglas and Bethany. Appellant returned about five minutes later with his gun. (6RT 662, 692.) Brown

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[3] When asked whether she had told a deputy sheriff after the shooting that appellant had "smelled like a brewery" that night, she answered that, "Maybe he did. Maybe I did." (6RT 682.) But her recollection as of the time of trial was that she just did not know what he smelled like that night. (6RT 682.)

knew the gun was not loaded. (6RT 665.) Appellant asked Brown where the bullets were. (6RT 663.) Brown said she did not know, but after appellant threatened her she told him the bullets were in the kitchen. (6RT 665.) Brown was shocked; appellant had never directed anger at Brown in this manner before. (6RT 697.) Appellant got the ammunition and began loading the gun. (6RT 665-666.)

Brown asked appellant what he was going to do. Appellant said he was going to hold Brown hostage because he knew Elaine was calling the police. (6RT 667.) Brown asked him if he was going to kill her and appellant said he would if he had to. (6RT 667.) Brown responded that "oh, that's nice, that's great, you're going to kill me in front of your kids." (6RT 667.)

Appellant went outside and fired his gun off four or five times. According to Brown, appellant yelled, "Come and get me." (6RT 667-668, 675.) He came back inside and told Brown to take the kids and leave. According to Brown, appellant told her "to get out, the cops were coming, and he was going to kill them." (6RT 668.)[4] Brown gathered some clothing and shoes and took the children across the street to the Gideons' home. (6RT 668-669.)

As Brown crossed the street she looked up the street and saw a police car coming. (6RT 670.) Brown and the kids went to the back of the Gideons' house. Shortly thereafter Brown heard gunshots in rapid succession. She was not sure how many shots, but estimated six to eight. (6RT 672.) Going to the front of the house, Brown saw two bodies in the

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[4] Before the grand jury, however, when Brown was asked what appellant said, she responded, "And he said he was going down. He said he didn't care anymore. He said he was going down." (1CT 129.)

street. (6RT 672-673.)

Besides Brown, the other principal prosecution witness to the events leading up to the shooting was Elaine Burgett, who had been Elaine Russell until her divorce from appellant soon after the shooting. Elaine testified that appellant left the house early Friday morning, January 2. (8RT 956-958.) They talked on the phone later that morning. (8RT 957.)

Still later in the day, appellant went to the house to get some of his belongings. Elaine believed he took his gun at the time. She had previously taken the ammunition out of the gun. (8RT 959.) Elaine believed appellant was on drugs – possibly methamphetamine – and told appellant so. (8RT 959-960.) Appellant told Elaine that he "just can't forgive the past anymore." (8RT 960.) Elaine wanted appellant out of the house and told him so. (8RT 960.) Appellant and Elaine talked again when appellant called from Jeff Alleva's house on Friday night. Appellant had called to talk about their marriage. (8RT 958.) He did not go home Friday night. (8RT 958.)

The next time Elaine saw appellant was early Sunday morning at their house. (8RT 962.) Her sister, Beverly Brown, talked to appellant for about ten minutes before Elaine got up; appellant was raising his voice. (8RT 963.) Elaine told appellant it was time for him to leave. (8RT 965.) Appellant began yelling that he did not have to leave. (8RT 965.) Elaine began to call 911 but appellant pulled the phone out of the wall. (8RT 965.) Appellant grabbed her by the hair and kicked her. (8RT 965.) They fought and Elaine managed to get hold of appellant so he could not get away. (8RT 966.) Appellant said he would kill Elaine if she did not let him go, so she let him go. (8RT 966.) Appellant yelled and screamed profanities and told Elaine that if she "messed with his work, his job, if [she] called the

police, he would kill [her]." (8RT 966.) Elaine agreed not to call the police. (8RT 967.) Appellant left in his truck. (8RT 967.) As Elaine ran across the street to the Gideons' house she saw appellant returning. (8RT 967-968.)

In the Gideons' house, Elaine reported to 911 that appellant had just beat her and that she needed help. (8RT 969.) After giving the phone to John Gideon, Elaine went to the window and saw appellant shooting his gun in the air. (8RT 970.) Brown then came across the street to the Gideons' home with the children. (8RT 970.) The next thing that happened was that Elaine heard more gunshots; it sounded like six or seven shots. (8RT 971, 991.)

Twilla Gideon was awakened on the morning of January 5 by Elaine Russell knocking on her rear door. (6RT 731.) Elaine wanted Gideon to call the police. (6RT 732.) Gideon called 911 but soon gave the phone to Elaine to explain what was happening. (6RT 732.) Shortly after Elaine arrived, Gideon heard the first sequence of shots. (6RT 733.) Only minutes later, Beverly Brown arrived with the Russell children. (6RT 733.) As Gideon took the children to a bedroom in the back of the house, she heard another rapid sequence of shots, this time six to eight shots. (6RT 734.) Gideon went to the front of the house and learned from her husband that two officers had been shot. (6RT 735.)

2. The Police Response and the Shootings

The 911 call from Elaine Russell came in at 2:52:56 a.m. (9RT 1129.) Two Riverside County sheriff deputies, Michael Haugen and Jim Lehmann, were dispatched to respond by their supervisor, Joseph Dowdell. (6RT 754-755.) Dowdell himself was 15 miles away at the Banning station, and began driving toward Whitewater to provide assistance. (6RT 755-

756.) While driving, Dowdell heard radio traffic that the officers had arrived in the area of the St. John's Boys home. He also learned that there had been shots fired. (6RT 758-759.) After the shots were fired, Dowdell heard radio traffic from either Lehmann or Haugen that the situation "was getting hairy" and that they were "going in." (6RT 759.) When Dowdell arrived at the scene the two officers had been shot. They were laying on the pavement. (6RT 766-768.) In fact, the two deputies were dead by the time the first responding officer, Mark Smith, reached them and ascertained their condition. (8 RT 1005-1008.)

3. Appellant's Arrest and Statements to the Police

Appellant walked out of the desert around 7:30 a.m. and was arrested without incident. (7RT 821-822.)

Eric Spidle was a senior detective in the Riverside Sheriff's Department who was assigned to investigate the Lehmann and Haugen homicides. (6RT 788.) Spidle first spoke to appellant in a police car at the scene of appellant's arrest on the morning of January 5. Appellant volunteered to show Spidle where he left the gun. (6RT 795.) They drove approximately a mile, and then proceeded on foot for another mile through the hills at appellant's direction to a place where appellant pointed out the rifle and ammunition in part of a rotting tree. (6RT 797-798.)

Spidle did not handle the rifle. He made arrangements for others to recover and document the rifle and other evidence and then left the area with appellant. (6RT 799-800.) Appellant was taken to the Riverside Sheriff's station, where appellant's clothes were taken, his blood was drawn and his body swabbed for gunshot residue. (6RT 802.)

Later that morning, appellant made a recorded statement to Spidle beginning at 11:32 a.m. (4Supp. CT 1.) After Spidle confirmed that

appellant had waived his *Miranda*[5] rights, he asked appellant if he was sober. Appellant answered that he was not sober and added that he had not "been right in a long time." He offered that "it's just been, been years of insanity." (4Supp. CT 3.) He added that "one minute, one minute I [pause] I thought I felt okay, and then, and then I just [pause] blow it." (4Supp. CT 3.) Appellant told Spidle that he had not been taking methamphetamine but that he had been drinking. (4Supp. CT 4.) He drank "[p]robably a twelve pack." (4Supp. CT 4.) He had been drinking at the shop where he worked and then at a bar. (4Supp. CT 4.) He started thinking about his wife and family and "some of the shit that's happened in the past. Shit that really hurt." (4Supp. CT 5.) Appellant believed his wife had been cheating on him. "And it's like everything's that happened over the last three years, it's like she set me up. And I don't, I don't know what's true anymore on that, you know, I don't know." (4Supp. CT 5.)

In fact, Elaine had been cheating on appellant. Appellant had suspected Elaine was having an affair, but she denied it and appellant did not know what to believe. They went to counseling with their pastor who suggested that there can be "imbalances of thinking" that could be cured by medication. (4Supp. CT 24-26.) Appellant said he sought medical treatment in the summer before the shooting. He saw a psychiatrist at the Veteran's Administration who prescribed him lithium. (4Supp. CT 5.)[6] But subsequently Elaine told him that everything had been her fault and that he did not need the medication. (4Supp. CT 5.) Appellant believed her and

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436

[6] The psychiatrist who treated him testified that appellant was actually prescribed lithium in April, 1996. (28RT 2855.)

stopped his medication. (4Supp. CT 27.)

After she admitted her affair, Elaine left appellant and took the children. Appellant started going to Alcoholics Anonymous and began feeling better. (4Supp. CT 27.) About the time things were "startin' to level out" for appellant and he was beginning to "become comfortable" and be "able to handle life," Elaine contacted him and told him that things did not work out for her and she wanted to come home. Appellant told her she could come home. (4Supp. CT 27.) This was less than six months before the shooting. (4Supp. CT 27.) Appellant began drinking again between the time Elaine returned and the shooting. (4Supp. CT 30.)

On January 4, prior to the shooting, appellant had consumed about a twelve-pack of beer. (4Supp. CT 31.) His first beer came after he left Jeff Alleva's house at around 8:30 or 9 p.m. (4Supp. CT 80.) He bought a quart of Corona and went to his workplace to drink it. (4Supp. CT 82.) Appellant was there for about an hour. (4Supp. CT 84.) He went out to get another quart, but went to the Red Barn Bar instead. (4Supp. CT 31, 82.) He arrived about 10:30 or 11 p.m. and drank about a six-pack there. (4Supp. CT 83, 84.) Appellant left the bar before the 2 a.m. closing time. He drove around for awhile and then headed back to the shop where he was staying. (4Supp. CT 32.) But then he turned around, went to a convenience store and bought one or two more quarts of beer. (4Supp. CT 32, 87.) Appellant's experience had been that he would become "intoxicated" on two beers and "drunk" on a six pack. (4Supp. CT 78.) He believed he was confrontational and prone to fighting when he has been drinking. (4Supp. CT 78, 79.)

Appellant decided to go home to get the address of Beverly Brown's boyfriend. (4Supp. CT 5.) He wanted to write to the boyfriend to find out

what other people had been saying about him. (4Supp. CT 6.) He continued drinking on the way to his house and had a quart bottle with him at the house. (4Supp. CT 87.)

When appellant went in the house he asked Beverly Brown if he could talk with her. He did not want to talk to Elaine, but he needed to talk to somebody. (4Supp. CT 34.) He was telling Brown how he felt about "the whole situation" when Elaine got up. (4Supp. CT 34.) "And then it, just turned ugly." (4Supp. CT 34.) Elaine wanted appellant to leave. Appellant and Elaine started fighting physically. Appellant did not remember just how it started. (4Supp. CT 8, 34.) At some point Elaine was holding appellant's arms while they were on the floor, and appellant said he would leave if she let him go. (4Supp. CT 35.) She let him go, but then "went for the phone." (4Supp. CT 35.) Appellant believed she was going to call the police, so he pulled the phone wires out. (4Supp. CT 6-7, 35.) He acknowledged telling Elaine he was going to kill her if she called the police, but commented, "But you know I always say that word and I don't mean it. I've never meant it. It's just like I get fuckin' pissed off." (4Supp. CT 8, 35, 77.)

Appellant went to leave. He broke his beer bottle with the remaining beer in it on the rocks in front of his house as he was leaving because he did not want to get caught with an open container. (4Supp. CT 32, 88.) He knew he was "buzzin' hard." (4Supp. CT 88.) Appellant left in his truck, drove about a block, and then returned when he saw Elaine go across the street. He knew she was going to call the police. (4Supp. CT 8, 35.) Appellant was mad. He had his gun with him, but no ammunition. (4Supp. CT 8.) He had taken his gun with him when he had removed some of his belongings from the house because he did not want Elaine "shootin' up

everything." (4Supp. CT 37.) She had previously shot the tires out on appellant's truck. (4Supp. CT 38.)

He went back to his house and threatened Brown into giving him the clips and bullets which Elaine had hidden. (4Supp. CT 8.) Appellant also told Brown he was going to hold her hostage. But about five seconds after he said that appellant looked out the window and saw police cars coming. (4Supp. CT 8, 39.) Appellant told Brown to take the children and leave and said that he was "a dead man." (4Supp. CT 9, 38.) He "just felt it was all over." He went outside and fired three or four rounds into the air for no reason; he was mad and wanted to get somebody's attention. (4Supp. CT 38, 39, 76.) Brown left with the children. Appellant denied telling Brown that he intended to shoot the police. (4Supp. CT 43.) Appellant went back inside, let the dogs loose, turned off all the lights and then left the house. (4Supp. CT 40-41.)

When appellant had first seen the police cars they were slowly turning northbound onto appellant's street. (4Supp. CT 43.) He saw them slow down and stop. (4Supp. CT 43.) Appellant wanted to get away and thought he could "sneak past them." (4Supp. CT 43.) He wanted to get across the freeway; he did not want to get caught and did not want to go to jail. (4Supp. CT 9.) He was "crouched down goin' real quick." (4Supp. CT 44.)

Appellant saw the silhouettes of the officers coming up the street and thought that if he shot in front of them that they would "run back the other way." (4Supp. CT 9.) Appellant shot to "scare 'em off." (4Supp. CT 44.) He saw the officers coming forward slowly. Appellant first recalled kneeling and firing what seemed like five or six shots. (4Supp. CT 11, 45.) On further reflection, though, he said he was crouched down and did not

take a stationary position when shooting. (4Supp. CT 45.) Appellant could not see through the sights on the rifle because of the way he was holding it. (4Supp. CT 45.) He was sure the officers would see him because he "was moving quick." (4Supp. CT 44.)

After firing, appellant "just took off runnin.'" (4Supp. CT 9.) He ran into the desert. He hid the rifle because he did not want to walk back down and give himself up with a gun in his hands because he did not want to get shot. (4Supp. CT 48.) He finally walked out and drew the attention of officers and was arrested without further incident. (4Supp. CT 48-49.)

Appellant did not know that he had killed the officers until told by the interrogating officer. (4Supp. CT 52.) He did not want to believe it was true; it was not his intention to kill anyone.

At 6 p.m. the same day, Spidle interviewed appellant briefly again after they had gone to the scene of the shooting. Spidle confirmed that appellant had agreed to show the officers the position from which he shot the gun, and that he had then shown the officers to the best of his ability. (4Supp. CT 95.)

Appellant told Spidle that the gun had been in his truck for only a couple days. (4Supp. CT 95.) He took it when he moved out of the house because he did not want his wife to have it and use it. (4Supp. CT 96.) Appellant believed that after he got the ammunition in the kitchen, he loaded all three clips, and that he changed clips after shooting in the air in front of his house. (4Supp. CT 96.) He was not sure whether he changed clips before or after shooting at the officers. (4Supp. CT 97.)

Spidle returned for another interview the next day at 11:41 a.m. in which he questioned appellant about some matter which had been covered in the previous interviews. First, appellant confirmed that he had moved

out of the house Friday morning at 2:00 a.m. Elaine had not kicked him out, as she had apparently told the police. (4Supp. CT 103.) He went back later Friday afternoon to get his clothing and a sleeping bag. (4Supp. CT 104.) That is when he also took the rifle. (4Supp. CT 105.) Elaine had already taken the ammunition and clips and had hidden them. (4Supp. CT 105.)

After he left in the truck on the morning of the shooting, appellant returned to make sure Elaine was not going to call the police. (4Supp. CT 106.) He did not want the police to come; he just wanted to go back to the shop where he was staying. (4Supp. CT 106.) He did not take the rifle in with him when he first returned. (4Supp. CT 106.) He looked for Elaine and did not find her. (4Supp. CT 107.) Brown lied and told him Elaine was still there. (4Supp. CT 107-108.) She told him Elaine was not going to call the police. (4Supp. CT 108.)

Spidle confronted appellant with Brown's assertion that at some point appellant indicated that he knew the police were coming and said something to the effect that "I don't give a shit, I'll take them out too." (4Supp. CT 111.) Appellant said that he did not remember saying that, but it was possible that he did. (4Supp. CT 111-112.) He did not remember Beverly saying that the police were coming and that he should leave. (4Supp. CT 112.)

At the time appellant told Brown she was a hostage, appellant's son came in from the bedroom and sat on the couch. (4Supp. CT 113.) Appellant told his son to listen to his mother, never to join the military, not to do drugs, and not to drink. (4Supp. CT 113.) Appellant also told his son he loved him. At that point appellant told Brown to take the children and get out of the house. (4Supp. CT 113.)

Appellant was unsure if it was at that point that he went outside and fired the gun in the air or if he had done that earlier. (4Supp. CT 113-114.) He saw the patrol cars approaching after Brown left with his children. (4Supp. CT 114.) That was when he let the dogs loose. (4Supp. CT 115.) At first he intended to barricade himself in the house, but then decided against staying in the house. He never had any intention of "shooting it out with the cops." (4Supp. CT 115.)

Spidle also confronted appellant with the fact that if he had exited the house in a different direction he could have avoided the police. Instead, his path led him in the direction of the police. Appellant said he had intended to bypass the police and then head in the direction from which they had been coming. He did not believe they would look for him in that direction. (4Supp. CT 116.) Appellant had the cover of darkness but was not sure whether or not the police could see him. (4Supp. CT 116.) When he saw the silhouettes of the officers he was surprised and thought it was possible they had seen him. (4Supp. CT 116.)

Appellant shot in the general direction of the silhouettes. He kept his fire low to avoid hitting them. (4Supp. CT 117, 119.) He did not hear them yell and did not see any flashlights on. (4Supp. CT 117.) He did know they were police officers. (4Supp. CT 117.) When appellant later returned to the scene of the shootings with the investigating officers, he had shown them the crouched position he was in when he fired. (4Supp. CT 118.) At that time he indicated that he was not sure whether he was still moving at the time he fired. (4Supp. CT 118.)

The police informed appellant that they found 12 shell casings within a few feet of the spot appellant had identified as the spot from which he had fired. (4Supp. CT 118.) Appellant said he did not realize he had fired so

many times; he thought he had "popped off five or six." (4Supp. CT 118.) He recalled being angry and scared at the time. (4Supp. CT 118.) After he fired and did not see the officers anymore, he assumed they had run back down the road to their car. (4Supp. CT 119.) "And at that time it was just like I was thinking to myself what the fuck am I doin'? You know I just started, I ran totally off into a different direction." (4Supp. CT 119.)

Spidle pointed out that appellant did not flee in the direction he had purported to want to go. (4Supp. CT 120.) Appellant said he "headed back up in the desert and at that point in time I just, like I was runnin' blind." (4Supp. CT 120.) He did not believe the officers were hit at that time; he believed they were okay. (4Supp. CT 120.) Spidle suggested that appellant's view of the officers might have been obstructed or that they "went down in the darkness right there in the street." Appellant agreed. (4Supp. CT 121.)

Appellant agreed that at the time of the shooting he believed that the officers were going to take him to jail, based on appellant's past domestic problems to which the police had responded. (4Supp. CT 121.) He acknowledged that he did not want the police there and had tried to prevent them from coming by attempting to stop Elaine from calling them. (4Supp. CT 122.)

One of the interviewing officers asked appellant what he was feeling at the time. Appellant responded, "And my actions are totally in the wrong ya know, I am in the wrong, it's no, I can't deny that, I fucked up, man I fucked up, what I did was wrong. Well takin' a life's everything and against what I believe man, and I really didn't mean, I didn't mean for them to be struck, I didn't mean for them to die, I didn't mean for them to be hurt." (4Supp. CT 122.)

One of the officers reminded appellant he had told Beverly "that it was all over for you. . ." and wondered what appellant meant by that. (4Supp. CT 123.) Appellant said, "Well, I mean everything was within family and and havin' you know, 'cause I felt my life was over, you know?" [¶] "What I said was words out of despair." (4Supp. CT 123.) The officer suggested appellant might have been planning a confrontation with the officers. (4Supp. CT 124-125.) Appellant did not agree. He had not been looking to hurt anyone and had always respected law enforcement people. (4Supp. CT 125.)

Spidle asked again about when appellant reloaded the ammunition clips, suggesting appellant reloaded after shooting off a few rounds outside because he anticipated further shooting. (4Supp. CT 127-130.) Appellant recalled reloading but he did not know when he did it. (4Supp. CT 127.) He pointed out that the military trained soldiers to keep their magazines loaded and to take care of their equipment. (4Supp. CT 130.)

The officers again sought to confirm that appellant could have said to Brown, "I don't give a shit if the cops are coming, I'll take them out too." (4Supp. CT 132.) Appellant repeated that he did not recall saying it, he did not think he said it, but it was possible. (4Supp. CT 132.)

The officers tried to get appellant to agree that he stopped before he shot the officers. (4Supp. CT 134.) Appellant said he did not recall stopping, that he remembered slowing down and being in a crouched position. "It was just like I was doing it before I realized what I was doing, you know, that I did it." (4Supp. CT 134.) Appellant wanted to go to the desert to sit and wait for people to leave. (4Supp. CT 137.)

Appellant admitted that what he had done was reckless. (4Supp. CT 138.) He lamented, "Boy oh boy, oh Jesus, you know my intentions

weren't that way. How'd they get hit, man, how'd they fuckin' get hit?" (4Supp. CT 139.)

As the interview ended, appellant continued to lament what had happened, that he had not intended to hurt anyone. (4Supp. CT 141-142.) Afterwards, he accepted the officers' offer to make some telephone calls. He called his employer to apologize for what had happened and to arrange for his final paycheck to go to his wife and kids. (4Supp. CT 144.) He then called his brother to say he was sorry for what happened and for involving the family through his actions. (4Supp. CT 146.)

4. Autopsy and Toxicology Evidence

Forensic pathologist Darryl Garber performed autopsies on Lehmann and Haugen. Lehmann had suffered a gunshot wound to the left side of his face, just in front of the left ear. The bullet exited on the right side of his face. (9RT 1150, Peo. Exh. 130.) The trajectory of the bullet had been slightly front-to-back, left-to-right and slightly downward. (9RT 1152.) According to Garber, this wound would have caused unconsciousness immediately, and death within a few minutes. (9RT 11154, 1155.) In Garber's opinion, the wound was not consistent with being a ricochet. (9RT 1156.)

Haugen's fatal wound was to the left side of his chest. (9RT 1159.) The wound was consistent with the bullet having penetrated Haugen's body armor before contacting his chest. (9RT 1161.) Garber did not believe this wound was the result of a ricochet. (9RT 1161.) The trajectory of the bullet was front-to-back, left-to-right and slightly upward. (9RT 1163.) This wound was the cause of death: it perforated both lungs and severed his aorta. (9RT 1165.) Haugen would have died within a few minutes. (9RT 1165-1166.) Haugen also received a gunshot wound through the bottom of

his left great toe that exited through the top and inside of the toe. (9RT 1163-1164.)

Toxicologist Maureen Black tested blood taken from appellant at 11:30 a.m., January 5, and found no amphetamine, cocaine, opiate or PCP. (8RT 1028-1029, 1036.) She also found no evidence of blood alcohol using gas chromatography. (8RT 1025, 1027.) A test of appellant's blood for methamphetamine was also negative. (8RT 1031.) A separate laboratory tested the blood for lithium and found none. (8RT 1032.) According to Black, a 150-pound man with a .18 blood-alcohol level at 2:30 a.m. could "burn off" that amount by 11:30 a.m. the next morning. If the person had been drinking for 4 ½ to 5 hours before 2:30 a.m., additional alcohol would have been burned off. (8RT 1043.)

There was some evidence of gunshot residue on both of appellant's hands and on the right side of his face. (9RT 1098-1099.) The criminalist who examined the gunshot residue concluded that the subject (appellant) had discharged the firearm or had his hand and face in an environment of gunshot residue. (9RT 1115.) The environment of gunshot residue meant within two-and-a-half feet of the side, top or bottom of the gun and within five feet of the muzzle. (9RT 1116.)

5. Gun and Crime Scene Evidence

Appellant led the police to the place in the desert where he had hidden a rifle and two to three magazines of ammunition under some bark near a tree trunk. (RT 853-854.) The gun was a .30-caliber M-1 carbine, a Korean War-era weapon which appellant bought in October, 1993. (5RT 574, 577-578.)

At the scene where the shooting had occurred, the sheriff's investigator found twelve .30 caliber shell casings in the area where

Sagebrush ended and the desert began – the area where appellant had been when he fired. The casings were in two separate groups, one of four and one of eight. (RT 880; Exhs. 62, 63.) The casings were approximately 132 feet from where the deceased officers lay. (RT886.) One group of casings ranged between 12' 5" and 13' 5" from the end of Sagebrush; the other group ranged from 7' 9" to 9' 10". (RT 923-924.) James Hall, a Department of Justice criminalist, test-fired appellant's M-1 and found that the shell casings were consistently ejected to the right and the rear of the shooter. (RT 1058.) He fired the weapon from a number of different positions and arrived at the unremarkable conclusion that the closer the gun was to the ground when fired, "the more concentrated or closer the expended casings were at their final resting point on the ground." (RT 1059.)

None of the officers' weapons had been fired. (7RT 877-879, 905-908.)

6. Other Prosecution Evidence

David Burgett was the brother of appellant's estranged wife, Elaine Russell. He had known appellant since 1983. (5RT 579-580.) Burgett did not like appellant; he disliked appellant for what he had done to his family, for his lack of responsibility and for "the actions that he took." (5RT 583.) On one occasion, around the time appellant and Burgett met in 1983, appellant made a statement to the effect that he did not like the police and those in authority. (5RT 582, 592.) Burgett recalled that "for the most part he [appellant] said that it wouldn't bother him a bit to shoot a police officer." (5RT 583.)

Burgett had on occasion gone target shooting with appellant in the desert. Burgett himself was "not that good a shot" (5RT 581) but believed appellant was (5RT 582). Another acquaintance of appellant, David

Harrison, also went target shooting with appellant. According to Harrison, appellant's knowledge of firearms was only "fair" and "not real extensive." (5RT 602.)

Elaine testified that in October 1989 there had been an incident in which the police were called in response to a domestic dispute involving herself and appellant. (8RT 973.) The argument was about appellant being drunk and coming home late. (8RT 973.) Appellant started throwing furniture and choked Elaine. (8RT 973.) When Elaine called 911 and reported the choking, appellant ripped the phone out of the wall. (8RT 973.) He threatened to kill her if she called the police. (8RT 976.) Appellant got his .22 handgun and pointed it at Elaine's head. (8RT 974.) He put the gun down and Elaine ran out of the house. (8RT 975.) Appellant then drove to a friend's house where he called 911; according to Elaine, appellant tried to blame the incident on her. Appellant was later arrested. (8RT 993.)

B. The Guilt Phase Defense

The defense presented only three witness at the guilt phase. David Wilson was the supervisor of forensic technicians for the Riverside Sheriff's Department assigned to the crime scene on January 5 when appellant was re-enacting the shootings for the authorities. (10RT 1212-1213.) Wilson overheard appellant speaking to another officer, telling that officer that before the shooting he had been running southbound on a dirt path (10RT 1214); that he had been running in the general direction of a bridge over the freeway to the southwest (10RT 1214).[7] Appellant said he

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[7] The court sustained the prosecution's objection to the defense leading the witness on this latter point, but there was no motion to strike the (continued...)

had seen the deputies (Lehman and Haugen) walk into the intersection. They were crouched down and approaching appellant's home, moving quickly. (10RT 1214, 1215.) Appellant said he pointed his rifle at the ground near the deputies and started shooting. Appellant saw what looked to him like sparks, which may have been his shots ricocheting off the asphalt. (10RT 1217.) He did not see the deputies anymore after he shot. (10RT 1215.) After that, appellant said he ran off towards the mountains. (10RT 1215.)

Charles Darnell was a retired Army officer with 22 years of service. He had experience in the Special Forces, served as a basic training officer and had experience with the M-1 rifle. Darnell, who reviewed appellant's military record, testified to appellant's limited training and skill with weapons while in the military. Appellant had enlisted with the goal of becoming a medic, and had received only the basic training with weapons that all soldiers receive. (10RT 1225-1226.) Appellant received a "marksman" qualification, which was the lowest level of qualification a soldier could receive. (10RT 1227.) Appellant's training would have been with an M-16 (10RT 1233) rather than an M-1, which was the weapon used in the shooting.

Darnell also testified as to the accuracy of firing the M-1 from various positions. Firing from a prone or kneeling position would be more accurate than firing while standing, particularly if the weapon was being held at hip level. (10RT 1230.)

Eric Spidle, the prosecution's investigating officer, testified for the

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[7] (...continued)
question and answer. (10RT 1214.)

defense that he had participated in testing the M-1 to determine if it fired, and the speed at which it could be fired. (10RT 1247-1248.) In two test-firings, twelve rounds were expended in 4.85 and 2.9 seconds, respectively. In a third test, the weapon was deliberately fired more slowly – twelve rounds in 10 seconds. (10RT 1249-1250.)

C. Prosecution Rebuttal Evidence

The Riverside Sheriff's Department tested appellant's M-1 rifle in the condition in which it was received. (10RT 1257-1259.) Twelve rounds were fired from 132 feet (10RT 1261) – the approximate distance between the victims and appellant when they were shot. The test rounds hit the target slightly high and to the left. (10RT 1261.)

D. The First Penalty Phase

The prosecution case in the first penalty phase trial, which ended in a hung jury, consisted of victim-impact evidence from six friends and family members of the deceased officers. Elizabeth Haugen described the effect of the loss of her husband on herself and her two children, Katy and Stephen. (RT 1451-1483.) Her niece, Jacqueline Mangham, provided further anecdotes as to the impact of the homicide on Elizabeth and Stephen Haugen. (13RT 1485-1489.) Geoffrey Mangham, Michael Haugen's father-in-law, testified that his wife became ill after the funeral and that the illness was attributed to the stress surrounding Haugen's death. (13RT 1493-1494.)

Valerie Lehmann testified to how she and her children, Christopher and Ashley Lehmann, had been affected by the loss of Jim Lehmann. (13RT 1496-1531.) James Odam, Jim Lehmann's brother-in-law, explained how angry Christopher Lehmann became after losing his father. (13RT 1533-1536.)

The defense penalty case consisted of four witnesses. Gordon Young, the pastor at appellant's church, had known appellant for ten years. Counseling was a large part of Young's ministry, and he had provided marriage counseling to appellant and Elaine Russell about 150 times. Appellant was sincere in his efforts to reform his life and resolve the conflicts in his marriage. (14RT 1547-1548.)

Melvin Wachs employed appellant as a sign painter. Wachs liked appellant, who was one of his best employees. (14RT 1564.) Appellant worked full time and got along with the other employees. In the period leading up to the date of the homicides, appellant appeared to be reaching out for some help; he seemed indecisive as if he did not know what to do. (14RT 1563.) He nevertheless continued to show up for work on time and do his job. (14RT 1564.)

Investigating officer Eric Spidle had contact with appellant at the time of the arrest. (14RT 1567.) According to Spidle, when he informed appellant that the deputies were dead, appellant "tilted his head back, closed his eyes, became a little teary-eyed [and his] emotion changed a bit." Spidle acknowledged that in his report he had described appellant as becoming "visibly emotional." (14RT 1567-1568.)

Appellant's mother, Frances Williams, described appellant's difficult childhood and adolescence. Appellant's father was an alcoholic who died when appellant was 10 years old. (14RT 1573-1574.) Appellant's life took a serious turn for the worse when Williams re-married two years later to Daniel Williams. Appellant's step-father disliked children and abused appellant. In one incident he beat appellant with a 2 x 4 so hard appellant could not go to school for a few days. (14RT 1575.) Appellant became a discipline problem at school following his mother's remarriage and dropped

out. He attended continuation school and at age 17 joined the Army. (14RT 1576.)

Appellant returned to Riverside in 1980 after his discharge from the Army at age 21. (14RT 1577.) Around this time appellant was the victim of a vicious beating and robbery. He was found unconscious in a dumpster with his head split open. (14RT 1578.) He was unconscious for four days. (14RT 1578.) After appellant left the hospital he was "totally changed." (14RT 1579.) He had mood swings and was suspicious. (14RT 1579.)

Appellant's problems with alcohol started after he got out of the Army and went to live in an apartment with two other men. (14RT 1579.) Later he married Elaine Russell and had two children, Bethany and Douglas, who were seven and ten years old respectively at the time of trial. (14RT 1581.) Having appellant in jail has been difficult for both children; they had a close relationship with appellant and understand that he would never be coming home again. (14RT 1583.) The case also took a toll on appellant's mother. She did not believe she "could take it" if the jury returned a death verdict. (14RT 1584.)

Appellant's mother apologized to the families of the deceased deputy sheriffs for their losses and their suffering. She stated her belief that appellant would not intentionally take a life, and asked for forgiveness for her son. (14RT 1585.)

E. The Penalty Retrial

1. The Prosecution Case

The most dramatic difference between the first trial and the penalty retrial was the absence from the retrial of the lengthy taped statements by appellant explaining what had happened and how he felt about having shot the officers. The prosecution also added several new victim impact

witnesses, including two young children.

David Burgett, appellant's former brother-in-law, identified the M-1 rifle as belonging to appellant. (25RT 2394.) Burgett again testified to target-shooting with appellant, describing appellant as being a very accurate shot at 60 to 70 feet. (25RT 2395-2598.) But Burgett had only gone target shooting with appellant once using the M-1. On that occasion, appellant shot a total of about 25-30 rounds. (25RT 2405.) Burgett also said that in the mid-1980's appellant expressed hostility toward authority figures – that he did not approve of authority figures and police in certain counties in which he had previous run-ins with the police. (25RT 2392-2393.)

Burgett noted that when appellant drank, it tended to exaggerate whatever mood he was in. (25RT 2400.) He also had seen appellant under the influence of methamphetamine, which he characterized as "a serious depressing drug." (25RT 2401.) He had seen appellant in short periods of paranoia while using methamphetamine. (25RT 2401.) Appellant and Elaine used methamphetamine heavily in 1993 and 1994. (25RT 2402.)

Beverly Brown told how appellant returned to the house in the early morning hours of Sunday, January 5, after leaving on Friday. Because Elaine Russell did not testify at the retrial, Brown was the sole witness testifying about the events in the house before the shooting. Her testimony was generally the same as at the guilt phase. Brown again testified that appellant appeared to have been drinking, and described how events devolved into a fight between appellant and Elaine, with appellant knocking Elaine onto the ground and getting on top of her. (25RT 2419-2420.) She described how appellant left, returned, forced her at gunpoint to tell him where the ammunition was, and fired off shots outside even as the police were driving toward the house. (25RT 2422-2425.) However, her

recollection about what appellant said about the police differed from her grand jury testimony. (See 1CT 129.) She now said appellant "said he was going to kill them, to shoot them" (25RT 2426) and that he also used the words "take them down," possibly in response to Brown asking appellant what he was going to do (25RT 2427).

Twilla Mae Gideon, the neighbor to whose house Elaine Russell fled after fighting with appellant, also reprised her guilt phase testimony with little substantive difference. (25RT 2475-2494.) Her husband, John Gideon, had not testified at the first trial. At the retrial, he testified that he was awakened in the early morning hours of January 5 by Elaine's hysterical voice and banging on the front door. (26RT 2530.) After the sheriff's department was contacted, John Gideon took the phone to talk to the dispatcher. (26RT 2531.) At some point Gideon looked out his window and saw appellant in the front yard of appellant's home. (26RT 2533.) Shortly thereafter, he heard three to four rounds of gunfire. (26RT 2533.)

Gideon heard a second series of shots but was uncertain how many minutes had passed after the first shots. (26RT 2534, 2538.) He looked out and could see that there were officers down. (26RT 2538.) There were at least six to seven shots in the second series and it was rapid fire. (26RT 2537, 2549.)

Sergeant Joseph Dowdell, the supervisor of Lehmann and Haugen, heard that Lehmann had been dispatched to the scene in response to a call regarding an assault, and that Haugen was providing backup. (25RT 2495, 2497.) He proceeded to the scene, but arrived after the officers had already been shot. (25RT 2507-2508.)

Mark Smith, an officer with the Banning Police Department, was on duty at 3:00 a.m. when he heard that two sheriff's deputies might have been

hurt in a shooting in the Whitewater area. (26RT 2554-2555.) He quickly drove to the area and ran to the officers with his trauma bag. (26RT 2555, 2559.) He determined that both officers were dead. (26RT 2560-2561.)

The dispatcher's records indicated that Lehmann and Haugen were dispatched at 2:56 a.m. (26RT 2570.) At 3:08 a.m. the dispatcher noted that the officers were "going in." She noted that at 3:12 a.m. shots were fired and at 3:19 a.m. the responding party – John Gideon – "advised that he's hearing six shots." (26RT 2571, Peo. Exhs. 139, 140.)

Appellant was arrested without incident around 7:30 a.m. when he walked out of the desert and was apprehended by police near the intersection of Sagebrush and Cottonwood in Whitewater. (26RT 2580-2582.) Blood samples and other physical evidence was taken from appellant around 11:30 a.m. (26RT 2624.) Appellant's blood tested negative for alcohol, amphetamines, cocaine, opiates, PCP, benzodiazepines and lithium. (26RT 2632, 2636.)

Riverside Sheriff Investigator Robert Joseph was in charge of the crime scene investigation. He inspected the deceased officers and found that none of their weapons had been fired. (26RT 2588-2589.) He found twelve .30 caliber shell casings in the desert off the pavement in the area from which the officers had been shot. (26RT 2591.) Joseph believed that the location of the shells indicated that appellant had fired eight times at Lehmann and four times at Haugen. (26RT 2610.) He also found five more of the same shell casing in appellant's front yard, apparently where appellant had fired shots into the air. (26RT 2593-2594.)

Joseph went into the desert to retrieve appellant's M-1 carbine and some ammunition, which was located near a log covered with bark. (26RT 2600.)

James Hall, a Department of Justice criminalist, test-fired the M-1 carbine in various positions to determine if the weapon worked and to get information about the ejection pattern of the expended shell casing. (26RT 2653.) He determined, consistent with common sense, that the higher the gun was held while firing, the wider the dispersal pattern of the shell casings. (26RT 2657-2660, 2668.) He examined the shell casings microscopically and concluded that appellant's M-1 had probably fired them, but he could not make a definitive conclusion to that effect. (26RT 2656.)

Darryl Garber, the forensic pathologist who performed the autopsies, testified about the cause of death of each officer and the nature of their wounds. (27RT 2707-2737.) His testimony was essentially consistent with his testimony at the guilt phase, described above.

The prosecution presented substantially more victim-impact evidence at the retrial than at the first trial. A total of nine witnesses testified – five as to Lehmann and four as to Haugen, and their stories were illustrated by 57 Lehmann and Haugen family photographs. These witnesses provided extensive biographical information about the two deceased officers and heart-wrenching accounts of the effects the two deaths had on the family members. Valerie Lehmann had been married to Jim Lehmann for almost 20 years. (27RT 2738.) Following the death of her husband, Lehmann had been unable to return to work for a variety of reasons. (27RT 2743.)

Lehmann also testified about the effects of her husband's death on her two children, Christopher and Ashley. Valerie said that the stress of the situation had caused Christopher to have seizures which had to be controlled by Dilantin. (27RT 2758-2759.) Eleven-year-old Ashley

attempted to testify about her father but soon had to leave the witness stand due to her crying. (RT 3076-3077.) She said that since her father's death she now believes that there are "lots of bad people out there." (27RT 3077.) James Odam, Valerie Lehmann's brother-in-law, testified that since Jim Lehmann died, Odam had taken on a role almost of being a stepfather, with a role in guidance, discipline and discussion with Ashley and Christopher. (27RT 2768.) There were times when Christopher was out of control and Odam had to help out. (27RT 2768.) Christopher had been an easygoing kid before his father died, but had since become "very lost." (27RT 2769.)

Ethel Lehmann, Jim Lehmann's mother, testified that she passed out when she learned her son had been killed. (30RT 3082.) The day after the funeral, she suffered a heart attack and was in intensive care for five days. (30RT 3082.) Mikel Anderson was Valerie Lehmann's father. (27RT 2772.) Anderson believed Jim Lehmann was a good husband and that his daughter had never gotten over her husband's death. (27RT 2772.). She was under pressure to raise her children by herself and she was no longer the happy, outgoing person she used to be. (27RT 2775.)

Elizabeth Haugen told the story of her entire relationship with Michael Haugen, from when they met to the day of his death. She illustrated her story with 25 photographs of their lives together and of their two children, Stephen and Katie. Elizabeth related at length the story of her husband going to work the night of the shooting, and being awakened at 5:30 a.m. to learn of his death. (27RT 2801.) She testified to the difficulties her children had as a result of losing their father and the changes in her own life. (27RT 2803-2808)

Jacqueline Mangham, Elizabeth Haugen's niece, testified about how hard Michael Haugen's death had been on Elizabeth. (27RT 2812.) She

also related an anecdote from 1997 in which Stephen Haugen said he was ready to join his father in heaven. (27RT 2813.) Omar Rodriguez was a family friend of the Haugens. Rodriguez testified that he bore the responsibility of telling third-grader Stephen Haugen that his father had been killed. Stephen "took it hard." (30RT 3074.) Kids at school became cruel to Stephen, and Stephen in turn became incorrigible. (30RT 3074.)

Stephen Haugen also testified. For Stephen, things had been bad around the house since the death of his father. (27RT 2818.) He tried to run away. (27RT 2818.) His mother eventually sent him away to boarding school; he preferred boarding school to being at home. (27RT 2820.) He now only saw his mother on weekends. (27RT 2819.)

Other prosecution witnesses included forensic technician Robert Johnson, who testified that the bottle of lithium seized from appellant's home contained 99 of the 120 prescribed capsules. (30RT 3068-3069.) Adam Ruiz, the rangemaster for the Riverside Sheriff's Department, test-fired appellant's M-1 and found he was able to hit the target from 132 feet each of 12 times he fired the weapon. (28RT 2833.)

2. The Defense Case

Beginning in 1984, appellant was treated repeatedly at the Veteran's Administration Hospital. In January 1984 he was evaluated in the emergency room for drug and alcohol dependence. (28RT 2847.) He completed the in-patient portion of the treatment, which lasted from a month to six weeks, but did not complete the aftercare portion in a halfway house. (28RT 2847-2848.) In August 1984 he tried to return to the program but was not admitted. (28RT 2848-2849.) In late 1986, appellant returned to the emergency room and was again evaluated for drug and alcohol dependence. (28RT 2849.) This time he was treated for about a

month and a half. (28RT 2849.) He was discharged from the program for failing to attend regularly scheduled group meetings. (28RT 2849-2850.)

In March 1996 appellant again returned to the hospital. This time he was diagnosed with amphetamine dependence in early full remission, meaning he had not been using the drug for more than a month but less than a year. (28RT 2851-2852.) Appellant reported he had not been using the drug for five months. (28RT 2852.)

In April 1996, psychiatrist Ray Verde diagnosed appellant with three dependencies: for amphetamine, alcohol and marijuana. (28RT 2852-2853.) Appellant also reported suffering mood swings and feeling "agitated." (28RT 2853.) Dr. Verde initially made a working diagnosis of cyclothymic disorder – a minor variation of bipolar disorder – and prescribed lithium to stabilize appellant's mood swings. (28RT 2855-2857.) The lithium was meant to slow down appellant's reactivity time. It does not make anger or irritability go away, but helps keep it from escalating to the point that the patient is "no longer thinking of other alternatives." (28RT 2857.) Near the end of April, appellant reported decreased irritability and anger, although these feeling were still present. (28RT 2857.) Because of appellant's report of improvement, Dr. Verde increased the dosage. Appellant did not come to his scheduled appointments in May, 1996, and had no further contact with the hospital. (28RT 2859.)

Jeff Alleva, who was a prosecution witness at the first trial, testified as a defense mitigation witness at the retrial. His testimony was similar to what he said at the first trial. Appellant came to see Alleva on Friday, January 3. Although they had not seen each other for a long time, appellant and Alleva had been friends for more than 20 years. Appellant talked to

Alleva about needing to get his life back on track; they talked about appellant getting back into recovery from addiction. (28RT 2892.) They had dinner together and Alleva gave appellant a mattress to take back to the shop to sleep on. (28RT 2892.) Alleva had been in recovery with appellant in the past. Appellant told Alleva he had not used methamphetamine for several months. (28RT 2898.) Appellant seemed sad. (28RT 2897.) On Saturday, appellant came over again and stayed until sometime around 9:00 p.m. (28RT 2898.)

Two of appellant's former employers testified on appellant's behalf. David Wakefield was a dental technician who hired appellant in 1996. (28RT 2899.) Appellant worked for Wakefield for about a year. Appellant was a hard worker and did not complain much. He came to work, did his job and was trustworthy. (28RT 2900.) A few months before appellant quit, his wife Elaine showed up at the laboratory and caused a scene by discussing their relationship in front of the others present. Appellant was very quiet and subdued while Elaine did all the talking. (28RT 2901.) Appellant changed a little after that incident and he had some absences. (28RT 2901.) Finally, appellant called in and said he was not coming to work any more.

Mel Wachs owned the sign company, Signs By Mel, where appellant had worked up until the time of his arrest. Appellant had worked for Wachs for six or seven months. (28RT 2905-2906.) Appellant was an excellent worker. (28RT 2906.) He was meticulous in his work and there was never a problem with him showing up on time. (28RT 2907.) He was very thoughtful and got along well with the other employees. He never raised his voice and never showed any sign of temper. (28RT 2907.)

In the last two weeks before the arrest, there was a change.

Appellant seemed under a great deal of stress. He was having problems with his wife. He wanted to leave his wife but did not know what to do about it. (28RT 2908.) On the Friday before the shooting appellant asked for permission to stay at the shop, and Wachs gave him permission to do so. In those last weeks before the shooting appellant told Wachs he had the feeling that his wife was putting speed in his coffee, and that made him very nervous. (28RT 2911.) He seemed nervous or "antsy;" he seemed a little frustrated or upset, and maybe a little depressed. (28RT 2912.)

Two co-workers at Signs By Mel also testified for appellant. Jared Anthony found appellant to be hardworking. (28RT 2918-2919.) In the last couple weeks before his arrest, however, appellant was "a lot more edgy" and talked about having problems at home. (28RT 2919.) He expressed concern that his wife was putting speed in his coffee.[8] (28RT 2922.) Catherine Lehman was the manager and head designer at Signs By Mel. (28RT 2926.) Lehman found appellant to be a hard worker, trustworthy and not a disciplinary problem. (28RT 2927.) He was quiet with a good sense of humor. (28RT 2927.) Not long before his arrest, appellant became very tense. (28RT 2929.) He had decided to get a divorce and had concerns about the stability of his wife and what would become of his children. (28RT 2928.)

Gordon Young, the pastor at appellant's church, again testified for appellant. He had known appellant for ten years and knew Elaine and appellant's children. (28RT 2936.) Over the years, Young had counseled appellant many times – in fact, maybe more than 100 times – regarding

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[8] This statement was introduced for the limited purpose of showing appellant's thoughts and mental state, not to show Elaine actually drugged appellant's coffee. (28RT 2922.)

problems which had arisen in his life. (28RT 2937, 2943.) There were substance abuse problems and marital problems. (28RT 2938.) Young counseled from a spiritual perspective, but came to believe that appellant's problems required medical attention, and told appellant so. (28RT 2938-2939.) He gave appellant this advice sometime in the summer of 1996 – a few months before appellant's arrest in January, 1997. (28RT 2940.)

Young had counseled the Russells once a week. Then there was "crisis-type counseling" for one particular period of six weeks when the family was in crisis. (28RT 2939-2940.) Some of this counseling was by telephone, but most of the time Young saw the Russells in person. (28RT 2940.) Following this crisis, Young heard from Elaine that things had improved after appellant had been examined and prescribed medication. (28RT 2941.) After that, Young received no calls from the Russells for about three months. (28RT 2941.) On cross-examination, however, Young acknowledged that Elaine may have called a few weeks before appellant's arrest to tell Young that appellant was threatening to shoot her. (28RT 2947-2948.)

There were times when appellant acted paranoid, making accusations which Young investigated and could not confirm. (28RT 2942.) The fears appeared real to appellant, however. (28RT 2942.)

Because the court had denied appellant's motion to admit appellant's taped admissions, the defense had to rely on Eric Spidle, the prosecution's investigating officer as a defense witness to show appellant's cooperation with the police and the remorse he showed upon learning that the officers he shot at were dead. Spidle spoke to appellant shortly after the arrest. (29RT 2965.) Early in their conversation appellant asked, "What happened to your buddies?" (29RT 2967.) Spidle responded that he would discuss

that with appellant at a different time. (29RT 2967.) After Spidle read appellant his *Miranda* rights, appellant said he wanted to talk to a lawyer but agreed to show the police where the gun was hidden. (29RT 2969.) Spidle described how they traveled by vehicle and on foot into the desert and collected the gun and ammunition. (29RT 2969-2970.)

When they got back to the police vehicle, but before they returned to Riverside, appellant again asked what happened to the two deputies. (29RT 2971.) Spidle told appellant they were dead. (29RT 2971.) On hearing this, appellant tilted his head back, closed his eyes and became "a little teary eyed." (29RT 2971.) He was visibly emotional. (29RT 2971.)

The police physically examined appellant when they arrived at the sheriff's station, and collected physical samples from him. (29RT 2972.) Spidle then interviewed appellant for approximately 2 hours beginning around 11:30 a.m. (29RT 2972.) At the end of the interview, appellant agreed to go back to the scene of the shooting to show the authorities some of the relevant locations. They spent about an hour at the scene, and then returned to the jail where Spidle had another brief interview with appellant. (29RT 2973.)

In Spidle's opinion, appellant was cooperative in the initial interview. (29RT 2983.) In his report, Spidle had also characterized appellant as remorseful in this interview. (RT (29RT 2983.) In testifying, however, Spidle said he believed that "regretful" was a more accurate description. (29RT 2984.)

Forensic scientist Richard Whalley test-fired appellant's M-1 rifle. In one test, to determine the ejection pattern of the shell casings, he held the gun at his hip, 42 inches above the ground and fired 12 shots. Eleven of these shots landed in an area 19 by 17 inches. (29RT 3008.) Whalley also

tested the rifle for accuracy and determined that it was shooting 4 to 5 inches high and to the left. (20RT 3012.) The rifle also had a light to moderate recoil which would cause the shots to elevate upward, increasing the angle with each shot if the shooter did nothing to control it. (29RT 3012-3013.) Controlling the recoil would be particularly important for maintaining accuracy if the shooter fired in a rapid manner. (29RT 3014.) When Whalley tested the rifle for accuracy at 132 feet – the estimated distance from which the deputies were shot – only nine of twelve shots hit a barrel 36 inches high and 22 inches wide. (29RT 3015, 3030.)

Charles Darnell, a 22-year decorated Army veteran, was an expert with an M-1 rifle and had reviewed appellant's military records. Appellant joined the Army in August, 1977, and was in the medical service. (30RT 3103.) His qualification test for the medical service was only two points over the minimum. (30RT 3104.) In his basic aidman's course, he failed 21 of the 37 exams – he was around 40% and the minimum to be an aidman was 60%; a score of 80% was necessary to be in the high level. (30RT 3105.) Appellant was assigned to be a litter bearer and an ambulance driver. (30RT 3105.)

Every soldier receives training in the use of a weapon. The lowest skill level at which a soldier qualifies to shoot a rifle is marksman. Everyone who goes through basic training will score high enough to be a marksman, which is what appellant did. (30RT 3106.)

According to Darnell, it is very awkward to fire the M-1 from a standing position. (30RT 3109.) Shooting it from hip level is a very common method of shooting the M-1, but you cannot sight the weapon in that position. (30RT 3109-3110.) Because the M-1 is so light, its problem is "climbing" or moving when it is being fired. When fired fast, "it's kind

of a scattering." Darnell noted that the government called the weapon "uncontrolled." (30RT 3115.)

Appellant received an honorable discharge from the Army despite three summary court-martial offenses and some civilian confinement. (30RT 3111.) There were indications that appellant abused drugs while in the military. (30RT 3112.)

Appellant's mother, Lucille Williams, testified for her son. Appellant was born in 1960. His father, Vilas Russell, died when appellant was 10 years old. (30RT 3085.) Although Vilas was an alcoholic, he and appellant got along well and were very close. (30RT 3085.) When Vilas died, appellant was moody, very lonely and seemed angry. (30RT 3085.)

When Williams remarried two years later, to Daniel Williams, things became worse for appellant. Daniel Williams did not like children and was violent with appellant. (30RT 3086.) When appellant was 13, Daniel Williams beat him with a 2 x 4 and knocked him unconscious. (30RT 3087.) Appellant ran away from home at age 14. (30RT 3087.) Williams became aware appellant was using drugs when he was 13 years old. (30RT 3090.)

Appellant did not finish high school but received a GED. (30RT 3088.) He joined the Army at age 17 to get away from home. After four years in the Army he moved back and held down steady work. (30RT 3088.) One day on his way home from work, appellant was violently assaulted and robbed. The assailants hit appellant on the head with a baseball bat and threw him into a dumpster. He was in a coma for four days. (30RT 3089.)

Prior to that incident, appellant had been angry and easily frustrated.

(30RT 3090.) Afterwards, appellant became introverted and had mood swings. (30RT 3090.)

Williams's health suffered following appellant's arrest. She lost 27 pounds and had insomnia and hair loss. (30RT 3091-3092.)

1

THE JURY WAS ERRONEOUSLY PERMITTED TO CONVICT APPELLANT ON A LEGALLY ERRONEOUS THEORY OF LYING-IN-WAIT MURDER

The prosecutor tried appellant using both premeditated/deliberate murder and lying-in-wait murder theories. His principle theory was that when appellant found out that the police were coming, he decided to kill them; he left his house by way of a path in the back, took up a position in the brush and shot the officers when they came by. (5RT 562-563; 11RT 1354-1356.) The prosecutor offered the jury a lying-in-wait theory as an alternative which addressed the possibility that the jury would credit some or all of appellant's defense that he was attempting to flee the area and intended only to shoot in front of the officers in order to give himself time to escape. (11RT 1303-1307.)

Explaining his lying-in-wait theory, the prosecutor told the jury that appellant was guilty of first-degree lying-in-wait murder even if they "believe[d] 100 percent what Mr. Russell had to say to Mr. Spidle on those videotaped interviews." This theory, however, is not consistent with the established law of lying-in-wait murder. Specifically, it is inconsistent with the lying-in-wait requirement that there be a substantial period of watching and waiting prior to the attack which results in death. The prosecutor's theory, combined with inadequate instructions on lying-in-wait murder, made it possible for the jury to convict appellant of both murders based on a legally erroneous theory of lying-in-wait murder. The error violated state law and deprived appellant of due process and a fair trial under both the state and federal constitutions. (U.S. Const., Amends. 5 & 14; Cal. Const., art I, §§ 5, 15 & 16.) Because it is possible the murder convictions were

based on an erroneous legal theory of murder, the convictions must be reversed.

A. Appellant's Statements

Appellant made various statements about the circumstances immediately preceding the shootings when he was questioned and videotaped by Detective Spidle after his arrest. These are the statements which, according to the prosecutor, established lying-in-wait murder if believed by the jury.

Early in the first taped statement appellant said he knew the police were coming and that he did not want to get caught and go to jail. (4Supp. CT 09.) He ran out a side door of the house. (4Supp. CT 09-10.) He wanted to get away by going "back down across the freeway." (4Supp. CT 09.) "And I saw that the officers walkin' up the street, I turned and I, I saw the silhouette of them, and I thought well if I shoot in front it wasn't in the pathway of the house and it wasn't in the pathway of them. If I shoot between here, they'll run back the other way." (4Supp. CT 09.) He knelt down and fired five or six shots into the street. (4Supp. CT 09, 11.) Then he "took off" running. (4Supp. CT 09.)

A few minutes later in the questioning, Spidle returned to the subject of the shooting. Appellant said he first saw the police cars when he looked out the window of his house. (4Supp. CT 42.) They were just turning onto his street. (4Supp. CT 43.) He saw them slow down and stop. (4Supp. CT 43.) He planned to sneak past them. (4Supp. CT 43, 44.) He was "crouched down goin' real quick" when he saw the officers. (4Supp. CT 44.) "And then I don't know what I thought. It's like I saw 'em coming', I thought well I'm gonna stop and I'm gonna, you know, make 'em go. . . . And I figured I'd put a line of fire down in front of them to turn them back

so they were, see I was, I thought for sure they were gonna see me, you know, as I was comin', cause I was movin' quick. . . . And so I figured, you know, I'd better scare 'em off. . . . And I fired and then it, shots, well, then it was just like I ran blind. (4Supp. CT 44.)

The statement then continued as follows:

> ES [Detective Eric Spidle]: Okay. And um, when you were firing the rifle, okay? . . . [W]ere you, you crouched down?
>
> TR [Tim Russell]: I was crouched and saw 'em, and I shot like this.
>
> ES: So you didn't go down on your knee? Did you, you didn't take a stationary position?
>
> TR: No, after I shot, after I shot, I like stopped for a second and I didn't see 'em and then I ran. (4Supp. CT 45.)

The next day Spidle interviewed appellant again and asked about the shooting:

> ES: Okay, and so you get to that point on that little side, the end of that little side street there, Sagebrush, okay, and what, what kept you, Tim, from just keep going?
>
> TR: Well when I saw the silhouette I was pretty surprised and shocked. I thought, I thought that possibly they'd seen me.
>
> ES: Okay, and so in thinkin' that they possibly saw you, you decided to shoot at 'em?
>
> TR: Well, shoot in that, in the general direction.

(4Supp. CT 116.)

> . . . .
>
> ES: Okay. Alright. Now, you kinda showed us a crouched position that you were I, and, and yesterday you indicated you weren't sure if you were still moving or not, okay?
>
> TR: Yes. (4Supp. CT 118.)

A few minutes later, this exchange took place:

ES: Okay, and at some point in time after you fire your gun in the air you take that same gun and you go into the darkness, west of your house, along the, the pathway here, and you get down here and you stop.

TR: ??? don't recall stopping.[[9]]

ES: You don't recall stopping but again you get in position where you slow down enough to your estimation to fire a gun.

TR: Well, I remember slowing down...

ES: Okay.

TR: ...maybe, I don't, I don't know if I slowed down, I remember being in a position...

ES: Crouched position.

TR: I remember being crouched, I saw the silhouette of one officer right here with another one behind him...

ES: Right.

TR: ... going down this way in front of them and I pulled the trigger. It was like within a matter of seconds. I mean...

ES: Right, I understand that.

TR...it's, it's, it's just like the, the reaction was quick.

ES: Right.

TR: It was just like I was doing it before I realized what I was doing, you know, that I did it.

(4Supp. CT 133-134.)

B. The Prosecutor's Argument

The prosecutor argued to the jury that appellant's own words established his guilt of lying-in-wait murder. This argument showed the jury a path to a first-degree murder verdict, albeit an erroneous path, even if

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[9] The question marks are those of the transcriber, apparently indicating an incomprehensible portion of the tape.

the jury accepted all or some of appellant's version of the shooting:

> Now, the Court is also going to talk to you about second-degree murder. And the Court is also going to talk to you about another form of first-degree murder called murder by lying in wait. Murder by ambush.
>
> Just as an example, and even though the evidence does not support this, but let's suppose you believe 100 percent what Mr. Russell had to say to Mr. Spidle on those videotaped interviews. Let's just assume for a moment that you conclude 100 percent what Mr. Russell said is true. [¶] . . . [¶] What you have then, Ladies and Gentlemen, the Court will talk to you about second-degree murder, doing an act which is inherently dangerous to human life. And that's what Mr. Russell did, if you believe his story. He still committed second-degree murder. [¶] . . . [¶] Or the Court will also tell you, well, let's say you determine from the evidence that Mr. Russell did intend to kill Mike Haugen and Jim Lehmann. But he didn't have enough time to really premeditate and deliberate.
>
> And the Court's going to tell you that premeditation and deliberation does not mean that you have to really think about it for a long, long time. You have to weigh the consequences of what you're doing. But let's just say you think that second-degree murder and, in particular, you conclude that everything the defendant said is reasonable.
>
> The Court is going to tell you that you still have first-degree murder, even though the defendant said I didn't intend to hurt anybody.
>
> If you find second-degree murder and then you also find that the defendant killed Jim Lehmann and Mike Haugen by lying in wait, and the Court defines lying in wait as follows: In order to establish first-degree murder by lying in wait, the perpetrator must establish a state of mind equal to, but not identical to, premeditation and deliberation.
>
> The state of mind is to watch and wait by purpose of gaining an advantage and taking the victim unawares in order to facilitate the act which constitutes murder. The concealment,

which is required, is that which puts the defendant in a position of advantage from which one can infer that the principal act of lying in wait was part of the defendant's plan to take the victims by surprise. It does not include the intent to kill or injure.

So, Ladies and Gentlemen, believe everything that the defendant says, he is still guilty of first-degree murder. And why? Here's the defendant's own words. The exhibits, the transcripts of his interview, as well as the tapes are in evidence. I'm looking at the first interview, page 9.

Now, 'I saw the officers walking up the street.' I'll start a little earlier. 'I went out out the side door. I went around. There's a little street below the house. I wanted to get back across the freeway and I saw the officers walking up the street. I saw the silhouette of them. I thought, well, if I shoot in front of them, if I shoot between here' – keep in mind that Mr. Russell was drawing a diagram for Mr. Spidle and he was explaining where he was shooting – 'if I shoot here, they will run back the other way.'

Well, Ladies and Gentlemen, by his own words he says that he took up a position to scare them.

Now, Ladies and Gentlemen, the evidence doesn't support a belief in what the defendant had to say. But that's going to be your ultimate decision. 'Well, here's the street. Here's the curb. I was around here in the pathway. I saw them walking. They're coming real slow and I knelt down and fired into the street.'

Then he goes on to describe it again. He took them by unawares. That was his intent.

Either way you look at it, Ladies and Gentlemen, Mr. Russell is guilty of first-degree murder. It's as simple as that. Whether you find premeditation and deliberation or if you believe his story, you have lying in wait, which is also first-degree murder.

(RT 1303-1307.)

C. A Substantial Period Of Watching And Waiting Is A Necessary Element Of Lying-In-Wait Murder

Under section 189 "murder which is perpetrated by means of. . . lying in wait. . ." is first degree murder. To come under this statute a murder must be committed under circumstances which include "'(1) a concealment of purpose, (2) *a substantial period of watching and waiting for an opportune time to act*, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . .'" (*People v. Hardy* (1992) 2 Cal.4th 86, 163, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557 *(Morales*); emphasis added.)

This Court has reaffirmed several times that one of the elements of lying-in-wait murder is a *substantial* period of watching and waiting. In *People v. Stanley* (1995) 10 Cal.4th 764, the defendant argued that because the element of deliberation is not required for lying-in-wait murder, it followed that lying-in-wait murder was no different from premeditated murder. This Court disagreed, stating that lying-in-wait murder requires a "factual matrix" distinct from ordinary premeditated murder which includes the elements of concealment of purpose, a substantial period of watching and waiting, and a surprise attack on an unsuspecting victim from a position of advantage. (*Id.* at p. 796.) Like *Hardy*, *Stanley* relied on *Morales*, *supra*, 48 Cal.3d 527, which involved a lying-in-wait special circumstance allegation under section 190.2, subdivision (a)(15), rather than lying-in-wait murder under section 189. While the two forms of lying in wait are "largely similar, but slightly different" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2), this Court has continued to make clear that a substantial period of watching and waiting is one of the similarities between the two forms, and is an element of both. (See e.g., *People v. Gurule* (2002) 28

Cal.4th 557, 630; *People v. Cole* (2004) 33 Cal.4th 1158, 1205; see also *People v. Poindexter* (2006) 144 Cal.App.4th 572.)

D. Appellant's Statements Did Not Contain Evidence Of A Substantial Period Of Watching And Waiting Before Appellant Shot The Officers

If appellant's statements to Spidle are accepted as true, appellant did not commit lying-in-wait murder. As appellant described events, there was no substantial period of watching and waiting. Appellant's plan was to escape into the night, not to confront the police. He had no intent to shoot before he unexpectedly saw the silhouettes through the darkness. Appellant could not have been watching and waiting for an opportune time to act – that is, to shoot – until he actually formed the intent to shoot. Therefore, the period of watching and waiting could not have begun until appellant saw the officers' silhouettes, and it ended when he fired. That period, as appellant described it, lasted "a matter of seconds. . . the reaction was quick." (4Supp. CT 116.) During that very brief period, appellant saw the silhouettes and reacted with shock and surprise. He was concerned the officers had seen him so he shot to scare them off. He did not take a stationary position (4Supp. CT 45), although early in his statement he indicated he "knelt down" (4Supp. CT 11). He was unsure whether he stopped or not when he shot. (4Supp. CT 134.)

Any period of watching and waiting under this theory of lying-in-wait murder could therefore have lasted only two or three seconds at most. In *People v. Edwards* (1991) 54 Cal.3d 787, 824 the Court found that a period of watching and waiting that lasted "a matter of minutes" was "substantial," but appellant has found no cases where a few seconds were found substantial. On the other hand, in *People v. Ceja* (1993) 4 Cal.4th

1134, defendant was struggling with the victim in the front yard and holding her by the hair when a third party, Ortega, ran out to intervene. Defendant pulled out a gun and pointed it at Ortega, who then hid behind a tree. Defendant then shot the victim. The Court found insufficient evidence of lying in wait. (*Id.* at p. 1141.) The brief period between appellant seeing the silhouettes of the officers and firing his weapon was a similarly insubstantial period of watching and waiting.

E. The Inadequate Instructions On Lying-In-Wait Allowed The Jury To Convict Appellant On The Erroneous Legal Theory Advocated By The Prosecutor

The court's instructions did not correctly inform the jury that lying-in-wait murder required a substantial period of watching and waiting, and thereby permitted the jury to convict appellant on the erroneous legal theory advanced by the prosecutor. The court gave three instructions on lying-in-wait murder. First, it gave the standard CALJIC instruction (CALJIC No. 8.25) as follows:

> The term 'lying in wait' is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. *The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.*

(11RT 1382-1383; emphasis added.)

Second, it repeated the standard instructions defining premeditation and deliberation:

> The word "premeditation" means considered beforehand. The word "deliberation" means formed or arrived at or determined upon as a result of careful thought and weighing of

> considerations for and against the proposed course of action.

(11RT 1383.)

Finally, it gave this special instruction on lying-in-wait murder:

> In order to establish first-degree murder based upon lying in wait, *the perpetrator must exhibit a state of mind equivalent to, but not identical to, premeditation and deliberation.* This state of mind is the intent to watch and wait for the purpose of gaining an advantage in taking the victim unawares in order to facilitate the act which constitutes murder.
>
> The concealment which is required is that which puts the defendant in a position of advantage from which one can infer that the principal act of lying in wait was part of the defendant's plan to take the victims by surprise. It does not include the intent to kill or injure the victim.
>
> In order to establish lying-in-wait murder, the prosecution must prove the crime involved the unlawful killing of a human being with malice aforethought. Malice may be express or implied. (11RT 1383; emphasis added.)

On the third day of deliberations, the jury sent a note pointing out the discrepancy between CALJIC No. 8.25 and the special instruction on premeditation and deliberation:

> P. 8.25 - 2nd paragraph
> "premeditation <u>or</u> deliberation"
> vs.
> Special Instruction
> 1st paragraph
> "premeditation <u>and</u> deliberation"

A note in the margin asked "which one?" (13CT 3585 [note], 3483 [minute order].)

The court responded that both instructions should be in the disjunctive, and gave the jury a corrected version of the special instruction. (13CT 3425-3426, 3483; 12RT 1428.) The jury returned its verdicts shortly

thereafter. (13CT 3483, 3485-3492.)

A court has a sua sponte duty to instruct the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1Cal.3d 444, 449; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) The general principles of law governing the case are those principles closely and openly connected with the evidence adduced before the court which are necessary for the jury's proper consideration of the case. (*People v. Wilson* (1962) 66 Cal.2d 749, 759; *People v. Wade* (1959) 53 Cal.2d 322, 334. None of the court's instructions informed the jury that to convict appellant on a lying-in-wait theory that appellant had to have watched and waited for a *substantial* period of time. This was error. (See *Morales*, *supra*, 48 Cal.3d at p. 557; *People v. Hardy*, *supra*, 2 Cal.4th at p. 163; *People v. Stanley*, *supra*, 10 Cal.4th at p. 796.)

This Court has previously addressed a claim of error from the failure to inform the jury that the period of lying in wait must be substantial. In *People v. Edwards* (1991) 54 Cal.3d 787, defendant's trial was held before the *Morales* decision, and consequently the lying-in-wait special circumstance instructions delivered by the trial court did not track the elements of lying in wait as described in *Morales*. This Court upheld the special circumstance finding against defendant's claim of instructional error because the instructions that were given fulfilled all the legal requirements of *Morales* even though the words were not always "precisely the same." (*Id.* at p. 822-823.) Part of defendant's argument in *Edwards* was that the instructions failed to require the jury to find the period of watching and waiting to be "substantial." But the Court noted that while the word "substantial" was not used, there was an instruction which told the jury that "If the murder is done suddenly, without a period of waiting, watching and

concealment, the special circumstance of lying in wait is not present." (*Id.* at p. 822.) Because the jury was told that the lying in wait had to be of sufficient duration to establish the elements of watching, waiting and concealment, *and* that a murder done suddenly without such watchful waiting and concealment is not murder by lying in wait, the jury would understand that lying-in-wait murder "necessarily include[d] a substantial temporal element." (*Id.* at p. 823.)

In the present case there was no instruction like the one in *Edwards* that either explicitly or implicitly informed jurors that the watching and waiting period had to be substantial. To the contrary, CALJIC No. 8.25 stated that the lying-in-wait period needed to last only long enough to show a state of mind equivalent to premeditation or deliberation. Jurors could have found appellant's statement that he decided to try to scare the officers away by shooting in front of them showed premeditation, even while accepting that the shots were a quick reaction only moments after seeing the officers. That premeditation would have been sufficient for the jury to find lying in wait under the instructions given, but would not have been sufficient to find *a substantial period* of lying in wait if the jury had been correctly instructed. Accordingly, the lying-in-wait instructions were inadequate and erroneous.

F. The Likelihood That The Jury Relied On A Legally Erroneous Theory Of First-Degree Murder Requires The Reversal Of Both Convictions

The theory of lying-in-wait murder argued by the prosecutor, combined with the inadequate lying-in-wait instructions, allowed the jury to convict appellant on a legally erroneous theory of murder. If the jury credited appellant's taped statement about the circumstances leading up to

the shooting, appellant could not be guilty of lying-in-wait murder because there was no substantial period of watching and waiting. "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green* (1980) 27 Cal.3d 1, 69.) In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court reaffirmed its holding in *Green* that "if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*Id.* at p. 1129.)

The error also violated appellant federal constitutional rights to due process (*Stromberg v. California* (1931) 283 U.S. 359) and those constitutional rights implicated assuming appellant was actually convicted on the illegal theory (*Griffin v. United States* (1991) 502 U.S. 46), including the right to due process and the right to proof beyond a reasonable doubt on every element of the crime (*In re Winship* (1970) 397 U.S. 358, 364). Furthermore, the deprivation of appellant's state law right to be free from conviction under a general verdict which may be based on an illegal theory is a violation of due process under *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.

The error cannot be considered harmless. There is no basis on the record in this case to find that the verdicts were based on a valid legal theory rather than an invalid one. (See *People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) In fact, the record suggests that at least some of the jury decided the case on the illegal theory.

The jury was in its third day of deliberations when it submitted a note asking the court to resolve the inconsistency between the instructions regarding the use of evidence of premeditation and deliberation in establishing whether appellant lay in wait. The court held a proceeding on the note beginning at 12:00 p.m. which resulted in a modified instruction being delivered to the jury. (13CT 3483.) The verdicts came shortly after the court gave its answer, at 2:10 p.m. (13CT 3483), suggesting that the answer resolved conflicts that were impeding a verdict on a lying-in-wait theory of murder.[10]

Such a conflict would be understandable under the facts of this case. Appellant has already shown how the jury could have been misled by the instructions and the prosecutor's argument to find appellant lay in wait based on evidence that appellant premeditated his actions in the two to three seconds after he saw the silhouettes of the officers. But it would have been harder for the jury to go astray had they been additionally required to find appellant deliberated on his actions. The jury was told that "deliberation" meant "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (11RT 1383.) Assuming the truth of appellant's statements to the police, the jury could not reasonably have found that appellant deliberated before shooting. As noted above, appellant said he reacted quickly after seeing the officers and that he shot only a matter of seconds between seeing them and shooting. (4Supp. CT 116.) Nothing in appellant's statements gave any indication of careful thought and weighing

[10] It is not clear from the record whether the jury took a break for lunch after receiving an answer to the note but before reaching a verdict. (12RT 1427.)

the considerations for and against shooting.

Once the jury was informed that the state of mind necessary to show lying in wait needed to be only the equivalent of premeditation rather than premeditation *and* deliberation, it was free to render a verdict based on the inadequate legal theory of lying in wait advanced by the prosecution. Because of the possibility that the jury based its verdicts on the inadequate legal theory, the convictions must be reversed.

G. The Failure To Instruct the Jury That The Period Of Lying In Wait Must Be Substantial Requires Reversal Of The Convictions

In section E., above, appellant has shown how the court's instructions permitted the jury to follow the prosecutor's erroneous legal theory of lying-in-wait murder. The court's delivery of those instructions was a separate error, permitting the jury to wrongly convict appellant of lying-in-wait murder.

One of the elements of lying-in-wait murder under section 189 is a substantial period of watching and waiting. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 796; *People v. Hardy*, *supra*, 2 Cal.4th at p. 163; see generally, section C., above.) As described in section E., the instructions given did not inform the jurors that the period of watching and waiting needed to be substantial. Rather, it told them that, "The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (11RT 1382-1383.)

Premeditation and deliberation can occur in "a very short period of time." (*People v. Bloyd* (1987) 43 Cal.3d 333, 348; see *People v. Velasquez* (1980) 26 Cal.3d 425, 435.) The test for premeditation and deliberation is

not time, but reflection. (*People v. Bloyd, supra*, 43 Cal.3d at p. 348.) The jury was instructed that premeditation simply meant "considered beforehand." (11RT 1383; see section E.) Accordingly, premeditation and deliberation – particularly premeditation – have virtually no temporal component. By contrast, under *Stanley*, *Hardy*, et al., the temporal component of the element of watching and waiting must by definition be "substantial." Therefore, the instruction was incorrect to allow evidence of a "state of mind equivalent to premeditation or deliberation" to suffice as proof of the element of a substantial period of watching and waiting.

The trial court had a duty to ensure that the jury was adequately informed on the law governing all elements of the case submitted to them. (*People v. Ford* (1964) 60 Cal.2d 772, 793; *People v. Sanchez* (1950) 35 Cal.2d 522, 526-528.) The failure to instruct on an essential element of the offense charged is error whenever there is any evidence deserving of any consideration from which the jury could have found in favor of the defendant on the omitted element. (*People v. Hamilton* (1978) 80 Cal.App.3d 124, 133.) As described above, there was a solid evidentiary basis for the jury to find that there was no substantial period of lying in wait, and the instructional error must therefore be considered prejudicial.

There error also violated appellant federal constitutional rights to a fair trial and due process under the Fifth, Sixth and Fourteenth Amendments. Appellant had a constitutional right to have the prosecution prove every fact necessary to constitute the crime with which appellant is charged beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) The instructional error here deprived appellant of a jury determination on an element of lying-in-wait murder and was therefore error. The failure to instruct on an element of the offense is reviewed under

the standard of *Chapman v. California* (1967) 386 U.S. 18. (*Rose v. Clark* (1986) 478 U.S. 570, 582.) As shown above, the prosecution cannot show beyond a reasonable doubt that the error did not affect the verdict. The evidence here could have led the jury rationally to conclude that there was no substantial period of lying-in-wait, and the error therefore was not harmless. (See *id.* at p. 577.)

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THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS AT THE GUILT AND PENALTY PHASES TO HAVE THE JURY VIEW THE SCENE OF THE SHOOTING AT NIGHT

A. Appellant's Guilt Phase Motion

On September 26, 1997, long before the beginning of the guilt phase, appellant filed a written motion for an order to have the jury view the scene of the shooting at night time, based on both statutory and due process grounds. (2CT 447-449.) Appellant particularly noted the impossibility of presenting a clear picture in court of the lighting at the scene. (2CT 449.) The trial court first heard the matter on August 18, 1998, after the jury had been sworn and before opening statements. (4RT 543.) Defense counsel pointed out that there was a complete record of which lights had been on at the scene (4RT 544-545) and offered that he had personally been to the area with his investigator when there was a full moon and a half-moon, and that the scene was "extremely black, extremely dark" in those situations. (4RT 545.) Appellant argued that the extreme darkness at the scene was important to the defense theory that appellant did not intend to kill the officers. (4RT 544.) The court made no ruling on the motion at the time appellant raised it.

On August 27, prior to the defense guilt phase case, appellant again raised the jury view issue. The prosecutor objected to a jury view and the court denied appellant's motion. The court gave three reasons for its ruling: First, duplicating the lighting conditions of January 5, 1997, would be impossible: "It is now summertime, and when we talk about stars, moon, overcast, rain, wind, it's just not subject to simulation." (10RT 1204.) Second, there was already sufficient evidence that it was "pitch black" at

the scene; and third, the issue was not whether appellant saw the officers or not, it was whether he was aiming at them. (10RT 1204.) The court's ruling was erroneous.

Section 1119 authorizes the court to have the jury transported to the scene of the offense when "in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed. . . ." (Sec. 1119.)[11] A court's ruling on a defendant's motion to have the jury view the crime scene is reviewed under an abuse of discretion standard. (*People v. Williams* (1997) 16 Cal.4th 153, 212, 213; *People v. Price* (1991) 1 Cal.4th 324, 422.)

None of the court's reasons for denying appellant's motion withstand scrutiny, and accordingly, the court abused its discretion in denying appellant's motion. First, the court's concern about not being able to duplicate the lighting conditions was unfounded. The prosecution indicated no disagreement with appellant's representation that the principal sources of the limited light at the scene – the artificial lights from street lights and homes – was a known quantity. (4RT 544-545.) There is no reason to believe there was any other significant source of light. The court's speculation about possible moonlight or starlight affecting visibility on January 5, 1997, had no substantial basis. Like tide tables, data on the times

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[11] Section 1119 reads in relevant part: "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; . . . ."

of moon rise and moon set are readily available (see http://aa.usno.navy.mil/cgi-bin/aa_pap.pl.), yet the court made its decision without considering what moonlight was actually illuminating the scene at the time of the shooting. Had the court actually inquired, it would have realized that moonlight simply could not have been a significant factor on January 5, 1997, because the moon was only 15% full. (See *ibid.*) Furthermore, this thin crescent moon rose on Whitewater at around 3:04 to 3:05 a.m., just minutes before the shooting. (*Ibid.*)[12]

The court also had before it proffered information that should have ameliorated its concerns about granting appellant's motion. Defense counsel represented that he had been at the scene when the moon was full and half-full, and that the area was extremely dark even on those occasions. (4RT 545.) Furthermore, the defense indicated its willingness to have the jury view the scene under such circumstances. (4RT 545.) There is no requirement that the conditions for a jury view be identical to when the incident in question occurred. Rather, the court may properly consider "whether the conditions for the jury view will be substantially the same." (*People v. Price*, *supra*, 1 Cal.4th 324, 422; see *People v. Pompa* (1923) 192 Cal. 412, 421.) Even daytime jury views have been ruled proper in cases where the events in question took place at night. (See *People v. Cooks* (1983) 141 Cal.App.3d 224, 322-323[daytime viewing of nighttime crime scenes]; *People v. O'Brien* (1976) 61 Cal.App.3d 766, 779-780 [daytime jury view of nighttime police surveillance positions].) Because the scene was ordinarily sufficiently dark at nighttime – even when the

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[12] Whitewater, California is approximately halfway between the towns of Cabazon and Desert Hot Springs where the moon rose on January 5, 1997 at 3:05 and 3:04 a.m., respectively.

moon was at its brightest – to show the limited visibility appellant experienced the night of the shooting, then the actual amount of moonlight (and starlight) in the early morning hours of January 5 was irrelevant. The court's concerns about duplicating the lighting was misplaced.

The court's second reason for denying the motion was also mistaken. The fact that both sides agreed that the scene was dark did not address the real issue of how that level of darkness affected visibility. Testimony characterizing the scene as being dark, or very dark, or "pitch black" is not the same as jurors experiencing the relevant level of darkness. Appellant sought to have jurors directly experience the visibility rather than interpret it from testimony which simply described the scene as dark. Furthermore, the prosecutor did not agree that it was "pitch black" as the defense argued to the jury (compare 11RT 1123 [defense argument] to 11RT 1354 [prosecution argument]). Rather, he claimed that appellant "could see perfectly. And do you know why, ladies and gentlemen? When you look at where the shooting took place, we have a very large vapor light right there (indicating)." (11RT 1354.) Whether or not appellant "could see perfectly" was the issue appellant sought to address by having the jury view the scene of the shooting. The court's second reason for denying appellant's motion was therefore erroneous.

Third, the court failed to recognize that the visibility at the scene was highly relevant to whether appellant aimed at the officers. Appellant knew that the police were on their way to his home, responding to a domestic dispute. According to appellant's version of events, he attempted to use the cover of darkness to get by the arriving officers and escape to the desert. (6 Supp. CT 116.) He was surprised when he saw the silhouettes of the officers and was concerned that they had seen him as well. (6 Supp. CT

116.) He fired his gun reactively, without sighting, in an attempt to scare them away, enabling him to escape. (6 Supp. CT 117-119.) The plausibility of appellant's defense, therefore, depended on the scene being extremely dark. Without the jurors seeing that darkness themselves, they were more likely to believe the prosecutor's version that appellant "could see perfectly," and planned to kill the officers and lay in wait for them. Furthermore, the low visibility gave greater credence to appellant's statement that he intended to shoot in front of the officer, and that hitting them with some of the shots was a mistake.

A jury view of the scene would have provided substantive evidence regarding the visibility at the time of the shooting which would have assisted the jury in determining whether appellant intentionally aimed at the officers when he fired his rifle. The statutory definition of evidence includes "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code § 140.) A view of the scene by the trier of fact is independent evidence on which a finding may be made. (*Sylva v. Kuck* (1966) 240 Cal.App.2d 127, 136.) Under article I, section 28, subdivision (d) relevant evidence shall not be excluded in criminal proceedings. A nighttime jury view of the scene would have provided relevant evidence to the jury on a critical issue in the case. The court therefore erred in refusing appellant's motion for the jury view of the scene.

Besides violating appellant's state rights, the error violated his federal constitutional rights to due process and the right to present a defense under the Fifth, Sixth and Fourteenth Amendments. (*Rock v. Arkansas* (1987) 483 U.S. 44; *Green v. Georgia* (1979) 442 U.S. 95; *Chambers v. Mississippi* (1973) 410 U.S. 284, 290 & fn. 3; *Washington v. Texas* (1967)

388 U.S. 14, 19;.)

Whether appellant intended to shoot the officer was a major issue in this case. As discussed above, the jury's impression of the visibility at the scene would have been affected by actually viewing the scene rather than simply hearing about how dark it was there. As to the state law error, there is a reasonable likelihood that but for the erroneous denial of appellant's motion for a jury view that the jury would have returned a verdict more favorable to appellant. (See *People v. Watson* (1956) 46 Cal.2d 818.) As to the federal constitutional errors, the prosecution cannot show beyond a reasonable doubt that the error did not affect the verdict. (*Chapman v. California* (1967) 386 U.S. 18.)

B. Appellant's Penalty Phase Motion

At the penalty phase, appellant again moved to have the jury transported to the scene of the shooting in order to be able to view the physical layout of the scene and to experience the darkness which limited appellant's ability to see the deputies climbing the hill toward him. (CT 3627-3629; 21RT 1867.) The prosecutor objected based on the purported difficulty in recreating the lighting conditions at the time of the shooting. (21 RT 1868.) The court again agreed with the prosecution, giving reasons for denying the motions which were similar to those at the guilt phase: "I believe to duplicate that evening, as far as lighting conditions with moon, stars, cloud conditions, that would be virtually impossible. And I think it would be more confusing than probative to the jury. [¶] The witnesses can certainly testify to the lighting conditions out there that evening, and I think it's rather uncontradicted that it was an extremely dark night. And I don't think anybody testified any differently than that." (21RT 1868.) For the reasons set forward in section A., above, the court's reasoning was wrong.

Part of appellant's penalty defense was lingering doubt as to his guilt, and the prosecutor's case in aggravation relied heavily on the circumstances of the crime. As discussed above, a view of the crime scene would make it more likely that the jury would conclude that appellant shot the officers unintentionally or in a reactive manner rather than in a premeditated and deliberate manner. Besides violating state law, the refusal to permit the jury view deprived appellant of his right to present mitigating evidence and to rebut the aggravating evidence in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (*Lockett v. Ohio* (1978) 438 U.S. 586; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Gardner v. Florida* (1977) 430 U.S. 349.) Whether assessed under the reasonable possibility test (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448) or the beyond a reasonable doubt test (*Chapman v. California*, *supra*, 386 U.S. at p. 24) for penalty phase error, the judgment of death must be reversed.

For all the foregoing reasons, the murder convictions and the sentence of death must be set aside.

3

THE TRIAL COURT INTERFERED WITH THE JURY'S DELIBERATIONS AND IMPROPERLY COERCED THE GUILT VERDICTS

On the morning of the third day of guilt phase deliberations, the trial court received a letter from Juror No. 2 complaining that Juror No. 8 was expressing sympathy for the defendant, relying on personal experiences, and failing to deliberate objectively. The court responded by individually questioning two jurors about the jury's deliberations – first, the juror foreperson (Juror No. 12) and then Juror No. 8. This inquiry uncovered no improprieties. Prior to Juror No. 8 returning to deliberations, the court gave her a series of directives regarding the issues raised in the letter. About 3 hours later, the jury returned with a guilty verdict. (13CT 3483.) The questioning of Juror No. 8 improperly intruded on the jurors' deliberations, and the remarks and instructions of the court directed to her after the questioning were improperly coercive. This juror was singled out for questioning about her deliberations and given individualized instructions on specific areas of law despite the fact that she had done nothing wrong during deliberations. The court's errors deprived appellant of his rights to due process, a fair trial, and a unanimous jury verdict under the state and federal constitutions. (U.S. Const., Amends. 5, 6, & 14; Cal. Const., art. I, §§ 15 & 16.)

A. Factual and Procedural Background

On September 2, the jury heard closing arguments at the guilt phase and received its instructions from the court. The jury then retired to deliberate at 2:30 p.m. (12CT 3384.) They deliberated all day September 3, and returned for further deliberations on September 4. (13CT 3482-3483.)

I don't want to intrude on the deliberations. [¶] I think by talking to the foreperson first we'll get a better take on whether or not this is a general perception of the other jurors." (12RT 1416.)

When the foreperson arrived, the court indicated it had received a letter from one of the jurors. (12RT 1416.)

> THE COURT: And that juror was critical of another juror making an allegation that that juror was having a difficult time setting aside his or her sympathy for the defendant and objectively deliberating on the case.
>
> The reason why you're here, you are the foreperson and I'll inquire of you, are you having problems with any of the jurors, as far as jurors mentioning sympathy or putting aside sympathy and failing to deliberate?
>
> JUROR NO. 12: I feel so.
>
> THE COURT: Which juror is that, [Juror No. 12]?
>
> JUROR NO. 12: I only know this person by their first name.
>
> THE COURT: The first name is?
>
> JUROR NO. 12: Judy.
>
> THE COURT: That would be Juror No. 8, [Juror No. 8].
>
> And can you be as specific as you can without telling us how people are voting or how people are discussing the issue of guilt or innocence, but specifically how they are deliberating or refusing to deliberate?
>
> JUROR NO. 12: I don't think she would describe herself as not being willing to deliberate in that she is certainly engaging in discussion back and forth and, you know, offering opinions and asking questions.
>
> But when she asks a question and any of the rest of us try to satisfy that question, she ignores that answer and comes immediately back to, "I feel this happened because of this". And it's just a circular kind of thing. She seems to perseverate on that perception, which has in my mind an

The court received this letter from Juror No. 2 on the morning of September 4:

9/4/98

Judge Majers [sic],

At this point in the deliberations, we have a juror, Juror #8 , (I don't know her number)[[13]] , who, so far, has been unable to set aside her empathy for the defendant and objectively deliberate. I have directly heard her say she "feels sorry for him," and has told the entire group she is unable to set aside her own personal experiences relating to mental illness in order to consider this case. It has been impossible for her to consider, objectively, the evidence and apply it to the law.

We have read & re-read the instructions you gave about setting aside pity when deliberating. Your instructions also mention a duty to notify the court in such a case. I fear we will not ever be able to effectively work toward a consensus with the group at large with the situation as it is.

In addition, she seems to be suffering personal angst during the process stating "pick on somebody else, I can't do this anymore." "I've had it!" "Can I abstain?"

Thank you for your attention to this matter.

[Juror #2]

(13CT 3584.)

The court decided, with the agreement of the parties, to speak to the foreperson of the jury. While waiting for the foreperson, the court commented that "this may be just a take of Juror No. 2. The other jurors may not share this impression. And I tread very lightly on these issues and

[13] The clerk has redacted the record in both the clerk's transcript and reporter's transcript to protect the identity of the jurors, and has substituted numbers for the jurors' names.

emotional basis. I mean, I don't know how specific I can explain this to you.

THE COURT: Has she mentioned anything about sympathy for the defendant?

JUROR NO. 12: Yes.

THE COURT: Specifically what has she said?

JUROR NO. 12: She said she felt sorry for him. I think she used the word "pity". She -- she feels that -- well, again, I don't know how specific I can get.

THE COURT: Well, specifically, I would like for you to tell me specifically what is she saying about sympathy and pity.

JUROR NO. 12: That she feels sorry for him. I think, and this is just speculation on my part, I realize, that she identifies with his plight so much so that she -- she has projected herself and so she uses examples of, "Well, I wouldn't do that." "I have felt like that, so therefore, I wouldn't do that."

And again, we've tried to explain that the instructions are very clear, you know, that we have been instructed to set that aside, and that just because you may have had a similar experience doesn't mean that it necessarily applies to this situation. And she is describing an emotional state, you know, that she was in. And that she feels that she shares with the defendant. And she used that as the basis of her decision.

THE COURT: All right, has she indicated that her sympathy for the defendant makes it difficult for her to evaluate the evidence?

JUROR NO. 12: She hasn't said so directly. She wanted to quit early yesterday. She says, "I'm so tired of this." She says I was -- today, just now, she says, "I wasn't going to talk today. I just wasn't going to say anything." She -- she just seems to be much more emotionally involved, when I observe the rest of us. I mean, you know, emotions do run high.

THE COURT: Sure.

JUROR NO. 12: But it has a different quality, Your Honor.

I'm not sure how else to describe it.

(12RT 1417-1419.) After the foreperson left, the parties disagreed as to what should happen next. Appellant argued that the conduct of Juror No. 8 described by the foreperson was not improper and that the jury as constituted should continue deliberating. (12RT 1419-1420.) The prosecutor believed the court should question Juror No. 8. (12RT 1421.) The court then had Juror No. 8 brought in for questioning.

THE COURT: Good morning, [Juror No. 8].

JUROR NO. 8: Good morning.

THE COURT: The record will reflect we have Juror No. 8 present.

[Juror No. 8], I would like to go over a couple of things with you. We've talked to the foreperson, [Juror No. 12], and we've received a letter from another juror. The Court is concerned about the deliberation process in this case, hence, I've requested that you be brought forth so we can talk to you.

And I'm not -- I am not and I will not be asking you questions about how people are voting or how you are voting, one way or the other. It doesn't make any difference to me.

What does make a difference to me is if jurors are using pity or sympathy for a defendant in any way in this case.

The jury has been instructed, and you have the instructions, and it's black letter law that a juror must not in any case allow pity or sympathy for a defendant to interfere with the deliberation process or influence his or her vote in the jury process.

That is extremely important, because it just can't be allowed.

Do you feel --, and I would urge you to be as honest as you can, because obviously, this is a serious and important case to everybody concerned -- do you feel that your feelings of sympathy towards the defendant is influencing your deliberation process?

JUROR NO. 8: No, I really don't believe so.

THE COURT: You've mentioned during the jury deliberations that you do feel pity and sympathy for the defendant.

JUROR NO. 8: In general, but I didn't say that had anything to do with my thinking processes.

THE COURT: Because you understand it can not. Because if it does, it's unfair to everybody involved in this case and you're in violation of your oath as a juror and in violation of the law.

JUROR NO. 8: No. I realize that. I do.

THE COURT: As far as your personal experiences are concerned, generally speaking, we do not ask a juror to leave his or her common sense behind. Common experiences and common sense are important tools in evaluating evidence and coming to a conclusion.

But if you focus on a particular personal event in your life and allow that to interfere with your objectivity in this case, that's a violation of your oath, as well.

Do you understand?

JUROR NO. 8: Yes, I understand that. I don't believe I've done that.

THE COURT: Well, I'm directing you not to.

JUROR NO. 8: (Juror nods head.)

THE COURT: And I'm directing you to further deliberate with the jurors. That means to discuss the evidence. Objectively. Okay?

JUROR NO. 8: We have. We've gone over and over it.

THE COURT: All right, [Juror No. 8], we'll ask you to go back to the jury deliberation room, and thank you very much for your time.

(12RT 1421-1423.)

The jury reached its verdicts approximately three hours later. (13CT 3483.)[14]

B. The Trial Court Improperly Intruded On The Jury's Deliberations Through Its Inquiry Of Juror No. 8 And Improperly Coerced Guilty Verdicts With Its Statements And Instructions To Her

The trial court committed multiple errors in conducting the inquiry it made after receiving the letter from Juror No. 2. The deliberative process of the jury is protected by the Sixth Amendment and article I, section 16 of the California Constitution. (*People v. Collins* (1976) 17 Cal.3d 687, 693; *People v. Oliver* (1987) 196 Cal.App.3d 423, 429; *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, 618 [federal constitutional rights].) Jury deliberations constitute a critical stage of a criminal trial. (*United States v. Ruggiero* (2d Cir.1991) 928 F.2d 1289, 1299.) While the court must investigate reports of misconduct to determine whether there is cause to replace a juror, "any intervention must be conducted with care so as to minimize pressure on legitimate minority jurors." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.) The court's actions here were far too intrusive to stay within the constitutional boundaries for intervening in jury deliberations.

1. The Court Should Not Have Questioned Juror No. 8

The court's first step in investigating Juror No. 2's allegations of

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[14] The Clerk's Transcript shows that the proceedings regarding the jury note began at 10:15 a.m., but does not indicate when that hearing was completed. At 12:00 p.m. there was another hearing on a jury note regarding inconsistencies in the instructions on premeditation and deliberation. The jury returned to court with the verdicts at 2:10 p.m. The record does not indicate if the jury interrupted deliberations for lunch. (13CT 3483.)

potential misconduct was to question the jury foreperson. It should also have been the last step. After the foreperson had testified, there was no substantial basis for further intrusions into the jury's deliberations by questioning Juror No. 8.

In the letter, Juror No. 2 complained about Juror No. 8 expressing sympathy for appellant and relying on her personal experience with mental illness; Juror No. 2 also expressed in the letter a general concern that Juror No. 8 was not deliberating objectively. The letter provided no substantial factual support that any misconduct had occurred.

The foreperson's testimony made it clear that Juror No. 8 was deliberating, "engaging in discussion back and forth and . . . offering opinions and asking questions." (12RT 1417.) The foreperson also said that during deliberations Juror No. 8 sympathized with the defendant and had relied on a prior emotional state she had personally experienced. (12RT 1418.) Nothing the foreperson said indicated Juror No. 8 was committing misconduct in any way. The trial court made no finding that any misconduct or impropriety had occurred, and there was no basis for making such a finding. (See e.g., *In re Malone* (1996) 12 Cal.4th 1935, 1963 [jurors' views of the evidence are properly informed by their life experiences].)

When a jury is divided between a strong majority favoring conviction and a small minority which disagrees, "[t]he group of jurors favoring conviction may well come to view the 'hold' or 'holdouts' not only as unreasonable, but as unwilling to follow the court's instructions on the law." (*United States v. Thomas*, *supra*, 116 F.3d at p. 622.) The letter from Juror No. 2 documents an example of this phenomenon. As the deliberations became heated (12RT 1419), it appears that the majority

jurors came to see the dissenting views of the holdout not as legitimate differences of opinion, but as the result of a refusal to apply the law as reflected in the court's instructions. The court should have recognized this after questioning the foreperson and simply told the jurors to continue deliberating.

Where the court's duty and authority to prevent disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, the court "should err in favor of the lesser of two evils – protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity." (*United States v. Thomas*, *supra*, 116 F.3d at p. 623.) This rule is grounded in the constitutional principle that to remove a juror because she is unpersuaded by the prosecution evidence is to deny a defendant his right to a unanimous jury. (*Id.* at p. 621.) The court's decision to pursue further Juror No. 2's unsubstantiated concerns by questioning Juror No. 8 was erroneous.

"The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." (*United States v. Thomas*, *supra*, 116 F.3d 606, 618.) "Secrecy affords jurors the freedom to engage in frank discussions, free from fear of exposure to the parties, to other participants in the trial and to the public." (*People v. Engleman* (2002) 28 Cal.4th 436, 442.) Over 70 years ago Justice Cardozo noted that, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (*Clark v. United States* (1933) 289 U.S. 1, 13.) "For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance

that it will never reach a larger audience." (*People v. Cleveland* (2001) 25 Cal.4th 466, 481-482, quoting *U.S. v. Thomas*, *supra*, 116 F.3d at pp. 618-619.)

Courts must exercise care in responding to an allegation from a deliberating jury that one of their number is refusing to follow the court's instructions or is refusing to deliberate. (*People v. Williams* (2001) 25 Cal.4th 441, 464-465, conc. opn. of Kennard, J.).) "The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 476.) Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. (*Ibid.*)

For notorious cases that capture the public's attention and generate strong feelings in the community, the mere suggestion that the views of a juror may be made public "understandably may cause anxiety and fear in jurors, and distort the process by which a verdict is reached; actually making such information available to the public might invite the retribution that jurors would rightly fear." (*United States v. Thomas*, *supra*, 116 F.3d at p. 619.) This was a high-profile criminal case that generated wide-spread animosity toward the defendant and natural sympathy for the victims and their families. (See 2CT 450-536 [Motion for Change of Venue and supporting documentation].) Multiple requests for still camera coverage of the trial by electronic media were granted. (See 12CT 3317 [entire trial], 3319-3320 [entire trial; request for TV camera and recorder denied], 3325 [entire trial]; 3326 [opening statements].) Numerous law enforcement personnel – friends and colleagues of the slain officers – were regularly seen in the spectator section of the courtroom. (See e.g., 14RT 1624

[approximately 25 officers in court]; 18RT 1791-1792 [victim's widows discussing court attendance].) The need to preserve the privacy of the jurors' deliberations was particularly acute here.

Furthermore, some of the statements attributed to Juror No. 8 are precisely the kind of frank statements that jurors would not want exposed to scrutiny outside the jury room. Juror No. 8 acknowledged she had sympathy for appellant, who was charged with murdering two well-liked police officers. According to Juror No. 2's letter, Juror No. 8 also acknowledged having personal experience in the past with mental illness.[15] These kind of statements are exactly the sort that jurors would be unlikely to share with other jurors during deliberations if they believed the statements would be subject to public or judicial scrutiny. Juror No. 8 learned that the court was aware of sensitive details of the experiences and beliefs which she had revealed during deliberations, and the court subjected her to pointed questioning about those experiences and beliefs. This violation of the privacy of deliberations would have a chilling effect on her willingness to engage in frank discussions during deliberations.

2. The Court's Questions to Juror No. 8 Were Improperly Intrusive

In questioning a juror to determine whether the juror is refusing to follow the trial court's instructions, the trial court should conduct only a very limited inquiry. (*People v. Williams*, *supra*, 25 Cal.4th at p. 464 (conc. opn. of Kennard, J.).) It should tell the juror that it wants to know only

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[15] The letter did not indicate whether Juror No. 8 was referring to her own illness or that of someone with whom she was acquainted. The foreperson's testimony suggests it was Juror No. 8's own illness. (12RT 1418.)

whether the juror is willing to abide by her oath to decide the case according to the evidence and the instructions. (*Ibid.*) If the juror answers the question "yes" the jury should resume deliberations; if "no" the juror should be excused. Only if the juror equivocates may the trial court inquire further. (*Ibid.*)

The trial court here went beyond simply asking Juror No. 8 if she could follow the instructions. It inquired specifically about how the juror's feelings of sympathy toward the defendant was influencing her in deliberations and discussed the use of personal experiences in deliberations. (12RT 1422-1423.) These questions and the discussion surrounding them improperly interfered with the deliberative process.

3. The Court's Remarks and Instructions to Juror No. 8 Were Coercive

When tried by a jury, a defendant is entitled to an uncoerced verdict from the jury. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 241.) The court must exercise its power without coercion of the jury. (*People v. Sandoval* (1992) 4 Cal.4th 155, 195-196; *People v. Carter* (1968) 68 Cal.2d 810, 817.) A court violates a defendant's due process right to an impartial jury and a fair trial when it gives an instruction which has an improperly coercive effect on the jury. (*Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359, 366.) Coercion exists where the court's instructions or remarks, under the totality of the circumstances, "operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency." (*People v. Carter*, *supra*, 68 Cal.2d at p. 817.) Whether the statements of a trial judge amount to coercion of a verdict depends upon the facts of each case. (*People v. Burton* (1961) 55 Cal.2d 328, 356.)

The archetypical coercive instruction is the *Allen*[16] "dynamite" instruction which instructs a deadlocked jury to work toward a unanimous verdict. (See *Jenkins v. United States* (1965) 380 U.S. 445, 446 (per curiam).) But an *Allen* analysis is proper whenever a defendant offers facts that fairly support an inference that jurors who did not agree with the majority felt pressure from the court to give up their conscientiously held beliefs in order to secure a verdict. (*Weaver v. Thompson*, *supra*, 197 F.3d at p. 366.) Whether the instructions and conduct of the trial judge violates a defendant's due process right to an impartial jury and a fair trial depends on whether the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision. (*Locks v. Sumner* (9th Cir. 1983) 703 F.2d 403, 406; *Jimenez v. Myers* (1993) 40 F.3d 976, 979.)

The remarks and instructions given to Juror No. 8 were coercive. The court asked Juror No. 8 whether her deliberations were being influenced by sympathy for the defendant, and the juror said they were not. The court nevertheless then insisted on telling her that if she was influenced by sympathy "it's unfair to everybody involved in this case and you're in violation of your oath as a juror and in violation of the law." (12RT 1422.)

The court next told her that jurors could rely on common sense in evaluating the evidence, [b]ut if you focus on a particular personal event in your life and allow that to interfere with your objectivity in this case, that's a violation of your oath, as well." (12RT 1423.) When the juror denied doing this, the court responded, "Well, I'm directing you not to." (12RT 1423.)

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[16] *Allen v. United States* (1896) 164 U.S. 492, 501.

Finally, without having any substantial basis for believing Juror No. 8 was not deliberating, the court told her, "And I'm directing you to further deliberate with the jurors. That means to discuss the evidence. Objectively. Okay?" (12RT 1423.)

Any reasonable juror in Juror No. 8's position would have felt the judge was coercing her to set aside her personal beliefs and conform her views to those of the majority jurors. (See *United States v. Sae-Chua* (1984) 725 F.2d 530, 532 [holdout juror would understand *Allen* charge was directed at her].) No other juror was singled out for individualized instructions and directives on the very topics that were the source of contention in the jury room. Even assuming the court was stating the law correctly, its remarks were coercive. (See e.g., *People v. Crossland* (1960) 182 Cal.App.2d 117, 119 [coercion found when the court's request that the jury deliberate further was deemed to be an opinion that the jury should reach a verdict]; see also *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.) Furthermore, the failure of the court to counterbalance the implications of its questions and comments by instructing Juror No. 8 not to surrender her sincere beliefs also indicates the court's remarks were coercive. (See *Jimenez v. Myers, supra*, 40 F.3d at p. 981.) Juror No. 8 would necessarily have understood the judge's directives and instructions were intended to urge her to reconsider her vote.

The length of deliberations before and after the court's inquiry is also relevant to determining whether there verdicts were coerced. (*Weaver v. Thompson*, *supra*, 197 F.3d at p. 366 [re *Allen* charge].) Here, the deliberations appeared to be at a stalemate after a day and a half. In a matter of a few hours after the court's remarks and instructions to the holdout juror, the jury reached a verdict. The totality of the circumstances

show that the verdicts were coerced by the court's remarks and instructions to Juror No. 8.

4. The Trial Court Made Additional Errors Which Interfered with the Deliberative Process and Coerced the Jurors

The secrecy of deliberations was additionally eroded by the trial court injecting its opinion into the jury room and failing to keep private its inquiry into potential misconduct. After the court completed its inquiry, it told the foreperson, "I'll discuss with the attorneys *if we have any recourse*." (RT1419, emphasis added.)

This unnecessary remark by the court gave the impression that it believed there was a problem with Juror No. 8 but that there might not be anything the court could do to solve that problem. Additionally, the court did nothing to deter the foreperson from discussing everything in the court's inquiry with the rest of the jury when deliberations resumed. Whatever purpose was served by questioning the foreperson apart from the rest of the jury was completely undone by this oversight. Indeed, if the court did not intend the inquiry to be confidential, it might have been better to conduct the inquiry in front of the other jurors rather than leaving it to the foreperson to interpret for the others what had taken place. This failure to ameliorate the impact of the court's intrusion into the deliberations could only serve to further poison those deliberations and bias the rest of the jury against Juror No. 8.

C. The Judgement Must Be Reversed

The trial court made a series of errors which, considered individually or together, require appellant's convictions to be reversed. The court erroneously invaded the secrecy of the jury's deliberations and exposed the sensitive thought processes of a holdout juror to public and judicial

scrutiny. This distortion of the deliberative process implicated appellant's rights to due process, a fair trial, and a unanimous jury verdict, and cannot be deemed harmless under either the beyond a reasonable doubt test of *Chapman v. California* (1967) 386 U.S. 18, or the reasonable probability test of *People v. Watson* (1956) 46 Cal.2d 818.

The court's coercion of the holdout juror through its remarks and instructions is per se reversible and not amenable to harmless error analysis. (See *People v. Gainer* (1977) 19 Cal.3d 835, 855 [coercion of juror a miscarriage of justice under Cal. Const., art. I, § 13]; *Smalls v. Bautista* (S.D.N.Y. 1998) 6 F.Supp.2d 211, 222-223 [harmless error analysis inapplicable to coercive *Allen* charge].) Therefore, the convictions and judgment of death must be reversed.

4

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT CONSISTENT WITH CALJIC NO. 2.03

Over appellant's objection, the court granted the prosecutor's request that the jury be instructed in the language of CALJIC No. 2.03 regarding the use of false statements by a defendant to show his consciousness of guilt. The statements which the prosecutor wanted the jury to believe showed appellant's consciousness of guilt were appellant's denials that he had said to Beverly Brown before the shootings that he was going to kill the police officers who responded to Elaine's report of domestic violence. As shown below, the instruction should not have been given, and the error deprived appellant of his rights to due process, trial by jury, and a fair trial. (U.S. Const., Amends. 6 & 14; Cal. Const., art., I, §§ 7, 15, & 16.)

A. Factual Background

Beverly Brown testified that after appellant had taken his gun outside and fired it into the air, he told her that the police were coming "and he was going to kill them." (6RT 668:13; see also 668:24.) On cross-examination, Brown was impeached with her testimony before the grand jury in which she had said that appellant's statement was, "Just that they were coming. That the police were coming and that he was going down." (6RT 716-717; see also 1CT 130-131 [grand jury testimony].)[17]

Soon after appellant was arrested, he made his first lengthy statements to the police. During the interrogation, Detective Spidle asked

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[17] Under repeated questioning by the prosecutor before the grand jury regarding whether appellant said he would shoot the police, Brown stated that was "the gist" of what appellant said. (1CT 131.)

appellant about his statement to Brown:

> ES [Spidle]: Now did you tell, be honest with me now, did you tell Beverly that you were gonna shoot the cops?
>
> TR: I never told Beverly that.
>
> ES: Okay. Did you say anything about if the cops come I'm gonna shoot 'em?
>
> TR: No.

The police returned for a further interview the next day and again asked about what was said after appellant knew the police were coming:

> ES: And, uh, you said something like you know, "I don't give a shit, I'll take them out too." And I, I want you to think about that because uh, we have that information from her and if you could have said that in your anger I want you to think if that's possible.
>
> TR: That is possible, yes.
>
> ES: That is possible that you said that?
>
> TR: This is possible, yes sir.
>
> ES: Okay, that you said words to the effect of "I don't care if the cops are comin', I'll take them out too."
>
> TR: Yes, at that time I, I told her that, you know, I'd kill her and Elaine.
>
> . . . . .
>
> ES: Uh huh. Do you remember, uh, saying the statement of "The cops are comin', I don't care, I'll take them out too?"
>
> TR: I don't remember saying that but it's very possible that I did, yes.

(4 Supp. CT 111.)

The prosecutor argued to the jury that because appellant first denied that he made a statement to Brown about killing the officers that they could determine appellant was lying, and infer from that lie a consciousness of his

guilt for intentionally murdering the officers. He argued as follows:

> Ladies and Gentlemen, the Court is going to mention to you a few things.
>
> If you find that Mr. Russell, for example, when he was talking to Mr. Spidle, if you conclude that he was lying, he did, in fact, threaten the police officers – and, Ladies and Gentlemen, again when you look at how Mr. Russell got to the point at the end of Sagebrush, with this scenario that he was going to try to run away, isn't it interesting after he shot Mike Lehmann and Jim Haugen he didn't do it? Remember he said he was going to run towards the freeway and go under the freeway and go somewhere? He hightailed it and ran in the opposite direction. Why? Because he did – Beverly Brown, *he did what he told her he was going to do.* He was going to kill the cops.
>
> The judge is going to tell you that if you find that Mr. Russell lied to Mr. Spidle you can use that what is called a consciousness of guilt. He has something to hide.

(11RT 1310; emphasis added)

The court subsequently instructed the jury in the language of CALJIC No. 2.03 as follows:

> "If you find that before this trial the defendant made a willfully falls [sic] or deliberately misleading statement concerning the crime for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide."

(11RT 1373.)

Giving this instruction was erroneous and the harm to appellant from the error was made worse by the prosecutor's argument.

B. The Instruction Permitted The Jury To Infer Appellant's Consciousness Of Guilt From Evidence Which Was Not Properly Susceptible To Such An Inference

For CALJIC No. 2.03 to be given, there must be some evidence in the record which, if believed by the jury, will sufficiently support an inference of consciousness of guilt. (*People v. Wilson* (2005) 36 Cal.4th 309, 330; see *People v. Coffman* (2004) 34 Cal.4th 1, 102 [re other consciousness of guilt instructions].) The instruction is justified when there exists evidence that the defendant prefabricated a story to explain his conduct. (*People v. Williams* (1995) 33 Cal.App.4th 467, 478; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103.) On the other hand, CALJIC No. 2.03 should not be given unless it can be inferred that the defendant fabricated a story for the purpose of explaining his conduct or deflecting suspicion from himself, as only then does a false statement indicate a consciousness of the defendant's guilt, thus becoming admissible against him. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 436; *People v. Louis* (1984) 159 Cal.App.3d 156, 160.)

The evidence was insufficient to support an inference of consciousness of guilt, and the instruction should not have been given. First, in the statements in question, appellant was not explaining his conduct. The sum total of what appellant said which the prosecutor relied on to show appellant's consciousness of guilt was, "I never told Beverly that" and "No" in response to questions about whether he told Brown he was going to shoot the police when they came to his house. These responses cannot reasonably be considered a prefabricated story to explain his conduct – they were not a story in any meaningful sense of the word, they were not offered as an explanation of anything, and they related to

statements made significantly before the shootings occurred. Where the nature of the prior statement is such that, even if false, it would not reasonably show defendant's consciousness of guilt, the statement cannot be used for that purpose. (See *People v. Albertson* (1944) 23 Cal.2d 550, 581-582, conc. opn. of Traynor, J.)

Second, the evidence is insufficient to show appellant was being wilfully false in any meaningful way. When the police re-interviewed appellant the next day and asked again about Brown's statement, appellant readily acknowledged he might have made such a statement to Brown, but had no recollection of doing so. (4 Supp. CT 111.) This exchange came in the course of appellant's lengthy, voluntary statement to the police in which he repeatedly acknowledged his responsibility for shooting the officers. In *People v. Mattson* (1990) 50 Cal.3d 826, 872, defendant initially denied committing certain offenses but later gave a full confession to those crimes. This Court noted that in such a situation that the inference of consciousness of guilt from the initial denial was "tenuous." (*Ibid.*) The inference was even weaker here. Appellant admitted his culpability for the shootings and equivocated as to whether he had made the statements attributed to him by Brown. Furthermore, the accuracy of Brown's statement itself was in question given that her original testimony at the grand jury was that appellant had not said anything about killing police. The consciousness of guilt instruction should not have been given under these circumstances.

C. The Consciousness 0f Guilt Instruction Embodied Improper Permissive Inferences

Besides there being insufficient evidence to justify CALJIC No. 2.03, the instruction embodied an improper permissive inference which violated appellant's constitutional rights. A permissive inference permits

the jury to infer one fact from other facts. In this case the instruction permitted the jury to infer appellant's consciousness of guilt from appellant's purportedly false statements. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 977.)

For a permissive inference instruction to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67 .) The Due Process Clause of the Fourteenth Amendment demands that inferences "be based on a rational connection between the fact proved and the fact to be inferred. [Citations.]" (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a connection that is logical or reasonable; it is rather a connection that is more likely than not. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28.) This test is applied to judge the inference as it operates under the facts of each specific case. (*Id.* at pp. 157, 162-163.)

Any consciousness of guilt by appellant which the prosecutor established here did not permit an inference that appellant intended to kill the police officers. Although the consciousness of guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is irrelevant to his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) "[E]vidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime." (*Id.* at p. 33.) "Conduct by the defendant after the killing in an effort to avoid detection and

punishment is obviously not relevant for purposes of showing premeditation and deliberation, as it only goes to show the defendant's state of mind at the time and not before or during the killing." (LaFave, Substantive Criminal Law (2d ed. 2003), §14.7, pp. 481-482.) Even if there were *some* rational connection here between appellant's statements and a consciousness of guilt, it is not a connection that is more likely than not. (See *Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 166, fn. 28 .) Therefore, it was error for the court to instruct in a manner which allowed the jury to use the consciousness of guilt evidence to infer that appellant harbored the mental states of premeditation, deliberation, and intent to kill at the time he shot in the direction of the officers.

This Court, however, has previously rejected claims that consciousness of guilt instructions permit irrational inferences concerning the defendant's mental state. (E.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579.) These cases in turn rely on *People v. Crandell* (1988) 46 Cal.3d 833, which concluded that reasonable jurors would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged." (*Id.* at p. 871.)

In light of the prosecutor's argument, there is simply no way that the jury here would have understood CALJIC No. 2.03 in this case to be referring only to some "consciousness of wrongdoing." Appellant's purportedly false statements were part of the lengthy interview with Detective Spidle in which appellant expressly and repeatedly acknowledged wrongdoing – he admitted he fired the shots that killed the officers. The prosecutor had no reason to try to indirectly prove appellant had committed a crime by showing consciousness of guilt when appellant had expressly

and candidly acknowledged wrongdoing. Instead, the prosecutor wanted to establish appellant's consciousness of guilt to prove that appellant intentionally killed the officers, which was the central issue in this case. And that is how he presented it to the jury in his argument. (See § A, *ante*; 11RT 1310.) Thus, even if CALJIC No. 2.03 in the abstract does not embody an improper permissive inference, it did under the facts and argument in this case.

The consciousness of guilt instructions permitted the jury to draw improper inferences of guilt against appellant which undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15.) It also violated appellant's right to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, it violated his right to a fair and reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17).

D. The Instruction Given Was Impermissibly Argumentative

In addition to its other defects as described above, CALJIC No. 2.03 was argumentative. The trial court must refuse to give instructions which are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) Such instructions present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.)

Argumentative instructions are defined as those which "'invite the

jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and therefore must be refused. (*Ibid.*)

Under this standard, CALJIC No. 2.03 is an improperly argumentative instruction. An instruction which tells the jury, "If you find" certain facts, then "you may" consider that evidence for a specific purpose is argumentative. (See *People v. Mincey*, *supra*, 2 Cal.4th at p. 437.) Furthermore, the instruction is argumentative in a way which benefits the prosecution. (See *People v. Seaton* (2001) 26 Cal.4th, 598, 673 [failure to give this instruction was harmless because the instruction "would have benefitted the prosecution, not the defense"].) Appellant recognizes that this Court has repeatedly rejected arguments that CALJIC No. 2.03 is argumentative (see e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Benavides* (2005) 35 Cal.4th 69, 100) but raises the issue to preserve the federal constitutional component of the argument (see *People v. Schmeck* (2005) 37 Cal.4th 240, 303), as well as to permit this Court to reconsider its previous decisions.

The instruction violates due process by lowering the prosecution's burden of proof. (See *In re Winship* (1970) 397 U.S. 358, 364.) While the instruction says that consciousness of guilt evidence is not sufficient by itself to prove guilt, it does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. It thus permits the jury to seize on one isolated piece of evidence, and use that in

combination with the consciousness of guilt evidence to conclude that the defendant is guilty. This is an unconstitutional lessening of the burden of proof.

The argumentative consciousness of guilt instruction invaded the province of the jury by focusing the jury's attention on evidence favorable to the prosecution. The instruction also served to place the trial court's imprimatur on the prosecution's theory of the case and lessened the prosecution's burden of proof. It therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., Amends 8 & 14.; Cal. Const., art. I, § 17.)

This Court's previous determinations that this state's consciousness of guilt instructions are not impermissibly argumentative should therefore be reconsidered, at least in light of the specific circumstances of this case.

E. The Error Requires Reversal

Because the erroneous delivery of the consciousness of guilt instructions violated several provisions of the federal Constitution, the judgment must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The central issue at the guilt phase of the trial was whether appellant intentionally shot the officers. The instructional error allowed the prosecutor to improperly strengthen his case that the shooting was intentional rather than accidental. The case was close and kept the jury

in heated discussions for several days before rendering a verdict. The error cannot be found harmless and the convictions and sentence of death must be reversed.

5

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THEY COULD CONVICT APPELLANT OF MURDER WITHOUT AGREEING WHETHER HE HAD COMMITTED PREMEDITATED MURDER OR LYING-IN-WAIT MURDER

Appellant was charged in Counts 1 and 2 of the indictment with the wilful murders of James Lehmann and Michael Haugen with malice aforethought in violation of section 187, subdivision (a). (CT 2-4.) The prosecution proceeded at trial on both murder under section 187, and lying-in-wait murder under section 189, and the jury was instructed on both malice-murder and lying-in-wait murder. (11RT 1382-1383.) The prosecutor argued both malice-murder and lying-in-wait murder to the jurors as to each killing, and specifically informed them that they did not have to unanimously agree on the form of murder in order to return guilty verdicts. Consistent with the prosecutor's argument, nothing in the court's instructions required the jurors to unanimously agree on whether each homicide was premeditated and deliberate or committed by means of lying-in-wait. The failure to require jury unanimity as to which statutory form of murder was committed as to each count was error and denied appellant his rights to have the state establish proof of the crimes beyond a reasonable doubt, to due process and to a reliable determination on allegations that he committed a capital offense. (U.S. Const., Amends. 5, 6, 8 & 14; Cal. Const., art. I, §§ 1, 15, 16, 17.)

This Court has previously heard and rejected various similar arguments pertaining to the relationship between malice-murder and felony-murder. (See e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. McPeters* (1992) 2

Cal.4th 1148, 1185.) Appellant acknowledges that the reasoning behind the present claim is similar to the reasoning rejected in these cases, but submits that the issue deserves consideration in light of the charges and facts of this case.

A. Lying-In-Wait Murder Does Not Have The Same Elements As Premeditated And Deliberate Murder

Due process requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship* (1970) 397 U.S. 358, 364.) Although states have great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

In *Schad v. Arizona* (1991) 501 U.S. 624, the United States Supreme Court addressed the due process implications of convicting a defendant of both premeditated murder and felony-murder. The defendant in *Schad* challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony-murder or premeditated and deliberate murder. The Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due process the Court gave deference to Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent

elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (*Id.* at p. 636, emphasis added.) Thus, while Arizona has authoritatively determined not to treat premeditation and the commission of a felony as independent elements of the crime, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* suggests that due process is violated if there is not unanimity as to all the elements.

California has followed a different course than Arizona. The various forms of first degree murder are set out in section 189. These include not only felony-murder but lying-in-wait murder as well as murder by other means.[18] While this Court has stated that there is only one crime of murder in California (see e.g., *People v. Davis* (1995) 10 Cal.4th 463, 515; but see *People v. Dillon* (1983) 34 Cal.3d 441, 476, fn. 23 [separate statutory sources for malice-murder and felony-murder]), and that various forms of murder may be described as two theories of that one crime (see *People v. Pride*, *supra*, 3 Cal.4th at p. 249 [re malice-murder and felony-murder]), the

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[18] Section 189 at the time of the offenses read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

various forms and/or theories of murder have different elements. When the state seeks to convict a defendant of a particular form of murder, it cannot remove one of those elements without violating due process under *Winship* and *Schad*.

There can be little doubt that lying-in-wait murder under section 189 has different elements than premeditated and deliberate murder. For lying-in-wait murder, "the prosecution must prove the *elements* of concealment of purpose together with 'a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v Stanley* (1995) 10 Cal.4th 764, 795, emphasis added, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.) The elements of lying in wait are distinct from the elements of premeditated malice murder. (*Ibid.*) For first degree malice murder the prosecution must prove premeditation *and* deliberation, whereas "the Legislature in adopting the lying-in-wait provision only required that the defendant be shown to have exhibited a state of mind which is 'equivalent to,' and not identical to, premeditation *or* deliberation." (*People v. Ruiz* (1988) 44 Cal.3d 589, 615, emphasis added.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 and 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones*

(1980) 445 U.S. 480, 488).

The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States*, *supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving *means* rather than *elements*:

> The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S. 624, 631-632, ... Where, for example, an element of robbery is force or the threat of force, some jurors may conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement -- a disagreement about means -- would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force.

(*Richardson v. United States*, *supra*, 526 U.S. at p. 817.)

By contrast, and as shown above, this case involves two forms of murder which California has determined are not merely separate theories of murder, but contain separate elements. Evidence of premeditation and deliberation, and evidence of concealment of purpose and watchful waiting are not simply means, or "brute facts," that may be used to establish a common element of a single crime. Rather, such evidence goes to establish separate elements of two forms of murder. The jury should not have been permitted to convict appellant of first-degree murder without being unanimous as to whether each of the two homicides was premeditated and deliberate murder or lying-in-wait murder.

B. The Error Was Prejudicial

Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, it is impossible to conduct harmless error analysis. The failure to properly instruct the jury was structural error, and reversal of the entire judgment is therefore required. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Furthermore, this was not simply an abstract error. There was not compelling evidence supporting one of the two forms of murder over the other, and reasonable jurors could have credited evidence supporting one form while rejecting evidence supporting the other. There is nothing to suggest that the jury unanimously agreed the crimes were either premeditated murder or lying-in-wait murder.

Moreover, it is clear from the jury's note during deliberations that the jury was actively engaged in assessing whether appellant had committed murder while lying-in-wait, and was focused on an area that distinguished premeditated and deliberate murder from lying-in-wait murder. (See Argument 1.F.) Specifically, it appears that the jury was trying to decide if appellant had deliberated prior to shooting at the officers. The court gave two instructions on lying-in-wait murder – CALJIC No. 8.25, and a special instruction further describing the elements of lying-in-wait murder. (13CT 3424, 3425.) CALJIC No. 8.25 in part told the jury that the "lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation *or* deliberation." (13CT 3424; CALJIC No. 8.25, emphasis added.) The court's special instruction told the jury that "[i]n order to establish First Degree Murder based upon lying in wait, the perpetrator must exhibit a state of mind equivalent to, but not identical to, premeditation *and*

deliberation." (13CT 3425, emphasis added.) The jurors were sufficiently focused on this aspect of lying-in-wait murder that they noticed the conflict in the two instructions and sent a note requesting that the court clarify whether the conjunctive or disjunctive form was correct. (13CT 3585.) The jury informed the court it had reached a verdict approximately two hours after receiving the court's clarification. (13CT 3483.)

The prosecution presented evidence in support of two different forms of murder, and argued each form to the jury. The court should have required the jurors to unanimously agree, if they could, on one form or the other in order to convict appellant. Because the court failed to do so, the convictions must be reversed.

6

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION AT THE PENALTY RETRIAL TO ADMIT HIS RECORDED STATEMENTS TO THE POLICE WHICH WERE INTRODUCED BY THE PROSECUTOR AT THE GUILT PHASE

At the penalty retrial appellant moved for an order allowing him to introduce the three videotaped statements appellant made to the police following his surrender and arrest. These statements, in which appellant confessed to being responsible for killing the two officers, were introduced into evidence and played for the jury as part of the prosecutor's case-in-chief at the guilt phase. On these tapes, which together are approximately 2 ½ hours long, appellant gave detailed descriptions of the events surrounding the shootings as well as information about his own background and his emotional state. The Statement of Facts contains an extensive summary of these statements as they pertain to the shootings and the circumstances surrounding them. (See pp. 12-21, ante.)

Appellant sought to introduce these statements as evidence of the circumstances of the crime and of appellant's character and background under section 190.3, factors (a) and (k), respectively. (14CT 3637-3641; 21RT 1854-1855, 1860-1861.) He argued that to the extent the statements on the tapes were otherwise inadmissible hearsay, they nevertheless should be admissible under *Green v. Georgia* (1979) 442 U.S. 95 (*Green*). He also argued that the statements contained character evidence admissible as non-hearsay or as exceptions to the hearsay rule. (14CT 3638-3641; 21RT 1854-1855, 1860-1861.) The prosecutor argued that the tapes were inadmissible because they contained hearsay and were too unreliable to be admissible under *Green*. (CT 3956-3958; 21RT 1856-1858.)

Addressing the admissibility of the taped statements under *Green*, the court first found that the evidence in appellant's statements was relevant to the penalty phase decision. (21RT 1862.) It found that appellant's version of the events would be relevant to the issue of lingering doubt, and that his mental state would be relevant to the issue of remorse. (21RT 1862.) The court ruled, however, that the statements were self-serving and therefore unreliable. (21RT 1863-1865.) Accordingly, the court concluded that the taped statements were inadmissible. This ruling was incorrect and deprived appellant of his federal constitutional rights to due process and a fair and reliable penalty determination (U.S. Const., Amends. 8 & 14) as well as his rights under state statutory and constitutional law (§ 190.3; Cal. Const. art. I, §§ 15, 16, 17).

A. The Court's Ruling Deprived Appellant Of His Right To Present Mitigating Evidence

Under the Eighth and Fourteenth Amendments, a defendant in a capital case must be permitted to present all relevant mitigating evidence to demonstrate that he deserves a sentence of life rather than death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-114.) "The 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.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015, quoting *Jurek v. Texas* (1976) 428 U.S. 262, 271.) *Lockett* specifically held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (438 U.S. at p.

604, italics in original.)

California law permits the defense to present evidence at the penalty phase relevant to aggravation and mitigation, including evidence of defendant's character, background, history, and mental condition. (§ 190.3.) Even pre-*Furman*,[19] California permitted a broad inquiry into the defendant's background and character. (See *People v. Nye* (1969) 71 Cal.2d 356, 371-372.) The penalty jury looked "at the individual as a whole being" to determine the appropriate sentence. (*People v. Morse* (1964) 60 Cal.2d 631, 647.)

The standard for what is relevant mitigating evidence is low. "Relevant 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." (*Tennard v. Dretke* (2004) 542 U.S. 274, 284; *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 345.) Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to the defendant's mitigating evidence. (*Boyde v. California* (1990) 494 U.S. 370, 377-378.) Thus the state cannot bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death. (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440-441.)

Under this legal framework, the evidence in appellant's taped statements was clearly relevant mitigation evidence on several grounds, as argued by appellant in his motion to admit the tapes. The tapes contained evidence of both the circumstances of the offense and appellant's character within the meaning of section 190.3, factors (a) and (k), including

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[19] *Furman v. Georgia* (1972) 408 U.S. 238

appellant's state of mind before, during and after the shooting, the fact that appellant surrendered without incident, led the police to where he had hidden the gun, made an early acknowledgment of culpability in a lengthy confession, and expressed remorse for what happened. As shown below, the court should have granted appellant's motion to admit this evidence.

1. The Statements Were Admissible Regardless of Any Hearsay They Contained

There is no question that appellant's taped statements contained hearsay. The hearsay statements were admissible as party admissions under Evidence Code section 1220[20] when offered by the prosecutor at the guilt phase. They were admitted without objection and without any limitation. At the penalty retrial the prosecutor chose not to use the tapes, and opposed appellant's use of them. Appellant wanted to have the penalty jury consider appellant's taped statements just as the first jury had, but could not introduce them under Evidence Code section 1220 because that section only applies when the hearsay statements are offered against a declarant who is a party to the action. (§ 1220.) Ordinarily, a penalty jury may consider all the evidence relevant to aggravation or mitigation, whether admitted at am earlier phase for another purpose or at the penalty phase. (§190.4, subd. (d); *People v. Carpenter* (1999) 21 Cal.4th 1016, 1060; *People v. Medina* (1995) 11 Cal.4th 694, 778-779.) The ability of the prosecutor to use the state hearsay rules to prevent the penalty retrial jury from hearing relevant evidence that he had put before the guilt phase jury deprived appellant of due process and a reliable penalty determination.

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[20] Evidence Code section 1220 states that: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party. . . ."

In *Chambers v. Mississippi* (1973) 410 U.S. 284, 302, the state's hearsay rules prevented the defendant from introducing evidence from three witnesses who would have testified that another person had independently confessed to them. The Supreme Court reversed the conviction on due process grounds, concluding that Chambers' defense was less persuasive then it might have been had the other confession been admitted. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Id.* at p. 302.)

In *Green, supra*, 442 U.S. 95, the Supreme Court applied the same principle to a capital penalty phase proceeding. There, defendant Green and his co-defendant Moore were tried separately for rape and murder. At his penalty proceeding, Green sought to show he was not present when the victim was killed and had not participated in her death. He tried to introduce Moore's confession to a third party who had testified for the prosecution in Moore's trial. According to the third party, Moore told him that he had committed the murder when defendant was not present. The trial court refused to allow this testimony in Green's penalty trial because it was hearsay. The Supreme Court held that regardless of Georgia's hearsay rule, the exclusion of this evidence violated Green's right to due process. The Court found that the excluded evidence was highly relevant to the penalty determination and that "substantial reasons existed to assume its reliability." Besides the circumstances under which the statement was made which indicated its reliability, the Court noted that "*Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.*" (*Id.* at p. 97, emphasis added.)

This Court has recognized that under *Green* the "[e]xclusion of hearsay testimony at a penalty phase may violate a defendant's due process rights if the excluded testimony is highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable." (*People v. Phillips* (2000) 22 Cal.4th 226, 238.) In this case, the trial court violated appellant's due process rights by refusing to admit appellant's taped confessions made to the police following his arrest. The evidence on the tape was reliable and relevant to a critical issue at the penalty phase.

As noted above, the trial court recognized the taped statements were relevant. It denied appellant's motion because it deemed the statements unreliable. In making that determination, however, the court completely overlooked the most important indicator of reliability under *Green* – the fact that the prosecutor considered the very same statements sufficiently reliable to use in the guilt phase to convict appellant. (*Green*, *supra*, 442 U.S. at p. 97.) The prosecutor played appellant's videotaped statements (Peo. Exh. Nos. 30 and 31) for the jury over the course of two court days (see 12CT 3329, 3332) as a major part of the state's guilt phase case-in-chief.

Green involved the statement of a co-defendant tried separately, but its rationale can be applicable to a defendant's own statements. Any claim that appellant's statements were unreliable when they had already been admitted at the guilt phase of his own trial makes little sense. The statements did not become less reliable evidence between September 18 – the day the first penalty phase mistried – and November 3 – the day appellant's motion to admit them at retrial was heard. Rather, they simply became less admissible under state law because the prosecutor made a

strategic choice not to introduce them as party admissions under Evidence Code section 1220. This is precisely the kind of mechanistic application of a state hearsay rule that violates due process under the principles of *Green* and *Chambers v. Mississippi*, *supra*, 410 U.S. 284.

The trial court's determination that the statements were unreliable was based largely on its conclusion that they were self-serving. The court pointed specifically to appellant's version of the shooting as tending to minimize his culpability. (21RT 1864.) Yet at the guilt phase, the prosecution relied on these very facts in support of his lying-in-wait theory of murder. As discussed in Argument 1, the prosecutor explained to the jury that even if they believed everything appellant said, he was still guilty of two first-degree lying-in-wait murders. (11RT 1303-1307.) In fact, there is a very real likelihood, particularly in light of the notes the jury sent to the court indicating their focus on the lying-in-wait theory argued by the prosecutor, that one or more jurors based their guilty verdict on that theory. (See Argument 1, pp. 55-58.) Accordingly, by excluding evidence of the taped statements, the court was excluding the very evidence upon which appellant's convictions likely were based.

Furthermore, without the appellant's taped statements before the jury, the prosecutor was able to characterize the shootings as premeditated and deliberate murder in his argument to the jury without the evidence from the guilt phase which cast doubt on the premeditated and deliberate theory. Thus, in describing the shooting in his argument to the penalty retrial jury, the prosecutor argued that appellant "runs off. Hides in the bushes and commits premeditated murder." (RT3151.) ". . . [D]efendant picked the most opportune location to wait down here. . . , wait[ed] until James Lehmann and Michael Haugen walked across that intersection . . . and

killed them." (RT 3142.)

This Court has previously rejected claims of error based on *Green* where the trial court has refused to admit recorded statements of the defendant. In *People v. Stanley*, *supra*, 10 Cal.4th 764 a defense-created videotaped statement by defendant under the influence of sodium amytal was introduced for the limited purpose of showing the information on which a defense psychiatrist based his opinions. This Court held that there was no error under *Green* at the penalty phase in refusing to modify the limiting instruction to allow the jury to consider the statements for whatever mitigating value they had. (*Id.* at pp. 838-840.) In *People v. Weaver* (2001) 26 Cal.4th 876, this Court found no error under *Green* where the trial court refused to allow the jury to consider for their truth videotaped statements defendant made while undergoing a diagnostic test for post-traumatic stress disorder. The tape was made by the defense to support defendant's claim of insanity. (*Id.* at pp. 980-981.) In both *Stanley* and *Weaver* the defense sought to use the statements for purposes beyond the limited purposes for which they were admitted. In the present case, defense counsel told the court, "we're not asking to do anything other than what the district attorney's office did in the first trial, which was present this evidence for the fact finders and use that evidence in deciding the case." (21RT 1855.)

In *People v. Jurado* (2006) 38 Cal.4th 72, the Court found no error in the trial court's refusal to admit under *Green* defendant's taped statement to the police, finding that the statement was self-serving and therefore unreliable. But the prosecutor in *Jurado* chose not to introduce the defendant's statement into evidence at either phase of the trial; it was only the defense which sought to introduce the tape. (*Id.* at pp. 704-705.) In appellant's case, the prosecutor had already used the taped statement to

obtain a verdict in the guilt phase. Appellant's argument is not that all defendants' statements resulting from police interrogations can be admitted through *Green*. But when the prosecution obtains a conviction using evidence of a confession or admission made during a police interrogation, it should not be able to use the state rules of evidence to claim the same evidence is unreliable in order to keep the defendant from using the evidence at the penalty trial.

Finally, there is an independent state law basis for admitting the tapes. Exceptions to the hearsay rules are not limited to those enumerated in the Evidence Code. (*In re Malinda S.* (1990) 51 Cal.3d 368, 376.) The California appellate courts have the authority to recognize nonstatutory exceptions to the hearsay rule, although this Court has urged that courts use caution in doing so. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 27; *People v. Ayala* (2000) 23 Cal.4th 225, 268.)

In *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 27, the Court left open the question of whether an exception for "critical reliable evidence" in capital cases should be recognized. Although this is an appropriate case for consideration of such an exception, the court can create an even narrower exception which is applicable here: Where, at the guilt phase of a capital case which results in conviction, the prosecutor has introduced without limitation appellant's statement or statements made in response to police questioning under Evidence Code 1220, any such statement or statements may be introduced by the defense at any subsequent penalty trial on the same charges regardless of whether the statement or statements fall under an exception to the hearsay rule. The basis for exceptions to the hearsay rule is the reliability of the out-of-court statement. (See *In re Cindy L.* (1997) 17 Cal.4th 15, 28 [exception to the hearsay rule is not valid unless

the class of hearsay evidence proposed for admission is reliable].) The prosecutor's use of these highly inculpatory taped statements at the guilt phase of appellant's trial is a sufficient indicator of their reliability to except them from the general rule against the admission of hearsay (Evid. Code § 1200, subd. (b)). (See *Green v. Georgia*, *supra*, 442 U.S. at p. 97.)

2. The Taped Statements Were Admissible for Non-Hearsay Purposes

Appellant also sought to introduce his taped statements to show mitigating character evidence under section 190.3, factor (k). He argued that this evidence gave "a very clear picture of Mr. Russell on the same day that he actually did the shooting." (21RT 1855.) He pointed out that the tapes provided evidence of appellant's voluntary surrender, his early acknowledgment that he was the shooter, his cooperation with the police including showing them where he had hidden his gun, and his remorse about what he had done. (CT 3638.)

Much of this kind of character evidence is manifested by appellant's conduct on the tapes and is not hearsay. Nonverbal conduct is a statement for purposes of exclusion under the hearsay rule only if the actor intended his conduct as a form of communication. Responses and reactions which are not intended as a substitute for verbal expression do not fall within the proscriptions of the hearsay rule. (*People v. Snow* (1987) 44 Cal.3d 216, 227-228.) In *People v. Jurado* (2006) 38 Cal.4th 72, 129, this Court held that defendant's emotional displays while being interrogated by the police were non-assertive conduct and therefore not hearsay. In appellant's case, the remorse and sorrow shown by appellant while being interrogated was also non-assertive conduct and therefore admissible to show his positive character under section 190.3, factor (k).

There is no question that remorse is a mitigating factor (*People v. Ashmus* (1991) 54 Cal.3d 932, 992; *People v. Dyer* (1988) 45 Cal.3d 26, 82) and that the jury must be permitted to consider any evidence that may reflect remorse (*People v. Williams* (1988) 44 Cal.3d 883, 971-972). The trial court acknowledged that appellant could introduce evidence of remorse but nevertheless refused to admit the taped statements. (21RT 1865.) The court indicated it would permit the testimony of Detective Spidle who observed appellant's reaction after he told appellant that the two officers were dead. (21RT 1865.) The defense did in fact call Spidle to testify about appellant's reaction, which occurred during a conversation that took place before the recorded statements. Spidle acknowedged that appellant became "visibly emotional" when Spidle told him the officers were dead. (29RT 2971.) The defense also sought to elicit from Spidle information consistent with Spidle's contemporaneous report that appellant appeared remorseful in the initial videotaped interview. Spidle attempted to distance himself from his report. He testified instead that, after having consulted a dictionary as to the definition of "remorse" he believed that it would be more accurate to say that appellant manifested "regret." (29RT 2984.)

Appellant was entitled to have the jury see his sorrowful and remorseful demeanor during his taped interrogation made shortly after the shooting. The tapes provided sympathetic non-hearsay evidence of appellant's humanity. He should not have been limited to the tepid interpretation of his emotions provided by the prosecutor's investigating officer when the entire interrogation was available on videotape. The court erred in excluding the taped statements.

B. The Error Was Prejudicial

The absence of the taped statements was the most significant

difference between the first penalty phase trial and the retrial. Their exclusion deprived the jury of the opportunity to see appellant as he was shortly after the shootings, to hear his contemporaneous confession and his remarks about the circumstances which led up to the shooting, and to see his deep emotional response to what he had done. It appears likely that the reason the prosecutor did not want the jury to see these tapes was that he feared the sympathetic impression they would have had on the jury. Because the error is of federal constitutional magnitude, the state must show beyond a reasonable doubt that the exclusion of the evidence did not affect the verdict. (*Chapman v. California*, *supra*, 386 U.S. 18.) Given the significance of the evidence excluded and the closeness of the case, the state cannot make that showing. The judgment of death as to both counts must therefore be reversed.

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THE TRIAL COURT ERRONEOUSLY EXCUSED SEVEN ANTI-DEATH PENALTY PROSPECTIVE JURORS AT THE PENALTY RETRIAL BASED ONLY ON THEIR ANSWERS ON THE JUROR QUESTIONNAIRE

On its own motion, the trial court at the penalty retrial erroneously excused seven prospective jurors prior to voir dire based on their opposition to the death penalty as expressed in answers in the juror questionnaire. Because of the nature of the questions asked in the questionnaire regarding the death penalty, and the specific answers given by these seven, there was no clear factual basis for excusing these individuals for cause. Excusing the seven prospective jurors opposed to the death penalty violated appellant's rights to a fair trial, due process and a reliable penalty determination under the Sixth and Fourteenth Amendments of the United States Constitution (*Witherspoon v. Illinois* (1968) 391 U.S. 510 (*Witherspoon*); *Adams v. Texas* (1980) 448 U.S. 38; *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*); *People v. Heard* (2003) 31 Cal.4th 946; *People v. Stewart* (2004) 33 Cal.4th 425 (*Stewart*)), and article I, section 16 of the California Constitution.

A. Procedural Background

Prospective jurors filled out a 15-page questionnaire. (21RT 1875.) It was similar to the questionnaire used at the first trial, with a few changes. (Compare 21CT 5666-5681 and 4CT 956-953.)[21] Prior to voir dire at the first trial, the parties had reviewed the questionnaires and stipulated to the

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[21] The juror questionnaire forms approved by the court are not part of the clerk's transcript. Appellant has cited to the questionnaire of prospective juror R.D. from the penalty retrial and Juror No. 1 from the first trial, respectively, to show the contents of the questionnaires.

excusal of numerous prospective jurors based only on the questionnaire answers. (4RT 282-289.) Discussing the questionnaire during pretrial proceedings at the penalty retrial, however, the prosecutor expressed reluctance to proceed in the same manner. He stated, "And I don't know if I'm going to want to do that this time, because a lot of them I didn't think were actually for cause on the face." (20RT 1848.) Without the parties to thin out the jury pool by stipulation, the court stepped in to do the job itself: once the questionnaires were complete, the court informed the parties it had made tentative rulings to excuse 25 or 26 jurors based solely on their answers in the questionnaire. (23RT 2032.) The court solicited "any opposition from counsel that – give you an opportunity to be heard." (23RT 2032.) Among the prospective jurors subject to the tentative rulings were seven – prospective juror Nos. 35, 42, 48, 52, 76, 89, and 96 – whose anti-death penalty attitudes were the basis for the court's intended excusal. The prosecutor indicated he had no objection to these seven. Appellant offered no objection to the first four as the court went through its list of intended excusals (23RT 2035 [juror No. 35], 2036 [juror No. 42], 2037 [jurors Nos. 48 and 52]); as to the last four, defense counsel stated "submitted" when the court inquired (23RT 2039 [juror No. 76], 2041 [juror No. 89], 2042 [juror No. 96]). Each of these seven prospective jurors was then excused without voir dire, on the basis of their questionnaire answers.[22] During the

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[22] This issue is properly preserved for appeal. This Court has never required an objection from the defense in order to claim on appeal that the court improperly excused an anti-death penalty juror under *Witherspoon* and *Witt*. "[T]he failure to object does not waive the right to raise the issue" of the erroneous excusal of a juror based on their opposition to the death penalty. (*People v. Cox* (1991) 53 Cal.3d 618, 648 fn. 4; see *People v.*
(continued...)

subsequent voir dire of the remaining prospective jurors, there was not even a single challenge raised based on a juror's opposition to the death penalty. Appellant submits that the court overreached by excluding those who might otherwise be eligible had the court taken the time to voir dire them. This overreaching was the result of using a questionnaire in which the questions were too imprecise to use to disqualify jurors under *Witt*, and because the answers and explanations given by the prospective jurors did not provide sufficient additional information to disqualify them. The court erred in excusing each of these seven jurors.

Because the trial court has made its decisions to excuse the prospective jurors solely on the basis of the questionnaires, this Court reviews each of those decisions de novo. (*People v. Avila* (2006) 38 Cal.4th 491, 529 (*Avila*); see *Stewart*, *supra*, 33 Cal.4th at p. 451.)

B. The Questionnaire Failed To Elicit Answers Which Would Reveal A Substantial Impairment Under *Witt*

A prospective juror in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless that juror's[23] views would prevent him or her from judging guilt or innocence or would cause the juror to reject the death penalty regardless of the evidence. (*Witherspoon*, *supra*, 391 U.S. at p. 522.) *Witherspoon* is not a ground for challenging any prospective juror; it is a limitation on the state's power to exclude prospective jurors. (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48.)

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[22] (...continued)
Velasquez (1980) 26 Cal.3d 425, 443 [federal precedents hold *Witherspoon* error not waived by "mere" failure to object].)

[23] For readability, prospective jurors in the argument are sometimes referred to as "jurors."

The *Witherspoon* standard was refined in *Witt*, *supra*, 469 U.S. 412, to permit the state to excuse a prospective juror based on the juror's opposition to the death penalty only where the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424.)

Courts traditionally have made their ruling on *Witherspoon-Witt* issues based on the voir dire of prospective jurors. California's extensive use of questionnaires in capital cases has allowed the courts and the parties to obtain substantial information about prospective jurors before ever questioning them in person, which in turn has tempted some courts to speed up the laborious process of picking a jury by excusing prospective jurors based solely on answers in these questionnaires. In *Stewart*, *supra*, 33 Cal.4th 425, the trial court excused five prospective jurors under *Witt* based solely on answers in the questionnaire. This Court reversed the death verdict because the questionnaire did not elicit sufficient information from which the court could determine whether a particular prospective juror was disqualified under *Witt*. (*Stewart*, *supra*, at p. 447.) *Stewart* left open the question of whether a prospective juror could properly be excused based solely on questionnaire answers while noting it was unaware of authority for such a practice. (*Id.* at p. 449.) This Court recently answered the question *Stewart* left open. In *Avila*, *supra*, 38 Cal.4th 491, the Court held that a prospective juror in a capital case may be excused for cause based solely on the answers to the written questionnaire "if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*Id.* at p. 531.)

Avila appears to be grounded in the common sense proposition that there is no reason to orally ask questions of a prospective juror whose

attitudes and beliefs are already known to all the parties and the court. However, this Court also cautioned that "[t]he legitimate pursuit of laudatory efficiency should not be transformed into an arbitrary pursuit of speed for its own sake." (*Avila*, *supra*, 38 Cal.4th at pp. 529-530, fn. 25.)

Voir dire is a constitutionally-protected critical phase in a criminal trial. (*Gomez v. United States* (1989) 490 U.S. 858, 873.) A key element of a defendant's right to an impartial jury is adequate voir dire to identify unqualified jurors. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729.) Without adequate voir dire, the trial court cannot fulfill its responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 (plur. opn.).) Moreover, although a trial court may have the power to excuse a juror for cause in the absence of a challenge by either of the parties, it is not the accepted practice, and courts should use any such power sparingly. (*People v. Jiminez* (1992) 11 Cal.App.4th 1611, 1621, disapproved on other grounds in *People v. Kobrin* (1995) 11 Cal.4th 416, 419.)

Thus, although *Avila* describes a means for the trial court to excuse prospective jurors based only on answers in a questionnaire, that means is a narrow exception to the general rule and practice that challenges to jurors for cause will be heard and made only after voir dire. As will be shown below, the present case is outside the *Avila* exception. It is far from clear that each of the seven jurors excused for their views on the death penalty would have been unwilling to set aside their beliefs and follow the law. First, as in *Stewart*, the critical questions in the questionnaire were written in a way which did not call for answers which could disqualify a prospective juror. Second, the additional explanatory answers given by the

seven jurors did not remedy the shortcomings in the questionnaire.

1. The Questions in the Questionnaire Were Not Designed to Definitively Identify Jurors Whose Attitudes Toward the Death Penalty Disqualified Them from Service

In *Avila*, this Court noted that the critical distinction between *Stewart* and *Avila* was that the questionnaire in *Avila* did not suffer from the defect that the one used in *Stewart* did. (*Avila*, *supra*, at p. 531.) Prospective jurors who acknowledged anti-death penalty sentiments in *Stewart* could not properly have been disqualified on the basis of their questionnaire answers because the phrasing of the critical question was such that a juror's anti-death penalty answer did not reveal that they would be prevented or substantially impaired in performing their duties as jurors. By contrast, in *Avila* the questionnaire included detailed questions which were consistent with standard questions used by trial courts in California during voir dire to assess jurors' attitudes toward the death penalty under the *Witt* standard: The three-tiered question in *Avila* asked:

> "97. If the People prove beyond a reasonable doubt that the defendant(s) is guilty of murder in the first degree, would you refuse to vote for such a verdict because of your conscientious opinion concerning the death penalty, knowing that verdict would obligate the jury to get into a second phase of the trial? In other words, regardless of the evidence, and because of your conscientious objections to the death penalty, would you in every case *automatically* vote for something other than murder in the first degree because you know that such a verdict would end the death penalty questions once and for all? Yes ____ No ____
>
> "98. If the People prove beyond a reasonable doubt that the defendant(s) is guilty of murder in the first degree and prove beyond a reasonable doubt the truthfulness of the special circumstances alleged, would you refuse to vote for a verdict of the truthfulness of the special circumstances

because of your conscientious opinion concerning the death penalty and your knowledge that to do so would obligate the jury to get into the penalty phase? In other words, regardless of the evidence that might be produced during the course of this trial, and because of your conscientious objections to the death penalty, would you in every case *automatically* vote for a verdict of not true as to the special circumstances alleged because you know that such a verdict would end the death penalty question then and there? Yes ____ No ____

"99. Do you entertain such conscientious opinions concerning the death penalty that, regardless of the evidence that might be developed during the penalty phase of the trial, should we get there, that you would automatically and absolutely refuse to vote for such a penalty in any case? In other words, regardless of the evidence and because of your conscientious objections to the death penalty, would you in every case *automatically* vote for life imprisonment without the possibility of parole and never vote for a verdict of death? Yes ____ No ____"

(*Avila*, *supra*, 38 Cal.4th at p. 528, fn 23, emphasis in original.)

Prospective jurors in the present case faced no similar clear inquiry. Although the questionnaire had a section which specifically sought information regarding the prospective jurors' attitudes toward the death penalty, neither the questions in that section nor those in other parts of the questionnaire used the standard *Witt* questions as were used in *Avila*, and the questions which were asked contained flaws similar to those in *Stewart*. As a result, it was impossible to determine from the answers to those questions whether prospective jurors were clearly disqualified under *Witt*. The key questions about the death penalty, Question Nos. 27 through 29, read as follows:[24]

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[24] Questions 30 and 31 were also in the section of the questionnaire (continued...)

27. Briefly describe your general feelings about the death penalty: [space provided for answer]

a. On a scale of 1-10, with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against the death penalty, how would you rate yourself? (circle one) 1 2 3 4 5 6 7 8 9 10

b. Is there a particular reason why you feel as you do about the death penalty? ___ Yes ___ No If yes, please explain: [space provided for answer]

c. If you are against the death penalty, would your opinion make it difficult for you to vote for the death penalty in this case, regardless of what the evidence was? ___ Yes ___ No
Please explain: [space provided for answer]

d. If you are in favor of the death penalty, would your opinion make it difficult for you to vote for life without the possibility of parole regardles of what the evidence was? ___ Yes ___ No Please explain: [space provided for answer]

e. Have you ever held a different opinion about the death penalty? ___ Yes ___ No

f. In what ways, if any, have your views about the death penalty changed over time? [space provided for answer]

g. What purpose do you think the death penalty serves? [space provided for answer]

28. Do you have any religious affiliations that takes

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[24] (...continued)
designated as "Opinions About the Death Penalty." Question No. 30 asked whether the jurors could follow an instruction that informed them that sentences of life without parole and death meant "exactly that" and would be carried out if imposed. Question No. 31 asked if jurors, in deciding the appropriate penalty, could ignore the cost of imprisoning people or executing them. (See 21CT 5678.)

[sic] a stance on the death penalty? ___ Yes ___ No
If yes, please explain: [space provided for answer]

29. It is important that you have the ability to approach this case with an open mind and a willingness to fairly consider whatever evidence is presented as opposed to having such strongly held opinions that you would be unable to fairly consider all the evidence presented during the possible [sic] penalty phase.

There are no circumstances under which a jury is instructed by the court that they must return a verdict of death. No matter what the evidence shows, the jury is always given the option in a penalty phase of choosing life without the possibility of parole. Assuming a defendant was convicted of a special circumstances murder, would you:

___ a. No matter what the evidence was, ALWAYS vote for the death penalty.

___ b. No matter what the evidence was, ALWAYS vote for life without possibility of parole.

___ c. I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate. (See 21CT 5677-5678.)

Additionally, there were at least three other questions – inexplicably included in the "drugs/alcohol" portion of the questionnaire, which was before the death penalty portion – which bore potential relevance on the *Witherspoon-Witt* issues without specifically mentioning the death penalty. Questions Nos. 21, 22 and 23 read:

21. Do you have any religious or moral feeling that would make it difficult or impossible for you to sit in judgment of another person? ___ Yes ___ No
If yes, please explain: [space provided for answer]

22. If the judge gives you an instruction on the law that differs from your beliefs or opinions, will you follow the

law as the judge instructs you? [space provided for answer]

> 23. Can you think of any reason that you might not be a fair and impartial juror, if selected to serve on this case? ___ Yes ___ No If yes, please explain: [space provided for answer]

(See 21CT 5674-5675.)

Setting aside for the moment any explanations prospective jurors appended to their answers, these questions on their face did not elicit sufficient information from which the court could properly determine that these jurors were disqualified under *Witt*. Question No. 27a sought a numerical rating of the prospective jurors' opposition or support of the death penalty, with 1 being "strongly opposed" to the death penalty. A prospective juror's conscientious objection to the death penalty is not a sufficient basis for excusing that person from the jury. (*Witherspoon*, *supra*, 391 U.S. at p. 522; *Witt*, *supra*, 469 U.S. at p. 424; *Lockhart v. McCree* (1986) 476 U.S. 162, 176. Even people who "firmly believe that the death penalty is unjust" can serve as jurors if they are willing to temporarily set aside their own beliefs in deference to the rule of law. (*Ibid.*) Thus Question No. 27a did not solicit any information which by itself would provide clear evidence of a basis for excusal.

Question No. 27c asked death penalty opponents if their opposition would "make it difficult for you to vote for the death penalty in this case, regardless of what the evidence was." (See 21CT 5677.) But having difficulty voting for the death penalty is far from being a disqualifying fact. In *Stewart* this Court reversed a death sentence where the trial court excused five jurors based on affirmative answers to a question very similar to Question No. 27c The question in *Stewart* read in relevant part: (1) "Do you have a conscientious opinion or belief about the death penalty which

would prevent or make it very difficult for you: . . . . (c) To ever vote to impose the death penalty?" (*Stewart*, *supra*, 33 Cal.4th at pp. 442-443.) This Court noted in *Stewart* that in light of the gravity of a sentence of death, for many people their personal and conscientious views concerning the death penalty would make it "very difficult"' ever to vote for the death penalty. But a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is both entitled and duty-bound to sit on a capital jury unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror. (*Id.* at p. 446.)

The same reasoning applies to Question No. 27c in the present case. Jurors cannot be excused simply because they would find it difficult to vote for death regardless of the evidence.[25] Because the question did not ask – either implicitly or explicitly – whether a prospective juror could set aside their personal opposition to the death penalty and follow the law, the jurors' answers could not clearly establish that they could be excused.

Question 29 is particularly problematic because of the inaccurate and misleading introductory sentences. While expressing the valid point that the death penalty is never mandatory, the introductory sentences give the impression that a penalty phase has unfettered sentencing discretion rather than discretion guided by the facts of the case and the court's instructions

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[25] Question No. 27c is an even less discerning tool than the question in *Stewart* for identifying prospective jurors who are excusable under *Witherspoon* and *Witt*. In *Stewart* the question asked whether opposition to the death penalty would *prevent* or make it *very difficult* to vote for death. Question No. 27c did not ask whether the juror's opposition would prevent them from making the decision and only asked whether the decision would be *difficult* rather than very difficult.

on the law. But underlying the *Witt* line of cases is the assumption that a juror may face an unresolvable tension between absolute opposition to the death penalty and a state's guided discretion law. (See *Witt*, *supra*, 469 U.S. at p. 422 [after *Furman* a state may properly challenge a prospective juror if he refuses to follow the statutory scheme].) The standard voir dire questioning under *Witt* explores this tension: If a juror can set aside their beliefs and follow the law they can serve, and if they cannot set their beliefs aside they cannot serve. Question 29 fails to acknowledge this tension even exists. An opponent of the death penalty, when told that they could always choose a life sentence over death, could reasonably check answer b – that they would always choose life given that choice – even though they would be willing to set aside their beliefs and impose the death penalty if their duties as jurors had been accurately described. Accordingly, jurors giving answer b to Question 29 did not "negate the possibility the jurors could set aside their feelings and deliberate fairly." (*Avila*, *supra*, 38 Cal.4th at p. 530.) There should have been clarifying follow-up examination of these individuals. (*Stewart*, *supra*, 33 Cal.4th at pp. 444-449.)

Question No. 21 asked if the prospective juror's religious or moral feelings "would make it difficult or impossible" to judge another person. The "difficult or impossible" construction is essentially the same as that of the question in *Stewart* which this Court found to be too imprecise to be the basis for disqualifying a prospective juror. (See *Stewart*, *supra*, 33 Cal.4th at p. 446.)

Question No. 22 asked if the juror was given an instruction on the law which differed from his or her beliefs or opinions whether the juror would follow the law as instructed. A juror may properly be discharged if they are unwilling to temporarily set aside their beliefs about capital

punishment and follow the law. (*Witt*, *supra*, 469 U.S. at p. 422.) In *Avila*, the questionnaire asked whether the prospective juror held such conscientious objections to the death penalty that, regardless of the evidence or strength of proof, he or she would automatically refuse to return a first degree murder verdict, find a special circumstance true, or impose the death penalty. The *Avila* court held that this question, which was more expansive and detailed than the one about capital punishment in *Stewart*, gave jurors the clear opportunity to disclose views against capital punishment which disqualified them for duty in a capital case. (*Avila*, *supra*, 38 Cal.4th at p. 531.) Unlike *Avila*, the question here failed to link in any way the concept that jurors are required to follow the law to the possibility that such a requirement might conflict with their beliefs about capital punishment.

Question No. 23 asked whether the juror could think of a reason they might not be impartial. Obviously, a person's subjective belief that they *might* not be impartial suggests a need for further inquiry but is not a basis by itself for disqualification.

Considered individually or together, these questions simply were not designed to elicit answers which would make clear that a prospective juror was unable to set aside their personal beliefs about the death penalty and follow the court's instructions on the law as required by *Witt*.

2. The Questionnaire Answers by the Prospective Jurors Did Not Make Clear That They Were Disqualified under *Witt*

None of the prospective jurors gave information in their questionnaire answers and explanations which provided an adequate basis upon which to excuse any of the six prospective jurors for cause. Juror No. 76, R.D., offered almost no information beyond the fact that he felt the

death penalty was wrong and that his belief was based on religion. (CT 5677-5678.) He explained that his church's stance on the death penalty was, "Do not kill." (CT 5678.) Furthermore, R.D. provided an inconsistent answer on Question 29 by answering that he would always vote *for* the death penalty. On Question 22 he answered "Not always" to the question whether he would follow the court's instructions if they differed from his beliefs. At a minimum, these answers created a conflict and ambiguity which needed to be resolved through voir dire. In finding the excusal of several prospective jurors proper in *Avila*, this Court relied not only on the fact that the questionnaire asked questions which accurately framed the key issues, but also on the fact that the jurors at issue provided answers which were "internally consistent." (*Avila*, *supra*, pp. 531-532 [responses of juror R.V. were "clear, unequivocal, and internally consistent" and juror C.H. gave responses which were "internally consistent and unambiguous"].) R.D.'s answers were not consistent and the questions were not accurately framed to elicit disqualifying answers. It was therefore not clear R.D. would be unwilling to set aside his beliefs and follow the law. (See *Avila*, *supra*, 38 Cal.4th at p. 531.) Moreover, it appears the trial court's decision was based on a faulty reading of R.D.'s questionnaire. The court's only discussion of R.D. was to summarily quote him as having said, "Vote life. It's wrong to kill." (23RT 2039-2040.) R.D. never said he would always vote for life; as pointed out above, he surprisingly answered Question No. 29 that he would always vote for death. (CT 5678.) He also never said, "It's wrong to kill." After answering that he had a religious affiliation which took a stance on the death penalty he offered as an explanation to his answer, "Do not kill." (CT 5678.) Accordingly, the court erred and R.D. should not have been excused.

Juror No. 35, M.L., was opposed to the death penalty for "a variety of reasons." (CT 4541.) In his explanation to question 27c he stated, "I simply would not vote for it." Yet on Question 22, regarding whether he would follow the law as instructed if it differed from his own opinions, he stated, "Most probably, but not absolutely certain I would." (CT 4538.) These answers appear to conflict, and M.L. should have been orally questioned to resolve any conflict. His answers do not clearly establish that he was disqualified from serving.

Juror No. 42, J.Q., indicated her feelings about the death penalty in answering Question No. 27 as follows: "I'm against it – God alone controls our life or death." (CT 4509.) She then referred back to this answer in her explanations to Questions 27b, 27c and 28. (CT 4509-4510.) J.Q. did not feel, however, that her religious beliefs would make it difficult for her to sit in judgment of another person. (CT 4506.) On Question 22, she gave *no answer* as to whether she would follow instructions which differed from her beliefs or opinions. Thus, despite being opposed to the death penalty, this juror gave no disqualifying answers, and on the one question – Question 22 – which most closely addressed the central issue under *Witherspoon* and *Witt*, she gave no answer at all. J.Q. should have been questioned in voir dire rather than being disqualified.

Juror No. 48, T.T., was a minister – an ordained Elder in the National Churches of God in Christ. T.T. explained that he did not believe in the death penalty and that his opinion about the death penalty "greatly changed" when he was "called to the ministry in 1982." (CT 5277-5278.) On Question No. 21 T.T. explained, "I could not condemn a person to receive the death penalty, under any circumstance." But on the very next question he agreed that he could follow the law as the judge instructed, even

if the instruction differed from his beliefs or opinions. (CT 5274.) Those answers appear to fall on both sides of the *Witt* inquiry and demanded reconciliation through voir dire. Furthermore, on Question 23 the juror indicated he could think of no reason why he might not be a fair and impartial juror in this case. (CT 5275.) There was not clear evidence that T.T. was disqualified by his views.

Three of these seven prospective jurors gave answers that did not have the kind of internal inconsistencies characteristic of the four described above. Juror No. 89, M.G., explained in Question 27b, "I could not participate in this action because I could not be forgiven." In Question 27c M.G. explained, "I could not possibly vote for the death penalty, my religion does not allow it." On Question 28 he stated, "I am Catholic and it is forbidden by the commandments of God." (20CT 5485-5486.) On Question No. 21 M.G. indicated his religion did not allow him to sit in judgment of another person, and on No. 22 he indicated he would not follow the law as instructed by the judge if it conflicted with his beliefs. (20CT 5482.)

Juror No. 96, D.F., indicated he was a Christian who had grown up in the Mennonite Church and "did not believe in taking a human life for any reason. I defended this conviction by receiving IW military status." (20CT 5421.) On Question 27c he stated "I could/would not be part of taking a human life." Juror No. 96 twice noted he was also opposed to abortion. (20 CT5421-5422.) This juror would find it difficult or impossible to sit in judgment of another person, and could follow the law except in death penalty cases. (20CT 5418.)

Juror No. 52, S.O., was Catholic and stated, "I could not stand being responsoble [sic] for someones [sic] death." (19CT 5261.) On Question

27c, which asked if her opinion would make it difficult to vote for the death penalty, S.O. answered affirmatively and explained, "I can not make." (19CT 5261-5262.) On question No. 22 she indicated that she could follow the court's instructions if they differed from her beliefs and opinions, "But not if it is to take a person's life." (19CT 5258.)

Despite the absence of inconsistencies in these jurors' answers, they nevertheless each should have been questioned rather than excused out of hand. First, this Court has recognized that jurors may actually hold more nuanced views than what they reveal in questionnaire answers. In *People v. Lucas* (1995) 12 Cal.4th 415, 485-486, this Court refused to find ineffective assistance of counsel where counsel failed to challenge a prospective juror who "had moderated the uncritical views she expressed regarding the death penalty in her questionnaire." Second, the Court in *Witt* noted that "[D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Witt*, *supra*, 469 U.S. at p. 424.) When, as here, the questions and answers have been received only in writing rather than in voir dire, a trial court's determinations of *Witherspoon-Witt* issues become even more suspect and less supportable. And when the questions asked were not designed to definitively determine jurors' attitudes without follow-up voir dire, such rulings are even more inaccurate. Furthermore, jurors in a capital penalty phase trial have greater discretion than jurors in other cases, and the examination of the juror must accordingly be more careful. (*United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1269.) None of these seven prospective jurors should have been excused based only on their answers in the jury questionnaires. By doing so, the trial court committed constitutional error as to each of them.

C. Prejudice

The improper excusal of a prospective juror because of their opposition to the death penalty is not subject to a harmless error analysis and compels automatic reversal. (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *People v. Heard*, *supra*, 31 Cal.4th 946, 968.) The verdict and judgment of death against appellant must therefore be reversed.

8

VICTIM IMPACT EVIDENCE INTRODUCED OVER APPELLANT'S OBJECTION DEPRIVED HIM OF A FAIR PENALTY TRIAL

The prosecution planned a powerful victim impact case for the retrial consisting of testimony from eight family members and one neighbor, and illustrated with a large array of family photographs. Prior to the retrial, appellant filed a motion to exclude all victim impact evidence.[26] (13CT 3603.) The motion broadly attacked the use of victim impact evidence and argued that permitting the evidence proposed by the prosecutor would violate the Eighth and Fourteenth Amendments and as well as California law, including section 190.3 and Evidence Code section 352. The motion further requested that any victim impact evidence that the court might admit be limited to the holdings of *Payne v. Tennessee* (1991) 501U.S. 808, and *People v. Edwards* (1991) 54 Cal.3d 787. (13CT 3603-3622.)

When the motion was argued, appellant reiterated that it was objecting to all the victim impact evidence, and did "not want to waive any issue with respect to victim impact. . . ." (21RT 1868.) The court denied the motion in its entirety. (18RT 1870.)

Prior to the testimony of Elizabeth Haugen, appellant made further

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[26] The phrase "victim impact" as used in the cases and in this argument has two meanings. In *Booth v. Maryland* (1987) 482 U.S. 496, the Supreme Court described four different kinds of evidence as victim impact evidence: the personal characterization of the victim, the impact of the crime on the victim's family, the family of the victim's characterizations of the defendant and the crime, and opinions about the sentence the defendant should receive. Victim impact is also used as a shorthand way of describing the second of those four kinds of evidence: the specific impact of the crime on the family.

specific objections to the proposed testimony of 10-year-old Stephen Haugen. He argued that having the child testify would be highly prejudicial and that the substance of his testimony could be introduced through Elizabeth Haugen, Stephen's mother, who was scheduled to testify before Stephen. Appellant was also concerned that Stephen would cry while testifying. (27RT 2781-2782.)

The court overruled appellant's objection. (27RT 2782-2783.) Still later, prior to Ashley Lehmann testifying, appellant made the same objection he had made as to Stephen Haugen's testimony. (29RT 3064.) The prosecutor assured the court that Ashley would not cry. (29RT 3064.) The court said it assumed the child's testimony "would concern the loss of her father and the affect on her and the family," overruled appellant's objection and permitted Ashley to testify. (29RT 3064, 3065.)

The court's rulings, and its failure to limit the prosecution's victim impact case in any way, were erroneous; they violated state statutory law (§ 190.3 and Evid. Code § 352) as well as appellant's rights to due process, a fair trial and a reliable penalty determination under the state and federal constitutions (U.S. Const., Amends. 5, 6, 8, & 14; Cal. Const., art. I, §§ 7, 15).

A. The Evidence

The prosecution presented nine victim impact witnesses, whose testimony covered 99 pages of reporter's transcripts, and 57 exhibits. The exhibits were all family photographs of the Lehmanns and Haugens. There were 14 occasions when the court reporter noted that one of these witnesses was "crying" or "sobbing" while testifying. (See 27RT 2743, 2745, 2748, 2752, 2753:18, 2753:26, 2755, 2765 [Valerie Lehmann]; 30RT 3076, 3077 [Ashley Lehmann], 3081:26, 3081:28 [Ethel Lehmann].)

The victim impact evidence began with Valerie Lehmann, wife of one of the deceased officers, Jim Lehmann. She began her lengthy testimony with the story of how she and her future husband met in college over 20 years earlier, dated and eventually married. (27RT 2738-2739) Valerie's story continued with descriptions of the young couple's first jobs, how they moved into their first apartment together and began a family with the birth of their children, Christopher and Ashley, in 1983 and 1987. (27RT 2740-2741.) The prosecutor illustrated Valerie's testimony by projecting numerous images of Lehman family photographs for the jury to see. (See e.g., 27RT 2739, 2740, 2741.)

Valerie began crying as she described how she had to quit her job after her husband died because her son Christopher told her he would make her life a living hell if she continued working. (27RT 2743.) The prosecutor showed more photographs showing family life at the house the Lehmanns bought in 1982. (27RT 2744, 2745.)

Valerie next discussed how her husband had always wanted to be a police officer, how she did not want him in that dangerous line of work, and how she eventually capitulated to his wishes. (27RT 2745-2746.) The prosecutor showed more photographs, including Jim Lehmann graduating from the academy and working as a park ranger. There were also photos of the family together at Christmas. (27RT 2746.) Valerie began crying again as she described a picture of her husband and Ashley at a father/daughter dance. More pictures illustrated Valerie's testimony about Ashley's first Holy Communion and a family vacation to Lake Louise in Canada. (27RT 2749.) Valerie described their family routine including the fact that her husband worked the night shift in order to be able to help out with the kids. (27RT 2750-2751.)

She then gave the jury an account of the evening of January 4 and cried again as she described Jim driving off to work for the last time. (27RT 2751-2752.) She next told the jury how she was drinking coffee the next morning when she saw a sheriff's patrol car parked outside and realized it was about Jim. (27RT 2753.) She cried again as she described the details of how she learned he was dead. Valerie continued on, tearfully telling how she phoned family members and how her children learned the news. (27RT 2755-2756.)

The prosecutor next focused Valerie's attention on her son Christopher. Valerie told the jury that Christopher had received his black belt in karate 13 days after his father was killed. (27RT 2757.) But Christopher lost interest in karate soon afterward; it was an activity his father had been involved with and Christopher "couldn't handle it" because his father was no longer involved. (27RT 2758.) Valerie described how Christopher began having seizures which were attributed to the stress related to the death of his father. (27RT 2759-2762.) Christopher's grades in school suffered after his father's death and he became very emotional and extremely angry. (27RT 2760.) He screamed profanities at Valerie and told her she could not do anything right. (27RT 2760.) Valerie related a specific incident in which Christopher grabbed and pushed her after she told him he had to stay home instead of going to a school dance. (27RT 2760-2761.)

Valerie also spoke about her daughter Ashley. The prosecutor showed more photographs – Ashley cheerleading, Ashley with Valerie and Christopher in Washington, D.C., at a ceremony for slain law enforcement officers. (27RT 2764.) Valerie described the details of the ceremony and her children's reactions to it. (27RT 2762-2763.) She described how

Ashley's reaction to her father's death changed her from being easy-going to angry. (27RT 2762.) She said that since the shooting Ashley almost never talked about her father or even mentioned his name. A therapist told Valerie that Ashley probably would not really address the loss of her father until she was an adult. (27RT 2765.) Valerie described going to the scene of the shooting on the first anniversary of the event; Ashley refused to go. (27RT 2766.) The prosecution finished with Valerie by having her identify a picture from her wedding of Jim Lehmann feeding her a piece of their wedding cake. (27RT 2766.)

Despite this extensive testimony, the prosecution was just beginning the presentation of its victim character and victim impact evidence as to the Lehmann shooting. James Odam, Valerie Lehmann's brother-in-law, provided additional testimony about the impact of Jim Lehmann's death on his son, Christopher. Odam described how he had played the role of "a typical uncle" to Christopher going to ball games and movies together, but that since the shooting he had taken on a role more like a stepfather. (27RT 2768.) Odam several times had to go to Valerie's house on an emergency basis to help her deal with Christopher when he was "out of control." Odam repeated Valerie's remarks about Christopher's poor records in school after the shooting. (27RT 2770.) Shortly after his father's death, Christopher wrote a letter indicating that he wanted to kill himself. (27RT 2771.)

Valerie Lehmann's father, Mikel Anderson, was the next witness. Anderson was friendly with Jim Lehmann; he felt Jim was a good husband and father. (27RT 2772-2773.) Anderson told a story of how Jim Lehmann knew Anderson liked creamed beef and would make a batch especially for him and drop it by. (27RT 2773.) Anderson next related the circumstances

under which he and his wife learned of the shooting on the morning of January 5 and drove over to be with Valerie. (27RT 2774.) Anderson believed that his daughter had never gotten over the loss of her husband. (27RT 2775.) He described the pressures on Valerie as a single parent, and how she was no longer as capable at dealing with problems as before. (27RT 2775-2776.) He felt she was now edgy and nervous; she was different. (27RT 2776-2777.)

Eleven-year-old Ashley Lehmann testified that she knew her father had been a police officer. She had not spoken much about her father since he died. She found out about her father dying when she woke up and found her mom crying. There was a police officer there. (30RT 3076.) Ashley began crying on the witness stand when asked if she had known then that something bad had happened. She continued testifying and said her father had told her that if a police officer came to the house, it meant he had been shot or was dead. (27RT 3077.) Eventually a chaplain had told her that her father was dead. (27RT 3077.)

Ashley said her father sometimes talked about the bad people in his work. (27RT 3077.) He told her that there were bad people "out there." (27RT 3077.) She had not really taken him seriously, but now she believed there were lots of bad people out there. (27RT 3077.) Ashley began crying again while testifying and the prosecutor took her off the stand. (27RT 3077.)

Jim Lehmann's mother, Ethel Lehmann, also testified. She told the story of her son growing up in various locations because her husband was in the Air Force. (27RT 3078-3079.) She told anecdotes from his youth, how he went away to college and talked about wanting to be a police officer. (27RT 3080-3081.) She cried as she talked about January 5. (27RT 3082.)

She went to her son's house and passed out when she found out that he had been killed. (27RT 3082.) She had a heart attack after the funeral and was in intensive care for five days. (27RT 3082.) She described her son as a beautiful person who was concerned about other people. (27RT 3082.)

The prosecutor proceeded in much the same way with the family of Michael Haugen as he had with the Lehmann family. Elizabeth Haugen told the jury how she met and began dating Michael in the early 1980's when they worked together at an airline. (27RT 2784.) She described their first date at a Christmas party, and the prosecutor showed the jury a photograph from that date. (27RT 2785.)

Elizabeth continued to describe her life with Michael Haugen – the birth of their two children, Michael's change of career to law enforcement, and buying a house in Westchester near the Los Angeles Airport. (27RT 2787.) The prosecutor again showed photographs of the Haugens, from both special and ordinary occasions such as Easter, Michael's graduation from the police academy, and playing in their backyard swimming pool. (27RT 2787.)

Elizabeth described her husband's career path in law enforcement, going from working full time as a service officer in the Hermosa Beach Police Department and going to the police academy at the same time before finally being hired by the Riverside Sheriff's Department. (27RT 2788-2789.) Elizabeth and Michael were together for ten years before getting married – their son Stephen served as the best man at their wedding. (27RT 2789.)

The prosecutor had Elizabeth describe a series of family photographs which were shown to the jury, including photographs from the Haugens' wedding and honeymoon, and a family vacation at Sea World when

Elizabeth was pregnant with their second child, Katie. (27RT 2790.) There were pictures of Katie, Michael feeding Katie, going to Las Vegas, and a neighbor's birthday party. (27RT 2791.) Elizabeth described Michael as a hands-on father. (27RT 2792.) Elizabeth narrated a series of photographs shown by the prosecutor illustrating her husband's life: flying ultralight airplanes, sharing a spontaneous meal out with the family, making funny faces, drinking coffee, and Katie in her Halloween costume. (27RT 2793-2795.) She shared amusing stories about her husband, such as how he would come home after the night shift and jump into their backyard swimming pool to let the whole neighborhood know he was home. (27RT 2791.)

Next, the prosecutor had Elizabeth describe in detail Michael's last evening at home before going to work on January 4 – feeding Katie, drinking coffee, saying goodbye to Elizabeth and Stephen. (27RT 2798.) She hinted that supernatural forces were at work when she described how, at around 3:00 to 3:10 a.m. on the morning of January 5 – the time of the shooting – 16-month old Katie woke up screaming, although she "never cries." (27RT 2799.) Elizabeth said that at 5:30 a.m. she learned from her neighbor, Sherry Rodriguez, that Michael had been killed. (27RT 2800.) The neighbor's husband, Omar Rodriguez, was also a deputy sheriff who had worked with Michael. Elizabeth then made phone calls and cleaned the house because she knew she would be having company. (27RT 2802-2803.)

Elizabeth testified that Stephen learned that his father was dead from Omar Rodriguez. Stephen was in third grade; he was devastated by the news. (27RT 2803.)

Elizabeth said that there had been a lot of changes in her household

since her husband died. Stephen did well at first, but in the fourth grade his grades "slipped and slipped" and his behavior at school was "appalling." (27RT 2804.) He was prescribed Prozac but it did not work. (27RT 2804.) Stephen got angrier and angrier. (27RT 2804.) He became somewhat more manageable when taking another medication, Adderall. (27RT 2805.)

Because Stephen's grades and behavior were so poor, Elizabeth threatened to send him away to boarding school. (27RT 2805.) Stephen "called [her] bluff" and he began boarding school in Orange County. (27RT 2805.) He did not want to be at home. (27RT 2806.) He began doing much better in school after going away and he became "a nice, polite young man." (27RT 2806.)

Elizabeth testified that three-year-old Katie knew that someone shot her father. She recounted a story of taking Katie to the scene of the shooting for an anniversary ceremony. Afterwards Katie expressed disappointment because they "didn't even get to see daddy" or to bring him home. (27RT 2806-2807.) There had been incidents when Katie ran up to uniformed officers and called them "daddy." (27RT 2808.)

Elizabeth's niece, Jacqueline Mangham, testified next for the prosecution. Mangham read a portion of a letter Michael Haugen had written to Mangham, who lived in England, when he was looking for a job as a police officer. In the letter Haugen stated, "It can be rough and a little dangerous at times, but the benefits outweigh the risks. Aren't you glad you live in a civilized country?" (27RT 2811-2812.)

Mangham said Elizabeth was strong but did not show her emotions. The prosecutor elicited Mangham's testimony that Elizabeth did not cry in public – perhaps to explain why Elizabeth did not cry while testifying. (27RT 2812.)

Mangham also testified about Michael Haugen's son, Stephen. Stephen came to visit Mangham in England in the summer of 1997 for two weeks. The first couple days Stephen seemed "quite good and strong." He started talking about his father one night, saying he was "ready to go talk to his daddy in heaven." (27RT 2813.) During the course of the holiday he talked about his father more and more and shared experiences they had together. (27RT 2814.)

Ten-year-old Steven testified that he tried to run away after his father died. (27RT 2818.) He agreed that things had been "pretty bad" around the house and at school since the shooting. (27RT 2818.) He did not do well at school and it was upsetting his mother. (27RT 2818.) His mother changed a lot after the shooting. (27RT 2818, 2819.) Steven started going to boarding school and now only saw his mother on weekends. (27RT 2819.) He felt better about this arrangement because he no longer wanted to live with his mother. (27RT 2819.)

Omar Rodriguez testified to the details of how he broke the news to Stephen of his father's death on the morning of January 5. Rodriguez told Stephen that "God has your daddy. He's not coming home." (27RT 3074.) Stephen began crying. (27RT 3074.) Rodriguez had contact with Stephen every day for the following months. Stephen took the loss of his father hard, and kids at school made fun of him because his father was dead. (27RT 3074.) He became incorrigible. (27RT 3074.)

B. The Lengthy Presentation Of Evidence About The Two Officers And The Impact Of Their Deaths On Their Family Rendered Appellant's Trial Fundamentally Unfair

The prosecution has only limited authority to present victim character and victim impact evidence at a capital case penalty trial. In

Booth v. Maryland (1987) 482 U.S. 496, the United States Supreme Court held that a state statute that permitted victim impact statements introduced at capital sentencing hearings violated the Eighth Amendment. These statements included personal characterizations of the victim, the impact of the crime on the victim's family, and family members' opinions about the crime, the defendant and the sentence he should receive. (*Id.* at p. 503, 508.) *South Carolina v. Gathers* (1989) 490 U.S. 805, extended the holding of *Booth* to include not only victim impact evidence, but victim impact arguments to the jury by the prosecutor. In *Payne v. Tennessee* (1991) 501 U.S. 808 (*Payne*), however, the Supreme Court overruled *Booth* and *Gathers* to the extent that those cases held that a statutory scheme permitting admission of evidence or argument relating to the victim's character and the impact of the victim's death on the victim's family violated the Eighth Amendment.

Payne did not overturn the *Booth-Gathers* rule that admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence is a per se violation of the Eighth Amendment. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2.) Furthermore, *Payne* did not hold that "victim impact evidence must be admitted, or even that it should be admitted." (*Id.* at p. 831, conc. opn. of O'Connor, J.) Finally, the Court also recognized that victim character evidence and victim impact evidence can be "so unduly prejudicial that it renders the trial fundamentally unfair" under the Fourteenth Amendment. (*Payne*, *supra*, 501 U.S. at p. 825.)

There are also limits on the use of victim-impact evidence in California. The only factors relevant to the penalty determination in a capital case in this state are those set out in section 190.3. (*People v. Boyd*

(1985) 38 Cal.3d 762, 772-776.) In *People v. Edwards* (1991) 54 Cal.3d 787, 834, this Court determined that some victim-impact evidence may be admissible under section 190.3, factor (a) as "circumstances of the crime of which the defendant was convicted in the present proceeding. . . ." *Edwards* held that factor (a) "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Ibid.*) The holding is limited to "evidence that logically shows the harm caused by the defendant." (*Ibid.*)

Edwards also warned that, "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*. . . ." (*People v. Edwards*, *supra*, at pp. 835-836.)

This Court has recently suggested that there are outer limits to the sheer volume of victim impact evidence allowable before due process is violated. In *People v. Robinson* (2005) 37 Cal.4th 592, the victim impact evidence came from four witnesses whose testimony filled 37 pages of reporters transcript and focused on the attributes of each victim and the effects of the murders on the witnesses and their families. The prosecutor also introduced 22 photographs of the victims in life. (*Id.* at 644-649.) While declining to reach the merits of the issue because there was no objection to the victim impact evidence at trial, the Court suggested that the prosecutor may have exceeded the limits on emotional evidence and argument about which *Edwards* cautioned. (*Id.* at pp. 651-652.) Citing it as an "extreme example" of excessive victim impact evidence violating due process, the *Robinson* Court favorably quoted *Salazar v. State*

(Tex.Crim.App. 2002) 90 S.W.3d 330:

> "*. . .we caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.* Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . . . Hence, *we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence.*"

(*Id.*, at p. 336, emphasis in original.)

There was much more victim impact evidence in the present case than in *Robinson*, and it was so excessive that it violated due process under both *Payne* and *Edwards*. The prosecutor began the victim impact phase of his case during the morning session on November 18 and filled most of the day with six victim impact witnesses.[27] On Monday, November 30, the prosecutor presented out of order three more victim impact witnesses. (30RT 3066-3083.) In all there were nine victim impact witnesses, covering 99 pages of transcript rich with anecdotes and heartbreaking details, which is summarized above in section A. The prosecutor illustrated this testimony with 57 family photographs projected overhead for the jury to see. Of the two children testifying, Ashley Lehmann was unable to complete her testimony because she was crying, and witnesses were regularly crying while on the witness stand.

Apart from the overall excess of the prosecutor's victim impact evidence, other errors in the victim impact case, either individually or together with the other errors and the excessive amount of evidence, violated appellant's right to due process and the Eighth Amendment. These

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[27] Forensic pathologist Darryl Garber and investigating officer Eric Spidle took up the remainder of the court day.

other errors are argued below: (1) the victim character evidence was excessive and partly inadmissible; (2) the testimony of the two children witnesses was cumulative and highly prejudicial; (3) some of the victim impact evidence was irrelevant or inadmissible under Evidence Code section 352; and (4) the prosecutor elicited defendant character evidence from Ashley Lehmann in violation of *Booth v. Maryland*, *supra*, 482 U.S. 496.

1. The Victim Character Evidence Was Excessive and Included Irrelevant Information about Lehmann and Haugen

The purpose of allowing victim character evidence is to show each victim's uniqueness as an individual human being. (*Payne*, *supra*, 501 U.S. at p. 823.) To this end, a state may decide that the jury should see "a quick glimpse of the life" defendant extinguished. (*Id*., at p. 830, conc. opn. of O'Connor, J., citing *Mills v. Maryland* (1988) 486 U.S. 367, 397, dis. opn. of Rehnquist, J.)

Rather than providing a "quick glimpse" of Jim Lehmann and Michael Haugen, the prosecutor instead gave their biographies. The jurors heard about Jim Lehmann being born into an Air Force family; that as a teenager he would come home from dates and talk to his mother (30RT 3079); how he played sports in school and graduated from high school. The jurors followed Lehmann through college, the courtship of his future wife and their wedding, to buying a home and starting a family. They saw dozen of family photographs and heard numerous stories of Lehmann's family life.

The jury also heard how Michael Haugen met his wife Elizabeth when they worked together, and were even shown a photograph from their

first date. (27RT 2784-2785.) Elizabeth described in detail her husband's career in law enforcement; she told how they got married after being together for ten years and already having a son who served as best man; she provided narration for a series of 24 family photographs (Peo. Exh. Nos. 145-168) which showed various holidays, celebration and family activities and vacations.

Appellant does not suggest that informing the jury that the victim had an individual identity or left some survivors would inject an arbitrary factor into a sentencing hearing. But the sheer amount of information, the details provided, and the emotional content of the testimony and exhibits here were beyond anything anticipated in *Payne* or *Edwards*. "[T]he more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence to the circumstances of the crime. . . . And the more marginal the relevance of the victim impact evidence, the greater is the risk that an arbitrary factor will be injected into the jury's sentencing deliberations." (*State v. Bernard* (La. 1992) 608 So.2d 966, 971.)

Particularly irrelevant were the long, detailed descriptions the prosecutor elicited from the two widows of Lehmann and Haugen leaving for work on the night they were shot – the last time they saw their husbands alive and the last words spoken between them. (See 27RT 2751-2752 [Lehmann]; 27RT 2795-2798 [Haugen].) To the extent these scenes reveal anything substantial about the victims as individuals, the same information could have been presented in a context that was less inherently emotional.

Also of marginal relevance and of tremendous prejudicial value as victim character evidence were the numerous family photographs. In *Salazar v. State*, *supra*, 90 S.W.3d at p. 333-334, the trial court erroneously

permitted a 17-minute video montage of 140 photographs of the victim set to music. "What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Id.* at pp. 335-336.) In *United States v. Sampson* (2004) 335 F.Supp.2d 166, 191, the court noted that a 27-minute video featuring over 200 still photographs of the victim would have provided much more than "a quick glimpse" of the victim's life. The lengthy presentation of the 57 family photographs projected for the jury with narration by the two widows was more appropriate to a memorial service than the penalty phase of a capital trial. (See *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1221, fn. 47 [noting district court prohibited the introduction of wedding photographs and home videos].) The presentation was only marginally relevant as victim character evidence and was obviously highly prejudicial.

Finally, even if the victim character evidence did not make the penalty phase fundamentally unfair under *Payne*, it was irrelevant information that "divert[ed] the jury's attention from its proper role and invit[ed] an irrational, purely subjective response" within the meaning of *Edwards* and Evidence Code section 352. (See *Edwards*, *supra*, 54 Cal.3d at p. 836.) The only applicability of victim character evidence in the penalty phase in California is through section 190.3, factor (a) – the circumstances of the crime. Under factor (a) there is no logical basis for allowing more than a "quick glimpse" at the life of the victims in the penalty phase. Accordingly, the victim character evidence presented – by testimony and exhibits – was excessive in quantity and excessive in emotional content and violated both the Eighth and Fourteenth Amendments of the federal constitution and their state constitutional

correlates.

2. The Testimony of the Two Children Was Cumulative and Highly Prejudicial

Appellant's concerns about the emotional impact of Ashley Lehmann and Stephen Haugen testifying were realized, particularly as to Ashley. Ashley left the witness stand crying after breaking down emotionally for the second time during her testimony. (30RT 3075-3077.) She should never have been called as a witness at all. Any victim character or victim impact evidence Ashley might have offered had already been thoroughly covered by the prosecutor:

Prior to Ashley testifying, the prosecutor had introduced 30 Lehmann family photographs (Peo. Exhs. 171-201), including such pictures as Ashley Lehmann and her father going to a father/daughter dance (27RT 2748), Ashley at her first Holy Communion (27RT 2749), Ashley at her father's funeral (27RT 2756), Ashley in her cheerleader outfit at a football game in the Fall of 1997 (27RT 2762), and Ashley at a memorial service for her father in Washington, D.C. (27RT 2764.)

Valerie Lehmann had already testified that her husband had been very engaged in raising his children and that one reason he worked the night shift was to be with them. (27RT 2751.) Valerie also described how her kids learned that their father was dead and their reaction to hearing that news. (27RT 2755-2756.) She told the jury how they went as a family to her husband's funeral and that they regularly visit his grave. (27RT 2756.) They also went as a family to a memorial service in Washington, D.C., for an annual ceremony for all law enforcement officers killed in the line of duty. (27RT 2763.)

Valerie even described Ashley's moods and behavior after her

father's death. Ashley was "pretty mellow, easy going" at first but later showed more anger. (27RT 2762.) Others had noticed this change as well. (27RT 2762.) Ashley had cried the morning she learned of her father's death, but after that "she was trying to run away from everything." (27RT 2763-2764.) Before the trial started, the only other time she had cried was at her father's funeral. (27RT 2764.) Ashley no longer mentioned her father's name around Valerie. (27RT 2764.) Valerie believed Ashley had never really "dealt with" her father's death, and a therapist told her Ashley probably would not do so until she was 18 to 21 years old. (27RT 2765.) The prosecutor had even presented Valerie's testimony that on the one-year anniversary of the shooting, Ashley refused to go to the scene of her father's death with the rest of her family. (27RT 2766.)

All this evidence was uncontested by the defense. It is unrealistic to imagine that even if Ashley had been able to continue testifying that she would have had other evidence to offer which was not simply cumulative to what the jury had already heard. Distilled to its essence, Ashley's brief testimony was pure emotion and no substance.[28]

Stephen Haugen's testimony was equally cumulative. Appellant was correct when he argued to the court that the substance of Stephen Haugen's testimony could have been, and was, introduced through other witnesses, particularly by Elizabeth Haugen. Elizabeth had already described how her husband was a good, "hands-on" father; that he and Stephen spent their summers together in the backyard swimming pool. (27RT 2792.) She described how the family went to Las Vegas on their last family vacation

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[28] In section B.4 appellant shows how Ashley's anecdote about her father telling her about the "bad people" he encountered in his work were inadmissible under *Booth*.

because Stephen wanted to go there. (27RT 2793.) She testified about her husband taking Stephen with him when he flew ultra-light airplanes. (27RT 2793.)

Elizabeth testified that when Stephen learned his father was dead, he was devastated. (27RT 2803.) He was in the third grade and nearly nine years old. (27RT 2803.) Elizabeth acknowledged that there had been a lot of changes in her household since her husband died. Stephen did well at first, but in the fourth grade his grades "slipped and slipped" and his behavior at school was "appalling." (27RT 2804.) He was prescribed Prozac but it did not work. (27RT 2804.) Stephen got angrier and angrier until he started taking another medication, Adderall, and became somewhat more manageable. (27RT 2804-2805.)

Because his grades and behavior were so poor Elizabeth threatened to send Stephen away to boarding school. (27RT 2805.) Stephen surprised her by saying he wanting to go away to school. He did not want to live at home any longer. (27RT 2805-2806.) Stephen began doing much better after going away to boarding school in Orange County and Elizabeth believed he had become "a nice, polite young man." (27RT 2805-2806.)

Jacqueline Mangham, Elizabeth's 29-year-old niece also testified about Stephen. She described how Stephen appeared to her when he visited her in England in the summer of 1997 for two weeks. She told the jury that at first Stephen seemed "quite good and strong." She said Stephen started talking about his father one night and said he was "ready to go talk to his daddy in heaven." (27RT 2813.) During the course of his two week stay in England, Stephen talked about his father more and more and shared experiences they had together. (27RT 2814.) Appellant did not cross-examine these witnesses or challenge this testimony in any way.

When Stephen Haugen himself testified, he offered little or nothing substantive as victim impact evidence beyond what his mother had already said. He acknowledged he began doing poorly at school after his father died and confirmed his mother's story about how he came to be at boarding school. He confirmed that his mother changed after the shooting. (27RT 2818-2819.) There was no reason to put Stephen on the witness stand other than to generate sympathy from the jury and to generate a commensurate degree of antipathy toward appellant.

Evidence is only relevant when it has a tendency "to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) In considering the probative and inflammatory potential of penalty phase evidence, the court should consider "the availability of less inflammatory methods of imparting to the jury the same or substantially the same information." (*People v. Love* (1960) 53 Cal.2d 843, 856.) The more a jury is exposed to the emotional aspects of a victim's death, the less likely [its] verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." (*Cagle v. State* (1996) 909 P.2d 806, 830.)

The cumulative and emotional testimony of Ashley Lehmann and Stephen Haugen should have been excluded.

3. Irrelevant Victim Impact Evidence Was Admitted

Current law holds that a state may conclude that evidence about the impact of the murder on the victim's family is relevant to the jury's decision on whether or not to impose the death penalty. (*Payne*, *supra*, 501 at p. 827.) In *People v Edwards*, *supra*, 54 Cal.3d at p. 835, this Court held

that some injurious impact of a crime could be admitted as a circumstance of the crime, but stated that its holding "only encompasses evidence that logically shows the harm caused by the defendant." Irrelevant information that diverts the jury's attention from its proper role or invokes an irrational, purely subjective response should not be admitted. (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Also, an injury may be too remote from any act by the defendant to be relevant to his moral culpability. (*People v. Harris* (2005) 37 Cal.4th 310, 352 [incident in which the victim's coffin was accidently opened at the funeral, causing distress for the bereaved, was too remote].)

At least two pieces of victim impact evidence were erroneously admitted in this case. First, evidence offered by Ethel Lehmann that she had suffered a heart attack two weeks after her son's death was irrelevant. There was no substantial evidence of a causal connection between Jim Lehmann's death and his mother's heart attack. Therefore, this could not properly be considered part of the impact of the homicide on Ethel within the meaning of *Payne* and *Edwards*. To the extent some inference could be drawn that there was a causal connection, the connection was so weak that the evidence should have been excluded as being more prejudicial than probative under Evidence Code section 352.

Second, the evidence that the Haugen's infant daughter, Katie, awoke from her sleep at the time of the shooting and began screaming and crying uncontrollably (27RT 2799) was also irrelevant. Jurors hearing this evidence would be led to infer that through some supernatural agency Katie was made aware of her father's death miles away at the moment it occurred. There was, of course, no basis for such an inference, and this evidence should never have been heard by the jury.

These two pieces of evidence had no established connection to any act by appellant and therefore have no relation to his moral culpability.

4. The Prosecutor Elicited Defendant Character Evidence from Ashley Lehmann in Violation of *Booth*

As noted above, *Payne* did not overule the holding of *Booth v. Maryland*, *supra*, 482 U.S. 496, that "admission of a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence violates the Eighth Amendment." (See *Payne*, supra, 501 U.S. at p. 830, fn. 2.) The prosecutor violated the *Booth* proscription against characterizations and opinions about the defendant when he elicited from Ashley her testimony that her father told her about "the bad people" in his work and that since her father was killed she now thinks there are lots of "bad people out there." (30RT 3077.) The clear inference from this testimony was that appellant was one of the "bad people" Ashley's father encountered in police work. (See *Booth v. Maryland*, *supra*, 482 U.S. at p. 508 [victims' daughter's opinions that "animals wouldn't do this" and that the perpetrators could not be rehabilitated were improper opinions].)

The admission of Ashley's opinion about appellant's character was inconsistent with the reasoned decision-making required in capital cases. (See *Booth v. Maryland*, *supra*, 482 U.S. at pp. 508-509.) While the jurors may generally have been aware of how Ashley would have felt toward appellant, "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." (*Id.* at p. 508.)

C. The Errors Were Prejudicial

The power of victim impact evidence to influence jurors is undeniable. In this case, the prosecutor exceeded the limits on the use of victim impact evidence to secure a death judgment. The only aggravating evidence the prosecutor had related to section 190.3, factor (a), which includes victim impact evidence. At the same time, the defense was able to show appellant as a sympathetic working man who was overwhelmed by his deteriorating marriage and addictions. There is no question that this was a close case – a previous jury was unable to reach a verdict and a mistrial was declared when the jury was deadlocked 8 to 4 on the issue of penalty. Accordingly, the state cannot establish beyond a reasonable doubt that the jury would have returned a death verdict even in the absence of the federal constitutional error. (*Chapman v. California*, *supra*, 386 U.S. 18.) There is a reasonable possibility that but for the state law error the jury would have returned a verdict more favorable to appellant. (*People v. Brown* (1988) 46 Cal.3d 432.) The death judgment must therefore be reversed.

9

THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON VICTIM IMPACT EVIDENCE AND IN FAILING TO OTHERWISE PROPERLY INSTRUCT THE JURY ON THE USE OF VICTIM IMPACT EVIDENCE

The trial court failed to give any instructions which specifically addressed how the jurors were to use the extensive victim impact evidence presented by the prosecution.

A. The Court Erroneously Refused Appellant's Proposed Instruction on Victim Impact Evidence

The defense proposed a special instruction to caution the jury regarding the use of emotional victim impact evidence. The proposed instruction read:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(13CT 3561.) The court refused to give the proposed instruction. (29RT 3057.) That refusal was error.

The trial court must instruct on any point of law pertinent to the case if requested by either party. (§1093, subd. (f).) The failure to give an instruction that is both correct and applicable to the case is error. (*People v. Benson* (1990) 52 Cal.3d 754, 807; *People v. Anderson* (1966) 64 Cal.2d 633, 641.) Appellant's proposed instruction was a correct statement of law

and was applicable in this case.

The proposed instruction was legally sound. There is no question that an accepted use of victim impact evidence is to show the specific harm caused by the defendant. (*People v. Edwards* (1991) 54 Cal.3d 787, 835.) The cautionary portion of the instruction tracks often-quoted language from *Edwards* that "the jury must face its obligation soberly and rationally" and that "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.)

The instruction was particularly pertinent to the case. The victim impact evidence was the heart of the prosecutor's penalty phase case. Nine family members and friends, including the two grieving widows and two young children of the deceased provided a full day's worth of victim impact testimony illustrated by 57 family photographs. The testimony was vivid, deeply personal, and highly emotional. (See Argument 8, *ante*.) Yet the only proper purpose of this 99 pages of testimony was to establish the specific harm defendant caused by showing the character of the victims and the impact of the deaths on their family and friends. (See *People v. Edwards*, *supra*, at p. 835.) The special instruction addressed that fact and informed the jury how it could properly use such evidence.

This Court has rejected defense claims that this same instruction was wrongly refused in *People v. Harris (Maurice)* (2005) 37 Cal.4th 310, and *People v. Ochoa* (2001) 26 Cal.4th 398, 445. In *Harris*, the Court gave two reasons for finding no error. First, the court gave a different special instruction to the jury regarding victim-impact evidence, making the defense instruction unnecessary. (*People v. Harris*, *supra*, 37 Cal.4th at p. 358.) In the present case, there was no other instruction on victim impact

evidence either offered or given.

Second, the *Harris* Court found the instruction "unclear as to whose emotional reaction it directed the jurors to consider with caution – that of the victim's family or the juror's own." Appellant disagrees that there is a realistic possibility that jurors would be confused by that portion of the instruction. But it is not within the discretion of the trial court to refuse an otherwise proper instruction because it needs minor tailoring. (*People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Hall* (1980) 28 Cal.3d 143, 159.) Any ambiguity in the instruction could have been easily resolved without refusing the instruction in its entirety.

In *People v. Ochoa*, *supra*, 26 Cal.4th at p. 445, the Court found no error in the failure to give the special instruction on victim impact evidence because "the instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No.8.84.1."[29] Appellant's proposed instruction was directed specifically toward victim impact evidence and the limited purpose for which it was admitted; CALJIC No. 8.84.1 concerns the general duties of the jury and does not address victim impact evidence specifically. The proposed instruction

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[29] The trial court gave CALJIC No. 8.84.1 as follows: "You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law as I state it to you. [¶] You must neither be influenced by bias or prejudice against the defendant or swayed by public opinion or public feeling. Both the People and the Defendant have a right to expect that you will consider all of the evidence and follow the law and exercise your decision consciously and reach a just verdict." (31RT 3191.)

admonished the jurors not to make the penalty decision based on "an irrational, purely subjective response to emotional evidence and argument." One purpose of the admonition would be to assure that the sympathy jurors would naturally feel for the victims and the victim's family would not cause them to impose the death verdict. CALJIC No. 8.84.1 admonished jurors only to avoid the influences of bias or prejudice against the defendant, and not to be swayed by public opinion and feeling. Therefore, appellant's special instruction contained pertinent information for the jurors that was not in CALJIC No. 8.84.1. Furthermore, none of the other instructions given provided the jury the information in the special instruction. The court erred in failing to give the proposed special instruction as requested.

B. The Trial Court Had a Sua Sponte Duty to Instruct the Jury on the Proper Use of Victim Impact Evidence

Even assuming there was a valid basis for refusing appellant's proposed instruction, the instructions as a whole were deficient because there was no instruction directing the jury as to the proper use of victim impact evidence.

In California, the trial court is ultimately responsible for insuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.4th 1001, 1022.) Even without a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085; *People v. Hood* (1969) 1 Cal.3d 444, 449.) The general principles of law relevant to the case are those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Marks* (1988)

45 Cal.3d 1335, 1345.)

Four other states – Oklahoma, New Jersey, Tennessee, and Georgia – require that in every case in which victim impact evidence is introduced, the trial court must instruct the jury on its appropriate use, and admonish against its misuse. (See *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) The Supreme Court of Pennsylvania has recommended a cautionary instruction on the use of victim impact evidence. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.) "Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.)

Here, victim impact evidence was a major part of the prosecutor's penalty case. His only evidence in aggravation was under factor (a) of section 190.3 – the circumstances of the crime and the existence of the special circumstances. He put on nine victim impact witnesses whose testimony covered 99 pages of reporter's transcripts and introduced 57 family photographs as exhibits. This evidence was all ostensibly introduced only for the limited purpose of showing the specific harm appellant caused through the homicides. The testimony of the victim impact witnesses extolled the virtues of the two slain officers and described their lives in considerable detail. The witnesses also gave extensive testimony about the specific physical and emotional impact the victims' deaths had on their

family and friends. Witnesses frequently cried and told deeply moving stories of their losses and of the direct and collateral effects of the victims' deaths. Under these circumstances, the limited purpose for which victim impact evidence was relevant and the danger that the emotional content of victim impact evidence wanted improperly affect the jurors were general principles of law openly and closely connected with the evidence which were necessary for the jury's understanding of the case.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Therefore, even if the court did not err in denying appellant's special instruction on victim impact evidence, the court had a sua sponte duty to instruct the jury on the limited use of victim impact evidence.

The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., Amends. 6, 8, & 14; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the emotional nature of the victim impact evidence presented in this case and the prosecutor's use of that evidence during his closing argument, the trial court's instructional error cannot be considered harmless, and therefore requires reversal.

10

THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT BEFORE THEY COULD CONSIDER EVIDENCE OF UNCHARGED ACTS OF VIOLENCE AS AN AGGRAVATING FACTOR THEY HAD TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED THOSE ACTS

In reaching a verdict of life or death, a penalty jury is required to consider the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force, or the express or implied threat to use force or violence. (§ 190.3, factor (b).) The prosecutor's case at the penalty phase retrial included evidence of acts of criminal violence by appellant which could have been considered as aggravating evidence by the jury under factor (b). The court erred by allowing the jury to consider this aggravating evidence without requiring that they find beyond a reasonable doubt that appellant committed those acts. A court must instruct the jury sua sponte that the commission of uncharged other crimes under factor (b) must be proven beyond a reasonable doubt before they can be considered as evidence in aggravation. (*People v. Robertson* (1982) 33 Cal. 3d 21, 53-56.) The failure to give the reasonable doubt instruction deprived appellant of due process, a fair penalty trial and a reliable penalty proceeding under the state and federal constitutions. (U.S. Const., Amends. 5, 6, 8 & 14; Cal. Const., art. I, § 16.)

A. The Prosecution Presented Evidence Of Unadjudicated Criminal Violence By Appellant

The prosecutor gave written notice before trial that he intended to introduce aggravating evidence at the penalty phase that on October 12, 1989, appellant threatened to kill his wife, Elaine Russell, and threatened to kill police officers on the same date. (3CT 660.) In his opening statement

to the penalty retrial jury, the prosecutor told the jury about the history of domestic violence he intended to show: "You're going to hear about the defendant's abuse of alcohol, abuse of his wife. You're going to hear a lot of history that goes over years about his conduct in terms of alcohol and his wife. [¶] You're going to hear about when his wife called the police over the years he would go to jail." (25RT 2377.) In describing the events leading up to the shootings, the prosecutor again mentions this history when telling the jury how appellant responded when he realized the police were coming: ". . . defendant, who is really mad now because his wife called the police, keeping in mind he has gone to jail when she has called the police in the past, ..." (25RT 2380.)

The prosecutor's evidence supporting these statements was weak. For reasons not apparent in the record, appellant's former wife Elaine did not testify at the penalty retrial. The prosecutor did present the testimony of Dave Burgett, appellant's former brother-in-law, who said that appellant had "mistreated" Elaine during their marriage. (25RT 2392.) Later, while cross-examining Dr. Edward Verde from the Veteran's Administration Hospital where appellant had been treated, the prosecutor elicited Verde's opinion that twelve incidents of domestic violence referred to in appellant's medical records could be associated with his personality as well as his drug and alcohol abuse. (28RT 2882.) Finally, while cross-examining pastor Gordon Young, who counseled appellant and Elaine, the prosecutor drew from the witness evidence that Elaine had told Young a few weeks before the homicides that appellant had threatened to shoot her. (28RT 2947-2948.)

None of this evidence could reasonably have been considered proof beyond a reasonable doubt that appellant committed one or more acts of

violent spousal abuse.[30] But there was, nevertheless, *some* evidence of such crimes. As such, the jury was free to consider this evidence as aggravating evidence of other crimes under section 190.3, factor (b). It is likely they did so, particularly in light of the uncontested evidence that appellant did assault his wife in the incident which shortly preceded the shooting of the deputies. The prosecutor apparently sought to establish that appellant in this case was simply repeating a sequence of violence against his wife and subsequent threats to the police which had occurred before. He also reminded the jury of the other crimes evidence during his closing argument when discussing Dr. Verde's testimony: "Aside from the prior unsuccessful chemical dependencies [sic] he has a history of violence, abused his girlfriend, prior to admission." (32RT 3138.)

Where the prosecution introduces evidence of other crimes attributed to appellant, the trial court is required to instruct the jury sua sponte that it cannot consider those crimes as aggravating evidence unless the crimes have been established by proof beyond a reasonable doubt. (*People v. Robertson, supra*, 33 Cal.3d at pp. 53-56 (plur. opn.).) *Robertson* has subsequently been followed repeatedly by this Court. (See e.g., *People v. Avena* (1996) 13 Cal.4th 394, 429; *People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Gates* (1987) 43 Cal.3d 1168, 1202; *People v. Phillips* (1985) 41 Cal.3d 29, 60.)

Even in capital cases predating *Furman v. Georgia, supra*, 408 U.S. 238, this Court had held that during the penalty phase the jury must be instructed that it "may consider evidence of other crimes only when the

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[30] Section 273.5 proscribes the wilful infliction of corporal injury on a spouse or cohabitant.

commission of such other crimes is proved beyond a reasonable doubt." (*People v. Stanworth* (1969) 71 Cal.2d 820, 840; see *People v. McClellan* (1969) 71 Cal.2d 793, 805; *People v. Polk* (1965) 63 Cal.2d 443, 450-451.) The rationale for adopting the reasonable doubt standard for this kind of evidence is the overriding importance of "other crimes" evidence to a jury's life-or-death decision in a capital case. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54, citing *People v. McClellan*, *supra*, 71 Cal.2d at p. 804.)

The court gave the standard form instruction (CALJIC No. 8.85) regarding the factors to be considered by the jury, which reads in relevant part:

> "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable: . . . [¶](b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceeding, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

Thus, the court instructed the jury that it was *required* to consider the evidence of prior criminal domestic violence elicited by the prosecution but failed to instruct that the jury could only consider that evidence as aggravation if it found beyond a reasonable doubt that appellant had actually committed such offense or offenses. The failure to give such an instruction was *Robertson* error.

The failure to give the instruction was error under both state law and the federal constitution in that it conflicts with the constitutional requirements that objective criteria guide the imposition of the death penalty (*Maynard v. Cartwright* (1988) 486 U.S. 356; *McCleskey v. Kemp*

(1987) 481 U.S. 279, 299-306), and the heightened need for reliability in capital trial and sentencing procedures (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 (plur. opn.); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585). To the extent *Robertson* error is otherwise only a state law issue, the error also deprived appellant of a state-created liberty interest and thereby violated his federal due process rights. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

B. The Error Was Prejudicial

The error cannot be considered harmless under either the state "reasonable possibility" test which applies to capital case penalty phase error (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-449 [applying reasonable possibility test to *Robertson* error]; *People v. Avena*, *supra*, 13 Cal.4th at p. 429 [same]), or under the beyond a reasonable doubt test (*Chapman v. California* (1967) 386 U.S. 18) which applies to federal constitutional error.

This Court has found *Robertson* error harmless in some situations, such as where a reasonable doubt instruction would not have made a difference because the other crimes evidence was so strong. (See e.g., *People v. Avena*, *supra*, 13 Cal.4th at pp. 434-435 [uncontested and overwhelming evidence of other crimes]; *People v. Pinholster* (1992) 1 Cal.4th 865, 965 [evidence substantially uncontroverted]; *People v. Brown*, *supra*, 46 Cal.3d at p. 448 [overwhelming evidence].) As noted above, the evidence in this case was weak, and a reasonable doubt instruction would have dissuaded reasonable jurors from placing any reliance on this evidence as aggravation under factor (b) at the penalty phase.

Evidence of minor crimes may also be harmless under *Robertson*. In *In re Wright* (1991) 52 Cal.3d 367, 438, this Court found it was doubtful the

jury would rely on evidence that (1) defendant threw a chair directed at no one in particular, and (2) defendant threw some paper at a San Quentin kitchen worker. Such "de minimis" conduct rendered harmless the failure to give a reasonable doubt instruction. (*Ibid.*) Evidence of unadjudicated acts of violence are admissible at a penalty phase because they tend "to show defendant's propensity for violence." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) Isolated incidents of throwing paper and chairs simply does not suggest a propensity for violence, but violent acts of spousal abuse do, and the other crimes evidence here therefore cannot be considered de minimis. Neither the nature of the act or acts attributed to appellant nor the strength of the evidence that such act or acts occurred is a basis for finding the instructional error harmless.

Instead, there is at least a reasonable possibility that the reliance of one or more jurors on factor (b) evidence was the difference between a life and death verdict. This was a close case and the jury's decision was a difficult one. The first jury, which found appellant guilty of the charged crimes, was divided 8-4 on the penalty verdict at the time a mistrial was declared. (17RT 1779.)

Whether or not appellant had a significant criminal history played a substantial role in how the question of the proper penalty was framed to the jury. In his final penalty argument to the retrial jury, the prosecutor sought to characterize the case as being between whether the circumstances of the crime and special circumstances under section 190.3, factor (a) outweighed defendant's sympathetic evidence under factor (k).

> "A through K goes everything from the circumstance of the crime, prior criminal activity, prior convictions, No. D, where the defendant was under the influence of extreme emotional disturbance and so on.

> "If you look – and these are the factors that you have to be guided by. . . . Some don't apply, some do. The only ones that really apply here, Ladies and Gentlemen, is No. A and No. K. . . . Because everything else in between doesn't apply to this situation."

(32RT 3148.) But the defense disagreed, pointing out that the absence of any substantial history of criminal violence under factor (b) or any felony convictions under factor (c) were also important mitigators for appellant. (32RT 3162.) The prosecutor, apparently realizing he could not make a case for appellant being a career criminal and using factors (b) and (c) as aggravators, sought instead to diminish the possibility the jury would see the absence of those factors as mitigators. Furthermore, the prosecutor invited the jury to consider factor (b) evidence when he argued, " He's someone who is so selfish and so cowardly, you know, he beats up on women." (31RT 3154.)

The court's instructional error permitted the jury to rely on weak evidence of prior domestic abuse to undermine appellant's claim he had no substantial criminal history. The instructional error thereby weakened appellant's case for life and strengthened the case for death.

Appellant had a compelling personal story of a lifelong struggle against addiction and mental illness, of loss and despair over the deterioration of his marriage around the time of the shooting, and of remorse after the shooting for being responsible for the death of two peace officers. Allowing the jury to conclude, based on insubstantial evidence, that appellant had a history of criminal violence significantly detracted from that story. The sentence and judgment of death must therefore be reversed.

11

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S SPECIAL INSTRUCTION INFORMING THE JURY THAT THE ABSENCE OF PRIOR FELONY CONVICTIONS WAS A MITIGATING FACTOR

Appellant had no felony convictions prior to the murder convictions in this case. The defense rightfully wanted the jury to know that this was an important mitigating fact. At both the first penalty phase and the penalty retrial appellant requested that the jury be instructed as follows: "The absence of any felony convictions prior to the crime[s] for which the defendant has been tried in the present proceedings is a mitigating factor." (21CT 5838.)

Appellant's proposed instruction revealed a substantial difference of opinion between the defense and the prosecutor on the relevant law. The prosecutor argued that the instruction was an incorrect statement of law, and that section 190.3, factor (c), which requires penalty jurors to consider "the presence or absence of any felony convictions" was a factor which could only be aggravating, not mitigating. When the instruction was proposed at the first trial, the prosecutor objected because he believed "that's a misstatement of law. He can argue it, that there's an absence of aggravating circumstances under [factors] (c), or (b), for example, but he can't turn that into a mitigating factor just like I can't turn the absence of a mitigating factor into an aggravating factor." (14RT 1599.) The prosecutor further noted that, "He's free to argue the concept under [factor] (k), or even, in the reverse, 'All the D.A. has is one aggravating factor.'" (14RT 1599.)

The court denied the instruction at the first penalty trial. At the retrial, appellant again requested the same instruction and again the court

denied the request. It is this ruling at the retrial, and the denial of the new trial motion based in part on this issue,[31] which appellant now contends was prejudicial error.

The court is required to instruct on any points of law pertinent to the issue if requested by either party. (§1093, subd. (f).) It is error for a court not to give an instruction if that instruction is both correct in law and applicable on the record. (*People v. Benson* (1990) 52 Cal.3d 754, 807; *People v. Anderson* (1966) 64 Cal.2d 633, 641.) Appellant's proposed instruction was a correct statement of law and was applicable in this case. The court's refusal to give the proposed instruction was error and undercut a significant piece of appellant's penalty phase defense, thereby violating his state statutory rights (§1093, subd. (f)) and his rights to due process and a reliable penalty determination under the state and federal constitutions (U.S. Const., Amends 5, 6, 8, 14; Cal. Const., art. I, §§ 7, 15, 16, 17).

A. Appellant's Proposed Instruction Correctly Stated The Law

The absence of prior felony convictions is a significant mitigating circumstance in a capital case. (*People v. Crandell* (1988) 46 Cal.3d 833, 884.) This Court has repeatedly indicated that the statutory source for this mitigator is section 190.3, factor (c), which requires the penalty jury to take into account, if relevant, "The presence or absence of any prior felony conviction." The Court has noted that factor (c) of the standard instruction (CALJIC No. 8.85) "told the jury that if it found an absence of evidence

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[31] After the jury returned a death verdict, appellant moved for a new trial based in part on the trial court's denial of this and other special instructions. (21CT 5857, 5862.) The motion for new trial was denied. (21CT 5888.)

that defendant had a history of . . . prior felony convictions, it could consider that fact in mitigation." (*People v. Lucero* (2000) 23 Cal.4th 692, 730.) In *People v. Clark* (1993) 5 Cal.4th 950, 1038, the Court stated that the trial court had "properly found the absence of prior force and violence and prior felony convictions rendered factors (b) and (c) mitigating." Justice Mosk once noted that under factor (c) the existence of felony convictions is aggravating while "the nonexistence of such convictions plainly is mitigating." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 153 (conc. opn. of Mosk, J.) This Court also has found that a trial court erred at the motion to modify sentence (§190.4, subd.(e)) by finding factor (c) "inapplicable" where defendant had no prior felony convictions. (*People v. Kelly* (1990) 51 Cal.3d 931, 971, citing *People v. Crandell*, *supra*, 46 Cal.3d at pp. 884-885.) Even the United States Supreme Court has assumed factor (c) can be mitigating. While considering the reach of the "unadorned" factor (k), the Court noted that the *other* listed factors "allow for consideration of mitigating evidence not associated with the crime itself, such as . . . the absence of prior felony convictions. . . ." (*Boyde v. California* (1990) 494 U.S. 370, 383.) Both the plain language of section 190.3 and the cases interpreting that statute are consistent with the language of appellant's proposed instruction; the instruction is a correct statement of law.

The prosecutor's questionable theory that the absence of felony convictions can be mitigating under factor (k), but not under factor (c), is irrelevant to whether the proposed instruction correctly states the law, because the instruction does not state under which factor the absence of felony convictions is mitigating. But as will be shown below, there should be little question that the absence of felony convictions is mitigating under

factor (c), not factor (k).

B. The Instruction Was Applicable To This Case

Besides being an accurate statement of law, appellant's proposed instruction was applicable to this case. There was no evidence presented that appellant had a felony conviction, so the proposed instruction correctly reflected the undisputed state of the evidence. Appellant's lack of a criminal record supported the defense case that appellant was a decent but troubled man who lapsed into an act of violence as his life unraveled. The proposed instruction would have informed the jury that the absence of a criminal record was a mitigating factor that they could consider and was clearly applicable to the case.

Nevertheless, special instructions that repeat or duplicate other instructions need not be given. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) This Court has frequently denied challenges to the validity of section 190.3 based on its failure to specify which of the sentencing factors are aggravating and which are mitigating. In denying such challenges, the Court has expressed the belief that "the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case." (*People v. Jackson* (1980) 28 Cal.3d 264, 316; see *People v. Zapien* (1993) 4 Cal.4th 929, 989.)

The authorities cited in section A, above, support appellant's position that the absence of felony convictions is mitigating and that section 190.3, factor (c) is the statutory source of that mitigator. However, the meaning of factor (c) can hardly be deemed self-evident: the veteran attorney who prosecuted this case believed factor (c) could only be aggravating, and was allowed to argue that position to the jury. Furthermore, this Court has recently indicated that whether or not factor (c)

can be mitigating is not a settled question. In *People v. Pollack* (2004) 32 Cal.4th 1153, 1194, the trial court refused defendant's proposed instruction which was similar to the one in the present case. This Court stated that it had never decided whether factor (c) can only be aggravating or whether it can be either aggravating or mitigating (*ibid.*; accord, *People v. Monterroso, supra*, 34 Cal.4th at p. 789), while at the same time noting that it has implied it could be mitigating in *People v. Clark, supra*, 5 Cal.4th at p. 1038.[32] Because the meaning of factor (c) is not self-evident, appellant was entitled to have his proposed instruction given in order to clarify for the jury that they could consider appellant's lack of felony convictions as mitigating.

Even if the meaning of factor (c) might ordinarily be self-evident, the prosecutor's argument here injected sufficient ambiguity that the court should have given appellant's proposed clarifying instruction. Instructions when combined with "the comments of the prosecutor may create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the jury.'" (*Brown v. California* (1987) 479 U.S. 538, 544-546 (conc. opn. of O'Connor, J.) quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 119 (conc. opn. of O'Connor, J.).) The prosecutor took advantage of the trial court's ruling and, consistent with his theory that factor (c) could only be aggravating, told the jury that the only factors which applied in this

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[32] As noted in section A., the trial court in *People v. Kelly, supra*, 51 Cal.3d at p. 971, erroneously found factor (c) "inapplicable" as mitigation. *Kelly* was a Riverside County case prosecuted by the same attorney as the present case, suggesting the belief that factor (c) can never be mitigating might be a localized phenomenon. *Pollack* and *Monterroso* indicate the belief is more widespread.

case were factors (a) and (k). (31RT 3148.)[33] Appellant in his argument to the jury disputed the prosecutor's claim, contending the jury should consider the lack of a criminal history under factors (b) and (c). (31RT 3162.) There was a clear dispute between the parties on this legal point which should have been clarified by the court by giving appellant's proposed instruction.

Contrary to part of appellant's argument, this Court in *People v. Jones* (2003) 30 Cal.4th 1084, 1124, determined that factor (k) "clearly authorizes the jury to consider defendant's lack of prior felony convictions." Subsequently, in *People v. Pollack*, *supra*, 32 Cal.4th at p. 1194, the Court found no error in the trial court's refusal to give defendant's special instruction without determining whether the absence of felony convictions is mitigating under factor (c). It reasoned that a jury instructed that it may consider the absence of prior felony convictions "and any 'aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death'" will necessarily understand that it may consider in mitigation a defendant's lack of prior felony convictions. (*Ibid.*, quoting *People v. Jones*, *supra*, 30 Cal.4th at p. 1124.) Appellant submits that *Pollack* and *Jones* are incorrect on this point.

First, the statute requires the jury to consider "Any *other* circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (§190.3, factor (k), emphasis added.) The word "other" clearly refers back to the circumstances described in factors (a) through (j). Factor (k) is therefore a "catchall" factor (*People v. Easley*

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[33] At the first penalty trial, the prosecutor had explicitly told the jury that factor (c) was "not applicable" in this case. (15RT 1651.)

(1983) 34 Cal.3d 858, 878) which includes those circumstances *not previously* referenced specifically. The absence of felony convictions is a circumstance the jury is specifically required to consider under factor (c) and it is therefore not a circumstance the jury could consider under factor (k).

The form jury instruction on section 190.3 (CALJIC No. 8.85) should, and does, accurately reflect this. In *People v. Frierson* (1979) 25 Cal.3d 142, 177-178, the Court found that the language in the statutory predecessor to factor (k)[34] was sufficiently broad to allow the jury to consider any aspect of defendant's character or record and any other mitigating circumstances the defendant offered, and accordingly, comported with the requirement of *Lockett v. Ohio* (1978) 438 U.S. 586, and *Eddings v. Oklahoma* (1982) 455 U.S. 104. In *People v. Easley*, *supra*, 34 Cal.3d at p. 879, this Court did not find the form instruction on factor (k) constitutionally deficient, but to avoid confusion in the future recommended that trial courts inform the jury "that it may consider as a mitigating factor 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (*Ibid.*, quoting *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; ellipses and brackets in original.) The *Easley* instruction therefore does not in any way expand the scope of what a penalty jury can consider in mitigation. The instruction given by the court in the present case is consistent with the Court's recommendation in *Easley* and,

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[34] At the time of Frierson's trial, the substance of factor (k) was contained in the identically-worded factor (j). Factors (d) through (j) were re-numbered following the passage of a new death penalty statute in 1978.

accordingly, simply informs the jury to consider circumstances not specifically referenced in factors (a) through (j).

Second, the factor (k) instruction focused on other aspects of a defendant's character and record *"that the defendant offers* as a basis for a sentence less than death. . . ." (31RT 3203, emphasis added.) Appellant offered evidence of his difficult childhood, his struggles with drug and alcohol addiction, and his character as a hard worker, but he offered no *evidence* that he lacked a felony conviction. Thus, the jury would have no basis on which to find absence of a felony conviction as a mitigator under factor (k).[35] Therefore, under the instructions given here on factor (c) and factor (k), the jury would not necessarily understand that it could consider appellant's lack of prior felony convictions as mitigation.

The error also violated appellant's rights to due process and a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. (*Gregg v. Georgia* (1976) 428 U.S. 153; *Green v. Georgia* (1979) 442 U.S. 95; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Zant v. Stephens* (1983) 462 U.S. 862.) Preventing jurors from giving mitigating weight to aspects of the defendant's character and record creates an

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[35] There is also a policy reason why the absence of convictions should be considered under factor (c) rather than (k). If defendants bear the burden of proving mitigation under factor (k) they would face the daunting task of affirmatively proving a negative – that they had no felony record. Furthermore, if the absence of felony conviction is mitigating only under factor (k), then factor (b), regarding the presence or absence of uncharged criminal violence, would have to be interpreted in the same manner. Defendants would then need to affirmatively prove that they had never committed an act of criminal violence in order to establish that fact as mitigating. Aside from unfairly burdening defendant, the process of proving these negative facts would likely be a time-consuming burden on the courts as well.

unconstitutional risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605; *Eddings v. Oklahoma* (1982) 455 U.S. 104 [sentencing judge refused to consider mitigation]; *McDowell v. Calderon* (1997) 130 F.3d 833, 837.)

C. The Error Was Prejudicial

The court's refusal to clarify the applicable law by giving appellant's proposed instruction created confusion for the jurors as to whether they could consider appellant's clean felony record as a factor in mitigation. As discussed above, the prosecutor argued to the jury, consistent with his position that factor (c) could only be an aggravator, that the only factors which applied to the case were factors (a) and (k). (31RT 3148.) His argument regarding factor (k) was that "basically it's – you can feel sorry for the defendant. That's what it boils down to. If you want to you can take any circumstances about his background and say, look, I just feel sorry for this guy." (31RT 3149.) In short, the prosecutor's argument was that the fact that appellant had no felony record was inapplicable to the penalty decision. It is not simply enough that mitigating evidence is before the jury. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 219.) A juror incorrectly following the prosecutor's reasoning on this point would not consider appellant's clean felony record as mitigation. That would be highly prejudicial to appellant. This Court has recognized that the absence of felony convictions is an important mitigating factor for jurors in capital cases. (*People v. Crandell*, *supra*, 46 Cal.3d at p. 884.) The lack of a substantial criminal history – including both prior acts of criminal violence and felony convictions – was an important component of

appellant's penalty phase defense. Moreover, as has been argued elsewhere, this was a close case. The first penalty jury was divided 8 to 4 when a mistrial was declared. It is more than a reasonable possibility (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448) that the penalty decision of one or more jurors was affected by the erroneous failure to give appellant's special instruction. Under the federal constitutional standard of prejudice, the prosecution cannot show beyond a reasonable doubt that the error did not contribute to the death verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

12

THE COURT ERRONEOUSLY REFUSED APPELLANT'S REQUESTED INSTRUCTION TO INFORM THE JURY NOT TO DOUBLE COUNT AGGRAVATING FACTORS WHICH ARE SPECIAL CIRCUMSTANCES

At the penalty retrial, the trial court erred by refusing appellant's proposed special jury instruction No. 7, which read, "The jury should not double count aggravating factors which are special circumstances." (21CT 5839.) The instruction was a correct statement of law and the defense request to admonish the jury against double counting should have been granted.

The guilt phase jury found four special circumstances to be true: findings in both Count I and II that appellant committed multiple murder (§ 190.2, subd. (a)(3)) and findings in both Count I and II that the victim in each count was a peace officer performing his duties (§190.2, subd. (a)(7)). As part of its instructions, the court informed the penalty retrial jury of the two murder convictions and each of the special circumstance findings from the guilt phase. (21CT 5796, 31RT 3197.)

The jury was also instructed that in determining which penalty was to be imposed, "You *shall* consider, take into account and be guided by the following factors, if applicable: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding *and* the existence of any special circumstances found to be true. . . ." (31RT 3202, emphasis added; see 21CT 5804.)

The jury was therefore required to consider both the circumstances of the offense and the statutory special circumstances. This Court has acknowledged that "[s]ince the latter are a subset of the former, a jury given

no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.'" (*People v. Melton* (1988) 44 Cal.3d 713, 768.) While refusing to require trial courts to give such clarifying instructions sua sponte, this Court has also repeatedly said that the instruction should be given if requested by the defense. (*People v. Monterroso* (2005) 34 Cal.4th 743, 789; *People v. Ashmus* (1991) 54 Cal.3d 932, 997; *People v. Morris* (1991) 53 Cal.3d 152, 224; *People v. Melton, supra*, 44 Cal.3d at p. 768.) Appellant's requested instruction was a correct instruction clarifying that it would be improper to double count the circumstances of the crime and the special circumstances, and the trial court's failure to give the instruction was error.

Despite acknowledging that an instruction admonishing against double-counting is proper, this Court has routinely found the failure to give it non-prejudicial. (See *People v. Melton, supra*, 44 Cal.3d at p. 768-769; *People v. Proctor, supra*, 4 Cal.4th at p. 550; *People v. Morris* (1991) 53 Cal.3d 152, 224-225.) Underlying these findings of no prejudice is the conclusory rationale of *Melton* that it is simply "unlikely" that jurors would actually double count absent the prosecutor encouraging them to do so in his argument and that the chance of prejudice was "remote." (*People v. Melton, supra*, 44 Cal.3d at pp. 768-769; see *People v. Mayfield* (1997) 14 Cal.4th 668, 805 [holding that CALJIC No. 8.85 does not imply that the jury may "double count" evidence].)

The Court's past refusal to acknowledge the possibility of prejudice has two components. One has focused on the specific language of section 190.3, factor (a): In *People v. Ashmus, supra*, 54 Cal.3d at p.997, this Court noted that the instruction "directs attention to '[t]he *circumstances* of the crime' and 'the *existence* of any special circumstances found to be true' –

but not to the '*circumstances* of the special circumstances.'" (*Ibid.*, emphasis in original.) *People v. Monterosso*, *supra*, 34 Cal.4th at p. 790 recently followed *Ashmus* on this point. Thus, theoretically, jurors could give weight both to the circumstances of the crime and to the existence of the special circumstances, as long as no weight was given to the underlying special circumstances themselves. (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 997.) But in *People v. Morris*, *supra*, 53 Cal.3d at p. 224, the Court gave an inconsistent interpretation to the same language. Defendant in *Morris* requested that the trial court avoid the double counting problem by simply deleting from factor (a) in the form instruction any reference to "special circumstances." This Court found the trial court's denial of defendant's request was proper because such a deletion carried with it the risk that "the jury might then believe it could consider only the circumstances of 'the crime' (i.e., murder) and not those of the special circumstance (i.e., robbery-murder)." (*Id.* at p. 224.) Thus *Morris* acknowledged that what a jury is considering under the standard instruction is not the mere "existence" of any special circumstances, but the underlying circumstances themselves.

Furthermore, when the standard criminal jury instructions were recently rewritten, the "existence of" language was deleted. The new form instruction, CALCRIM 763, describes factor (a) as: "The circumstances of the crime[s] that the defendant was convicted of in this case and any special circumstances that were found true." If the Judicial Council's Task Force on Criminal Jury Instructions believed that the phrase "and the existence of any special circumstances" from section 190.3, factor (a) meant "and any special circumstances" then jurors likely would also. Certainly it is unreasonable to believe that jurors necessarily would have understood the

instruction in the strained interpretation suggested in *Ashmus* and *Monterroso*.

The second component of this Court's failure to acknowledge the prejudice which can result from double counting has been the proposition that "common sense" indicates that jurors would understand not to double count. (*People v. Melton*, *supra*, 44 Cal.3d at p. 769.) *Brown v. Sanders* (2006) 546 U.S. __, 126 S.Ct. 884, provides some fresh perspective on this concept. *Sanders* determined that California is not a "weighing" state while analyzing the prejudice resulting from the jury's reliance on the unconstitutional "heinous, atrocious and cruel" special circumstance. Justice Stevens, discussing the California penalty phase scheme in his dissent,[36] noted that the jury, having been told to weigh the circumstances of the crime *and* the existence of any special circumstances found to be true, "may consider its conclusion that the killing was heinous separately from the 'circumstances of the crime' underlying that erroneous conclusion, improperly counting the nature of the crime twice in determining whether a sentence of death is warranted." *Brown v. Sanders*, *supra*, 546 U.S. at p. __, 126 S.Ct. at p. 895 (dis. opn. of Stevens, J.)

Justice Stevens also noted that alternatively the jury

> "recognizing that the legislature had decided that a "heinous, atrocious, or cruel" murder, without more, can be worthy of the death penalty, may consider this a legislative imprimatur on a decision to impose death and therefore give greater weight to its improper heinousness finding than the circumstances of the crime would otherwise dictate. Under either scenario a weight has been added to death's side of the scale, and one cannot presume that this weight made no

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[36] Nothing in the majority opinion in *Sanders* was contrary to these observations about the California penalty phase scheme by Justice Stevens.

difference to the jury's ultimate conclusion."

(*Ibid.*) Although Justice Stevens did not directly state how likely it is that jurors would double count special circumstances, his reasoning shows clearly that double counting is a real and potentially prejudicial possibility.

In the present case, the special circumstance that the victims were police officers intentionally killed in the performance of their duties was particularly susceptible to being improperly double-counted by the jury. Reasonable jurors would likely consider the fact that Lehmann and Haugen were officers killed while on duty as an aggravating circumstance of the crime. They could then reasonably follow the clear language of the instruction and give additional weight to the same fact as a special circumstance, perhaps believing that the mention of both the circumstances of the crime and the special circumstances was a recognition by the law that the killing of police officers was sufficiently egregious to be given additional weight. No misleading argument by the prosecutor was necessary for the jurors to make this mistake. Rather than defying common sense, or being only a remote or theoretical possibility, there is a very real likelihood the jury double counted in this case.

A trial court's erroneous refusal of a defendant's proper instruction at a capital penalty trial requires reversal of the death judgment under state law if there is a reasonable possibility that the failure to give the instruction affected the jury's verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448-449 [re erroneous failure to instruct on beyond a reasonable doubt standard as to factor (b) evidence]; see also *People v. Edwards* (1991) 54 Cal.3d 787, 843-844 [*Brown* test applied to failure to instruct penalty jury sua sponte with cautionary instruction re defendant's admissions].) The test is different where no instruction has been requested and there is no sua sponte

duty to give such an instruction. When reviewing a supposedly ambiguous instruction the test is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violated the Constitution. (*People v. Ayala* (2000) 24 Cal.4th 243, 290; *People v. Welch* (1999) 20 Cal.4th 701, 766.)

Melton pre-dated *Brown* and did not indicate reliance on a formal standard of prejudice, perhaps because it found no error. In recent cases in which the trial court refused defendant's request for an admonition against double counting this Court has referred back to *Melton* in finding no prejudice (see e.g., *People v. Monterosso, supra*, 34 Cal.4th at pp. 789-790; *People v. San Nicolas* (2005) 34 Cal.4th 614, 671), or to the reasonable likelihood test (e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 290). Appellant submits that where the trial court wrongly refuses a proper defense instruction admonishing the jury not to double count the circumstances of the crime and the special circumstances, the error should be reviewed under the *Brown* reasonable possibility standard.

Had the court given appellant's requested instruction it would have eliminated any real chance the jury would double count the circumstances of the crime and the special circumstances. Without the instruction there is a reasonable possibility that the jury would have returned a life verdict. The case was a close one – the first jury had been divided 8 to 4 when the mistrial was declared. Appellant had no prior felonies and no substantial history of criminal violence. The fact that there were two victims who were police officers could easily have been seen by one or more jurors as being the critical pieces of aggravating evidence against appellant. Because the instructions invited the jurors to artificially inflate the aggravating weight of those very facts, there is a reasonable possibility that an instruction

admonishing the jurors not to double count those facts would have made the difference between life and death for appellant.

The error also violated appellant's federal constitutional rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments. The discretion of a capital case penalty jury must be suitably directed and limited "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.) A death sentence "must be tailored to the [the defendant's] personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801.) Double counting aggravating factors "has a tendency to skew the weighing process and creates the risk that the death penalty will be imposed arbitrarily and thus, unconstitutionally." (*United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111; cf. *Stringer v. Black* (1992) 503 U.S. 222.) The prosecution cannot show beyond a reasonable doubt that the federal constitutional violations which resulted from the failure to give appellant's requested instruction did not effect the jury's penalty verdict. (See *Chapman v. California* (1967) 386 U.S. 18.)

The judgment of death must therefore be reversed.

13

THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS ALLOWED THE JURY IMPROPERLY TO CONSIDER CIRCUMSTANCES OF THE CRIME AS AGGRAVATING EVIDENCE UNDER SECTION 190.3, FACTOR (b)

At the penalty retrial, the jury was improperly allowed to consider circumstances of the crimes as evidence of uncharged violent crimes under section 190.3, factor (b). The error violated appellant's state statutory rights as well as his rights to due process, a fair trial and a reliable penalty determination (U.S. Const., Amends. 5, 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17).

Appellant was initially indicted on four charges related to the events of the early morning hours of January 5, 1997. Two of the charges were murder. Appellant also was charged with assault with a deadly weapon under section 245, subdivision (a)(1) on Beverly Brown, and committing misdemeanor spousal abuse on his wife, Elaine Russell, under section 273.5, subdivision (a). (1CT 7-8.) On the seventh day of the guilt phase, appellant withdrew his not guilty plea and pled no contest to misdemeanor spousal abuse. (CT 3334.) Two days later, prior to the guilt phase instructions to the jury and argument of counsel, the court granted the prosecution's motion to dismiss the assault charge. (CT 3384.)

For the penalty retrial, the court did not inform the jury about either the assault charge or the misdemeanor spousal abuse conviction. Evidence relating to those incidents, which occurred minutes before the homicides, was admitted at the retrial as circumstances of the capital crimes. Consistent with the language of CALJIC 8.85, the jury was instructed that it could consider under factor (b) "the presence or absence of criminal activity

by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." (31RT 3202.) This instruction was misleading and inaccurate under the facts of this case because it allowed the jury to consider the misdemeanor spousal abuse of Elaine Russell and evidence of an assault on Beverly Brown as aggravating evidence under factor (b) rather than only as factor (a) evidence of the circumstances of the crime.

Factors (a) and (b) are mutually exclusive as factors in aggravation. (See *People v. Melton*, *supra*, 44 Cal.3d at p. 763.) Criminal activity involving force or violence under subdivision (b) is limited to conduct other than the immediate circumstances for which the death penalty is being contemplated. (*People v. Melton*, *supra*, 44 Cal.3d at p. 763.) Subdivisions (b) and (c) pertain only to criminal activity other than the crimes for which the defendant was convicted in the present proceeding. (*People v. Miranda* (1987) 44 Cal.3d 57, 106.) It is improper for the jury to consider the underlying crimes as separate and distinct aggravating circumstances under either factors (b) or (c). (*Ibid.*) The events involving Elaine Russell and Brown immediately preceded the homicides and should therefore only have been considered by the jury as factor (a) evidence.

This Court has acknowledged the possibility of confusion for the jury in determining which acts can be considered as factor (b) evidence. (See e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 151; *People v. Melton*, *supra*, 44 Cal.3d at p. 763; *People v. Robertson*, *supra*, 33 Cal.3d at p. 55, fn. 19.) Mindful of that potential for confusion, the Court in *Melton* directed trial courts to instruct jurors in future cases that the violent crimes described in subdivision (b) do not include the circumstances of the capital

offense itself. (*Ibid.*)

The trial court here instructed using the language for factor (b) in CALJIC No. 8.85 which was intended to effectuate the Court's directive: "(b) the presence or absence of criminal activity by the defendant, *other than the crimes for which the defendant has been tried in the present proceedings. . . .*" (31RT 3202, emphasis added.) The italicized phrase might properly clarify the distinction between factors (a) and (b) in most cases, but here, because there was a mistrial at the first penalty phase, the jury knew about the first trial only what it was told by the court. The jury was told only that appellant had been convicted of two counts of first degree murder and the special circumstances. (RT 3197.) As a result, from this jury's perspective, the only acts of criminal violence unavailable for consideration under factor (b) were the two homicides. Accordingly, the jury was erroneously permitted to consider the evidence of assault and the spousal abuse as factor (b) evidence. The jury was therefore permitted to erroneously double-count that evidence as both factor (a) and factor (b) aggravation.

This Court has suggested that, unless the prosecutor urges the jury to double count, "any ambiguity in the language of the statute or instructions will rarely cause prejudice." (*People v. Melton*, *supra*, 44 Cal.3d at p. 763; see also *People v. Gallego* (1990) 52 Cal.3d 115, 198.) Under the facts of this case, however, the ambiguity was prejudicial. First, there is nothing inherently illogical about jurors double-counting evidence in aggravation. For example, for a defendant who has been convicted of a violent felony, in many instances the jurors may properly consider that crime as aggravating evidence under both factors (b) and (c). (*People v. Melton*, *supra*, 44 Cal.3d at p. 764.) Second, the instructions, consistent with section 190.3,

specifically required the jury to consider the applicability of each statutory factor. Third, the language in CALJIC No. 8.85, derived from *Melton*, which was designed to deter jurors from double counting, would have had the opposite effect in this case because the jurors receiving the instruction were not the jurors who tried the guilt phase and were not fully informed of all the charges in that proceeding. The instruction specifically alerts the jurors to distinguish between acts which were tried in the present proceeding and those which were not. Because jurors at the retrial would give meaning to this language and distinction, they would likely understand the instruction to require them to consider the assault and spousal abuse as both factor (a) and (b) aggravation because they had been informed that only the murder charges were excepted from their consideration under factor (b). Therefore the instructional error was prejudicial even without the prosecutor urging the jury to double count.

Appellant was also prejudiced simply by the jurors considering these incidents as factor (b) evidence even if they did not double count them and consider them as factor (a) evidence. One of appellant's arguments for a life verdict was that he had no substantial history of criminality or criminal violence and that the jury should consider the absence of evidence of factors (b) and (c) as mitigating. Permitting the jurors to consider the assault and spousal abuse as factor (b) evidence undercut that argument. Although the prosecutor did not argue those incidents as aggravation under factor (b), he argued that only factors (a) and (k) were relevant to the jury's decision. The jury could best understand this argument to mean that there was sufficient evidence of prior criminal violence that they could not consider the absence of factor (b) evidence to be mitigating. Therefore there is more than a reasonable likelihood that the jury applied the instruction in a manner

which permitted them to improperly consider these two incidents as factor (b) evidence and to double count them in assessing whether to give appellant a life sentence or death. (See *People v. Ayala*, *supra*, 24 Cal.4th at p. 290; *People v. Welch*, *supra*, 20 Cal.4th at p. 766.) There is a reasonable possibility (*People v. Brown*, *supra*, 46 Cal.3d at pp. 448-449) that, but for the erroneous instruction, the jury would have returned with a life verdict rather than death. As has been shown previously, this was a close case. One or more jurors could have been swayed by the improper use of the factor (b) evidence here.

The error also violated appellant's federal constitutional rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments. The discretion of a capital case penalty jury must be suitably directed and limited "so as to minimize the risk of wholly arbitrary and capricious action" (*Gregg v. Georgia* (1976) 428 U.S. 153, 189), and a death sentence must be tailored to the defendant's personal responsibility and moral guilt (*Enmund v. Florida* (1982) 458 U.S. 782, 801). As discussed in Argument 12, *ante*, double counting aggravating factors "has a tendency to skew the weighing process and creates the risk that the death penalty will be imposed arbitrarily and thus, unconstitutionally." (*United States v. McCullah*, *supra*, 76 F.3d at p. 1111; cf. *Stringer v. Black*, *supra*, 503 U.S. 222.) The prosecution cannot show beyond a reasonable doubt that the federal constitutional violations which resulted from the failure to instruct properly did not effect the jury's penalty verdict. (See *Chapman v. California*, *supra*, 386 U.S. 18.)

The judgment of death must therefore be reversed.

14

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF[37]

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. As set forth elsewhere in this brief, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. (See Argument___, *post.*) As discussed herein, juries do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument 18, *post.*) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to

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[37] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court held that "[r]outine instructional and constitutional challenges," will be deemed "fairly presented" for the purposes of state and subsequent federal review so long as the appellant's brief: (1) identifies the claim in the context of the facts; (2) notes that the Court has rejected the same or a similar claim in a prior decision; and (3) asks the Court to reconsider that decision. However, in order to ensure that the federal courts deem these challenges fairly presented to the state courts and thus fully preserved for federal review, appellant submits more than the minimum briefing suggested in *Schmeck.*

impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (§ 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[38]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist,

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[38] There are two exceptions to this lack of a burden of proof. The special circumstances (§ 190.2) and the aggravating factor of violent criminal activity (§ 190.3 subsection (b)) must be proved beyond a reasonable doubt.

[or] that they outweigh mitigating factors . . . ." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, *supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 471-472, *Ring v. Arizona* (2002) 536 U.S. 584, 607, and *Blakely v. Washington* (2004) 542 U.S. 296, 300-313.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id*. at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt

unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*.

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring*, *supra*, 536 U.S. at p. 609.)[39] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to

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[39] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

both." (*Id.*)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely*, *supra*, 542 U.S. at p. 300.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 542 U.S. at p. 303, emphasis in original.)

Twenty-six states require that factors relied on to impose death in a penalty phase be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[40] Only California and four

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[40] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La.

(continued...)

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

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not

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[40] (...continued)
Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

"susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[41] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (31RT 3204-3205; 21CT 5808-5809; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the

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[41] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[42]

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

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi, supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-

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

increasing) facts about the *way* in which the offender carried out that crime." (*Blakely*, *supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604, quoting *Apprendi*, *supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring*, *supra*, 536 U.S. at p. 604, quoting *Apprendi*, *supra*, 530 U.S. at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the

the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered.[43] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow, supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. In both states, the absence of

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

an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *People v. Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' [Citation omitted.] No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, italics added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating

can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State*, *supra*, 59 P.3d 450.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 542 U.S. at p. 304.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[44]

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[44] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court

(continued...)

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

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[44] (...continued)
cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman*, *supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

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

(*Ring*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi*, *supra,* 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the

> Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to

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

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."

(*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 357 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship*, *supra*, 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338, 342 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [same]; *People v. Thomas* (1977) 19 Cal.3d 630, 632 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

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

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional

> requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is

ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is

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

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence

may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State

while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[45]

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[45] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the
(continued...)

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Evidence Code section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486

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[45] (...continued)
existence of the protections afforded a defendant.

U.S. at p. 374; *Myers v. Ylst*,(9th Cir. 1990) 897 F.2d 417, 421.)

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

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

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that a juror

would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's

life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1992) 1 Cal.4th 103, 462-464 (cert. granted on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802); see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[46]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not,

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[46] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[47]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. at p. 732; accord *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584; *Gardner v. Florida*, *supra*, 430 U.S. at p. 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury. (Cf. *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 [holding that the Due Process and Equal Protection Clauses of the

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[47] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

Fourteenth Amendment were not violated by a Louisiana rule which allowed for conviction based on a plurality vote of nine out of twelve jurors].)

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

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[48] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., §1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see

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[48] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).)

Monge v. California, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

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

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The

> second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

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

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to

unanimous jury findings beyond a reasonable doubt.

E. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. 8 & 14; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. 14; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death

penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

F. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

15

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

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

circumstances.

> To return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole.

(31RT 3204-3205.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. The flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., Amend. 14), to a fair trial by jury (U.S. Const., Amends. 6 & 14), and to a reliable penalty determination (U.S. Const., Amends. 6, 8 & 14) and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (31RT 3205.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in

meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5; internal citations omitted.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[49]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case

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[49] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, emphasis added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of

the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. 8 & 14), the death judgment must be reversed.

B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty, For Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *accord*, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of

"appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; *i.e.*, it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," *i.e.*, that the defendant is eligible for execution, and the ultimate determination that it

is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (31RT 3205 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. 8 & 14), denies due process (U.S. Const., Amend. 14; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346) and must be reversed.

C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

Section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's

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[51] (...continued)
474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due

process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

16

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on section 190.3 pursuant to a tailored version of CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (31RT 3202-3203) and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (31RT 3204-32-5). These instructions, together with the application of these statutory sentencing factors, rendered appellant's death sentence unconstitutional. First, the application of section 190.3, subdivision (a) resulted in the arbitrary and capricious imposition of the death penalty on appellant. Second, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Third, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fourth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instructions to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Sixth, and finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable

capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

A. The Instruction On Section 190.3, Subdivision (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Section 190.3, subsection (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within that statute's meaning, even ones squarely at odds with others deemed supportive of death sentences in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975-976), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, e.g., the defendant: had a "hatred of religion";[52] sought to conceal evidence three weeks after the crime;[53]

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[52] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.

[53] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

threatened witnesses after his arrest;[54] disposed of the victim's body in a manner precluding its recovery,[55] or had a mental condition that compelled him to commit the crime.[56]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California, supra,* 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) It is, therefore, unconstitutional as applied. (*Ibid.*)

B. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those

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[54] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

[55] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

[56] *People v. Smith* (2005) 35 Cal.4th 334, 352.

inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for "only" one factor.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to

screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

C. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable And Evenhanded Application Of The Death Penalty

Ordinarily, in California trial court practice, the trial court does not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating or which could be either aggravating or mitigating depending upon the evidence. However, in the present case, the court gave the jury a special jury instruction requested by trial counsel. It read, "The factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider. You are not allowed to consider any other factors or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case." (21CT 5806; see 31RT 3203.) Yet, as a matter of state law factors (c), (d), (e), (f), (g), (h) and (j), which were introduced by a prefatory "whether or not" were relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184;

People v. Edelbacher (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide appellant's jury with guidance on this point was reversible error.

D. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded The Jurors' Consideration Of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); 31RT 3202-3203), and "substantial" (*see* factor (g); 31RT 3203), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

E. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth

Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (11 Cal.3d at p. 267.) The same reasoning must

death penalty procedures unconstitutional.

F. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Them To Capital Defendants Like Appellant Violates Equal Protection

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at

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[57] (...continued)
Colo. Rev. Stat.Ann., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[57] California's failure to require such findings renders its

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[57] See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987);
(continued...)

stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights . . . It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) . . . ." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument 17, *post*, appellant explains why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He makes the same argument here with regard

to the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on violent criminal acts under section 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate fact-finding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

G. Conclusion

For all the reasons set forth above, appellant's death sentence must be reversed.

17

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original) (quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 [opinion of Stewart, Powell, and Stevens, JJ.]).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v.*

Georgia (1976) 428 U.S. 153, 198; *Proffitt v. Florida, supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the

> Court will be well advised to reevaluate its decision in *Pulley v. Harris*.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris* to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[58]

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[58] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. See *State v. Dixon,* 283 So.2d 1, 10 (Fla. 1973); *Alford v. State* 307 So.2d 433, 444 (Fla. 1975); *People v. Brownell* 404 N.E.2d 181, 197 (Ill. 1980); *Brewer v. State* 417 NE.2d 889, 899 (Ind. 1980); *State v. Pierre* 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants* 250 N.W.2d 881, 890 (Neb. 1977) (comparison

(continued...)

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Section 190.2 immunizes few kinds of first degree murderers from death eligibility, and section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in Arguments 14-17, *ante*. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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[58] (...continued)
with other capital prosecutions where death has and has not been imposed); *Collins v. State* 548 S.W.2d 106, 121 (Ark. 1977).

18

THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND SENTENCE OF DEATH

There were serious constitutional errors in appellant's trial, including evidentiary and instructional errors in both phases of the trial. As set forth in the preceding arguments, each error was sufficiently prejudicial to warrant reversal of the judgment of conviction and the sentence of death. Even assuming that none of these errors is prejudicial by itself, their cumulative effect undermines any confidence in the integrity of the proceedings which ultimately resulted in two murder convictions and a death sentence. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1206-1208; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439.)

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may prejudice a defendant. (See *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"].) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United*

States v. Wallace (9th Cir. 1988) 848 F.2d 1464, 1476.) When considered together, the errors in the guilt phase were prejudicial, and appellant's convictions must be reversed.

The death judgment against appellant also must be evaluated in light of the cumulative effect of error. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) Moreover, the errors being considered cumulatively must include those from both the guilt and penalty phases of trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase]; *Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888 ["Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the later"].) Evidence which may otherwise not affect the guilt determination can have a prejudicial impact during the penalty trial. (See *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) The exclusion of critical defense evidence, the failure to properly limit the use of victim impact evidence, and the various instructional errors were prejudicial when considered cumulatively, and particularly so when considered in light of all the errors at both phases of the trial.

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case were harmless. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Williams* (1971) 22

Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 366; *People v. Pierce* (1979) 24 Cal.3d 199, 208.) Here, it certainly cannot be said that the errors had "no effect" on any juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Given the number and severity of the errors in this case, their cumulative effect was to deny appellant due process, a fair trial by jury, and fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The convictions and sentence of death must therefore be reversed.

19

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States is one of the few nations that regularly use the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 846-847 (conc. & dis. opn. of Harrison, J.).) As the Supreme Court of Canada recently explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death-penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth

Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[59] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty

[59] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (see Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital-sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. Appellant recognizes that this Court has previously rejected international-law claims directed at the death penalty in California. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human-rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, appellant requests that this Court reconsider its prior stance on this issue and, in the context of this case, find that appellant's death sentence violates international law. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky*, *supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn.).) Indeed, all nations of Western Europe – plus Canada,

Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of April 2006) at *<http://www.amnesty.org>* or *<http://www.deathpenaltyinfo.org>*.) Many other countries including almost all Eastern European, Central American, and South American nations, also have abolished the death penalty either completely or for ordinary crimes; Mexico abolished the death penalty for all crimes in 2005. (*Ibid.*)

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries, 1; see also *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment" as defined in the federal Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The

Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally-retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are

subject to law-of-nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence must therefore be set aside.

CONCLUSION

For the foregoing reasons, the entire judgment must be reversed.

DATED: December 13, 2006

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, rule 36(b)(2))

I, Kent Barkhurst, am the Deputy State Public Defender assigned to represent appellant in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 72,804 words in length.

DATED: December 13, 2006

KENT BARKHURST
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Timothy Russell* Cal. Supreme Ct. No. S075875

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing the same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
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Each said envelope was then, on December 13, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on December 13, 2006, at San Francisco, California.

____

DECLARANT