SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | ) | Calif. Supreme Court No. S166168 |
| Plaintiff and Respondent, | ) | Orange Co. Super. Ct. No. 03CF0441 |
| v. | ) | |
| MICHAEL A. LAMB, | ) | AUTOMATIC APPEAL |
| Defendant and Appellant. | ) | |

Orange County Superior Court Case No. S166168
The Hon. William R. Froeberg, Judge

SUPREME COURT
FILED

SEP - 5 2014

Frank A. McGuire Clerk

Deputy

# APPELLANT'S OPENING BRIEF

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Appeal under the California
Appellate Project's Independent
Case System

DEATH PENALTY

**TOPICAL INDEX**


INTRODUCTION 1

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 8

EVIDENCE PRESENTED BY THE PROSECUTION

A. The Concededly Prejudicial and Inflammatory Fox News Exposé of the PEN1 Gang, and Its Penchant for Drugs, Violence, and Weapons Was the Jury's Introduction to the Case. 8

B. Scott Miller Was Shot and Killed in Anaheim on the Night of March 8, 2002. 22

1. Miller was found dead in an alley after neighbors heard a loud bang. 22

2. Appellant was at an apartment near where Miller was killed sometime that night. 23

3. Evidence that appellant was at Freiwald's apartment the night Miller was killed. 27

4. A jailhouse informant claimed that appellant admitted killing Miller. 28

C. On March 11, 2002, Undercover Police Officers Chased Appellant and Rump in a Suspected Stolen Car; Appellant and Rump Abandoned the Car and Entered An Apartment Building Where Appellant Was Seen Firing One Shot Downward from the Balcony. 32

**TOPICAL INDEX (cont'd)**


1. Eyewitness testimony. 32

2. The prosecution's evidence relating to the 9 mm. gun, which was intended to prove premeditated attempted murder, was inconclusive. 37

D. Appellant's Jailhouse Conversations, Letters And Phone Calls. 40

E. Expert Gang-Related Testimony . 41

1. The Fox video was not the overriding factor in Miller's death. 41

2. The history and culture of white supremacist gangs in general and PEN1 in particular. 42

3. Expert opinion that appellant and Rump were active PEN1 gang members. 47

EVIDENCE PRESENTED BY THE DEFENSE

F. Testimony Relating to Miller's Murder. 48

1. Billy Joe Johnson testified that he alone killed Scott Miller. 48

2. Miller and Johnson were at Raphoon's party shortly before Miller was killed. 53

3. Expert testimony. 57

G. Defense to the Attempted Murder Charge. 58

## TOPICAL INDEX (cont'd)

PENALTY PHASE – AGGRAVATING EVIDENCE

INTRODUCTION 60

A. Factor (a) Evidence: Circumstances of the Capital Murder. 61

B. Factor (a) Evidence: Victim Impact Evidence. 62

C. Factor (b) Evidence: Prior Acts of Violence. 63

1. The Attempted Murder of Sergeant Helmick. 63

2. At age 19, appellant confronted a beachgoer wearing Doc Marten boots. 63

3. Appellant and two other inmates assaulted inmate Munding with their fists. 63

4. Appellant stabbed an inmate at Chino State Prison in 1999. 65

5. The alleged conspiracy to escape. 66

6. Shanks were found in appellant's cell in 2003, 2005, and 2006. 68

D. Factor (c) Evidence: Appellant Had Three Prior Minor Convictions. 71

**TOPICAL INDEX (cont'd)**


PENALTY PHASE – MITIGATING EVIDENCE 71

A. Appellant's Family Life. 71

1. The years in Cerritos. 73

2. The move to Dana Point. 75

3. The breakup of the family. 83

B. Expert testimony. 88

ARGUMENT

I. CONDUCTING A SECOND PENALTY PHASE TRIAL AFTER THE FIRST PENALTY PHASE JURY FAILED TO REACH A VERDICT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS 90

A. After Appellant's First Penalty Phase Jury Deadlocked 6/5/1 and a Mistrial Was Declared, Appellant Was Forced to Face A Second Penalty Phase Trial. 91

B. California's Statute Mandating Retrial Of the Penalty Phase of a Capital Trial Violates the Eighth Amendment Requirements That Punishment Conform to Evolving Community Standards and that the Penalty Determination In a Capital Trial Be an Individualized Decision. 92

**TOPICAL INDEX (cont'd)**


C. The California Statute Mandating a Second Penalty Phase Trial Is Vastly at Odds with Evolving Standards of Common Decency and Thus Violates the Eighth Amendment. 94

D. Retrial of the Penalty Phase Contravenes the Constitutional Requirement that Each Juror Must Make an Individualized Determination. 98

E. Appellant's Death Sentence Is In Violation Of Federal Due Process. 100

F. Conclusion. 103

II. THE ERRONEOUS ADMISSION OF EVIDENCE OF APPELLANT'S ALLEGED PARTICIPATION IN A CONSPIRACY TO SMUGGLE WEAPONS AND INSTRUMENTS OF ESCAPE INTO THE JAIL, AND TO ESCAPE FROM JAIL, EVIDENCE DEEMED INADMISSIBLE BY THE SAME JUDGE AT THE FIRST PENALTY TRIAL, VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL BY JURY AND A RELIABLE SENTENCING DETERMINATION 104

A. Summary of Facts Below 104

1. At the first penalty trial, the court deemed the prosecution's evidence insufficient of appellant's alleged conspiracy to be legally insufficient. 104

**TOPICAL INDEX (cont'd)**


2. After the first penalty jury failed to reach a verdict, the trial court did an about-face and ruled that the same evidence was admissible at the second penalty trial. 107

B. The Trial Court's Ruling at the First Penalty Trial Was Correct: There Was No Evidence Appellant Entered into Any Agreement to Smuggle Escape Weapons And/Or Instruments Of Escape into the Jail, or Any Agreement To Attempt to Escape from Jail. 109

1. Evidence of violent criminal activity is admissible under section 190.3(b) only if the evidence is sufficient to demonstrate to a rational trier of fact that the accused committed a violent crime. 109

2. An agreement to commit a crime is the essential element of a conspiracy. 111

3. The prosecution failed to establish evidence that appellant entered into an agreement to smuggle weapons into the jail and attempt to escape. 112

4. Even assuming arguendo the evidence was sufficient to infer an agreement, the evidence was insufficient to infer a violent escape attempt. 116

5. The trial court's rationale for changing its ruling fails on its own terms. 118

**TOPICAL INDEX (cont'd)**


D. The Erroneous Admission of Evidence of the Supposed Conspiracy to Smuggle Weapons and To Escape Was Clearly Prejudicial, Especially Given the Fact that the First Penalty Trial Failed To Reach a Verdict Where This Same Evidence Had Been Excluded. 121

III. THE ADMISSION OF EVIDENCE OF THE FOX VIDEO SHOWING INFLAMMATORY IMAGES AND HEARSAY STATEMENTS BY SCOTT MILLER, OTHER GANG MEMBERS, AND POLICE AND CORRECTIONAL OFFICERS AND DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, REQUIRING REVERSAL OF HIS CONVICTIONS FOR BOTH THE MARCH 8 AND THE MARCH 11 OFFENSES 124

A. The Inflammatory Fox Video Was Played for the Jury at Opening Statement at Both the Guilt and the Penalty Trials. 125

B. The Defense Objected to Admission of the Fox Video At Both the Guilt Trial and the Second Penalty Trial As Irrelevant, Prejudicial, and in Violation of Appellant's Federal Due Process and Fair Trial Rights. 138

C. The Fox Video Was So Extremely Inflammatory That It Created the Substantial Likelihood that the Jurors Would Use It For an Illegitimate Purpose. 144

D. The Fox Video Was Inadmissible Given Its Undeniable Prejudicial Impact and Its Lack Of Relevance to Show Either Appellant's Knowledge or His Motive to Kill Miller. 147

## TOPICAL INDEX (Cont'd)


1. The Fox video did not tend to show that appellant knew the PEN1 gang engaged in a pattern of criminal activity. 148

2. The Fox video did not tend to show appellant had a motive to kill Miller. 149

3. The case law relied on by the trial court does not support the admission of a videotape of a sensationalized television program. 152

4. Case law permitting videotape evidence of admissions and crime scenes does not apply to the facts of this case. 153

E. The Undisputed and Extremely Prejudicial Nature of The Fox Video Required Its Exclusion Even If It Was Marginally Relevant. 157

F. The Erroneous Admission of the Fox Video Requires Reversal of Appellant's Convictions. 159

1. Both the guilt and penalty phases of the trial were tainted by the presentation of the video in opening statements. 160

2. The prosecutor's reliance on the Fox video is an indication of prejudice. 163

3. Appellant's death sentence must be vacated. 164

**TOPICAL INDEX (cont'd)**


G. The Trial Court's Admonition Was Ineffectual And Does Not Redeem the Error or Erase The Prejudicial Impact of the Fox Video. 166

IV. THE EXCLUSION OF MITIGATING EVIDENCE OF APPELLANT'S MOTHER'S ABUSE AT THE HANDS OF HER FATHER AND TESTIMONY BY A NEIGHBOR AS TO HOW APPELLANT'S PARENTS BROKE HIS SPIRIT VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, THE RIGHT TO PRESENT A DEFENSE, AND PROTECTION AGAINST CRUEL AND UNUSUALPUNISHMENT, BECAUSE THE EXCLUDED EVIDENCE WAS DIRECTLY LINKED TO APPELLANT'S OWN CHARACTER AND THUS ADMISSIBLE UNDER UNITED STATES SUPREME COURT PRECEDENTS 171

A. The Trial Court Erroneously Refused to Permit Multi-Generational Mitigation Evidence That Provided Context for Evidence of Appellant's Mother's Alcoholism and Its Effect on Appellant. 172

B. The Eighth Amendment Requires Admission Of All Mitigating Evidence Relating to the Defendant's Background and Character. 173

C. Appellant Has a Constitutional Right to Present Multi-Generational Evidence of Family Dysfunction. 174

D. Due Process and an Even-Handed Application of The Rules of Evidence Required the Trial Court To Allow Admission of Appellant's Multi-Generational Mitigation Evidence. 177

E. The Trial Court Erroneously Excluded Classic Evidence of Appellant's Character When It Struck Testimony by Neighbor Bernard Cain That Appellant's Spirit Had Been Broken by His Parent's Treatment of Him. 179

F. The Exclusion of Relevant Mitigation Prejudiced Appellant. 181

PENALTY PHASE ISSUES RELATING TO PROSECUTORIAL AND JUDICIAL MISCONDUCT

V. THE PROSECUTORIAL MISCONDUCT AT PENALTY PHASE CROSS-EXAMINATION AND CLOSING ARGUMENT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND HIS PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT 183

A. The Prosecutor's Cross-examination of Johnson Included Attacks on Defense Counsels' Integrity, Accusations and Suggestions of Collusion; and Providing His Own Unsworn Testimony. 185

B. The Prosecutor's Penalty Phase Argument Was Replete With Improper Assertions, Accusations And Suggestions. 191

1. The prosecutor repeatedly attacked the integrity of defense counsel. 191

**TOPICAL INDEX (cont'd)**


2. The prosecutor repeatedly argued that defense wanted only "one juror" to vote against death, an attack on defense counsel's integrity that ascribed to defense counsel an improper motive and strategy of trying to take the jurors' focus away from the law and the evidence, and also implying that defense counsel did not believe in appellant's innocence of the crime or the propriety of a life rather than a death sentence. 196

3. The prosecutor repeatedly injected into the argument his personal beliefs and reactions to the evidence in a concerted pattern of improper vouching. 197

(a) The prosecutor's personal beliefs. 197

(b) Improper vouching. 200

4. The prosecutor's argument comparing appellant to Nazi war criminals and contrasting him with Nelson Mandela violated the trial court's ruling. 201

5. The prosecutor misstated the facts. 202

C. The Continuous Course of Improper Prosecutorial Argument Requires Reversal of Appellant's Sentence of Death. 203

**TOPICAL INDEX (cont'd)**


VI. THE TRIAL JUDGE COMMITTED JUDICIAL MISCONDUCT WHEN HE MADE COMMENTS MINIMIZING THE JURY'S RESPONSIBILITY IN DETERMINING PENALTY BY GIVING MISLEADING AND INCORRECT "STATISTICS" AS TO DEATH ROW INMATES REQUIRES REVERSAL OF APPELLANT'S SENTENCE OF DEATH 207

A. A Fair Trial in a Fair Tribunal Is a Basic Requirement of Federal Due Process and That Fairness Requires Not Only the Absence of Bias but Even the Probability of Unfairness. 207

B. The Judge's Comments to the Jurors During Voir Dire Amounted to Error Under *Caldwell v. Mississippi.* 208

C. The Judicial Misconduct Was Prejudicial. 214

JURY SELECTION ERROR

VII. THE TRIAL COURT'S ERRONEOUS GRANT OF A CHALLENGE TO CAUSE AT THE SECOND PENALTY TRIAL TO A PROSPECTIVE JUROR WHO WAS EQUIVOCAL OR CONFLICTED ABOUT THE DEATH PENALTY BUT WHO WAS ABLE TO CONSIDER ALL THE EVIDENCE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, DUE PROCESS AND EQUAL PROTECTION AND A RELIABLE SENTENCING DETERMINATION 216

A. The Removal of a Prospective Juror Who Was Not Shown to Be Substantially Impaired Requires Reversal Of Appellant's Penalty Trial. 216

**TOPICAL INDEX (cont'd)**


B. Prospective Juror 144 Agreed to Consider All the Facts "On the Fence" About the Death Penalty, and Only Said She Would Not Impose a Death Sentence When She Was Improperly Forced to Give a Yes or No Answer, Explaining That She Understood the Decision to be An Individualized Weighing Based on the Evidence Not A Forced Prejudging "Yes or No." 217

C. A Prospective Juror Can Be Excluded for Cause Only If She Is Unable to Follow the Law and Cannot Consider All Sentencing Alternatives. 220

D. Erroneous Cause Excusal of a Prospective Juror In Violation of Witherspoon and Witt Requires Reversal of the Death Sentence. 226

CLAIMS RELATING TO THE GANG SPECIAL CIRCUMSTANCE FINDING AND GUILT PHASE ERRORS

VIII. THIS COURT MUST STRIKE THE GANG-MURDER SPECIAL CIRCUMSTANCE FINDING, ON ITS FACE, AND AS APPLIED IN THIS CASE, AS UNCONSTITUTIONALLY VAGUE AND INSUFFICIENTLY NARROWING, IN VIOLATION OF FEDERAL AND STATE DUE PROCESS AND EQUAL PROTECTION GUARANTEES, AND THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT 227

A. Introduction to Argument. 227

B. The Lack of a Meaningful Distinction Between the Gang Special Circumstance and a First Degree Murder with a Gang Enhancement Renders the Special Circumstance Invalid in This Case. 228

**TOPICAL INDEX (cont'd)**


IX. APPELLANT'S CONVICTION FOR CONSPIRACY TO COMMIT MURDER SCOTT MILLER IS UNSUPPORTED BY THE EVIDENCE AND MUST BE VACATED AS VIOLATIVE OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS 233

A. Introduction to Argument. 233

B. The Prosecution Failed to Present Solid And Credible Evidence that Appellant Entered Into an Agreement to Murder. 236

C. The Prosecutor's Reliance on the Fox Video as Evidence of the Conspiracy in Urging the Jury to Convict Appellant of Conspiracy Is Further Indication that There Was No Solid and Substantial Evidence that Appellant Entered Into a Conspiracy with the Specific Intent to Kill Scott Miller. 243

D. Conclusion: Appellant's Conspiracy Conviction Must Be Vacated. 244

X. THE PROSECUTOR'S REPEATED IMPROPER ARGUMENTS TO THE JURY VIOLATED APPELLANT'S FEDERAL DUE PROCESS AND FAIR TRIAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS 245

A. Introduction to Argument. 245

B. The Prosecutor's Improper Arguments to the Jury Constituted a Course of Conduct that Deprived Appellant of a Fair Trial. 246

**TOPICAL INDEX (cont'd)**


1. The prosecutor improperly attacked defense counsels' integrity by telling the jurors that that the defense presentation was "not fair" and "not right" and that the defense was trying to fool the jurors. 246

2. The prosecutor improperly vouched for the strength of his evidence by arguing to the jury that based on his own personal experience the case against appellant was unusually strong and "not even close." 254

3. Conclusion. 256

C. The Continuous Course of Improper Prosecutorial Argument Requires Reversal of Appellant's Sentence of Death. 256

XI. THE TRIAL COURT'S REFUSAL TO SEVER THE ATTEMPTED MURDER CHARGE FROM THE CAPITAL MURDER CHARGE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL 260

A. Introduction to Argument. 260

B. The Trial Court Should Order Severance of Otherwise Joinable Offenses When Severance Is Necessary To Ensure the Defendant's Constitutional Rights To Due Process and a Fair Trial. 261

**TOPICAL INDEX (cont'd)**


C. Application of the Guidelines Used in Assessing The Need for Severance Demonstrates that the Joinder of the March 11 with the March 8 Offenses Violated Appellant's Due Process Rights. 262

1. Evidence of the March 11 attempted murder and the capital murder was not cross-admissible. 263

2. The inflammatory nature of the police shooting. 266

3. The spillover effect of the evidence of the police shooting likely influenced the jury on the outcome of the capital murder charge. 267

4. The March 8 offense was a capital charge. 267

5. Conclusion. 268

D. The Denial of Appellant's Severance Motion Prejudiced His Defense as to Both Sets of Offenses. 268

CLAIM RELATED TO THE ATTEMPTED MURDER OF A POLICE OFFICER

XII. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY ADMITTING INTO EVIDENCE AGAINST APPELLANT RUMP'S HEARSAY STATEMENT THAT HE THOUGHT THE DRIVER OF THE WHITE CAR WAS A PAROLE OFFICER 269

A. Procedural History. 269

**TOPICAL INDEX (cont'd)**


B. The Admission of Rump's Statement Against Appellant Violated Appellant's Confrontation Clause Rights Under The Sixth Amendment Because It Was a Testimonial Statement Used for Its Truth and Rump Was Unavailable For Cross-Examination. 271

1. Rump's Out-of-Court Statement Was Used Against Appellant for Its Truth. 271

2. The "shared motive" theory relied on by the trial court does not apply to the facts of this case. 276

3. The admission of Rump's statement violated *Aranda/Bruton*. 278

4. Rump's Statement Was Testimonial in Nature Because the Police Tape-Recorded Rump and Appellant For Purposes of Investigating Crime: Its Admission Against Appellant Violated His Confrontation Rights Under *Crawford*. 279

5. The Admission of Rump's Statement Also Violated Appellant's Federal Due Process Rights Because It Was Irrelevant To Appellant's State of Mind and Thus Deprived Appellant of a Fair Trial on The Attempted Murder Charge. 281

C. The Erroneous Admission of Rump's Statement Prejudiced Appellant's Defense to the Premeditated Attempted Murder Charge. 282

**TOPICAL INDEX (cont'd)**


XIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION 286

XIV. THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE 299

A. Current Empirical Studies Prove That the Death Qualification Process is Unconstitutional. 300

1. The statistical research since *Hovey*. 301

2. The factual basis of *Lockhart* is no longer sound. 303

a. Misinterpretation of the scientific data. 304

b. Incorrect legal observations. 305

c. The scientific evidence. 306

B. Data Regarding the Impact of Death Qualification on Jurors' Race, Gender, and Religion. 308

C. Prosecutorial Misuse of Death Qualification. 309

D. Death Qualification in California Violates the Eighth Amendment. 310

E. The Death-Qualification Process is Unconstitutional. 311

F. Death Qualification Violates the Right to a Jury Trial. 313

**TOPICAL INDEX (cont'd)**


G. Errors in Death Qualifying the Penalty Jury Requires Reversal of the Guilt Verdicts as Well. 315

H. Conclusion. 317

CONCLUSION 320

CERTIFICATE OF COMPLIANCE 321

CERTIFICATE OF SERVICE 322

## TABLE OF AUTHORITIES CITED

### FEDERAL CASES


*Abdul-Kabir v. Quarterman* (2007) 500 U.S. 233 174

*Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813 207

*Arizona v. Fulminante* (1991) 499 U.S. 279 103

*Atkins v. Virginia* (2002) 536 U.S. 304 90, 94, 96

*Bates v. Bell* (6th Cir. 2005) 402 F.3d 635 206

*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 261

*Berger v. United States* (1935) 295 U.S. 78 185, 190, 256

*Blakely v. Washington* (2004) 542 U.S. 296 288, 289

*Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011 163, 182

*Bruton v. United States* (1968) 391 U.S. 123 270, 278

*Buchanan v. Kentucky* (1987) 483 U.S. 402 299

*Burks v. United States* (1978) 437 U.S. 1 245

*Caldwell v. Mississippi* (1985) 472 U.S. 320 205, 211

*Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868 207-208

*Chapman v. California* (1967) 386 U.S. 18 121, 159, 181, 214, 256, 282

*Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047 212

*Crawford v. Washington* (2004) 541 U.S. 36 270, 280

*Cunningham v. California* (2007) 549 U.S. 270 287

*Darden v. Wainwright* (1986) 477 U.S. 168 189, 202

*Davis v. Georgia* (1976) 429 U.S. 122 280

*Davis v. Washington* (2006) 547 U.S. 813 320

*Donnelly v. DeChristoforo* (1974) 416 U.S. 637 184, 185, 204, 245-246, 256

*Eddings v. Oklahoma* (1982) 455 U.S. 104 173

*Estelle v. McGuire* (1991) 502 U.S. 62 124, 270, 282

*Ford v. Wainwright* (1986) 477 U.S. 399 96, 102

*Furman v. Georgia* (1972) 408 U.S. 238 93, 98, 228

*Godfrey v. Georgia* (1980) 446 U.S. 420 184, 228

*Goldsmith v. Witkowski* (4th Cir. 1992) 981 F.2d 697 168

*Gomez v. United States* (1989) 490 U.S. 858 312

*Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633 178

*Gray v. Mississippi* (1987) 481 U.S. 648 217, 227

*Green v. Georgia* (1979) 442 U.S. 95 179

*Gregg v. Georgia* (1976) 428 U.S. 153 99, 173, 210

*Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897 190

## TABLE OF AUTHORITIES CITED

### FEDERAL CASES


*Abdul-Kabir v. Quarterman* (2007) 500 U.S. 233 174

*Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813 207

*Arizona v. Fulminante* (1991) 499 U.S. 279 103

*Atkins v. Virginia* (2002) 536 U.S. 304 90, 94, 96

*Bates v. Bell* (6th Cir. 2005) 402 F.3d 635 206

*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 261

*Berger v. United States* (1935) 295 U.S. 78 185, 190, 256

*Blakely v. Washington* (2004) 542 U.S. 296 288, 289

*Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011 163, 182

*Bruton v. United States* (1968) 391 U.S. 123 270, 278

*Buchanan v. Kentucky* (1987) 483 U.S. 402 299

*Burks v. United States* (1978) 437 U.S. 1 245

*Caldwell v. Mississippi* (1985) 472 U.S. 320 205, 211

*Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868 207-208

*Chapman v. California* (1967) 386 U.S. 18 121, 159, 181, 214, 256, 282

*Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047 212

*Crawford v. Washington* (2004) 541 U.S. 36 270, 280

**TABLE OF AUTHORITIES CITED ( cont'd)**


| | |
|---|---|
| *Cunningham v. California* (2007) 549 U.S. 270 | 287 |
| *Darden v. Wainwright* (1986) 477 U.S. 168 | 189, 202 |
| *Davis v. Georgia* (1976) 429 U.S. 122 | 280 |
| *Davis v. Washington* (2006) 547 U.S. 813 | 320 |
| *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 | 184, 185, 204, 245-246, 256 |
| *Eddings v. Oklahoma* (1982) 455 U.S. 104 | 173 |
| *Estelle v. McGuire* (1991) 502 U.S. 62 | 124, 270, 282 |
| *Ford v. Wainwright* (1986) 477 U.S. 399 | 96, 102 |
| *Furman v. Georgia* (1972) 408 U.S. 238 | 93, 98, 228 |
| *Godfrey v. Georgia* (1980) 446 U.S. 420 | 184, 228 |
| *Goldsmith v. Witkowski* (4th Cir. 1992) 981 F.2d 697 | 168 |
| *Gomez v. United States* (1989) 490 U.S. 858 | 312 |
| *Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633 | 178 |
| *Gray v. Mississippi* (1987) 481 U.S. 648 | 217, 227 |
| *Green v. Georgia* (1979) 442 U.S. 95 | 179 |
| *Gregg v. Georgia* (1976) 428 U.S. 153 | 99, 173, 210 |
| *Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897 | 190 |

## TABLE OF AUTHORITIES CITED ( cont'd)


*In re Murchison* (1955) 349 U.S. 133 207

*Jackson v. Virginia* (1979) 443 U.S. 307 236

*Jamal v. Van DeKamp* (9th Cir. 1991) 926 F.2d 918 124

*Kansas v. Marsh* (2006) 548 U.S. 163 298

*Krulewitch v. United States* (1949) 336 U.S. 440 168

*Lockett v. Ohio* (1978) 438 U.S. 586 173

*Lockhart v. McCree* (1986) 476 U.S. 162 300, 305, 309-310 315, 319

*Maggio v. Williams* (1983) 464 U.S. 46 211

*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 281

*Mills v. Maryland* (1988) 486 U.S. 367 99, 100

*Mistretta v. United States* (1989) 488 U.S. 361 208

*Monge v. California* (1998) 524 U.S. 721 103, 121, 125, 184

*Mu'min v. Virginia* (1991) 500 U.S. 415 217

*Panzavecchia v. Wainwright* (5th Cir. Unit B 1981) 658 F.2d 337 261

*Parker v. Matthews* (2012) __ U.S. ___ [132 S.Ct. 2148] 193, 249

*Penry v. Lynaugh* (1989) 492 U.S. 302 94

*Porter v. McCollum* (2009) 558 U.S. 30 174

**TABLE OF AUTHORITIES CITED ( cont'd)**


| | |
|---|---|
| *Powers v. Ohio* (1991) 499 U.S. 400 | 312 |
| *Pulley v. Harris* (1984) 465 U.S. 37 | 298 |
| *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261 | 211 |
| *Ring v. Arizona* (2002) 536 U.S. 584 | 287, 288, 292 |
| *Roper v. Simmons* (2005) 543 U.S. 551 | 96 |
| *Rump v. McEwen* (C.D.Cal. 2011) U.S. Dist.Ct. LEXIS 153605 | 238 |
| *Saffle v. Parks* (1990) 494 U.S. 484 | 98 |
| *Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097 | 191, 252 |
| *Taylor v. Kentucky* (1978) 436 U.S. 478 | 123, 164, 207, 215 260, 285 |
| *Taylor v. Louisiana* (1975) 419 U.S. 522 | 313, 314 |
| *Tennard v. Dretke* (2004) 524 U.S. 274 | 174 |
| *Tennessee v. Street* (1985) 471 U.S. 409 | 276 |
| *Tison v. Arizona* (1987) 481 U.S. 137 | 229 |
| *Trop v. Dulles* (1958) 356 U.S. 86 | 90, 94, 95 |
| *United States v. Booker* (2005) 543 U.S. 220 | 286-87 |
| *United States v. Brooks* (9th Cir. 2007) 508 F.3d 1205 | 200 |
| *United States v. Carolene Products* (1938) 304 U.S. 144 | 304 |
| *United States v. Francis* (6th Cir. 1999) 170 F.3d 546 | 186 |

## TABLE OF AUTHORITIES CITED ( cont'd)


| | |
|---|---|
| *United States v. Frederick* (9th Cir. 1995) 78 F.3d 1370 | 123, 260 |
| *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050 | 168, 199, 255 |
| *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315 | 185, 245 |
| *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179 | 165, 166 |
| *United States v. Rodrigues* (1998 U.S.App. LEXIS 36919) as amended at (9th Cir. 1999) 170 F.3d 881 | 258 |
| *United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199 | 199, 205 |
| *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799 | 168 |
| *Utrecht v. Brown* (2007) 551 U.S. 1 | 220 |
| *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355 | 281-282 |
| *Wardius v. Oregon* (1973) 412 U.S. 470 | 170 |
| *Washington v. Texas* (1967) 388 U.S. 14 | 170-171 |
| *Wainwright v. Witt* (1985) 469 U.S. 412 | 221, 227 |
| *Webb v. Texas* (1972) 409 U.S. 95 | 179 |
| *Wiggins v. Smith* (2003) 539 U.S. 510 | 174, 175 |
| *Williams v. Taylor* (2000) 529 U.S. 362 | 174 |
| *Witherspoon* v. *Illinois* (1968) 391 U.S. 510 | 220, 305, 315, 319 |
| *Woodson v. North Carolina* (1976) 428 U.S. 280 | 99, 103, 173, 184 204, 210, 310-311 |

*Yohn v. Love* (3d Cir. 1996) 76 F.3d 508 284

**STATE CASES**

*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933 262

*Harris v. Superior Court* (1992) 3 Cal.App.4th 661 145

*Hovey v. Superior Court* (1980) 28 Cal.3d 1 300, 316

*In re Brian J.* (2007) 150 Cal.App.4th 97 197, 266

*In re Sassounian* (1995) 9 Cal.4th 535 242

*In re Scott* (2003) 29 Cal.4th 783 176

*People v. Abel* (2012) 53 Cal. 4th 891 212

*People v. Albarran* (2007) 149 Cal.App.4th 214 124

*People v. Alvarez* (1996) 14 Cal.4th 155 262

*People v. Anzalone* (2013) 56 Cal.4th 545 103

*People v. Aranda* (1965) 63 Cal.2d 518 270, 272

*People v. Archer* (2000) 82 Cal.App.4th 1380 279

*People v. Arias* (1996) 13 Cal.4th 92 268

*People v. Ashmus* (1991) 54 Cal.3d 932 316

*People v. Babbitt* (1988) 45 Cal.3d 660 147

## TABLE OF AUTHORITIES CITED ( cont'd)


*People v. Bacigalupo* (1993) 6 Cal.4th 457 292

*People v. Bain* (1971) 5 Cal.3d 839 188

*People v. Bean* (1988) 46 Cal.3d 919 262

*People v. Boyd* (1985) 38 Cal.3d 762 110, 117, 120

*People v. Boyde* (1988) 46 Cal.3d 212 118, 119, 120

*People v. Bracamonte* (1981) 119 Cal.App.3d 644 168

*People v. Butler* (2009) 46 Cal.4th 847 271

*People v. Carr* (2006) 190 Cal.App. 4th 475 231

*People v. Carrington* (2009) 47 Cal.4th 145 293-95

*People v. Catlin* (2001) 26 Cal.4th 81 233, 295

*People v. Champion* (1995) 9 Cal.4th 879 157, 212

*People v. Clair* (1992) 2 Cal.4th 629 110

*People v. Collins* (2010) 49 Cal.4th 175 189, 202, 288-89 292-97

*People v. Cox* (1991) 53 Cal.3d 618 157

*People v. Cummings* (1993) 4 Cal.4th 1233 263

*People v. D'Arcy* (2010) 48 Cal.4th 257 289, 291-293, 296

*People v. Davis* (2005) 36 Cal.4th 510 189, 202

## TABLE OF AUTHORITIES CITED ( cont'd)


| | |
|---|---|
| *People v. Day* (1992) 2 Cal.App.4th 405 | 123 |
| *People v. Diaz* (2014) 227 Cal.App.4th 362 | 144-147, 161, 169 |
| *People v. Drolet* (1973) 30 Cal.App.3d 207 | 112 |
| *People v. Duarte* (2000) 24 Cal.4th 603 | 271 |
| *People v. Dykes* (2009) 46 Cal.4th 731 | 204-205 |
| *People v. Ewoldt* (1994) 7 Cal.4th 380 | 264, 265 |
| *People v. Fields* (1983) 35 Cal.3d 329 | 300-301, 316 |
| *People v. Frazier* (2001) 89 Cal.App.4th 30 | 122 |
| *People v. Fuentes* (1986) 183 Cal.App.3d 444 | 122, 181 |
| *People v. Gallego* (1990) 52 Cal.3d 115 | 102, 120, 122 |
| *People v. Gionis* (1995) 9 Cal.4th 1196 | 191, 252 |
| *People v. Grant* (2003) 113 Cal.App.4th 579 | 269 |
| *People v. Green* (1980) 27 Cal.3d 1 | 259 |
| *People v. Greenberger* (1997) 58 Cal.App.4th 298 | 272, 273 |
| *People v. Guzman* (2000) 80 Cal.App.4th 1282 | 163, 164, 258 |
| *People v. Harris* (2005) 37 Cal.4th 310 | 154, 156 |
| *People v. Hawthorne* (1992) 4 Cal.4th 43 | 290 |

## TABLE OF AUTHORITIES CITED ( cont'd)


*People v. Herrera* (2010) 49 Cal.4th 613 230

*People v. Herrera* (1999) 70 Cal.App.4th 1456 236

*People v. Herring* (1993) 20 Cal.App.4th 1066 191, 252

*People v. Hidalgo* (1947) 78 Cal.App.2d 926 189

*People v. Hill* (1998) 17 Cal.4th 800 123, 164, 183, 187-188, 191 204, 206, 215, 246, 252, 255-257, 260, 285

*People v. Hill* (1995) 34 Cal.App.4th 727 263

*People v. Hines* (1997) 15 Cal.4th 997 212

*People v. Hole* (1983) 139 Cal.App.3d 431 276

*People v. Homick* (2013) 55 Cal.4th 816 245

*People v. Humphrey* (1996) Cal.4th 1073 123

*People v. Johnson* (2013) 57 Cal.4th 250 111

*People v. Jones* (1997) 15 Cal.4th 119 191

*People v. Kasim* (1997) 56 Cal.App.4th 1360 185, 245

*People v. Kelly* (2007) 42 Cal.4th 763 227

*People v. Killebrew* (2002) 103 Cal.App.4th 644 114, 116, 165

*People v. Kirkes* (1952) 39 Cal.2d 719 188-189

*People v. Lancaster* (2007) 41 Cal.4th 50 117

**TABLE OF AUTHORITIES CITED ( cont'd)**


| | |
|---|---|
| *People v. Laursen* (1968) 264 Cal.App.2d 932 | 168 |
| *People v. Lee* (2011) 51 Cal.4th 620 | 236 |
| *People v. Lewis & Oliver* (2006) 39 Cal.4th 970 | 180 |
| *People v. Lindsey* (1988) 205 Cal.App.3d 112 | 205, 284 |
| *People v. Lightsey* (2012) 54 Cal.4th 668 | 116 |
| *People v. Livingston* (2012) 53 Cal.4th 1145 | 280 |
| *People v. Lucero* (2000) 23 Cal.4th 692 | 212 |
| *People v. Martinez* (2010) 47 Cal.4th 911 | 257 |
| *People v. Martinez* (1984) 36 Cal.3d 816 | 122, 181 |
| *People v. Mason* (1991) 52 Cal.3d 909 | 119, 110 |
| *People v. McWhorter* (2009) 47 Cal.4th 318 | 286, 288, 294 |
| *People v. Mejia* (2013) 211 Cal.App.4th 586 | 231 |
| *People v. Mendoza* (2000) 24 Cal.4th 130 | 212, 288, 295 |
| *People v. Mil* (2012) 53 Cal.4th 400 | 283 |

*People v. Mills* (2010) 48 Cal.4th 158 212, 288, 290, 292, 293, 296

*People v. Mejia* (2013) 211 Cal.App.4th 586 231

*People v. Minifie* (1996) 13 Cal.4th 1055 163, 182

*People v. Moore* (2011) 51 Cal.4th 1104 110, 117

*People v. Morales* (2001) 25 Cal.4th 34 259

*People v. Morris* (1988) 46 Cal.3d 1 242

*People v. Nolan* (1932) 126 Cal. App. 623 189

*People v. Osband* (1996) 13 Cal.4th 622 268

*People v. Phillips* (1985) 41 Cal.3d 29 108, 110

*People v. Powers-Monachello* (2010) 189 Cal.App.4th 400 114

*People v. Ramos* (1986) 37 Cal. 3d 136 211

*People v. Ray* (1996) 13 Cal.4th 313 290

*People v. Riggs* (2008) 44 Cal.4th 248 153, 154, 156

*People v. Samayoa* (1997) 15 Cal.4th 795 246

*People v. Sandoval* (1992) 4 Cal.4th 155 263

*People v. Scheid* (1997) 16 Cal.4th 1 142, 152

*People v. Schmeck* (2005) 37 Cal.3d 240 286, 288

*People v. Scott* (2011) 52 Cal.4th 452 157

## TABLE OF AUTHORITIES CITED ( cont'd)


| | |
|---|---|
| *People v. Stewart* (2004) 33 Cal.4th 425 | 222, 320 |
| *People v. Sturm* (2006) 37 Cal.4th 1218 | 211, 212 |
| *People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12 | 236, 237 |
| *People v. Taylor* (2010) 48 Cal.4th 574 | 94, 287, 291-94, 296-297 |
| *People v. Thomas* (2012) 54 Cal.4th 908 | 177 |
| *People v. Thompson* (2010) 49 Cal.4th 79 | 293-95, 297 |
| *People v. Tully* (2012) 54 Cal.4th 952 | 116 |
| *People v. Turner* (1990) 50 Cal.3d 668 | 142, 152 |
| *People v. Vance* (2010) 188 Cal.App.4th 1182 | 257 |
| *People v. Vargas* (1973) 9 Cal.3d 470 | 205, 284 |
| *People v. Watson* (1956) 46 Cal.2d 818 | 164 |
| *People v. Welch* (1999) 20 Cal.4th 701 | 212 |
| *People v. Whalen* (2013) 56 Cal.4th 1 | 212, 227 |
| *People v. Williams* (1997) 16 Cal.4th 153 | 197 |
| *Raven v. Deukmejian* (1990) 52 Cal.3d 336 | 304 |
| *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672 | 92 |
| *Williams v. Superior Court* (1984) 36 Cal.3d 441 | 261-262 |

## TABLE OF AUTHORITIES CITED ( cont'd)

**CALIFORNIA STATUTES**


| | |
|---|---|
| Evid. Code, section 210 | 147 |
| Evid. Code, section 352 | 140, 269 |
| Evid. Code, section 764 | 234 |
| Evid. Code, section 1101 | 263 |
| Evid. Code, section 1200 | 271 |
| Evid. Code, section 1230 | 271, 272 |
| Pen. Code, section 186.22 | 5, 229 |
| Pen. Code, section 187 | 4-5, 229 |
| Pen. Code, section 190.2 | 4, 229, 232 |
| Pen. Code, section 190.3 | passim |
| Pen. Code, section 664 | 5 |
| Pen. Code, section 667 | 4 |
| Pen. Code, section 667.5 | 6 |
| Pen. Code, section 954 | 261 |
| Pen. Code, section 1118.1 | 234 |
| Pen. Code, section 1149 | 93 |
| Pen. Code, section 12021 | 4-5 |

Pen. Code, section 12021.1 4

Pen. Code, section 12022.53 5

Pen. Code, section 12031 4

**FOREIGN STATUTES**

18 U.S.C.A. section 3593(3) (West Supp. 1995) 97

21 USCA section 848(1) (West Supp. 1995) 97

A.R.S. §13-752(K) 97

Ala. Code, § 13A-5-46(g)(2009) 92, 97

Ark. Stat. Ann. § 5-4-603(c) (1993) 97

Col. Rev. Stat. § 18-1.3-1201(2)(b)(II)(d) (2003) 97

Del. Code Ann., tit.11, § 4209 (c)(3)(b)(1) (2009) 92, 97

Fla. Stat.Ann. 921.141(2) (2009) 92, 97

Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994) 97

Id. Code § 19-2512(7)(c) (2003) 97

Ind. Code Ann. § 35-30-2-9(f) (2009) 92

Kan. Stat. Ann. § 21-4624(e) (Supp.1994) 97

La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995) 97

Miss. Code Ann. § 99-19-103 (1994) 97

## TABLE OF AUTHORITIES CITED ( cont'd)


| | |
|---|---|
| Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995) | 92, 97 |
| NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994) | 97 |
| Nev. Rev. Stat. § 175.556 (2003) | 97 |
| Nev. Rev. Stat. Ann. § 175.556(1) (2009) | 92 |
| NC Gen. Stat. § 15A-2000(b) (Supp. 1994) | 97 |
| Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993) | 97 |
| Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995) | 97 |
| Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001) | 97 |
| Pa. Stat. Ann. tit. 42, § 9711(c)(I)(v) Purdon Supp. 1995) | 97 |
| SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995) | 97 |
| SD Codified Laws Ann. §§ 23A-27A-4 (1988) | 97 |
| Tenn. Code Ann. § 39-13-204(h) (1991) | 97 |
| Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995) | 97 |
| Utah Code Ann. § 76-3-207(4) (1995) | 97 |
| Va. Code Ann. § 19.2-264.4 (1990) | 97 |
| Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995) | 97 |
| Wyo. Stat. § 6-2-102(e) (Supp. 1994) | 97 |

## TABLE OF AUTHORITIES CITED ( cont'd)

**CONSTITUTIONAL PROVISIONS**


U.S. Const., 5th, 6th, 8th and 14th Amd. passim

Cal.Const., art. I, section 1, 7, 15, 16 and 17 passim


**TREATISES AND LAW REVIEW ARTICLES**


Bowers, W. & Foglia, W., Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing (2003) 39 Crim. Law. Bull. 51

Bowers, W., The Capital Jury Project: Rationale, Design, and Preview of Early Findings, (1995) 70 Ind. L. J. 1043 306, 307

Byrne, *Lockhart v. McCree*: Conviction-Proneness and the Constitutionality of Death-Qualified Juries (1986) 36 Cath. U. L. Rev. 287 303

Garvey, The Overproduction of Death (2000) 100 Colum. L. Rev. 2030 309, 314

Haney, et al., "Modern" Death Qualification: New Data on Its Biasing Effects (1994) 18 Law & Human Behavior 619 302

Kadane, After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors (1984) 8 Law & Human Behavior 115 301

Kadane, Juries Hearing Death Penalty Cases: Statistical

Analysis of a Legal Procedure (1984)
78 J. American Statistical Assn. 544 301

Liptak, Facing a Jury of (Some of) One's Peers,
New York Times (July 20, 2003), Section 4 314

Moar, Death Qualified Juries in Capital Cases:
The Supreme Court's Decision in *Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369 303, 304, 308

Moller, Death-Qualified Juries Are the
'Conscience of the Community'? L.A. Daily Journal,
(May 31, 1988) p. 4 314

Noll et.al, "The Cumulative Burden Borne by Offspring
Whose Mothers Were Sexually Abused as Children,"
PMC U.S. National Library of Medicine, National Institute
of Health (May 18, 2011)
at <ncbi.nlm.nih.gov/pmc/ articles/ PMC3096869/> 176

Pears & Capaldi, "Intergenerational Transmission of Abuse,"
Child Abuse & Neglect (2001-Elsevier) Vol. 25, Issue 11,
Nov. 2001 at <http://www.sciencedirect.com/science/article/ pii/
S0145213401002861><http:www.deathpenaltyinfo.org/
race-death-row-inmates-executed-1976#inmaterace> 176

Peters, Constitutional Law: Does "Death
Qualification" Spell Death for the Capital Defendant's
Constitutional Right to an Impartial Jury?
(1987) 26 Washburn LJ. 382 306

Rosenburg, Deadliest D.A. (1995)
N.Y. Times Magazine (July 16, 1995) 309

Rozelle, "The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation" (Fall 2006) 38 Ariz. St. L. J. 769 307

Seltzer et al., The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example (1986) 29 How. LJ. 571 302

Smith, Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries (1989) 18 Sw. U. L. Rev. 493 303, 305

Thompson, Death Qualification After Wainwright v. Witt and Lockhart v. McCree (1989) 13 Law & Human Behavior 185 303

Witkin, 1 *California Criminal Law* (3rd Ed. 2000) 111

ABA Guidelines for Appointment and Performance of Counsel In Death Penalty Cases (1989) Commentary, Guideline 10.11 175

**MISCELLANEOUS**

Ballot Pamp., Primary Elec. (Mar. 7, 2000) 232

<http://www.programmerinterview.com/index.pho/American-vocabulary> 186

http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#inmaterace 209

| | |
|---|---|
| <http://www.scientificamerican.com/article/many-prisoners-on-death-row-are-wrongfully-convicted [reporting study by Professor Samuel Gross et.al. from the University of Michigan | |
| <http://www.sfgate.com/bayarea/article/AK-47-cop-killer-gets-life-2600660.php> | 266 |
| <http://en.wikipedia.org/wiki/Sensationalism | 168 |
| urban dictionary.com | 192 |
| <www.buzzle.com/articles/effects-of-media-sensationalism.htm | 168 |
| <www.brainyquote.com/quotes/quotes/o/oliverwend 135058.htm> | 175 |

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA, | ) | Calif. Supreme Court No. S166168 |
| Plaintiff and Respondent, | ) | Orange Co. Super. Ct. No. 03CF0441 |
| v. | ) | |
| MICHAEL A. LAMB, | ) | AUTOMATIC APPEAL |
| Defendant and Appellant. | ) | |

**INTRODUCTION**

Scott Miller was killed by a single gunshot to the back of his head on the night of March 8, 2002. There were no eyewitnesses and no forensic evidence linking appellant to the murder. The defense presented evidence that Billy Joe Johnson had killed Miller.

Three days later, undercover police officers chased appellant and his former co-defendant Rump in a reportedly stolen car. After a wild pursuit, appellant and Rump ditched the car and ran to the balcony of an apartment building, followed by the undercover officers. The officers heard a single gunshot, and an officer in a surveillance helicopter saw a

muzzle flash. Appellant was convicted of attempted murder. He defended on the ground that he did not know his pursuers were police officers.

The prosecution used appellant's status as a gang member to supply the missing elements of the crimes for which he was convicted. Most significantly, the prosecution played in opening statement of both the guilt and penalty phases of the trial a sensationalized two-part television "exposé" of appellant's gang PEN1,[1] a broadcast that prominently featured victim Scott Miller.

The prosecution proceeded on the theory that appellant killed Miller under orders from gang leaders in retaliation appearing in the broadcast over a year before his death – even though the prosecution presented no evidence that appellant had seen the Fox video or that he had been ordered by gang leaders to kill Miller.

Consequently, the Fox video was of no or marginal relevance. On the other hand, presenting the Fox video evidence to the jurors was

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[1] PEN1 is pronounced "peen-eye." PEN1 was also known as "PDS" for PEN1 Death Squad. (16RT 3183.)

extremely and indisputably prejudicial, as demonstrated by the trial court's response after viewing the video prior to trial:

> "We've got cross burnings. We've got swastikas. We've got attack dogs. We've got methamphetamine. We've got people being accused of murder. We've got allegations of association with Nazi Lowriders, with Aryan Brothers. How much more inflammatory could it get? I suppose if we had them lynching some individual it might have been more inflammatory, but I don't know how it could have been otherwise." (2RT 455-56.)

In short, the Fox video, with its graphic and unforgettable images of violence, race-baiting, guns, drugs and neo-Nazism, transformed a weak case of identity in the Miller killing and a weak case of knowledge and intent in the attempted murder charge into convictions on all counts.

The erroneous admission of the Fox video (Arg. III, pages 124-170, below), together with other erroneous rulings, deprived appellant of his federal constitutional rights to due process, a fair trial, and a reliable sentencing decision. Most notably, after the first penalty jury failed to reach a verdict and remained split at 6/5/1, the trial court abruptly reversed itself and admitted in the second penalty trial evidence of appellant's supposed jail escape attempt – even though in the first penalty

trial the court had found the identical evidence constitutionally insufficient. (See Arg. II, pages 104-123 below).

## STATEMENT OF THE CASE

Third Amended Information number 03CF0441 was filed in Orange County Superior Court on May 14, 2004.[2] The information charged appellant and former codefendant Jacob Rump with the following crimes alleged to have occurred on March 8, 2002, in Anaheim, California:

Count 1: conspiracy to murder Scott Miller, in violation of Penal Code[3] section 187(a);

Count 2: special circumstance gang murder, in violation of sections 187(1) and 190.2(a)(22);

Counts 3-4: felon in possession as a firearm, as to appellant, and Rump, respectively, in violation of section 12021(a)(1) and 12021.1(b);

Count 5: carrying a gun by an active gang member, in violation of section 12031(a)(1) and (a)(2)(C);

---

[2] The initial capital murder information was filed on November 10, 2003. On March 7, 2004, the second amended consolidated information was filed, consolidating the capital murder charges (counts one to six) from March 8, 2002 with the attempted murder charges (counts seven, eight and 10) from March 11, 2002. (3CT 443, 664-52, 669-77.)

[3] All statutory references are to the Penal Code, unless specified otherwise.

Count 6: active participation in a street gang, in violation of 186.22(a).

The following counts charging appellant and Rump were initially filed before, but subsequently consolidated with, the special circumstance murder information, and were alleged to have occurred on March 11, 2002, three days after Miller's murder:[4]

Count 7: the premeditated and deliberate attempted murder of a peace officer, Sergeant Michael Helmick, in violation of sections 187 and 664, subd. (a)(e)(f);

Counts 8 & 10: felon in possession of a firearm in violation of section 12021(a)(1) (appellant only); violent felon in possession of a firearm in violation of section 12021.1(a) (Rump only);

Count 9: active participation in a street gang, in violation of section 186.22(a).

The prosecution alleged gang enhancements pursuant to section 186.22(b)(1)(A) as to Counts 1-8 and 10; and a section 12022.53(e)(1) gun enhancement was alleged against appellant on counts 1 and 2; also alleged against appellant were two prior prison term enhancements under

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[4] See 3CT 644-52 and 669-77, consolidating Information 02NF0788 with the capital murder counts.

section 667.5(b) for prior convictions of burglary and auto theft.[5] (3CT 531-38.)

Joint jury trial began on May 3, 2007. (5CT 1169.) On July 2, 2007, after five days of deliberations, the jury returned verdicts of guilty on counts one (conspiracy to murder, with a true finding on the gang allegation), eight (felon in possession of a firearm) and nine (active gang participation). (6CT 1437-39.) Deliberations continued that same day after one juror was replaced for medical reasons, and on July 10, after six-and-a-half more days of deliberations, the jury returned verdicts of guilty on counts two (first degree murder), three (felon in possession of a firearm), five (gang member carrying a firearm), six (active gang participation), and seven (premeditated attempted murder). The jury also returned true findings on the personal use of a firearm allegation attached to count one; the gang special circumstance allegation; the gang enhancement and the intentional personal discharge of a firearm attached to count two; the gang allegations attached to counts three, five, and

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[5] Various prior serious felony convictions and prior prison terms were alleged against Rump as well.

seven; and the intentional and personal discharge of a firearm attached to count seven. (8CT 1899-1903; 8CT 1843-61 [verdict forms].)[6]

The first penalty trial began on July 12, 2007. (8CT 1915.) On July 31, 2007, after more than two days of deliberations, the jury remained "static" and almost evenly split as to penalty, and a mistrial was declared. (8CT 2094-95; 28RT 5675.)

The second penalty trial began on April 29, 2008, and on June 11, 2008, after three days of deliberations, the jury returned a death verdict. (10CT 2586.)

On August 22, 2008, appellant was sentenced to death for the special circumstance murder; the other counts were stricken for sentencing purposes only. (10CT 2644.) The court denied appellant's motion to reduce restitution, and imposed a $10,000 restitution fine; restitution in the amount of $6541.24 for the victims was imposed, jointly

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[6] Rump was convicted of special circumstance murder in the joint trial, but was not charged with capital murder. He was sentenced to LWOP. (*People v. Rump*, 2009 Cal.App. Unpub. LEXIS 8388].)

and severally, with Rump's obligation. (10CT 2645, 2657-58.) This appeal is automatic.

## STATEMENT OF FACTS

### EVIDENCE PRESENTED BY THE PROSECUTION

#### A. The Concededly Prejudicial and Inflammatory Fox News Exposé of the PEN1 Gang, and Its Penchant for Drugs, Violence, and Weapons Was the Jury's Introduction to the Case.

Appellant begins his summary of the evidence, as did the prosecutor at trial, with a Fox news broadcast, touted as an "exposé" of the PEN1 gang. The broadcast aired as a two-part special February 20 and 21, 2001, over a year before Miller's death. The prosecutor was allowed to play the broadcast in his opening statement and the recording was admitted into evidence. (16RT 3127; Exh. 231].)

The video was introduced by two anchorpersons, and contained interviews with Scott Miller,[7] other PEN1 gang members (but not appellant), and correctional and police officers. In addition, numerous

---

[7] It was stipulated that Scott Miller was the man in the video wearing the football jersey and brass knuckles, who addressed his pit bull as "Tank," and who talked about selling methamphetamine and said that snitches die. (2RT 448.)

highly inflammatory images were displayed, including burning swastikas, gang members shooting at a target accompanied by a voice "F--- that N---; various weapons being loaded and fired, attack dogs, burned out meth labs, gang members smoking and preparing to sell methamphetamine, gang members tattooed with swastikas, Nazi salutes, mug shots, and an alleged gang victim in a hospital bed attached to monitors.

The transcript[8] of the Fox video is as follows:[9]

Anchor: They call themselves Public Enemy number one or PEN1, and the state Dept. of Corrections calls them an emerging public threat. Chris Blatchford [hereafter "Rptr"] is here to expose this group for the first time on TV. Chris.

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[8] The transcript reproduced here is based on the video admitted into evidence as Exhibit 231 [guilt trial] and Exhibit 133 [penalty retrial] and Court Exhibit 6. Although the court stated that a transcript would be provided to the jury (2RT 267), there was no transcript admitted into evidence as an exhibit. The prosecutor in this case provided a transcript to appellate counsel, and that is the transcript reproduced here, except that appellate counsel has added in brackets images displayed before, or superimposed over, the spoken voices (unless the image is of a reporter or anchorperson). Appellate counsel will request transmission of the exhibit to this Court when briefing is completed.

[9] The words spoken by the anchorpersons and reporters are set out without quotation marks. Statements made by Scott Miller, other gang members and police and correctional officers are contained within quotation marks.

Rptr: Also known as the PEN1 Death Squad, law enforcement intelligence says the gang is increasing recruitment efforts in the ranks of white supremacy skinheads.
And as we see in this undercover report, the PEN1 is making a push for power in prison, but also out on the streets.
[IMAGE OF SCOTT MILLER HARNESSING PITBULL]
This dog's owner [Scott Miller] belongs to a group so taken with violence --

Scott Miller: "His name's Hitman. Hitman Tank."

Rptr: -- he jokes even his pitbull carries a sawed off shotgun. [IMAGE OF THREE PITBULLS BARKING AND FIGHTING] But later seeing the dog in action, it's arguable Tank doesn't need a weapon. He is one.

Scott Miller: "If I don't have a gat [gun] and start bombing on someone my dog locks on you too. It's a little teamwork. Good boy Tank."

Rptr: [IMAGE OF MILLER LOADING A REVOLVER] And as night falls in this remote area near Big Bear –

Scott Miller: "Myself I have over 300 guns."

Rptr: -- the tattooed hands of Tank's owner ready a .38 revolver -- [IMAGE OF MILLER'S TATTOOED ARMS HOLDING GUN]

Scott Miller: "Ain't no love."

Rptr: [IMAGE OF MAN SHOOTING AT TARGET]-- quickly uses it to demonstrate his murderous methods.

He is a shot caller in a gang called Public Enemy No. 1, mostly known as PEN1, sometimes referred to as PDS, short for the

PEN1 Death Squad, ready to kill enemies and snitches.
[IMAGES OF PEN1, PDS AND SWASTIKA TATTOOS]

Scott Miller: [IMAGE OF MILLER LOADING AND FIRING SHOTGUN]

"They'll probably end up with one of these in their heads. 16 gauge right here. I guarantee you won't get up if I blast you, you know."

Rptr: [IMAGES OF GRAFFITTI FEATURING OF PEN1, DEATH SQUAD, RUDIMENTARY PEN1 "POPE ADRIAN 37TH PSYCHIATRIC"]

As far as we can determine, PEN1 started in Long Beach about 1986, a small group of teenagers stealing their name from a hard core punk rock band called Rudimentary PEN1.

PEN1 member
Brody Davis: [IMAGE OF BRODY DAVIS AT TABLE IN INTERVIEW ROOM]
"Rudimentary PEN1, that's how PEN1 started."

Rptr: This PEN1 Member in a police tape obtained by Fox News remembers the beginning.

Davis: "We were kids. I mean we started it as kids. We were all punk rockers at Disneyland."

Rptr: [IMAGE OF DAVIS WITH HATE, PEN1, AND SWASTIKA AND SKULL TATTOOS] He is Brody Davis, a parolee who has done time for intimidating a witness. A far cry from Disneyland, he and his PEN1 brothers put down roots in the white supremacist skinhead movement [IMAGE OF GANG MEMBERS GIVING NAZI SALUTES AND TATTOOED MEN WITH BLACKED OUT EYES MAKING GANG SIGNS], fertilized by hate,

still blossoming into racist anger. [IMAGE OF THREE TATTOOED MEN MAKING HEIL HITLER SALUTES]

[SOUND OF GUNSHOTS AND TWO TATTOOED MEN SHOOTING AT TARGET]

"F--- that N-----."

Rptr: [TWO GROUP PHOTOS OF GANG MEMBERS WITH THEIR EYES BLACKED OUT]

By the early 90's PEN1 had moved to Orange County which became its main stomping ground. Anaheim became a familiar haunt.

[IMAGE OF DETECTIVE MILLER] Det. Tim Miller remembers them for auto theft, burglaries and drug activity.

Detective Tim Miller: "They were all into dope, uh, you know using methamphetamine was, was really the big thing, the drug of choice."

Scott Miller: [IMAGE OF BRASS KNUCKLES, A POLICE SCANNER, AND DRUGS AND DRUG PARAPHERNALIA ON A TABLE]

"About 7 grams."

Rptr: Now the drug culture runs through the veins of the PEN1 organization like blood.

Scott Miller: "This is what you call methamphetamines, glass."

Rptr: Especially methamphetamines. [IMAGE OF DAVIS IN INTERVIEW ROOM] But in all fairness some PEN1 talk against the use of drugs.

Davis: "Yeah, we don't all do drugs. You know what a skinhead is? A skinhead is, is, is a working class man that doesn't want to do, that doesn't do drugs."

Unk PEN1 member: [IMAGE OF PERSON SMOKING A GLASS PIPE] Everybody want it."

Rptr: But clearly . . .

Unk PEN1 member: "Speed. It's number one, number one drug."

Rptr. It appears PEN1's use of meth is epidemic.

Unk PEN1 Member: :"Everybody's on it. It's all it is, is crack. It's another form of crack."

Rptr: And also for PEN1 --- [IMAGE OF MILLER'S TABLE, WEIGHING OUT DRUGS ON A SCALE]

Scott Miller: "I just do this for money."

Rptr: Meth is a major source of income.

Scott Miller: "I'll do jail time. I'll do whatever I have to do to make the money, to get my coin, ya know. I live by the code of silence." [IMAGE OF WEIGHING DRUGS ON SCALE AND WITH PIPE]

Rptr: And he lives on the profits of drug sales.

Scott Miller: "Probably about $400 a day, but I'm not really pushing the issue."

Rptr: He says he gets the dope from PEN1 buddies.

Scott Miller: "My partners make it."

Rptr: [POSTER SAYING "DO NOT ENTER"]
For a while they were making it here.

Scott Miller: "We were manufacturing speed."

Rptr: [IMAGES OF BURNED CABIN]

That's until the dangerous chemicals used to make meth exploded.

Scott Miller: "We got a spark and the house went up."

Rptr: Apparently flames destroyed the cabin before firefighters and police arrived.

Scott Miller: [IMAGE OF POLICE SCANNER, AMMUNITION AND BRASS KNUCKLES ON TABLE]

"I usually have it turned on."

Rptr: These PEN1 often monitor police activity on a scanner.

Unk PEN1 Member: [GUNSHOTS AND IMAGE OF HOODED PERSON HOLDING REVOLVER]
We'll blast! [IMAGE OF HOODED PERSON CHAMBERING A SHOTGUN]

Rptr: And according to law enforcement intelligence obtained by Fox 11 news –

Unk PEN1 member: "Put some holes in the motherfucker's head."

Rptr: [IMAGE OF HOODED GANG MEMBER HOLDING REVOLVER)

PEN1 are actively recruiting new members to protect their interests [IMAGE OF SHOTGUN SHELLS AND BULLETS] and strengthen their position among other white criminal elements. (NOISE). Dept. of Corrections gang officer, Wes Harris.

DOC Officer Harris: [IMAGE OF HARRIS] "These groups are going to start popping up everywhere and they are uh, extremely violent."

Rptr: [IMAGES OF VIKING SKELETON AND SWASTIKA TATTOOS]

He says PEN1 sees themselves as Viking warriors, true to pagan Nordic gods, a die on your shield philosophy and no remorse. [IMAGE OF 3 GANG MEMBERS, ONE MAKING NAZI SALUTE] It fits well with a group that has evolved from punk rockers to racist skinheads [IMAGES OF SWASTIKA, AND SKINHEAD GRAFFITTI] to a gang of thugs moving into organized crime.

Scott Miller: [IMAGE OF MILLER WALKING ON STREET WITH HIS PITBULL]

"In this business it's guns, speed, violence and sex. That's what it's all about."

Rptr: Law enforcement sources say there is an alarming chain of events launching PEN1's power, causing an alliance with another well known white supremacist group and threatening to beef up PEN1's influence in prison yards and out in the street. We'll have that story tomorrow.

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Anchor: They call themselves Public Enemy number one, or PEN1 and investigators warn that this group, learning from the

mistakes of other white supremacist groups, are emerging as a public threat.

Chris Blatchford is here with more: Chris.

Rptr: Law enforcement authorities believe that PEN1, with their roots in the streets, are now positioning themselves as a criminal force inside prison walls. And as we see in this Fox undercover report, cops say PEN1 violence can already reach from prison yards to neighborhood streets.

[ IMAGE OF PRISON GATE CLOSING AND VIEW OF INMATES]

Investigators say it was ordered from with inside prison walls – a prison based hit and according to court papers obtained by Fox 11, Donald Mazza is the one who was given the mission to murder. [IMAGES OF COURT PLEADINGS AND MUGSHOT OF MAZZA SHOWING TATTOOS INCLUDING SWASTIKA AND "RACIAL LOYALTY"]

'Racial loyalty' tattooed on his chest, he is the reputed president of a white supremacy gang called PEN1 or the PEN1 Death Squad.

[IMAGE OF PRISON DOOR OPENING]

And when this heavy metal door at Wasco State Prison cranked open in April of1999 inmate Mazza, [IMAGE OF MAZZA MUG SHOT] known as Popeye, was released on parole. Detectives say within 5 hours of his release Popeye was back in Orange County, seated inside a camper smoking methamphetamine [IMAGE OF TATTOOED PERSON SMOKING] with two accomplices and the hit victim, a gang dropout named Billy Ray Austin. [FELONY COMPLAINT HIGHLIGHTING WORDS "USE OF KNIFE"]

According to this felony complaint, Dominic Rizzo [IMAGE OF MUGSHOT OF RIZZO], another PEN1 parolee, beat and held Austin as Popeye [IMAGE OF MAZZA MUGSHOT] plunged a knife into him over and over again. Then Popeye turned to witnesses and asked, 'Want some too punk?'

DOC officer Harris: [IMAGE OF HARRIS] "This particular group has a very great potential for violence and are pretty much unpredictable when that violence may occur."

Rptr: Correctional officer Wes Harris says, [IMAGES OF AERIAL VIEW OF PRISON, ARMED GUARDS AND "PEN1" AND "DEATH SQUAD] at the Wasco State Prison, investigators first started noticing PEN1 in 1996 and Fox 11 has learned an interesting chain of events led up to that. [IMAGE of PEN1, DEATH SQUAD TATTOOS/GRAFFITI]

[IMAGE OF BARE-CHESTED TATTOOED INMATES EXERCISING IN YARD]

It started decades ago with members of the Aryan Brotherhood or AB, the gang among gangs among white supremacists, [IMAGE OF STINSON] led by convicted killer John Stinson, [IMAGE OF BULLET-PROOF VESTED GUARDS STANDING BY LOCKED CELL DOORS] the AB are locked away in special units at maximum security prisons like this one at Pelican Bay. This white supremacist ex-convict explains it simply:

Unk PEN1 member: [IMAGE OF SPEAKER IN SHADOW]

"I don't know too many ABs walking the yard because ABs are all locked down and they don't have any physical contact with anybody."

Rptr: [IMAGE OF GUARD CLOSING CELL DOOR] With AB locked down that gave rise to the Nazi Lowriders or LRN, [IMAGES OF SWASTIKA AND NAZI LOW RIDER TATTOOS], another white supremacist gang [IMAGE OF PRISON YARD]that started running the prison yards in the 1990's [IMAGE OF BURNING AND SPINNING SWASTIKA] and calling the shots for white Nazi gangs out in the streets.

Unk PEN1 member: [IMAGE OF SPEAKER IN SHADOW] "They're straight killers and Low Riders are killers. They're like rattle snakes. You walk across their shaded area and they're liable to strike you without much of a warning at all."

Rptr: [IMAGES OF BARE-CHESTED AND TATTOOED GANG MEMBERS BEING PHOTOGRAPHED BY POLICE]

And without a warning at all, in January of 1999 the NLR was snake bit itself. The Department of Corrections named NLR a prison gang [IMAGE OF MAN WITH NLR TATTOO] and its members, like the Aryan Brotherhood, [IMAGE OF PRISON TIER AND CELLS] are now locked down in special security cells. And that has opened a prison door for PEN1. [IMAGE OF PRISON DOOR OPENING]

DOC Officer Harris: [IMAGE OF HARRIS]

"We are getting intelligence they are stepping up to take the place of the Nazi Low Riders from the main line."

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Rptr: [MUGSHOT IMAGES OF MAZZA, RIZZO AND STRINGFELLOW WITH TATTOOS INCLUDING "HATE CRIME" TATTOO]

And other law enforcement intelligence sources tell us Popeye Mazza, Dominic Rizzo, and Devlin Gazo Stringfellow are all PEN1 shot callers who have formed alliances with bosses in the NLR and the AB. All still embrace their white supremacist philosophy.

Unk PEN1 member: [IMAGE OF SPEAKER IN SHADOW] "100 percent to the bone. If you ain't white,you ain't right and that's how it is."

Rptr: [IMAGE OF TATTOOED MEN -- MAZZA AND TWO OTHERS WITH BLACKED-OUT EYES SALUTING]

[IMAGE OF INMATES EXERCISING IN PRISON YARD] But law enforcement intelligence obtained by Fox 11 says PEN1 are now modeling themselves into a more seasoned prison gang. Their main goal now is to profit from drug sales – [IMAGE OF DRUGS AND BULLETS ON A TABLE]

Scott Miller: "I sell it for $125, an 8-ball."

Rptr: -- especially methamphetamines.

Scott Miller: "This is a white man's drug."

Rptr: Not only out here on the street but here [IMAGE OF PRISON INMATES IN YARD] inside prison walls. In fact, cops say PEN1 wants to increase its control of all criminal activity by all white inmates.

DOC Officer Harris: [IMAGE OF HARRIS] "They are under directives when they are paroled to start building a cell of members from their area."

Rptr: [IMAGE OF HANDWRITTEN LETTER]

This correspondence intercepted by law enforcement talks about PEN1 expansion into Riverside County. The PEN1 letter says, 'We're like gods up here.' The area, he adds, is ripe, for a PEN1 yuppie squad. [IMAGES OF SKINHEAD AND PEN1 TATTOOS]
In Ventura County, police intelligence reveals a PEN1 alliance with the murderous gang Skin Head Dogs. [IMAGE PRISON WALLS] Additionally, state corrections officials have PEN1 members in custody from Sacramento, Redding, Los Angeles, Shasta, Kern, and Orange Counties.

[IMAGE OF O'LEARY WITH PEN1 AND SKINHEAD SWASTIKA AND PEN1 DEATH SQUAD TATTOOS]

Now even a younger breed of PEN1, like 18-year-old Bryan O'Leary are leaving a trail of violence. PENI tattooed on his neck, Death Squad on his arms, and more PEN1 carved on his stomach, [IMAGE OF BAILEY'S MUGSHOT]
O'Leary paired up with young skinhead Anthony Bailey. They attacked an ex-white supremacist in Huntington Beach.

Officer Guy Faust: [IMAGE OF OFFICER FAUST]

"One guy took a knife, stabbed him twice, another guy took a baseball bat and hit him upside the head." [IMAGE OF MAN ON GUERNEY IN HOSPITAL BED HOOKED UP TO MONITORS]

Rptr: Officer Guy Faust says O'Leary got 15 years in prison. Bailey got 12 years behind bars. [IMAGES OF BAILEY AND O'LEARY MUGSHOTS]

Ofcr Faust: "Basically what happened was, the victim had talked trash about PEN1."

Rptr: [IMAGE OF MILLER'S FIST WITH BRASS KNUCKLES]

There is no doubt that PEN1 figuratively and literally have put on white supremacist brass knuckles

Scott Miller: "If I sock you with this, you're not going to get up. I guarantee that."

Rptr: And gang investigators guarantee that PEN1 has already moved beyond its neo Nazi beginnings into organized crime. At the same time, attorneys for reputed PEN1 leaders Donald Mazza and Dominic Rizzo say their clients are not guilty of conspiracy to murder charges that they now face in Orange County and they quote, look forward to the truth coming out at trial, and that's scheduled to begin next week.

Anchor: I suppose we can expect an update then. Chris, thanks for that intense look.

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After presentation of the Fox exposé reporting the prejudicial hearsay and opinions about the PEN1 gang, the prosecution presented the following evidence relating to the charged crimes.

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### B. Scott Miller Was Shot and Killed in Anaheim on the Night of March 8, 2002.

#### 1. Miller was found dead in an alley after neighbors heard a loud bang.

Around 11:30 pm on March 8, 2002, neighbors on the Gramercy Street alley in Anaheim heard a loud bang. Twenty seconds later a car was heard screeching away. (7RT 1435, 1441-42.) Officer Matthew Adrian arrived at the scene to find Scott Miller lying facedown next to a dumpster. He had died from a single gunshot wound to the back of the head. (8RT 1527-32; 1540.)

A black baseball cap and a can of Pepsi were found under Miller's body, and some 15 feet north, a shell casing was found. (8RT 1447-48, 1455, 1460, 1481, 1504.) Tire tracks through the blood stains went eastward from the body but did not match the tire treads on the rented Taurus appellant and Rump were driving when arrested three days later. (8RT 1459, 1483-85, 11RT 2095.) A print of a man's shoe size 8.5 to 10 was found in a planter box near the apartment building. A cast of the shoe print did not match the three pairs of shoes later recovered from appellant or Rump. Nor did it match Miller's shoes. (8RT 1467, 1475-76, 1497-99.)

### 2. Appellant was at an apartment near where Miller was killed sometime that night.

Christina Harris Hughes [Harris] lived with her two-year-old son in a two-story apartment abutting the alley where Miller was shot. Harris had met appellant and Rump about two or three weeks earlier. Harris' friend Tanya Hinson and the two men sometimes stayed with Harris, and they all used drugs together. (14RT 2572, 2576-77, 2614.)

On March 8, 2002, Harris was at home with her son. She either slept until late afternoon, or got up earlier, and took an afternoon nap. Appellant phoned, mentioned going to a concert, and told Harris that it was important that Hinson call him when she arrived. (14RT 2579-80.) Harris told Hinson she didn't want anyone at the apartment that night. When Harris' friend Brenda Amezcua and another friend stopped by around 10:00 p.m. en route to a club, Harris went downstairs and saw Hinson, appellant and Rump in the living room. They asked if she wanted to go to the concert but left when Harris requested they do so. Sometime later, Harris heard a gunshot; she wasn't sure how long after appellant and the others left. (14RT 2582-85, 2622.) Harris had told the police that

when she heard the shot she was vacuuming upstairs and that her son was watching a cartoon, although she testified he was sleeping at the time. (14RT 2635-38.)

From her window facing the alley, Harris saw three shaved-head Mexicans in a blue Honda both before and after hearing the shot. (14RT 2598-99, 2670, 2677.) Some 10 minutes after the shot, Harris went downstairs with Amezcua[10] and saw a body in the alley. Harris did not call the police because she was a drug dealer. (14RT 2587-92, 2862.)

In police interviews at her house at 4:00 a.m. and 6:00 a.m., Harris did not mention that appellant and Rump had been in her apartment. In a videotaped interview at the police station the next day, March 9, Harris admitted that they had been there. (14RT 2603, 2612; Exh. 204A, played at 14RT 2749.) However, because Harris believed, as she told the police, that appellant and Rump had left 20 minutes or more before the shooting, she didn't think they were related to the shooting. (14RT 2648-51, 2680.) It was a gang neighborhood and she frequently heard gunshots; moreover,

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[10] Amezcua denied going into the alley. (14RT 2720.)

her heavy meth use at that time made it difficult for her to remember times and dates. (14RT 2655, 2668, 2679.)

In a follow-up interview at her apartment on March 11, Harris told Detective Blazek that "Mike" and "Jake" had come to her apartment; she described their tattoos. (14RT 2758.) Blazek left in the middle of this interview when the Helmick shooting was broadcast on the police radio. When Blazek returned to complete the interview, Harris said she heard a single gunshot two or three minutes after Mike and Jake left her apartment, and that she went outside with Amezcua and saw the body, but didn't call the police because she was in shock. (14RT 2759-61.) Harris made another taped statement on March 18, 2002,[11] which was similar to her testimony at trial. She did not know Mike or Jake's last names, but she described them to the police. (16RT 3139-47.) She had never seen either of them with a gun. (16RT 3164.)

Although Blazek conducted five interviews with Harris (who admitted heavy drug use during this time), Blazek never asked her about

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11 Exh. 206A ; 12 CT 3108-80, played to the jury at 14RT 2788.

her drug use and claimed to have first learned of her meth use when she testified in court.[12] (15RT 2854-55.)

Tanya Hinson[13] had little memory of March 2002, as she had just been released from a three-month hospital stay for a broken neck, and upon her release, started taking meth again and stayed at Harris' apartment. She believed that her accident and heavy drug use (intravenous meth injections four times a day) resulted in her memory problems. (13RT 2400-09, 2446-47, 2455-58.)

Hinson did not recall her whereabouts on March 8, 2002, and did not think she saw appellant and Rump that day or on March 10. (13RT 2423, 2434-35.) She knew appellant as POK1 and had corresponded with him in custody "years ago."[14] (13RT 2418-21.) Hinson acknowledged she

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[12] Blazek agreed that at 11:30 p.m. Harris was vacuuming, which was "unusual" and made him wonder. He also testified that she looked tired in the 4:00 a.m. interview and that she was still awake at 6:00 a.m. (15RT 2875-78.)

[13] Hinson was in custody at the time of trial, having been convicted of reckless driving, and possession of meth with a gang enhancement. (13RT 2397-2400.) She testified under a grant of immunity. (13RT 2467.)

[14] A letter to appellant dated March 29, 2002 was signed by her, "Love you, your Little One." (13RT 2452-53.) In a jail phone call with Adam on February 2, 2003, the day of her arrest for murder in this case, Adam told Hinson that he had

had red hair and a "Chuckie" tattoo on her neck – the description of the girl David Freiwald saw at Robin Freiwald's home with appellant and Rump on March 10, 2002. (12RT 2291, 14RT 2781, 15RT 2835, 2839.)

Hinson was arrested for the Miller murder on February 5, 2003 and was interrogated by Blazek the same day. She told the police that Miller was shot after she had left Harris' home. (14RT 2778, 2807.) In a tape-recorded phone call from the jail the same day to a man identified only as Raymond, Hinson said, "they're saying it happened March 8 or something," and "I know exactly where I was" the weekend of March 8, 2002. (13RT 2446, 14RT 2781; Exh. 198A at 11CT 2920-25.)

**3. Evidence that appellant was at Freiwald's apartment the night Miller was killed.**

In 2002, then 10-year-old Michael Allred lived with his mother Robin Freiwald in Anaheim in 2002. (10RT 1834-16.) For a few weeks prior to March 11, 2002, appellant and codefendant Rump had been staying with them, sleeping on the couch or in his mother's room. (10RT

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talked to appellant the day before, and that appellant talked about her all the time. (Exh. 199A at 12CT 2927-29, played for jury at 13RT 2450.)

1840-52.) Allred recalled that from 4:00 to 8:00 p.m. on Friday March 8, appellant and Rump were at home watching the movie "Joe Dirt" with him and his family. (10RT 1855, 1880-81.) However, Allred also remembered saying that he would not have watched the movie on Friday because he had a math book his teacher gave him and she wouldn't have given him that book on a Friday. (10RT 1858.) He believed they must have watched the movie on Friday because he was at his grandmother's Saturday night and by Monday he was in foster care. (10RT 1880.) Allred told the police that appellant and Rump were driving a Taurus but he had never seen them with guns or heard them talking about guns. (10RT 1872-74.)

**4. A jailhouse informant claimed that appellant admitted killing Miller.**

When Darryl Mason[15] was imprisoned in November of 2002, he contacted his parole agent and Detective Blazek. Mason denied that he

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15 Mason had numerous misdemeanor and felony convictions for drugs and theft, and evading the police. (11RT 2118-21, 2182.) He had been to prison 13 times, serving three terms and parole violations. (12RT 2173-74.) He also had PENI and white pride and "Death Squad" tattoos. (11RT 2122-23, 2220-22.)

had been promised any benefit for the information he supplied, although he had requested leniency. (11RT 2123-25.)

Mason testified that he became a PEN1 gang member around 1992 and was still active in 2002. Donald "Popeye" Mazza was the leader at that time [he "had the keys," i.e., made the decisions]. Mason refused to take orders from Mazza and just did what he wanted.[16] Mason said because of that he was "in the hat," i.e., there was a hit out on him, the consequence for not following orders or being a snitch, even though nothing happened to him for giving information in this case.[17] (12RT 2144-51.)

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[16] Mason mocked PEN1's supposed power. He told of a meeting in which he told Popeye he wouldn't follow orders and Popeye got mad, threw a beer at the wall, and then said they had an important matter: someone needed $2000 for bail. Mason laughed at them for being unable to come up with $2000 – he thought it was ridiculous, and said "What kind of gang in this?" Mason made a single phone call after which he gave Popeye the $2000. (12RT 2152-54, 2235.)

[17] Mason told the police that Billy Joe Johnson was in the hat with the Aryan Brotherhood and that he came out of the hat by joining PEN1. Mason "ran his mouth" about Popeye to Johnson when they were in custody together. He thought Johnson might have repeated this information to Popeye resulting in Popeye putting Mason in the hat. (12RT 2249-54.)

In June of 2002, during his 10-day stay in the Orange County jail (where PEN1 controlled the white population), Mason ended up having the keys over Popeye, whom Mason, who was "bigger or badder" considered too weak. (12RT 2160-62, 2179, 2225.)

Mason did not know Scott Miller but had heard he was a founder of PEN1 and that he was in the hat for making the Fox video. (12RT 2155-56.) Mason believed there was an understanding in the gang that something was supposed to happen to Miller for going on the news. (12RT 2157.)

One day appellant, whom Mason had not known before, came up to Mason's door and, talking through the crack on the side of the cell door,[18] said he had "whacked Scottish [Scott Miller] and that he had

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[18] Orange County sheriff's deputy Terry Bower testified that appellant and Mason were in adjacent cells during Mason's stay from June 13-18, 2002, and that inmates could easily talk to each other under or at the edge of cell doors. (14RT 2544-46.) To emphasize the point that there would be no need for inmates to talk through a crack in the door, the defense presented testimony by Orange County Deputy Wayne Richards that in June of 2002, in the jail intake/release center, inmates generally went into the day room two cells at a time. (20RT 3860-61.)

stripes [status] coming for that."[19] (12RT 2164-65, 2237, 2246.) According to Mason, appellant said he shot him in the back of the head. (12RT 2166.) Mason thought appellant was joking because of the way he handled himself; Mason told the police he considered appellant's statement a joke. (12RT 2249-60.)[20] Five days later, Mason was freed from custody, but he did not contact law enforcement until five months later, when he was back in custody in Chino State prison. (12RT 2167, 2263.)

Mason acknowledged that he had heard about Miller's death on the streets before he was incarcerated, and that 99% of what one heard in custody was probably not true. (12RT 2215-17.) Mason first denied but subsequently admitted that he had heard about the police questioning people about Miller's death prior to giving information about appellant. (12RT 2247-49.) He heard from a few different people in Chino – before

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19 Mason testified that in a gang, the more violent a member is, the bigger his name. Prior to Miller's death, Mason had not heard that appellant had a high status. (12RT 2158-59.)

20 Blazek interviewed Mason with parole agent Slaten at Chino prison on March 18, 2002. (12RT 2279.)

he was in the Orange County jail with appellant -- that appellant had killed Miller. (12RT 2215, 2273.)

In 2005, Mason was back in custody for evading the police. He asked law enforcement for a benefit in exchange for his testimony in this case. This request was denied and he was told it "would look bad." Nonetheless, Mason was sentenced to two years instead of five years when he pled guilty, and his prior prison terms were struck, and he only served a total of 14 months on the two-year sentence. (12RT 2202-05.) Mason refused to answer any question about the Aryan Brotherhood: "I don't want to talk about the Aryan Brotherhood." (12RT 2278.)

### C. On March 11, 2002, Undercover Police Officers Chased Appellant and Rump in a Suspected Stolen Car; Appellant and Rump Abandoned the Car and Entered An Apartment Building Where Appellant Was Seen Firing One Shot Downward from the Balcony.

#### 1. Eyewitness testimony.

Sergeant Michael Helmick of Anaheim Police Department worked undercover: he drove an unmarked car, wore normal clothes to blend in, and tried not to look like a police officer. (8RT 1566-67.) His undercover

car was in radio communication with Sergeant Bryan Santy in the police helicopter ("Angel") through a "green channel."[21] (8RT 1575.)

On March 11, 2002, at 3:10 p.m., Helmick was dispatched to the alley at 318 South Melrose on the report of a possible stolen Ford Taurus.[22] Helmick was driving a white Buick without lights or sirens, and was wearing blue pants and a shirt. (8RT 1578-80.) Helmick did not enter the alley, because he did not want to be recognized as a police officer. Instead he contacted helicopter dispatcher Santy who said the license plate would be visible from the wall of the nearby fire station. (10RT 1961-62.) After Helmick verified the license plate as the one reported stolen he called Detective Danny Allen for assistance. (8RT 1584-88.) Meanwhile, Santy saw the Taurus on the move and requested marked patrol cars. The

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[21] A tape recording of the green channel communications between Angel and the officers on the ground was played to the jury. (9RT 1660-62; Exh. 70, 70a.)

[22] Robert Henderson rented a Ford Taurus from Budget on March 7, 2002 and reported it stolen on March 10. At trial, Henderson could not recall telling the police that he rented the car for a friend named Danny in hopes of getting drugs in return, that Danny gave him $300 to rent it, or that Danny told him to report it stolen. (8RT 1544-47, 1559; 10RT 1928-29, 11RT 2022.)

Taurus turned west and Helmick pulled in behind it. He identified the driver as codefendant Rump. (8RT 1583-91.)

The Taurus stopped at an apartment complex and picked up a man later identified as appellant. The Taurus drove off, with Helmick following. Helmick saw Rump look at him in the side view mirror and noticed – from 50 to 60 feet away – the tattoos on Rump's arms, which he considered "prison tattoos." (8RT 1592-95, 9RT 1709.) When the Taurus made an abrupt U-turn, Helmick angled left to block it, and drove straight at it, "playing chicken." The Taurus went around him, over the curb and back onto the street, at a high speed. Helmick turned to follow. As the Taurus approached Broadway toward Detective Allen's car (an unmarked silver Monte Carlo, also without police lights or sirens), Allen centered his car to block as much of the road as he could. The Taurus again swerved and went around him. As the Taurus passed him Allen identified the driver as Rump. (8RT 1595-1601, 1684, 15RT 2890-93, 2927-28.)

Helmick, with Allen behind him, continued to follow the Taurus as it went through stop signs at a high rate of speed. When the Taurus stopped, appellant and Rump ran north into an apartment complex, less

than a mile from where the chase had begun. (8RT 1602-06; 1609-10.) Following directions from Santy, Helmick took up chase on foot, wearing his badge on his belt and, because of the noise of the helicopter flying low, his radio handset at his ear. (8RT 1609-12.)

Helmick passed by a gardener,[23] then met up with Allen who had his gun drawn and wore a raid jacket stenciled on the back with the word "police." (15RT 2895-98.) Santy directed the officers to appellant's and Rump's location on a balcony alcove. (15RT 2966-71.) Both Helmick and Allen had guns drawn as they approached the stairs but they had still not identified themselves as police officers. Santy saw appellant reach over the balcony and point a gun towards Helmick and warned the officers. (8RT 1627, 15RT 2912, 2971-73, 14RT 2796.) Helmick, who was several feet from the stairwell, and two or three feet out from the apartment balcony, heard a gunshot, but he did not hear a bullet pass him and did

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[23] Gardener Ghassan Alaghbar did not recognize Helmick and Allen as police officers and thought they were friends of the first man who had run past him on the stairs. Alaghbar identified appellant in a field show-up as the man he saw shoot a gun. (12RT 2313-20, 2329, 2343-44, 14RT 2702-05.)

not hear a bullet strike anywhere nearby. He and Allen took cover under the stairs. (8RT 1615-25, 1694-96, 15RT 2904-05.)

Helmick then retreated some 50 feet away, waved Allen to come towards him, and only then did the two then identify themselves as police officers and tell the suspects to give themselves up. Helmick did not identify himself as a police officer earlier because he did not want to give his position or location away, and didn't want the suspects to know the police were in the apartment complex. (15RT 2917-18, 2937-38.)

Santy testified that he had seen appellant "fiddling" with the gun, and that within 30-60 seconds appellant threw the gun, wrapped in a bandanna, off the balcony. (8RT 1643-46, 15RT 2983.) The gun magazine had 10 rounds of live ammunition. (9RT 1761.) The police conducted a thorough search of the property, checked all the windows and even the nearby park and railroad tracks, but found no bullet strike marks. The firearm examiner suggested that a bullet could have penetrated into the dirt without leaving a mark. (9RT 1786-87.)

Appellant came down and gave himself up. Rump limped down after that. (15RT 2913-16, 2953.) Two unique gunshot residue primer

particles were found on the sample taken from appellant's right hand. Rump's sample was negative for gunshot residue. (13RT 2382-83.) Appellant was not wearing glasses and no eyeglasses were found at the scene. (9RT 1703.)

**2. The prosecution's evidence relating to the 9 mm. gun, which was intended to prove premeditated attempted murder, was inconclusive.**

The gun seized in the Helmick incident was a chrome-colored Browning 9 mm. semi automatic. (9RT 1758.) When crime scene investigator James Conley took possession of it, the hammer was cocked in a firing position and the safety was off. (9RT 1759.) When Conley removed the magazine and slowly pulled back the slide, he saw a cartridge casing inside. He had to turn the gun upside down to shake it out. Conley testified that with the spent casing inside, the gun would not have fired even if the trigger were pulled. Thus at trial – but not in his report – he described the gun as "jammed."[24] (9RT 1760-61, 1789-90.)

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[24] He testified that a properly functioning 9 mm. hand gun could jam or malfunction as a result of defective ammunition or mechanical malfunction on the extractor. If the gun were fired and the casing did not eject then the weapon could not be fired again. (9RT 1737-39.)

Conley videotaped himself removing the spent casing from the gun and acknowledged that his concern at the time was more with making a good video than with checking the proper functioning of the gun. Thus, he held the gun with the ejection port facing upwards to allow for the best "camera view." (9RT 1800-01.) When Conley first pulled back the slide, the extractor appeared to be working properly, but at some point he tipped the gun upside down to remove it. Conley's slow and careful movements could themselves have resulted in the casing not ejecting; when he moved his thumb out of the way, he was able to pull the slide back and the casing was extracted. (9RT 1797-99, 1805.) Conley agreed that the extractors did work but he had to use "some force" to make them eject the casing. He wasn't sure he had to use more than the normal pressure, and agreed that had he been more familiar with the gun, he would not have emptied it the way he did but would have held it so that he could see the slide. Someone familiar with the gun could have easily cleared the spent casing. (9RT 1807-09.)

Rocky Edwards, firearm examiner for the Santa Ana police department, also examined the gun and ballistic evidence from the Miller

scene and the Helmick scene. (13RT 2349, 2355-56.) He reviewed the Orange County crime lab report that said that the gun operated normally and that the casing from the Miller scene was fired from that gun. (13RT 2357-58.) However, the bullet fragments recovered from the autopsy were damaged and no conclusive match could be made. (13RT 2366-67.)

After reviewing Conley's video, Edwards testified that he did not consider the gun to be jammed. Edwards stated that when Conley was pulling the slide back, he placed his hand over the hammer, which would have impeded the slide. He was doing this for forensic purposes, to preserve the gun, and also because he didn't know if the casing that was chambered had been fired. (13RT 2368-71.) Moreover, the video showed that the gun was recovered with the hammer back, and if someone had pulled the trigger, even if the expended casing remained in the chamber, the hammer would have dropped, and would not have been cocked with the slide back, as it was. (13RT 2373.) Edwards stated that something -- the white bandanna wrapped around the gun, some external force, or the shooter's thumb -- could have impeded the movement of the slide. (13RT 2361-64.)

### D. Appellant's Jailhouse Conversations, Letters And Phone Calls.

Sergeant Jay Clapper testified that appellant and Rump were placed in adjoining interview rooms after their arrest on March 11, 2002 and their shouted conversation was taped. (10RT 1899.) Rump asked who was the dude in the white car that was trying to hit them. Appellant said he didn't know. Rump said he thought it might have been a parole agent. (Exh. 105A at 11CT 2723-2730, played to the jury at 10RT 1940.)

In an interview with the police, when the officer told appellant that he was being charged with attempted murder for shooting a gun, appellant said he didn't know who he was shooting at, that people were chasing him and he was afraid for his life. (11CT 2697-98 [Exh. 100A], 10RT 1900.)

Law enforcement collected correspondence to and from appellant and Rump during the last few years of their custody.[25] (11RT 1978.) There were multiple letters to appellant from women using the last name "Lamb," and letters to and from both appellant and Rump with

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[25] See Exh. 143 [chart of the correspondence].

correspondents including Billy Joe Johnson, Rizzo, Mazza, Freiwald and Tanya Hinson (11RT 1979; Exh. 153-179.)

In a letter from appellant to Monika Brewski Witak, stamped "filed Dec 13 2002," appellant said that he had told her upfront he was "going to do life." (Exh. 171A.) In another letter, also stamped with that date, appellant referred to himself as a "Hollywood hitman." (Exh. 170A.) To Tanya Runsdell (Hinson), appellant wrote that he believed Billy Joe Johnson got a hall pass . . . riding my coattails, smile." (Exh. 165A.)

**E. Expert Gang-Related Testimony .**

**1. The Fox video was not the overriding factor in Miller's death.**

Lt. Clay Epperson testified as an expert in white racist gangs. (16RT 3063-70.) He said that prior to Miller's death, there was a recurring rumor that Miller would be hit for his participation in the Fox video. It was widely known within PEN1 prior to March 2002 that Miller, although nominally disguised, was the person interviewed on the Fox video. (16RT 3191-92.)

In Epperson's opinion, the Fox video was a "contributing factor" in Miller's death but not the "overriding factor." (16RT 3191.) Epperson believed that from 1996 or 2000 on, Miller was widely disliked and viewed

as reckless and out of control by the PEN1 inner circle and had made a "fair amount of enemies." (16RT 3126, 3189-90.) Epperson had heard the rumor that Jesse "Ugly" Wyman had been designated to kill Miller. (16RT 3125.)

### 2. The history and culture of white supremacist gangs in general and PEN1 in particular.

White supremacist gangs are based on ideology rather than turf, and their names usually reference racial orientation or violence. (16RT 3073-74.) Tattoos are significant and refer to affiliation and prison terms, and announce a strong gang commitment. (16RT 3075-77.) The Celtic cross is often used, as is the swastika, its South African variant the triskele, the "SS" as a reference to Nazism, and the anarchy sign (an encircled "A").[26] (16RT 3079-80.)

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[26] Photographs of tattoos on appellant's head, chest, arm and back were displayed to the jury. The tattoos were: a swastika, "Blood and Honor," "Skin," a Celtic cross, "LAS" [Los Angeles Skins], a skull, the anarchy symbol, "Death Squad," and "WP" [white pride]. On his forehead and visible without the need for photographs, he had tattoos of "PDS" and "187." (Exh. 114-128 at 10RT 1960-64.)

Epperson claimed that any gang member has to maintain respect and standing in the gang by violence, by fighting and committing for the gang and to snitch. Members brag to each other about crimes committed in order to garner respect; however, bragging about a crime one did not commit would weaken a member's position and subject him to possible sanction or attack. (16RT 3084-86.)

Gang members might wait a long time, a year or more, to exact payback for not abiding by gang rules. Snitching – by talking to the police or the news media – is viewed as disrespect or treason and is an act "that must be responded to." A snitch can expect serious violence in retaliation for his disrespect. (16RT 3086-88.)

A gang member committing a violent crime would expect backup and would not take a companion who wouldn't back him up. However, the trigger person would get more status than a backup guy. A member's name "is made" on violence and criminal activity: that's "what the gang does." (16RT 3090.) White supremacist gangs have a fascination with gun violence, and use guns to achieve a violent end and to intimidate; however, gun possession also poses a risk of arrest and prison to the gang

member who has prior felonies. It was "somewhat rare" for a PENI gang member to carry a gun. (16RT 3091-93, 3196.)

Epperson was familiar with PEN1 [pronounced "peen-eye"], also known as PDS [PEN1 Death Squad]. PEN1 began in the 1980's with followers of a punk rock group and evolved into a skinhead white racist gang, forming PENI, in 1986. Donald Mazza, Davis, Scott Miller and Stringfellow were the founders; Rizzo joined a bit later. PEN1 developed into a mercenary gang with a classic skinhead racist ideology; its members tended to hate any racial group other than whites. PEN1 gang members were "self serving mercenary criminals." Although they claimed a racist ideology, their understanding of the concept was unsophisticated and they rarely committed hate crimes. (16RT 3094-97, 33193.)

PEN1 was qualified as a gang by the California Department of Corrections in 2002 as an associate of Aryan Brotherhood. (16RT 3097-98.) Prior to 2002, the Nazi Lowriders acted for the Aryan Brotherhood,[27] but when the Lowriders were validated as prison gangs, their members

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[27] Epperson recited the history of the Aryan Brotherhood from its genesis in prison in 1967 to its decline after a RICO prosecution in 2002. (16RT 3082-83.)

were placed in the S.H.U., and PEN1 filled the resulting power vacuum, becoming one of the fastest-growing white gangs in California prisons. (16RT 3100.) PEN1 nurtured a hatred of law enforcement beyond that of other gangs because of their ideology that the police are part of the evil Zionist influence destroying the way of life for Aryans. Thus, a PEN1 member who killed a police officer would have a "hugely increased" status in the gang. (16RT 3102-03.)

Despite their white racist ideology, including the use of "88" to refer to Heil Hitler, and the "14 words" that include the philosophy of securing the existence of the white race, the vast majority of PEN1 crimes targeted other whites within their own gang or their own area of influence, and not minorities. Violence was an absolute cornerstone of the gang and a member was measured by his willingness to use violence. Intimidation of witnesses or victims through egregious violence was a feature of the gang, and was used to stop prosecutions. (16RT 3104-06.)

In 2002, PEN1 had in place an internal discipline process to punish misconduct, which could be implemented on the spot by senior members ("shot callers"). (16RT 3105.)

Mazza, aka Popeye, was the president of PEN1. He sported tattoos such as "PDS," "Racial loyalty," "Skinhead," and "Not guilty." (16RT 3107-09.) Rizzo aka Droopy had PEN1, Skins, PDS and Celtic cross tattoos. Billy Joe Johnson was associated with the Nazi Lowriders in 2001, but claimed to have been cut from that gang when he refused an Aryan Brotherhood order to kill his own cellmate, because he deemed such a killing too blatantly obvious. Johnson ended up leaving his gang and becoming a PENI member. He had swastika and SS tattoos. (16RT 3116-20.)

Meth use was a constant feature of PEN1: virtually all PEN1 members used meth most of the time when out of custody, and often when in custody. Most gang members tended to steal cars, borrow cars from willing friends, or trade drugs for a car, in the so-called "crack rental" practiced by PEN1, where the drug buyer turns over his car to the drug seller, then reports it stolen after 10-20 days, and tells the gang member not to use it after that time. (16RT 3121-23.)

Epperson testified that in his opinion in 2002, PEN1's primary activities included methamphetamine trafficking, identity-type property crimes, and crimes of violence in support of those crimes. (16RT 3142-43.)

He based this opinion on his training, experience, personal knowledge, and the convictions of Massa, Rizzo, Lansdale, Davis, O'Leary, Sherwin, Shaw and Parks from 1993 to 2000 for [various crimes from drug sales, gun possession, forgery, theft, burglary, attempted murder, conspiracy to murder and witness intimidation]. (16RT 3130-42.)

### 3. Expert opinion that appellant and Rump were active PEN1 gang members.

Epperson had never met appellant but had heard in a police meeting that he and Rump were out on parole in 2002, with parole conditions not to associate with other gang members. (16RT 3143-44, 3152.) Epperson opined that appellant was a PEN1 member: he had admitted in field interviews and jail intake interview his PEN1 membership, had been validated by the CDC and prison as a PEN1 member in 2001, and since his release from prison (where he had been incarcerated on a burglary conviction) had added a PDS and 737 [for PDS] tattoos in large letters above his eyebrows. (16RT 3146-49, 3151.)

Epperson also based his opinion that appellant actively participated in the PEN1 gang on appellant's May 2002 letter to Rizzo (Exh. 148A) giving his "utmost" to Rizzo and signing it "love and loyalty;" appellant's

September 2002 letter to Adam Royster (Exh. 167A), quoting Nietzsche and Hitler's Mein Kamp; appellant's October 2002 letter to Rizzo (Exh. 168A) referring to a "world run by cops and cowards" signed POK1MAN; appellant's February 2003 letter to Mazza (Exh. 174A) saying he was "proud to know" Mazza thought so highly of him, and that he would do his best to complete whatever task was before him; appellant's February 2003 letter to Simone Lawrence (Exh. 177A), referring to arguments with Monika, stating that she was scared and confused, and that she was "just starting to realize who I am and what kind of status and rep I hold" and that he had "worked hard to be a solid dude." (16RT 3165-67.)

## EVIDENCE PRESENTED BY THE DEFENSE

### A. Testimony Relating to Miller's Murder.

#### 1. Billy Joe Johnson testified that he alone killed Scott Miller.

Billy Joe Johnson,[28] arrived at his cousin Johnny Raphoon's birthday party around 6:00 p.m. on March 8. Johnson and his friend Scott Miller had been arguing and continued to do so at the party. Johnson was angry

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[28] Johnson had tattoos of SS lightning bolts, and an eagle, a swastika, and an iron cross. (18RT 3548-51.)

with Miller for having mistreated some girls who were friends of Johnson.[29] Johnson was also angry that Miller had made the Fox video. Miller was not really disguised in the video because his tattoos were visible, as was his pit bull Tank, and everyone in Johnson's social circle knew it was Miller in the video. (18RT 3523-25; 3527-32.)

Despite their argument, Johnson and Miller left the party around 8:00 p.m. to get heroin. On the way, Johnson stopped in a strip mall because Miller wanted to make a phone call. (18RT 3527, 3533.) Marnie Simmons, Miller's ex-girlfriend received a voice mail message made around 10:23 p.m. on March 8. At first, a woman, possibly Shirley Williams, was on the line, and then Miller came on and said he was at Raphoon's party, and that he was scared. She heard someone in the background telling him to get off the phone. It sounded like Johnson. (RT 3415-17, 3419-20, 3424.)

Johnson testified that after the phone call, he and Miller continued on their way, and then walked down an alley en route to the apartment

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[29] That is, Miller was running around with a lot of girls. (18RT 3635.)

complex that was their destination. Johnson, who was "pretty perturbed," just grabbed his gun from his waistband and blasted Miller, then turned around, jumped back in his truck and returned to the party. (18RT 3533-34.) Johnson believed that Miller had "stepped out of line" and that it was time to kill him. (18RT 3557, 3604.) "He did wrong; he paid his price." (18RT 3607.) It was a clean kill, "one shot, one kill." (18RT 3617.)

Johnson returned to the party where he got together with Shirley Williams, one of the women Miller had been seeing. The two went to Noel Smith's house around 3:00 or 4:00 a.m. Johnson's friend Gordon Bridges was there and Johnson asked if he had heard that Miller "got blasted." Johnson and Williams then went to a motel. (18RT 3535-37.) When Johnson later saw Bridges at Mike Jones' pool table shop, Johnson told Bridges to "watch his mouth." (18RT 3538.)

A day or two later, Johnson saw appellant at a bar. Appellant told him that some Mexican gang members were shooting at him and that he was looking for a weapon. (18RT 3546, 3596.) Johnson gave appellant then gun that had been given to him six months earlier in exchange for drugs by someone he refused to name. (18RT 3597-98.) Johnson wore a

size 9.5 or 10 shoe – and would have fit the shoe print found near Miller's body, which was determined to be a size 8.5 to 11. (18RT 3553; 8RT 1478-79; 9RT 1743.)

Johnson denied ever telling anyone that he was upset that appellant had shot Miller in the back of the head (instead of the face); he also denied telling anyone that he was present at the murder but that appellant was the shooter. (18RT 3623.) At the time of his testimony, Johnson was serving a 45-years-to-life sentence for killing Corey Lamon with a hammer, a crime to which he pleaded guilty on June 30, 2006.[30] (36RT 3551-52, 3563.)

At the time of his testimony, Johnson had not been charged with Miller's homicide. On July 5, 2006, he called Gail Greco, the defense investigator,[31] and when she visited him in jail, he told her he wanted to

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[30] Johnson later tried to get his plea set aside because he had been led to believe that none of his codefendants in the case would serve more than 12 years if he pled guilty, and that did not happen. His girlfriend got more time than he was promised she would get. (18RT 3572-76, 3630.)

[31] Johnson had been Rump's cellmate for a time, and got Greco's number though a mutual friend. (18RT 3581, 3586.) However, he told Bridges that Miller was killed two years before he was celled with Rump. (18RT 3627.)

do right, that he was the one who had killed Miller, and that appellant and Rump had nothing to do with killing Miller. (18RT 3555-56, 3589.)

Gordon Bridges was Miller's longtime friend. Around 10:30 or 11:00 p.m. on March 8, Bridges heard that the police had been to Jones' pool place.[32] Bridges went to the pool place around 1:00 a.m. and learned that Miller left the pool when the surveillance camera showed the police approaching. Bridges was concerned and went out looking for Miller. (18RT 3718-20.) Around 3:00 or 4:00 a.m. he still hadn't found Miller. He was at the house of Noel Smith when Bridges' friend Billy Johnson and Miller's girlfriend Shirley Williams came in. Everyone was getting high. Bridges said he had been looking for Miller and Johnson told him Miller had been found shot in the back of the head in an Anaheim alley. (18RT

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[32] Michael Jones sold refurbished pool tables in Costa Mesa. Around 11 a.m. on March 8, 2002, he and Miller picked up a pool table and loaded it into Jones' trailer. He paid Miller $200 for the table which was to go to the two men at the house where they got the table. (17RT 3400-02.) Miller left and returned to Jones' place of business around 4 or 5 p.m. Meanwhile the police arrived. Miller told Jones not to mention his name, and he ran down the back alley when the police cars showed up. Jones returned the table. Jones told the police that the week before Miller was killed, Wyman had called about 10 times looking for him. (17RT 3403-07.)

3729-24.) Bridges told Johnson to look him in the eye and tell him he had nothing to do with it. Johnson refused and told Bridges it was "politics" and to "mind his own business." (18RT 3732.) Williams later told Bridges that Johnson forced her to take Miller (whom they had picked up near the pool place) to Anaheim in her truck and that Jesse Wyman was in the back of the truck. (18RT 3725-26, 3731.)

Two or three weeks later, Smith, scared and crying, told Bridges that Johnson and Donny McLachlan had forced him to take them to Bridges. As a result, Bridges met up with Johnson who told him to shut his mouth and to back off of Jesse Wyman. (19RT 3727-29, 3731.)

Noel Smith was in prison for possession of a firearm at the time of his testimony. Smith knew Miller and his girlfriend Williams for about three weeks, but had known Bridges for a year. (18RT 3644-45.) Smith denied that anyone came to his home the night Miller was killed. He told the police he did not know Johnson and didn't recall telling the police that Williams came by around 3:00 or 4:00 a.m. (18RT 3647-50.) Smith also did not recall a visit from Johnson and McLachlan shortly after Miller was killed, or that they forced him into their vehicle. Nor did he recall telling

Bridges that he was forced into their vehicle or later calling Bridges to say "that did not happen. That's not true." (18RT 3651.) He denied that Ugly Wyman pulled a gun on him and told him to keep his mouth shut. (18RT 3654.)

### 2. Miller and Johnson were at Raphoon's party shortly before Miller was killed.

John Raphoon had a birthday party at his house in Costa Mesa on March 8, 2002. (15RT 3003.) When Scott Miller arrived around 6:00 or 7:00 a.m., he and Raphoon started drinking a big bottle of vodka. By 9:00 a.m., Raphoon was "in the sack" and thus was a blank about any events that day after that time. (17RT 3276-78, 3282, 3286.) People showed up in the afternoon, including Raphoon's cousin Billy Joe Johnson, who at some point left to pick up Shirley "Sqwrls" Williams. Raphoon could not recall telling the police that Miller had Williams' white truck. (17RT 3279-84.) Raphoon thought he saw Williams the next day when she came to pick up some of her clothes; he thought he first learned of Miller's death from Williams or in the newspaper when Williams was there, but wasn't sure if that was the day after the party or two days later. (17RT 3238-91, 3301.)

Andrea Iacono Metzger was "in and out" of Raphoon's party twice. She was both drunk and really high on meth. She arrived during daylight hours. (17RT 3304, 3306, 3308, 3311.) She saw Miller and Johnson talking there but did not recall any "serious" talk; they were joking about Miller keeping his guard up. (16RT 3315-16.) Around 9:00 p.m. she left with Johnson. They had sex in a parking lot and then he took her home. Metzger denied seeing Jesse Ugly Wyman at the party and denied telling her friend Claudia Cricket Beeman that Ugly had a problem with Miller at the party, or that it was "going off over at Raphoon's." (17RT 3311-12.) In a police interview the next day (while Metzger was still drunk and high) she said she was going to get in trouble when asked who was at the party; the police said no one else could hear her. (17RT 3321-23.)

Shirley "Sqwrls" Williams had been dating Miller in March of 2002, and she regularly allowed him to use her white Tacoma truck, and sometimes had trouble getting him to return it. (17RT 3357-48.) Williams was living here and there out of her truck, and using heroin and speed, but also working at a mall. (17RT 3348-49.)

She and Miller had a fight about him being with another girl, and Williams had not talked to Miller for two days when she saw him at Raphoon's party at 10:00 p.m. (17RT 3360-63, 3373.) Minutes after arriving at the party, Williams left to look for some heroin. She was unsuccessful and when she returned to Raphoon's at 11:00 p.m., Miller was no longer there. She did not see Wyman there either. (17RT 3363-66.) Williams then left the party with Johnson to pick up some speed at a hotel, after which they went to Johnson's mother's home, and then at 5 a.m. to a hotel. (17RT 3375-77.) Williams said that on Sunday morning she heard – from a female friend she did not identify -- that Miller had been killed. Williams stayed with Johnson for about a week after Miller was killed. At some time she went to Raphoon's to pick up his skateboard. (17RT 3378-79, 3381.)

Williams did not recall accompanying Johnson to Smith's house or meeting Bridges there early in the morning on March 9. She did not recall telling Bridges that Johnson made her take Miller to Anaheim with Wyman hiding in the back of the truck. (17RT 3382-83.)

Claudia "Cricket" Beeman[33] did not recall telling the police that Miller and Williams were boyfriend/girlfriend. (17RT 3334-35.) She told the police that Iacono Metzger and Wyman came to her house that night. Iacono Metzger said that it was "going off" at Raphoon's house and that PEN1 and the Nazi Lowriders were there. (17RT 3337-38.) Williams told Beeman that Ugly Wyman was at the party and was mad at Miller and had a problem with him. (17RT 3343.) Williams came to Beeman's house on Saturday to tell her that Miller had been killed; but Beeman also said she heard it from Raphoon. (17 RT 3339-40.)

**3. Expert testimony.**

Dr. David Smith, a specialist in methamphetamine (meth) addiction, testified that meth is a general nervous system stimulant that blocks sleep, increases muscle tension, alters judgment and time perception, makes the reflexes hyperactive, and enhances physical performance but increases error, and results in agitation, anxiety, rage, and finally in the worst cases, psychosis. (18RT 3449-50, 3458-64.) Dr. Smith's review of Harris'

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[33] She had convictions and a prison sentence for possession of meth and car theft. (17RT 3348.)

videotaped police interview showed she was clearly under the influence of meth and in the hyper agitation/increased error state. She also had the bumps on her skin consistent with meth use. (18RT 3468, 3471.) Dr. Smith's review of the videotaped conversation of Rump and appellant in the jail showed behavior by Rump consistent with coming off of meth ("crashing") and showed serious brain impairment. Appellant was less impaired than Rump, but still under the influence of meth in an agitation/anger/rage state. Both had the red bumps of meth users.[34] (18RT 3473-77.)

Daniel Vasquez, a former prison warden with the California Department of Corrections, testified as a gang expert. (19RT 3671.) The expected retaliation by a gang against a member who gave information in court or to the public was usually carried out as quickly as possible. (19RT 3698, 3705, 3767.)

A validated prison gang is one determined to be extremely dangerous and its members are placed into maximum custody (SHU) and

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[34] On a scale of 1 to 10, Rump was an 8 and appellant a 6. (18RT 3480.)

are locked down 23 to 24 hours a day. PENI is a street gang and not a prison gang. (19RT 3680-82, 3686.) Darryl Mason was placed in a "sensitive yard" in 2003 after giving informing on appellant, based on having "enemies" in the prison. Such a yard has definite benefits, including educating and vocational training and contact visits. (19RT 3687-89.)

**G. Defense to the Attempted Murder Charge.**

Sergeant Charles Knight arrived at the scene with a SWAT team and contacted the other officers present. Based on information from those officers, he tried to determine the direction the gun was pointed where fired, but was unable to make the determination. No one stated to him that the gun was fired "at" Helmick. (19RT 3662-65, 3668.)

Daniel Vasquez testified that an armed gang member who was being chased by someone he *knew* was a police officer would want to get rid of the gun immediately. A gang member in possession of a gun he knew had been used two days earlier to kill someone would not carry it: he would want to get rid of it. (19RT 3678-79.)

Dr. Wynette Augustine, an optometrist, examined appellant's vision in October of 2001. Both eyes were 20/200 without correction; after 16 inches his uncorrected vision would be blurry, and exponentially blurrier as distance increased. (20RT 3854-56.) An exam in the last year showed his vision at 20/400, with blurred vision at 10 inches. (20RT 3856-57.)

## PENALTY PHASE – AGGRAVATING EVIDENCE

### INTRODUCTION

The evidence in the retrial of the penalty phase tracked the evidence presented at the guilt phase, and at the first penalty trial (which ended in a mistrial), with one major exception.

At the first penalty trial, the trial court excluded evidence of appellant's supposed participation in a conspiracy to escape from jail while incarcerated on these charges, on the ground that the evidence did not pass constitutional muster. After the mistrial, the prosecutor requested the court to revisit the issue, and the trial court then found the same evidence sufficient. It was presented to the jury. (See Part C, section 5, pages 65-69, below, and Argument II, pages 104-123, below.)

### A. Factor (a) Evidence: Circumstances of the Capital Murder.

The facts presented to describe the circumstances of Miller's murder were not significantly different from those summarized above in the Summary of Facts presented at the guilt trial (see pages 8-59, above), except as follows:

At the time of the second trial Billy Joe Johnson had been charged with the capital murder of Scott Miller. Recordings of his phone calls with Becky Mangan, and a three-way call with Mangan and appellant made on the last day of the first trial were introduced. On June 14, 2007, Johnson told Mangan, "I'm gonna make 'em go all the way to the box." (13CT 3395-97; Exh. 126A.) Later that same day, in a three-way call (Mangan, appellant and Johnson) Johnson said (incorrectly) that "they filed charges" on him; appellant asked Johnson how he got "more fame" than he did, referring to a newspaper article; and they laughed about Johnson refusing to testify as to his "stash place." (13CT 3415-19.) On July 9, 2007, Mangan referred to the case possibly being retried and told Johnson the trigger on the gun was gold. (13CT 3400-01; Exh. 131A.)

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### B. Factor (a) Evidence: Victim Impact Evidence.

Miller's mother Bonnie Miller testified that Miller was a perfect baby, a thoughtful child, a good brother to his disabled older brother, and a charismatic surfer and pretty good student loved by everyone. (36RT 7280-84.) Miller lived with his mother most of his 38 years. After he died, her own mother had a heart problem, was nervous all the time, and almost died because it was "Just too much stress on the whole family." (36RT 7288, 7293.) Mrs. Miller's older son had a mental breakdown and was suicidal most of the year after Scott Miller's death. (36RT 7292.) Mrs. Miller's ex-husband fell apart when she told him about Scott Miller's death, and then he died of stroke. (36RT 7293-94.)

Mrs. Miller had legal custody of Miller's son who was born after Miller's death as the child's mother was in prison. It tore out Mrs. Miller's heart to tell her grandson he couldn't see his father because he was in heaven. (36RT 7289-92, 7306.) Life would never be the same; it was "torture over and over." (36RT 7293-94.)

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### C. Factor (B) Evidence: Prior Acts of Violence.

#### 1. The Attempted Murder of Sergeant Helmick.

The prosecution presented testimony similar to that presented in the first guilt trial as to the shot fired at Sergeant Helmick after the car chase. (See pages 32-38 above.)

#### 2. At age 19, appellant confronted a beachgoer wearing Doc Marten boots.

Marc Gunderson was 19 years old in June of 1994 when he went to the beach in San Clemente and saw a group of young men including appellant. Appellant told Gunderson if he was not into "white power, he could not wear Doc Marten boots, and that he take them or he and his friends would beat them off. Just then police officers arrived and took appellant into custody and found that he had a large Mag light flashlight, although appellant never threatened Gunderson with it. (36RT 7315-23, 7329.)

#### 3. Appellant and two other inmates assaulted inmate Munding with their fists

Inmate Ace Munding was playing cards at the Taft Correctional Institute in November of 1996 when "someone" asked him to go outside. As he walked out the door three men beat him. He did not know why.

(36RT 7350-51.) Correctional officer Deborah Thiess saw three inmates attack Munding with closed fists. (36RT 7332-35.) As she approached, appellant went up the stairs covering his bloodied hands with a beanie. (36RT 7335-37.) Correctional officer Sheri Everett followed appellant up the stairs; he had disrobed and was taking a shower. (36RT 7342-44.) Munding was taken to the hospital where he had seven stitches to his right eye. (36RT 7346.)

Michael Maydon testified that he, appellant and another inmate were all first-timers from Orange County at the Taft Facility. (36RT 7353-54.) Maydon was ordered by a shotcaller to "take care of" Munding, i.e., assault him, because Munding was snitching on people who brought contraband into the prison. Because Maydon was afraid to carry out the order alone, he got appellant and the other inmate involved. They feared that they would be assaulted if they didn't follow the order. The beating lasted only 10 seconds. After that they were sent to administrative segregation in Corcoran, a dangerous higher-level prison. (36RT 7355-60, 7364.)

Appellant admitted his involvement saying he did what he had to do, that it wouldn't happen again, and that he did not want to "go to Corcoran." (36RT 7351-52.)

**4. Appellant stabbed an inmate at Chino State Prison in 1999.**

On September 26, 1999, correctional sergeant Ricardo Matute was the culinary officer at the Chino Reception. (36RT 7373-74.) He saw appellant walking away from inmate Edward Walsh's table. Walsh said appellant hit him for no reason. (36RT 7376-80.) When an alarm went off, all inmates dropped to the floor except for appellant who walked to the other end of the culinary hall. After appellant was restrained, a seven-inch metal shank with a cloth handle was found three feet away from him. (36RT 7382-87.) Appellant had blood splatter on his shirt and hands. Walsh was treated for a four-inch wound to the back of his neck. (36RT 7403, 7414-16.)

Edward Walsh had convictions for lewd conduct and receiving stolen property, but was deemed incompetent in 1995 when facing a spousal abuse felony charge. He was incarcerated at the time of his testimony. He did recall getting stabbed in Chino. (37RT 7456-59.)

### 5. The alleged conspiracy to escape.

In the first penalty trial, the following evidence as to an alleged conspiracy to escape was excluded as insufficient. In the second trial, the same evidence was deemed admissible. (See Arg. II, pages 104-121, below.)

Orange County sheriff's investigator Larry Zurborg worked gang enforcement. On February 19, 2003, based on information that David Wolfe was a PEN1 associate with an outstanding warrant, Zurborg set up surveillance at Wolfe's residence and arrested him as he was getting into a car with a woman. Wolfe admitted having a syringe in his sock. (37RT 7468-71.) A tenth of a gram of meth was found in his front pants pocket, and a four-inch hacksaw blade in his back pocket. Inside the car, Zurborg found a punch tool and a metal tube containing marijuana and five hacksaw blades. (37RT 7472-73.) Zurborg testified that hacksaw blades could be used as burglary tools, and he arrested Wolfe for possession of burglary tools. Zurborg also testified that people who know they are going into custody smuggle contraband into the jail using "keister kits" that they

put between their butt cheeks.[35] However, Zurborg found no lubricant or Vaseline and didn't see Wolfe trying to put anything in his pants as Zurborg approached. (37RT 7474-75, 7483.)

David Wolfe[36] had shared a dayroom with appellant in the Orange County jail in 2003. (37RT 7496-98.) Wolfe testified that when Zurborg arrested him he was taking the hacksaw blades to his car to cut the lug nuts off his tires. The punch tool was to break the car window: his car was locked at his brother's mobile home. Wolfe was "spun out" on speed at the time of his arrest. He had planned to "cheek" the marijuana if stopped by law enforcement, in order to avoid another arrest. He did not intend to bring the marijuana or the tools into the jail in his rectum. (37RT 7500-02, 7534.)

The prosecutor questioned Wolfe about letters he wrote to appellant when he was out of custody: In November of 2002 he said he

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35 Former deputy Dennis Burke testified that in a police interview Wolfe said the hacksaw blades were a "tweaker tool kit." (37RT 7546-48.)

36 Wolfe had felony convictions for drug possession, possession of stolen property, burglary and forgery, and possession of a firearm, and had been to prison. (37RT 7492-94.)

still had no charges pending, and in December of 2002, he said that if he hit the street, he would not forget to touch appellant. In response to the prosecutor asking if he was giving appellant updates on the status of his charges, Wolfe said he was just writing friendly letters. (37RT 7505-10.) The prosecutor asked about a third letter Wolfe wrote to appellant in 2003 after his arrest. Wolfe explained he meant to ask appellant for help in getting out of administrative segregation because he didn't want to be judged as a rat, and the letter was not meant to refute the idea that he was in administrative segregation for ratting on appellant (as the prosecutor said). (37RT 7515-16, 7527.)[37]

Monika Witak pleaded guilty to conspiracy in 2005. She knew Mazza and appellant, with whom she corresponded. She was arrested for attempting to visit appellant in jail using a false name. (38RT 7747-50.) At the time of trial she did not recall the letter she wrote to appellant dated February 10, 2003, or what she meant in that letter. The letter stated that she had done everything that was asked of her, but that she couldn't force

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[37] Both Wolfe and Witak denied knowing or writing to each other. (37RT 7530, 7535, 38RT 7760.)

a guy to put the stuff up his behind and bring him back to jail. (38RT 7756-58.)

A letter from Monika Witak to appellant, dated February 10, 2003, when Wolfe was still in custody, said she had done her best for him, that she had done everything he asked and that she could not " just tie him down, pack his ass and force him to do that." (38RT 7757-58; Exh. 204.)

**6. Shanks were found in appellant's cell in 2003, 2005, and 2006.**

On February 19, 2003, Orange County deputy sheriff Wayne Richards found a seven-inch shank, another piece of metal three-and-a-half inches long, and two plastic lighters behind the intercom box in the cell appellant shared with another inmate. He said an inmate could kill with "something like that." (37RT 7551-57.) Richards testified that if an inmate were to move the cell sink and cut the rebar in an exterior wall with a hacksaw blade, he could reach the plumbing tunnel, as another inmate had done at some unspecified time, although the would-be escapee in that incident was unsuccessful. (37RT 7558-59, 7564.)

Deputy sheriff Julio Vargas searched appellant's two-man cell on June 22, 2005, and found that a piece of metal had been removed from

the wall and replaced with toothpaste. The missing six-inch piece of metal had been sharpened and was found in a bed sheet.[38] (38RT 7619-21; 7627-28.) The deputy testified he was concerned for his safety as a result, although he did not mention any such concerns in his report. (38RT 7624, 7638.) Prior to the search, appellant had said he had nothing to hide. When the deputy showed him the metal, appellant smirked, asked how it had gotten there, and when the deputy left, said "shank you later," which the deputy understood as a probable joke, and did not really consider the statement a threat. Vargas knew that appellant joked quite a bit. (38RT 7625-26, 7631-32, 7642.)

Deputy sheriff Guadalupe Ortiz found a three-inch long piece of metal in the appellant's mattress at the Santa Ana jail on May 30, 2006. (35RT 6919.) She described the metal as a shank, which could be made into a "deadly weapon," and which caused her concern for the safety of inmates and deputies. (35RT 6923-24.)

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38 Exh. 172, 173.

### D. Factor (c) Evidence: Appellant Had Three Prior Minor Convictions.

Appellant had prior convictions for second-degree burglary, car theft, and possession of marijuana for sale. (39RT 8026-27.)

## PENALTY PHASE

## MITIGATION EVIDENCE

### A. Appellant's Family Life.

Appellant's parents, Steve and Cathy Lamb were high school sweethearts. Cathy's sister Claudia Hayes tried to break up the relationship because Steve was older, very controlling, and used drugs and alcohol. However, after Steve returned from Vietnam, he and Cathy married and appellant was born 18 months later, in 1973. (40RT 8265-68.) Two younger sons, Danny and Matt, were born six and nine years later. (40RT 8184, 8279.)

Steve was addicted to both heroin and marijuana when he came back from Vietnam. He kicked his heroin habit but remained a life-long daily marijuana smoker; he also used cocaine.[39] (39RT 7933-34, 40RT

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[39] Steve was dishonorably discharged from the army after he went AWOL in Germany and assaulted and injured someone. He kicked his heroin habit but continued to smoke marijuana. (38RT 7860-62.)

8248-49.) Cathy herself was an alcoholic whose daytime "partying" began when appellant was a baby, and continued and worsened over the years. (38RT 7854-55.)

Steve was controlling and verbally abusive throughout their marriage from 1971 to 2001, and was physically abusive towards his sons. Appellant was a delightful child but had severe allergy-based asthma and was frequently hospitalized between the ages of five and eight. Appellant took medications that made him fidgety and caused him trouble in school. However, Steve thought appellant's medical condition was "emotional." When appellant was six or seven, he hid under his bed as a game. However, Steve punished him by beating him with a belt, leaving bruises and welts. Cathy was intimidated and "sort of" protected appellant from his father but did not really stand up to Steve. (40RT 8250-53.)

Cathy's sister Claudia Hayes lived with the Lambs when appellant was four years old and remained close to him. She described appellant as a sensitive and asthmatic child who cried a lot, and Steve as a stern and abusive father who was angry at appellant's numerous hospitalizations,

and who thought appellant's condition was "all in his head" and that he should "knock it off." (39RT 8074-75.)

**1. The years in Cerritos.**

In 1982, nine-year-old appellant was a Little League star[40] in the Cerritos neighborhood and Steve managed his team.[41] (38RT 7856, 7860.) Steve continued his physical discipline of appellant. When Steve coached appellant's team, his abuse was more verbal and mental, although he continued to use physical force on both appellant and Danny. Steve would yell at appellant until he cried if he misplayed. (40RT 8257-58.) Both appellant's aunt Claudia Hayes and his grandmother stopped attending baseball games because of Steve's embarrassing verbal lashings. Appellant never stood up to or talked back to Steve; instead, he tried to please his dad.[42] (39RT 8078-79.)

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[40] Appellant also suffered from asthma and was hospitalized three or four times. (38RT 7859.)

[41] Appellant played ball until he was 16 or 17 and was an exceptional player, scouted by the Royals and Padres major league teams. (38RT 7871-72.)

[42] Cerritos neighbor William Rowlands also testified that appellant lived and breathed baseball, that he was polite and respectful, never violent, and that Steve was harder on appellant than he should have been. (39RT 7929-30, 7942.)

Cerritos neighbor Sheryl Williams considered appellant a second son; her own son Robert Toyias was appellant's best friend. (39RT 7952-54.) Appellant was funny and sensitive; he was respectful and a kind and loving big brother. Once, when all three boys spent the weekend at another neighbor's' house, one-year old Matt fell into the pool and was taken to the hospital. Appellant was extremely upset thinking his brother would die. (39RT 7955-57.)

Robert Toyias, Sheryl Williams' son, considered appellant his brother. Appellant was fun and never violent. Although he was an excellent baseball player, appellant's father was merciless with him and yelled and berated him publicly during games. Still, appellant tried to make his dad proud. (39RT 7976-81.) On a fishing trip with neighborhood families, appellant had his fishing pole in a cove among a big school of bass. Steve dropped anchor and grabbed appellant's pole and fished with it himself. Toyias described this incident as epitomizing Steve's attitude towards his son. (39RT 7981-82.)

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### 2. The move to Dana Point.

Steve Lamb supplemented his income at a retail jewelry store by laundering marijuana smuggling money. (38RT 7864.) In 1986, when appellant was 13, Steve collected his $250,000 share of a drug deal, bought a 28-foot boat, and moved the family from Cerritos to Dana Point. They now had two mortgages, as Cathy's brother lived in their Cerritos house rent-free, and a boat payment. Steve had lost his retail job because he had stolen money from his employer. He started his own diamond brokerage with a $25,000 loan from Cathy's father, but that business failed. Steve stole from his vendors and Cathy had to give her wedding ring as part payment for the theft, in addition to cleaning houses to make up for Steve's debt. (38RT 7865-67, 7873, 40RT 8259-60, 8267.)

Steve was supposed to be holding money for his drug-dealing partners and making payments on the boat used in the drug deal but he did neither, and the partners came to collect. The family was deep in debt. Steve was out of work for a long time. Cathy was partying and drinking a lot. She first went into rehab after the move to Dana Point, and eventually went through 13 treatment facilities before getting sober.

(40RT 8263-65.) Meanwhile, she tried to work three jobs and her drinking escalated. (38RT 7836.)

Finally, the Lambs had to sell the Cerritos house to pay off the drug debts. Steve lost his "identity" when he lost his job, and he drank a lot and smoked a lot of marijuana. Cathy's drinking became severe and she had blackouts, drank hairspray, and didn't know what was going on. Appellant, at ages 13 to 16, was left in charge of his younger brothers. Cathy didn't care how this affected him: "All I cared about was having a drink . . . When you consume as much alcohol as I did, it takes away your ability to care about anything." (40RT 8268-69.) She was also diagnosed as bipolar and as her alcoholism progressed, she became a horrible person. She had mood swings and explosive fits of anger. She didn't monitor appellant's school work, she just worked, ate, drank and slept. (40RT 8269-71.)

Cathy's sister Claudia Hayes described Cathy's deteriorating alcoholism: She was either volatile and belligerent or comatose and drooling on the couch. Their mother put her into rehab a couple of times. (39RT 8080-85.) Cerritos neighbor Sheryl Williams and her son Robert spent one weekend with the Lambs in Dana Point. Cathy poured herself a

big tumbler of orange juice and vodka, which upset appellant. Cathy admitted she was drinking too much. (39RT 7958-60.) When Robert was around 15 he moved in with his father and stepmother, who made him cut off ties with old friends. Robert was forced to call appellant and tell him they couldn't see each other anymore. Appellant felt abandoned that his only friend was leaving him and both cried. (39RT 7988-90.)

The move to Dana Point was hard for appellant and he was lonely. Steve continued his physical and verbal abuse of appellant, which became more severe as appellant entered junior high school.[43] (40RT 8266.)

Claudette and Bernard Cain and their children lived across the street from the Lambs in Dana Point from 1986 to 1995. Mrs. Cain witnessed Cathy's deterioration into severe alcoholism: she became "a very mean and abusive drunk." (38RT 7822-24.) Twice, Mrs. Cain helped Cathy's mother place her in a rehab program. (38RT 7824-25.) Appellant's father Steve Lamb was a regular and open marijuana smoker. Steve was in

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[43] Cathy said: "I was from a father who beat me, and his father beat him . . . I always drank, but began to drink more. That was okay for me but then I stopped protecting him." (40RT 8266.)

and out of jobs; Cathy took on two and sometimes three jobs. Their marriage was under a lot of stress and Cathy's drinking escalated. (38RT 7835-36.) Cathy was too caught up in her alcoholism to be able to parent her children. (38RT 7847.)

Appellant was the caretaker, as he had been from a young age. He was responsible for feeding and taking care of his two younger brothers, as his parents liked to party[44] and were away from the home on a regular basis. Appellant also babysat for the Cain children. (38RT 7825-29, 40RT 8266.) Appellant was funny, loving and respectful, and very protective of his brothers. (38RT 7825-28.) He was trustworthy, responsible and had a heart of gold. Appellant was forced into the role of the adult in his own household because his mother was an alcoholic and his father was a drug addict. When Bernard Cain confronted Steve about his drug use in front of the children, Steve forbade Mr. Cain from entering the Lamb house. But the Cains continued their friendship with appellant and he and his

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[44] Mrs. Cain saw the aftermath of the Lambs' parties, with alcohol and liquor bottles strewn about the house, and people "sacked out all over." (RT 7835.)

brothers were welcome at their house. The Lamb household became a "war zone." Appellant was often crying. (40RT 8130-36.)

Steve's niece Shannon lived with the Lambs for a couple of years during this time, and she and appellant were close. She was four or five years older than appellant. When she left, it hit appellant hard, as apart from Mrs. Cain, Shannon was the only person who could sometimes relieve him of the weight of family responsibility. Cathy worked nights, or Steve was gone, or they were both out, and all the household and childcare responsibilities fell on him. Appellant cooked, he cleaned, and was a good big brother. (38RT 7837-38.)

Daniel Lamb, appellant's younger brother, testified that appellant was the only parent he had growing up. Their father was harsh, but the yelling wasn't as bad as the hitting; he was both physically and verbally abusive. On the other hand, appellant was always loving and affectionate and carried Danny around on his shoulders. If Danny had a problem, he went to appellant for help, not his parents. (40RT 8180-84, 8187, 8192.) Danny did not respect his mother and father as parents, and didn't even

consider them his parents. He loves and appreciates appellant for what he did for him. (40RT 8202.)

The years in Dana Point were the worst of Dannys' life. His parents were always down in the bar at the harbor or smoking marijuana at home. At age 13, Danny had to drive them home from the bar because they were so wasted and hammered. He often saw his mother drinking hair spray but appellant told him it helped with her cold sores. Appellant never bad-mouthed his mom or dad. (40RT 8185-88.) Bottles of liquor were everywhere, stashed in the garage, under the sofa, down her pants. Sometimes his mother got drunk and tried to take Danny or Matt in the car. Appellant would hide the keys and never let her take them although she would slap him and scream at him. (40RT 8190-91.)

Appellant also protected Danny from his father. Once when Steve was hitting Danny with a belt on his bare backside, appellant grabbed his father by the throat and told him never to touch him again; after that Steve never beat Danny again. When their father was verbally or physically abusive to appellant, though, he just took it, and didn't stand up to Steve. (40RT 8192-93.)

Danielle Curry Sena dated appellant's younger brother Danny when she was in high school, and spent a lot of time at the Lamb house, where there was no parental supervision.[45] Steve was never home, and Cathy would come home drunk early in the morning. Cathy was volatile at best and cycled from happy drunk to angry loud drunk to passed out. It was scary and embarrassing for her sons. (40RT 8154, 8159.) Appellant was gentle and fun to be around. He took the father role with Danny and was like a brother to her, always there for her when she needed him. (40RT 8150-53.) Danielle maintained her friendship with appellant through to the present. When she went through a bad divorce, appellant was her "rock" providing support and shedding a positive light on everything. He lifted her up. She never saw him angry or violent. When he got upset he would be happier and funnier on the outside. (40RT 8158-60.) In 1994-95, appellant started hanging out with a crowd she didn't like; she knew he

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[45] Robert Toyias confirmed that the Lamb household had no rules. Although the parents left the kids alone to fend for themselves, appellant did not drink or do drugs. Cathy always had a drink in her hand, and slept in the day; she would be angry if they woke her up when they were making their own breakfast. (39RT 7984-87.)

had a drug issue but she never saw him use drugs. He was always a big brother to her. (40RT 8161.)

Matthew Lamb, appellant's younger brother by nine years, had a strong bond with appellant who always took care of him and Danny. (40RT 8279-81.) Cathy and Steve Lamb were never present and it was appellant who spent time with him and Danny, encouraged him in his art, and was always there when he needed help. (40RT 8285-86.)

One night at Dana Point, Cathy was extremely drunk and got into a fight and wanted to take him with her to her sister's house. Matt was scared he would die in an accident and appellant pulled her out of the car. (40RT 8291.) The boys had a daily routine of looking for bottles, even hair spray and vanilla, that Cathy had hidden. They would hug her so they could pat her down to look for a bottle in her pants. She was almost always drunk and it was painful for the boys, who had a lot of friends who were forbidden from playing at the Lamb house. (40RT 8291-92.)

Matt voluntarily moved away from both his parents when he was 16 years old. His mother was at her worst and his father couldn't make ends meet. His older brothers both used drugs. Still, there were more

good times than bad with his brothers. "We don't play the 'woe is me' card." When he is with appellant they just laugh: that is their way of dealing with things. Appellant always made him happy. (40RT 8287-89, 8293.) Appellant wanted his father's support but Steve just washed his hands of him once he got in trouble. ("Dad will never change. He still owes me money." (40RT 8290.)

**3. The breakup of the family.**

By the time appellant was 15 or 16 in 1987-88 it was "like a normality" for Steve to come home to find Cathy "drunk – drinking and stuff." (38RT 7868-69.) Cathy would leave the house for her bartending job around 2:00 p.m. and not return until 4:00 or 5:00 a.m. She spent all the money from her bartending job on drinks after closing time. (38RT 7869, 7876.) By this time, Steve was smoking marijuana in front of appellant, and gave appellant "extra ounces" of marijuana to sell to his friends. (38RT 7878-79.) But when Steve found out appellant was selling marijuana at Rancho Santa Margarita High School, he threw him out of the house. (38RT 7904.)

Appellant got into trouble for stealing car stereos when he was about 16. Steve began divorce proceedings around this time. (38RT 7876, 7878-79.) Claudia Hayes wanted to take appellant to live with but Cathy wouldn't allow it.[46] (39RT 8087.) Steve considered appellant to be "on his own." In 1991 appellant was put into a drug rehabilitation program, but in Steve's opinion, this just made him worse. (38RT 7880-81.) Steve never visited appellant in jail and did not know where he was.[47] Steve was not interested in his case. (38RT 7884.)

The Lambs finally lost the Dana Point house. At that point Cathy was in rehab and Steve had moved out a year before and was working on a fishing boat. (39RT 8086-87.) When Cathy and Steve divorced, they got separate apartments, but for two years they kept seeing each other. According to Cathy, Steve still "bedded [her] and ... borrowed lots of money," brought her liquor and got her drunk when she was on the

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[46] Hayes and her children continued to maintain their close relationship with appellant, writing and talking to him once a week. (38RT 8089.)

[47] The last time Steve saw appellant, approximately nine years before his testimony, he told his son he could end up in jail, or dead, or straighten himself out; and that he would him back up in one of those. (38RT 7881.)

wagon. (40RT 8272-73.) Cathy lived in different apartments and lost each apartment. Appellant was with her for a while, but at age 18 he came and went. During this time, Cathy was arrested twice on DUI charges; although appellant was in need of guidance, Cathy was barely able to stay afloat herself. (40RT 8274-75.) She started drinking heavily again, and went into rehab. When she came out she had nowhere to go. Both appellant and Danny had gotten into trouble. Cathy finally went into a hospital and was told she had to take care of her bipolar disorder in order to get sober. At the time of trial, she had been sober for over five years, never having been sober for even a year before that, and had a good relationship with appellant. She knew that she had abandoned her sons emotionally and physically when they were young. (40RT 8275-76.)

By 1994, the family had broken up. Danny tried to stay with his mother because his father was extremely verbally abusive, but eventually he ran away. In 2001, he was convicted of a felony and spent eight months in jail. He then went to a recovery home because his mother was in rehab and his father had no permanent place. Danny met his wife in

recovery and married and moved out of state as soon as he was finished with probation. (40RT 8193-8200.)

Around this time, appellant stayed for 10 months with Sheryl Williams' family and worked in their moving and storage company. He was an excellent employee. Towards the end of the 10 months, she noticed he was hanging out with an unsavory crowd and when he left there was some damage to trailer where he had been living. (39RT 7960-64.) Some months later Cathy showed up at the Williams' house every Monday night for several weeks. She was highly intoxicated although she was supposed to be going to school. Cathy was so drunk Mrs. Williams couldn't believe she drove to her house without killing someone. She had to call Cathy's mother to pick her up. (39RT 7964-66.)

David Hart ran the umpiring service for Del Obispo Youth Baseball. Appellant was a baseball star with real potential. When appellant was about 20, Hart hired paid him $25 a game to work with 9-to-12 year old kids, even though it was unusual to have such a young man working in this role. Hart observed that appellant worked well and got along with the young boys. (39RT 8059-62.)

John Veeh remembered appellant from Dana Hills High School, where Veeh was vice principal and where appellant went to school from 1989-90. Appellant was respectful and accepted responsibility for discipline problems. On the other hand, his parents did not participate or meet with staff. (39RT 8050-51, 8056.) In 1991, appellant went to a rehab hospital and then entered Horizons alternative school. (39RT 8055.) Robert Manley taught appellant there and remembered him a pleasant student who never caused discipline problems, and who was never violent or disrespectful. On the other hand, appellant's parents had no contact at all with the school or with him. (38RT 7781-85.)

Shayna White knew appellant as her mom's boyfriend and she spent a lot of time with him when she was eight to 11 years old. They went to the beach and shopping, and did "normal family things." He was like her father, and protective of her, the funniest and nicest person she had ever met in her life. He was respectful of her mother and he was never violent. (40RT 8145-47.)

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**B. Expert testimony.**

Daniel Vasquez, a former warden at San Quentin, testified as a prison and gang expert. He stated that if a person got "out of the hat" with a gang like the Aryan Brotherhood by trying to take credit for a crime he hadn't committed, he would go right back into the hat. Inmates are experienced in finding out what others are charged with: they listen in to the staff, and they find paperwork, etc. (39RT 8004-06.)

Vasquez described the grim conditions of the Segregated Housing Unit (SHU): only 10 hours a week out of the cell, no natural sunlight, a dog run for exercise, and a shower only three times a week. (39RT 8007-08.) Thus it an advantage *not* to be a validated prison gang member; advantages include movement to a lower level of security, contact with others, daylight, and access to self-betterment programs.[48] (39RT 8009-10.) Vasquez also explained that an inmate sentenced to LWOP spent the first five years of his sentence in maximum custody, just one step short of

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[48] That is, the consequences from the prison gang, and the different prison conditions would not tend to provide a motive for someone like Billy Joe Johnson to take credit for a crime he did not commit.

S.H.U., that LWOP meant the rest of one's life in prison, and that no one had ever escaped from a level 4 California prison. (39RT 8010-15.)

Addiction specialist Dr. David Smith described methamphetamine as a general but rapid central nervous system stimulant. At high dosages, it produces an abnormal surge in brain chemicals causing paranoia and hallucinations.[49] Chronic use, with the resultant sleep deprivation, disregulates neurochemistry so seriously that it produces a paranoid schizophrenic-like reactions. (38RT 7798-7801.) Studies and clinical interviews show a tremendous distortion of time perception in meth users. (38RT 7802-03.) In a user with a family history of addiction, meth is "very addicting." (38RT 7805-07.) The police video of appellant and Rump, showing them yelling and then falling asleep was consistent with meth use, and the sores on appellant's skin were consistent with heavy meth use. (38RT 7810-11.)

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[49] Tactile hallucinations result in what are called "speed bumps," the red sores common among meth users. Meth causes dilated blood vessels, which the user thinks are bugs, and tries to dig them out of his skin. (RT 7804.) The scratching then becomes infected. (38RT 7809.)

## ARGUMENT

### I. CONDUCTING A SECOND PENALTY PHASE TRIAL AFTER THE FIRST PENALTY PHASE JURY FAILED TO REACH A VERDICT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

As set forth below, the California statutory scheme, mandating that a capital defendant undergo a second penalty phase trial after the first penalty phase jury fails to reach a verdict, is contrary to evolving standards of decency, and in violation of the Eighth Amendment prohibition against cruel and unusual punishment. (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *Atkins v. Virginia* (2002) 536 U.S. 304, 312.)

The second penalty trial also violated appellant's state and federal constitutional rights to a fair jury trial, a reliable penalty determination, due process and equal protection as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. The retrial of the penalty phase was also in violation of the constitutional protections in article I, sections 1, 7, 15, 16 and 17 of the California Constitution.

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### A. After Appellant's First Penalty Phase Jury Deadlocked 6/5/1 and a Mistrial Was Declared, Appellant Was Forced to Face A Second Penalty Phase Trial.

Appellant's first penalty trial began on July 12, 2007. (8CT 1915.) On July 31, 2007, after three days of deliberation, the jury remained "static" and almost evenly split as to penalty. A mistrial was declared. (8CT 1944-47, 9CT 2095; 42RT 8640-45 [6/5/1 split].)

On August 21, 2007, the prosecution refiled the capital prosecution. The defense moved to bar the retrial as violative of the Eighth Amendment protection against cruel and unusual punishment under evolving standards of decency, and in violation of section 17 of the California Constitution. (9CT 2200-08.) On April 28, 2007, the trial court denied the defense motion, stating that it had "no discretion" and that the prosecution had an "unfettered right" to retry the penalty phase. (9CT 2223-24; 28 RT 5678, 5704. )

The second penalty trial began on April 29, 2008, and on June 11, 2008. After three days of deliberations, the jury returned a death verdict. (10CT 2586.)

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### B. California's Statute Mandating Retrial Of the Penalty Phase of a Capital Trial Violates the Eighth Amendment Requirements That Punishment Conform to Evolving Community Standards and that the Penalty Determination In a Capital Trial Be an Individualized Decision.

Penal Code section 190.4(b) *mandates* that if the penalty phase jury is unable to reach a unanimous verdict, the trial court "**shall** order a new jury impaneled to try the issue as to what the penalty shall be."

Of the 33 jurisdictions with a death penalty (32 states and the federal government), only California and Arizona[50] *require* the defendant to face a second penalty phase jury if the first jury fails to reach a verdict, and only seven *permit* retrial after the first penalty jury fails to impose the death penalty: Alabama, Delaware, Florida, Indiana, Kentucky, Montana and Nevada.[51] The federal courts and the other 23 states permit only a single penalty trial, and if that trial ends without a verdict, the prosecution

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50 A.R.S. §13-752(K).

51 Ala. Code, § 13A-5-46(g)(2009); Del. Code Ann., tit.11, § 4209 (c)(3)(b)(1) (2009); Fla. Stat.Ann. 921.141(2) (2009); Ind. Code Ann. § 35-30-2-9(f) (2009); Mont. Code Ann. § 46-18-305 (2009); Nev. Rev. Stat. Ann. § 175.556(1) (2009). The Kentucky statute is silent but case law suggests that a retrial is permitted. (*Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 681.)

cannot retry the penalty phase. By mandating a second penalty trial, California even treats capital defendants differently than non-capital defendants. In any other murder prosecution case where the jury deadlocks, a retrial is optional, and not mandatory. (Pen. Code, section 1149 [after mistrial "the cause may be tried again"].) California is vastly at odds with the evolving standards of decency on this issue.

In the touchstone case on Eighth Amendment jurisprudence, *Furman v. Georgia* (1972) 408 U.S. 238, Justice Stewart declared that the death penalty as it was then being imposed was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (*Id.* at 309-10.) That is, the rarity or unusual imposition of the death penalty (on "a capriciously selected random handful" of the totality of convicted murderers) was strong evidence that it was being imposed in an arbitrary and capricious manner violative of the Eighth Amendment.

The *mandatory* provision of the California statute -- calling for empanelment of a new jury and retrial after a deadlocked penalty phase jury fails to return a verdict -- violates the two fundamental principles underlying the constitutionality of capital punishment, i.e., the required

consistent application of the death penalty (it cannot be "unusual"); and the required individual judgment of each penalty phase juror.

### C. The California Statute Mandating a Second Penalty Phase Trial Is Vastly at Odds with Evolving Standards of Common Decency and Thus Violates the Eighth Amendment.

Appellant contends that the empanelment of a second penalty jury to retry the penalty phase constitutes federal constitutional error by departing from the evolving standards of decency in this country.

The basic concept underlying the Eighth Amendment is "nothing less than the dignity of man," and the Amendment thus "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, 356 U.S. at 101.) The Supreme Court has held that the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (*Atkins v. Virginia*, 536 U.S. at 312 quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 331.)

Appellant acknowledges that in *People v. Taylor* (2010) 48 Cal.4th 574, 634 this Court rejected a similar Eighth Amendment claim, declaring "that California is among the 'handful' of states that allows a penalty

retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or 'evolving standards of decency that mark the progress of a maturing society.'" Appellant disagrees.

First, California is not just one of "a handful of states" that allows a penalty retrial: it is one of only two states that mandates a penalty retrial, and one of only seven of the 33 jurisdictions in this country that provide for a penalty retrial. Secondly, the United States Supreme Court has made it clear that Eighth Amendment jurisprudence draws its meaning from the evolving standards of decency, and that state legislation provides the clearest and most reliable evidence of those standards, as set forth in *Trop v. Dulles,* the very case this Court cited in *Taylor* for the proposition that evolving standards as shown by state legislation are not enough to find an Eighth Amendment violation.

The United States Supreme Court has recently prohibited imposition of the death penalty in a number of cases, because "evolving standards of decency" rendered the death penalty out of step with contemporary values and thus in violation of the Eighth Amendment. In

*Roper v. Simmons* (2005) 543 U.S. 551, 570-78, the High Court held that the death sentence for juveniles was cruel and unusual, noting that 30 states prohibited execution of minors, including 12 that had abandoned the death penalty for any offender. Similarly in *Atkins v. Virginia*, 536 U.S. at, 313 and 321, the High Court declared unconstitutional the death sentence for the mentally retarded, relying on the evolving community standards evidence that 30 states prohibited execution of mentally retarded including 12 that barred the death penalty altogether. *Ford v. Wainwright* (1986) 477 U.S. 399, 408-11 held that the Eighth Amendment prohibited execution of an incompetent defendant, relying on the objective indicia that 26 of the 41 states that then had a death penalty statute explicitly required suspending execution of an incompetent prisoner, while others had more discretionary procedures for suspension of the sentence and only one had no specific procedure governing the issue.

The same analysis requires this Court to find that a second penalty retrial in this case violates the "evolving standards" doctrine of the Eighth Amendment. As set out above, in Part B, an overwhelming majority of

states that allow the death penalty to be imposed do not permit retrial of the penalty phase after the first jury as been unable to reach a unanimous verdict. The death penalty is barred in 18 states, the District of Columbia and Puerto Rico; of the 33 jurisdictions that have the death penalty, 24 (or 73%) of them require that if the (first) penalty jury is unable to reach a unanimous verdict, the defendant must be sentenced to life without possibility of parole.[52] There is no provision for a retrial on penalty.

Only seven of the 33 death penalty jurisdictions permit a retrial; and only two (California and Arizona) require it. Thus, of the death penalty

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[52] 18 U.S.C.A. section 3593(3) (West Supp. 1995); 21 USCA section 848(1) (West Supp. 1995); Ark. Stat. Ann. § 5-4-603(c) (1993); Col. Rev. Stat. § 18-1.3-1201(2)(b)(II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id. Code § 19-2512(7)(c) (2003); Ind. IC 35-50-2-9; Kan. Stat. Ann. § 21-4624(e) (Supp.1994); La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, § 9711(c)(I)(v) Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); SD Codified Laws Ann. §§ 23A-27A-4 (1988); Tenn. Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994).

jurisdictions, only two out of 33, or 6% mandate a second penalty phase trial. The California scheme is an anomaly and stands with only nine other states in allowing a retrial on penalty, and with only one other state in mandating a retrial.

In short, whether the statute requires a second trial or allows a second trial, requiring appellant to defend himself against possible execution more than once is contrary to our country's "evolving standards of decency" in violation of his Eighth Amendment rights.

### D. Retrial of the Penalty Phase Contravenes the Constitutional Requirement that Each Juror Must Make an Individualized Determination.

After *Furman v. Georgia* (1972) 408 U.S. 238 declared the death penalty as it was then being imposed to be cruel and unusual, many states, including California, reenacted death penalty statutes. The United States Supreme Court upheld many of these statutes with one principled caveat: The law must allow each juror to make an individualized moral decision in deciding between a death or life sentence at penalty phase. (*Saffle v. Parks* (1990) 494 U.S. 484, 492-93 [the law requires a moral response to the evidence concerning the imposition of the death penalty].) That is,

each juror's unique weighing of aggravating evidence against mitigating evidence is not just permitted, or contemplated, but *required*. (See e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280 [striking down death penalty statute which removed from the individual judgment of the jurors the consideration of the defendant's character and circumstances]; *Mills v. Maryland* (1988) 486 U.S. 367, 375 [each individual juror must be free to identify and consider any evidence in mitigation].)

*Gregg v. Georgia* (1976) 428 U.S. 153, 181 held that the Eighth Amendment standard of decency is measured not only by referencing state legislation, but that "[t]he jury also is a significant and reliable objective index of contemporary values because it is so directly involved." Accordingly, "one of the most important functions any jury can perform in making [] a selection [between life imprisonment and the death penalty] is to maintain a link between contemporary community values and the penal system." (*Ibid.*)

When the jury is unable to make that selection, as appellant's first penalty phase jury was, the divergence of the individual jurors' conclusions should not be dismissed as a failure to reach a verdict. Rather, the lack of

agreement is an "objective index" of the community's values as to the appropriate punishment for the defendant, i.e., that in this case, the death sentence was not appropriate. This is especially true in this case, in which a mistrial was declared not because of a single holdout juror, but because of an almost even split among the jurors between life and death (6/5/1).

The prohibition of a retrial of the penalty phase is based on the deep respect for the individual conscience and moral judgment of each juror deciding a capital defendant's fate. (*Mills v. Maryland,* 486 U.S. at 375.) A retrial after the penalty phase jurors are deadlocked sends a message to the community that the individual moral judgment of each juror is not trusted or valued, despite the instructions given to the jurors to decide appellant's penalty as individual moral beings. (See CC No. 766; 10CT 2487.) Such a message conflicts with the Eighth Amendment focus on evolving standards of decency in our society and the importance capital jurisprudence places on the individual conscience of each juror.

### E. Appellant's Death Sentence Is In Violation of Federal Due Process.

The second jury's decision cannot be considered a reliable determination that death was the appropriate punishment since the two

juries heard much of the same evidence and yet reached different conclusions. This is particularly so in that both juries deliberated for three days before deadlocking in the first instance, and three days in the second before reaching a verdict of death in the second – in short, the facts are far from a convincing showing that appellant deserves to die.

Either the death verdict in this case was plainly arbitrary – the result of throwing the dice twice to obtain a one-out-of-two chance of getting a death sentence – or the differences in the aggravating evidence presented at the two trials resulted in the death verdict at the second trial. Although both juries heard the same evidence relating to the offenses themselves, the second penalty jury heard evidence that the trial court had excluded as insufficient in the first trial: At the first penalty trial, evidence of appellant's alleged involvement in a conspiracy to smuggle into the jail weapons and instruments of escape was struck from the record. The trial court heard the evidence and ruled it inadmissible because the "gulf was too large" to "connect the dots" of the supposed conspiracy to appellant. (25RT 5060-61.) Yet after the jury deadlocked at 6/5/1, the prosecutor asked the court to "reconsider" its ruling and to find the very same

evidence now admissible. The trial court did an about-face and ruled the evidence inadmissible under a poorly articulated and faulty rationale. (See Arg. II, below.) The second penalty prosecution, now fortified by the inadmissible evidence of a supposed violent or potentially violent escape attempt, resulted in a death verdict[53] that was fundamentally unfair in violation of federal due process. "Where a statute indicates 'with language of unmistakable mandatory character' [e.g., by use of the word 'shall'] that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." (*Ford v. Wainwright* (1986) 447 U.S. 399, 428 [conc. opn. of O'Connor, J.].)

Such fundamental unfairness is surely an underlying rationale for the majority rule that allows the prosecution only one attempt at a verdict of death. Although in ordinary cases, the defendant faces a second

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[53] As this Court observed in *People v. Gallego* (1990) 52 Cal.3d 115, 212, "the erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty."

prosecution after a mistrial because of a hung jury, death is different,[54] and the same rule should not apply in capital prosecutions. In particular, it is fundamentally unfair to allow the prosecution a second chance at a death verdict with evidence already once deemed inadmissible.

**F. Conclusion.**

In conclusion, fundamental fairness, the national consensus against death penalty retrials, the recognition that "death is different," and the required individualized juror determination at the penalty phase, require a prohibition against repeated attempts by the state to sentence a defendant to death. Because the second penalty trial was invalid, the verdict of death is also invalid. The structural error[55] requires this Court to

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[54] Because the death penalty is qualitatively different from imprisonment there is a corresponding difference in the need for reliability in the determination that death is the proper punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280; see also *Monge v. California* (1998) 524 U.S. 721, 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings"].)

[55] Structural errors are those that go to the very construction of the trial mechanism, those affecting the entire conduct of the trial from beginning to end, as opposed to trial errors, which are those that occur during the presentation of the case to the jury. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 308; *People v. Anzalone* (2013) 56 Cal.4th 545, 553-54.

vacate appellant's death sentence and to impose instead a sentence of life without the possibility of parole.

## II. THE ERRONEOUS ADMISSION OF EVIDENCE OF APPELLANT'S ALLEGED PARTICIPATION IN A CONSPIRACY TO SMUGGLE WEAPONS AND INSTRUMENTS OF ESCAPE INTO THE JAIL, AND TO ESCAPE FROM JAIL, EVIDENCE DEEMED INADMISSIBLE BY THE SAME JUDGE AT THE FIRST PENALTY TRIAL, VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL BY JURY AND A RELIABLE SENTENCING DETERMINATION

### A. Summary of Facts Below.

#### 1. At the first penalty trial, the court deemed the prosecution's evidence insufficient of appellant's alleged conspiracy to be legally insufficient.

The prosecution presented the following testimony at the first penalty trial: David Wolfe and appellant had been housed in the same jail location. (24RT 4895.) In December of 2002, Wolfe was in Chino State Prison awaiting release under Proposition 36. He wrote to appellant: "If I happen to Prop and hit the street, I haven't and won't forget to touch you, comrade." (Exh. 263.)

Wolfe was released from custody on February 12, 2003. (24RT 4893.) On February 19, 2003, Wolfe knew there was a warrant out for his

arrest for failure to report. (24RT 4900.) He was arrested that day in a car with a woman named Laurice Sloan. The police found five small broken hacksaw blades and some marijuana, and he was arrested for possession of burglary tools (he was a convicted burglar). He told the police the blades were his "tweaker tool kit," that the blades were to cut the lug nuts on his car, and that he had wrapped the marijuana in order to smuggle it into jail for himself if he was arrested. (24RT 4900-03, 4924.) He denied any plan to smuggle these items into the jail and denied that appellant ever requested or directed him to bring escape instruments into the jail. (24RT 4895-96, 4901, 4918-19.) He did not know Monika Witak. (24RT 4893.)

After Wolfe's arrest for burglary tools, he was placed in segregation and wrote to appellant again. This letter said nothing about him not ratting or snitching out appellant, but asked appellant to let people know he was in segregation because of the items found on him when he was arrested, not because he was a snitch, as it was dangerous to be known as a snitch. (24RT 4908-09, 4914-16.)

On that same day, the deputies found a shank, a smaller piece of metal, and lighters in the cell appellant shared with another inmate. (24RT 4820-26.)

On February 10, 2003, appellant's girlfriend Monika Witak wrote to appellant asking why he got mad at her, because she had done everything he asked. She wrote: "As if I can just tie him down, pack his ass and force him to do that. [] I did my best for you, made sure you had the other." (Exh. 269.) Witak did not know Wolfe and denied that appellant wanted her to use Wolfe to smuggle anything into the jail. She said the reference to "pack his ass" was "more sexual than anything." (24RT 4936, 4944.)

Detective Hoffman testified that on February 19, 2003, Wolfe had been arrested for possession of burglary tools. (24RT 4953.) Hoffman interrogated Wolfe, who denied any plan to smuggle escape tools into the jail. Wolfe said that he had the blades for cutting the lug nuts off his tires, and that he had marijuana rolled up to "cheek" in case of his arrest, because he had a warrant out on him. (24RT 4953, 4957.)

After this testimony was presented, the trial court struck the entirety of this evidence on the basis that the "gulf was too large" to

"connect the dots" of the supposed conspiracy to appellant. (25RT 5060-61.) The jury was not instructed on conspiracy to smuggle or escape.

### 2. After the first penalty jury failed to reach a verdict, the trial court did an about-face and ruled that the same evidence was admissible at the second penalty trial.

Prior to the second penalty trial, the prosecutor asked the trial court to reconsider its ruling from the first penalty trial striking, as legally insufficient under section 190.3(b), the evidence of appellant's supposed "involvement in a plan to smuggle into the jail more weapons and instruments of escape and conspiring to escape from jail." (9CT 2189.) The defense pointed out that the prosecution's proposed evidence was the same as that presented and struck at the first trial, and that the court had ruled that same evidence factually and constitutionally insufficient.

Nonetheless, the trial court stated that it had not previously considered the "conspiracy" aspect of the evidence, and declared that legally the evidence now "needed to come in." The court added that, because of the "comedy of errors," the evidence was not necessarily aggravating. (28RT 5790-96.) The trial court's reasoning was defective: the prosecution introduced this evidence under section 190.3(b), and the

jury was instructed that it was aggravating. Under *People v. Phillips* (1985) 41 Cal.3d 28, 72-72 & fn. 25, the judge makes the initial determination whether the conspiracy, if proven, amounted to violent criminal activity within the meaning of section 190.3, subdivision (b). Because the jury was instructed according to this principle, the only determination for the jury was whether the conspiracy had been proven, i.e., not whether it was an aggravating fact. (See CALCRIM 764 at 10CT 2435-37.) Consequently, if any juror believed the prosecutor's theory, it would be aggravation contributing to a death verdict. This evidence could only be considered as non-aggravating if no juror could reasonably believe there was a conspiracy or that appellant was involved, in which case, as in the first trial, the evidence should have been excluded.

In short, the same evidence declared insufficient to connect appellant to any conspiracy at the first trial was introduced in the second trial. (See Statement of Facts, Part 5. C, above, pp. 65-68.)[56] The trial

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56 After the evidence was admitted, the defense repeated its request to strike the evidence, and also objected to jury instructions on the alleged conspiracy. (39RT 8118.)

court's about-face ruling is flawed in multiple ways. As demonstrated below, the prosecution's evidence failed to establish that appellant entered into an agreement. Assuming arguendo that the evidence can be interpreted to show an agreement, there was no evidence that the agreement was to attempt a jail escape; and assuming the evidence could be stretched to this point, there was insufficient evidence that the conspiracy to escape was violent.

### B. The Trial Court's Ruling at the First Penalty Trial Was Correct: There Was No Evidence Appellant Entered into Any Agreement to Smuggle Escape Weapons And/Or Instruments Of Escape into the Jail, or Any Agreement To Attempt to Escape from Jail.

#### 1. Evidence of violent criminal activity is admissible under section 190.3(b) only if the evidence is sufficient to demonstrate to a rational trier of fact that the accused committed a violent crime.

The trial court was right the first time: the prosecution was unable to present evidence which would allow a rational trier of fact to make a determination beyond a reasonable doubt that any violent criminal activity took place and that appellant participated in it.

Section 190.3(b) provides for admission of aggravating evidence of criminal activity involving the attempted use of force or violence, or threat

to use force or violence against a person; a threat of violence to property is not sufficient. (*People v. Clair* (1992) 2 Cal.4th 629, 672-73; see *People v. Boyd* (1985) 38 Cal.3d 762, 776-78 [error to admit evidence that the defendant committed the crime of attempted escape by removing a metal grate from an air vent in a lockup tank because the activity did not involve use or attempted use of force, or that the defendant threatened any person with violence or threat].)

Under *People v. Phillips* (1985) 41 Cal.3d 29, 65, 72[57] and its progeny, factor (b) "criminal activity" is admissible only if the evidence demonstrates the commission of an actual crime, specifically, a violation of a penal statute. Before the prosecution can introduce factor (b) evidence, the trial court must find that the prosecution has shown "evidence that would allow a rational trier of fact to make a determination beyond a reasonable doubt" that the violent criminal activity took place. (*Id.* at 75, fn. 25, *People v. Moore* (2011) 51 Cal.4th 1104, 1135-36.)

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[57] *Phillips* rejected the Attorney General's argument that the criminal activity "need not amount to the actual commission of a crime to be admissible as an aggravating factor under the statute." (*Id.* at 66.)

### 2. An agreement to commit a crime is the essential element of a conspiracy.

The prosecution's proposed section 190.3(b) theory - at both the first and second trial -- was that appellant entered into an agreement to smuggle weapons into a penal institution and an agreement to attempt an escape. (3CT 638, 9 CT 2149 [section 190.3 notices at first and second trials].)[58]

The essence of the crime of conspiracy is the agreement or common design. (*People v. Johnson* (2013) 57 Cal.4th 250, 258.) Conspirators must agree to the commission of a criminal act. Proof of agreement does not require evidence of a formal agreement or that the parties actually met. However, there must be some manifestation or communication of a mutual understanding: this may be established by circumstantial evidence. (*Id.* at 264; see also Witkin, 1 *California Criminal Law* (3rd Ed. 2000), Elements, section 75, p. 286.)

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[58] See jury instructions at second penalty trial: 10CT 2453-56 [CC 415: Conspiracy]; 10CT 2479-80 [CC 2747: Conspiracy to smuggle weapons into a penal institution]; 10CT 2481-82 [CC 2760: Conspiracy to escape from county jail].)

The conspiracy or mutual agreement must be independently established: the acts and declarations of an alleged conspirator cannot be used as the sole proof of the agreement. (*Ibid.*) Mere association alone cannot form the basis for conspiracy. Thus, the fact that the alleged coconspirators knew each other or took some joint action does not prove the existence of an agreement. (*People v. Drolet* (1973) 30 Cal.App.3d 207, 218.)

### 3. The prosecution failed to establish evidence that appellant entered into an agreement to smuggle weapons into the jail and attempt to escape.

The first fatal flaw in the prosecution's case is that there was no evidence of any agreement to smuggle escape weapons or tools, i.e., hacksaw blades, into the jail for appellant's attempted escape. The prosecution was able to prove that appellant knew both Wolfe and Witak. But there was no evidence that Wolfe and Witak even knew each other or had ever met.

There was no evidence that appellant and Wolfe entered into an agreement for Wolfe to attempt to smuggle hacksaw blades into the jail. The prosecutor established that Wolfe and appellant knew each other in

jail and corresponded with each other after they met in jail. Despite the prosecutor's pointed questions as to the contents of their correspondence, there was no evidence from the letters themselves or from Wolfe's testimony that appellant either requested or directed him, or that they had an agreement, to smuggle any item into the jail for appellant's escape attempt.

Nor was there any evidence that appellant and Witak entered into such an agreement. The prosecutor relied on Witak's letter to appellant dated February 10, 2003 (nine days before Wolfe was arrested), a letter the prosecutor described as "establishing that she was, at the behest of [appellant] trying to arrange for a man to smuggle contraband to the defendant." (9CT 2190.) Even assuming arguendo that Witak's letter tended to show that she asked someone to "pack his ass" at appellant's behest, it does not tend to show any plan to smuggle "weapons and instruments of escape." The prosecution's own claim is telling: he argued that the letter established that Witak was trying to arrange for the smuggling of *contraband* – and refrained from a claim that the letter showed a plan to smuggle weapons or instruments of escape.

The prosecution's case did not amount to facts from which a reasonable inference could be based but rather speculation based on conjecture based on surmise. The courts have condemned such speculation as support for a conspiracy charge. For example, *People v. Killebrew* (2002) 103 Cal.App.4th 644 held that there was insufficient evidence of a conspiracy to possess a handgun by a gang member. The prosecution's theory was that the defendant was part of a group travelling armed into a location in the expectation of gang retaliation. To tie the defendant to the conspiracy, the prosecution had to establish that he was in a certain car; three of the passengers in that car were positively identified and denied the defendant was also in the car. The prosecution's evidence was that another witness saw four people in the car, and the defendant was known to be in the area at the time. The appellate court concluded that these facts did "not lead to an inference, reasonable or otherwise," that the defendant was in the car. (*Id.* at 661; see also *People v. Powers-Monachello* (2010) 189 Cal.App.4th 400, 411-14 [evidence was insufficient to support a charge of conspiring to possess cocaine for sale

where the defendant's statements showed an association but no agreement to do more than store a safe].)

In this case, the trial court considered it "significant" that Wolfe was arrested with burglary tools the same day that correctional officers found a shank in appellant's cell. But appellant's possession of a shank unrelated in any way to Wolfe or Witak does not tend to prove any agreement to smuggle weapons into the jail. In sum, the prosecution was able to show that appellant and Wolfe knew each other in jail, that appellant might have asked Witak to get someone to "pack his ass" with something, and that Wolfe was arrested in the possession of burglary tools and marijuana.

As the trial court stated in the first trial, it was too much of a stretch to connect the dots. A jury would have to infer (1) that a request to a "guy" was a request to Wolfe even though there was no evidence that Witak and Wolfe even knew each other; (2) that the reference to "pack his ass" necessarily referred to a plan to smuggle weapons and instruments of escape into the jail, rather than drugs or anything else; (3) and that the letter written by Witak on February 10, referring to events in the past and some kind of failure, was necessarily related to Wolfe's possession of

drugs and burglary tools on February 19 and a plan to smuggle weapons into the jail in an escape attempt by appellant. As stated succinctly by the *Killebrew* court: "Speculation is not substantial evidence." (103 Cal.App.4th at 661.)

**4. Even assuming arguendo the evidence was sufficient to infer an agreement, the evidence was insufficient to infer a violent escape attempt.**

Thus, even assuming arguendo that the evidence was sufficient to infer some sort of agreement, it was insufficient evidence to permit an inference of a violent escape attempt. The cases finding sufficient evidence to infer a violent escape attempt are distinguishable on their facts from the meager facts here. For example, *People v. Lightsey* (2012) 54 Cal.4th 668, 727-28 [defendant's actions of "squaring up" with fists clenched in "combative stance" under factor (b) where jury could have found his actions carried an implied threat of violence]; *People v. Tully* (2012) 54 Cal.4th 952, 1028-29 [testimony by two deputies that defendant was involved in two jailhouse altercations was sufficient proof of violent criminal activity under factor (b), where the evidence of mutual combat and testimony that the defendant was injured permitted an inference that

he landed a blow and thus committed a battery]; *People v. Moore*, 51 Cal.4th at 1177-78 [correctional officer's testimony that the defendant threw his food tray at her and splattered food all over her was sufficient under factor (b) for the jury to conclude the defendant had committed an assault or battery].)

The facts of this case fit more closely those of *People v. Lancaster* (2007) 41 Cal.4th 50, 92-94, in which this Court held that evidence of the defendant's possession of a handcuff key was improperly admitted under factor (b) because there was no evidence of an actual escape attempt or any other crime related to the keys. Here, Wolfe was found in possession of drugs and burglary tools, but there was no evidence of any criminal agreement to smuggle those weapons or tools into the jail. Even if the Witak letter provides a sufficient basis for an inference of an agreement to smuggle something into the jail more than nine days earlier, there is no evidence that such an agreement related to weapons or tools, and thus the smuggling/escape attempt evidence was inadmissible. (*People v. Boyd,* 38 Cal.3d at 776-77.)

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### 5. The trial court's rationale for changing its ruling fails on its own terms.

The trial court's supposed rationale for doing a 180-degree turn on this ruling makes little sense. The court stated that it had not previously considered the "conspiracy aspect" addressed in *Boyde* and *Mason*, under which the alleged conspiracy to smuggle and escape "qualified." However, as shown below, neither case supports the court's ruling.

In *People v. Boyde* (1988) 46 Cal.3d 212, 248, evidence of a conspiracy to effect an escape was properly introduced where inmate English testified that inmate Moore said he was going to help Boyde escape; English had also seen two letters from Boyde to English, and English and Moore discussed the escape, which included a plan for Moore to leave wire cutters and a gun on the roof of the jail so Boyde could kill a deputy and escape. (English reported the plan to the authorities and the letters were photocopied and returned to Moore's cell.) *Boyde* stands for the proposition that a plan calling for use of a gun is admissible under factor (b) but it does not come close to supporting the admission of the evidence challenged here.

*Boyde* involved testimony that the defendant planned an escape with Moore, including letters from the defendant discussing the plan, to which Moore had initially agreed. The contrast with the evidence in this case is striking. First, there is no evidence, even circumstantial evidence, that appellant entered into an agreement to smuggle any kind of escape tool or weapon into the jail in an escape attempt; secondly, even assuming an agreement to smuggle something into the jail, there is no evidence of an agreement for a violent escape. (See Part B, sections 3 and 4 above, pp. 112-118.)

*People v. Mason* (1991) 52 Cal.3d 909, 954-56 did not even involve a conspiracy. *Mason* held admissible under factor (b) evidence of the defendant's two attempts to escape and his three possessions of weapons in jail. The defendant had twice loosened the metal screen on the window to his cell in administrative segregation; and testimony showed that an escape from that cell would "almost certainly have involved defendant in a confrontation with a guard," and testimony as to the impossibility of a hypothetical non-violent escape (involving cutting through three walls and several windows and rappelling 100 feet down) was unrebutted.

*Mason* stands only for the proposition that an escape attempt, depending on the particular facts, can sometimes be said to involve "an implied threat to use force." Thus, as *Mason* pointed out, in *People v. Boyd*, 38 Cal.3d at 776-77, there was no showing of an implied threat to use force, where the evidence showed only that the defendant removed a grating from an air vent; whereas in *People v. Boyde*, 46 Cal.3d at 250, a plan to use a gun, if necessary, to subdue a guard did involved an implied threat to use force. (*Mason*, 52 Cal.3d at 955.)[59]

In short, the trial court's original ruling was correct. The prosecution's evidence was not enough to "connect the dots" of a conspiracy to smuggle weapons and attempt a violent or potentially violent escape attempt. In the trial court's own words, "the gulf [was] too

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[59] In *People v. Gallego*, 52 Cal.3d at 155, the evidence of a conspiracy to escape included a note written by the defendant found under the mattress of another inmate named Brice, stating: "Could be a ticket out of here. Lay dead. . . Put it under the heater outside your cell." A shank was found hidden in front of Brice's cell, and mattress covers torn in strips were found in the defendant's cell. This Court considered the evidence to pose a "close question" as to whether this plan met the test of factor (b) of implied violence. (*Id.* at 196.) The evidence here is much less than that in *Gallego*. There is no evidence at all in this case that appellant entertained a plan or entered an agreement to attempt "a ticket out of here," violent or otherwise.

large." (25RT 5060.) The admission of the evidence violated appellant's rights to due process and to a reliable sentencing determination, and, as shown below, require this Court to vacate his sentence of death. (*Monge v. California*, 524 U.S. at 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings"].)

### D. The Erroneous Admission of Evidence of the Alleged Conspiracy to Smuggle Weapons and To Escape Was Clearly Prejudicial, Especially Given the Fact that the First Penalty Trial Failed To Reach a Verdict Where This Same Evidence Had Been Excluded.

Because the erroneously admitted evidence violated federal constitutional law, review for prejudice is under *Chapman v. California* (1967) 386 U.S. 18, 24, requiring reversal unless the prosecution can show, beyond a reasonable doubt, that the error was harmless.

A showing of harmlessness cannot be made in this case, as the indicia of prejudice are many. First, the jury verdict in the first trial, where the evidence was stricken, dramatically highlights the prejudicial effect of the conspiracy to escape evidence. The first jury was evenly split as to penalty, and failed to reach a verdict. In the second trial, where the only

difference in the evidence was the (erroneous) admission of the alleged conspiracy to escape, the jury reached a verdict of death. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 38-39 [prejudice established where the jury in a subsequent trial on nearly identical evidence reached a different result].)

Secondly, as this Court noted in *People v. Gallego*, 52 Cal. 3d at 212: "We agree with defendant that in some cases, erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty." In this case, the erroneously admitted evidence clearly did weigh heavily, and resulted in a death verdict instead of a life or split verdict. The fact that the second penalty trial was a "difficult" one also weighs in on the prejudice. The second penalty phase jury deliberated for three days before reaching the death verdict and the trial court acknowledged that it was "obvious[] from the sniffles and grim faces" that it was not an easy decision. (42RT 8635.) *(People v. Fuentes* (1986) 183 Cal.App.3d 444, 456 [error deemed prejudicial because the case was a "difficult" one for the jury as evidenced by the long deliberations]; see also *People v. Martinez* (1984) 36 Cal.3d 816, 822-823 [finding error reversible where one-and-a-

half days of deliberations after a three-day trial showed that the "fragile structure of the prosecution case clearly troubled the jury;" *People v. Day* (1992) 2 Cal.App.4th 405, 420, overruled on other grounds in *People v. Humphrey* (1996) Cal.4th 1073, 1085 [prejudice shown by length of deliberations plus request for reread of evidence and instructions].)

The prejudicial impact of the erroneous admission of the escape evidence is compelling and difficult to deny. The first penalty trial in which the evidence was excluded failed to reach a verdict, and the second trial in which the evidence was admitted sentenced appellant to death.

However, this Court must also consider the cumulative prejudicial impact of this and the other penalty phase errors. It is settled law that "a series of trial error, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Hill* (1998) 17 Cal.4th 800, 844; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial]; *United States v. Frederick* (9th Cir. 1995) 78 F.3d 1370, 1381 [reversing for cumulative prejudicial impact of various errors].)

## III. THE ADMISSION OF EVIDENCE OF THE FOX VIDEO SHOWING INFLAMMATORY IMAGES AND HEARSAY STATEMENTS BY SCOTT MILLER, OTHER GANG MEMBERS, AND POLICE AND CORRECTIONAL OFFICERS DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND VIOLATED THE RELIABILITY REQUIREMENT OF THE EIGHTH AMENDMENT, RESULING IN REVERSIBLE ERROR FOR BOTH THE MARCH 8 AND THE MARCH 11 OFFENSES, AND/OR HIS SENTENCE OF DEATH

As set out above in the Introduction to this brief, the prosecution introduced its case at opening statement in both the guilt and penalty phases by playing for the jury the irrelevant but extremely inflammatory Fox broadcast, an "exposé" of the PEN1 gang, featuring provocative images and blatant hearsay as to murders, weapons, drugs, and neo-Nazism.

At guilt phase, the erroneous admission of highly prejudicial evidence of marginal relevance can, and in this case did, amount to a violation of the federal constitutional rights to due process and a fair trial. (*Estelle v. McGuire* (1991) 502 U.S. 62 [error rendering trial fundamentally unfair may violate federal due process]; *Jamal v. Van DeKamp* (9th Cir. 1991) 926 F.2d 918, 919 [accord]; see also *People v. Albarran* (2007) 149 Cal.App.4th 214 231 [the infusion into the trial of gang evidence, including

gang tattoos, violated the defendant's constitutional rights to a fair trial].)

At the penalty phase, the erroneous admission of the Fox video rendered the verdict unreliable in violation of appellant's Eighth Amendment rights. (*Monge v. California* (1998) 524 U.S. 721, 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings"].)

### A. The Inflammatory Fox Video Was Played for the Jury at Opening Statement at Both the Guilt and the Penalty Trials.

At both the guilt and penalty phases of the trial, the prosecutor played for the jury a two-part video featuring Scott Miller in opening statement. (7RT 1366; 31RT 6238-39; Exh. 231-232 [guilt] and Exh. 133-34 [penalty].)[60] The video had been broadcast on the Fox news channel more than a year before Miller's death. The video was introduced by two anchorpersons, and contained interviews with Scott Miller, other PEN1 gang members, and correctional and police officers. In addition, numerous highly inflammatory images were displayed, including burning

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60 It was stipulated that Scott Miller was the man in the video wearing the football jersey and brass knuckles, who addressed his pit bull as "Tank," and who talked about selling methamphetamine and said that snitches die. (2RT 448.)

swastikas, gang members shooting at a target accompanied by a voice "F--- that N---; various weapons being loaded and fired, attack dogs, burned out meth labs, gang members smoking and preparing to sell methamphetamine, gang members tattooed with swastikas, Nazi salutes, mug shots, and an alleged gang victim in a hospital bed attached to monitors.

The transcript of the Fox video is as follows:[61]

Anchor: They call themselves Public Enemy number one or PEN1, and the state Dept. of Corrections calls them an emerging public threat. Chris Blatchford [hereafter "Rptr"] is here to expose this group for the first time on TV. Chris.

Rptr: Also known as the PEN1 Death Squad, law enforcement intelligence says the gang is increasing recruitment efforts in the ranks of white supremacy skinheads.
And as we see in this undercover report, the PEN1 is making a push for power in prison, but also out on the streets.
[IMAGE OF SCOTT MILLER HARNESSING PITBULL]
This dog's owner [Scott Miller] belongs to a group so taken with violence --

Scott Miller: "His name's Hitman. Hitman Tank."

Rptr: -- he jokes even his pitbull carries a sawed off shotgun.
[IMAGE OF THREE PITBULLS BARKING AND FIGHTING] But

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61 The text of the Fox video was set out in the Statement of Facts at pages 9-21. It is repeated here for convenience in evaluating the argument.

later seeing the dog in action, it's arguable Tank doesn't need a weapon. He is one.

Scott Miller: "If I don't have a gat [gun] and start bombing on someone my dog locks on you too. It's a little teamwork. Good boy Tank."

Rptr: [IMAGE OF MILLER LOADING A REVOLVER] And as night falls in this remote area near Big Bear –

Scott Miller: "Myself I have over 300 guns."

Rptr: -- the tattooed hands of Tank's owner ready a .38 revolver -- [IMAGE OF MILLER'S TATTOOED ARMS HOLDING GUN]

Scott Miller: "Ain't no love."

Rptr: [IMAGE OF MAN SHOOTING AT TARGET]-- quickly uses it to demonstrate his murderous methods.

He is a shot caller in a gang called Public Enemy No. 1, mostly known as PEN1, sometimes referred to as PDS, short for the PEN1 Death Squad, ready to kill enemies and snitches. [IMAGES OF PEN1, PDS AND SWASTIKA TATTOOS]

Scott Miller: [IMAGE OF MILLER LOADING AND FIRING SHOTGUN] "They'll probably end up with one of these in their heads. 16 gauge right here. I guarantee you won't get up if I blast you, you know."

Rptr: [IMAGES OF GRAFFITTI FEATURING OF PEN1, DEATH SQUAD, RUDIMENTARY PEN1 "POPE ADRIAN 37TH PSYCHIATRIC"]

As far as we can determine, PEN1 started in Long Beach about 1986, a small group of teenagers stealing their name from a hard core punk rock band called Rudimentary PEN1.

PEN1 member
Brody Davis: [IMAGE OF BRODY DAVIS AT TABLE IN INTERVIEW ROOM] "Rudimentary PEN1, that's how PEN1 started."

Rptr: This PEN1 Member in a police tape obtained by Fox News remembers the beginning.

Davis: "We were kids. I mean we started it as kids. We were all punk rockers at Disneyland."

Rptr: [IMAGE OF DAVIS WITH HATE, PEN1, AND SWASTIKA AND SKULL TATTOOS] He is Brody Davis, a parolee who has done time for intimidating a witness. A far cry from Disneyland, he and his PEN1 brothers put down roots in the white supremacist skinhead movement [IMAGE OF GANG MEMBERS GIVING NAZI SALUTES AND TATTOOED MEN WITH BLACKED OUT EYES MAKING GANG SIGNS], fertilized by hate, still blossoming into racist anger. [IMAGE OF THREE TATTOOED MEN MAKING HEIL HITLER SALUTES]

[SOUND OF GUNSHOTS AND TWO TATTOOED MEN SHOOTING AT TARGET]

"F--- that N-----."

Rptr: [TWO GROUP PHOTOS OF GANG MEMBERS WITH THEIR EYES BLACKED OUT]

By the early 90's PEN1 had moved to Orange County which became its main stomping ground. Anaheim became a familiar haunt.

[IMAGE OF DETECTIVE MILLER] Det. Tim Miller remembers them for auto theft, burglaries and drug activity.

Detective Tim Miller: "They were all into dope, uh, you know using methamphetamine was, was really the big thing, the drug of choice."

Scott Miller: [IMAGE OF BRASS KNUCKLES, A POLICE SCANNER, AND DRUGS AND DRUG PARAPHERNALIA ON A TABLE]

"About 7 grams."

Rptr: Now the drug culture runs through the veins of the PEN1 organization like blood.

Scott Miller: "This is what you call methamphetamines, glass."

Rptr: Especially methamphetamines. [IMAGE OF DAVIS IN INTERVIEW ROOM] But in all fairness some PEN1 talk against the use of drugs.

Davis: "Yeah, we don't all do drugs. You know what a skinhead is? A skinhead is, is, is a working class man that doesn't want to do, that doesn't do drugs."

Unk PEN1 member: [IMAGE OF PERSON SMOKING A GLASS PIPE] Everybody want it."

Rptr: But clearly . . .

Unk PEN1 member: "Speed. It's number one, number one drug."

Rptr. It appears PEN1's use of meth is epidemic.

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Unk PEN1 Member: "Everybody's on it. It's all it is, is crack. It's another form of crack."

Rptr: And also for PEN1 --- [IMAGE OF MILLER'S TABLE, WEIGHING OUT DRUGS ON A SCALE]

Scott Miller: "I just do this for money."

Rptr: Meth is a major source of income.

Scott Miller: "I'll do jail time. I'll do whatever I have to do to make the money, to get my coin, ya know. I live by the code of silence." [IMAGE OF WEIGHING DRUGS ON SCALE AND WITH PIPE]

Rptr: And he lives on the profits of drug sales.

Scott Miller: "Probably about $400 a day, but I'm not really pushing the issue."

Rptr: He says he gets the dope from PEN1 buddies.

Scott Miller: "My partners make it."

Rptr: [POSTER SAYING "DO NOT ENTER"]
For a while they were making it here.

Scott Miller: "We were manufacturing speed."

Rptr: [IMAGES OF BURNED CABIN]
That's until the dangerous chemicals used to make meth exploded.

Scott Miller: "We got a spark and the house went up."

Rptr: Apparently flames destroyed the cabin before firefighters and police arrived.

Scott Miller: [IMAGE OF POLICE SCANNER, AMMUNITION AND BRASS KNUCKLES ON TABLE]

"I usually have it turned on."

Rptr: These PEN1 often monitor police activity on a scanner.

Unk PEN1 Member: [GUNSHOTS AND IMAGE OF HOODED PERSON HOLDING REVOLVER]
We'll blast! [IMAGE OF HOODED PERSON CHAMBERING A SHOTGUN]

Rptr: And according to law enforcement intelligence obtained by Fox 11 news –

Unk PEN1 member: "Put some holes in the motherfucker's head."

Rptr: [IMAGE OF HOODED GANG MEMBER HOLDING REVOLVER)

PEN1 are actively recruiting new members to protect their interests [IMAGE OF SHOTGUN SHELLS AND BULLETS] and strengthen their position among other white criminal elements. (NOISE). Dept. of Corrections gang officer, Wes Harris.

DOC Officer Harris: [IMAGE OF HARRIS] "These groups are going to start popping up everywhere and they are uh, extremely violent."

Rptr: [IMAGES OF VIKING SKELETON AND SWASTIKA TATTOOS] He says PEN1 sees themselves as Viking warriors, true to pagan Nordic gods, a die on your shield philosophy and no remorse. [IMAGE OF 3 GANG MEMBERS, ONE MAKING NAZI SALUTE] It fits well with a group that has evolved from punk rockers to racist skinheads [IMAGES OF SWASTIKA, AND SKINHEAD GRAFFITTI] to a gang of thugs moving into organized crime.

Scott Miller: [IMAGE OF MILLER WALKING ON STREET WITH HIS PITBULL]
"In this business it's guns, speed, violence and sex. That's what it's all about."

Rptr: Law enforcement sources say there is an alarming chain of events launching PEN1's power, causing an alliance with another well known white supremacist group and threatening to beef up PEN1's influence in prison yards and out in the street. We'll have that story tomorrow.

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Anchor: They call themselves Public Enemy number one, or PEN1 and investigators warn that this group, learning from the mistakes of other white supremacist groups, are emerging as a public threat.

Chris Blatchford is here with more: Chris.

Rptr: Law enforcement authorities believe that PEN1, with their roots in the streets, are now positioning themselves as a criminal force inside prison walls. And as we see in this Fox undercover report, cops say PEN1 violence can already reach from prison yards to neighborhood streets.

[ IMAGE OF PRISON GATE CLOSING AND VIEW OF INMATES]

Investigators say it was ordered from with inside prison walls – a prison based hit and according to court papers obtained by Fox 11, Donald Mazza is the one who was given the mission to murder. [IMAGES OF COURT PLEADINGS AND MUGSHOT OF MAZZA SHOWING TATTOOS INCLUDING SWASTIKA AND "RACIAL LOYALTY"]

'Racial loyalty' tattooed on his chest, he is the reputed president of a white supremacy gang called PEN1 or the PEN1 Death Squad.

[IMAGE OF PRISON DOOR OPENING]
And when this heavy metal door at Wasco State Prison cranked open in April of1999 inmate Mazza, [IMAGE OF MAZZA MUG SHOT] known as Popeye, was released on parole. Detectives say within 5 hours of his release Popeye was back in Orange County, seated inside a camper smoking methamphetamine [IMAGE OF TATTOOED PERSON SMOKING] with two accomplices and the hit victim, a gang dropout named Billy Ray Austin. [FELONY COMPLAINT HIGHLIGHTING WORDS "USE OF KNIFE"]

According to this felony complaint, Dominic Rizzo [IMAGE OF MUGSHOT OF RIZZO], another PEN1 parolee, beat and held Austin as Popeye [IMAGE OF MAZZA MUGSHOT] plunged a knife into him over and over again. Then Popeye turned to witnesses and asked, 'Want some too punk?'

DOC officer Harris: [IMAGE OF HARRIS] "This particular group has a very great potential for violence and are pretty much unpredictable when that violence may occur."

Rptr: Correctional officer Wes Harris says, [IMAGES OF AERIAL VIEW OF PRISON, ARMED GUARDS AND "PEN1" AND "DEATH SQUAD] at the Wasco State Prison, investigators first started noticing PEN1 in 1996 and Fox 11 has learned an interesting chain of events led up to that. [IMAGE of PEN1, DEATH SQUAD TATTOOS/GRAFFITI]

[IMAGE OF BARE-CHESTED TATTOOED INMATES EXERCISING IN YARD]

It started decades ago with members of the Aryan Brotherhood or AB, the gang among gangs among white supremacists, [IMAGE OF STINSON] led by convicted killer John Stinson, [IMAGE OF BULLET-PROOF VESTED GUARDS STANDING BY LOCKED CELL DOORS] the AB are locked away in special units at maximum security prisons like this one at Pelican Bay. This white supremacist ex-convict explains it simply:

Unk PEN1 member: [IMAGE OF SPEAKER IN SHADOW]
"I don't know too many ABs walking the yard because ABs are all locked down and they don't have any physical contact with anybody."

Rptr: [IMAGE OF GUARD CLOSING CELL DOOR] With AB locked down that gave rise to the Nazi Lowriders or LRN, [IMAGES OF SWASTIKA AND NAZI LOW RIDER TATTOOS], another white supremacist gang [IMAGE OF PRISON YARD]that started running the prison yards in the 1990's [IMAGE OF BURNING AND SPINNING SWASTIKA] and calling the shots for white Nazi gangs out in the streets.

Unk PEN1 member: [IMAGE OF SPEAKER IN SHADOW] "They're straight killers and Low Riders are killers. They're like rattle snakes. You walk across their shaded area and they're liable to strike you without much of a warning at all."

Rptr: [IMAGES OF BARE-CHESTED AND TATTOOED GANG MEMBERS BEING PHOTOGRAPHED BY POLICE]

And without a warning at all, in January of 1999 the NLR was snake bit itself. The Department of Corrections named NLR a prison gang [IMAGE OF MAN WITH NLR TATTOO] and its members, like the Aryan Brotherhood, [IMAGE OF PRISON

TIER AND CELLS] are now locked down in special security cells. And that has opened a prison door for PEN1. [IMAGE OF PRISON DOOR OPENING]

DOC Officer Harris: [IMAGE OF HARRIS]

"We are getting intelligence they are stepping up to take the place of the Nazi Low Riders from the main line."

Rptr: [MUGSHOT IMAGES OF MAZZA, RIZZO AND STRINGFELLOW WITH TATTOOS INCLUDING "HATE CRIME" TATTOO]

And other law enforcement intelligence sources tell us Popeye Mazza, Dominic Rizzo, and Devlin Gazo Stringfellow are all PEN1 shot callers who have formed alliances with bosses in the NLR and the AB. All still embrace their white supremacist philosophy.

Unk PEN1 member: [IMAGE OF SPEAKER IN SHADOW] "100 percent to the bone. If you ain't white,you ain't right and that's how it is."

Rptr: [IMAGE OF TATTOOED MEN -- MAZZA AND TWO OTHERS WITH BLACKED-OUT EYES SALUTING]

[IMAGE OF INMATES EXERCISING IN PRISON YARD] But law enforcement intelligence obtained by Fox 11 says PEN1 are now modeling themselves into a more seasoned prison gang. Their main goal now is to profit from drug sales – [IMAGE OF DRUGS AND BULLETS ON A TABLE]

Scott Miller: "I sell it for $125, an 8-ball."

Rptr: -- especially methamphetamines.

Scott Miller: "This is a white man's drug."

Rptr: Not only out here on the street but here [IMAGE OF PRISON INMATES IN YARD] inside prison walls. In fact, cops say PEN1 wants to increase its control of all criminal activity by all white inmates.

DOC Officer Harris: [IMAGE OF HARRIS] "They are under directives when they are paroled to start building a cell of members from their area."

Rptr: [IMAGE OF HANDWRITTEN LETTER]

This correspondence intercepted by law enforcement talks about PEN1 expansion into Riverside County. The PEN1 letter says, 'We're like gods up here.' The area, he adds, is ripe, for a PEN1 yuppie squad. [IMAGES OF SKINHEAD AND PEN1 TATTOOS]
In Ventura County, police intelligence reveals a PEN1 alliance with the murderous gang Skin Head Dogs. [IMAGE PRISON WALLS] Additionally, state corrections officials have PEN1 members in custody from Sacramento, Redding, Los Angeles, Shasta, Kern, and Orange Counties.

[IMAGE OF O'LEARY WITH PEN1 AND SKINHEAD SWASTIKA AND PEN1 DEATH SQUAD TATTOOS]

Now even a younger breed of PEN1, like 18-year-old Bryan O'Leary are leaving a trail of violence. PENI tattooed on his neck, Death Squad on his arms, and more PEN1 carved on his stomach, [IMAGE OF BAILEY'S MUGSHOT]
O'Leary paired up with young skinhead Anthony Bailey. They attacked an ex-white supremacist in Huntington Beach.

Officer
Guy Faust: [IMAGE OF OFFICER FAUST]

"One guy took a knife, stabbed him twice, another guy took a baseball bat and hit him upside the head." [IMAGE OF MAN ON GUERNEY IN HOSPITAL BED HOOKED UP TO MONITORS]

Rptr: Officer Guy Faust says O'Leary got 15 years in prison. Bailey got 12 years behind bars. [IMAGES OF BAILEY AND O'LEARY MUGSHOTS]

Ofcr Faust: "Basically what happened was, the victim had talked trash about PEN1."

Rptr: [IMAGE OF MILLER'S FIST WITH BRASS KNUCKLES]

There is no doubt that PEN1 figuratively and literally have put on white supremacist brass knuckles

Scott Miller: "If I sock you with this, you're not going to get up. I guarantee that."

Rptr: And gang investigators guarantee that PEN1 has already moved beyond its neo Nazi beginnings into organized crime. At the same time, attorneys for reputed PEN1 leaders Donald Mazza and Dominic Rizzo say their clients are not guilty of conspiracy to murder charges that they now face in Orange County and they quote, look forward to the truth coming out at trial, and that's scheduled to begin next week.

Anchor: I suppose we can expect an update then. Chris, thanks for that intense look.

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### B. The Defense Objected to Admission of the Fox Video At Both the Guilt Trial and the Second Penalty Trial as Irrelevant, Prejudicial, and in Violation of Appellant's Federal Due Process and Fair Trial Rights.

On February 20 and 21, 2001, more than a year before Scott Miller was shot, Fox News broadcast two segments featuring interviews of Scott Miller with other gang members, and prison and police officers. (2RT 423-24; Court Exhibit 6; EXH 231.) The defense objected to the playing of the video in the prosecutor's opening statements, and to its admission into evidence, as irrelevant and unduly prejudicial, in violation of appellant's federal constitutional rights to due process and a fair trial. In the alternative, the defense requested redaction of the portions narrated by the reporters and the police correctional officers. (2RT 446-75; 3RT 475; 28RT 5725-266 [guilt phase objections, arguments and rulings incorporated at penalty phase].)

The defense argued that the video was saturated with media hype, filled with exaggeration and hyperbolic statements and images that were far beyond the scope of testimony of a sworn expert witness. (2RT 449-51.) Counsel pointed out that the prosecution's reason for using the

video, to prove motive, could easily be "accommodated through other less inflammatory means." (2RT 451-52.)

The prosecutor argued that it was precisely the "exaggerated media hype" in the video that made it relevant;" that Mazza [was] the one that put out the order [to kill Miller];" and that the video was aired a week before Mazza's scheduled trial date – even though neither the video nor any other evidence tended to show that Mazza had issued an order to kill. (2RT 452-54.) According to the prosecutor, the "only prejudicial aspect" of the video was that PEN1 "was a bad gang." (2RT 454.)

The trial court was initially unconvinced. The court described the video as substituting a "TV program for the testimony of an expert with no opportunity for defense counsel to cross-examine [the reporter and interviewees which would also] render all other [prosecution] evidence unnecessary." The court concluded that playing the video "would pretty much cinch the case [for the prosecution]" and emphasized that the video was beyond doubt unduly prejudicial:

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"We've got cross burnings. We've got swastikas. We've got attack dogs. We've got methamphetamine. We've got people being accused of murder. We've got allegations of association with Nazi Lowriders, with Aryan Brothers. **How much more inflammatory could it get? I suppose if we had them lynching some individual it might have been more inflammatory, but I don't know how it could have been otherwise.**" (2RT 455-56; emphasis provided.)

The prosecutor insisted that informing the jury through other testimony that Miller had talked publicly about the gang – without playing the video -- was "not painting a true picture to the jury" and that it would take away "a lot of the factors that kind of lead to the event." (2RT 454, 456.) However, the prosecutor failed to explain why the jury needed to know more than Miller's supposed violation of the gang code of silence in order to prove appellant's motive; nor did the prosecutor explain how the swastikas and racism and shootings and the threats PEN1 posed to the public at large added anything probative to his theory of motive.[62]

The trial court then ruled that under Evidence Code section 352 analysis the clips involving only Scott Miller were relevant and admissible.

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[62] The prosecutor resorted to the cliché that although the video might be inflammatory "in the abstract," it was not inflammatory within the context of this case." (2RT 456-57.)

(2RT 457.) This did not satisfy the prosecutor, who stated: "I'm willing to stand up and tell you maybe a lot of this stuff [the reporters, officers and unknown gang members are] saying is false, but that's the whole point . . . for why it makes it the kind of motive that triggered [] the timing of it, the fact that they showed Mazza on it during that same segment talking about his trial about to start next week," i.e., the broadcasting of the video provided a motive to kill Miller, because Mazza and Rizzo, PEN1 shot callers, were scheduled to go to trial the week after the broadcast. (2RT 458-59.) The prosecutor also argued that the way Miller spoke [even though his voice was digitally altered] provided a "different level of motive" that rendered the video relevant, in that Miller's statements and the way he made them were so provocative that they triggered Mazza and Rizzo to order him killed. The prosecutor insisted that there would be "a lot of testimony about that," including a statement from the defendant's own mouth saying, 'The reason why I killed him is because he went on Fox 11.'" (RT 461-62.) These prosecutorial assertions were, however, merely that. There was in fact, **no evidence presented** that appellant made such a statement, or even that Mazza and Rizzo made such an order.

The next day, the trial court ruled that the tape would clearly "not be admissible to prove any substantive element of any crime charged" *except* for the element in Penal Code section 186.22(a) of engaging in a pattern of criminal gang activity (because the videotape served "as providing notice to the defendants that members of their gang engage in and have engaged in a pattern of criminal gang activity."). (3RT 474.)

The court acknowledged finding no authority for the prosecutor's argument that "only by playing the broadcast will the jurors fully understand" appellant's supposed motive for killing Miller, i.e., that Mazza and Rizzo became so provoked by Miller's complicity in filming the videotape that they ordered him killed. However, the court analogized to the admission of autopsy and crime scene photos and videotapes, citing cases[63] that held that such demonstrative evidence could be admissible to corroborate and/or clarify testimony by live witnesses.

Finally, although the court considered the broadcast clearly and highly "prejudicial because it depicts gang members in various criminal

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[63] *People v. Scheid* (1997) 16 Cal.4th 1, 19 and *People v. Turner* (1990) 50 Cal.3d 668, 706. (See below, Part D, pages 152-153.)

pursuits, shows burning swastikas, individuals giving Nazi salutes, has law enforcement personnel rendering opinions on the scope and extent of gang activities, names purposed leaders of the gang, and generally illustrates with narration and video what has come to be regarded as typical or standard gang expert testimony," it deemed the probative value to outweigh the prejudice. (3RT 474-75.)

The ruling was prejudicial error in violation of appellant's federal constitutional due process and fair trial rights, and at the penalty phase, the error deprived appellant of his Eighth Amendment right to a reliable sentencing determination. As shown below, the Fox video was not relevant to show appellant's motive to kill or his knowledge of a pattern of PEN1 gang crimes. Although there was no admissible evidence in support the prosecution's theory of motive, and although the prosecutor conceded that he had no evidence that appellant even saw the video (21RT 4304), the video poisoned both the guilt and penalty phase juries before any evidence had been presented. As the trial court noted, the video could hardly have been more prejudicial and it "cinched" the case for the prosecution.

### C. The Fox Video Was So Extremely Inflammatory That It Created the Substantial Likelihood that the Jurors Would Use It For an Illegitimate Purpose.

As this Court stated in *People v. Doolin* (2009) 45 Cal.4th 390, 439, evidence should be excluded as unduly prejudicial under Evidence Code section 352 "when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point on which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." The undue prejudice inheres in the "substantial likelihood the jury will use [the evidence] for an illegitimate purpose." The *Doolin* description of unduly prejudicial evidence is a precise description of the Fox video and its impact on the jurors in this case.

*People v. Diaz* (2014) 227 Cal.App.4th 362 reversed a drunk-driver's murder conviction where the prosecution played two videos containing testimonials of tearful individuals discussing the details of alcohol-related crashes in which their loved ones were killed.

*Diaz* is instructive and provides a template for finding error and harm in this case. *Diaz* found prejudicial error for the admission of

irrelevant and highly inflammatory statements in the videos that appealed to the jurors' sense of sympathy. In this case, the prejudicial error was in admitting irrelevant and highly inflammatory statements and images that appealed to the jurors' passion and prejudice against appellant. Although the facts of *Diaz* are the counterpoint to the facts at bar, the legal principles apply equally to both cases.[64]

1. *Diaz* found error in part because the video contained "numerous statements that where entirely irrelevant to the case." (*Id.* at 381.) The same must be said of this case.

2. *Diaz* emphasized the "extremely prejudicial impact" of the numerous video images "that serve to heighten the emotional impact of the video" – "an impact that one cannot fully appreciate from merely reading the cold transcripts." (*Id.* at 379-80.) The images in this case were so startling and graphic as to strike fear and horror into any viewer. Even

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64 As explained in *Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666-67: "In an attempt to extract legal principles from an opinion that supports a particular point of view, we must not seize upon those facts, the pertinence of which go only to the circumstances of the case but are not material to its holding. The *Palsgraf* rule, for example, is not limited to train stations."

the trial court remarked after an initial viewing that the video could hardly be "more inflammatory" and noted that it would "pretty much cinch" the case for the prosecution. (2RT 455-56.)

3. *Diaz* deemed the erroneous admission of the video evidence prejudicial even under the more forgiving standard for state error, and even though there was "strong evidence" of the defendant's guilt. (*Id.* at 385.) Although the judge in *Diaz* ordered the jurors to disregard the statements made in the video as well as the charges and punishments referred to therein for other drunk drivers, the appellate court considered the instruction inadequate: In the first place, the whole point of the videos viewed by the jurors was to illustrate what happened to drunk drivers in another state. Alluding to the truism that one cannot unring a bell, *Diaz* pointed out that the jury heard not just a bell but a "constant clang." In addition, the deliberations showed that the case was a close one, and the previous trial had resulted in a hung jury on the murder charge. (*Id.* at 382-83.) All three of these indicia of prejudice are present in this case as well, as set out in more detail below.

4. Perhaps the most significant point that the *Diaz* opinion makes is that the prosecution had other evidence it could have used in its attempt to meet its burden of proof, without running "the substantial risk of severe prejudice that allowing the jury to view the videos did." (*Id.* at 382.) This Court should insist that the prosecution rely on admissible evidence to prove its case, and should forbid "trial by television."

**D. The Fox Video Was Inadmissible Given Its Undeniable Prejudicial Impact and Its Lack Of Relevance to Show Either Appellant's Knowledge or His Motive to Kill Miller.**

Only relevant evidence is admissible against a defendant. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Relevant evidence is that which has some tendency in reason to prove or disprove a disputed fact on consequence to the determination of the action. (Evid. Code, section 210.)

The trial court ruled that none of the statements made in the Fox video was admitted for its truth, and that the video was admissible for two purposes only: (1) to show that appellant had notice that the PEN1 gang engaged in a pattern of criminal activity as required to prove the charge of active gang participation; and (2) to show that the viewing of the

broadcast provided appellant with a motive to kill Miller. Neither rationale withstands legal scrutiny. (6RT 1313-14; CT 1705; 10CT 2475.)[65]

### 1. The Fox video did not tend to show that appellant knew the PEN1 gang engaged in a pattern of criminal activity.

As to whether the Fox video served to notify appellant that PEN1 engaged in a pattern of criminal activity, the trial court's ruling fails on its own terms. The numerous hearsay statements contained in the video cannot and do not tend to prove or disprove such knowledge by appellant *unless* those statements are considered for their truth. Miller's statements, and the statements by law enforcement officers, that PEN1's emerging threat to the public at large, its fascination with drugs and weapons and violence, etc., if not considered for their truth, do not in any way tend to prove that PEN1 committed crimes and/or that appellant therefore knew that PEN1 was engaged in criminal activity. At most, the statements tended to prove that the hearsay declarants entertained such beliefs. However, their beliefs and opinions did not tend to prove that

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[65] At the penalty phase, the Fox video evidence was limited to showing appellant's motive. (10CT 2475.)

appellant had such knowledge, particularly since there was no proof that appellant ever saw the video.

**2. The Fox video did not tend to show appellant had a motive to kill Miller.**

As to whether the Fox video tended to prove appellant had a gang motive to kill Miller, the missing link is obvious. There was no evidence that appellant had seen the video or that he knew about it prior to or at the time of Miller's death. Indeed, at closing argument to the jury the prosecutor conceded that he failed to present any evidence that appellant saw the Fox video: saying he did not know and did not introduce evidence that appellant and Rump actually saw the video. (21RT 4304.) Without this prerequisite, the fact that the Fox network broadcast the video a year or more before Miller's death does not and cannot prove appellant's motive to kill him.

The prosecutor' *theory* of motive remained a theory, unsupported by record evidence. He claimed that Mazza and Rizzo were so incensed by the video which aired only a week before their trial was set, that they ordered Miller killed; that the reason Miller wasn't killed until 13 months later was because other PEN1 members had been ordered to kill Miller but

were unsuccessful; that finally the order dribbled down the ladder to appellant and Rump; and to top it all off, that a witness would testify that appellant himself said that "[t] reason why I killed him is because he went on Fox 11.'" (2RT 452-53; 7RT 1366-67; RT 3191.) However, none of these assertions was backed up by the evidence.

For example, the prosecutor told the judge that it was "exactly that exaggerated media hype" that rendered the Fox video so relevant because "Mazza [was] the one that put out the order" and the video was broadcast a week before Mazza's trial. (2RT 452-53.) However, there was no evidence that Mazza put out an order on Miller. Nor was there any evidence produced to show that the shot callers were "so incensed" or that "they put a hit out on Miller." The gang expert, Lt. Epperson, was unable to testify that the Fox video was the reason Miller was killed, and testified that he thought the video could have been a contributing factor but "not the overriding factor" for Miller's death. (16RT 3191.) Likewise, there was no evidence in support of the prosecutor's offer of proof and his claim to the jury in opening statement that appellant and Rump "were not the first team designated to do this hit" and that other gang members

were assigned to the kill Miller but were unable to carry out their murderous assignment.[66] (2RT 454-55; 7RT 1366-67.)

The prosecutor also told the trial court that there would be testimony referring directly to "a statement from the defendant's own mouth saying, 'The reason why I killed him is because he went on Fox 11.'" (2RT 462.) Again, no such evidence existed. The only witness to testify to statements made by appellant was the jailhouse informant Mason. Mason testified that appellant said he had shot Miller and had stripes coming for that; Mason thought appellant was joking and did not testify to any statement by appellant regarding the Fox video. (12RT 3264-66.)

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[66] Informant Darryl Mason testified that he "heard" that the police had questioned witnesses about Miller's murder. (12RT 2247.) Lt. Epperson testified that Gross and Wyman were "suggested" and rumored as suspects in Miller's death; the rumor came from a police investigator. (16RT 3125-26.) These rumors that other people were responsible for Miller's death are not "evidence" – they are not even rumors that other people were designated to kill Miller and were unable to carry out the order.

### 3. The case law relied on by the trial court does not support the admission of a videotape of a sensationalized television program.

In ruling the Fox video admissible, the trial court analogized to two cases by this Court that admitted autopsy and crime scene photos and video, *People v. Scheid* (1997) 16 Cal.3d 1, 19 and *People v. Turner* (1990) 50 Cal.3d 668, 706.[67] The analogy is specious because the cited cases admitted videotapes and photos to corroborate or clarify testimony by live witnesses. In this case, as the trial court had itself noted, the video, rife with hearsay and prejudicial and irrelevant images, operated as a "substitution" for sworn testimony. Moreover, the videotape could and should not have been admitted to corroborate live testimony, because there was **no such evidence**: no one testified under oath that appellant

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[67] *Scheid* upheld the admission of photographs that showed the victims' wounds and their shackling because it served to illustrate and corroborate the testimony of witnesses who discovered the bodies and crime scene. *Turner* upheld the admission of photographs and a videotape of the crime scene because the two divergent views of how the homicide occurred depended on details of physical evidence, including the condition of the victim's body and the crime scene.

said he had killed Miller because of his appearance on the Fox video, and no one testified under oath that Mazza and Rizzo had viewed the videotaped and the issued an order to kill Miller. (See section 2, pages 150-151, above.)

The difference between this case and the cases relied on by the trial court is dramatic: in this case, the video was a substitute for sworn testimony on irrelevant but prejudicial matter; in *Scheid* and *Turner* the video and photographs involved the facts of the crime itself and served to explain sworn testimony.

**4. The cases permitting videotape evidence of admissions and crime scenes do not apply to the facts of this case.**

In *People v. Riggs* (2008) 44 Cal.4th 248, 290-91 this Court upheld the admission of a "heavily edited" 80-second segment of an episode of the television program *America's Most Wanted* that featured the version of events related to a detective by the defendant's wife. However, in *Riggs*, the defendant himself told the detective that he had seen the episode and agreed with most of the version related therein by his wife; he further agreed that his statement was an adoptive admission. His only

claim was that he did not adopt the sensationalized manner in which those details were conveyed. This Court held that the "visual and audio elements" gave "full context to the defendant's statement" and the "extremely brief" depiction of the murder did not pose an intolerable risk of affecting the fairness of the proceedings as they did not show the victim actually being shot or the aftermath. (*Id.* at 292.)

*Riggs* is far different from this case: it involved an 80-second video depicting the homicide at issue, of which the jury had already heard evidence. By contrast, the Fox video played for 11 minutes and 52 seconds – eight times longer than the video in *Riggs*; and none of the various and inflammatory hearsay statements and frightening images involved either appellant or the crime.

*People v. Harris* (2005) 37 Cal.4th 310, 331-32 upheld the admission into evidence of a videotape of the victim taken at a birthday party two weeks before her death, because it was relevant to proving that she normally wore the jewelry that was allegedly stolen during the murder; and because the segment of the video played did "not engender an

emotional reaction but [was] neutral and unremarkable."[68] The Fox video was sensationalized rather than neutral and was edited to provoke fear and horror in the viewers, and did not involve appellant or the crime in any way.

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68 The California case law allows for the admission of victim-impact videos, and videos of crime scenes or crime reenactments. None of these cases is relevant to the Fox video, which was a sensationalized, wide-ranging and scare-mongering look at PEN1 and Aryan Brotherhood gangs, in which multiple layers of hearsay were expounded to emphasize the emerging threat of these gangs to the public at large.

The contrast between this case, and *Riggs* and *Harris* is dramatic:

| ***Riggs*** | ***Harris*** | ***Lamb*** |
|---|---|---|
| Video was relevant as adoptive admission by the defendant as to the depiction of the crime | Video was relevant to prove victim normally wore jewelry allegedly stolen in the charged murder, i.e., relevant to an element of the charged offense | Video was not relevant to the charged murder and there was no evidence appellant had seen or heard of it |
| Defendant admitted seeing the video and agreeing with statements made by his wife in that video | Because the defendant said he agreed with statements he heard in video, the video gave explained his adopted statements | |
| The audio-visual elements were extremely brief | | Video was played for almost 12 minutes |
| Video was heavily edited | | Video was rife with inflammatory a burning swastika and gunshots accompanied by a yell of "Fuck that nigger." and images unrelated to the crime and designed to instill fear in the public at large |
| Did not pose intolerable risk | Video was neutral and unremarkable and did not engender emotional reactions | Judge said video could only have been more inflammatory if it featured an actual lynching |

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### E. The Undisputed and Extremely Prejudicial Nature of The Fox Video Required Its Exclusion Even If It Was Marginally Relevant.

As shown above, the probative value of the Fox video was marginal to non-existent. Even assuming arguendo that portions of the video might have some relevance, its slight probative value was greatly outweighed by undue prejudice. "Undue prejudice" within the meaning of Evidence Code section 352 is not synonymous with "damaging," but refers to evidence "of such a nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*People v. Scott* (2011) 52 Cal.4th 452, 491.) This definition of undue prejudice is a spot-on description of the Fox video and its logical impact on the jurors.

Even when evidence is relevant, trial courts should carefully scrutinize gang-related evidence before admitting it because it may have a highly inflammatory impact on the jury. (See e.g., *People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Cox* (1991) 53 Cal.3d 618, 660.) In the end, the trial court failed to carefully scrutinize the images and hearsay in

the video and succumbed instead to the prosecutor's vague and personalized argument that he felt "strongly" that the video had to come in because it was relevant "in context" to paint for the jury the "true picture." (2RT 455-57.) Resort to an argument that evidence is relevant when viewed in the "context of the case" suggests an inability to make a clear and precise explanation of its logical relevance of the evidence.

For example, the prosecutor was able to explain that Miller's going public with gang information would provide a motive to punish him for exposing the gang. However, the prosecutor was unable to give a logical explanation for why it was necessary to go beyond that information with the extremely inflammatory aspects of the broadcast, including mock executions accompanied by a yell of "kill the nigger," images of drugs and guns and burning swastikas, etc. The prosecutor's only explanation was that the motive-providing evidence was "not a true picture" in the "context" of the case. In fact, the playing of the sensationalized video -- untethered to any evidence connecting appellant to the video or the events depicted there -- distorted the trial, the fact-finding process and appellant's fair trial and due process rights.

This is particularly true with respect to the penalty trial, where appellant's motive for Miller's murder was of minimal significance since the jury had already convicted him of special circumstance murder, a conviction the penalty jury was obligated to accept. The Fox video was not a circumstance of the crime admissible at penalty phase because, as shown above, there was no evidence that Mazza and/or Rizzo put out an order to kill Miller because they were "so incensed" by Miller's appearance in the Fox video, and no evidence that appellant was ordered to kill Miller because of the Fox broadcast. When the prosecutor played the Fox video in opening statement at the second penalty trial, he referred to appellant, Rump and Johnson as the "chosen death squad," but there was *no evidence* of that. (31RT 6284.)

**F. The Erroneous Admission of the Fox Video Requires Reversal of Appellant's Convictions And/Or His Sentence of Death.**

Review for prejudice from federal constitutional error is under *Chapman v. California* (1967) 386 U.S. 18, 24, requiring reversal unless the prosecution can show, beyond a reasonable doubt, that the error was

harmless. Such a showing cannot be made for either the guilt or the penalty verdict.

After the viewing the video, the trial judge eloquently described the visceral and extremely prejudicial impact on him: "We've got cross burnings. We've got swastikas. We've got attack dogs. We've got methamphetamine. We've got people being accused of murder. We've got allegations of association with Nazi Lowriders, with Aryan Brothers. *How much more inflammatory could it get? I suppose if we had them lynching some individual it might have been more inflammatory, but I don't know how it could have been otherwise.*" (2RT 455-56; emphasis provided.) The Fox video surely had the same impact on the jurors who viewed it.

**1. Both the guilt and penalty phases of the trial were tainted by the presentation of the video in opening statements.**

At both the guilt and the penalty trials, the prosecutor took full advantage of the powerful impact of the video and front-loaded his presentation by playing it for the jury in opening statement.[69] At guilt

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[69] See 7RT 1366 and 31RT 6239.

phase, the prosecutor told the jurors that they were present "because of hate, hate. The ideology of bigotry, anarchy, these are the glues that force together a gang called PEN1," a gang with control as the center of their existence, "control not just on the streets but control in the prison system" --- phrases and concepts plucked directly from the Fox video. (See 7RT 1352-53.) At the penalty phase, the prosecutor told the jury, as if it were evidence to be presented, that Mazzo and Rizzo conspired to and almost killed a man after getting out of prison, that they were awaiting trial at the time the Fox video was broadcast, and that they then ordered Miller killed and that appellant, with Rump and Johnson, were the chosen death squad. (31RT 6238-40.) Again, these were words borrowed from the Fox video, rather than from evidence presented through admissible testimony or documents.[70] (See *People v. Diaz*, 227 Cal.App.4th at 384 [the

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[70] Mazza's court documents, including the minute order continuing his trial date were introduced into evidence at the penalty phase. In addition, the gang expert testified that if a decision were to be made to retaliate for disrespectful behavior such as appearing in a video, it would be for the gang benefit. The expert had heard "rumors" that John Gross or Ugly Wyman might kill Miller. (38RT 7704, 7722-24: Exh. 201, 202.) This evidence does not add up to an inference that Mazza and Rizzo ordered appellant to kill Miller.

prosecutor's references to erroneously admitted inflammatory videos rendered the error prejudicial].)

Both the guilt and penalty phase juries were thus tainted from the very beginning of the trial with the compelling statements and images so prominently featured in the video. As the trial court noted at the outset, the Fox video and its numerous inflammatory images and hearsay statements "would pretty much cinch" the case for the prosecution.

In fact, the images in the video were likely the most persuasive to, and the least likely to be forgotten by, the jurors. The jurors were instructed not to consider the truth of statements uttered by the various hearsay declarants starring in the Fox presentation. But there was no admonition (and there could have been none) that warned the jurors not to consider the inflammatory images displayed therein; and no admonition could have managed to erase from the jurors' minds the burning swastika, the mock execution of an African-American, the repeated claims that PEN1 was an "emerging threat" not just in the prison system but to society at large. The jurors were certainly strongly affected (as was the trial judge himself) by their first impression of the case – the

Fox video – an impression reinforced by the prosecutor's insistence that the concepts illustrated in that video were the reason they were sitting in judgment on appellant.

**2. The prosecutor's reliance on the Fox video is an indication of prejudice.**

A prosecutor's reliance on inadmissible testimony in argument is a powerful indicator of prejudice. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071 [prosecutorial argument exploiting error "tips the scale in favor of finding prejudice"].)[71] The prejudice in this case is even more clear-cut because it flowed from hearsay statements and rumors and opinions, enhanced by inflammatory and unforgettable images.

The prosecutor's use of the video in opening statement is akin to the facts in *People v. Guzman* (2000) 80 Cal.App.4th 1282, which held that the prosecutor's repeated improper mention during closing argument of a witness' willingness to talk, accompanied by the use of demonstrative chart to get the point across, was prejudicial. "Short of hiring a skywriter, it would have been difficult to make more of it." (*Id.* at 1290.) The

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[71] See also *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1017 [prosecutor's argument can enhance immensely the impact of inadmissible evidence].

*Guzman* court explained that the prosecutor's "relentless insistence" on the point "could only have served to convince [the jurors] this was an important point." " (*Ibid.*) The same is true here.[72] Reversal of appellant's convictions is required.

### 3. Appellant's death sentence must be vacated.

The erroneous admission of the Fox video was even more prejudicial to appellant at the penalty phase. First, whatever attenuated relevance the video had at guilt phase was stretched beyond the breaking point at the penalty phase. The Fox video was supposedly admitted at the penalty phase only to show appellant's motive, but he had already been convicted of first degree murder with a gang special circumstance, a conviction the jury was obligated to accept. Secondly, because the

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[72] Even were this Court to assess the error at guilt phase under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, reversal is required for the reasons stated above. Moreover, even though appellant contends that the erroneous admission into evidence of the undeniably inflammatory Fox video is prejudicial standing alone, the prejudice from this error must also be considered together with the prejudicial impact of the other guilt trial errors. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 [a series of trial errors may rise by accretion to reversible error]; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].) See Arg. **II**, Part D, pages 121-123.

prosecution failed to show that appellant had even seen or known about the video, it was not a circumstance of the crime.

Finally, the presentation of evidence of the FOX video turned the sentencing phase into a proceeding on appellant's supposed hatred of minorities and monstrous racist beliefs, although there was no evidence of that he personally shared any of those beliefs. The Fox video took the place of evidence, and resulted in "trial by television." *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, 190, quoted in *People v. Killebrew* (2002) 103 Cal.App.4th 644, 654 explained the prejudice resulting from an improper trial by expert. A trial by television is much worse.

*Mejia* explained that gang expert witnesses who stray beyond the appropriate bounds of "expert" matters and simply disgorge factual knowledge" are "no longer aiding the jury in its factfinding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense." (*Mejia*, 545 F.3d at 190-91.) The pronouncements of such "a chronicler of the recent past [] serve as shortcuts to proving guilt." The result is a "transformation" of the case

displaces the jury by connecting all other testimony and evidence into a coherent picture of the defendant's guilt." (*Mejia*, 545 F.3d at 190-91.)

The Fox video had a similar but more devastating effect in this case. It transformed g the hub of the case to connect all other evidence into a coherent picture of the defendant's guilt, and of the propriety of the death sentence. This is the "true picture" and "full context" that the prosecutor wanted from the video, but it was improper and prejudicial. The video did did provide a vivid picture and a larger context but it displaced the jury's factfinding, and operated as a shortcut to both guilt and the death sentence.

### G. The Trial Court's Admonition Was Ineffectual And Does Not Redeem the Error or Erase The Prejudicial Impact of the Fox Video.

The trial court agreed to admonish the jury before the videotape was played in opening statement. (3RT 476.) The trial court refused (as "too strong") the admonition requested by the defense that would have told the jury to assume that statements made in the video were false "unless proved [true] beyond a reasonable doubt by other evidence." (6RT 1311-142.) A modified version of CalCrim 1403 was given at both the

guilt and penalty phases of trial. This instruction was given at the guilt phase:

> "Evidence consisting of news segments aired by Fox 11 News was introduced during the trial. This evidence was presented to you for limited purposes. By admitting this evidence the court is not advising you that it actually goes towards proving any issue in this case; that determination is to be made by you. The news broadcast contains images of bigotry, opinions by certain individuals, inflammatory remarks by purported gang members and sensationalism by newscasters. You may not consider the recording as proof of the truth of any statements made by anyone during the recording. The information contained in the news segments is relevant for two purposes only:
>
> 1. Did a defendant view either broadcast and if so did the broadcast serve to notify that defendant that members of PEN1 engage in criminal activity?
>
> 2. Did the airing of the broadcast provide a motive for the killing of Scott Miller?
>
> You may not consider anything contained on the recording for any other purpose. You may not conclude from this evidence that the Defendant is a person of bad character or that he has a disposition to commit crime." (7CT 1602-04.)

At penalty phase the instruction was redacted to state that the jury could use the Fox video only as motive evidence, and the use of the video as notice to appellant of the PEN1's criminal activity (as in number 1, above) was deleted. (10CT 2475.) The instructions to the jury at both guilt

and penalty phase were insufficient to alleviate the harm caused by showing the video to the jury.

In the first place, the case law is replete with holdings rejecting the notion that jury instructions are sufficient to obliterate prejudice. (See e.g., *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1054; *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799, 806; *Goldsmith v. Witkowski* (4th Cir. 1992) 981 F.2d 697, 703; *People v. Laursen* (1968) 264 Cal.App.2d 932, 939; *People v. Bracamonte* (1981) 119 Cal.App.3d 644, 650, quoting *Krulewitch v. United States* (1949) 336 U.S. 440,453 ["'The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'".)

This is especially true when the prejudicial evidence presented to the jury is a sensationalized[73] mass-media presentation designed to incite an emotional rather than a rational reaction, and to instill fear into the

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[73] Media sensationalism is the style of reporting news to the public that involves the use of fear, anger, excitement and crude thrill, undertaken by the media to increase the viewership and ratings.
See <www.buzzle.com/articles/effects-of-media-sensationalism.htm>;
see also <http://en.wikipedia.org/wiki/Sensationalism>.

jurors personally because of the gang's threat to the public at large. The Fox video included the following references to PEN1: an "emerging public threat," making a push for power in prisons and "also out on the streets," an "extremely violent" gang with groups "popping up everywhere," "moving into organized crime," "threatening to beef up PEN1's influence in prisons [] and out in the streets" as an "emerging public threat," "PEN1 violence can already reach from prison [] to neighborhood streets," and PEN1's violence is "pretty much unpredictable when that violence may occur," "out here on the street [and] inside prison walls," "gang investigators guarantee that PEN1 has already moved beyond its neo Nazi beginnings into organized crime."

*People v. Diaz*, 227 Cal.App.4th 362, discussed above, addresses precisely this point. Where the whole point of the video is to show the violent, dangerous, murderous, racist, mercenary, neo-Nazi inclinations of the gang to which appellant gave allegiance, an instruction to disregard it is inadequate. The bell cannot be unrung; and in this case, as in *Diaz*, it

was not just a bell, but a carillon[74] of clanging bells. (*Id.* at 383.)

In addition, the video was presented at the beginning of the trial, giving the jury a first impression difficult to forget or to disregard. The provocative and explosive images and language of the video were searing and although none involved appellant personally, they provided the background against which appellant was necessarily judged. This performance was certainly not lost on the jurors, who could only have concluded that its presentation at the opening statement proved its importance. Indeed, the prosecutor repeatedly insisted to the trial court that only by viewing the video could the jury get the "true picture" and full "context" of the crime. (2RT 455-57.) The prosecutor's insistence was successful, but this Court should not now consider an argument by respondent that in fact the video had little effect on the jurors, and/or that the trial court's reasoned admonition operated to wipe out the effect of the powerful media presentation. (See e.g., *Yohn v. Love* (3d Cir. 1996) 76 F.3d 508, 523, fn. 28 [rejecting state's harmless error argument because it

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[74] A carillon is an instrument consisting of 23 or more bells housed in a bell tower that are played serially.

downplayed the importance of the evidence prosecutor fought so hard to be admitted at trial].) In fact, the trial court's reasoned admonition asked the jury to do what was psychologically impossible, i.e., erase from their minds the all-too-vivid images and pronouncements of a video the trial court itself described as inflammatory and sensational.

The Fox video tainted appellant's trial and requires reversal of his convictions.

## IV. THE EXCLUSION OF MITIGATING EVIDENCE OF APPELLANT'S MOTHER'S ABUSE AT THE HANDS OF HER FATHER AND TESTIMONY BY A NEIGHBOR AS TO HOW APPELLANT'S PARENTS BROKE HIS SPIRIT VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, THE RIGHT TO PRESENT A DEFENSE, AND PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT, BECAUSE THE EXCLUDED EVIDENCE WAS DIRECTLY LINKED TO APPELLANT'S OWN CHARACTER AND THUS ADMISSIBLE UNDER UNITED STATES SUPREME COURT PRECEDENTS

Appellant contends that the trial court's exclusion of mitigating evidence, including evidence of multigenerational dysfunction and testimony by neighbor Bernard Cain, violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to due process, to the right to present a defense, and to a reliable sentencing determination.

### A. The Trial Court Erroneously Refused to Permit Multi-Generational Mitigation Evidence That Provided Context for Evidence of Appellant's Mother's Alcoholism and Its Effect on Appellant.

The trial court sustained objections to proposed defense testimony of extreme mental illness on both sides of the family, and the brutal sexual molestation suffered by his mother as a child, which contributed to her alcoholism. The defense offer of proof included evidence that when appellant's father was a child, his mother repeatedly threatened to kill herself, and then did commit suicide in his presence; and that when appellant's mother was a child she was brutally molested over a six-year period. Defense counsel argued that under factor (k) this evidence explained why appellant's father detached himself from the family (he was told to "tough it out" and "detach himself from it"), and why appellant's mother drank herself into oblivion during appellant's childhood, thus providing context to appellant's own background and character. Defense counsel also offered to prove mental illness, suicides, and institutionalizations on both sides of appellant's family. (23RT 4761-64.) The trial court excluded the evidence on the basis that it required the fact finders to "speculate" as to the character of appellant's parents, and

granted the prosecution's motion to exclude the proffered evidence. (23RT 4765-69; 28RT 5727-29.)

### B. The Eighth Amendment Requires Admission Of All Mitigating Evidence Relating to the Defendant's Background and Character.

In 1976, the United States Supreme Court held that under the Eighth Amendment the states seeking to sentence a criminal defendant to death had to allow for individualized consideration of the circumstances of the crime as well as the character and record of the offender. (*Gregg v. Georgia*, 428 U.S. at 198; *Woodson v. North Carolina*, 428 U.S. at 304.) Two years later, the High Court held that the Eighth Amendment required the sentencer to consider "*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." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [emphasis in original].) In 1982, *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115 held that mitigating evidence is relevant even if it does not "provide a legal excuse from criminal responsibility," and described a young defendant's turbulent family history and emotional disturbance as "particularly relevant."

In sum, the United States Supreme Court has consistently and emphatically held that relevant mitigation in a capital case encompasses any evidence that the defendant "proffers as a basis for a sentence less than death," which includes evidence tending to humanize the defendant. (*Abdul-Kabir v. Quarterman* (2007) 500 U.S. 233, 247; see also *Porter v. McCollum* (2009) 558 U.S. 30, 39, citing *Williams v. Taylor* (2000) 529 U.S. 362, 398 [evidence about the defendant's background and character is relevant because of our society's belief that defendants who commit crimes attributable to a disadvantaged background may be less culpable].)

Because "'virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances,'" *Tennard v. Dretke* (2004) 524 U.S. 274, 285, the question here is whether multigenerational evidence is relevant to the defendant's circumstances.

### C. Appellant Has a Constitutional Right to Present Multi-Generational Evidence of Family Dysfunction.

Appellant submits that multi-generational evidence of family dysfunction is admissible under *Lockett* and its progeny: In *Wiggins v.*

*Smith* (2003) 539 U.S. 510, 522, the High Court described the American Bar Association guidelines for capital defenders as the standard for determining competency of counsel. Those guidelines expressly require defense counsel to prepare a multigenerational social history as part of the Sixth Amendment duty to investigate and present mitigating evidence, because the jury often requires multigenerational evidence to understand the defendant's mental state and functioning. (ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases (1989), Commentary, ABA Guideline 10.11; see also the ABA Guidelines adopted in 2003.)

As Justice Oliver Wendell Holmes, Jr., said, "A child's education should begin at least 100 years before he is born."[75] Justice Holmes' point was that educated grandparents and educated parents tend to raise educated children. The converse is just as true: an abusive father (Cathy Lamb's father) will raise a troubled and dysfunctional daughter (Cathy Lamb, appellant's mother), who in turn will tend to raise a son (appellant),

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[75] See <www.brainyquote.com/quotes/quotes/o/oliverwend135058.htm1#xss1p1Q76sBf>

emotionally crippled by his own mother's trauma. (See e.g., Noll et.al, "The Cumulative Burden Borne by Offspring Whose Mothers Were Sexually Abused as Children," PMC U.S. National Library of Medicine, National Institute of Health (May 18, 2011) at ncbi.nlm.nih.gov/pmc/ articles/ PMC3096869/.) [76]

Respondent will likely argue, and appellant acknowledges, that this Court has sometimes upheld the exclusion of proffered mitigating evidence relating to the defendant's family background. For example, *In re Scott* (2003) 29 Cal.4th 783, 820-21 held that the referee was correct in refusing to admit certain evidence regarding petitioner's family and home conditions that was not linked directly to petitioner, on the grounds that evidence of the defendant's family background was of no consequence in and of itself. However, the referee ruled that such evidence would be admissible if it were linked to the defendant.

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[76] See also Pears & Capaldi, "Intergenerational Transmission of Abuse," Child Abuse & Neglect (2001-Elsevier) Vol. 25, Issue 11, Nov. 2001 at <http://www.sciencedirect.com/science/article/ pii/S0145213401002861>.)

In *People v. Thomas* (2012) 54 Cal.4th 908 this Court found no Eighth Amendment violation in the exclusion of specific testimonial descriptions of the sexual abuse suffered by the defendant's mother at the hands of her father and stepbrother when she was a child, where that testimony would have been given not by percipient witnesses but by an expert who would have testified to hearsay reports of the abuse. However, in that case, the trial court had allowed the expert to testify "in general terms [to] the abuse and violence the defendant's mother had encountered" and how that might have affected the defendant." (*Id.* at 942-43.) Here by contrast, the trial court excluded all the evidence of the abuse suffered by appellant's mother and how that had affected appellant.

### D. Due Process and an Even-Handed Application of The Rules of Evidence Required the Trial Court To Allow Admission of Appellant's Multi-Generational Mitigation Evidence.

This Court should consider the impact of the asymmetrical rulings at penalty phase. The trial court allowed vicarious victim impact evidence in aggravation, when it permitted Scott Miller's mother Bonnie Miller to testify to the impact of Miller's death on (1) Miller's son, unborn at the

time of Miller's death; (2) Bonnie Miller's own mother; (3) Scott Miller's older brother; and (4) Scott Miller's father, who had long been separated from the family.[77] After such victim impact testimony, federal due process and fundamental fairness require that the defense be permitted an equal chance to present multi-generational mitigating evidence.

*Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633, 645-46 held that the asymmetrical application of evidentiary standards is unconstitutional. A state may not arbitrarily prevent a defendant from presenting evidence that is material, trustworthy, and important to his defense; and when the trial court allows the prosecution to present similar evidence, it is a violation of the constitutional prohibition against arbitrary application of evidentiary standards to defendants.

*Gray* noted that the United States Supreme Court has repeatedly focused criticism on the unjustified and **uneven application** of evidentiary standards in a way that favors the prosecution over defendants. (*Id.* at 645-46, citing *Wardius v. Oregon* (1973) 412 U.S. 470 [holding that discovery must be a two-way street]; *Washington v. Texas* (1967) 388 U.S.

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[77] 36RT 7280-88, 7292-94, 7306.

14, 22 [state rule applying unequal standards to defendants and the state held unconstitutional]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [exclusion of defense proffer based on state hearsay rules violated due process where the state rules allowed the state to introduce the same evidence in a co-defendant's trial]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge's admonition to defense witness which was not given to prosecution witnesses violated due process and right to present a defense].)

The trial court ruling allowing presentation to the jury of evidence of vicarious victim impact evidence in aggravation, while excluding appellant's multi-generational mitigation evidence, is a clear example of asymmetrical application of the rules of evidence in favor of the prosecution and to the detriment of the defense, in violation of appellant's federal constitutional rights to present a defense and to due process.

### E. The Trial Court Erroneously Excluded Classic Evidence of Appellant's Character When It Struck Testimony by Neighbor Bernard Cain That Appellant's Spirit Had Been Broken by His Parent's Treatment of Him.

Neighbor Bernard Cain testified to appellant's difficult upbringing and his excellent behavior as an older brother. In response to a question

whether appellant had the same personality in his mid-teens as when he was younger, Cain stated that he watched appellant's "spirit get broken." The trial court granted the prosecutor's objection and the struck the testimony as "nonresponsive." (40RT 8136-37.)

First, the answer was not nonresponsive. Implicit in Cain's answer was that appellant had changed because his spirit had been broken by his parents' treatment of him. Such an explanation is not subject to a motion to strike as "nonresponsive." For example, in *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1026, a witness testified that his daughter had been traumatized by witnessing the murders; this testimony was "responsive" in that it explained why the witness did not linger at the crime scene to give as detailed an account as he did at trial. Similarly here, Cain's testimony that he watched appellant's spirit being broken explained why appellant's teenage personality had changed.

Secondly, Cain's statement was quintessential mitigating evidence, relating directly to appellant's character and background, i.e., the circumstances that led to his present situation, and thus clearly admissible under *Lockett* and *Eddings*.

## F. The Exclusion of Relevant Mitigation Prejudiced Appellant and Requires This Court to Vacate His Sentence of Death.

The exclusion of relevant mitigating evidence implicates appellant's protections under the Eighth Amendment, so prejudice must be analyzed under the standard of *Chapman v. California*, 386 U.S. at 24, requiring reversal unless the prosecution can show beyond a reasonable doubt that the error was harmless. The prosecution cannot make such a showing in this case.

First, the penalty phase determination was a quintessentially close case, a significant factor weighing in favor of prejudice. The first penalty jury deadlocked at 6/5/1 after three days of deliberation; the second penalty jury only imposed the death penalty after three days of deliberation and the trial court acknowledged that it was "obvious [] from the sniffles and grim faces" that it was not an easy decision. (42RT 8635.) *(People v. Fuentes*, 183 Cal.App.3d at 456 [error deemed prejudicial because the case was a "difficult" one for the jury as evidenced by the long deliberations]; see also *People v. Martinez*, 36 Cal.3d at 822-823 [finding error reversible where one-and-a-half days of deliberations after a three-

day trial showed that the "fragile structure of the prosecution case clearly troubled the jury."].)

Secondly, adding insult to injury, after having managed to exclude significant mitigating evidence, the prosecutor mocked other less persuasive mitigation by claiming that he "almost fainted when the neighbor [Cain] said [appellant] was nice to [Cain's] dog." (41RT 8376-77.)) Both this Court and the Ninth Circuit consider prosecutorial exploitation of evidentiary error as an indication of prejudice. (*People v. Minifie*, 13 Cal.4th 1055, 1071 [prosecutorial argument exploiting error "tips the scale in favor of finding prejudice"]; *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1017 [prosecutor's argument can enhance immensely the impact of inadmissible evidence].)

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## PENALTY PHASE ISSUES RELATING TO PROSECUTORIAL AND JUDICIAL MISCONDUCT

## V. THE PROSECUTORIAL MISCONDUCT AT PENALTY PHASE CROSS-EXAMINATION AND CLOSING ARGUMENT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND HIS PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

A prosecutor's intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the trial with unfairness. The result is a denial of the federal constitutional guarantee of due process under the Fifth, Sixth and Fourteenth Amendments.

The prosecutor in this case made multiple errors in cross-examining defense witness Billy Joe Johnson. In addition, the prosecutor erred in arguing the penalty phase evidence to the jury by (1) making accusations of collusion between defense counsel and a witness; (2) misstating the law and facts; (3) attacking defense counsel's integrity; and (4) injecting his personal opinions and observations into the argument. This pattern of prosecutorial error[78] or misconduct deprived appellant of his federal

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[78] *People v. Hill,* 17 Cal.4th at 822-23 & fn. 1 explained that prosecutorial "misconduct" is a misnomer; prosecutorial error is the more apt description. Bad faith is not a prerequisite for gaining appellate relief based on the

constitutional rights to due process and a fair trial under *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-43 and *Darden v. Wainwright* (1986) 477 U.S. 168, 182 [prosecutorial argument that misstates the evidence can deprive the defendant of his Sixth and Fourteenth Amendment rights to a fair trial].

The penalty phase prosecutorial error also violated appellant's Eighth Amendment right to a reliable sentencing determination. (*Monge v. California* (1998) 524 U.S. 721, 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings"]; *Godfrey v. Georgia* (1980) 446 U.S. 420 [Eighth Amendment requires higher degree of scrutiny in capital cases]; *Woodson v. North Carolina* (1976) 428 U.S. 380 [because the death penalty is qualitatively different from imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case].)

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prosecutor's actions because the injury to the defendant occurs whether the conduct was committed inadvertently or intentionally.

### A. The Prosecutor's Cross-examination of Johnson Included Attacks on Defense Counsels' Integrity, Accusations and Suggestions of Collusion; and Providing His Own Unsworn Testimony.

Prosecutors have a special obligation to promote justice: their duty "is not merely that of an advocate" nor is it "to obtain convictions" – rather it is "to fully and fairly present the evidence." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323, citing *Berger v. United States* (1935) 295 U.S. 78, 88 [prosecutor's job is not just to win but to win fairly by "staying well within the rules"].) *Kojayan* quoted the warning of Justice Douglas that the prosecutor's proper and constitutional function is "to give those accused of crime a fair trial" --- not "to tack as many skins" as possible to the wall. (*Kojayan* at 1323, quoting *Donnelly v. DeChristoforo*, 416 U.S. at 648-49 (1974) [Douglas, J., dissenting]).

Unfortunately, the prosecutor failed to heed these constitutional warnings in his cross-examination, and instead dedicated himself to a relentless evisceration of witness Billy Joe Johnson, repeatedly venturing

outside the bounds of the rules.[79] Indeed, the trial court described the prosecutor's cross-examination of Johnson as a "pissing contest."[80] (36RT 7178-84.)

The prosecutor accused Johnson of colluding with defense counsel: "You're going to say whatever Mr. Stapleton [the defense attorney] tells you to say, aren't you?" Even after the objection was sustained, the prosecutor insisted: "You have a job in this courtroom, don't you?" Johnson answered "no." When the court allowed the "no" to remain, the prosecutor asserted that Johnson's "job" was "to stand up for the gang . . . the homeboy, isn't that correct?" (35RT 6990-91.)

Such prosecutorial accusations were clearly improper under both state and federal law. The prosecutor repeatedly stated that Johnson would say "whatever [defense counsel] told him to say," because that was

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79 Prosecutorial error is usually found in argument to the jury. However, an improper cross-examination also constitutes prosecutorial error or misconduct. (See e.g., *United States v. Francis* (6th Cir. 1999) 170 F.3d 546, 550-51 (6th Cir. 1999) [improper prosecutorial questioning of the witness].)

80 "The term 'pissing contest' is often used to describe a contest between people, usually men, which is completely pointless and is just about ego." (<http://www.programmerinterview.com/index.pho/american-vocabulary>)

"his job in this courtroom." This was a direct and flagrant attack on defense counsel's integrity, i.e., an accusation that the defense was suborning perjury from Johnson. Such a course of conduct by the prosecutor must be swiftly and soundly condemned, as counter to constitutional principles of fair play and due process. (*Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097, 1106 [the prosecutor "stray[ed] beyond proper advocacy" by offering her own opinion of the defense witness' credibility and by implying that defense counsel had fabricated evidence]; *People v. Hill*, 17 Cal.4th at 822 [prosecutor's personal attack on defense counsel's integrity is improper].)

The prosecutor also improperly testified himself during the cross-examination of Johnson. For example, he told the jury and Johnson that Johnson "[didn't]t give a damn about the oath." Defense counsel's argumentative objection was sustained. (35RT 7018.) The prosecutor paid little heed to the court's rulings and didn't even bother to pose questions, instead just asserting his own version of the facts. He stated to Johnson and the jury: "Last year you came and testified and it didn't work -- " (35RT 7025-26.) The defense objection was sustained. (35RT 7026.)

After Johnson testified that he had fired the gun before he gave it to appellant, the prosecutor said: "That's not what you said last time." The trial court sustained an argumentative objection. (35RT 7068.)

The most flagrant example of the prosecutor providing his own testimony to contradict Johnson came after Johnson testified that he had obtained the gun used to shoot Miller at the house of a drug connection. The prosecutor asked if Johnson got the gun "inside a house." Johnson answered, "No. *Outside*." Although Johnson testified that he got it outside, the prosecutor said, "You just said *inside* . . . didn't you?" Johnson correctly repeated: "No, I said outside." Undaunted, the prosecutor then provided his own interpretation of Johnson's testimony on this point, "but then you caught yourself. It can't be inside the house because you just told the jury that he fired it, right?" Johnson repeated, "It was outside in the alley" and said the seller fired the gun in the air. The prosecutor: "Do you realize how ridiculous that sounds?" The court sustained an objection. (35RT 7069.)[81]

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[81] In *People v. Bain* (1971) 5 Cal.3d 839, 846, the prosecutor argued to the jury in this fashion: "If I thought the evidence in this case didn't support my theory, do you think I would prosecute this man?" In *People v. Kirkes* (1952) 39

Here the prosecutor managed a triple play: First, he misstated the facts and testified to (mistaken) facts (that Johnson had said the gun was fired inside and then "caught" himself). Both state and federal cases hold that it is improper for a prosecutor to misstate the evidence. (*People v. Collins* (2010) 49 Cal.4th 175, 230 [although the prosecutor can draw reasonable inferences from the evidence it is misconduct to misstate the facts]; *People v. Davis* (2005) 36 Cal.4th 510, 550 [accord]; *Darden v. Wainwright*(1986) 477 U.S. 168, 182.)

Secondly, he gave his personal opinion of Johnson's credibility ("ridiculous"). As stated definitively in *People v. Nolan* (1932) 126 Cal. App. 623, 640-641: "It should go without saying that no attorney should venture a bald opinion, stated as a fact, with reference to an issue or . . . the evidence]." The prosecutor's insistence that Johnson's testimony was reached by collusion with defense counsel and ridiculous to boot

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Cal.2d 719, 722, the prosecutor argued "I would not have been associated with the prosecution of this particular case unless I had [believed knew this particular defendant was guilty of this particular offense." And in *People v. Hidalgo* (1947) 78 Cal.App.2d 926, 936, the prosecutor told the jury, "Any time I am not absolutely convinced of the guilt of the defendant . . . I will tell the jury about it."

amounted to a kind of negative vouching, which is just as improper, if not more, than vouching that testimony is highly credible and truthful. (*People v. Hill*, 17 Cal.4th at 828 [prosecutorial vouching for a witness is improper because the conduct "make[s] the prosecutor his own witness – offering unsworn testimony not subject to cross-examination"].) Prosecutors have an obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Thirdly, because the prosecutor had already claimed that defense counsel had colluded with Johnson in fabricating a defense, his statement that Johnson's testimony was "ridiculous" was also an attack on defense counsel, thus compounding both the impropriety and the prejudicial impact. (*Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897, 913 [improper to impugn character of defense counsel by suggesting he pressured a witness to change his testimony].

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### B. The Prosecutor's Penalty Phase Argument Was Replete With Improper Assertions, Accusations And Suggestions.

The prosecutor's intemperate behavior carried over into his penalty phase argument, during which he repeatedly attacked defense counsel's integrity, injected his personal opinions into his argument, and misstated the facts.

#### 1. The prosecutor repeatedly attacked the integrity of defense counsel.

Although the prosecutor is entitled to make fair comments on the evidence presented, *People v. Jones* (1997) 15 Cal.4th 119, 186, and point out that lawyers are schooled in the art of persuasion, *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, it has long been held that personal attacks on the integrity of defense counsel are improper. (*People v. Hill*, 17 Cal.4th at 822; *Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097, 1106 [improper to imply defense counsel had fabricated evidence]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075 [improper and prejudicial for the prosecutor to state that the defense attorney did not want the jury to hear the truth and had to help his witnesses plan a defense].) *People v. Jones* (1997) 15 Cal.4th 119, 168 held it improper for the prosecutor to state that defense

counsel was lying and that his lack of candor damaged his credibility.

Before making these repeated attacks on the integrity of defense counsel, the prosecutor made a preemptive attempt to cover his tracks by saying that he had respect for defense counsel who were "some of the best," that they "did a great job for their client," and that nothing he was going to say "should make anyone think they did anything wrong, unethical, inappropriate, absolutely not." (41RT 8358.)[82] These statements exemplify the rhetorical device of paralipsis, a form of irony that brings up a subject by denying that it was brought up, a device frequently used to make an *ad hominen* attack. (See e.g., www.mannerofspeaking.org.)

This is amply demonstrated by the prosecutor's very next statement: "They're doing their job, absolutely. And bless their hearts for doing it.[83] But be careful. Be careful. [The defense argument that the

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82 The prosecutor also stated at one point that it was "not defense attorneys' fault," but Johnson and appellant were fabricating the defense. (41RT 8410-11.)

83 "Bless their hearts" is a "term used prior to ridiculing, insulting the sensibilities of, or pointing out the shortcomings of someone," so as to soften the blow. (See urban dictionary.com.)

prosecution is for death and the defense is for life is] not fair. That's not right. And the argument, the argument is intellectually offensive." (41RT 8359.)

*Parker v. Matthews* (2012) __ U.S. ___ [132 S.Ct. 2148] rejected a due process claim where the prosecutor made an argument that could have been viewed as suggesting that the defendant had colluded with his lawyer because immediately afterward the prosecutor expressly disavowed any suggestion of collusion. Here by contrast, the prosecutor repeatedly argued to the jury that defense counsel's actions and words were unfair, not right, and offensive. Prosecutorial claims that defense counsel conducted the defense in a way that was unfair, wrong, legally inappropriate, and even immoral ("offensive") is tantamount to an attack on defense counsels' integrity.

For example, the prosecutor warned the jurors of potential defense arguments that defense counsel were "for life" and he was for death because such an argument was unfair and "intellectually offensive." (41RT 8359.) The prosecutor asserted that the defense attorney incorrectly said in opening statement that Bridges was Bonnie Miller's lifelong friend in

order to give Bridges credibility. The prosecutor expressly accused the defense of making this statement, not "by accident" but "all by design." Although the prosecutor backtracked and said that defense counsel "did not do anything wrong," he continued to argue that the defense argument was "not fair and not right." (41RT 8424.)

The prosecutor suggested that the defense might argue that Miller would not have been a good father, then said, "Listen to their argument, which is by the way inappropriate based on the law." (41RT 8428.) The supposed "unfairness" of the defense presentation and argument was prominent throughout the prosecutor's argument. The prosecutor stated: "They're hoping someone will get that impression and just stick with it and let that taint your evaluation of the facts . . . . That will not be fair." (41RT 8463.) The prosecutor quoted defense counsel as saying that "Mazza is the big bad guy . . . they gave him a deal and they want to put my client to death." The prosecutor then said that considering this defense argument "would be absolutely inappropriate." (41RT 8477.) In fact, the remark in defense counsel's opening statement as to Mazza and his 15-year sentence did not refer to the life or death sentencing decision at all, but

was part of the proposed evidence as to lingering doubt as to appellant's guilt for the murder of Miller. (See 31RT 6301.)[84] The prosecutor not only accused defense counsel of making an "absolutely inappropriate" argument; the accusation was of making an inappropriate argument that defense counsel never even made.

The prosecutor ended his argument as he had begun it, by ascribing an argument or tactic to defense counsel and then attacking counsel's integrity for making it: The defense attorney will tell you to "reject anger and hatred" but that is an "offensive argument" because it says that the death penalty is about anger but it is part of our law. They're going to say "don't kill my client," which is offensive because it implies killing is murdering, but the death penalty is lawful and the jury took an oath to follow the law. (41RT 8502; 41RT 8503 [repeating that the defense argument for life was "intellectually offensive"].)

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[84] The defense opening statement by lead counsel, 31RT 6291-6328, related to lingering doubt as to guilt of the first degree murder. The opening statement by second counsel, 31RT 6329-46, argued the sentencing decision as to life or death.

**2. The prosecutor repeatedly argued that the defense wanted only "one juror" to vote against death, an attack on defense counsel's integrity that ascribed to defense counsel an improper motive and strategy of trying to take the jurors' focus away from the law and the evidence, and also implying that defense counsel did not believe in appellant's innocence of the crime or the propriety of a life rather than a death sentence.**

As part of an argument that Johnson was lying, the prosecutor ascribed to the defense a desire for what he called "the Rule of One," i.e., "the defense doesn't want 12 people to buy it, they just want one." When the defense argumentative objection was overruled, the prosecutor continued, "If they get one juror to take focus away from law or jury instruction or evidence, you can't have a verdict. They just want one." (42RT 8425-27.) The prosecutor returned to this argument after saying that none of the mitigation (which he described as red herrings and the boogeyman) warranted a life sentence: "I want to read to you the testimony [ ]to see how that rule of one they're trying to do, rule of one, they just want one juror." (42RT 8487-88.) The prosecutor repeated the argument. ""But see, it's that idea about, if we [referring to the defense] can let the jury think [a witness is] the boogeyman and let somebody be

left with that impression, maybe it will work, maybe we'll get one juror." (42RT 8491.) Then the prosecutor said that defense counsel described Bridges as Miller's lifelong friend because "they want that one juror to get that impression and never let go of it." (42RT 8497.) He ascribed the same improper motive to testimony by Bernard Cain: "See they just want one, just one." (42RT 8498.)

### 3. The prosecutor repeatedly injected into the argument his personal beliefs and reactions to the evidence in a concerted pattern of improper vouching.

#### (a) The prosecutor's personal beliefs.

The Court in *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053 was emphatic in declaring that "a prosecutor has no business telling the jury his individual impressions of the evidence" which may mislead the jury into thinking his conclusions have been validated by the government's investigatory apparatus. (See also *People v. Williams* (1997) 16 Cal.4th 153, 257 [impermissible vouching occurs where the prosecutor suggests that information not presented to the jury supports the prosecution's case]; *In re Brian J.* (2007) 150 Cal.App.4th 97, 123 [misconduct for prosecutor to inject his personal view into the argument].)

The prosecutor's penalty phase argument was riddled with statements of his personal impressions, views, and beliefs regarding the evidence. The prosecutor described the penalty determination as boiling down to the pain appellant caused and who he was; the prosecutor then said appellant did not deserve the lesser punishment of life because he was "a piece of trash. . . I almost fainted when --." The defense objection of improper argument was overruled. The prosecutor continued, stating that he "almost fainted when the neighbor [Cain] said [appellant] was nice to [Cain's] dog." (41RT 8376-77.)

The prosecutor continued with his litany of personal impressions, saying that he "almost fell out of [his] chair" when defense counsel described Bridges as his best witness. (41RT 8396.) In an argument that "this gun" killed Miller, the prosecutor told the jury that defense counsel had "very expensive taste," and wanted the best expert, "not the best in Orange County, not the best in California [but] the best in the world to examine that weapon," and so "I [the prosecutor] moved heaven and earth to do it for him. . . He has gotten every single right he deserves." (41RT 8360.)

The prosecutor's personal emotional responses were clearly irrelevant, as were his actions (if any, and if they existed were outside the evidence) in getting a ballistics expert, and his "legal opinion" as to the "rights" appellant "deserved" and received. But beyond their irrelevance looms a larger problem. The prosecutor had already set himself up as the arbiter of what was proper and fair (opposing that to defense counsels' offensive and legally incorrect strategy and tactics). From this improperly established pedestal, the prosecutor suggested to the jury – through his personal beliefs and impressions -- that his conclusions as to what appellant got or deserved, and what evidence was worthy of consideration or not, had been validated by investigation or evidence the jury did not hear, as explained in *Kerr*, 981 F.2d at 1053. (See also *United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199, 1204-06 [reversing where the prosecutor suggested extrajudicial information supported the prosecution's theory of the case and the prosecutor expressed his personal belief that the process resulted in truth-telling by prosecution witnesses].)

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**(b) Improper vouching.**

*United States v. Brooks* (9th Cir. 2007) 508 F.3d 1205, 1209 described typical forms of improper prosecutorial vouching as (1) placing the government's prestige behind a witness by expressing a personal belief in the witness's veracity; and (2) suggesting that information not presented to the jury supported the witness's testimony]. The prosecutor engaged in both kinds of improper vouching in his argument to the jury.

Arguing that appellant was an "evil doer filled with hate, a Nazi lover" who "richly deserved" the death sentence, the prosecutor assured the jury several times that it was "not even close." (See e.g., 41RT 8356-58, 8376, RT 8442, 42RT 8482, 8518.) This frequent refrain of "It's not even close" operated first to suggest that based on the prosecutor's own experience and outside knowledge this was a case – in comparison with others that might have presented closer question – in which the determination of sentence was open and shut, while at the same time putting his personal prestige behind the "proper" and "appropriate" and "richly deserved" sentence of death, as opposed to the "offensive" sentence of life.

The irony and injury here is that this case was the direct opposite of what the prosecutor was saying, i.e., far from a case in which "it was not even close," the first jury (the only other proper arbiter of what the appropriate sentence should be) proved that the case was as close as it could be. (See 42RT 8640-45 [first penalty jury was split 6/5/1].)

**4. The prosecutor's argument comparing appellant to Nazi war criminals and contrasting him with Nelson Mandela violated the trial court's ruling.**

The prosecutor improperly compared appellant to Nazi war criminals. The prosecutor had argued strenuously that the defense should be precluded from arguing against the death penalty on the grounds that appellant was not the "worst of the worst." (9CT 2365-69.) The trial court ruled that this Court had repeatedly held that "worst of the worst" arguments were inappropriate because they invited the jury to compare the case with other cases not before it. (39RT 8119-23.)

Having managed to preclude the defense from arguing that appellant was not the worst of the worst, the prosecutor then argued that he was indeed the worst of the worst. The prosecutor compared the capital crime to Nazi war crimes and the Holocaust: "Remember who in

the past have [] tried to use that excuse, 'I was just following orders.' Right? Right? In the Nuremberg trial. 'I'm just following orders.' Right under his eye. That swastika." (41RT 8381.)

Not only did the prosecutor compare appellant to Nuremberg war criminals, he attempted to diminish the impact of the defense mitigation by arguing that adversity sometimes bred a "Mandela" or "people who helped others" in natural disasters such as a hurricane. The prosecutor thus did precisely what he had kept the defense from doing, and what the trial court ruled was improper: comparing appellant to cases not before the jury (Nazi war criminals) and contrasting him to exemplary individual cases also not before the jury (Nelson Mandela).

**5. The prosecutor misstated the facts.**

Both state and federal cases hold that it is improper for a prosecutor to misstate the evidence. (*People v. Collins* (2010) 49 Cal.4th 175, 230 [although the prosecutor can draw reasonable inferences from the evidence it is misconduct to misstate the facts]; *People v. Davis* (2005) 36 Cal.4th 510, 550 [accord]; *Darden v. Wainwright*, 477 U.S. at 182.)

The prosecutor argued that at the time of the Helmick incident appellant was "wearing contacts," and urged the jury not to "fall for that" defense, i.e., that appellant could not see that Helmick was a police officer. However, there was no evidence that appellant was wearing contacts on that day. The only evidence as to appellant's eyesight, apart from the testimony as to his defective vision, was a document from the Department of Corrections that contained the annotation "wears contacts, will wear them." (38RT 7923.) The prosecutor's argument not only misstated the facts, it implied that the defense had concocted a fraudulent defense that the jurors should "not fall for."

### C. The Continuous Course of Improper Prosecutorial Argument Requires Reversal of Appellant's Sentence of Death.

The many instances of prosecutorial error/misconduct in cross-examination of Johnson and jury argument violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights. The prosecutor's unsworn statements deprived appellant of his Sixth Amendment confrontation rights. Prosecutorial vouching for a witness is improper because the conduct "make[s] the prosecutor his own witness – offering unsworn

testimony not subject to cross-examination." (*People v. Hill*, 17 Cal.4th at 828.) The prosecutor's pattern of misconduct in argument infected the penalty trial with unfairness thus violating federal due process guarantees. (*Donnelly v. DeChristoforo*, 416 U.S. at 642-43.) In addition, the improper prosecutorial arguments deprived appellant of his right to a reliable sentencing determination under the Eighth Amendment. (*Woodson v. North Carolina*, 428 U.S. at 304.) Consequently, the error should be assessed for prejudice under the federal constitutional standard of *Chapman v. California*, 386 U.S. at 24, which requires reversal unless the prosecution can show harmlessness beyond a reasonable doubt.

In *People v. Hill*, 17 Cal.4th at 927, this Court noted that even though statements by the prosecutor are "[w]orthless as a matter of law" they can be "dynamite to the jury" "because of the special regard the jury has for the prosecutor." (Internal quotation marks and citations omitted.) This is particularly true in this case for the following reasons.

Prejudice from improper prosecutorial argument is analyzed by considering how the improper remarks would or could have been understood by the jury in the context of the entire argument. (*People v.*

*Dykes* (2009) 46 Cal.4th 731, 771-72; *United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199, 1205-06.) Applying this test, reversal is warranted here: The prosecutor's assertions that the defense arguments for life were "offensive" and not even legally appropriate, whereas the case for death was "not even close," when considered with the prestige accorded the prosecutor, would have strongly suggested to the jurors that a sentence other than death, or a serious consideration of the mitigation evidence, was somehow wrong, or counter to the applicable legal principles. Indeed, to the extent these arguments tended to minimize the jury's role and responsibility for the sentencing decision, they amounted to *Caldwell* error in violation of appellant's Eighth Amendment rights. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328.)

In addition, the improper prosecutorial arguments based on the prosecutor's own personal experience and prestige went directly to the heart of the defense case in mitigation. Error striking directly at the heart of the defense is deemed prejudicial. (*People v. Lindsey* (1988) 205 Cal.App.3d 112, 117; *People v. Vargas* (1973) 9 Cal.3d 470, 481.)

The prosecutor's course of conduct in this case mirrors that found prejudicial in *Bates v. Bell* (6th Cir. 2005) 402 F.3d 635. In both cases, (1) the prosecutor "attempted to place the government's thumb on the scales by repeatedly interjecting [his] personal opinion into the record" regarding appellant's death-worthiness; (2) the improper conduct was not isolated to a single comment, or a single portion of the argument but personal opinion and attacks on defense counsel were laced throughout the argument. (*Id.* at 647-48.)

*Bates v. Bell* further explains that while "overwhelming evidence of guilt can sometimes be sufficient" to find some prosecutorial misconduct harmless, evidence of guilt does not immunize the sentencing phase verdict. (*Id.* at 648-49.) Where, as here and in *Bates v. Bell*, the prosecutor's actions operate to preclude the jury's proper consideration of mitigation, the jury is unable to make the fair and individualized decision required by the Eighth Amendment, and reversal is required. (*Id.* at 649.)

Finally, even assuming arguendo that this error was not prejudicial standing alone, this Court must review for prejudice in the context of the other errors in this trial. (See *People v. Hill*, 17 Cal.4th at 844 [a series of

trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15 [cumulative effect of trial court errors can violate federal due process rights].)

## VI. THE TRIAL JUDGE COMMITTED JUDICIAL MISCONDUCT WHEN HE MADE COMMENTS MINIMIZING THE JURY'S RESPONSIBILITY IN DETERMINING PENALTY BY GIVING MISLEADING AND INCORRECT "STATISTICS" AS TO DEATH ROW INMATES REQUIRES REVERSAL OF APPELLANT'S SENTENCE OF DEATH

### A. A Fair Trial in a Fair Tribunal Is a Basic Requirement of Federal Due Process and That Fairness Requires Not Only the Absence of Bias but Even the Probability of Unfairness.

The United States Supreme Court long ago held that a "fair trial in a fair tribunal is a basic requirement of due process." (*In re Murchison* (1955) 349 U.S. 133, 136.) Fairness requires not only "an absence of actual bias" but also the absence of "even the probability of unfairness." (*Murchison*, 349 U.S. at 136.) Thus, the litigant need not prove actual bias to establish a due process violation, just an intolerable risk of bias. (*Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 825; *Caperton v. A.T. Massey*

*Coal Co.* (2009) 556 U.S. 868, 883-84 [a due process violation based on an unfair tribunal does not require proof of actual bias].) As explained in *Mistretta v. United States* (1989) 488 U.S. 361, 407: "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."

### B. The Judge's Comments to the Jurors During Voir Dire Amounted to Error Under *Caldwell v. Mississippi.*

*During* jury selection at the second penalty trial, the judge told the jury that most death row inmates, and most death row inmates executed, were "white," contrary to what "people have bought into [in the] media." The judge continued to explain that despite this supposedly misguided publicity, an innocent defendant being executed or freed was "unusual" and not the average. (29RT 5831-32.)

The judge's off-the-cuff "statistics" were not only wholly irrelevant, they were wrong in part and misleading in others. As of August 6, 2014, the white population of death row inmates in the U. S. was 1323, while the population of blacks, Latinos and other-race death row inmates was 1737. In California, there were 269 white inmates on death row, and 485

inmates of other races [269 Blacks, 179 Latinos, 12 Native Americans and 25 Asians].[85] The judge's "facts" were misleading -- in proportion to the population at large, **non-whites** are grossly overrepresented in both the death row populations and in those death row inmates executed. For example, of the 13 inmates executed in California since 1976, eight were white and five were non-white, but non-whites were executed at a higher rate in California compared to the population at large.

As to supposed rarity of innocent defendants being convicted or executed, a recent statistical analysis of data on both 7,482 defendants sentenced to death between 1973 and 2004 and death row exonerations during that time showed that at least 4.1 per cent of the defendants sentenced to death were wrongly convicted. (See <http://www.scientificamerican.com/article/many-prisoners-on-death-row-are-wrongfully-convicted [reporting study by Professor Samuel Gross et. al. from the University of Michigan].

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85 Statistics from website of Death Penalty Information Center. <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#inmaterace>

The judge's motive in making his remarks may be obscure, but their effect of the remarks is clear:[86] despite the lingering doubt defense at the second penalty trial, the jurors were told that such a situation was "rare." The comments suggested to the jury that appellant being white made him a likely candidate for the death penalty since most death row inmates and most inmates executed were "in fact" white! The judge's ill-considered opinions -- delivered as facts -- set up for the jury a framework diametrically opposed to the "individualized" decision-making process required under the Eighth Amendment. (*Gregg v. Georgia*, 428 U.S. at 198; *Woodson v. North Carolina*, 428 U.S. at 304.)

In a case in which a large part of the case in mitigation was lingering doubt, and in which appellant was accused of belonging to a white supremacist gang, the judge's reckless comments at a minimum posed an intolerable risk of bias, and thus judicial misconduct. The effect of the

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[86] After the first penalty phase jury declined to impose the death penalty in this case, in which one white gang member was convicted of killing another white gang member, the judge's remarks could be viewed as an (improper) attempt to "correct" any media-based ideas the new jurors might have harbored that would have kept them from imposing the death penalty on a white defendant.

statements made by the judge was to minimize the jury's role and responsibility for the sentencing decision, itself a violation of federal due process and the Eighth Amendment. The United States Supreme Court has repeatedly held that a prosecutorial statement tending to minimize the jury's role and responsibility for the sentencing decision in a capital case violates the Eighth Amendment and federal due process. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-29; *Maggio v. Williams* (1983) 464 U.S. 46, Stevens, J., concurring; see also *Riley v. Taylor* (3rd Cir. 2001) [en banc] 277 F.3d 261 [granting habeas relief to death row inmate where prosecutor made improper reference to automatic appeal following a death sentence]; see also *People v. Ramos* (1986) 37 Cal. 3d 136, 157 [jury instruction that diminished the jury's sense of responsibility for its sentencing decision violated state due process].)

If it is a constitutional violation for a prosecutor to make such remarks, *a fortiori a* judge's remarks violate the defendant's Eighth and Fourteenth Amendment rights, given the "great confidence" jurors place

in the "correctness [of the judge's views] expressed during trials." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.)[87]

Although this Court has rejected a number of *Caldwell* error claims based on statements by prosecutors,[88] a statement *by the judge* tending to diminish the jury's responsibility requires stricter scrutiny. This Court has repeatedly insisted that "trial courts must be scrupulously evenhanded" in conducting death qualification voir dire. (*People v. Whalen* (2013) 56 Cal.4th 1, 40 [internal quotation marks omitted], citing *People v. Mills* (2010) 48 Cal.4th 158, 198 and *People v. Champion* (1995) 9 Cal.4th 879, 908–909.)

In *People v. Abel* (2012) 53 Cal. 4th 891, 917-918 this Court emphasized that judges should be "even-handed" in questioning prospective jurors during death qualification, but rejected a claim that the judge expressed a pro-prosecution bias in voir dire by suggesting he

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87 *Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, *People v. Hines* (1997) 15 Cal.4th 997, 1072-74, establish that no objection on federal constitutional grounds is required to preserve federal challenge to such an instruction.

88 See e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 186; *People v. Welch* (1999) 20 Cal.4th 701, 762; *People v. Lucero* (2000) 23 Cal.4th 692, 734.

favored the death penalty. However, in *Abel*, the judge's comment was simply an explanation of the process, i.e., that if the jury found the defendant guilty of felony murder, it would then have to choose between two serious penalties, life without parole, or the death sentence, thus impressing on the jury the gravity of the case. Here by contrast, the judge was not explaining the trial procedure but was giving his own opinion, unsupported by any facts or authority, as to supposed racial breakdowns in capital cases, "statistics" that suggested to the jury that the lingering doubt case in mitigation was unlikely since such a situation was "rare," and that appellant, as a white defendant, was thereby suggesting to the jurors first, that the lingering doubt defense was likely without merit, and secondly, that appellant was at least statistically a good candidate for the death penalty.[89] The judge's comments thus injected into the sentencing determination "speculative and impermissible factors." (*People v. Ramos*

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89 At the sentencing hearing, the trial judge remarked that it was "ironic that a gang based on anarchy [was] able to carry out an execution in little more than a year . . . when it takes the State of California more than 25 years." (42RT 8640-45.) Although this remark was not made in the presence of the jury, appellant reports it here because it tends to show the judge's bias in favor of the death penalty.

(1984) 37 Cal.3d 136, 157-59 [*Briggs* instruction violated state due process].)

### C. The Judicial Misconduct Was Prejudicial.

Because the error implicated appellant's Eighth Amendment rights, review for prejudice is under the *Chapman v. California*, 386 U.S. at 24 standard: this Court must reverse appellant's sentence of death unless the prosecution can show beyond a reasonable doubt that the misconduct was harmless. Such a showing cannot be made here.

*People v. Sturm,* 37 Cal.4th at 1233 reversed a judgment of death where the judge had, through his comments to the jury, conveyed his disdain for the defense expert witness, observing that jurors "rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials."].) *Sturm* deemed the judicial misconduct prejudicial under any standard because although the crime was "undeniably heinous, a death sentence [] was by no means a foregone conclusion." (*Id.* at 1244.) Indeed, at the first penalty phase (as in this case) the jury was unable to reach a verdict, making it reasonably probable

probable that the second penalty phase verdict would have been different in the absence of the judicial misconduct. (*Ibid.*) The same is true here.

Even if the error is considered harmless when the claim is considered on its own, the Court must consider the cumulative prejudicial effect of the multiple constitutional errors at penalty phase. (See Arg. II, Part D, pages 121-123 above, citing *People v. Hill*, 17 Cal.4th at 844 [a series of trial errors may rise by accretion to reversible error]; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].)

The combined effect of these errors – from the extremely inflammatory Fox video presentation, to the judge's misguided comments, and multiple instances of prosecutorial misconduct in argument, to the erroneous admission of highly influential aggravating evidence of an alleged conspiracy to escape, and to the wrongful exclusion of critical multi-generational mitigation, and the aggravating evidence of the Helmick attempted murder, including the erroneous admission of Rump's statement that was used as evidence of appellant's belief,[90] was to

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[90] See Argument XII, below, at pages 269 et seq.

encourage the jury to reach a death verdict. In short, the death verdict is not reliable and cannot fairly be described as based on the evidence because proper mitigation was excluded and aggravation of the most harmful kind -- an alleged violent escape attempt and the Fox video -- was wrongfully admitted.

## JURY SELECTION ERROR

## VII. THE TRIAL COURT'S ERRONEOUS GRANT OF A CHALLENGE TO CAUSE AT THE SECOND PENALTY TRIAL TO A PROSPECTIVE JUROR WHO WAS EQUIVOCAL OR CONFLICTED ABOUT THE DEATH PENALTY BUT WHO WAS ABLE TO CONSIDER ALL THE EVIDENCE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, DUE PROCESS AND EQUAL PROTECTION AND A RELIABLE SENTENCING DETERMINATION

### A. The Removal of a Prospective Juror Who Was Not Shown to Be Substantially Impaired Requires Reversal Of Appellant's Penalty Trial.

The trial court erred and violated appellant's federal constitutional rights to an impartial jury, to due process and equal protection, and to a reliable sentencing determination under the Fifth, Sixth, Eighth and Fourteenth Amendments by granting the prosecution's cause challenge at the second penalty trial to a prospective juror where the prosecution

failed to meet its burden of showing that the excused juror was substantially impaired due to an inability or refusal to follow the law. The Sixth and Fourteenth Amendments guarantee the defendant's right to an impartial jury and fundamental fairness in selecting the jury. (*Mu'min v. Virginia* (1991) 500 U.S. 415, 501.)

The erroneous excusal of a juror based on her supposed views on capital punishment also violates the defendant's Eighth Amendment right because it slants the jury in favor of a death sentence, affecting the impartiality of the jury panel, which goes to the very integrity of the legal system, and implicates the defendant's constitutional right not to be sentenced by a trivial organized to return a verdict of death. (*Gray v. Mississippi* (1987) 481 U.S. 648, 668.)

**B. Prospective Juror 144 Agreed to Consider All the Facts Although She Described Herself as Conflicted and "On the Fence" About the Death Penalty, and Only Said She Would Not Impose a Death Sentence When She Was Improperly Forced to Give a Yes or No Answer, Explaining That She Understood the Decision to be An Individualized Weighing Based on the Evidence Not A Forced Prejudging "Yes or No."**

Prospective juror 144 ["PJ 144"] answered the initial questions posed by the trial court as follows: Her ex-husband was an Oregon police

officer, which would lead her to expect a higher degree of accuracy in a police officer-witnesses although she recognized they could make mistakes too; her father and stepmother were involved in psychiatry/psychology; she agreed that being a gang member didn't necessarily mean the member committed crimes. As to whether she could impose either a life or death sentence, PJ 144 said, "It was difficult for me to answer yes or no." (She had made an asterisk on the questionnaire.) (30RT 6065-67.) She described herself as "conflicted about assessing the death penalty," because of her religious convictions, but also because of what she had heard in voir dire about "weighing different factors." (30RT 6068.) When asked if she could "see herself ever voting for death," she said she didn't honestly know. When asked, "Would you consider it, though?" she answered definitively, "I would consider hearing all of the testimony and weighing the factors, yes." The court then asked whether she could vote for the death penalty if she found the aggravating circumstances to outweigh the mitigating. She answered, "If you are making me say yes or no, I would say no, I could not [under any circumstances]." (30RT 6068-69.)

On voir dire by defense counsel, PJ 144 reiterated that she was "conflicted." She said she was "on the fence" and did not know which "concrete answer to give, yes or no," because she did not "see it as a yes or no." (30RT 6083.) PJ 144 then asked whether the decision had to be unanimous and when told it was, PJ 144 repeated that it was difficult to answer yes or no, explaining that when she was summoned for jury duty she did not think it would be such an important case, and she "never really honestly truly thought about what [her] views were on imposing a death sentence." Consequently, she "just really couldn't distill down exactly if it was a yes or a no." (30RT 6084.) She agreed that her responses as to being conflicted or "thinking about all the issues" was distinct from saying she could not follow the law. (*Ibid.*) PJ 144 then asked for clarification of the law: "Because you have said that it's not adding up A plus B plus C equals the death penalty. But then we're supposed to come to individual judgment on mitigating factors and the aggravating factors and bringing in our emotions and our beliefs, even though it's supposed to stop at that gate." She could state unequivocally that she could assess the testimony but didn't know if she could impose the death sentence. (30RT 6085.) She

just truly did not know. (30RT 6086.) She confirmed to the prosecutor that she stood by her answer to the judge, that she would say she could not vote for the death penalty if she was forced to give a yes or no answer to a matter she did not consider a "yes or no" situation. (*Ibid.*)

In sum, PJ 144 never said that she could never vote for death – she only said only that she would say "no" if "forced" to give a yes or no answer prior to hearing a penalty phase presentation, but that she understood the judge's instructions (correctly) to require an individualized decision after weighing all the factors. She never said that she would not or could not follow the judge's instructions on the law. She did say that she would consider all the evidence. She was therefore not substantially impaired and could not legally be excused for cause.

### C. A Prospective Juror Can Be Excluded for Cause Only If She Is Unable to Follow the Law and Cannot Consider All Sentencing Alternatives.

*Utrecht v. Brown* (2007) 551 U.S. 1, 6 is the United States Supreme Court's most recent reiteration of the rule set out in *Witherspoon* v. *Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, i.e., that a prospective juror is properly excluded in a capital case *only* if she is unable

to follow the court's instructions and cannot conscientiously consider all of the sentencing alternatives. A prospective juror's views on capital punishment do not render her "substantially impaired" and thus subject to excusal for cause. To the contrary, "[a] prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing a juror for bias in a capital case. *Wainwright v. Witt* (1985) 469 U.S. 412, 424 held that a person "who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State."

Moreover, the prosecution, as the moving party, bears the burden of demonstrating to the trial court that the *Witherspoon-Witt* standard is satisfied, i.e., that the prospective juror is unable to follow the judge's instructions and cannot conscientiously consider all sentencing alternatives. (*Witt,* 469 U.S. at 423.)

Under these precedents, it was error for the trial court to excuse prospective juror 144 for cause. The prosecution failed to carry its burden. PJ 144 was not substantially impaired by her conflicted views on the death

penalty. She stated that she could and would consider and weigh all the evidence, and she never asserted an inability or refusal to follow the law.

PJ 144 was forced to give a "yes or no" answer to what she perceived was an individualized and moral decision, but she was not asked follow-up questions as to whether she would follow the law and court's instructions.

*People v. Stewart* (2004) 33 Cal.4th 425, 266 held that although a juror might find it very difficult to vote for the death penalty, the juror could not be considered substantially impaired "unless [] she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." *Stewart* further noted that a prospective juror who declared herself against the death penalty in the questionnaire could not be excused as "substantially impaired" because in follow-up questioning she might demonstrate an ability to put aside personal reservations and follow the law. (*Id.* at 427.)

The contrasting treatment of an apparent automatic-death-penalty juror demonstrates the efficacy of follow-up questions. Prospective Juror

179 [PJ 179] stated on voir dire that he actually felt LWOP was a bit harsher than the death penalty. When asked about his comment "if you take a life you should pay," PJ 179 added a caveat that if someone was killed accidentally, or unintentionally, the person should pay; and that if someone had already been convicted of first degree murder, PJ 179's first response would be "without knowing the facts at this point" that the person should get the death penalty. The judge then followed up and asked PJ 179 if he would be open to another penalty if he heard mitigating factors, he said "Yeah, I guess, if there was enough mitigating factors, anything's possible." (30RT 6146-47.) The judge then asked PJ 179 if he would consider "other circumstances in mitigation; perhaps sympathy, perhaps lingering doubt, victim impact, other crimes, perhaps." PJ 179 thought he could consider them. (30RT 6148.)

On voir dire by defense counsel, PJ 179 repeated that having learned appellant had been convicted of premeditated intentional murder, his "first response, without seeing more evidence" would be to impose the death penalty. (30RT 6148.) The judge then asked another leading

question:[91] "I mean, are there circumstances, based on what you've just been told of the fact pattern, that you would certainly consider as indicating life without possibility of parole?" PJ 179 said, "I guess there could be. I don't know any. . . . Maybe he was under the influence of drugs . . . [but] I would not find that as being an excuse to lighten the sentence to the other." (30RT 6149.) Defense counsel asked: "So unless you heard something other than the fact that it was an intentional murder, you would be predisposed to give the death penalty, is what you're saying?" He said, "Yeah, I think so." The prosecutor attempted to rehabilitate PJ 179 by pointing out that he hadn't heard all the evidence yet and asked PJ 179 if he would agree to follow the instructions of the judge. PJ 179 agreed. The prosecutor asked if he would weigh mitigating and aggravating circumstances and make a decision on that, if the law told him to and PJ 179 said he would. In a final leading question, the prosecutor said "and if the appropriate penalty is life without possibility of

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[91] A leading question is one that suggests to the witness the answer desired by the questioner. (Evid. Code, section 764.)

parole, you'll come back with life without possibility of parole, correct?" PJ 179 said "correct." (30RT 6151-52.)

The trial court's ruling on the defense cause challenge to PJ 179 also stands in stark contrast to the ruling on the prosecution's challenge to PJ 144. The defense argued that PJ 179, despite some of his rote answers, essentially stated that he would consider mitigation only if the killing was unintentional. The court denied the challenge on the basis that PJ 179's statement "was less than unequivocal," that is, his pro-death-penalty bias was equivocal. (30RT 6166.) However, PJ 144 was just as equivocal, if not more and more explicitly equivocal. For example, she repeatedly said she was "conflicted"[92] and "on the fence," whereas PJ 179 stated that unless the killing was accidental or non-intentional he would vote for a death sentence. PJ 144 was forced to give a "yes or no" answer before having heard the evidence, whereas PJ 179 was supposedly purged of his bias by being told that he had not yet heard all the evidence, and then was asked

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92 "Conflicted," according to the Merriam-Webster online dictionary indicates "having or showing feelings that disagree with one another." To be conflicted is synonymous with being "ambivalent" and/or "equivocal."

(as PJ 144 was not) if he would follow the law; and finally was asked the pointedly leading question, "if the appropriate penalty is life without possibility of parole, you'll come back with life without possibility of parole, correct?" PJ 179 said "correct." (30RT 6151-52.)

Because PJ 144 never said that she would not follow the law, and was never asked if she would, the legal presumption is that she would follow the law. "[T]he law presumes that citizens who resolutely support or resolutely oppose the death penalty are capable of setting aside their personal views when serving as jurors." (*People v. Whalen* (2013) 56 Cal.4th 1, 98, Lui, J., conc.opn.) "Separating one's personal views from one's fidelity to the law is as familiar as it is essential to our justice system." (*Ibid.*, citing *Lockhart* 476 U.S. at 176. )

### D. Erroneous Cause Excusal of a Prospective Juror In Violation of Witherspoon and Witt Requires Reversal of the Death Sentence.

Where a prospective juror is erroneously excused for cause in violation of the *Witt-Witherspoon* rule, reversal is required without inquiry as to prejudice. A defendant cannot be constitutionally sentenced to death by a jury chosen by exclusion of a prospective juror, where the juror

was excluded for voicing a general objection to the death penalty or expressing conscientious scruples against its infliction. (*Gray*, 481 U.S. at 668; *Witt*, 469 U.S. at 522-23.) The same reversible per se rule applies under the state constitutional standard. (*Whalen*, 56 Cal.4th at 26; *Stewart*, 33 Cal.4th at 455; *People v. Kelly* (2007) 42 Cal.4th 763, 777 [erroneous exclusion based on juror's views on the death penalty is per se reversible error].)

## CLAIMS RELATING TO THE GANG SPECIAL CIRCUMSTANCE FINDING AND GUILT PHASE ERRORS

## VIII. THIS COURT MUST STRIKE THE GANG-MURDER SPECIAL CIRCUMSTANCE FINDING AS UNCONSTITUTIONALLY VAGUE AND INSUFFICIENTLY NARROWING, IN VIOLATION OF FEDERAL AND STATE DUE PROCESS AND EQUAL PROTECTION GUARANTEES, AND THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

### A. Introduction to Argument.

The defense moved to strike the single special circumstance of committing a murder while an active participant in a criminal street gang as unconstitutionally vague, both on its face and as applied in this case, and thus in violation of federal and state due process and equal protection

guarantees, and the protection against cruel and unusual punishments. (4CT 888-915.) The trial court denied the motion.

To avoid the Eighth Amendment prohibition against cruel and unusual punishment, a state's capital sentence scheme must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*Furman v. Georgia* (1972) 408 U.S. 238, 131; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The state must "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion'" by providing clear and objective standards that provide specific and detailed guidance and that make "rationally reviewable" the process for imposing a death sentence. (*Id.* at 428.)

### B. The Lack of a Meaningful Distinction Between the Gang Special Circumstance and a First Degree Murder with a Gang Enhancement Renders the Special Circumstance Invalid in This Case.

As argued below, there is no meaningful distinction between a first degree murder charge with a gang enhancement and a substantive gang offense[93] on the one hand, and a gang special circumstance murder charge

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93 See Penal Code sections 186.22(a) & (b)(1).

under 190.2(a)(22) on the other.[94] The only difference is that for the gang murder special circumstance to apply, the killing must be intentional (whereas a gang-enhanced first degree murder could be felony-murder). However, in this case, the prosecutor's *only* theory of first-degree murder against appellant was premeditated intentional murder. Consequently, as to appellant, there was no meaningful difference between first degree murder with gang enhancement and the gang special circumstance murder charge.[95]

The prosecutorial decision to charge a gang-related murder as a capital offense, rather than as first degree murder with a gang

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[94] Penal Code section 190.2(a)(22) defines the gang special circumstance allegation as an intentional killing while the defendant was an active participant in a criminal street gang (186.22(f)) and the murder was carried out to further the gang's activities. On the other hand, the gang enhancement that can be attached to a murder charge provides for an enhanced sentence for any person who actively participates in a gang with knowledge of the gang's pattern of criminal activity, and who willfully promotes or assists any felonious conduct by gang members. (Section 186.22(a) and 186.22(b)(1).)

[95] The United States Supreme Court has declared that "[a] narrow focus on the question of whether or not a given defendant intended to kill is a highly unsatisfactory means of distinguishing the most culpable and dangerous of murderers." (*Tison v. Arizona* (1987) 481 U.S. 137, 157.)

enhancement or substantive gang offense, is necessarily arbitrary and capricious. There are no objective criteria for distinguishing between active gang members prosecuted for murder with a gang enhancement, and those prosecuted for a special circumstance gang murder.

The judge stated that he aware of many other gang murder cases in Orange County that were prosecuted as non-capital cases, and that this was the first such case he had seen calling for the death penalty. However, he was unable to articulate any standard for distinguishing those cases from this case, except to say the other cases did not have "the same facts" or "fact pattern" – without specifying the facts that made this case "unique." (2RT 200-08.)

This truism (no cases have "the same facts") does not provide a meaningful basis for distinguishing gang murders from capital gang murders as no cases have "the same facts." However, the judge decided that the prosecution's decision to charge the special circumstance did not seem unreasonable, because this was the first case with "this fact pattern" – without specifying which facts of this case made it so unique. (2RT 200-208.) For example, *People v. Herrera* (2010) 49 Cal.4th 613 is an Orange

County case in which the defendant gang member went with two other gang members into a rival gang's territory and shot and killed a man they saw there and the defendant was later arrested after a police chase. The Orange County *Herrera* facts are similar to those in the case at bar except that the victim here was a gang member or a former gang member, whereas the victim in *Herrera* apparently only lived in a rival gang territory but was not a gang member.

A rational comparison of the case at bar with *Herrera*, in light of the ballot initiative, which was described as intending to protect the community from hardened violent gang members, would make *Herrera* and not this case the capital prosecution under the gang special circumstance.[96]

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[96] *People v. Carr* (2006) 190 Cal.App.4th 475 involved a gang special circumstance allegation; the opinion expressly states that the death penalty was not sought. (*Id.* at 478, fn. 1.) *People v. Johnson* (2013) 57 Cal.4th 250 involved a gang and multiple murder special circumstances but it apparently was not charged as a death penalty case. *People v. Shabazz* (2006) 38 Cal.4th 55 held that the transferred intent doctrine applied the gang special circumstance allegation but it appears the prosecution did not seek the death penalty. *People v. Mejia* (2013) 211 Cal.App.4th 586 held that the provocative act doctrine applies to a gang special circumstance allegation; again, the prosecution apparently did not elect to charge the case as capital murder.

The text of Proposition 21, which added the gang multiple murder special circumstance to the death penalty statute in 2000, and the ballot pamphlet prepared for the proposition, provide little guidance. Proposition 21 (entitled "Juvenile Crime – Initiative Statute") focused on juvenile crime and treatment, and added the special circumstance almost as an after-thought to the provisions that increased prison terms for gang-related crimes, made it easier to prosecute crimes related to gang recruitment, expanded the law on conspiracy to include gang-related activities, allowed wider use of wiretaps against known or suspected gang members, and required those convicted of gang-related offenses to register with the police, declaring only: "In addition, this measure adds gang-related murder to the list of 'special circumstances' that make offenders eligible for the death penalty."[97] No other rationale or justification for adding the 22nd special circumstance to section 190.2 was given.

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[97] See Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21 at http://librarysource.uchastings.edu/ballot_pdf/2000p.pdf at pp. 32-35.

In arguing that the gang special circumstance murder was valid, the prosecutor analogized this case to *People v. Catlin* (2001) 26 Cal.4th 81, which upheld the murder-by-poison special circumstance as sufficiently distinct from first degree murder-by-poison, because the special circumstance required an intentional killing whereas the first degree poison murder could be established through either express or implied malice. The analogy to *Catlin* is overly simple, however. There are two significant differences between the reasoning in *Catlin* and this case.

First, as stated above, although the gang special circumstance does require an intentional first degree murder, intentional premeditated murder was the sole theory of prosecution in this case, so that as applied here, the special circumstance was no different in any significant legal way from a first degree murder with gang enhancements. Secondly, *Catlin* relied on the fact that because murder-by-poison was "a relatively rare crime," the "existence of the special circumstance of murder by poison" did not have "the potential of sweeping into the death-eligible category most persons who commit first degree murder." (*Id.* at 159.) The gang special circumstance, by contrast, does have that sweeping potential.

In sum, because of the absence of narrowing criteria, the special circumstance of section 190.2(a)(22) is unconstitutionally vague and constitutes cruel and unusual punishment in the case at bar.

## GUILT PHASE CLAIMS

## IX. APPELLANT'S CONVICTION FOR CONSPIRACY TO COMMIT MURDER SCOTT MILLER IS UNSUPPORTED BY THE EVIDENCE AND MUST BE VACATED AS VIOLATIVE OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS

### A. Introduction to Argument.

Appellant was charged with conspiracy to murder Scott Miller by agreeing with Rump or another unnamed alleged conspirator. The overt acts alleged were that appellant and Rump arrived in Anaheim, met with Hinson, that appellant was armed, that he went out to the alley, and that he shot Miller there. (3CT 531-32 [information]; 21RT 4172-73 [jury instructions].)

The trial court denied appellant's motion for entry of judgment of acquittal under Penal Code section 1118.1[98] and ruled that the evidence

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98 See 6CT 1329; 17RT 3271.

was sufficient to sustain a conviction for the offense of conspiracy to murder Miller. The trial court relied on the following evidence: testimony from Christina Harris (Hughes) that on March 8, 2002, Lamb called to ask if Tanya Hinson was there, and for Hinson to call him because it was important; that Harris later went downstairs in her apartment where she saw appellant, Rump and Tanya and told them to leave; that when Harris went back upstairs she heard a gunshot (she told the police she heard the gunshot about two minutes after the three left); that she went outside and saw a body and did not call the police; and that Harris later lied to the police about appellant and Rump being in her apartment. The court stated that his evidence, whether credible or not "would seem" to provide a basis for a jury concluding "that there was a conspiracy going on that evening, at least, between Tanya, [Lamb and Rump] and perhaps even Ms. Harris-Hughes."[99] (20RT 3942-43.)

Appellant contends that his conviction for conspiracy to commit murder violated his federal constitutional due process rights because it

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[99] The trial court included Hughes in the conspiracy, considering it "rather inconceivable" that she would hear a gunshot, go outside and see a body, not call the police, and then lie about it if she weren't involved. (20RT 3943.)

was unsupported by sufficient evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307.)

### B. The Prosecution Failed to Present Solid And Credible Evidence that Appellant Entered Into an Agreement to Murder.

When the sufficiency of the evidence is challenged on appeal, the record is reviewed in the light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which the a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

A conspiracy is an agreement between two or more people to commit a public offense. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464.) The elements are (1) a specific intent to agree to commit a public offense; (2) a further specific intent to commit the offense itself; and (3) proof of an overt act in furtherance of the object of the agreement. (*People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 20.)

A conspiratorial agreement may be proved by circumstantial evidence without direct evidence of an agreement, and common gang

membership may be part of circumstantial evidence supporting the inference of a conspiracy. The circumstances from which a conspiratorial agreement may be inferred include the defendants' conduct in mutually carrying out a common illegal purpose, the nature of the act, and the relationship and interests of the parties. (*Id.* at 21.)

*Quinteros* declared that while mere association does not prove a conspiracy, gang membership may be part of the circumstantial evidence supporting an inference of conspiracy. *Quinteros* upheld a challenged conspiracy conviction because in addition to gang association, the evidence of a conspiratorial agreement was "abundant." (*Id.* at 20-21.) There was no such "abundant" or even adequate evidence of appellant's conspiratorial agreement in this case, as shown below.

The prosecution presented no evidence as to appellant's actions after he left Harris' apartment, other than that he was in possession of the murder weapon three days later. This fact does not show that appellant entered into an agreement. There was no evidence presented of a prior agreement to commit a crime and/or specifically to kill Miller. Appellant's phone call asking Harris to tell Hinson to call him is not a sufficient basis in

support of an inference that there was a plan and agreement afoot to kill Miller.[100]

Although the prosecutor promised in opening statement that he would produce evidence that the PEN1 shot callers had put out an order to kill Miller and that appellant and Rump were acting on gang orders, no such evidence was presented. [101]

*Rump v. McEwen* (C.D.Cal. 2011) U.S. Dist.Ct. LEXIS 153605 rejected the claim of insufficient evidence of a conspiracy made by appellant's former codefendant Rump. The federal magistrate's decision relied on

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100 The trial court also referred to Rump's statement (that he thought the white car was occupied by a parole agent) as circumstantial evidence of a conspiracy. (20RT 3943.) Appellant has demonstrated that Rump's statement was inadmissible against appellant for any purposes, as the trial court had originally ruled. (See Argument XII, below, at pages 269 et seq.)

101 In arguing the admissibility of the Fox video, the prosecutor told the trial court that "Mazza is the one that put out the order [to kill Miller because of the Fox video]." (2RT 452.) In opening statement, the prosecutor played the Fox video and told the jury that "Mazza was not going to tolerate [the fact that Miller appeared in the Fox video] and appellant and Rump "carried out the order [to kill Miller] . . . They needed somebody solid to be able to do it. You're gonna find out they tried other people. It took until Lamb and Rump to take Scott Miller out . . . they were a chosen [] death squad to carry out this hit." (7RT 1366-67.)

supposed testimony from jailhouse informant Darryl Mason that the PEN1 gang had ordered a "hit" on Miller because of his appearance in the Fox video.

However, Mason actually testified that he "had heard" that Miller was "in the hat" – which he defined as "being in trouble" with the gang -- for going on Fox 11 news, and that "as far as [he] knew [] there was an understanding" that something was supposed to happen to Scott Miller as a result of the Fox 11 broadcast. (12RT 2156-57.)

Mason's hearsay testimony, and his conjecture ("as far as he knew") about a vague understanding that "something" was supposed to happen to Miller is definitively not solid credible evidence supporting an inference that there was a PEN1 gang order to kill him, that appellant knew about it, and that he had a specific intent to kill Miller.[102]

Mason also testified that during his 10-day stay in the jail appellant (whom he had not known before) reported to him through a crack in his

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[102] The federal magistrate also relied on a letter Rump had written which was not admitted as to appellant; Rump's presence at Harris' apartment shortly before Miller's murder; and the gang association.

cell door that he (appellant) had "stripes" coming for having killed Miller. (12RT 2164-65, 2237, 2246, 2249-60.)[103] However, Mason did **not** provide any testimony that the killing was a hit, that he had been ordered by gang shot callers to kill Miller, that he was acting in accordance with a gang plan, or even that he had killed in concert with another person. Indeed, Mason's testimony was to the contrary: he stated the gang really had no rules, that to the extent there were rules, they could be broken at any time, that an order to kill would not have to come down from a PEN1 leader, and that he, for example, handled disrespect on the spot and on his own. (12RT 2255-57.)

Lt. Clay Epperson, testifying as a gang expert, stated that prior to Miller's death, there was a *recurring rumor* that Miller would be hit for his participation in the Fox video. (16RT 3191-92.) On cross-examination, Lt.

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[103] Appellant's statement that he had "stripes" coming may support the gang allegations but it does not support an inference that he entered into an agreement beforehand to kill Miller. The gang expert testified, any crime committed by a gang member, even "stealing a sandwich," would be for the benefit of the gang. (16RT 3200-01.) Thus, that appellant thought he deserved "stripes" might tend to show a crime was gang-related or for gang benefit, but it is not solid credible evidence of a conspiratorial agreement.

Epperson clarified and emphasized that he did not have any knowledge that the Fox video was the reason for a gang plan to kill Miller. When asked if he knew the video was "supposedly the reason," Epperson claimed no expert knowledge but said, "Um, I think that's a reason that the gang members pointed to." (16RT 3191.) For example, Epperson had heard the rumor from police investigators working the PEN1 gang that Jesse "Ugly" Wyman had been designated to kill Miller. (16RT 3125.)

Hearsay as to rumors, even in the guise of an expert opinion, does not constitute credible solid evidence in support of a conspiracy or appellant's entry into a conspiracy. Indeed, in Epperson's opinion, the Fox video was a "contributing factor" in Miller's death but not the "overriding factor," as Miller was widely disliked and had made a "fair amount of enemies." (16RT 3126, 3189-91.)

In response to a hypothetical question, a question that *assumed* a former shot caller brought negative attention to a white supremacist gang, and that gang members formed a plan to lure him into a secluded area to kill him, Epperson gave his opinion that such an act would be for the benefit of the gang. (16RT 3177-79, 3197.) An expert opinion as to the

gang benefit of a crime *that assumes* the existence of a plan to kill Miller certainly does not amount to evidence of that plan; more importantly, it does not constitute evidence that appellant agreed to that plan.

*People v. Morris* (1988) 46 Cal.3d 1[104] is instructive because it distinguishes between solid evidence in support of an inference sufficient to sustain a conviction, and speculation and conjecture which is legally insufficient (but which the prosecution relied on in this case). The *Morris* Court emphasized that *speculation* was an unconstitutional substitute for substantial solid evidence:

> "We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork. [¶] A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" (*Id.* at 14-15.)

The prosecution in this case relied on speculation and conjecture rather than solid evidence that appellant agreed to kill Scott Miller, and thus under *Morris*, his conviction must be vacated.

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104 *Morris* was overruled in part on another ground in *In re Sassounian* (1995) 9 Cal.4th 535.

### C. The Prosecutor's Reliance on the Fox Video as Evidence of the Conspiracy in Urging the Jury to Convict Appellant of Conspiracy Is Further Indication that There Was No Solid and Substantial Evidence that Appellant Entered Into a Conspiracy with the Specific Intent to Kill Scott Miller.

It is notable that in arguing to the jurors that the evidence showed a conspiracy, the prosecutor stated that an agreement can be "quick and informal," counter to the supposed prosecution theory that the appellant and Rump had agreed to the gang-ordered hit beforehand. (21RT 4274.)

Even more telling is the fact that the prosecutor repeatedly relied on the Fox video as proof that the Miller's appearance in the video caused Mazza to order a PEN1 gang hit on Miller, and that appellant and Rump carried out that gang order, even though the Fox video contained no such evidence and was not admitted for its truth. In final closing argument to the to the jury, the prosecutor referred to "the orders that Mr. Lamb and Mr. Rump got out of state prison with [indicating], 'you got to take Scott Miller out.'" (23RT 4633.)

The prosecutor also told the jury to "listen to Mr. Lamb's call to Robin Friewald" – and then quoted a phone call not from Lamb but from

Rump, in which Rump said he told Tanya Hinson "'if we don't do this right now, we're not going to get a chance to.'" (RT 23RT 4632.) This phone call was made by Rump and was not admissible against appellant. More to the point, the antecedent to which "doing this right now" referred was **not** killing Miller: the reference was to Rump's wish that he had had sex with Friewald before he left:

> "J.R. I just want a fucking . . . Goddamn, I should have fucked you before I left!
> RF: Huh? Goddamn it!
> JR: (Laughs) Fuck. And you know what's fucked up, too? Is I told T, right?
> RF: Uh-huh.
> JR: Okay. I told her, I said, check it out. I said, more than likely, if we don't do this right now, we're not going to get a chance to. You know what I mean?
> RF: Yeah." (11CT 2766.)

### D. Conclusion: Appellant's Conspiracy Conviction Must Be Vacated.

In sum, although the prosecutor repeatedly insisted to the judge and argued to the jury that there was evidence that appellant and Rump agreed to PEN1 shot caller orders to kill Miller, there was no solid credible evidence of that conspiracy.

This Court should vacate appellant's conspiracy conviction. The Fifth Amendment protection against double jeopardy prevents another attempt to convict him of the same offense. (*Burks v. United States* (1978) 437 U.S. 1, 11; *People v. Homick* (2013) 55 Cal.4th 816, 845.)

## X. THE PROSECUTOR'S REPEATED IMPROPER ARGUMENTS TO THE JURY VIOLATED APPELLANT'S FEDERAL DUE PROCESS AND FAIR TRIAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

### A. Introduction to Argument

Prosecutors have a special obligation to promote justice: their duty "is not merely that of an advocate," nor is it "to obtain convictions;" rather it is "to fully and fairly present the evidence." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378; *United States v. Kajayan* (9th Cir. 1993) 8 F.3d 1315, 1323 [prosecutor's job is not just to win but to win fairly by "staying well within the rules"].) A prosecutor's intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the trial with unfairness. The result is a denial of the federal constitutional guarantee of due process. (*Donnelly v. DeChristoforo* (1974)

416 U.S. 637, 642-43; *People v. Hill*, 17 Cal.4th at 818; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

The prosecutor violated this obligation and appellant's federal due process rights by making improper and unsupported arguments to the jury. The claims below are not isolated instances of improper argument – rather the prosecutor engaged in a course of misconduct or error that permeated his argument and prejudiced appellant's defense. The prosecutor's strategy can be described as a number of one-two punches: attacking defense counsel's integrity and arguing that the defense presentation was "unfair" on the one hand, and on the other hand, by contrasting that the defense and defense counsel with his own personal values and emotions in a form of vouching, as set out below.

### B. The Prosecutor's Improper Arguments to the Jury Constituted a Course of Conduct that Deprived Appellant of a Fair Trial.[105]

#### 1. The prosecutor improperly attacked defense counsels' integrity by telling the jurors that that the defense presentation was "not fair" and "not right" and that the defense was trying to fool the jurors.

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105 The prosecutor repeated many of these same kinds of improper arguments at penalty phase. (See Arg. V, pages 183-206, above.)

The prosecutor's argument to the jury was riddled with claims that the defense presentation was "unfair" and "not right," that it "had no place in the courtroom," and that defense counsel were trying to fool the jurors and keep them from doing their jobs. These kinds of arguments, detailed below, are improper because they are not based on the facts, i.e., they are not reasonable inferences from the evidence. Moreover, the arguments attacked defense counsel's integrity.

Dr. Smith testified as the defense expert as to the effects of methamphetamine use and addiction, of which there was ample evidence at trial. After review of the videotape of appellant's and Rump's jailhouse conversation shortly after their arrest, Dr. Smith testified that although appellant appeared less impaired than Rump, appellant was nonetheless still under the influence of meth in an agitation/anger/rage state, and both had the red bumps of chronic meth users.[106] (18RT 3473-77.)

In closing argument the prosecutor told the jury that he was "hard on Dr. Smith [in his cross-examination] because what [Dr. Smith] was

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106 On a scale of 1 to 10, Rump was an 8 and appellant a 6. (18RT 3480.)

trying to do *is not fair and not right*; it doesn't make them less guilty." (21RT 4257; emphasis provided.) Later in the argument he described Dr. Smith's testimony as "absolute trash" that had "no place in a courtroom in a case like this." (23RT 4624.)

The prosecutor repeatedly told the jury not to let the defendants "fool" them. (See e.g., 21RT 4329 ["if you buy into their baloney story"]; 21 RT 4570 & 4572 ["Don't let these two defendants fool you."].) Appellant does not claim that such argument is improper. However, the prosecutor's argument *was* improper when he insinuated that defense counsel were complicit in an attempt to fool the jury.

> ""I want you to think about this. Think about this for a second. Think about what *the defense want you to buy*." (21RT 4280; emphasis supplied.)
>
> "Don't let these two defendants fool you . . . . [Defense counsel stood in front of you in opening statement and said, I'm gonna prove to you beyond a reasonable doubt that the gun was not jammed.' And I remember thinking, 'Man, you're gonna buy me a big drink because this gun was jammed.'" (23RT 4570.)
>
> "[Defense counsel were using red herrings, which is] stuff that have [sic]nothing to do with why we're here that *they're trying to use to get your focus away from your job*." (23RT 4609; emphasis supplied.)
>
> "Now, you remember I told you about the Rule of One? I'll tell you what the Rule of One is. [] You're going to go, 'Are they really [] Do

> they really believe that we are going to buy that [] that 12 of us are going to buy this story?' They don 't want 12. You know what they want? One [indicating] because *if they can fool one juror into taking his or her focus away from the facts and the law*, they win. *That's not fair* because if you follow the law reasonably, objectively and fairly, the only conclusion is that they're guilty beyond any reasonable doubt." (23RT 4645; emphasis supplied.)[107]
>
> Referring to co-counsel's argument that the gang expert "refused to answer questions just like Mason and just like Billy Joe Johnson . . . You know what I think he's referring to is when Clay Epperson said, 'The hypo you're giving me is absurd, I can't answer your question because the hypo you're giving me is absurd.' And he calls that refused to answer question." The prosecutor said "*Doesn't it kind of turn your stomach – it turned mine* – when [co-counsel] said [that]?" (23RT 4617; emphasis supplied.)

As to the latter remark, appellant refers this Court to the proper and reasonable argument made by counsel for the co-defendant, i.e., that the jurors should assess the testimony of an expert witness "just like any other witness," and that the only witnesses who "refused to answer

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[107] Appellant acknowledges that the prosecutor told the jury that defense counsel were good lawyers and "I hope you don't get the impression that I was trying to convey that the source of the fabrication were the defense attorneys. Absolutely not. . . . It's the defendants and their gang." (23RT 4597.) *Parker v. Matthews* (2012) __ U.S. ___ [132 S.Ct. 2148] rejected a due process claim where the prosecutor made an argument that could have been viewed as suggesting that the defendant had colluded with his lawyer because immediately afterward the prosecutor expressly disavowed any suggestion of collusion. Here by contrast, the prosecutor *repeatedly* argued to the jury that defense counsel's actions and words were unfair, not right, and offensive.

questions" were the jailhouse informant Mason, Billy Joe Johnson, and Lt. Epperson, who "got kind of defensive, wouldn't answer the question, and he had no opinion."[108] (See 23RT 4538-39.)

Defense counsel's hypothetical was based on the facts, and his argument was eminently proper and entirely correct in stating that the credibility of all witnesses was to be judged by the same standard. On the other hand, the prosecutor's insistence that the argument was nausea-inducing to him personally, and his suggestion that the jurors should have the same reaction, and his implication that the defense question (based on the facts) was "absurd," as Epperson claimed it to be, was altogether improper.

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[108] Counsel was referring to Lt. Epperson's response to a hypothetical question based on the facts of this case, i.e., that the police officers did not identify themselves as police during their pursuit, until after a shot was discharged. Epperson testified: "It's such an absurd set of hypothetical facts that [] I can't give a valid answer, in other words, it's just absurd. I can't give a valid answer." The court struck that answer and when the question was reposed, Epperson again claimed that he didn't "know how to respond in any way that would present any kind of accurate answer." His answer was stricken. (16RT 3223-24.) The expert witness's refusal to answer, and his description of the hypothetical question as "absurd" even though it was based on the facts of the case, was a proper matter for argument by defense counsel.

Not only did the prosecutor's comments tend to mischaracterize the cross-examination as improper, his claim to have personally found the defense argument physically sickening implied that defense counsel was not only wrong but possibly unethical in daring to compare an officer's testimony to that of gang members, even those called by the prosecution.[109]

In sum, the prosecutor repeatedly emphasized that defense counsel were trying to "sell" the jury false facts and arguments, that they were

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[109] In addition to the instances of misconduct set out above, the prosecutor argued to the jury that the defendants were "not on trial because they are white supremacists, who could serve "as a billboard for Hitler," and who are "filled with hate," or because "they glorify a symbol that stands for unimaginable atrocity, that swastika symbol. That's not why they're here . . . It's despicable, absolutely despicable, but that's not why they're here. [] They're here because they killed this human being . . . and they tried to kill a police officer." . . . and they killed Miller and tried to kill a police officer." (21RT 4288.) The rhetoric device is "paralipsis," making a statement that is then denied, for the purpose of emphasizing the statement. If the prosecutor had limited his evidence to only that evidence relevant to the homicide and attempted homicide, appellant might have been fairly tried. However, the prosecutor went to great lengths to introduce every tattoo and Nazi reference or symbol related to the defendants and other gang members, including the burning crosses and racist remarks and symbols depicted in the Fox video. The subsequent emphasis on this evidence, despite the disclaimer, certainly influenced the jurors to reach a verdict based on the passion rather than the relevant evidence.

trying to fool the jurors or at least one juror (so they could "win"), that counsel was trying to take the jurors' focus away from the facts and the law, *that the defense was presenting "garbage" testimony that was unfair and had no place in the courtroom*, and that counsel made arguments that were so unfair and not right that they actually made the prosecutor personally sick to his stomach.

Although the prosecutor is entitled to make fair comments on the evidence presented, *People v. Jones* (1997) 15 Cal.4th 119, 186, and can properly point out that lawyers are schooled in the art of persuasion, *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, it has long been held that personal attacks on the integrity of defense counsel are improper. (*People v. Hill* (1998) 17 Cal.4th 800, 832; *Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097, 1106 [improper to imply defense counsel had fabricated evidence]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075 [improper and prejudicial for the prosecutor to state that the defense attorney did not want the jury to hear the truth and had to help his witnesses plan a defense].)

The prosecutor's arguments -- that defense counsel conducted the defense in a way that was unfair, wrong, legally inappropriate, and an attempt to fool the jurors and keep them from carrying out their oaths and their duties --- are tantamount to an attack on defense counsels' integrity.

The prosecutor not only told the jurors that the defense presentation and argument was unfair, nausea-inducing and an attempt to trick them, he also contrasted the allegedly improper approach of defense counsel with his own approach: He told the jury he "need[ed] to do this job" (as opposed to defense counsel who were conducting their job in an unfair manner and were trying to keep the jurors from doing their jobs) and had "to be able to sleep at night." (21RT 4270.) In addition, as discussed immediately below, he repeatedly vouched for the strength of the prosecution's case based on his own personal experience and feelings.

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### 2. The prosecutor improperly vouched for the strength of his evidence by arguing to the jury that based on his own personal experience the case against appellant was unusually strong and "not even close."

The prosecutor bragged to the jury about his experience: "I've been doing this a lot and Billy Joe Johnson is not the first murderer I crossed." The prosecutor then relied on his long experience to tell the jury that the prosecution's case against appellant was even stronger and better after the defense witnesses testified, which was a "rare" occurrence: "It's rare when the prosecutor's case gets better after the defense witnesses testify but that's what happened here." (23RT 4593.)

The prosecutor regaled the jury with his personal impression: "I was going, 'This is great.' With the defense it got better and better . . . not that I'm a good lawyer. No. It's the truth." (23RT 4593.) The prosecutor repeated his refrain that the case was "not even close" many, many times. "Do you want me to jump right now and tell you this is not even close?" (23RT 4570; see also 21RT 4225, 4272, 4281, 4309, 4321, 23RT 4594, 4596, 4598, 4599, 4630, 4632.)[110]

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[110] The prosecutor repeatedly injected his personal opinion about the evidence into the argument, telling the jury that "it gets better and better" (23RT

These assertions were improper on two counts: they amounted to a form of vouching for his own witnesses, and they were rife with his personal impressions. Prosecutorial vouching for a witness is improper because the conduct "make[s] the prosecutor his own witness – offering unsworn testimony not subject to cross-examination." (*People v. Hill*, 17 Cal.4th at 828.) The law is clear in holding that "a prosecutor has no business telling the jury his individual impressions of the evidence," because that may mislead the jury into thinking his conclusions have been validated by the government's investigatory apparatus. (*United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053; *In re Brian J.* (2007) 150 Cal.App.4th 97, 123 [misconduct for prosecutor to inject his personal view into the argument].)

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4251, 4279, 4280, 4281, 4285, 4571, 4581, 4590, 4630, 4631, 4644) and saying "I love this one" (RT 4614, 4627, 4591) and "Give me a break" (23RT 4625) and "you gotta be kidding me." (23RT 4588.)

### 3. Conclusion.

In sum, the prosecutor repeatedly violated his obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

## C. The Continuous Course of Improper Prosecutorial Argument Requires Reversal of Appellant's Convictions.

The many instances of prosecutorial error/misconduct in argument violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights. The prosecutor's unsworn statements deprived appellant of his Sixth Amendment confrontation rights. (*People v. Hill*, 17 Cal.4th at 828.) The prosecutor's pattern of misconduct in argument infected the trial with unfairness thus violating federal due process guarantees. (*Donnelly v. DeChristoforo*, 416 U.S. at 642-43.)

Review for prejudice is thus under the *Chapman v. California* (1967) 386 U.S. 18, 24 standard for federal constitutional error, i.e., reversal is required unless the prosecution can prove the error harmless beyond a reasonable doubt.

The many and varied improper arguments addressed above denied appellant of a fair trial and thus require reversal of his convictions. The improper comments were interspersed throughout the prosecutor's argument and cannot be described as "isolated incidents" or "brief," factors often used to excuse improper prosecutorial argument. (See e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 957.)

Where improper comments are repeated throughout the argument, and where the comments involve not only giving personal impressions, vouching, and attacks on defense counsel's integrity, as here, it is highly likely that the argument affected the outcome of the case and reversal is required. *People v. Hill*, 17 Cal.4th at 847 observed that the "sheer number of the instances of prosecutorial misconduct," considered together, "created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors."

The same is true here. *People v. Vance* (2010) 188 Cal.App.4th 1182, 1206-07 also reversed because the numerous improper prosecutorial arguments shifted the jury's attention away from the

evidence. In another Orange County case, the Court of Appeal found reversible error depriving the defendant of a fair trial where the prosecutor's improper remarks were repeated and insistent, stating that "in terms of frequency, intensity and purpose, the prosecutor's comments were anything but benign." (*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1290.) *Guzman* pointed out that the prosecutor's "relentless insistence" on a point "could only have served to convince [the jurors] this was an important point."

In short, the prosecutor's many improper comments prejudiced appellant in both the attempted murder and the capital murder counts because they focused the jury not on the evidence and the burden of proof, but on the prosecutor's personal opinion of the strength of his case, his experience, and on the supposed fast one the defense was trying to pull by using unfair and wrong tactics. (See *United States v. Rodrigues* (1998 U.S.App. LEXIS 36919) as amended at (9th Cir. 1999) 170 F.3d 881 [prosecutorial misconduct, including misstatements of what the government had to prove and disparaging statements to jury about defense counsel, required reversal of convictions].) The prosecutor's

tactics were effective but they deprived appellant of a fair trial, requiring reversal of his convictions.

Assuming arguendo that this Court considers the error harmless, the Court should consider the cumulative prejudicial impact of the other trial errors, including the erroneous admission of the inflammatory Fox video, the trial court's refusal to sever the counts (as to all counts), and the erroneous admission of Rump's statement (as to the attempted murder count). In *People v. Morales* (2001) 25 Cal.4th 34, this Court recognized, the proposition that "in cases suffering from insufficient evidence, deficient instructions or other errors made in presenting evidence or giving instructions, ill-advised remarks by the prosecutor may compound the trial's defects. (*Id.* at 48, quoting *People v. Green* (1980) 27 Cal.3d 1, 70.) This is precisely the case here. In addition to insufficient evidence of conspiracy to murder (Arg. IX, above, pages 233 to 244), the prosecutor's improper remarks prejudiced the jury and significantly increased the risk of a verdict based on emotional reactions rather than the evidence.

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It is settled law that "a series of trial error, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Hill*, 17 Cal.4th at,844; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial]; *United States v. Frederick*, 78 F.3d at1381 [reversing for cumulative prejudicial impact of various errors].)

## XI. THE TRIAL COURT'S REFUSAL TO SEVER THE ATTEMPTED MURDER CHARGE FROM THE CAPITAL MURDER CHARGE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

### A. Introduction to Argument.

Appellant moved to sever the attempted murder of Sergeant Helmick and felon-in- possession-of-a-firearm counts (March 11, 2002) that had been consolidated with the capital murder and conspiracy counts (March 8, 2002) as violative of his constitutional rights to due process and a fair trial. (5CT 1003-1015.) The trial court declared both sets of offenses inflammatory, but found "significant cross-admissibility of evidence," so

that the inflammatory nature of the offenses did not "overcome the preference for consolidation" or joinder. (2RT 212.)

Misjoinder of counts violates federal due process where the joinder makes the trial fundamentally unfair. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084-85 (joinder of strong and weak murder charges made trial fundamentally unfair); *Panzavecchia v. Wainwright* (5th Cir. Unit B 1981) 658 F.2d 337, 340-42 [reversing where evidence not cross-admissible prejudiced the defendant and denied him his right to a fair trial].)

As set out in detail below, the trial court's refusal to sever the March 11 offenses from the capital murder charge rendered appellant's trial fundamentally unfair in violation of his federal due process rights.

**B. The Trial Court Should Order Severance of Otherwise Joinable Offenses When Severance Is Necessary To Ensure the Defendant's Constitutional Rights To Due Process and a Fair Trial.**

Although Penal Code section 954 authorizes joinder of two or more offenses of the same class in a single prosecution, joinder is subject to the trial court's authority to order separate trials, an authority that should be exercised when necessary to ensure the defendant's fundamental constitutional rights to due process and a fair trial. (*Williams v. Superior*

*Court* (1984) 36 Cal.3d 441, 448; *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.)

Because assaultive crimes against the person, such as the capital murder and the assault/attempted murder of Sergeant Helmick, are of the same class,[111] joinder is authorized *unless* —as is the case here -- the joint prosecution endangered appellant's rights to due process and a fair trial. (*People v. Bean* (1988) 46 Cal.3d 919, 935 [court should order severance of otherwise joinable offenses when separate trials are necessary to guarantee due process and a fair trial].)

### C. Application of the Guidelines Used in Assessing The Need for Severance Demonstrates that the Joinder of the March 11 with the March 8 Offenses Violated Appellant's Due Process Rights.

Four factors are used as guidelines in assessing whether offenses can be joined or should be severed: (1) whether evidence of the jointly-tried crimes would not be not cross-admissible in separate trials, since cross-admissibility could dispel any prejudice; (2) whether certain of the charges are unusually likely to inflame the jury against the defendant; (3)

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111 See *People v. Alvarez* (1996) 14 Cal.4th 155, 188.

whether a weak case has been joined with a strong case, or with another weak case, so that the spillover effect of the evidence on one count might alter the outcome of another; and (4) whether any one of the charges is a capital prosecution. (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-73.) The final determination of the issue must be resolved by considering the particular facts of each individual case. (*People v. Hill* (1995) 34 Cal.App.4th 727, 735.)[112]

Application of the relevant factors in the context of the particular facts of this case shows clearly that the trial court should have ordered separate trials on the capital murder charge and the assault/attempted murder of a police officer charge.

**1. Evidence of the March 11 attempted murder and the capital murder was not cross-admissible.**

Evidence of the March 11 and March 8 offenses would not have been cross-admissible in separate trials as uncharged crimes under Evidence Code section 1101(b). Because evidence of uncharged offenses is "so prejudicial" it is admissible only if it has "substantial probative

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[112] The trial court's ruling denying severance is reviewed for abuse of discretion. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.)

value." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Evidence Code section 1101(b) permits the admission of evidence of an uncharged crime to prove identity, intent, or common plan.

To prove identity, the two offenses (or sets of offenses) must share such sufficiently distinctive common features as to support the inference that the same person committed both acts. (*Id.* at 402-03.) The only common feature of the murder and the attempted murder charges is the same gun. The manner of the offenses was radically different. Scott Miller was a gang member shot in the back of his head at close range in middle of night. Sergeant Helmick was involved in a car chase in the middle of the day, there was helicopter surveillance, and if a shot was fired from the gun, neither the projectile nor a strike mark was ever found in the extensive search. Furthermore, Helmick testified that he did not hear or see a bullet pass him. Thus, the evidence of one offense would not be admissible in a trial of the other to prove appellant's identity.

To prove common scheme or plan, there must be a similarity of results and "such a concurrence of common features" so as to show that the two acts are "caused by a general plan of which they are the individual

manifestations." (*Ibid.*) No such concurrence of common features can be detected so as to render part of a "general plan" the back alley murder of a gang member and the daylight gunshot in the presence of a massive police presence.

To prove intent, a lesser degree of similarity or common features is required, but there must be sufficiently similarity to support an inference that the defendant harbored the same intent in each instance. (*Id.* at 402.) The prosecutor stated that he would argue that appellant shot at the police *because* he and Rump had killed Miller. (2RT 211.) However, the prosecutor's *theory* of motive does not constitute an inference as to appellant's intent. There was no evidence that appellant and Rump were fleeing from the undercover unmarked police car and then fired a shot at a plain-clothes officer *because* of appellant's alleged involvement in Miller's murder.

In sum, because of the lack of similarities in the two offenses, the March 11 incident would not be relevant if the March 8 Miller murder charge had been tried alone; likewise, evidence of the Miller murder would not be relevant if the March 11 incident had been tried separately.

Moreover, where the connection between the uncharged offense (the March 11 shooting) and the ultimate fact in dispute is not clear, i.e., where it is unclear that appellant's motive in shooting at an undercover officer in mid-day was *because* he had killed Miller, the evidence should be excluded.

**2. The inflammatory nature of the police shooting.**

The trial court considered both cases "pretty inflammatory." (2RT 212.) In fact, the specter of an armed gang member shooting at an officer of the law is perhaps considered more nefarious than any act other than a crime against a child.[113]

Even though the evidence that appellant attempted to murder the officer was weak, especially as to the allegation of premeditation and deliberation, its inflammatory effect worked to appellant's disadvantage in the capital murder charge.

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[113] See e.g., <http://www.sfgate.com/bayarea/article/AK-47-cop-killer-gets-life-2600660.php> ["An emotional judge was near tears today as she sentenced [gang member] to life in prison without parole for the AK-47 murder of San Francisco [police officer] and the attempted murder of his partner.]

### 3. The spillover effect of the evidence of the police shooting likely influenced the jury on the outcome of the capital murder charge.

The prosecution's evidence on the Helmick shooting was much stronger than its evidence as to the capital murder, insofar as there was no question of identity in the Helmick shooting and the only jury question was intent. The capital murder charge presented the opposite scenario: identity was in question, whereas intent to kill was not. Joinder thus created a spillover effect in both. The jurors were likely to conclude that a defendant who would shoot at a police officer would also have shot and killed a gang member (identity) and that a gang member who would shoot a man in the back in an alley would also have shot at a police officer with intent to kill.

### 4. The March 8 offense was a capital charge.

The murder charge carried the death penalty where the attempted murder did not. The attempted murder of a police officer charge was extremely likely to inflame the jurors against appellant, as the trial court acknowledged.

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### 5. Conclusion.

In sum, the relevant factors used as guidelines in severance/joinder all indicate that the trial court should have granted severance in order to protect appellant's federal constitutional due process and fair trial rights.

## D. The Denial of Appellant's Severance Motion Prejudiced His Defense as to Both Sets of Offenses.[114]

As demonstrated above, the order denying severance prejudiced appellant and requires reversal of his guilt trial.[115] Even though the two sets of offenses were not cross-admissible, the jury heard evidence of both in a single trial, and each set of offenses had an adverse spillover effect on the other. The trial court should have granted severance in order to ensure appellant's federal constitutional rights to due process and a fair trial. Because appellant has demonstrated prejudice from the failure to

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[114] The defendant has the burden to demonstrate prejudice from an order denying severance. (*People v. Osband* (1996) 13 Cal.4th 622, 666.)

[115] Even if the ruling was correct when made, reversal is required if the joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Arias* (1996) 13 Cal.4th 92, 127.)

sever the counts, this Court must reverse. (*People v. Grant* (2003) 113 Cal.App.4th 579, 587, 593-94.)

**CLAIM RELATED TO THE ATTEMPTED MURDER OF A POLICE OFFICER**

## XII. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY ADMITTING INTO EVIDENCE AGAINST APPELLANT RUMP'S HEARSAY STATEMENT THAT HE THOUGHT THE DRIVER OF THE WHITE CAR WAS A PAROLE OFFICER

### A. Procedural History.

In a tape-recorded jailhouse conversation between appellant and Rump, Rump asked who was the dude in the white car that was trying to hit them. Appellant said he didn't know. Rump said he thought it might have been a parole agent. (Exh. 105A at 11CT 2723-2730; 10RT 1940 [played to the jury].) The prosecution sought to introduce Rump's statement against appellant. Appellant objected on the grounds of federal constitutional due process and confrontation, hearsay, relevancy, and prejudice.[116] (2RT 214; 2RT 334-44.)

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[116] The trial court ruled that "every hearsay, relevance or 352 objection is deemed to have been made under the Due Process Clause of the 14th Amendment, Confrontation Clause of the 6th and 14th Amendments." (2RT 214.)

The trial court rejected the defense hearsay objection, concluding that although it was "arguably hearsay, [] technically it's not" because it was not offered for the truth, and that the statement was relevant to show appellant's motive because it was "reasonable to assume" appellant had the same motive as Rump did. (20RT 3946.)

As set out in detail below, the ruling was doubly erroneous: (1) Rump's statement was indeed offered, and used, for the truth of the matter stated, and thus was hearsay and inadmissible against appellant; and (2) Rump's statement was not relevant to show appellant's state of mind. The use of the statement against appellant violated his confrontation and due process rights. (*Crawford v. Washington* (2004) 541 U.S. 36; *Estelle v. McGuire* (1991) 502 U.S. 62.) Because Rump was a co-defendant and unavailable as a witness, the admission of the statement also violated *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518, 529.

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## B. The Admission of Rump's Statement Against Appellant Violated Appellant's Confrontation Clause Rights Under The Sixth Amendment Because It Was a Testimonial Statement Used for Its Truth and Rump Was Unavailable For Cross-Examination.

### 1. Rump's Out-of-Court Statement Was Used Against Appellant for Its Truth.

California prohibits the use of hearsay statements used for their truth, unless they qualify under a statutory exception. (Evid. Code, section 1200.) The prosecutor argued that Rump's statement qualified as a hearsay exception under Evidence Code section 1230 as a declaration against penal interest. The court agreed that as to Rump it was a declaration against penal interest because a parole officer is a peace officer; the statement was thus admissible (*for its truth*) as to Rump to show his knowledge on the attempted murder of a police officer (count seven). (2RT 334-44.)[117]

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[117] Appellant contends the statement was used for its truth and was not a declaration against penal interest. However, even a statement that might arguably be against one's penal interest does not qualify under Evidence Code section 1230 where the statement was made in an attempt to justify one's actions because such an attempt undermines its trustworthiness. (*People v. Butler* (2009) 46 Cal.4th 847, 865-67.) Moreover, constitutional requirements demand that section 1230 applies only to statements that are "specifically disserving to the interest of the declarant." (*People v. Duarte* (2000) 24 Cal.4th 603, 612-18 [reversible error to admit statements that were not specifically

However, the court ruled that Rump's statement was "not to be used against Mr. Lamb for any purpose" and that the jury would be so advised. The trial court was definitive: Rump's statement was not admissible as an adoptive admission because "the statement itself is an indication of Mr. Rump's belief, *not Mr. Lamb's*," and there was *no "indication that [appellant] personally share[d] Mr. Rump's belief.*" (2RT 416; emphasis supplied.) The trial court made the specific point that appellant's own statements in the conversation with Rump supported this conclusion: "[I]n fact, as shown on page two of the transcript, when asked by Mr. Rump [who was in the white car]," appellant responded that he did not know (2RT 416-17.) If Rump had communicated his belief to appellant at the time they were in the car, there would have been no reason for him to later tell appellant what he had previously been thinking.

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disserving of the declarant's penal interests where the statements tended to sympathetically describe the declarant's participation in a shooting in a sympathetic manner, and to minimize his responsibility for the injuries]; see also *People v. Greenberger* (1997) 58 Cal.App.4th 298, 328, 329 [a statement comes under the hearsay exception in Evidence Code section 1230, only if it genuinely and specifically inculpatory of the declarant].)

However, the prosecutor later insisted that if Rump (truly) thought the white car was driven by a parole officer, then he must have communicated that thought to appellant, and appellant must have shared the belief that a parole officer was in the white car. Presto! According to the prosecutor the statement was therefore circumstantial evidence of appellant's knowledge. (20RT 3943.) According to the prosecutor, whenever there are co-defendants, "the state of mind of one is relevant as to the state of mind of the other."[118] (2RT 417-18, 20RT 3945-46.)

This argument apparently persuaded the trial court to change tack. After the prosecutor's insistence that the statement be admitted against appellant, the trial court decided that "under the circumstances" there was a reason to think appellant shared Rump's belief: "It seems clear that

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[118] The prosecutor initially relied on *People v. Greenberger*, 58 Cal.App.4th 298 for this theory. The trial court correctly noted that the prosecutor was reading the case too broadly. (See 2RT 214, 334-44; 20RT 3942 3952.) *Greenberger* neither holds nor suggests that an inference of shared intent can be based on the mere fact of being charged as codefendants. *Greenberger* does hold that "a declaration against interest may be admitted in a joint trial so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness." (*Id.* at 333.) Appellant maintains that Rump's statement is *not* a declaration against interest. (See above, fn. 117 at pages 271-272.)

if Mr. Rump's motive was to avoid detection by law enforcement, it's reasonable to assume under the circumstances of this case that Mr. Lamb had the same motive."[119] (20RT 3948.)

But it is *not* reasonable to make that assumption. The trial court itself had earlier declared in a definitive and detailed analysis that the statement was "an indication of Mr. Rump's belief, *not Mr. Lamb's*," and there was *no "indication that [appellant] personally share[d] Mr. Rump's belief.*" (2RT 416; emphasis supplied.) The trial court made the specific point that appellant's own statements in the conversation with Rump supported this conclusion: "[I]n fact, as shown on page two of the transcript, when asked by Mr. Rump [who was in the white car]," appellant responded that he did not know (2RT 416-17.)

In short, the fact that Rump said *after the fact* that "he thought" the car was driven by a parole agent does not support an inference that Rump

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119 The trial court's statement here emphasizes the use of Rump's statement *for its truth*, i.e., that he thought his pursuers were parole agents, a thought that supposedly gave him the motive to avoid detection by law enforcement – even though the court held that the statement was not hearsay as to appellant because it was not being used for its truth.

communicated this thought to appellant in the car; furthermore, the fact that appellant later told Rump that he didn't know who was in the car refutes the inference that appellant "shared" Rump's belief.

When appellant objected on hearsay grounds to the admission of Rump's statement against him, the trial court rejected the argument, stating that Rump's statement was "not offered for the truth," that is, it wasn't offered for the truth of the statement that the person in the white car was a parole officer. (20RT 3946.) The trial court's eleventh hour analysis is incorrect because, as it had initially decided, the statement does not state that the occupant of the white car was a parole officer. Rather, the statement sets out *Rump's belief* and it was offered and used for the truth of that matter. Nonetheless, it should not have been admissible against appellant to show that he shared that belief. If the statement was not offered for the truth of Rump's belief, then for what purpose was it offered, and what relevance did it have to appellant?

The shared motive theory on which the trial court based its ruling, addressed immediately below, presumes that Rump's belief was offered

for its truth. If not, it would not be evidence of a motive, and could not be evidence of appellant's shared motive.[120]

### 2. The "shared motive" theory relied on by the trial court does not apply to the facts of this case.

In the revision of its ruling, the trial court relied on a theory of "shared or derivative motive" as set out in *People v. Hole* (1983) 139 Cal.App.3d 431, 436-37. *Hole* upheld the admission of evidence of an uncharged conspirator's (Goodrich) motive to commit arson as proof of the defendants' motive, where there was evidence in support the reasonable inference that Goodrich had recruited the defendants to torch the building: "Thus Goodrich's motive was derivatively appellants' motive." (*Ibid.*)

Appellant contends that *Hole* does not apply to the facts here. In the first place, the case is of questionable authority: it has never been cited for the proposition relied on; and the decision itself acknowledges that it found no other cases directly on point. (*Id.* at 436.)

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[120] I.e., there was no valid nonhearsay purpose for admitting Rump's statement against appellant. (Compare *Tennessee v. Street* (1985) 471 U.S. 409.)

Secondly, in *Hole*, Goodrich's motive to burn down the market was abundantly clear: he was the owner' the market was subject to a large mortgage; he had taken $800 in cash out of the safe on the morning before the fire; the firefighters found the market door locked; within minutes of the alarm, the police found the defendants near the burning market in Goodrich's car (along with matches, a gas can, a pistol and the keys to the market doors and burglar alarm); and one defendant was Goodrich's nephew and the other his employee. Thus, as the *Hole* court stated, Goodrich's motive was clear and the evidence linking the defendants to that motive was "substantial."

*Hole* is in stark contrast to the case at bar. Rump's motive in running from the pursuing undercover unmarked car was hardly clear, and the principal evidence that linked appellant to Rump's motive was Rump's statement itself. In short, the admission of Rump's statement against appellant as proof of appellant's motive was predicated not on facts, but on an assumption that the two communicated their thoughts. Indeed, the facts, as trial court had initially concluded in emphatic form, contradicted that assumption. (See 2RT 416 [trial court's initial ruling the statement

indicated Rump's belief, not appellant's," and there was *no "indication that [appellant] personally share[d] Mr. Rump's belief.*"].)[121]

Moreover, in *Hole*, the motive of uncharged co-conspirator Goodrich was actually a circumstance of the crime, and explained why Hole was driving Goodrich's car nearby and shortly after the fire with a pistol, gas can and keys to the store. Furthermore, none of the evidence of Goodrich's motive was testimonial in nature, and he was avaialbe to testify, so there was no confrontation clause issue as there is in the present case.

### 3. The admission of Rump's statement violated *Aranda/Bruton*.

*Bruton v. United States*, 391 U.S. 123 and *People v. Aranda*, 63 Cal.2d at 529 held that the federal and state guarantees under the Confrontation and Due Process Clauses prohibit the introduction into evidence in a joint trial the admissions of a co-defendant, where those

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[121] The court later instructed the jury that each defendant's statements was admissible only against the declarant *except* for Rump's statement to appellant in the taped jailhouse conversation, "I thought the guys in the white car might be a parole agents." (7CT 1525-26; 1718.)

statements incriminate the defendant. Because the co-defendant is unavailable to testify, the defendant is unable to cross-examine the declarant.

Rump's statement was expressly admitted as tending to show that appellant shared Rump's stated beliefs; therefore the statement incriminated appellant. (See *People v. Archer* (2000) 82 Cal.App.4th 1380, 1388 [even a redacted admission violates the defendant's confrontation rights where the statement unmistakably implicates him.) In this case, the implication was explicit: The trial court instructed the jurors that they could use Rump's statement against appellant. (7CT 1525-26; 1718.)

**4. Rump's Statement Was Testimonial in Nature Because the Police Tape-Recorded Rump and Appellant For Purposes of Investigating Crime: Its Admission Against Appellant Violated His Confrontation Rights Under *Crawford*.**

The trial court ruled that because Rump's statement was a declaration against penal interest, and not testimonial, it was admissible under *Crawford.* (20RT 3947.) Appellant has shown above Rump's statement was *not* a declaration against interest, and it was admitted for its truth against appellant. Because the police obtained the statement for

purposes of criminal investigation, its admission violated appellant's Sixth Amendment right to confrontation.

In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court held that the Sixth Amendment prohibited the admission of out-of court testimonial statements offered for their truth, unless the declarant testified at trial or the defendant had had a prior opportunity for cross-examination. A statement to the police is deemed testimonial in nature where the primary purpose in eliciting the statement is to investigate the crime. (*Davis v. Washington* (2006) 547 U.S. 813, 822.)

Appellant contends that the police tape-recording of Rump and appellant was made for purposes of investigating a crime, and is thus testimonial, and its admission against appellant violated his Sixth Amendment right to confront the witnesses against him. (See *People v. Livingston* (2012) 53 Cal.4th 1145-1158-59 [police videotaped interview conducted to investigate the crime was "testimonial" and thus its admission violated the defendant's Confrontation Clause rights under *Crawford*].)

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### 5. The Admission of Rump's Statement Also Violated Appellant's Federal Due Process Rights Because It Was Irrelevant To Appellant's State of Mind and Thus Deprived Appellant of a Fair Trial on The Attempted Murder Charge.

Even assuming *arguendo* no hearsay or confrontation violation, the admission of Rump's statement violated appellant's federal due process and fair trial rights. As shown above, Rump's statement of his belief was not a statement of appellant's belief: the trial court itself originally made that finding: there was no indication that appellant shared Rump's belief, and there was evidence that he did not. (See Part B, section 1, above, pages 272, 274.)

Evidence that does not support any permissible inference relevant to the charges against appellant, and that tends to prejudice the defendant, amounts to a violation of federal due process by depriving the defendant of a fair trial. (See e.g., *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [character evidence of propensity--defendant's possession of and fascination with knives-- did not support any permissible inference relevant to defendant's prosecution for the stabbing-murder of his mother, and violated due process]; *Walters v. Maass* (9th Cir. 1995) 45

F.3d 1355, 1357 [state court evidentiary rulings can violate federal law "either by infringing upon a specific federal constitutional [] provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process"]; *Estelle v. McGuire*, 502 U.S. at 70-75 [admission of evidence rendering the trial fundamentally unfair may violated federal due process].)

As set out above, Rump's state of mind was irrelevant, yet highly prejudicial to appellant, and thus deprived appellant of a fair trial and his due process rights on the attempted murder charge.

**C. The Erroneous Admission of Rump's Statement Prejudiced Appellant's Defense to the Premeditated Attempted Murder Charge.**

Because the error is of federal constitutional dimension, prejudice must be assessed under the standard of *Chapman v. California*, 386 U.S. at 24 standard, which requires reversal unless the prosecution can prove the error harmless beyond a reasonable doubt. The prosecution cannot meet this standard for the following reasons.

First, the critical factual issue in the prosecution for attempted murder of a peace officer was whether appellant *knew* that his pursuers

were officers of the law. A robust defense was mounted against this charge, including evidence that (1) the police car and the officers themselves were undercover; (2) they had not identified themselves as officers until after the gun was fired; (3) the other eyewitness on the ground, gardener Ghassan Alaghbar, who saw the officers at close range, thought they were friends of appellant and Rump, not police officers; (4) appellant had poor eyesight; and (5) there was conflicting evidence as to whether the gun had jammed.

Secondly, the case against appellant as to his knowledge and motive was not overwhelming. (Compare: *People v. Mil* (2012) 53 Cal.4th 400, 410 [constitutional error held harmless because the evidence against the defendant was overwhelming].) The police officers wore plain clothes and tried to fit in to the neighborhood. During the pursuit, they acted more like gang members or criminals than police officers: they did not use a siren or lights, and they tried to block Rump and appellant and drive them off the road.

Thirdly, the use of Rump's belief that the car was driven by a peace officer leaped over these "reasonable doubt" hurdles by using Rump's

state of mind as a template of *appellant's state of mind.* The weaknesses in the prosecution's case that appellant knew and intended to shoot to kill a peace officer were all diminished and/or swept away by the erroneous admission of evidence of Rump's belief as a stand-in for appellant's state of mind. For this reason alone, the errors should be deemed prejudicial. (See e.g. *People v. Lindsey* (1988) 205 Cal.App.3d 112, 117 and *People v. Vargas* (1973) 9 Cal.3d 470, 481 [both holding that error striking directly at the heart of the defense is reversible error].)

Fourth, although the Attorney General will argue that the evidentiary error should be deemed harmless, this argument should be rejected on the further ground that the prosecutor obviously considered the evidence critical to his case, repeatedly insisting on its admission even after the trial court had ruled Rump's statement inadmissible against appellant for any reason. (*Yohn v. Love* (3d Cir. 1996) 76 F.3d 508, 523, fn. 28 [rejecting state's harmless error argument because it downplayed the importance of the evidence prosecutor fought so hard to be admitted at trial].)

Finally, even assuming arguendo that this Court considers the error harmless standing alone, the Court should consider the cumulative prejudicial impact of the other trial errors, including the erroneous admission of the inflammatory Fox video, the trial court's refusal to sever the counts, and the prosecutorial errors in argument, as argued above in Arguments X and XII. (*People v. Hill*, 17 Cal.4th at 844; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].) For example, in closing argument the prosecutor argued that Rump's statement showed that he was "floating" ideas and red herrings, as part of the prosecution's improper jury arguments that the defense was trying to fool the jurors by using "red herrings." (20RT 4609, 4616; see Arg. X, Part B, pages 246-255.)

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

In *People v. Schmeck* (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at 304.) Appellant has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed

since then,[122] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

1. Factor (a): Section 190.3, subdivision (a), permitting a jury to sentence a defendant to death based on the "circumstances of the crime," is applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment.

The jury in this case was instructed in accord with this provision. (10CT 2430.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating

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122 See e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 143-44, and *People v. McWhorter* (2009) 47 Cal.4th 318, 377-379.

circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[123] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at. 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Mills*, 48 Cal.4th at 213-14; *People v. McWhorter*, 47 Cal.4th at 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, 37 Cal.4th at 304-05.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

2. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts that involved the express or implied use of violence. (10CT 2430.) The jury was instructed that it had to agree unanimously as to factor (c) evidence of appellant's prior convictions

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[123] See *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, *Cunningham v. California* (2007) 549 U.S. 270.

(10CT 2437) but the jurors were not instructed that they could not rely on factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 and its progeny,[124] the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at 609.)

In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th 259-61; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing jurors who know the defendant has already

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124 See cases cited above in previous footnote.

been convicted of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decision maker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

3. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (10CT 2432.) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., *People v. Mills*, 48 Cal.4th at 213; *People v. Ray* (1996) 13 Cal.4th 313, 358.) These decisions should be

reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

4. Inapplicable, vague, limited and burdenless factors: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALCRIM instruction 763. (10CT 2431-34.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation. These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Taylor*, 48 Cal.4th at 661-63; *People v. D'Arcy*, 48 Cal.4th at 308.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned

provisions of the federal Constitution.

5. Failure to narrow: California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

6. Burden of proof and persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these decisions had to be made beyond a reasonable doubt, an omission that violated *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor

was the jury given any burden of proof or persuasion. These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Taylor*, 48 Cal.4th at 259-61; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213;.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

7. Written findings: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these

arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Thompson*, 49 Cal.4th at 143-44; *People v. Taylor*, 48 Cal.4th at 661-63.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

8. Mandatory life sentence: The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. McWhorter*, 47 Cal.4th at 379; *People v. Carrington* (2009) 47 Cal.4th 145,199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

9. Vague standard for decision-making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so

substantial" in comparison to the mitigating circumstances that death is warranted (10CT 2488) creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Carrington*, 47 Cal.4th at 199; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Mendoza*, 24 Cal.4th at 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

12. Intercase proportionality review: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th 259-61; *People v. Thompson*, 49 Cal.4th at 143-44;

*People v. Taylor*, 48 Cal.4th at 661-63.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

13. Disparate sentence review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of he fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Mills*, 48 Cal.4th at 214.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

14. International law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including

the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Taylor*, 48 Cal.4th at 661-63; *People v. D'Arcy*, 48 Cal.4th at 308.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of federal law and the Constitution.

15. Cruel and unusual punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, 49 Cal.4th at 143-44; *People v. Taylor*, 48 Cal.4th at 661-63.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

16. Cumulative deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of

California's capital sentencing scheme. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6; see also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. To the extent respondent hereafter contends that any of these issues is not properly preserved, on the grounds that, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

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## XIV. THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE

The death-qualification procedure used in California to select juries in capital cases is unconstitutional. The death-qualification process produces juries which are both more likely to convict and more likely to vote for death and also disproportionately remove women, members of racial minorities and religious people from juries, in violation of the rights of a capital defendant to equal protection and due process as well as the right to a reliable death penalty adjudication, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I of the California Constitution, sections 7,15,16 and 17.

As the United States Supreme Court has explained: "A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6 [internal citations

and quotations omitted).) This Court has held that the only question that a trial court needs to resolve during the death-qualification process is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Mattson* (1990) 50 Cal. 3d 826, 845.)

### A. Current Empirical Studies Prove That the Death Qualification Process is Unconstitutional.

In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, and *People v. Fields* (1983) 35 Cal.3d 329, this Court examined the vast body of research concerning problems caused by the California death-qualification procedure, but found not violation of the Sixth Amendment right to an impartial guilt phase jury. (See also *Lockhart v. McCree* (1986) 476 U.S. 162, 165, 167 [accord].) However, the concerns about statistical evidence stated in *Hovey* and *Fields* have since been resolved, and new evidence establishes that the factual basis on which *Lockhart* rests is no longer valid.

The questions raised in these cases must be reevaluated in light of the new evidence.

### 1. The statistical research since *Hovey*.

*Hovey* generally accepted the vast research condemning the death-qualification process, but noted that the studies did not take into account the fact that California also excluded automatic death penalty jurors via "life-qualification." (*Hovey*, 28 Cal.3d at 18-19.) As set forth immediately below, this problem has been solved, and this Court should now acknowledge that fact.

After *Hovey*, a study was conducted that specifically addressed the "*Hovey* problem." (Kadane, Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure (1984) 78 J. American Statistical Assn. 544.) The conclusion was that excluding the "always or never" group, i.e., the automatic death and automatic life jurors, results in a "distinct and substantial anti-defense bias" at the guilt phase. (*Id.* at 551.) Additional research using data unavailable at the time of *Hovey*[125] proved that "the

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[125] See Kadane, After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors (1984) 8 Law & Human Behavior 115 [hereafter "Kadane, After Hovey"].

procedure of death qualification biases the jury pool against the defense." (*Id.* at 119.) More recent studies have reached the same result.[126]

A study described as "likely the most detailed statewide survey on Californians' death penalty attitudes ever done,"[127] found that "[d]eath-qualified juries remain significantly different from those that sit in any other kind of criminal case." (*Id.* at 631.)[128] These are the types of research that this Court sought in *Hovey*, and they establish that death qualification of capital jurors, even when "life qualification" also occurs, violates the Sixth and Fourteenth Amendments and article I, sections 7, 15, 16 and 17 of the California Constitution.

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[126] See, e.g., Seltzer et al., The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example (1986) 29 How. LJ. 571, 604 [hereafter "Seltzer et al."]; see also Luginbuhl & Middendorf, Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials (1988) 12 Law & Human Behavior 263. [hereafter Luginbuhl & Middendorf].)

[127] See *id.* at 623, 625.

[128] See Haney, et al., "Modern" Death Qualification: New Data on Its Biasing Effects (1994) 18 Law & Human Behavior 619, 619-622 [hereafter "Haney"].)

### 2. The factual basis of *Lockhart* is no longer sound.

*Lockhart* has been repeatedly criticized for its analysis of both the data and the law related to death qualification. (See, e.g., Smith, Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries (1989) 18 Sw. U. L. Rev. 493, 528 [hereafter "Smith"] [*Lockhart* is "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"].)[129] Because the "constitutional facts" relied upon in *Lockhart* are no longer correct, the holding should not be considered controlling under the federal

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[129] See also Thompson, Death Qualification After Wainwright v. Witt and Lockhart v. McCree (1989) 13 Law & Human Behavior 185, 202 [hereafter "Thompson"][*Lockhart* is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality"]; Byrne, *Lockhart v. McCree*: Conviction-Proneness and the Constitutionality of Death-Qualified Juries (1986) 36 Cath. U. L. Rev. 287, 318 [hereafter "Byrne"] [*Lockhart* was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury"]; Moar, Death Qualified Juries in Capital Cases: The Supreme Court's Decision in *Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374 [hereafter "Moar"] [detailing criticism of the Court's analysis of the scientific data].

Constitution. (*United States v. Carolene Products* (1938) 304 U.S. 144, 153.) This Court needs to review the new data and reevaluate this issue.

Moreover, *Lockhart* does not control the issues raised under the California Constitution. (*Raven v. Deukmejian* (1990) 52 Ca1.3d 336, 352-354.) This Court should continue the path it began in *Hovey* and find the death qualification process unconstitutional under the California Constitution.

**a. Misinterpretation of the scientific data.**

Despite that the studies presented in *Lockhart* were carried out in a "manner appropriate and acceptable to social or behavioral scientists," the United States Supreme Court categorically dismissed them. (Smith, 18 Sw. U. L. Rev. at p. 537.) In *Lockhart*, the Supreme Court was presented with over 15 years of scholarly research on death-qualification procedures, using a "wide variety of stimuli, subjects, methodologies, and statistical analyses." (Moar, at pp. 386-387.) From both a scientific and a legal perspective, "[g]iven the seriousness of the constitutional issues involved [] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social

science research." (*Id.* at 387.) *Lockhart* "ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases." (Byrne, at p. 315.) In deciding the issue here, the Court should not rely upon the analysis of the statistics found in *Lockhart*.

**b. Incorrect legal observations.**

*Witherspoon*, 391 U.S. 510 had all but accepted that, once the "fragmentary" scientific data on the effect of death qualification on the guilt phase was solidified, the Court would act to prevent impartial guilt phase juries. "It seemed only inadequate proof of 'death-qualified' juror bias caused the Court to uphold Witherspoon's guilty verdict." (Smith, at 518.) This Court should not follow this faulty lead, but should instead continue on its own path, as laid out by *Hovey*, both in construing and applying the federal and state Constitutions properly. "The Court's holding in *Lockhart* infers [sic] that the Constitution does not

guarantee the capital defendant an 'impartial jury' in the true meaning of the phrase, but merely a jury that is capable of imposing the death penalty if requested to do so by the prosecution."[130]

This is not the meaning of impartiality, under either the federal or the state Constitutions as discussed in *Hovey*, nor is it the proper one.

**c. The scientific evidence.**

Empirical studies of actual jurors from actual capital cases show that many capital jurors who had been death-qualified under *Witt*, and "who had decided a real capital defendant's fate, approached their task believing that the death penalty is the only appropriate penalty for many of the kinds of murder commonly tried as capital offenses."[131]

In 1990, a group of researchers funded by the National Science Foundation formed the Capital Jury Project ("CJP") with the purpose of

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[130] Peters, Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury? (1987) 26 Washburn LJ. 382, 395.

[131] Bowers, W. & Foglia, W., Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing (2003) 39 Crim. Law. Bull. 51, 62 [hereafter "Bowers & Foglia"].

generating a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions. (See Bowers, W., The Capital Jury Project: Rationale, Design, and Preview of Early Findings, (1995) 70 Ind. L. J. 1043.) The work of the CJP has addressed many of the specific problems noted in *Lockhart*. First, it studied 1201 actual jurors who participated in 354 actual cases. Second, the CJP studied how their decisions were influenced by their peers during jury deliberations. Third, as a result of studying actual jurors, this research data is not "contaminated" by the influence of the so-called nullifiers [automatic life jurors] because they were all excused during the death-qualification process at voir dire.[132]

The CJP study confirms what the earlier studies described in *Lockhart* showed: the death-qualification process results in juries more prone to convict and to choose the death penalty; that it produced skewed juries, particularly in the following ways: (1) there are more automatic death penalty jurors; (2) many of these jurors don't understand the nature

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[132] Rozelle, "The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation" (Fall 2006) 38 Ariz. St. L. J. 769, 784.

of mitigation evidence; and (3) such jurors tend to decide prematurely to convict and to choose the death sentence. (*Rozelle* at 785, 787-93.)

### B. Data Regarding the Impact of Death Qualification on Jurors' Race, Gender, and Religion.

*Lockhart* did not address whether death qualification had a negative impact on the racial, gender, and religious composition of juries. This Court acknowledged in *Fields* that this issue is of constitutional dimension and required more research. Such research is now available, and it compels a finding that the death-qualification process has an adverse effect on the inclusion of important classes of people in capital juries. Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, at p. 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," adversely affecting two distinctive groups under a fair cross-section analysis. (*Id.* at 388.)[133]

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[133] See also Seltzer et al. at p. 604 [death qualification results in juries that under-represent blacks]; Luginbuhl & Middendorf at p. 269 [there is a significant correlation between attitudes about the death penalty and the gender, race, age, and educational backgrounds of jurors].)

### C. Prosecutorial Misuse of Death Qualification.

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, at p. 199.) Some prosecutors have acknowledged that death qualification skews the jury and that they use this unconstitutional practice to their advantage in obtaining conviction-prone juries. (See Garvey, The Overproduction of Death (2000) 100 Colum. L. Rev. 2030, 2097 & fns.163 and 164 [hereafter "Garvey"].)[134]

*Lockhart* declined to consider the prosecutorial motives underlying death qualification because the petitioner had not argued that death qualification was instituted as a means "for the State to arbitrarily skew the composition of capital-case juries." (476 U.S. at 176.) But the *Lockhart*

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[134] See also Rosenburg, Deadliest D.A. (1995) N.Y. Times Magazine (July 16, 1995) p. 42 [quoting "various former and current Pennsylvania prosecutors explaining the Philadelphia District Attorney's practice of seeking the death penalty in nearly all murder cases" as self-consciously designed to give prosecutors a permanent thumb on the scale enabling them to "'use everything you can' to win" because everyone who's ever prosecuted a murder case wants a death-qualified jury, because of the "'perception... that minorities tend to say much more often that they are opposed to the death penalty,'" which means that a lot of Latinos and blacks will be stricken from the jury by death qualification questions.

dissent predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." (476 U.S. at 185 [dis. opn of Marshall, J., Brennan, J., & Stevens, J.].)

The prosecutor's use of death qualification in this case violated appellant's Sixth, Eighth and Fourteenth Amendment rights and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

### D. Death Qualification in California Violates the Eighth Amendment.

In California, the death-qualification process skews juries by making them more conviction-prone and more likely to vote for a death sentence. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 7,15, 16 and 17 of the California Constitution.

The Eighth Amendment requires "heightened reliability" in capital cases because death is qualitatively different from a sentence of imprisonment, however long. (*Woodson v. North Carolina* (1976) 428 U.S.

280, 305.) Since death qualification results in a jury more likely to choose a death sentence, it cannot survive the "heightened reliability" requirement.

In California, capital defendants face juries not allowed in any other type of case: capital defendants are tried by juries at both the guilt and penalty phases that are far less "impartial" than juries provided to defendants in any other kind of criminal case. Accordingly, the death-qualification process violates the "heightened reliability" requirement of the Eighth Amendment because it is utterly "cruel and unusual" to put a human being on trial for his life while also forcing him to face a jury that is prone to convict and condemn him to die because many if not all of the jurors who would have been open to the defense evidence had been excluded. Since appellant faced such a death-qualified jury, his convictions, the special circumstance finding against him, and his death penalty must be reversed.

**E. The Death-Qualification Process is Unconstitutional.**

Even if this Court does not condemn death qualification in principle, the process of death qualification in California courts is nevertheless

unconstitutional. The Supreme Court did not reach this issue in *Lockhart*. In *Hovey*, this Court reviewed the evidence on this issue and generally accepted it, although the decision only addressed some of the problems presented by the evidence. In *Fields*, this Court improperly allowed more specific death-qualification voir dire, which exacerbated the problems of the process.

"The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." (*Powers v. Ohio* (1991) 499 U.S. 400, 412, quoting *Gomez v. United States* (1989) 490 U.S. 858, 874.) As detailed in *Hovey* and in recent studies, death-qualification voir dire persuades jurors to adopt pro-conviction and pro-death views. The result is that potential jurors who do not share such pro-prosecution attitudes on guilt and penalty are removed from the panel.

The death qualification in this case influenced the deliberative process and the mind set of the jurors concerning their responsibilities and duties. The use of death-qualification voir dire in California violates the

Sixth, Eighth and Fourteenth Amendments and article I, sections 7,15,16 and 17 of the California Constitution. Any verdict reached by a jury chosen in this manner cannot stand since the use of a jury whose views are skewed and biased constitutes a structural error.

**F. Death Qualification Violates the Right to a Jury Trial.**

*Taylor v. Louisiana* (1975) 419 U.S. 522, 530-531 identified three purposes underlying the Sixth Amendment right to a jury trial, and death qualification defeats all three. First, "the purpose of a jury is to guard against the exercise of arbitrary power--to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Ibid.*) Death qualification makes the "common sense judgment of the community" unavailable. The evidence now shows that a death-qualified jury fails to represent the judgment of the excluded community members. Death qualification also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (*Ibid.*) Evidence shows that prosecutors intentionally use the death qualification process to

remove potential jurors so that there is no "hedge" to prevent their overzealousness. (See, e.g., Garvey, at 2097 and fn. 163.)

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. (*Ibid.*) Death qualification fails to preserve confidence in the system and discourages community participation.[135]

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor v. Louisiana*, 419 U.S. at 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

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[135] See, e.g., Moller, Death-Qualified Juries Are the 'Conscience of the Community'? L.A. Daily Journal, (May 31, 1988) p. 4, Col. 3 [noting the "Orwellian doublespeak" of referring to a death-qualified jury as the "conscience of the community"];"(Smith, at p. 499 ["the irony of trusting the life or death decision to that segment of the population least likely to show mercy is apparent"]; Liptak, Facing a Jury of (Some of) One's Peers, New York Times (July 20, 2003), Section 4.

Finally, because the death-qualification process undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. "We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes oft he fair cross-section requirement." (*Lockhart*, 476 U.S. at 175.) For these reasons, death qualification violates the Sixth and Fourteenth Amendments of the United States Constitution and article I, sections 7,15,16 and 17 of the California Constitution.

### G. Errors in Death Qualifying the Penalty Jury Requires Reversal of the Guilt Verdicts as Well.

*Witherspoon v. Illinois* identified three separate problems regarding death qualification. First, death qualification can be so extreme as to make the jury biased at the penalty phase. Second, death qualification that is so extreme may also make the jury biased at the guilt phase. Third, even death qualification that is not so extreme biases the jury at the guilt phase. (391 U.S. 510.)

The first issue is the one that formed the basis for the limits on death qualification in *Witherspoon*. The second and third issues were left

open for further studies. However, it appears that courts have erroneously compounded these issues. (See, e.g., *Hovey*, 28 Cal.3d at 11-12 [summarizing *Witherspoon* and discussing the two issues as if they were identical]; see also *People v. Fields*, 35 Cal.3d at 344.)

This melding of issues is incorrect. The second issue is whether death qualification that did not meet the proper standard for removal of penalty phase jurors was improper at the guilt phase. (*Witherspoon*, 391 U.S. at 516-18.) *Witherspoon* held that because the evidence on this second issue was not yet developed, it only would reverse the penalty phase. (*Id.* at 516-18, 522, fn. 21.) The third issue is whether, assuming the State properly death-qualified the jury for purposes of the penalty phase, it was proper for such death qualification to also exclude potential jurors from the guilt phase. (*Id.* at 521, fn. 19.) This was the issue involving the "guilt phase includables" discussed in *Lockhart* and *Hovey*.

This Court has routinely asserted that *Witherspoon* error at the penalty phase requires the reversal of the penalty but not the guilt verdicts. (See e.g., *People v. Ashmus* (1991) 54 Cal.3d 932, 962.) The High Court has not addressed this issue. This Court should alter its

position on this point and find that error resulting from the death qualification of the jury also requires reversal of any convictions resulting from the guilt phase.

Since the evidence shows that a death-qualified jury is conviction prone and different from a typical jury, this Court should reconsider the conclusion that *Witherspoon* error requires only penalty reversal. The State's only conceivable legitimate interest in death qualification is at the penalty phase. If it committed error in achieving this interest, then it has no interest in death-qualifying the guilt phase jury. Since the prosecution did death-qualify the jury in this case, appellant improperly faced a biased guilt phase jury. Moreover, an error resulting in a biased jury cannot be harmless. When this Court finds error as to the penalty phase jury's death qualification, it must also reverse appellant's guilt phase convictions.

**H. Conclusion.**

The death-qualification process in California is irrational and unconstitutional. It prevents citizens from performing as jurors in capital cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital jurors to make "moral and normative"

decisions. These citizens' voices are eliminated from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, California allows some case-specific death qualification; one effect of this process is to remove jurors highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

The death-qualification procedure in California also violates the equal protection and due process clauses of the Fourteenth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. In addition, since death qualification results in juries which are more likely to convict and to choose the death sentence, capital defendants' guilt and penalty determinations are not made with the heightened reliability required by the Eighth Amendment.

A vast amount of scientific data demonstrates that death-qualified juries are far more conviction-prone and death-prone than any other juries. The data shows that the death-qualification process disproportionately removes minorities, women, and religious people from

sitting on capital juries in violation of the Sixth and Fourteenth Amendments. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully representative of the community.

From beginning to end, death qualification violated appellant's rights in this case, resulting in what was expressly prohibited by the Supreme Court:

> "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (*Lockhart v. McCree*, 476 U.S. at 179, quoting *Witherspoon*, 391 U.S. at 520-521 [footnotes and internal citations omitted].)

Thus, death qualification in general and as applied in this particular case violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Since this error is comparable to other constitutional errors in the jury selection, it requires reversal of

defendant's convictions and death sentence without inquiry into prejudice. (See, e.g., *Davis v. Georgia* (1976) 429 U.S. 122, 123 [improper challenges for cause]; *People v. Stewart* (2004) 33 Ca1.4th 425, 454.) Appellant's convictions and death sentence accordingly must be reversed.

**CONCLUSION**

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and sentence of death and remand for a fair trial, or in the alternative, vacate his sentence of death and impose a sentence of life without possibility of parole.

DATED: September 4, 2014

Respectfully submitted,

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**CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)**

I, Kathy R. Moreno, attorney for Michael A. Lamb, certify that this Appellant's Opening Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word-processing program on which it was produced, the number of words contained herein is 57,379 and the font is Calibri 13.

I hereby declare, under penalty of perjury, that the above is true and correct, this 4th day of September, 2014, in Berkeley, CA.

Kathy R Moreno

KATHY R. MORENO

**CERTIFICATE OF SERVICE**

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S OPENING BRIEF by depositing, postage paid, in the United States mail on September __, 2014 a true and full copy thereof, to the following:

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I hereby declare under penalty of perjury that the above is true and correct. Executed this __day of September, 2014, in Berkeley, CA under penalty of perjury.

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